Children as Bargaining Chips

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Children as Bargaining Chips

Clare Ryan

ABSTRACT

The parent-child relationship is one of the most valued and protected relationships in constitutional and family law. At the same time, the state has custodial power over children: a power that is necessary in some cases to protect vulnerable children from danger, neglect, and abandonment. But because the parent-child bond is so powerful, state actors can be tempted to exploit it for their own purposes. Custodial power over children provides state actors with the means to put pressure on the parent by threatening to remove the child. In these circumstances, the state uses the child as a bargaining chip to be traded for other rights, irrespective of the child’s wellbeing. Misuse of the state’s custodial power is harmful for two main reasons. First, children are harmed when separated from their parents. Second, parents are harmed by the separation because they are forced to choose between the exercise of two fundamental rights: custody of their children and individual liberty.

This Article focuses on the question of how the law should distinguish between the state’s exercise of its custodial powers for permissible grounds, such as to protect the child, and its exercise of custodial powers for impermissible grounds, such as to induce the parent to give up another right. To answer this question, this Article first demonstrates that the state is, in fact, putting pressure on parents by deploying its custodial power. The Article identifies three areas of law—immigration, criminal confessions, and child welfare—in which this occurs. In each of these situations, I argue that consideration of the child’s wellbeing should be a formal legal requirement. The Article then proposes a constitutional test for scrutinizing a state’s separation, or threat of separation, of the parent and child. This test is designed to reveal what I term “impermissible leverage.” The principles articulated in the impermissible leverage test can be incorporated into state and federal statutes, as well as into the regulation of agencies tasked with child removal. The Article concludes with possible remedies when acts of impermissible leverage do occur.

AUTHOR

Clare Ryan is the Harry S. Redmon, Jr. Assistant Professor of Law at LSU Law Center. She holds a J.D. and a Ph.D. in Law from Yale Law School. Many thanks to my doctoral committee: Professors Susan Rose-Ackerman, Judith Resnik, and Douglas NeJaime, for their insightful feedback throughout the
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**TABLE OF CONTENTS**

**INTRODUCTION**.......................................................................................................................................................... 412

I. **LEGITIMATE AND ILLEGITIMATE SEPARATION**........................................................................................................ 416
   A. The Child’s Wellbeing........................................................................................................................................ 420
   B. The Harm of Separation.................................................................................................................................... 421
      1. Harm to Children........................................................................................................................................ 421
      2. Harm to Parents........................................................................................................................................ 423

II. **THE BARGAIN IN PRACTICE: IMMIGRATION, CONFESSIONS, REMOVAL**................................................. 426
   A. Family Separation at the Border.................................................................................................................. 426
   B. Interrogations and Confessions .................................................................................................................. 431
   C. Child Removal and Reunification.............................................................................................................. 438

III. **TAKING KIDS OFF THE BARGAINING TABLE** ................................................................................................. 445
   A. Identifying the Bargain.................................................................................................................................. 445
   B. Impermissible Leverage.............................................................................................................................. 447
   C. Existing Law............................................................................................................................................... 450
   D. Remedies.................................................................................................................................................. 454
   E. Obstacles and Objections.......................................................................................................................... 456

**CONCLUSION**...................................................................................................................................................... 459
INTRODUCTION

States separate children from their parents every day. Sometimes state intervention is necessary to protect the child’s safety, but safety does not always motivate or justify the separation decision. Child removal is a powerful tool. Similar to detention, removal strikes at the very heart of individual liberty; it is one of the state’s most coercive powers.\(^1\) Removal demands scrutiny commensurate with its power. And yet, in many instances a state actor’s power to separate, or to threaten separation, receives little oversight.

Recent U.S. immigration policy has shed new light on the state’s power to separate parents and children. From the early days of the Trump administration,\(^2\) government officials contemplated family separation strategies for immigration deterrence.\(^3\) Ultimately, the administration settled on a strategy of “zero tolerance.”\(^4\) Any parent charged with a criminal offense, which included illegal entry, would be placed in facilities where children were not permitted.\(^5\) This policy led to widespread de facto family separation and the classification of thousands of children as unaccompanied minors despite the fact that many had parents or

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2. I do not suggest that the Trump administration was the first to use family detention as a means of immigration deterrence. The Obama administration was also criticized for employing similar policies. See, e.g., R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 170 (D.D.C. 2015) (noting that plaintiffs alleged that DHS detained mothers and minor children fleeing violence in Central America in part to deter future asylum seekers); Sarah Rogerson, Lack of Detained Parents’ Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship, 47 FAM. L.Q. 141, 142 (2013) (identifying problems of family separation in immigration under the Obama administration). What makes the more recent policies distinctive is the extent to which they directly condition access to one’s child on the ostensibly voluntary waiver of rights. See infra Subpart II.A.


5. Id.
Children as Bargaining Chips

willing caretakers in the United States.\textsuperscript{6} Significant political pressure in 2018 against the government’s policies ignited with the shocking revelation that government authorities responsible for these unaccompanied minors had lost track of more than a thousand children.\textsuperscript{7}

The biggest pushback against the Trump administration’s policy of family separation came from moral and political objections to what many viewed as a barbaric practice.\textsuperscript{8} The deaths of Jakelin Caal Maquin, age seven,\textsuperscript{9} and Felipe Gómez Alonzo, age eight,\textsuperscript{10} while in immigration detention pointed a spotlight on the tragic consequences of the government’s actions. There are ample reasons to criticize the family separation policy, from conditions of detention to the repeated violations of the right to asylum.\textsuperscript{11} This Article highlights an underlying dynamic that can be overlooked in the crisis: The administration is removing children from their parents as a means to induce the parents to waive asylum and immigration rights. The child is used as a bargaining chip, and their personal autonomy and wellbeing are disregarded.


\textsuperscript{7} In April of 2018, Trump administration officials acknowledged that approximately 1500 children who were deemed “unaccompanied” and had been placed with families in the United States could no longer be reached or accounted for. See Ron Nixon, Federal Agencies Lost Track of Nearly 1,500 Migrant Children Placed With Sponsors, N.Y. Times (Apr. 26, 2018), https://www.nytimes.com/2018/04/26/us/politics/migrant-children-missing.html [https://perma.cc/TJ23-A23J].


The strategy of using children as bargaining chips is not new. Behind the appalling images of children being ripped away from their parents is a legal structure that allows the state to control access to children in order to influence adult behavior. Because the state has the power to remove children from their parents—to control custody over the child—it also has the power to condition custody on the parent waiving other rights. This Article addresses situations in which the bargain—custody in exchange for parental action—is not necessary for the child’s welfare. Compare, for example, a police officer threatening child removal to induce a parent’s confession to larceny with a police officer threatening child removal as a consequence for a parent’s physical violence toward the child. This Article argues that a new constitutional test is required to protect the rights of parents and children in cases in which the state deploys the threat of separation as leverage against the parent.

The parent-child relationship is one of the most valued and protected relationships in constitutional and family law. Indeed, it is unique among intimate relationships in its legal protections and cultural significance. There are three core reasons why the parent-child bond is protected by law in ways that do not extend to other types of relationships. First, children are uniquely dependent and someone must be responsible for their care. Second, the state has an interest in protecting and promoting the emotional, educational, and caretaking benefits children receive from their parents. Third, the freedom to reproduce—and to transmit one’s values and property across generations—is a central feature of individual liberty.

12. For a recent comprehensive analysis of this relationship in law, see Anne C. Dailey & Laura A. Rosenbury, The New Law of the Child, 127 YALE L.J. 1448, 1484 (2018). See also Joanna L. Grossman, Constitutional Parentage, 32 CONST. COMMENT. 307, 309 (2017) (“It is a fundamental tenet of family law that parents are imbued with constitutionally protected rights, an idea cemented by a series of cases in the early twentieth century.”). See also the discussion of U.S. Supreme Court jurisprudence on parental rights infra note 157.


14. See Khara M. Bridges, The Poverty of Privacy Rights 105 (2017) (explaining the instrumental justification for parental rights as “inherent love, coupled with a parent’s unrivaled knowledge of her child, predisposes a parent to act in her child’s best interest”).

15. See Vivian E. Hamilton, Immature Citizens and the State, 2010 BYU L. REV. 1055, 1085 (collecting political theorists’ justifications for the parent’s interest in “instilling their own values and beliefs in their children”).
The state also has custodial power over children. This power is sometimes necessary to protect children from danger, neglect, and abandonment. Since children are dependent on adult care, and cannot leave an unsafe environment on their own, state intervention is sometimes necessary to protect the child. Because the parent-child bond is so powerful, however, state actors can be tempted to exploit it for their own purposes. The state’s custodial power over children provides state actors with the means to put pressure on the parent by threatening to remove the child. In these circumstances the state treats custody as a bargaining chip to be traded for other rights.

The state’s separation power harms both children and parents. Children suffer mental and physical damage when separated from a parent. Parents also suffer the pain of separation, as well as the harm of being forced to choose between the exercise of two fundamental rights: custody of their child and their individual liberty. The question that this Article answers, therefore, is how to distinguish the state’s exercise of its custodial powers for permissible grounds, such as to protect the child, from its exercise of custodial powers for impermissible grounds, such as to induce the parent to give up another right.

This Article first demonstrates that the state is, in fact, putting pressure on parents through the impermissible use of its custodial power. The Article identifies the shared features present in three areas of law in which the bargaining chip dynamic occurs. First is in the area of immigration. Subpart II.A focuses on the state policy of separating parents and children, deeming the children unaccompanied minors under the state’s custody, and detaining the parents in an adult-only center. Parents in that situation are given a choice: waive immigration and asylum claims and reunify or remain separated from their child. Without the state’s power to separate the parent and child, the state would not be able to compel an individual to waive access to judicial review of their immigration claims. It is the parents’ concern for their children that the state exploits to induce


18. See Subpart I.B.2. In this Article, the term “individual liberty” means the individual’s ability to freely exercise her constitutional rights without undue interference from the state.
them to waive their rights. Subpart II.B addresses criminal interrogations. In the interrogation setting, police officers threaten to prevent the individual from seeing their child if they do not cooperate. In other words, interrogators offer a choice, sometimes real and sometimes false, between waiving the right against self-incrimination and access to the child. Subpart II.C concerns the area of child protection and removal. Social workers sometimes require parents to engage in substance abuse or behavioral programs, agree to assign custodial rights over to family members, terminate other intimate relationships, or pay the state fees in order to prevent losing custody of their child or to get the child back. While some of these requirements are directly related to the child’s wellbeing, others are not. Nor are they obligations that the state could place on an individual adult absent the threat of child removal.

Finally, Part III presents ways that lawmakers can protect the parent-child bond from what this Article terms “impermissible leverage.” This Part proposes ways in which the impermissible leverage analysis could be incorporated into constitutional doctrine, federal and state statutes, and policies regulating relevant state actors. The impermissible leverage test aims to identify situations in which the child’s safety is a pretext for other government interests or in which the government uses the fact that someone is a parent to assert pressure that the state would not otherwise possess.

Grounding the approach in existing law, this Article expands on doctrines, including unconstitutional conditions and tort theories involving wrongful separation, to identify what constitutes impermissible action by the state. The Article concludes by proposing remedies for impermissible leverage. In any situation when access to a child is at stake, the child’s interest must be included as part of the analysis. A child-oriented approach would require the state to justify its decision to limit access to the child, rather than treating access as a collateral consequence of the parent’s decision.

I. Legitimate and Illegitimate Separation

The realization that children make good leverage has existed in legal or quasilegal practice for a thousand years or more. In the Middle Ages, for instance, it was not uncommon for noble families to send their children as hostages to their enemies as surety for peace. The enemy was assured that the offer of

20. See Annette Parks, “Thy Father’s Valiancy Has Proved No Boon”: The Fates of Helena Angelina Doukaina and Her Children, in Medieval Hostageship c.700–c.1500: Hostage, Captive,
peace was genuine because if the family violated their agreement, the rival family could kill or harm the hostage child. Likewise, the child could be married to a member of the rival family, serving to further solidify peaceful relations.21

In modern American popular culture, the image of children as pawns is closely linked to divorce.22 One parent threatening to seek full custody if the other parent does not waive other entitlements, or simply to punish their former spouse for perceived transgressions, is a familiar picture.23 In 1979, Robert Mnookin and Lewis Kornhauser wrote their famous piece Bargaining in the Shadow of Law: The Case of Divorce, which revealed in detail how a former spouse’s entitlements in law shape their bargaining power vis-à-vis the other spouse over access to their children.24

For decades, family law scholars and lawmakers have pointed out the ways in which this approach disadvantages less financially well-off parties.25 Unequal bargaining power is exacerbated when the poorer party also values custody more than the wealthier party. In this situation, the wealthier ex-spouse can bargain down their financial obligations by promising to cede custody to their former spouse. If both parents have equal claims to custody at the time of divorce, then a parent who cares more about financial gain or punishing the ex-spouse can use the

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21. KOSTO, supra note 19, at 2.
22. See, e.g., Penelope Eileen Bryan, Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion, 47 BUFF. L. REV. 1153, 1195 (1999). See also PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.02 (AM. L. INST. 2002) (explaining that “a parent may make custodial demands for strategic purposes to pressure the other parent into financial or other compromises that are unfair and do not serve the child’s interests, or to force into litigation a case that could have been settled if the result were more predictable.”).
23. As Sarah and Michael Abramowicz note:
   Scholars have long held up custody settlements as a paradigmatic instance of negotiations vulnerable to improper trade-offs. While the empirical frequency of trade-offs is debated, many scholars contend that the parent more invested in custody will often trade away marital property, spousal support, or child support for a greater share of custody. Some claim that the less-invested parent may threaten to initiate custody litigation to pressure the other parent to make such trade-offs.
25. For a particularly robust critique of the Mnookin/Kornhauser approach, see Bryan, supra note 22, at 1191–92.
state’s power to back up their threat of seeking custody. Because physical assets and custody are often determined through the same divorce agreement, parties can use money and custody as exchangeable entitlements. Lawmakers and scholars have long struggled with the question of how to regulate private custody decisions in light of these competing interests.

This Article asks: What happens when the one striking the bargain is not a parent, but the state? U.S. history contains multiple instances of large-scale family separation policies designed to control, eradicate, and enslave whole populations. The laws of slavery permitted, and indeed encouraged, white slaveowners to dismantle enslaved families. The U.S. government shattered Indigenous communities through the use of child removal policy as a form of cultural genocide. Orphan trains carried the children of recent immigrants to work as

26. It has not always been the case that both parents have equal default custody rights. In the past, fathers had strong (if not dispositive) presumptive custody rights. In the nineteenth century, this default gave way to the “tender years” presumption, which favored keeping young children with their mothers. It was not until the 1970s that custody defaults became neutral as to mother and father. Today, the presumption is often in favor of the primary caretaker, which remains predominantly mothers (although, of course, today family formations are less likely to consist of a heterosexual married couple raising their biological children). See J. Herbie DiFonzo, From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy, 52 Fam. Ct. Rev. 213, 214–15 (2014) (delineating the Anglo-American history of custody presumptions).

27. Historically, the state has played an active role even in custody disputes between private parties. Courts have awarded custody based on moral judgments about a parent’s “lifestyle”—including denying custody to parents in same-sex relationships or relationships with people of other races or religions. These practices are formally prohibited today, but the best interest of the child analysis is capacious enough to permit judges to frame their own moral judgments as concern for the child. See Solangel Maldonado, Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes, 55 Fam. Ct. Rev. 213, 214–15 (2017). Scholars and judges have raised concerns and objections about the bargain over custody since the 1970s. See Alexandra Selfridge, Equal Protection and Gender Preference in Divorce Contests Over Custody, 16 J. Contemp. Legal Issues 165, 171–72 (2007); Richard Neely, The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed, 3 Yale L. & Pol’y Rev. 168 (1984) (offering a judge’s perspective that women are disadvantaged in bargains over custody).


indentured servants for white, Protestant families in the Midwest. Although these policies varied in scope, purpose, and violence, the underlying goal was the same: to take children from their parents as a means of social control. These practices, although formally a thing of the past, still send powerful reverberations through contemporary policies.

There are several crucial differences between private custody disputes and those in which the state is a party. First, the state wields a coercive parens patriae power: State actors are authorized to remove children and place them under state custody. Second, child removal is cabined by constitutional and statutory limits on state power. Both the nature of the power over children and the limits on that power are different when the state, rather than a private actor, is striking the bargain.

The category of state regulations that seek to influence adults’ behavior through their children is vast. Rules about vaccines and compulsory education shape parental choices about what kind of schooling their child receives, whether affordable child care or parental leave exist shapes the choices the parents make about their careers, school district lines guide families’ choices about where to live, and the list goes on and on. This is not an Article that takes aim at all of these direct and indirect measures, which might be broadly described as situations in which an adult makes different choices than they would otherwise because they are a parent, and the law forces them to choose between their counterfactual nonparent preference and what they think is best for their child. This Article addresses a narrower category: situations in which the state uses, or threatens to use, its authority over child custody to induce parents to relinquish their own liberty rights.

30. See Rebecca S. Trammell, Orphan Train Myths and Legal Reality, MOD. AM., Spring 2009, at 3, 3–5 (describing the development of “orphan trains” designed to send poor, immigrant children from East Coast cities to families in the Midwest).

31. See Hamilton, supra note 15, at 1055. (“The state’s assertion of its parens patriae power can serve two functions: First, it can guarantee the basic negative liberty of the immature by withholding from others absolute authority over them. Second, it can pursue affirmatively the welfare of the immature by asserting the interests that it believes the immature person would advance herself, were she able to do so.”).

32. See discussion infra Subpart III.C.

This Article uses the bargaining chip metaphor throughout, although in most cases the interaction between the parent and state is not expressly described as a bargain.\(^{34}\) Sometimes terms like “waiver” or “consent” are used to describe situations in which the parent gives up a right in order to remain with their child, however, there is rarely a moment in which the state explicitly demands: “your child or your rights?” The bargaining chip image is useful because it reminds the reader that the child is treated as an object, rather than a subject of the law, and that the parent holds other bargaining chips against which the child is balanced.\(^{35}\)

A. The Child’s Wellbeing

This Article confronts the line between legitimate and illegitimate uses of the state’s child removal power. This Subpart defines legitimate removals as those in which the governing policy or individual state actor’s decision to separate the parent and child is justified by the child’s wellbeing and in which removal is necessary to protect that wellbeing. Illegitimate removals, or threats of removal, are those in which separation is not necessary to protect the child’s wellbeing and is instead used as a means to compel the parent to give up constitutionally-protected liberty rights in order to maintain custody. This is not a test of the decisionmaker’s subjective intent—in some cases, the individual who threatens removal might not be consciously aware of why they are doing so or may believe they are doing so to protect the child. Rather, this is an objective test (albeit one with considerable room for disagreement in application), which requires that the removal be, in fact, necessary for the child’s wellbeing.

If separation is only legitimate when it is necessary for the child’s wellbeing, then a definition of wellbeing is required. This Article relies on the “Child Wellbeing” model articulated by Clare Huntington, Elizabeth Scott, and others in

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34. The state also has the power to take the parent away through incarceration, deportation, or commitment. This Article does not address situations in which the state has the power to detain the adult, irrespective of whether or not they are a parent, even if this detention has negative consequences for a child. Rather, this Article is concerned with situations in which the state is forcing the parent to make a choice between access to their child and their rights.

35. Another term that might be more apt in some of these cases is that the child is being treated as a hostage. I hesitate to use this more violent term because I think it narrows the scope of the claim too far, but some of the examples described throughout this Article do seem more like hostage negotiations than bargains.
recent family law scholarship. The child wellbeing model focuses on the availability of family support, evidence-based intervention and prevention of abuse, and recognition of the racially disproportionate effects of state intervention on families. Legitimate removals are those that protect the child from harm—as defined by the best available evidence—and are only used as a last resort when family support is not effective. This model still leaves space for disagreement about when a child’s wellbeing is threatened, but it provides a framework to measure the threat of removal. If the removal can be defended on the child wellbeing grounds, then it is legitimate—otherwise it is not.

B. The Harm of Separation

1. Harm to Children

The harm of illegitimate removal can be severe. Children who are separated from their parents frequently suffer lifelong psychological and health consequences. In an interview with The Guardian, a child who had been subject

36. See Clare Huntington & Elizabeth S. Scott, Conceptualizing Legal Childhood in the Twenty-First Century, 118 MICH. L. REV. 1371, 1376 (2020), (describing the core tenets of the “child wellbeing” model as “reliance on research, recognition of social welfare benefits, and acknowledgment of systemic racism . . . ”).

37. Id. at 1412.

38. This definition might be very broad and interpreted differently by different actors. That is, in part, intentional because there is probably not a one size fits all definition. There is merit to the view that the prevailing definition of the best interest of the child is too vague, gives too much discretion to state decisionmakers, and casts far too wide a net over different parenting practices in ways that are deeply harmful especially to Black communities. It is for that reason that this Article emphasizes reliance on the best available evidence of what constitutes harm.

39. For more on an evidence-based model of child welfare that is consistent with this view of legitimate separations, see Josh Gupta-Kagan, Toward a Public Health Legal Structure for Child Welfare, 92 NEB. L. REV. 897, 899 (2014) (“A public health approach would . . . seek[ ] the most effective protection for children and assistance to families while minimizing government coercion, invasions of core liberty interests, and sanctions.”).

to temporary removals explained, "it felt like being kidnapped." One recent study concluded:

Research, policy, and practice indicate that child removal and entry into foster care evokes emotional and psychological trauma and is the most drastic safety intervention utilized by a child welfare agency. The harm that can occur as a result of removal results in a "monsoon of stress hormones... flood[ing] the brain and body." Even brief separations can cause the release of higher levels of cortisol—stress hormones—that begin to damage brain cells.42

Shanta Trivedi, a legal scholar, noted:

Recent uproar about the separation of immigrant children from their parents at our southern border has led to an outpouring of information from the medical community about the horrifying effects that family separation has on children. . .

This information, while disturbing, is not new. Study after study demonstrates that children suffer complex and long-lasting harms when they are removed from their parents....43

In addition to the serious physical and psychological damage that removal can inflict, children who are used as bargaining chips also face independent harms. Children are rightsholders as well as objects of the law. Their rights are often ignored, however, in what are framed as dyadic disputes between the parent and the state, but in fact implicate the child’s interests apart from any claims by the parent.44 Using the child as leverage rests on a long history of treating children as property.45 When the child is

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42. Vivek Sankaran, Christopher Church & Monique Mitchell, A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families, 102 MARQ. L. REV. 1161, 1167 (2019).


45. See Kevin Noble Maillard, Rethinking Children as Property: The Transitive Family, 32 CARDOZO L. REV. 225, 226 (2010) (“Although some consider it ‘patently unthinkable’ to characterize parent/child relationships within a classic rhetoric of ownership and possession,
not a party to the dispute, but merely an object to be bartered over by adult actors, their inherent dignity is denied.46

The fact that a child’s wellbeing is secondary to adult interests puts the vulnerable child in an even more precarious position. For their protection, law incapacitates children and places core decisions such as where they will live, and with whom, in the hands of adults.47 These protective measures, however, make children vulnerable. Because of the uniquely weak position of children in the law, doctrines relating to children often articulate the duties and responsibilities owed to them by adults, especially parents.48 When the ability of parents to protect their children is jeopardized, children’s incapacity means they have little recourse to legal protection or self-help.

2. Harm to Parents

The state’s removal power also hurts parents. In a recent lawsuit challenging family separation in the immigration context, an expert witness testified:

Forcible family separation can also have devastating psychological and neurobiological consequences for parents. The traumatic nature of separation from the child is likely to be exacerbated when parents are not provided with information about their child’s location or condition, or when parents do not have access to information in their native language. In adults, psychological trauma is associated with elevated risk for psychiatric disorders including post-traumatic stress disorder and can induce physiological changes, including but not limited to dysregulated stress responding, amygdala hyperactivity, and deficits in these expected reactions make up a small part of a much larger conversation. Judges, lawyers, and litigants employ the language of property when adjudicating legal parenthood . . . ”); Barbara Bennett Woodhouse, “Who Owns the Child?”, Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 997 (1992) (”[Supreme Court decisions] were animated . . . [by] a conservative attachment to the patriarchal family, to a class-stratified society, and to a parent’s private property rights in his children and their labor. . . . [and] constitutionalized a narrow, tradition-bound vision of the child as essentially private property.”).

46. For more on the historical development of children from “property” to “people,” see MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994).
48. For the legal framework governing the dynamic of child incapacity and parental responsibility, see Dailey & Rosenbury, supra note 44, at 1460.
prefrontal cortex control of the amygdala, which are associated with difficulty regulating fear. 49

A fundamental premise of this Article is that the role of parent is worthy of general protection, and exceptions to that protection should be clearly articulated. Even more so, the state’s power to use children as bargaining chips is likely to hurt good parents 50 more than it hurts bad parents because parents who care about their children are more likely to waive other rights to avoid separation. For those parents who do separate, the cost will be higher the more they care about their children. Leveraging children also allows the state to compel adults to do things that the state would not have the power to require otherwise. Consequently, leveraging children puts parents in a worse position vis-à-vis the state than nonparents.

The state’s power to threaten removal might also put women in a worse position than men. Women are often the primary caretakers of children. They are also more likely to be conditioned to put their children’s needs before their own and are more likely to be perceived as having a special attachment to children, thus making it more likely that state actors will think to put pressure on that bond. 51 Legally vulnerable groups face a greater risk from pressure on the parent-child bond. These groups include: undocumented migrants who have few legal rights and greater reasonable fears about being separated from their children; nonbiological parents, especially those in same-sex couples and transgender or gender nonconforming individuals whose parental rights are relatively new and still remain tenuous in some cases; 52 and low-income parents who are generally


50. This Article defines good parents as those who prioritize the wellbeing of their child.

51. In the private law example of custody awards, the concern that custody would be granted to mothers only if they complied with certain social expectations, especially regarding sexuality, arose in the late twentieth century when many states revised their custody laws to be gender neutral. As Laura Sack put it, “[t]rial court judges in particular have . . . repeatedly [found] primary caretaking mothers ‘unfit’ on the basis of their sexual conduct (usually characterized as ‘sexual misconduct’), their survival of domestic abuse, or their paucity of economic resources, without establishing any connection between these factors and their fitness as parents.” Laura Sack, Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases, 4 YALE J.L. & FEMINISM 291, 292–93 (1992).

52. For more on the challenges faced by same-sex parents, and other nonbiological parents, even in the wake of Obergefell v. Hodges, 576 U.S. 644 (2015), the decision in which the U.S. Supreme Court legalized same-sex marriage, see Douglas NeJaime, The Nature of Parenthood, 126 YALE L.J. 2260 (2017).
more likely to be subject to state interference into the parent-child relationship and lack other resources with which to bargain.\footnote{33}{See BRIDGES, supra note 14, at 10–14 (describing how intrusive the state is into the lives of poor mothers because of the requirements placed on access to state aide and the frequency with which poor mothers are scrutinized by child welfare services).}

The state’s power to capitalize on the parental role for its own ends also burdens individual liberty. Pressure on the parent infringes on their freedom, autonomy, and privacy.\footnote{34}{James G. Dwyer, Parents’ Self-Determination and Children’s Custody: A New Analytical Framework for State Structuring of Children’s Family Life, 54 ARIZ. L. REV. 79, 80–81 (2012) (describing the objection to state regulation of parental choices by conditioning access to the child).} If the state could not compel an autonomous adult to waive her rights, why should it be able to do so simply because she is a mother? The choice to become a parent should not, without other justification, expose the individual to greater government control over how the individual exercises their rights.

With the harms of using children as bargaining chips in mind, the next Part addresses how these bargains arise in a range of legal contexts. The three contexts described in the next Part all concern people who have the preexisting legal status of parent. It is important to note that the state also acts as a gatekeeper for individuals whose claim of rights vis-à-vis the child is even more tenuous: people who are not yet legal parents, but who have some claim to de facto or future parentage.\footnote{35}{For more on de facto or functional parentage, see Jessica Feinberg, Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents’ Increased Access to Obtaining Formal Legal Parent Status, 83 BROOK. L. REV. 55, 56 (2017) (explaining that states have begun to recognize some rights for individuals who have acted in the role of parents even if they do not have the legal status of parent, but that the rights of such functional parents remain tenuous in many cases).} Legal recognition of parentage is a necessary precondition for the rest of the legal protections discussed in this Article. It stands to reason that if the state can put pressure on the parent-child bond when the parent already holds formal legal rights, it can also put pressure on individuals who are seeking legal recognition as parents.\footnote{36}{See Nejaim, supra note 52, at 2260 (2017) (“Those who break from traditional norms of gender and sexuality . . . often find their parent-child relationships discounted.”). Historically, nonrecognition of parentage based on public approbation for the type of family formation has served as a powerful tool for funneling people into certain kinds of families. The deterrent function of parental recognition—and denial thereof—is closely related to the concerns raised in this Article; however, it presents a distinct set of problems that will be addressed in future work.}
II. THE BARGAIN IN PRACTICE: IMMIGRATION, CONFESSIONS, REMOVAL

A. Family Separation at the Border

The Trump administration’s zero tolerance policy at the U.S.–Mexico border created the conditions for categorical family separation by design. The policy, in essence, worked in the following way: Adults who were stopped at the border were charged with illegal entry, sometimes in conjunction with other charges and, consequently, were detained in immigration detention facilities designated for criminal offenders. Children were not permitted into these facilities—for their own safety—and were therefore deemed to be unaccompanied and taken into state custody. Public scrutiny of the policy understandably focused primarily on the horrifying conditions of the facilities, on the administration’s failure to account for the children in its care, and on the children who died while in custody. The purpose and effect of this zero tolerance policy was to force parents to make a choice: pursue their legal rights to remain in the United States or waive their rights in order to reunite with their children.

Lawyers representing classes of detained immigrants in several regions of the country filed suits challenging the law on the grounds that it violated due process; in particular, they argued that the state could not justify the separation of parents and children. In the summer of 2018, a federal district court judge in California granted a preliminary injunction ordering an end to the policy of family separation absent a specific finding that the parent is unfit or poses a danger to the child. The judge further ordered that children be reunified with their parents within very

57. See supra text accompanying note 4.
58. See White Memorandum, supra note 3, at 2.
62. In addition to the choice posed to parents regarding the initial separation, the government also provided parents with the following choice: “[I]f these parents become subject to an executable removal order, [the government] will offer these parents ‘the choice whether to be removed with [their] child or to allow the child to remain in the United States to pursue any immigration claims the child may have.” Ms. L. v. U.S. Immigr. & Customs Enft, 415 F. Supp. 3d 980, 995 (S.D. Cal. 2020) (quoting Opp’n to Mot. At 19 n.7, Ms. L., 415 F. Supp. 3d 980).
63. Id.
short deadlines and enjoined the government from deporting adults without first reunifying them with their children absent a voluntary waiver of reunification.\footnote{Id.} A federal district court in Connecticut issued a similar injunction in July 2018, although the Connecticut litigation expressly focused on the child’s right of reunification with the parent, rather than on the parent’s right, which was the subject of the California suit.\footnote{Id. at 743.} In its order, the court in Connecticut obliged the government to “present a plan for addressing the children’s trauma as a result of the Government’s unconstitutional separation of the children from their parents.”\footnote{Id. at 745.} Other district courts have begun to issue similar rulings requiring the government to justify family separation in individual cases, not merely on general deterrence and immigration enforcement grounds.\footnote{See Jacinto-Castanon de Nolasco v. U.S. Immigr. & Customs Enf’t, 319 F. Supp. 3d 491, 500 (D.D.C. 2018) (“The fact that Ms. Jacinto-Castanon is lawfully detained in immigration custody does not eliminate her due process right to family integrity. . . . [T]he defendants have continued to separate Ms. Jacinto-Castanon and her sons in a manner that absolutely prevents her from providing care to, or exercising custody and control over, her sons. Plaintiffs therefore have demonstrated that defendants’ actions likely implicate their right to family integrity.”); M.G.U. v. Nielsen, 325 F. Supp. 3d 111, 119 (D.D.C. 2018) (emphasizing “the fundamental liberty interest in family integrity”).} In response, the administration agreed to begin reunifying parents and children.\footnote{Id.} But there was a catch. Parents who waived asylum or other immigration claims could be reunited swiftly for deportation. Those who decided to pursue claims in U.S. courts, however, were offered no such promise of reunification because, so long as some criminal charge was pending, including illegal reentry, they remain housed in facilities where children were not permitted to live.\footnote{Id.} Therefore, even if the parent had a colorable claim to immigration relief that they wished to make, they would remain detained pending consideration of

65. Id.
67. Id. at 745.
68. Although the effects of the Trump Administration’s zero tolerance policy are still felt by many, the policy itself is no longer in force. The Biden Administration has begun efforts to reunite families separated under the policy. See Kevin Sieff, Biden Announces Efforts to Reunite Migrant Families Separated by Trump Administration, WASH. POST (Feb. 2, 2021, 6:26 PM), https://www.washingtonpost.com/world/the_americas/family-separation-migrant-biden-executive-order/2021/02/01/ebb6ada8-64bf-11eb-8c64-9595888caa15_story.html [https://perma.cc/F2V7-QD3E].
69. See Jacinto-Castanon de Nolasco v. U.S. Immigr. & Customs Enf’t, 319 F. Supp. 3d 491, 500 (D.D.C. 2018) (“The fact that Ms. Jacinto-Castanon is lawfully detained in immigration custody does not eliminate her due process right to family integrity. . . . [T]he defendants have continued to separate Ms. Jacinto-Castanon and her sons in a manner that absolutely prevents her from providing care to, or exercising custody and control over, her sons. Plaintiffs therefore have demonstrated that defendants’ actions likely implicate their right to family integrity.”); M.G.U. v. Nielsen, 325 F. Supp. 3d 111, 119 (D.D.C. 2018) (emphasizing “the fundamental liberty interest in family integrity”).
71. Id.
the claim. But if they waived their asylum claim, the parent and their child could be reunited and, eventually, deported.

Lawyers representing the detained parents urged the California district court to find that the government’s workaround was in violation of the temporary restraining order on family separation. In January 2020, the district court held that the government’s actions did not violate the court order. Although detaining parents for the misdemeanor offense of illegal entry was not sufficient grounds for separation, the court held that the felony “illegal reentry” was grounds for continued separation, as was charging of other criminal offenses, illness, and gang affiliation.

Even if the detained parent ultimately prevails in their immigration case, this does not mean that they will necessarily reunite with their children. The problem arises when the length of time in immigration detention exceeds the length of time under which a child is permitted to remain in foster care under federal law. A recent article details the bind into which this policy places parents. In one case:

Faced with deportation, Hilaria applied for a type of immigration relief available to certain victims of domestic violence. However, given the assault charges against her, she was in violation of a zero-tolerance policy against so-called “criminal” immigrants, reducing the chances the government would grant her a visa. Twelve months after the incident, Hilaria was still in a detention center, and her children were still in foster care.

... Under federal law, states are required to file a Termination of Parental Rights (“TPR”) petition if a parent’s child has been in foster care for fifteen consecutive months. In Hilaria’s case, she was almost

73. Id.
74. Id. at 991–98.
75. Under federal law, there is a presumption that if a child has been in foster care for fifteen of the last twenty-two months, the state’s child welfare department should move to terminate parental rights and make the child available for adoption. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.
certainly detained for several more months while her application for relief was adjudicated. As a result of these policies, Hilaria faced a strong likelihood that the state would initiate proceedings to terminate her parental rights.\footnote{66}{Olivia Saldana Schulman, “Now They’ve Robbed Me:” The Use of Termination of Parental Rights in Government-Fractured Immigrant Families, 43 N.Y.U. REV. L. & SOC. CHANGE 361, 363–64 (2019).}

This example illustrates the doubly coercive power of immigration detention. Not only are parents worried about the conditions under which their children are held, and therefore compelled to waive their own asylum claims in order to reunite, but also those who do continue to fight deportation risk losing parental rights entirely if their cases take too long. Access to and custody of children serve as powerful forms of leverage for the government, which it uses to circumvent the legal rights of many parents to asylum or other forms of immigration relief.

At present, although courts have placed limits on the government’s zero tolerance policy and subsequent separations, the state’s power to use children as leverage remains a very real threat to many families. The state’s approach of designating parents as dangerous, but then agreeing to reunite them with their children if they waive immigration claims, illustrates how challenging it can be to place meaningful limits on the state’s power, especially in contexts like immigration in which the executive branch wields significant discretion.\footnote{77}{There is significant scholarship on the increasingly broad scope of executive discretion in the immigration field. For a recent analysis of this phenomenon, see Fatma E. Marouf, Executive Overreaching in Immigration Adjudication, 93 TUL. L. REV. 707, 723 (2019) (delineating the scope of executive discretion over immigration).}

The limits of current law to restrict the government’s authority over border regulation were underscored in a 2019 opinion from the Fifth Circuit Court of Appeals.\footnote{78}{United States v. Vasquez-Hernandez, 924 F.3d 164 (5th Cir. 2019).} There, the court rejected the claim that by charging “bona fide asylum seekers” with the crime of illegal entry to force them to choose between family reunification and pursuing their asylum claim from adult detention facilities, the government acted in a manner that constituted “outrageous government conduct” in violation of due process.\footnote{Id. at 168–70.} The court concluded that the government had not used family separation to aid them in obtaining convictions, and therefore its tactics were not impermissible.\footnote{Id. at 170.} Subpart II.B addresses separation as a tool to induce confessions in the criminal context.
The court’s conclusion underscores the lacunae in existing law because there was no constitutional standard that is clearly applicable to the use of separation as a tool to induce bargains of the type raised in this case. The appellants instead had to rely on the very high threshold of “outrageous conduct” in violation of due process, a standard which fails to protect the child’s interests or the parent-child relationship in contexts in which the parent is detained.\textsuperscript{81}

The family separation example, therefore, helps to illustrate the broader bargaining chip dynamics. It is an extreme case that has garnered public attention focused on a specific time and place.\textsuperscript{82} The state’s abuse of power is, to many, quite evident. Identifying the underlying power dynamic the state relies on can help illuminate other less extreme contexts when the state wields a similar power.\textsuperscript{83} Even if the attacks on the government’s border policies do not prevail, the critiques and proposed remedies raised in family separation litigation might be brought to bear on less fraught scenarios in which courts are more likely to step in and limit the state’s power.\textsuperscript{84}

\textsuperscript{81.} Vasquez-Hernandez, 924 F.3d at 170.

\textsuperscript{82.} As the district court explained in one ruling:

Here, the context is an international border between the United States and Mexico, which hundreds, if not thousands, of people cross every day. In this context, the government interests go well beyond just the fitness and danger that a parent may present to his or her own child. Rather, the government interests extend to securing the Nation’s borders and enforcing the Nation’s criminal and immigration laws, and all that those interests entail, including detention and parole determinations for migrants taken into custody.


\textsuperscript{83.} See Stephen Lee, Family Separation as Slow Death, 119 COLUM. L. REV. 2319, 2323 (2019) (“In the immigration context, the recent outrage directed at family separation at the border stems from a broader principle on which there is some degree of consensus, namely that our modern admissions system should be committed to principles of family reunification—the opposite, and the rule to the exception, of family separation. But a holistic examination of the broader immigration system shows that the exception of family separations operates much more like the rule....”).

\textsuperscript{84.} One such instance is the claims brought by separated families for damages. Although current federal law makes recovery for these harms nearly impossible, the legal claims constructed in these lawsuits provide a new way of thinking about damages suits for the harm of wrongful separation. See C.M. v. United States, No. CV-19-05217-PHX-SRB, 2020 WL 1698191, at *1, *5 (D. Ariz. Mar. 30, 2020) (explaining that plaintiffs, who were subject to the Trump administration’s family separation policy, filed suit under the Federal Tort Claims Act for intentional infliction of emotional distress and negligence, but ultimately rejecting this claim).
B. Interrogations and Confessions

In 1963, the U.S. Supreme Court decided *Lynumn v. Illinois*, a precursor to the far more famous decision a few years later in *Miranda v. Arizona*. Beatrice Lynumn was a young woman with two children ages three and four. She was interrogated in her home by three officers as part of a sting operation in which she was accused of selling marijuana to a police informant. In the course of her interrogation, the officers told Beatrice that she could get ten years, that her children might lose their welfare benefits, and that she would likely lose custody of the children if she went to jail. The Court held that Ms. Lynumn’s “will was overborne” during her confession and that the officers’ actions amounted to coercion.

The Court’s ruling, however, was hardly a model of clarity. Coerced confession cases can be hard to parse because courts employ a “totality of the circumstances” test. In one paragraph the Court listed a number of factors that led it to hold that the confession was coerced:

> It is thus abundantly clear that the petitioner’s oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not “cooperate.” These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly “set her up.” There was no friend or adviser to whom she might turn. She had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.

86. 384 U.S. 436 (1966). The Court cited *Lynumn* in its *Miranda* opinion, describing Beatrice Lynumn as “a woman who confessed to the arresting officer after being importuned to ‘cooperate’ in order to prevent her children from being taken by relief authorities.” *Id.* at 456.
88. *Id.*
89. *Id.* at 534.
90. *Id.*
91. United States v. Tingle, 658 F.2d 1332, 1337 (9th Cir. 1981). For more on the current doctrine for determining voluntariness in the confession context, see Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 Mich. L. Rev. 1, 3 (2015) (“[T]he voluntariness doctrine remains as hazy and unfocused as ever, bouncing among various concerns about confessions and almost always arriving at the conclusion that what the police did was, all things considered, acceptable.”).
The opinion includes a variety of possible factors that might sway a court in determining if a confession was coerced. Was it that the police may not have been telling the truth about the children losing welfare benefits? Or that she was a young mother? Or the fact that she had never been in trouble with the law before? The weight of each factor is not clear. Nevertheless, the Court seemed to place significant weight on the threats made regarding Lynumn’s children.

In United States v. Tingle, the Ninth Circuit articulated a clearer connection between its holding that a confession was coerced and the police’s threats to the accused’s child. In Tingle, a young mother confessed to attempted bank robbery after police officers suggested that she might be reunited sooner with her child if she cooperated. The Ninth Circuit ruled that the confession was not voluntary, stating:

[T]he purpose and objective of the interrogation was to cause Tingle to fear that, if she failed to cooperate, she would not see her young child for a long time. . . . The relationship between parent and child embodies a primordial and fundamental value of our society. When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit “cooperation,” they exert the “improper influence” . . .

The Ninth Circuit’s broader interpretation has not been consistently adopted by other circuits or state courts, nor has it resulted in a blanket prohibition on putting pressure on the parent-child relationship to compel a confession. Lynumn is nevertheless still cited in state and federal cases with some regularity. Some courts have relied on Lynumn and Tingle for the proposition that mentioning the harm to one’s child or suggesting that confessing will lead to quicker access to the accused’s child is prohibited. But in almost all court of appeals’ decisions citing

93. Tingle, 658 F.2d at 1336.
94. Id.
95. Id.
96. A Westlaw search of citations to Lynumn reveals over 900 cases in which an interrogator put pressure on the parent-child relationship.
97. See, e.g., Brown v. Horell, 644 F.3d 969, 980 (9th Cir. 2011) (finding that an interrogator coerced the defendant by urging him to confess in order to see his baby). In Brown, however, the court ultimately concluded:

Were this case on direct review, the above analysis would likely lead us to conclude that [the interrogator’s] tactics were coercive . . . and that [the defendant’s] admissions should therefore have been suppressed. The question before us on habeas review, however, is not whether we believe the state court’s determination to be erroneous—which we do—but whether it is unreasonable in light of clearly established Supreme Court law.

Id. at 981–82.
to Lynumn, courts have looked to other compounding factors such as the age and education of the accused, the location of the interrogation, and the accused’s reaction in order to determine that the confession was not coerced. As the First Circuit explained: “[W]hile Lynumn and its progeny counsel us to be particularly cognizant of the risk of coercion when reviewing interrogations where officers invoke references to a family member, our cases also emphasize that discussion of a family member, on its own, is not per se coercive.” Therefore, although the Lynumn /Tingle framework is available to invalidate confessions, it does not appear to provide much protection to parents in practice.

One reason why Lynumn has not been a more powerful tool in suppressing confessions, despite evidence that pressure on the parent-child relationship is a widespread practice, is that there is no clear standard for a court to apply. The coercion framework does not address the unique factors present in the parent-child relationship. As the Oregon Court of Appeals, sitting en banc, recently articulated:

Few things are more powerful than the familial bonds that tie us together—especially the bonds of love and protection that a parent has for his or her child. When those bonds are used as a pressure point to induce a confession to a crime, there is a risk: Was the confession a product of free will, or the result of an inducement of hope or fear such as to render the confession unreliable? That question, and how a court goes about arriving at an answer, is the essence of this case.

Every case is different in the particulars, but some notable themes that arise when examining the body of coerced confession cases. First, the milder forms

98. See Loza v. Mitchell, 766 F.3d 466, 479 (6th Cir. 2014) (concluding that the detectives were “merely inform[ing] appellant of the possible consequences of his actions” when they told him that his unborn child’s mother could be imprisoned for the killings he was suspected of committing); McCalvin v. Yukins, 444 F.3d 713, 720 (6th Cir. 2006) (“Although some of the circumstances surrounding [the] confession were perhaps coercive . . . [including that the detective stated that the accused] would not have contact with her children if convicted . . . [I]t was not objectively unreasonable . . . to hold that [her] will was not overborne.”); United States v. Syslo, 303 F.3d 860, 867 (8th Cir. 2002) (finding no coercion when the accused raised the issue of her children).


100. See Kate Levine, Police Suspects, 116 COLUM. L. REV. 1197, 1215 (2016) (citing to case law that asserts threats to family do not constitute coercion as support for the conclusion that “[i]n reality, the voluntariness standard puts almost no restrictions on what police may do to induce a confession.”).


102. Compare Janusiak v. Cooper, 937 F.3d 880, 887 (7th Cir. 2019) (police suggesting the accused would go home to her children if she cooperated), United States v. Bey, 825 F.3d 75, 82 (1st Cir. 2016) (officer mentioning contacting child protective services as part of obtaining consent to
of pressure usually entail the interrogator exhorting the suspect to “think of your kids.” This alone is unlikely to cross the line into coercion under current doctrine.\(^{103}\) Some other forms of pressure must also occur. Second, in some cases, the added pressure comes in the form of threats or inducements. For instance, interrogators may offer to put in a good word with the district attorney or threaten to contact child welfare.\(^{104}\) The primary characteristic of this form of pressure is that the interrogator refers to individuals with power over custody determinations, thereby making the link between law enforcement and other agencies more explicit for the suspect. The interrogator relies on the web of mutual assistance, professional connections, and shared objectives that connects many different state actors in a collaborative effort toward punitive social control.\(^{105}\)

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103. See Janusiak, 937 F.3d at 890–91 (“[P]olice are not forbidden from talking about a suspect’s children. Nor would that be practical. It is only natural for a criminal suspect to want to know what could happen with her children. When the suspect raises the matter, a police officer can avoid a later accusation of impermissible exploitation by avoiding the question with a truthful statement (e.g., ‘I don’t know what will happen to your kids’). The police also can talk truthfully about the likely consequences for children when a parent is arrested, jailed, convicted, or imprisoned.”) (citations omitted).

104. See State v. Polk, 812 N.W.2d 670, 676 (Iowa 2012) (describing how the interrogator suggested that working with the county attorney would allow the accused to see his children sooner and concluding that “[t]he relationship between parent and child embodies a primordial and fundamental value of our society.”) (citing to Lynumn and progeny).

These tactics are not limited to the interrogation room. Witnesses and family members of the accused are sometimes threatened in similar ways to ensure testimony or to pressure someone into consenting to a search. In an especially egregious case, a judge made an ex parte ruling at the behest of the prosecutor to detain the victim of sustained domestic violence and put her children into the Department of Children and Family Service’s custody in order to ensure that she testified against her ex-husband.

What are these techniques doing? Police officers, acting alone, cannot make long term custody determinations or decide who is entitled to welfare or other services. They do, however, wield significant power in the child removal context. In some states, police officers can make emergency removals themselves, but even when that is not available, police and child welfare actors work closely together. People who find themselves caught in the criminal system have good reason to fear that an officer can influence when they see their children again, regardless of the officer’s de jure power to do so. This reasonable fear is only underscored by the presence of other state actors in the system, including social workers, during criminal investigations and interrogations. Interrogators in these situations take advantage of the accused’s fear and exploit the idea that a good parent sacrifices for their child. By framing the parent’s confession as a sacrifice made to protect the child, a noble act against self-interest but for the good of the innocent child, interrogators can convince parents to comply. In reality, the officer

106. See, e.g., Broom v. United States, 118 A.3d 207, 210 (D.C. 2015) (describing officers attempting to gain consent to search an apartment by stating that both residents could be placed under arrest and “the child would be sent to Child and Family Services,” at which point the child’s mother “started crying and pleading” with her partner to allow the officers to conduct the search).

107. Raphael v. State, 994 P.2d 1004, 1010 (Alaska 2000). The Supreme Court of Alaska held that the witness’s testimony was involuntary given that reunification with her children was predicated on her testifying and “[t]he psychological effect of taking away [her] children without a proper custody hearing was, most likely, even more coercive than [her] own incarceration.” Id. at 1010.

108. See Paul Chill, Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings, 41 FAM. CT. REV. 457, 457 (2003) (explaining that depending on the jurisdiction, emergency holds sometimes occur after an ex parte judicial order and can sometimes be effectuated by law enforcement or a child protective services department without prior judicial authorization).

is rarely concerned with the child’s wellbeing, but instead is focused on ensuring a conviction.

In some cases, the interrogator’s threats or promises regarding the child are lies or, at least, considerable exaggerations of the interrogator’s power. Even when the interrogator’s statements are true, or involve persuasive warnings such as “consider your children,” the effect on the parent can be enough to overwhelm their ability to exercise their constitutional rights. Concern for the child can illicit powerful emotional responses in parents—protective responses, which society seems to encourage and support in parents in other contexts—such that they fail to act in a manner consistent with their own best interest.

These interrogation tactics might illicit several responses. One is that the individual becomes so overwhelmed with fear and concern for their child that they are no longer capable of making autonomous decisions in their own self-interest. The other is that the accused makes a reasoned choice—given the information available to them, their knowledge of the system, and what the officer has told them—to exchange their own right against self-incrimination in order to obtain more favorable treatment for the child. This second type of case does not seem to be under the current definition of coercion, although a “totality of the circumstances” analysis makes it hard to define the contours of the coerced confessions doctrine with much certainty.

This Article contends that the current interpretation of *Lynumn* is too narrow and permits interrogation tactics that are harmful to parents and, by extension, to children. Instead, this Article suggests that the interrogator’s reference to a suspect’s child should be limited to situations in which (1) it is directly relevant to the case (for example, if the child were a witness or a victim) or (2) the accused directly asks the officer about possible implications for the child and the officer provides a truthful response. If the proposed rule were adopted, the interrogator would still have all the techniques available as when the accused is not a parent or is a parent who is not moved by their children’s welfare.

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[T]he detectives threatened the defendant with the loss of contact with his child by repeatedly and falsely claiming that if he did not tell them what happened, the child could be taken away and raised by strangers. Although we have stated that a particular tactic generally will not render a confession involuntary, the particular conduct at issue here, threats concerning a person’s loved one, may impinge on the voluntariness of a defendant’s confession.

*Id.* (citations omitted).
But the interrogator would not be permitted to use the child as leverage even when their statements to the parent are truthful and the parent makes a reasoned decision. Finally, for many people who are caught up in the criminal legal system, interrogation is only the first stage at which access to their child can be used as leverage against them.111 Once an adult is in custody or serving a sentence, access to children remains a powerful tool for the state.112 Prison officials can deny visitation rights as punishment or to deter disruptive behavior.113 Parents detained in federal custody can be separated from their children by hundreds or even thousands of miles.114 The power of the state to distance parents and children looms large in a legal system that features both mass incarceration and mass detention of undocumented immigrants.115

111. It is important to distinguish the bargain that is proposed in cases like Lynumn, or similar cases in which visitation rights are used to compel prisoners to comply with other state objectives, from the harm children generally face when their parents are incarcerated. There are strong reasons to think that the levels of incarceration in the United States put excessive pressure on the parent-child relationship and that sentencing laws fail to consider the harm to children if their caretakers are imprisoned. But in most criminal prosecutions, the state would have the power to incarcerate individuals regardless of whether or not they are parents—the fact that the defendant is a parent does not give the state any additional power over them. In the bargaining chip examples described in this Article, the fact that the defendant is a parent allows the state to exert additional pressure over them in exchange for access to the child. See Sarah Abramowicz, Rethinking Parental Incarceration, 82 U. Colo. L. Rev. 793, 817–18 (2011) (arguing for greater consideration of the child’s wellbeing in parental sentencing); see also DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES (2009) (providing a comprehensive analysis of the relationship between criminal law and familial relationships).

112. See Pamela Lewis, Comment, Behind the Glass Wall: Barriers That Incarcerated Parents Face Regarding the Care, Custody and Control of Their Children, 19 J. Am. Acad. Matrim. Laws. 97, 107–08 (2004) (explaining that prison officials can enforce visitation restrictions so long as they are “rationally related to a legitimate penological interest.”).


114. See Custody & Care: Designations, FED. BUREAU OF PRISONS https://www.bop.gov/inmates/custody_and_care/designations.jsp [https://perma.cc/K6R6-KZEJ] (describing the position, taken by the Bureau of Prisons, that they control the location of all inmates, and that there is a default for placement in a prison within 500 miles from the release residence, but this default can be overridden for a long list of reasons).

C. Child Removal and Reunification

The mission of the child protection system is just that: to protect children. In an ideal world, when a child welfare agency removes a child from their parents it will always be for, and only for, the child’s wellbeing. This Subpart, however, presents the ways in which the current system provides opportunities for state actors to insert other interests into the removal decision. Children are not always treated like bargaining chips in the child welfare system, but the fact that the system has the appearance of protecting children serves to obfuscate those situations in which children are being used as chips.

The U.S. Supreme Court requires a higher burden of proof than that in a standard civil case before the state can permanently separate a parent and child: The state must prove with clear and convincing evidence that termination of parental rights is warranted.\(^{116}\) The Court justifies the clear and convincing burden because of the nature of the right at stake. Parental rights are fundamental:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.\(^{117}\)

The Court has further held that indigent parents in termination of parental rights cases must be free to appeal without the burden of fees.\(^{118}\) As Justice Ginsburg explained, “parental termination decrees are among the most severe forms of state action. . . .”\(^{119}\) Although not a criminal sanction, termination of the parent-child relationship is different in degree than other types of civil family law actions like divorce and custody.\(^{120}\)

These heightened constitutional requirements on the state, however, only apply to termination cases. Routine investigations of abuse and neglect, emergency removal of children, placement in foster care, and decisions about visitation and reunification conditions are typically dealt with under state law using the standard burdens in a civil case.\(^{121}\) In spite of its strong defense of parental rights, the U.S.

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117. Id. at 753.
119. Id. at 128.
120. Id. at 127.
Supreme Court has also declined to extend the right to counsel in termination cases, although many states have done so.

A complex set of state and federal laws scaffold the local practice of child protection. Every state has provisions dictating what constitutes abuse and neglect sufficient to trigger emergency removal and placement of a child in foster care. In Connecticut, for example, upon initial removal of the child, the burden is on the state to show:

"[W]hether the Department of Children and Families made reasonable efforts to keep the minor child with his or her parent, parents or guardian prior to the issuance of such order and, if such efforts were not made, whether such reasonable efforts were not possible, taking into consideration the minor child's best interests, including the minor child's health and safety." 

By contrast, if a parent petitions for return of the child, the standard shifts:

"If the court determines that the factors which resulted in the removal of the parent have been resolved satisfactorily, the court may remove the foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." Id. § 1912(e) (emphasis added). Likewise, "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." Id. § 1912(f) (emphasis added). ICWA presents a complex question about the relationship between the U.S. government and tribal authorities. Although this issue is beyond the scope of this Article, the treatment of American Indian children in the removal context raises important questions about the role that community interests play in the child welfare setting.

122. Lassiter v. Dep't of Soc. Servs. Of Durham Cnty., 452 U.S. 18, 31–32 (1981) ("[W]e [cannot] say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore ... leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.").

123. For more on state and federal right to counsel in termination proceedings, see generally Vivek S. Sankaran, Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases, 44 J. LEGIS 1 (2017) (collecting state laws on the right to counsel at various stages of child welfare cases).


125. CONN. GEN. STAT. ANN. § 45a-607(b)(3) (West 2019).
guardian and reinstate the parent as guardian of the person of the minor, if it determines that it is in the best interests of the minor to do so.\textsuperscript{126}

The term “resolved satisfactorily” gives the court significant discretion to require the parent to alter their behavior, living conditions, and other aspects of their lives before reunification with the child.

Under federal law, funding for state child protection programs is conditioned on the state developing standards for child removal and reunification in line with certain federal criteria, which leaves significant open-endedness for state variation.\textsuperscript{127} In 1997, the Adoption and Safe Families Act expressly codified that a child’s “health and safety” should be of “paramount concern” in child removal decisions.\textsuperscript{128} Federal law also conditions funds on the state providing “reasonable efforts” to reunite the parent and child before terminating parental rights.\textsuperscript{129} The Child Abuse Prevention and Treatment Act (CAPTA) requires states to provide children in dependency proceedings with a “guardian ad litem” whose role is to make recommendations to the court regarding the “best interests of the child.” Most recently, in 2018 the Family First Prevention Services Act expanded funding to states to include additional prevention programs and kinship care, designed to avoid formal removal proceedings.\textsuperscript{131}

State and federal child protection laws both enable and restrict state actors, primarily social workers, in their bargaining power over parents. Before a child is formally removed from a parent’s care, social workers can recommend voluntary separations.\textsuperscript{132} When social workers are investigating allegations of abuse, they

\textsuperscript{126} CONN. GEN. STAT. ANN. § 45a-611(b) (West 2019).
\textsuperscript{130} 42 U.S.C. § 5106a(b)(2)(B)(xiii) & (II) (“[I]n every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings ….”).
\textsuperscript{131} The Family First Prevention Services Act was passed as part of the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 170.
\textsuperscript{132} See Josh Gupta-Kagan, America’s Hidden Foster Care System, 72 STAN. L. REV. 841, 843 (2020). ("[T]he agency threatens to remove children and take parents to court… unless the parents agree to change their children’s physical custody to the identified kinship caregiver. The state thus effectuates the children’s loss of their parents’ care and the parents’ loss of physical
will sometimes suggest that the parent voluntarily leave the home or place the child with another caretaker. The underlying threat is that if the parents refuse to voluntarily relinquish custody, the state will be more likely to enforce removal later on. Parents might also relinquish custody because the separation will trigger funding for social services that would be otherwise unavailable.

In a 2006 case decided by the Seventh Circuit, Judge Posner opined that such voluntary waivers do not raise constitutional due process concerns because:

[w]e can't see how parents are made worse off by being given the option of accepting the offer of a safety plan. It is rare to be disadvantaged by having more rather than fewer options. If you tell a guest that you will mix him either a Martini or a Manhattan, how is he worse off than if you tell him you'll mix him a Martini?

As legal scholar Josh Gupta-Kagan correctly points out, unlike the cocktail party envisioned in Judge Posner’s metaphor, the context in which parents are induced to voluntarily relinquish custody:

occurs when a state agency with awesome powers to destroy families and create new ones interacts with families largely of low socioeconomic status, often with low social capital, and typically without funds, counsel, or much education. . . . Other factors—such as a parent’s immigration status or disability—may exacerbate this power imbalance further. In this context, without the procedural protections held by criminal defendants or civil litigants, it is doubtful that much meaningful negotiation occurs.
As another scholar, Soledad McGrath, notes, “A family’s decision to participate in assessment and services in lieu of a child protection investigation may seem to be a relatively simple, proactive choice, but it is a choice that can lead to severe consequences for a family and is, in fact, no choice at all.” These seemingly voluntary actions on the part of the parent often make it much easier for the state to terminate parental rights down the road, even with the higher constitutional protections associated with permanent termination. In some cases, efforts to induce parents to voluntarily consent to temporary separation or other requirements imposed by the social worker might very well be in the child’s interest. The problem is there is no way to know; as the research above reveals, such agreements take place with little oversight or scrutiny as to the reasons social workers provide for inducing parental compliance.

In some cases, children are removed for only a couple of days before being returned to their parents. These temporary emergency removals, or holds, often occur without court authorization. A recent study found that such removals are more frequent in jurisdictions where law enforcement officers are authorized to make emergency removals. Although there might be many reasons for this variation across jurisdictions, as the previous Subpart demonstrates, one possibility is that police officers are taking away children as part of an arrest of the parent on grounds unrelated to the child’s welfare. Such removals can give the police more leverage in inducing a confession if the police are also the ones responsible for taking the child away. Also, in removals by police, the officer’s primary focus is more likely to be on effectuating the arrest, rather than on the child’s wellbeing.

To compound the issues with removal, once the parent and child have been separated, the standards for reunification are not mirror images of the removal rules. As one scholar has noted:

138. Another possible “voluntary” action that parents might be induced to take is to waive parental rights for one child in order to preserve their parental rights regarding children who are younger or even yet to be born.
139. See supra notes 136 and 137.
140. See Chill, supra note 108, at 457.
Once a child is removed, a variety of factors converge to make it very
difficult for parents to ever get the child back. One court has referred to
this as the “snowball effect.” The very focus of court proceedings
changes—from whether the child should be removed to whether he or
she should be returned. As a practical matter, the parents must now
demonstrate their fitness to have the child reunited with them, rather
than the state having to demonstrate the need for out-of-home
placement. By seizing physical control of the child, the state tilts the
very playing field of the litigation. The burden of proof shifts, in effect,
if not in law, from the state to the parents.143

In other words, simply fixing whatever triggered the initial removal is often
insufficient for reunification.144 Some of the conditions of reunification are
explicitly tied to the child’s wellbeing such as ensuring that the home is safe. But
what about requirements like passing a drug test for marijuana use or ensuring the
no one in the home has a criminal record? Is there evidence that these things are
per se dangerous for children or are more dangerous than being in foster care and
separated from one’s primary caretaker? Instead, some scholars have persuasively
argued that such requirements constitute a backdoor by which the state can
further control the behavior of primarily poor families of color.145

One extreme illustration of how the state can use the reasonable efforts rule
to force a parent to choose between custody and the parent’s other interests arises
when states move to terminate parental rights in part for failure to reimburse the
state for the expenses of foster care. In Collateral Children, Daniel Hatcher
identified states’ practice of filing for termination of parental rights on the grounds

143. Chill, supra note 108, at 459.
144. As one scholar noted:

Once a child is placed in temporary foster care, the state child welfare agencies
and the juvenile courts often require parents to jump over higher and higher
hurdles before the child will be returned to their custody. As the requirements
for reunification of the child and parent are ratcheted up, parents become
discouraged, the child’s stay in foster care is lengthened, and often the first
choice for the child’s permanent, stable home, the parental home, is lost.
David J. Herring, Inclusion of the Reasonable Efforts Requirement in Termination of Parental
Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System, 54 U. PITL

(2007) (“State custody of children has a racial geography.”); Starla J. Williams, Violence
Against Poor and Minority Women & the Containment of Children of Color: A Response to
and the child welfare systems operate in tandem to disengage poor minority women from
their children . . . .”)
that the parent had not paid the state as little as $150.\textsuperscript{146} He observed that in some cases:

Case plans required by federal law to aid reunification are illegally converted into debt-collection tools. If the parents fall behind, the government-owed debt can become a consideration, sometimes the sole factor, for the permanent seizure of their children through the process of terminating parental rights. Foster children become collateral, mortgaged to secure the debt for their own care.\textsuperscript{147}

Although such stark cases seem to be relatively rare, they demonstrate how appealing it is for the state to use custody as a carrot and a stick over parents.

In some cases, state intervention is warranted in order to protect children from physical or sexual violence or severe neglect.\textsuperscript{148} In spite of its stated goal to protect children from familial abuse, however, child removal is also a tool of social control. Families that fail to conform to a certain model of behavior can be punished with separation. Communities with high levels of social services involvement find themselves under continued scrutiny and surveillance that would never be tolerated in more privileged neighborhoods.\textsuperscript{149} Politically unpopular or insular religious communities are also targets of state intervention, with child protection as the purported ground.\textsuperscript{150} State actors sometimes wield the powerful tool of child removal with scant judicial oversight, so long as permanent termination of parental rights is not on the table. Then, once the termination phase arrives, the status quo often militates in favor of permanent

\textsuperscript{146} Daniel L. Hatcher, Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support, \textit{74} BROOK. L. REV. 1333, 1363 (2009).

\textsuperscript{147} Id. at 1333–34.

\textsuperscript{148} The notorious U.S. Supreme Court case of \textit{DeShaney v. Winnebago} provides an example in which state intervention was warranted. In that case, four-year-old Joshua DeShaney was beaten so severely by his father that he went into a coma and was permanently disabled. \textit{DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.}, 489 U.S. 189, 193 (1989). Cases like that of Joshua DeShaney, however, do not represent the majority of child removal cases. A study that combined fifty state child abuse and neglect reports from 2017 found that 75 percent of cases involved neglect, while physical abuse cases represented 18 percent and sexual abuse 9 percent (note that some cases involve multiple allegations such that the total percentages are higher than 100 percent). \textit{Child Maltreatment, CHILD TRENDS} (May 7, 2019), https://www.childtrends.org/indicators/child-maltreatment [https://perma.cc/6UZB-EZ2T].

\textsuperscript{149} See \textsc{Bridges}, supra note 14, at 113 (describing in detail the role of state surveillance on poor mothers).

\textsuperscript{150} See generally \textsc{Stuart A. Wright & Susan J. Palmer, Storming Zion: Government Raids on Religious Communities} (2016) (explaining how child protection is often the justification for military-like raids on insular religious communities and cults); Jessica Dixon Weaver, \textit{The Texas Mis-Step: Why the Largest Child Removal in Modern U.S. History Failed}, \textit{16} WM. & MARY J. WOMEN & L 449, 449 (2010) (explaining how Texas removed more than four hundred children from an insular religious community under the theory that they had a "pervasive belief system" of marrying minor girls to adult men).
separation regardless of how the case began. Consequently, by the time a parent’s constitutional protections come to the fore, the bargain has already been struck. The next Part proposes tools that empower courts to scrutinize separation decisions more thoroughly.

III. Taking Kids Off the Bargaining Table

A. Identifying the Bargain

The previous Part described three contexts—immigration, confessions, and child removal—that share the same basic feature: the state asks the parent to choose between custody and liberty. That choice is not grounded in the child’s wellbeing, but rather in the state’s interest in compelling the parent to take desired actions. Apart from that core attribute, the cases of immigration, confessions, and removal vary along several dimensions. Because each case is treated in its own legal silo, it is harder to see the bargaining chip dynamic as a systemic problem, which requires a response that cuts across substantive areas of law.

This Part highlights three dimensions of variation that differentiate the types of cases in which the bargaining chip dynamic might arise. The three dimensions—status quo, stated reason for removal, and state role—all alter the balance of power between the individual and the state. Variation across these dimensions can make the bargain appear quite different, when in fact they all share a core commonality: At some point, the parent is faced with a choice to relinquish custody or their own liberty.

The first relevant feature is the status quo: What is the parent being asked to give up versus what is the state threatening to take? Is the parent’s physical liberty constrained as in criminal and some immigration cases? Is the child already within the state’s custody? These questions matter because the choice between custody and liberty is not made in the abstract, but rather in light of the existing conditions. Parents who are faced with the choice of giving up their child in order to retain liberty are in a different position from those who give up their liberty to reunify with a child who has already been separated from them. The way in which laws limit the state’s power to force such a choice, and what remedies—such as reunification, access to a hearing, and monetary damages—are most appropriate will also depend on whether the parent and child begin and end the case together or separate.

The second dimension is whether the state is claiming to act on behalf of the child’s welfare or for some other reason. What is the state’s asserted justification for removing the child? The state’s justification is not always obvious, nor is there necessarily only one reason. At one end of the spectrum is a separation based solely
on the child’s safety and welfare, and on the other is one in which the child’s interest is not considered at all. Most cases will fall somewhere in the middle, but understanding what the state claims is the reason for the separation will help reveal the best legal tools for testing whether the separation is in fact furthering the child’s welfare.

The third dimension is the type of actor who is proposing the bargain. Both state and municipal-level officials, such as child protective services and law enforcement, as well as federal officials, such as immigration officials and federal law enforcement, are capable of engaging in threats of child removal. The state actor with whom the parent is interacting varies in terms of their scope of discretion and professional role. Judicial interventions will be more effective in cases in which judges have more authority to review the state’s actions. By contrast, in situations in which executive power is the strongest, judicial remedies are least likely to be fruitful. Role also matters. Different categories of professionals who might be posing the custody or liberty bargain are amenable to different strategies for altering behavior. Because of their professional identity, social workers, for example, might be swayed by evidence that putting pressure on parents to engage in certain programs for reunification actually hurts children more than it helps them. Police officers might be more persuaded by arguments that parents are more likely to lie if they are worried about their children’s wellbeing. In other words, different interventions will work best for different kinds of state actors.

Cases in which the bargaining chip dynamic arises are varied. This variation might suggest a piecemeal response, in which different legal reforms are targeted at different areas of law. To some extent, especially when it comes to appropriate remedies, that is probably necessary. This Part, however, argues that a single legal test captures much of what is wrong about the bargaining chip dynamic and can be applied in a wide range of cases despite their apparent differences.

151. See supra Subpart II.A (federal immigration officers); Subpart II.B (state and federal law enforcement); and Subpart II.C (state child welfare officers).
152. For example, the Preamble to the National Association of Social Worker’s Code of Ethics begins: “The primary mission of the social work profession is to enhance human well-being and help meet the basic human needs of all people, with particular attention to the needs and empowerment of people who are vulnerable, oppressed, and living in poverty.” Preamble, Read the Code of Ethics, NAT’L ASS’N OF SOC. WORKERS, https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English [https://perma.cc/5W2E-GK3M].
B. **Impermissible Leverage**

It is not always easy to identify the cases in which the state uses its power over the parent-child relationship as leverage rather than for the child’s welfare. In some of the scenarios described above, custody of the child is the central question in dispute. In other cases, custody is a collateral consequence. On their face, these contexts seem so different that they are not amenable to a single solution, but they do raise a shared problem: The state uses custody as leverage to impose costs on the parent’s liberty rights. The remedies will vary depending on the procedural posture of the case, but first lawmakers must have tools for identifying what constitutes impermissible leverage.

The test proposed in this Part would serve as a more robust limit on the state’s power than the legal tools currently available to parents seeking to resist such bargains. In keeping with the definition of legitimate separation presented above, an overarching principle that ought to permeate the analysis is: Has the child’s wellbeing been taken into account? Has the child been given a meaningful opportunity to have their needs and wishes known? A child-centered approach should include: (1) considering a child’s preferences; (2) honoring the child’s right to access information and to have a voice in the process; (3) treating the consequences for children as central rather than collateral consequences; (4) prioritizing the wellbeing of a particular child over the state’s preferences or values; and (5) preserving choices that will be available to the child as an adult. Keeping the child at the forefront of the analysis will reduce the state’s power to treat access to children like a property entitlement to be allocated among adults.

With a child-centered approach in mind, the constitutional test would proceed as follows: In cases in which the state threatens to assert its custodial power over children—and thereby forces a bargain with the parent—the parent should be able to raise a claim under the Due Process Clause of the Fourteenth Amendment and trigger the following inquiry:

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153. See supra Subpart I.A.
154. A child’s interests are distinct from the child’s wishes or expressed preferences. Sometimes what is in a child’s interests can be determined by asking the child directly, but in other circumstances that is either not possible nor desirable. Therefore, the question of who decides what is in the child’s interest is always relevant in the examples presented here and the answer will vary based on context. For more on the difference between a best interests standard and a wishes standard, see Erik S. Pitchal, *From Paternalism to Process: Reflections From the Bench on 40 Years of American Child Advocacy*, 39 Childs. Legal Rts. J. 1, 4–5 (2019).
Is the action demanded of the parent justified by the child’s safety or wellbeing? This is a threshold inquiry and the state’s proffered justification should be accepted unless it is patently false.

(a) If the answer to the threshold inquiry is yes: Do means of protecting the child exist that are less intrusive on the parent-child relationship? For example, has the state provided resources toward remedying the underlying cause of the danger to the child?

(b) If the answer to the threshold question is no: What justifies the action demanded of the parent? To this inquiry, the state might offer responses such as national security, control of immigration, or crime prevention. Given the justification proffered, would the state be permitted to require the parent’s action or waiver in the absence of the child custody question? In other words, is the state taking advantage of the parent-child relationship to do something it would otherwise be unable to do?

If the court held that the leverage is grounded in the child’s welfare but there are less intrusive means available, or if the leverage is not grounded in the child’s welfare and the state’s only avenue for exerting pressure on the parent is through the child, then the court should find that the state has engaged in impermissible leverage.

The proposed test takes three forms: constitutional, statutory, and policy. The constitutional test would be the strongest form of judicial oversight. Constitutional doctrine would be the best venue for this test because, as the previous examples show, the bargaining chip problem arises in multiple areas of law, which are governed by different federal and state laws. Incorporating the test into the parental rights doctrine as a constitutional matter would infuse all of these disparate areas of law with a child welfare-focused inquiry.

Nevertheless, if a change to the constitutional doctrine is overly ambitious, then the test can also be incorporated into specific federal and state laws. Finally, an additional avenue to implementing the impermissible leverage test is to include it in policies governing different state actors. For example, a police department could implement a policy that its officers never mention access to a suspect’s child unless it was directly relevant to the alleged offense. A child welfare agency could require its social workers to document and justify separation as the least intrusive means available to protect the child. Agencies could also implement protocols in which for every requirement imposed on a parent whose child is removed, the state would be obligated to provide a specific reason why that requirement is necessary for the child’s wellbeing. All three levels—constitutional, statutory, and policy—could operate in conjunction or separately.
To illustrate how the impermissible leverage doctrine would work in practice, consider the following hypothetical cases. In the family separation at the border context, consider a case in which the parent is held in an adult immigration facility on the charge of illegal reentry and is offered the option of waiving her immigration claim in order to reunite with her child and be deported. The court would first ask if the determination that the parent is dangerous is necessary for the child’s wellbeing—in some cases, such as when the parent has a violent criminal record, it might be a close call, but in the standard illegal reentry case, the answer is likely to be no. If the court finds separation is grounded in the child’s wellbeing, then the less intrusive means inquiry might suggest to a court that holding the family together, providing opportunities for visitation, or even offering conditional release might be appropriate. If the separation is justified by reasons other than the child’s wellbeing, such as border security and immigration control, then the court would ask whether absent the promise of reunification in exchange for waiver, the state would be able to induce an adult to waive her rights. In this case, the individual has a right to claim asylum and to access the court to assert her immigration claims, so the state could not exert the same pressure on a nonparent. Therefore, the family separation policy exerts impermissible leverage on the fundamental rights to be free from arbitrary detention and to access courts.

In the confession context, rather than relying on the tangled doctrine of coercion, consider a case in which the interrogating officer has told the accused that he will put in a “good word” with the prosecutor if the accused cooperates, but that failure to cooperate will result in a call to child protective services. The court would ask: is the threat of calling child protective services necessary to protect the child? This might be the case if the child is the alleged victim. If not, however, the court would inquire whether the interrogator could have put the same sort of pressure on a nonparent. Any mention of separating the parent and child in the context of an interrogation that is not necessary to protect the child would be impermissible because the interrogator would be relying on the suspect’s identity as a parent to compel them to waive their right against self-incrimination, a tactic that would not be available to an interrogator if the suspect did not have children.

In the child removal and reunification context, the same sort of inquiry would apply. For instance, consider a situation in which the parent is unable to complete substance abuse courses or in which the parent resides with someone with a criminal record. In these cases, a court could find that there are less intrusive means than removal which would protect the child. A finding that less intrusive means are available would also serve to smoke out those situations in which the state purports to be acting in the child’s best interest but is really using the child’s safety as a screen for controlling the parent. Take, as another example, the case in
which a parent is given the option to voluntarily relinquish care of the child to a family member in order to avoid further investigation. In that case, a court would determine whether in-home services would be a less restrictive approach. Even in the event that the court found that the separation was justified to protect the child’s welfare and was the least restrictive means, the court would then revisit the question at the time of a termination of parental rights judgment to assure that at each step in the process, separation was necessary. When revisiting the question, the court would look to whether the cumulative effect of the intermediate steps leading up to the termination motion conformed to the impermissible leverage inquiry. In other words, did the sum of the requirements put on the parent to reunify exceed what was necessary for the child’s welfare? If impermissible leverage had been used, the court could deny the termination petition even if the formal statutory requirements for termination were met.

C. Existing Law

The doctrine of impermissible leverage fits into the existing legal doctrine. There is no need to produce new solutions out of whole cloth—many sources of existing law already support the parent-child relationship and could be activated to enforce more robust limits on state power over families. The Fourteenth Amendment contains procedural and substantive protections for families.156

Starting in the early twentieth century, the U.S. Supreme Court articulated substantive due process protection for parental rights, which the forthcoming new Restatement on Children and the Law describes:

It has long been recognized that parents have a constitutional liberty interest in the care and custody of their children that is protected under the Due Process Clause of the 14th Amendment. . . . [But that] under its parens patriae and police-power authority, the state can override parental authority when necessary to protect the health and welfare of children.157

156. Id. Although parental rights cases primarily arise in conflicts between the parent and state-level actors, the Due Process Clause of the Fifth Amendment has also been interpreted to protect parental rights against federal actors such as in immigration cases. See Aguilar v. U.S. Immigr. & Customs Enf't Div. of Dep't of Homeland Sec., 510 F.3d 1, 23 (1st Cir. 2007) ("[T]he interest of parents in the care, custody, and control of their offspring is among the most venerable of the liberty interests protected by the Fifth Amendment . . . .").

Federal statutes echo the value placed on parents and their children. A series of federal laws since the mid-twentieth century have conditioned funding on state child protection laws that include efforts to preserve the parent-child relationship. Federal Indian law has even more stringent requirements, in light of the country’s long history of using child removal as a means to obliterate Indigenous communities. Even in immigration law, the parent-child bond is treated as special. Each of these statutes strikes a balance between parental rights and state control, which is guided by constitutional understandings of parental rights, but also goes beyond what the U.S. Supreme Court has interpreted the U.S. Constitution to require. State law, likewise, governs many of the interactions described above. Although the exact contours of rights and duties vary across jurisdictions, state law often includes provisions solicitous to the parent-child relationship.

In addition to substantive legal protections of the parent-child relationship, courts have developed doctrines for limiting the state’s power to burden fundamental rights. The proposed impermissible leverage analysis draws from existing doctrine that the U.S. Supreme Court has developed in other areas in which the state imposes conditions that force individuals to choose between rights and other interests.

One such existing approach is the unconstitutional conditions doctrine. Although the unconstitutional conditions doctrine has taken many forms over the last century, in essence it holds that the government cannot require a person to

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U.S. 57 (2000); Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

158. See supra Subpart II.C for federal law protecting parental rights in child removal cases.


160. Examples include priorities for family reunification, derivative rights for minor children based on a parent’s immigration status, and perhaps most fundamentally, the power to pass citizenship status from parent to child. See generally Kerry Abrams & R. Kent Piacenti, Immigration’s Family Values, 100 V.A. L. REV. 629 (2014) (describing the centrality of the parent-child relationship in immigration law, but also showing how immigration law is out of step with domestic family law).


162. See Sherbert v. Verner, 374 U.S. 398, 404 (1963) (“Nor may… the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant’s ‘right’ but merely a ‘privilege.’ It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”).
waive a fundamental right in order to obtain a government benefit. As Kathleen Sullivan put it, the doctrine “reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.” In other words, this doctrine addresses cases in which “conditions ‘penalize’ or ‘deter’ the exercise of constitutional rights.” Sullivan notes that courts often focus on the “germaneness” of the requirement as a means of identifying which conditions are permissible and which are not. In that way, the government is prevented from using its vast wealth and power, not to mention its monopoly over many benefits, to induce individuals to waive fundamental rights.

Scholars disagree about how much work the unconstitutional conditions doctrine does in the modern regulatory state. The doctrine’s power to protect rights may be especially weak in the areas with which this Article is concerned. In the context of poor families, Khiara Bridges argues that the unconstitutional conditions doctrine has not protected mothers from being forced to choose between privacy and welfare benefits: “In case after case, the Court has upheld conditions that force poor mothers to surrender the privacy rights that traditional rights discourse claims they have.” In turn, Bridges argues, if women do refuse to waive their privacy rights, they are barred from accessing the resources necessary to provide adequate food, clothing, and shelter for their children, thereby risking child removal.

The unconstitutional conditions doctrine is helpful because it highlights how even when framed as a choice, some waivers of rights are unconstitutional. It also provides some tools for determining when waivers are suspect. First: is the condition germane? While vague and subject to many possible interpretations, this question allows courts to distinguish between, for instance, requirements that parents take measures to ensure a safe home before reunifying with a child and requirements that parents waive asylum claims to reunify with a child.

164. Id.
165. Id. at 1433.
166. Id. at 1420.
168. Bridges, supra note 14, at 79.
169. Id. at 130. (“[I]t is misguided to believe that if a poor pregnant woman declined to receive welfare benefits, she would enjoy privacy and would be able to keep the state out of her family’s affairs . . . . This is because a lack of receipt of benefits justifies the state intervening into the families in order to protect children.”) (emphasis in original).
Second: does the condition required by the state to obtain the benefit burden a fundamental right? In the child custody cases, that question could apply to both sides of the coin. Exercising the right against self-incrimination could put an impermissible burden on parental rights, for example, by extending the time before which a parent can see their child. On the other side of the coin, exercising parental rights could impermissibly burden another right, for example if a parent were to waive their asylum claim to speed up reunification.

The unconstitutional conditions doctrine alone, however, is insufficient to protect the rights addressed in this Article. As a matter of constitutional law, the proposed impermissible leverage doctrine shares a similar logic and structure to the unconstitutional conditions doctrine, but it is more directly tailored to the problem of using children as bargaining chips. The unconstitutional conditions doctrine envisions interactions between an individual and the state, and so it is designed to protect the interest of the individual. As such, it does not contemplate a third-party interest, such as the child.170 As Janet Dolgin pointed out:

Constitutional rules are of little help in clarifying social confusion about the family because they presume individual autonomy. As a result, they have failed—and will likely continue to fail—to satisfactorily resolve cases that question the scope of childhood and the meaning of the parent-child relationship. Constitutional rules are thus unable to protect children directly as long as childhood is understood as a status, presuming age as the determinant of a vulnerable and innocent stage of life.171

The impermissible leverage doctrine, by contrast, arises in a triadic relationship among parent, child, and state.

Also, the unconstitutional conditions doctrine deals with waivers of constitutional rights in exchange for government benefits.172 The state is free to get rid of the benefit entirely, but not to condition access to it on unconstitutional grounds. By contrast, in the examples presented above, the parent is forced to

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170. See Ira C. Lupu, The Separation of Powers and the Protection of Children, 61 U. CHI. L. REV. 1317, 1318 (1994) ("In disputes involving the interests of children, however, the legal dynamics change considerably. Because children ordinarily lack legal capacity to decide major matters for themselves, disputes that would be triangular in form among adults are instead legally bilateral. That is, the conflicts primarily involve the state and the mediating entity—the family or other custodian—without the independent, autonomous voice of the child being heard in the formal legal controversies.")

171. Dolgin, supra note 44, at 338 (emphasis omitted).

172. Sullivan, supra note 163, at 1422 ("What government benefits give rise to unconstitutional conditions problems? Those benefits that government is permitted but not compelled to provide.").
choose between custody and other rights.\textsuperscript{173} So, rather than choosing between welfare benefits and free speech, the parent is choosing between custody and the right against self-incrimination or between custody and waiving privacy rights.

While the techniques deployed in the unconstitutional conditions doctrine are helpful in smoking out situations in which the state is using its power to compel people to waive fundamental rights, it is not sufficient to cover the situations described in this Article. When children are involved, additional considerations are required because the relevant party is not just the right’s holder. The child’s interest, as well as the parent’s, must be balanced against the state’s justification in conditioning access.

D. Remedies

Many remedies are possible in response to state acts of impermissible leverage. The appropriate response will be context-dependent: Sometimes cases will require holding confessions involuntary, ordering reunification, invalidating custody agreements, and so on. In other instances, ex ante categorical rules might be more effective—for instance, prohibiting social workers from conditioning reunification on factors they cannot justify as necessary for the child’s safety.

In all of these cases, courts must remain mindful that time alters the balance of rights and interests. Time passes differently for children, especially when it comes to bonds formed with caretakers. Procedural reforms would help ameliorate some of the problems of passing time. An expedited review process for cases involving children would help ensure that custody decisions are timely. The state’s burden to justify its actions could also become increasingly higher the longer a child is separated from their parent. Finally, the individual could seek damages from the state for unreasonable delays in proceedings. Speed, of course, is not the only value. Accuracy is also important. But time is of the essence when it comes to custodial decisions.\textsuperscript{174}

Often parents in the situations described above will seek custody or reunification as the remedy. In fact, custody may seem like the only possible remedy for the incommensurable loss of time with one’s child. In some cases, however, this remedy will be inapt. It may be that so much time has passed during adjudication that the child is better off staying in the home where they have been

\textsuperscript{173} See supra Part II.
\textsuperscript{174} See Sankaran, Church & Mitchell, supra note 42, at 1193 (arguing in favor of immediate appeal processes for reviewing removal orders and referencing the Washington D.C. model of expedited review as an example that other jurisdictions could follow).
living—this is particularly true for young children who may not even remember
the parent who has been fighting for reunification.175 It may also be that the child
was never, in fact, removed from the parent because the parent made the choice to
remain with the child at whatever the cost. Such cases might involve a waived
asylum claim or confession to a crime. In such cases, the fact that the waiver was
predicated on threats to the parent-child relationship could be grounds for appeal.

In the immigration context, the remedies are more complex and might be
hard to enforce given the scope of executive power. Nevertheless, even in
immigration, advocates have won recent victories on the rights of parents and
children.176 One possible remedy is to say that waivers of asylum claims are
deemed involuntary if pursuing the asylum claim would extend the period in
which a parent and child were separated.

Courts are accustomed to using monetary compensation in lieu of specific
performance. One possibility, raised recently by Malinda Seymore, is to introduce
a tort of wrongful separation.177 Seymore focuses on parents suing for civil
damages in cases in which consent to adopt is later found to be involuntary. The
idea that separation constitutes harm, however, could be expanded beyond this
narrow context. Children who were wrongfully separated from their parents
should have standing to sue for attendant damages, including pain and suffering.
Seymore’s remedy is aimed at individuals who work for private adoption agencies
and who have coerced parents into relinquishing parental rights.178 Some
adjustments to her proposal would be necessary to fit the state actors’ conduct in
the cases described in this Article, but the idea that tort law—whether
constitutional tort or otherwise—could provide monetary remedies is a fruitful
avenue for further consideration.

Remedies that produce costs for the state, such as civil damages or suppressed
confessions, may actually lead to a larger decrease in the use of children as
bargaining chips than would the remedy of reunification alone. The state often
does not want care and control of the child, which can be expensive and produce

175. Since Beyond the Best Interests of the Child raised the controversial example of Jewish children
fostered by neighbors during the Holocaust, the question of permanency over parental
rights has posed thorny challenges for advocates of children’s rights. JOSEPH GOLDSTEIN, ANNA
FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979); see also Libby S.
Adler, The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act
of 1997, 38 HARV. J. ON LEGIS. 1, 36 (2001) (articulating the conflict between family
reunification and permanency in the history of American child welfare law).

176. See Subpart II.A.

177. Malinda L. Seymore, Adopting Civil Damages: Wrongful Family Separation in Adoption, 76
WASH. & LEE L. REV. 895, 902 (2019) (advocating for a new tort of wrongful separation to
provide a remedy when parents are coerced into giving a child up for adoption).

178. Id.
high administrative costs for the state. Being forced to return the child to their parent, therefore, is unlikely to provide much deterrence against initial removals. By contrast, a remedy with some financial sting might actually serve as a deterrent that would dissuade state actors from engaging in unnecessary removals in the first place.

Ultimately, however, by the time such disputes reach the courtroom, much of the damage has already been done. An effective model should focus on prevention rather than on remediation. It is unrealistic to decree that state actors can never lean on a parent’s concern for their child when trying to get people to act in certain ways. But more can be done to train officers, immigration officials, social workers, and others to avoid creating a Hobson’s choice for parents. Because so many of these examples begin with choices by ground-level state actors like social workers and police officers, one place to begin reforms is in training these actors. Such trainings could help state actors avoid taking advantage of the parent-child relationship to extract concessions from an adult over whom they would have little or no control were they not a parent or, perhaps worse, a parent who does not care about the wellbeing of their child.

E. Obstacles and Objections

Some readers will likely see the concerns raised in this Article as unnecessary or unjustified impediments to legitimate assertions of state power. The parents in the examples described above made choices: to end a marriage, to cross a border, to be implicated in a crime, which put them in positions in which their children were at risk. The state, rather than acting as a menace to the child’s welfare, used its parenspatriae power to act as a protective safety net for children caught up in their parents’ poor decisions.179 Although some of the examples above might seem unnecessary or cruel, these are the exceptions to the rule. In most cases, this objection goes, the state only threatens child removal when it is in the child’s best interest.

Some view the state’s capacity to control parental decisions through access to the child as necessary, insofar as children are not able to assert exert power themselves. In intimate adult relationships, individuals can exert pressure on their partners by threatening to leave. Since children do not have the option of exit, the state must serve as a proxy. James Dwyer, for instance, puts it in the following terms:

179. See Dwyer, supra note 54, at 82.
[A] judicial or agency decision about child custody is analogous to a relationship decision that competent adults routinely make for themselves, without state intervention. It is one instance of decisionmaking about with whom a person will share a home and family life. This is a sort of decision we expect individuals ordinarily to make privately based on their assessment of their own interests. As noted above, it is a decision people routinely make in reaction to the way others behave and express themselves.

Thus, state actors’ decisions about children’s family life are, at a higher descriptive level, of the same type as decisions private adult individuals routinely make for themselves, just carried out in a different way.180

Dwyer’s analogy, however, ignores the fact that the state’s interests in child removal cases are not coextensive with the child’s interests. State actors will often have reasons for using their removal power that go beyond the child’s interest, or what the child would do if they could make the decision for themselves.

The proposed impermissible leverage doctrine would do little to hamper a state that is acting in good faith to protect a child’s wellbeing. It would, however, help to police the boundaries when both well-meaning and nefarious state actors are tempted to use the powerful tool of child removal to achieve other ends. Sometimes misuse of parent-child separation is quite visible, as with the public outcry after the Trump administration’s immigration policy came to light, but more often it involves subtler expressions of power. Taken individually, efforts by police to induce confessions or by social workers to get parents to conform to middle class social norms might seem benign. When taken as a whole, however, as this Article attempts to do, the problem is much more serious. A more stringent legal test for the state’s power would provide additional oversight of a power that is tempting to misuse.

The second objection comes from those who reject the notion that the parent-child relationship deserves special legal protections. Such individuals might object that reifying the central place of the parent-child relationship disregards other central relationships of childhood such as siblings, grandparents, and teachers. Why focus on the child as a bargaining chip and not on all situations in which the state makes threats regarding an individual’s rights vis-à-vis third parties? Certainly, spouses, grandparents, siblings, and many others share close bonds that can be exploited. Allowing the state to put pressure on intimate relationships that are not expressly protected by an unnecessarily narrow

180. Id. at 85.
definition of the parent and child could serve to make already legally fragile relationships all the more vulnerable.

To this objection, this Article notes that the state has a unique custodial power over children, which it can only exert over competent adults through detention.\textsuperscript{181} Additionally, the American legal system has long treated the parent-child relationship as warranting particular solicitude and protection.\textsuperscript{182} Although I am sympathetic to the argument that the state should generally not be able to use access to one's closest intimates against a person, the case of children raises special problems. Children do not have the resources or capacity to challenge their separation in the way that adult intimates would, nor does the state engage in out-of-home placement of competent adults. The specific trauma that children suffer when they are separated from a parent also militates in favor of treating this context different from other forms of leverage against intimates.

Critics of the central place of the parent-child relationship in this Article might also raise the concern that this approach risks sustaining the private sphere of the family, which can hide many of its own harms. Telling the state to "keep out" of the family has a long history of protecting exploitation and unequal power dynamics within the family unit, which the state can disrupt by protecting weaker members.\textsuperscript{183}

This Article does not intend to paint a one-dimensional picture of the loving family threatened by the overbearing state. There are some parents from whom the state's threat of separation will have little effect, or for whom separation from a


\textsuperscript{182} So too has the system protected the relationship of martial couples, for overlapping but distinct reasons. Like the parent-child relationship, the martial relationship involves support and care that the law seeks to protect. Unlike the parent-child relationship, however, marriage is usually between two adults, both of whom have legal autonomy and capacity. See Peter Nicolas, Fundamental Rights in A Post-Obergefell World, 27 YALE J.L. & FEMINISM 331, 346 (2016) (reviewing case law on marriage as a fundamental right); Milton C. Regan Jr., Spousal Privilege and the Meanings of Marriage, 81 VA. L. REV. 2045, 2050 (1995) (providing rationales for why the law protects spousal communications).

\textsuperscript{183} For more on privacy in the family, see Suzanne A. Kim, Reconstructing Family Privacy, 57 HASTINGS L.J. 557, 558 (2006) (describing feminist critiques of family privacy); Martha Albertson Fineman, What Place for Family Privacy?, 67 GEO. WASH. L. REV. 1207, 1211 (1999) ("[P]rivacy [should] not be a right to separation, secrecy, or seclusion, but the right to autonomy or self-determination for the family even though it is firmly located within a supportive and reciprocal state."); Barbara Bennett Woodhouse, The Dark Side of Family Privacy, 67 GEO. WASH. L. REV. 1247, 1251 (1999) ("Although I share Professor Fineman's concern about the specter of government dictating women's lives, I fear that invoking an entity-based doctrine of family privacy and autonomy as a means of sheltering the caretaking unit from state intrusion may be a bargain with the devil.").
Children as Bargaining Chips

Some parents harm, abuse, and exploit their children. Some are indifferent to their children. Others are unaware that they even have children. Some parents voluntarily relinquish custody of their children for reasons unrelated to direct state action and others will forfeit their parental rights through their abusive actions. This Article critiques the state’s power to leverage the parent-child bond in cases in which the threat is effective, that is, when parents want to protect and care for their children and are willing to give up significant rights of their own to do so. The proposals contained in this Article also seek to protect parenthood in general, notwithstanding the qualities of a particular parent-child relationship.

CONCLUSION

Over the last several years, the crisis of family separation at the U.S.–Mexico border, along with widespread public protest over racial violence committed by the police, has raised public awareness of the destructive power of the state. Efforts to abolish—or substantially reform—Immigration and Customs Enforcement (ICE), prisons, police forces, and even child protection agencies are increasingly part of the discussion in both civil society and in academic settings. This is a moment in which deep reflection on the scope of state power is necessary.

This Article speaks to the need for change by illuminating practices that are often hidden from public and judicial scrutiny, but which touch the very core of individual rights. The purpose of this Article is to illuminate a dynamic that cuts across different areas of law and so might be overlooked by reform efforts aimed


188. See supra note 16 on the call for abolishing the current child welfare system.

189. For a culmination of scholarly and social movement thought on abolitionism, see Dorothy E. Roberts, Foreword: Abolition Constitutionalism, 133 HARV. L. REV. 1, 7–8 (2019).
at a particular institution or practice. By uncovering the underlying bargaining chip dynamic, this Article aims to propose a new impermissible leverage test in order to facilitate clearer, more consistent, and more rights-protecting decisions about when separation is legitimate to protect the child’s wellbeing and when it is not.