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THE RISE OF ZERO TOLERANCE AND THE DEMISE OF FAMILY

Mariela Olivares*

ABSTRACT

This article explores the intersection of immigration law and family law and argues that the current regime dedicated to decimating immigrant families in the United States does not comport with the history and spirit of immigration law and policy. Policies shifting away from family unity and towards an inhumane treatment of immigrant families is anchored in the political rhetoric that normalizes the oppression of immigrants. By characterizing immigrants as nonhuman—even “animals,” as described by President Donald Trump—the current slate of anti-immigrant policies that specifically target families is normalized. Part I discusses contemporary immigration law that terrorizes the family unit and explores the Zero Tolerance Prosecution policy against asylum seekers and other entering immigrants that led to Customs and Border Protection officials tearing children away from their parents at the border. The continuation and expansion of family detention bolsters the policy, in which immigrant families and unaccompanied minors are held in government custody. These policies prevail in part because the narrative surrounding immigrant criminality and dehumanization—despite empirical evidence demonstrating no

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correlation between immigrant status and criminality—paves the way to more easily tyrannize immigrant families.

In contrast to this contemporary movement against the family, Part II provides critical historical context, asserting that the history of immigration law and policy is one deeply committed to family unity. Although this history is clearly marred by the deeply entrenched legacy of racial and ethnic discrimination and is rooted in principles of male dominance, it is undeniable that family primacy is a fundamental principle in immigration law. Part III then explores immigration law's precarious intersection with the laws that protect families and children, noting how immigration policies cloaked as national security measures have more recently infringed upon immigrant families' decision making. The last generation of jurisprudence, though, has embraced a broader fealty to family integrity. This Part also discusses how policies of detaining immigrant families and children and separating immigrant families are in direct contradiction to the law's established commitment to actions that are in the best interests of children and pursuant to child welfare standards. This discussion then leads to Part IV's exploration of the recent litigation and advocacy efforts to dismantle the Family Separation Policy. It then predicts that this litigation and movement are harbingers of establishing due process rights of immigrant family integrity. The article concludes with a call to advocates to resist the demeaning, dehumanizing narrative and to push forward in preserving and protecting families.

INTRODUCTION

A Honduran mother and child recently crossed the United States (U.S.)–Mexico border.¹ After declaring to U.S. Customs and Border Protection (CBP) officials her intent to seek asylum based on being

1. Mirian G., *At the Border, My Son Was Taken from Me*, CNN (July 11, 2018, 1:43 PM), <https://us.cnn.com/2018/05/29/opinions/immigration-separation-mother-son-mirian/index.html> [https://perma.cc/6APC-72XH].

the target of violence in her home country, the mother and her eighteen-month-old son were transferred to a holding facility where they spent the night together.² The mother, Mirian, recounts what happened next:

When we woke up the next morning, immigration officers brought us outside where there were two government cars waiting. They said that I would be going to one place, and my son would go to another. I asked why repeatedly, but they didn't give me a reason. The officers forced me to strap my son into a car seat. As I looked for the buckles, my hands shook, and my son started to cry. Without giving me even a moment to comfort him, the officer shut the door. I could see my son through the window, looking back at me—waiting for me to get in the car with him—but I wasn't allowed to. He was screaming as the car drove away.³

Just like the myriad stories told in the spring and summer of 2018 under the Trump Administration's zero-tolerance prosecution policy (the Zero Tolerance Prosecution Policy), Mirian's story of forced separation from her child displays the cruelty of the U.S. government's actions against immigrant families. Mirian endured a long and agonizing experience, and after a positive preliminary finding of credibility in her asylum claim, she notes:

On May 2, my son was brought to me after spending two months and [eleven] days with strangers. It was an indescribable, uncontainable joy to hold him. I couldn't stop kissing his face. The entire time we were separated, my son was the reason that I held on and finally, he was there, like a vision. This May, I passed my first Mother's

2. *Id.*

3. *Id.*

Day in the United States with my son.⁴

Former U.S. Attorney General Jeff Sessions proudly announced the Zero Tolerance Prosecution Policy after months of setting up the system, targeting immigrants arriving into the U.S. seeking asylum or otherwise entering surreptitiously and detained at the border.⁵ Sessions declared in April 2018 that anyone “illegally entering this country will not be rewarded, but will instead be met with the full prosecutorial powers of the Department of Justice.”⁶ A month later, Sessions followed up his directive to prosecutors’ offices nationwide to pursue widespread prosecutions of those entering the U.S.: “If you cross this border unlawfully, then we will prosecute you. It’s that simple.”⁷ This harsh new policy included those seeking asylum under U.S. law and those arriving to the border with children—two groups of people not previously singled out for prosecution.⁸

As described more fully in Part I, the U.S. Department of Homeland Security (DHS) did not conceive of the Zero Tolerance Prosecution Policy overnight, but instead built it on a historical and contemporary foundation that targets immigrant families.⁹ More recently, President Barack Obama’s Administration expanded the process of detaining families—mostly mothers and children—in immigration prisons.¹⁰ Despite outcry by activists and scholars,

4. *Id.*

5. See Press Release, U.S. Dep’t of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [https://perma.cc/3383-XD8N].

6. *Id.*

7. Jeff Sessions, U.S. Attorney Gen., Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [https://perma.cc/ER5V-ZZYB] [hereinafter Immigration Remarks].

8. See *id.* Sessions added, “If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law.” *Id.* To be sure, the use of “smuggling” is an intentional mischaracterization of the efforts by parents to bring their own children with them to the United States. Sessions evokes criminal behavior against parents who bring their children with them, conduct which should not be characterized as “smuggling.”

9. See *infra* Part I.

10. Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 973 (2016) [hereinafter Olivares, *Intersectionality at the Intersection*].

family detention continued unabated while the American public largely remained silent and uninformed.¹¹ Only in 2018, when images and audio recordings of children being literally ripped from their parents flooded the media airwaves, did the world begin to pay attention due, also, to the broader resistance movement against President Donald Trump.¹² Seemingly all of a sudden, the world erupted in anguished protest against family separation, questioning how this cruel and draconian practice could be taking place.¹³ Wringing their hands, our friends and neighbors wondered: how did we, as a country, arrive at a cultural and political reality in which the government openly and under the guise of the law takes children away from capable, loving parents? To be sure, the current reality of targeting immigrant families and children is not a surprise given the historical, legal, and political foundation that dehumanizes immigrants in the U.S. This long-standing and now deeply entrenched process of dehumanization is reinforced and perpetuated by a strategic political narrative, bolstered by widely disseminated lies and misrepresentations.¹⁴

11. *Id.* at 1006.

12. Ginger Thompson, *Listen to Children Who've Just Been Separated from Their Parents at the Border*, PROPUBLICA, <https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy> [https://perma.cc/TD6H-S9V6]; see also Salvador Rizzo, *The Facts About Trump's Policy of Separating Families at the Border*, WASH. POST (June 19, 2018, 3:00 AM), https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/?utm_term=.ad80422a484d [https://perma.cc/6BGP-7A89]; Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html> [https://perma.cc/G7NQ-7N44] (“Over the past month, marches across the country have cropped up, adding to the pressure on the Trump [A]dministration to yield to calls to end the practice of splitting up or detaining families.”).

13. See generally Phil McCausland et al., *Thousands Across U.S. Join ‘Keep Families Together’ March to Protest Family Separation*, NBC NEWS (June 30, 2018, 3:49 PM), <https://www.nbcnews.com/news/us-news/thousands-across-u-s-join-keep-families-together-march-protest-n888006> [https://perma.cc/46N9-YKWD]; Vann R. Newkirk II, *Family Separation Protests Shift the Narrative*, ATLANTIC (June 30, 2018), <https://www.theatlantic.com/politics/archive/2018/06/a-rally-for-families-by-families/564239/> [https://perma.cc/4A5A-48KS].

14. In other recent articles, I explore the power of political rhetoric and narrative. See generally Olivares, *Intersectionality at the Intersection*, *supra* note 10; Mariela Olivares, *Narrative Reform Dilemmas*, 82 MO. L. REV. 1089 (2017).

Shining a brighter light on this phenomenon, this article explores the intersection of immigration law and family law and argues that the current regime dedicated to decimating immigrant families in the U.S. does not comport with the history and spirit of immigration law and policy.¹⁵ Policies shifting away from family unity and toward the inhumane treatment of immigrant families are anchored in the political rhetoric that normalizes the oppression of immigrants. By characterizing immigrants as nonhuman—even “animals,” as described by Trump—the current slate of anti-immigrant policies that specifically target families is normalized.¹⁶ Part I discusses contemporary immigration law that terrorizes the family unit.¹⁷ I explore the Zero Tolerance Prosecution Policy against asylum-seekers and other entering immigrants that led to CBP officials tearing children away from their parents at the border.¹⁸ The policy is bolstered by the continuation and expansion of family detention in which immigrant families and unaccompanied minors are held in government custody. These policies prevail in part because the narrative surrounding immigrant criminality and dehumanization—despite empirical evidence demonstrating no correlation between immigrant status and criminality—paves the way to more easily tyrannize immigrant families.¹⁹

In contrast to this contemporary movement against the family, Part II provides a critical historical context, asserting that the history of

15. In propounding on this important intersection of family law and immigration law, I owe a great debt to scholars who have contributed profoundly to this area, including Kerry Abrams and David Thronson, both of whose works I discuss in this article.

16. Shereen Marisol Meraji, *What Happens When Groups of People are Described as Animals*, NPR (June 28, 2018, 7:24 PM), <https://www.npr.org/2018/06/28/624416635/what-happens-when-groups-of-people-are-described-as-animals> [https://perma.cc/CT49-AAPE].

17. See *infra* Part I.

18. Sari Horwitz & Maria Sacchetti, *Sessions Vows to Prosecute All Illegal Border Crossers and Separate Children from Their Parents*, WASH. POST (May 7, 2018, 6:07 PM), https://www.washingtonpost.com/world/national-security/sessions-says-justice-dept-will-prosecute-every-person-who-crosses-border-unlawfully/2018/05/07/e1312b7e-5216-11e8-9c91-7dab596e8252_story.html?noredirect=on [https://perma.cc/F73G-LY85].

19. See Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56 CRIMINOLOGY 370, 393 (2018) (the report spans over the period from 1990 to 2014, where “findings suggest that undocumented immigration over this period is generally associated with decreasing violent crime.”).

immigration law and policy is one deeply committed to family unity.²⁰ Although this history is clearly marred by the entrenched legacy of racial and ethnic discrimination and is rooted in principles of male dominance, it is undeniable that family primacy is a fundamental principle in immigration law.²¹ Part III then explores immigration law's precarious intersection with the laws that protect families and children, noting how immigration policies cloaked as national security measures have more recently infringed upon immigrant families' decision making.²² The last generation of jurisprudence, though, has embraced a broader fealty to family integrity. Part III also discusses how policies of detaining immigrant families and children and separating immigrant families are in direct contradiction to the law's established commitment to actions that are in the best interests of children and pursuant to child welfare standards.²³ This discussion then leads to Part IV's exploration of the recent litigation and advocacy efforts to dismantle what has become known as the Family Separation Policy.²⁴ It also predicts that this case and movement are harbingers of establishing due process rights of immigrant family integrity. The article concludes with a call to advocates to resist the demeaning, dehumanizing narrative and to push forward in preserving and protecting families.²⁵

I. The Immigrant Family in the Bullseye

This Part begins with a discussion of the assault on the family in the present day to better contrast the historical practices outlined in Part II.²⁶ This exploration is timely because, despite the decades-long history of the U.S. government detaining immigrant children and families and its startling expansion beginning in 2014, the public

20. *See infra* Part II.

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part III.

24. *See infra* Part IV.

25. *See infra* Conclusion.

26. *See generally infra* Part II.

outcry only took dramatic hold in 2018 under Trump's Family Separation Policy, which the Administration erroneously dictated as a necessary component of the Zero Tolerance Prosecution Policy.²⁷ As this Part more fully outlines, this program of separating children from fit parents is undergirded by the broad expanse of family detention.²⁸ Moreover, the Family Separation Policy is bolstered by the demeaning narrative that epitomizes current American political rhetoric.

A. *The Road to the Family Separation Policy*

The Trump Administration's plan to enforce family separations at the border began in early 2017.²⁹ In a pilot program that targeted the West Texas and New Mexico sector of the U.S.–Mexico border between July and November 2017, DHS began to criminally prosecute every adult immigrant apprehended by CBP, even if that meant they would be taken away from their children with whom they were traveling.³⁰ At this point, the policy was not publicly announced, but as one report showed, at least one federal court noticed the disturbing trend of immigrant criminal defendants informing the court that they had been separated from their children when charged with the crime of “improper entry by an alien,” and given no information about the whereabouts of their children or when they would be reunited.³¹ The children were taken and placed with

27. See generally Joshua Barajas, *How Trump's Family Separation Policy Became What It Is Today*, PBS (June 21, 2018, 12:43 PM), <https://www.pbs.org/newshour/nation/how-trumps-family-separation-policy-has-become-what-it-is-today> [https://perma.cc/XQ65-7L4P].

28. See *infra* Part I.

29. Barajas, *supra* note 27.

30. Maria Sacchetti, *Top Homeland Security Officials Urge Criminal Prosecution of Parents Crossing Border with Children*, WASH. POST (Apr. 26, 2018), https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/a0bdcee0-4964-11e8-8b5a-3b1697adcc2a_story.html?noredirect=on&utm_term=.d4ae3d0fbb54 [https://perma.cc/5PTA-4EFJ] (citing a DHS memo obtained by the Washington Post).

31. Katherine Hawkins, *Where Family Separation Began: A Case in El Paso Shows Flores is the Solution, Not the Problem*, JUST SECURITY (June 22, 2018), <https://www.justsecurity.org/58363/family-separation-began-case-el-paso-shows-flores-solution-problem/> [https://perma.cc/8MAC-99AA]. Hawkins describes a federal magistrate judge's reaction to cases before the court:

the U.S. Department of Health and Human Services' Office of Refugee Resettlement (ORR).³²

At this early time in the policy's implementation and for some point thereafter, the Administration stated that its goal was to deter more parents from attempting to cross the border with their children.³³ In an interview with CNN, former Secretary of Homeland Security John Kelly confirmed this objective: "Yes, I'm considering [that], in order to deter more movement along this terribly dangerous network. I am considering exactly that."³⁴ In response, researchers and advocates worked to debunk the myth that such a policy would effectively act as a deterrent to future migration,³⁵ which uncovered stories of desperation and uncertainty.³⁶ After public and political outcry, Kelly recanted and denied that he ever considered deterrence as a reason behind the policy, though this contradicted previous Trump Administration statements concerning family separation.³⁷ Specifically, portions of the separation policy were outlined in a DHS

Miguel Torres, a federal magistrate judge in the Western District of Texas stated during a court hearing on Nov. 1, 2017 that 'with some frequency in the last few months,' defendants being prosecuted for immigration offenses had described being separated from a minor child at the time of their arrest.

Id.

32. *See id.*

33. *See* Sacchetti, *supra* note 30 (citing the DHS memo in which DHS officials note that "threatening adults with criminal charges and prison time would be the 'most effective' way to reverse the steadily rising number of attempted crossings").

34. Daniella Diaz, *Kelly: DHS Is Considering Separating Undocumented Children from Their Parents at the Border*, CNN (Mar. 7, 2017, 7:33 AM), <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html> [<https://perma.cc/BE6X-V4AP>].

35. Michael Corradini et al., *Operation Streamline: No Evidence that Criminal Prosecution Deters Migration*, VERA INST. JUST. (June 2018), <https://www.vera.org/publications/operation-streamline> [<https://perma.cc/Z7KX-NEUX>].

36. *E.g.*, Associated Press, *After Being Separated from Daughter at Border, Mom Warns Illegal Immigrants to 'Find Another Country,'* CBS NEWS (July 2, 2018, 10:00 AM), <https://www.cbsnews.com/news/after-being-separated-from-daughter-at-border-mom-warns-illegal-immigrants-to-find-another-country/> [<https://perma.cc/FDQ8-C2SQ>]. One mother reported, for example, that the policy would have deterred her entrance had she known. *Id.* Buena Ventura Martin Godinez, a mother who was separated from her seven-year-old daughter, shared that the U.S. is no longer the safe country she once thought it to be. *Id.* "I would advise people to find another country to seek refuge . . . people don't have a heart." *Id.*

37. Tal Kopan, *Kelly Says DHS Won't Separate Families at the Border*, CNN (Mar. 29, 2017, 10:15 PM), <https://www.cnn.com/2017/03/29/politics/border-families-separation-kelly/index.html> [<https://perma.cc/3KYU-ULSG>].

memo stating that threatening adults with prison was the “most effective” way to deter border crossings as incarceration of parents would inevitably lead to family separation because children could not be held in adult criminal detention.³⁸ By October 2017, DHS implemented the Family Separation Policy in full force, causing chaos at the U.S.–Mexico border.³⁹ From October 2017 to March 2017, more than 100 children under the age of four were forcibly taken from their parents.⁴⁰ Many of the children were taken to hastily organized shelters where some ostensible efforts were made to find a relative or guardian with whom to place the children.⁴¹ In many instances, however, U.S. government officials could not find an appropriate guardian, leaving the children in custody without any plan of parental reunification.⁴² Moreover, no consistent process existed to determine whether the children were separated from a legitimate parent, and no consistent process existed to reunite parents and children who were mistakenly separated.⁴³

Despite these significant problems, the program continued.⁴⁴ By April 2018, more than 700 children were separated from their parents.⁴⁵ June 2018 data shows that CBP separated nearly 1,800

38. See Jeremy Stahl, *A Moral and Legal Abomination*, SLATE (June 3, 2018, 7:30 PM), <https://slate.com/news-and-politics/2018/06/trumps-child-separation-policy-is-a-moral-and-constitutional-abomination.html> [<https://perma.cc/W6QF-GHP5>] (citing the DHS memo).

39. Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html> [<https://perma.cc/QX4L-SMU9>].

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*; see also Jonathan Blitzer, *The Government Has No Plan for Reuniting the Immigrant Families It Is Tearing Apart*, NEW YORKER (June 18, 2018), <https://www.newyorker.com/news/news-desk/the-government-has-no-plan-for-reuniting-the-immigrant-families-it-is-tearing-apart> [<https://perma.cc/C93R-FDC8>] (stating the government has no protocols “for keeping track of parents and children concurrently, for keeping parents and children in contact with each other while they are separated, or for eventually reuniting them”). See generally U.S. DEP’T OF HEALTH & HUMAN SERVS., SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> [<https://perma.cc/8N27-EU9L>] [hereinafter SEPARATED CHILDREN]. This report details the bungled implementation of the Family Separation Policy from its inception. *Id.* The report’s findings are discussed more fully *infra* at Part I.D. and Part III.

44. Press Release, U.S. DEP’T OF JUSTICE, *supra* note 5.

45. Barajas, *supra* note 27 (discussing the Family Separation Policy).

families between October 2017 and February 2018.⁴⁶ Despite widespread bipartisan condemnation, the Trump Administration defended its actions, falsely asserting that the measures protected children and were a direct result of the policies and inaction by the previous Obama Administration and the supposed obstinance of Democratic lawmakers.⁴⁷ Trump asserted that although he hates to see the separation of parents from children, the Democrats “forced . . . upon our nation” the separation policy.⁴⁸ Former Secretary of Homeland Security Kirstjen Nielsen stated at a June 2018 event for the National Sheriffs’ Association that DHS owed no apologies or regrets for separating children from their parents.⁴⁹

But the political and social consequences were swift. A survey showed that two in three voters opposed the Family Separation Policy.⁵⁰ Former First Ladies Michelle Obama, Laura Bush, and Rosalynn Carter and former Secretary of State Hillary Clinton denounced the policy, calling it “immoral,” “disgraceful,” and a “humanitarian crisis.”⁵¹ After the continued public and political

46. Mica Rosenberg, *Exclusive: Nearly 1,800 Families Separated at U.S.–Mexico Border*, REUTERS (June 8, 2018, 4:40 PM), <https://www.reuters.com/article/us-usa-immigration-children-exclusive/exclusive-nearly-1800-families-separated-at-us-mexico-border-in-17-months-through-february-idUSKCN1J42UE> [<https://perma.cc/RLQ2-QV6X>].

47. *Id.*; see also Tal Kopan et al., *Trump Again Falsely Blames the Democrats for His Administration’s Family Separations*, CNN (June 16, 2018, 2:15 AM), <https://www.cnn.com/2018/06/15/politics/family-separation-democrats-trump/index.html> [<https://perma.cc/3K7J-WT5D>]. In an interview at the White House, President Trump stated, “I hate it. I hate to see the separation of parents and children . . . [t]he Democrats forced that law upon our nation.” *Id.*; Eric Levitz, *Trump: Obama Was for ‘Open Borders’—Also, His Immigration Policies Were the Same as Mine*, INTELLIGENCER (June 25, 2018, 4:18 PM), <http://nymag.com/daily/intelligencer/2018/06/trump-tweet-obama-family-separation-outrage-media-unfair-same-policies.html> [<https://perma.cc/A3QG-HGM5>].

48. Kopan, *supra* note 47.

49. Associated Press, *DHS Head Nielsen Says No Apology for Separating Families*, PBS (June 18, 2018, 12:43 PM), <https://www.pbs.org/newshour/politics/watch-dhs-head-nielsen-says-no-apology-for-separating-families> [<https://perma.cc/ZHM9-2GUP>].

50. David Smith, *Child Separations: Trump Faces Extreme Backlash from Public and His Own Party*, GUARDIAN (June 19, 2018, 2:23 PM), <https://www.theguardian.com/us-news/2018/jun/19/child-separation-camps-trump-border-policy-backlash-republicans> [<https://perma.cc/9QSN-KYCM>] (citing a Quinnipiac University national poll which questioned 905 voters nationwide from June 14–17, 2018).

51. Matt Stevens & Sarah Mervosh, *The 4 Former First Ladies Condemn Trump’s Border Policy*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/us/politics/first-ladies-trump-family-separation.html> [<https://perma.cc/H7K3-6PW2>].

pressure, which included calls for the policy's end from prominent Republicans,⁵² Trump signed an executive order on June 20, 2018, ending the Family Separation Policy despite the continued implementation of the Zero Tolerance Prosecution Policy.⁵³

Legal action accompanied the political and social outcry. Seventeen states and the District of Columbia filed a lawsuit against DHS, arguing that family separation is a "cruel and unlawful" practice.⁵⁴ Immigrant rights advocates in Los Angeles sued DHS, demanding that the agency work to reunite children with their parents.⁵⁵ A federal court in California enjoined most family separations at the border and required border officials to reunite all children with their families.⁵⁶ Specifically, the court ordered that children younger than five be reunited with their parents by July 3, 2018, and that children five and older be reunited with their parents by July 26, 2018.⁵⁷ Those deadlines came and went without the government's full compliance.⁵⁸

On July 7, 2018, DHS announced that by that point, only fifty-one children were either eligible or in the process for being confirmed eligible to be reunited with their parents, arguing that the vetting process—DNA testing to verify parentage, criminal background

52. Smith, *supra* note 50. One commentator cited Republican Congressman Fred Upton who called the family separation an "ugly and inhumane practice," and former Senator John McCain who tweeted, "The [A]dministration has the power to rescind this policy. It should do so now." *Id.*

53. Barajas, *supra* note 27.

54. Complaint for Declaratory and Injunctive Relief, *Washington v. United States*, No. 2:18-cv-00939 (W.D. Wash. filed June 26, 2018) [<https://perma.cc/DJ4E-NEFV>]. In August 2018, the court granted Defendant's motion to transfer venue and transferred the case to the Southern District of California to be considered in conjunction with *Ms. L. v. U.S. Immigration and Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

55. Memorandum in Support of Motion for Class Certification, *Ms. L.*, 310 F. Supp. 3d 1133 (S.D. Cal. Mar. 9, 2018) (No. 18-cv-00428-DMS-MDD); *see also* Laura Jarrett, *Federal Judge Orders Reunification of Parents and Children, End to Most Family Separations at Border*, CNN (June 27, 2018, 11:04 AM), <https://www.cnn.com/2018/06/26/politics/federal-court-order-family-separations/index.html> [<https://perma.cc/RXF9-U3WZ>].

56. *See generally* *Ms. L.*, 310 F. Supp. 3d 1133.

57. *See* Jarrett, *supra* note 55.

58. John Burnett, *Government Misses Migrant Family Reunification Deadline*, NPR (July 10, 2018, 6:13 PM), <https://www.npr.org/2018/07/10/627821359/government-misses-migrant-family-reunification-deadline> [<https://perma.cc/8VYL-8267>]. As this case remains ongoing as of this writing, it is likely this article will not reflect the most current update.

checking, and information gathering on other adults living in the home in which the child would be placed—was taking longer than expected.⁵⁹ In response to DHS's failure to meet the deadline, certain Democratic senators sent a letter to DHS demanding that officials provide status briefings on the reunification process.⁶⁰ Senators Kamala Harris, Jeff Merkley, and Catherine Cortez Masto introduced legislation that would immediately reunify all families and require a permanent system of coordination between all agencies dealing with detained immigrants and their children.⁶¹ The Senate Judiciary Committee received the bill for review in July 2018 but has not taken further action.⁶²

Importantly, and as a counterargument to the falsehood that the Family Separation Policy was a necessary result of increased prosecutions for border crossers, the implementation of the 2018 Zero Tolerance Prosecution Policy was not the first time the U.S. government pursued such a program. In 2005, the George W. Bush Administration undertook broad-scale criminal prosecutions of all unlawful entrants in certain parts of Arizona and Texas, a program that continued during the Obama Administration.⁶³ And although prosecutions of unlawful entrants have long been a matter of prosecutorial discretion, a similar strict prosecution policy was tested in 2017, which, according to U.S. Immigration and Customs Enforcement (ICE), led to a significant decline in surreptitious border

59. *Id.*; Anna Giaritelli, *DHS Creating Office to Tell Central American Governments About Family Reunification Efforts: Report*, WASH. EXAMINER (July 11, 2018, 2:39 PM), <https://www.washingtonexaminer.com/news/dhs-creating-office-to-tell-central-american-governments-about-family-reunification-efforts-report> [https://perma.cc/HDV6-PFW7].

60. Michelle Lou, *Here's What's Happening with Trump Administration's Family Reunification Efforts*, HUFFINGTON POST (July 18, 2018, 9:47 AM), https://www.huffingtonpost.com/entry/trump-family-reunification-children-border_us_5b4cb469e4b0bc69a7899aa8 [https://perma.cc/5FTV-PSSM].

61. REUNITE Act, S. 3227, 115th Cong. (2018); *see also* Lou, *supra* note 60.

62. *See* S. 3227.

63. *Immigration Enforcement Under Obama Returns to Highs of Bush Era*, TRAC IMMIGR. (July 15, 2010), <http://trac.syr.edu/immigration/reports/233/> [https://perma.cc/9VRJ-9M26]; *see also* Miriam Jordan & Ron Nixon, *Trump Administration Threatens Jail and Separating Children from Parents for Those Who Illegally Cross Southwest Border*, N.Y. TIMES (May 7, 2018), <https://www.nytimes.com/2018/05/07/us/politics/homeland-security-prosecute-undocumented-immigrants.html> [https://perma.cc/7CY7-76ZD].

crossings by families.⁶⁴ Public records reveal that the number of immigrants detained at the border dropped between 2015 (when increased family detentions became the norm) and 2018.⁶⁵ Between January and June 2018, DHS apprehended nearly 49,000 family members at the U.S.–Mexico border—more than twice as many during the same period in 2017.⁶⁶ When DHS formally ended the Family Separation Policy, these numbers again dropped approximately 15% compared to the apprehension numbers between May and June 2018.⁶⁷

The decision to separate parents from their children when the parents were put into prosecution proceedings was a maneuver used to punish arriving immigrants and to eventually normalize the enhanced use of family detention.⁶⁸ As discussed below, family detention has long been utilized when immigrant families arrived with undocumented status to the country, but the families were routinely kept together per agency protocol.⁶⁹ When DHS implemented a similar policy of separating families in the early 2000s after ramping up immigration prosecutions due to post-9/11 security concerns and the provisions under the USA PATRIOT Act of 2001, Congress responded by directing DHS to halt family

64. U.S. IMMIGRATION AND CUSTOMS ENF^T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2017), <https://www.ice.gov/removal-statistics/2017> [<https://perma.cc/Q47G-7PBD>].

65. *Id.*

66. Kristen Bialik, *Border Apprehensions Increased in 2018—Especially for Migrant Families*, PEW RES. CTR. (July 6, 2018), <https://reliefweb.int/report/united-states-america/border-apprehensions-migrant-families-have-risen-substantially-so-far> [<https://perma.cc/PQL2-FK5Z>].

67. *U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018*, U.S. CUSTOMS AND BORDER PROTECTION (Oct. 23, 2018) <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions> [<https://perma.cc/A5UG-RTEG>]; see also Kate Morrissey, *Illegal Border Crossings Decrease in June, the First Time in 2018*, L.A. TIMES (July 6, 2018, 7:55 PM), <http://www.latimes.com/nation/la-na-border-crossings-immigration-20180706-story.html> [<https://perma.cc/GA2G-DJ4U>].

68. Caitlin Dickerson & Ron Nixon, *Trump Administration Considers Separating Families to Combat Illegal Immigration*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/us/trump-immigrant-families-separate.html> [<https://perma.cc/PVK8-9MNB>] (stating that “[p]revious administrations have stopped short of resorting to policies like family separation”). Using family separation as a way to deter border crossings is “precisely what the creators of the policy are hoping for.” *Id.*

69. See *infra* Part IV.

separations and liberalize the use of family detention, when appropriate.⁷⁰ Similarly, in response to the recent litigation and court order that prompted the end of the Family Separation Policy, the U.S. Department of Justice announced on June 29, 2018, that families will be kept together in detention centers “during the pendency of their immigration cases.”⁷¹ Although it remains to be seen if Trump’s immigration policies will result in a long-term decrease in border crossings and apprehensions, recent practice demonstrates that detaining families in a backlogged immigration system will only result in the inhumane, continued detention of children and immigrants with bona fide applications for asylum. Indeed, as the next section explains, the 2018 Family Separation Policy was a targeted strategy to normalize and continue the family detention regime.⁷²

B. Family Separation as a Strategy to Normalize Imprisoning Immigrant Families

It is important to highlight that the U.S. government has been imprisoning immigrants not accused of any crime (other than, possibly, entry to the country, which is not always a crime) since the late nineteenth century. As Elliott Young details, the country incarcerated immigrants in the “late 1880s when scores of Chinese migrants found in the United States without authorization were sent to a federal prison on McNeil Island . . . where they were sentenced to hard labor before being deported.”⁷³ Young describes how

70. Lazaro Zamora, *What You Need to Know: Immigrant Family Detention*, BIPARTISAN POL’Y CTR. (Aug. 27, 2015), <https://bipartisanpolicy.org/blog/what-you-need-to-know-immigrant-family-detention/> [https://perma.cc/S392-MHQJ]. In 2005, Congress stated, “When detention of family units is necessary, the Committee directs DHS to use appropriate detention space to house them together.” *Id.*

71. Dara Lind, *It’s Official: The Trump Administration Has Replaced Family Separation with Indefinite Family Detention*, VOX (June 30, 2018, 1:39 PM), <https://www.vox.com/2018/6/30/17520820/families-together-detention-separate-camp-military> [https://perma.cc/U5LV-6M6X].

72. See *infra* Part I.B.

73. Elliott Young, *Trump’s Zero Tolerance Policy Could Lead to the Imprisonment of Hundreds of Thousands of Immigrants by the End of 2018*, HIST. NEWS NETWORK (July 1, 2018), <https://historynewsnetwork.org/article/169426> [https://perma.cc/BX5V-H8M9].

incarceration increased in the 1920s and through World War II when Japanese, Germans, and Italians were “kidnapped and locked-up in Immigration and Naturalization Services (INS) detention camps.”⁷⁴ Incarceration rates increased through the twentieth century and skyrocketed after 1996 legislation broadly expanded the definition of criminal behaviors that would lead to detention and deportation.⁷⁵

The imprisonment of children as unaccompanied or as part of a family structure came to the public consciousness and became part of formal governmental procedure when a fifteen-year-old girl from El Salvador, Jenny Flores, attempted to enter the U.S. without documentation in the 1980s to join her mother.⁷⁶ Jenny was apprehended by the then-U.S. INS, and Jenny’s mother’s employer called Carlos Holguín, an immigration lawyer in Los Angeles, to seek assistance with Jenny’s release.⁷⁷ INS refused to release Jenny to anyone who was not a legal guardian because, INS claimed, it was worried about the welfare of the child.⁷⁸ Yet, in subsequent interviews, Holguín noted that when he visited the facility detaining Jenny with other children and adults, he saw conditions that “were completely inconsistent with any true concern for child welfare or their well-being.”⁷⁹ INS detained Jenny in an old motel that was fenced with barbed wire for two months.⁸⁰ Reports surfaced that

74. *Id.*

75. See César C. García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 167, 179 (2009) (“In 1996, . . . [b]ent on curbing undocumented immigration, deporting criminal aliens, protecting the nation from terrorists, . . . Congress passed a series of ‘get tough on immigrant[s]’ laws. Detention of many aliens became mandatory, with the number of immigrants detained increasing dramatically in local jails, federal penitentiaries, and privately run detention facilities.”).

76. See Dara Lind & Dylan Scott, *Flores Agreement: Trump’s Executive Order to End Family Separation Might Run Afoul of a 1997 Court Ruling*, VOX (June 21, 2018, 10:42 AM), <https://www.vox.com/2018/6/20/17484546/executive-order-family-separation-flores-settlement-agreement-immigration> [<https://perma.cc/VFA7-MFNY>].

77. See *The History of the Flores Settlement and Its Effects on Immigration*, NPR (June 22, 2018, 4:24 PM), <https://www.npr.org/2018/06/22/622678753/the-history-of-the-flores-settlement-and-its-effects-on-immigration> [<https://perma.cc/7SLU-SYLQ>] [hereinafter NPR, *History of the Flores Settlement*].

78. See Lind & Scott, *supra* note 76.

79. See NPR, *History of the Flores Settlement*, *supra* note 77.

80. *Id.*

Jenny and other children were subjected to regular strip searches; had no communication with their parents; were not given any educational instruction; and were imprisoned with detained adults.⁸¹

In the lawsuit filed against INS, *Flores v. Reno*, plaintiffs argued that INS should screen available adults (other than legal guardians) and release children to them if they are competent and fit and that INS must improve the living conditions of the minor detention facilities to meet minimum child welfare standards.⁸² The case wound its way to the U.S. Supreme Court and eventually ended in a settlement between the parties in 1997 (the Flores Settlement).⁸³ The Flores Settlement outlined the conditions by which the U.S. government must treat detained immigrant children and continues to govern the detention practice.⁸⁴ The Flores Settlement, among other things, limits the amount of time children can be held in federal detention to twenty days.⁸⁵ It also requires immigration officials to “place each detained minor in the least restrictive setting appropriate” and release immigrants under eighteen “without unnecessary delay.”⁸⁶

Family detention continued in the early 2000s, and in 2008, Congress passed the Trafficking Victims Protection Reauthorization Act which included a savings clause that kept the Flores Settlement in force, indicating congressional willingness to continue the terms of the agreement.⁸⁷ Since its inception, DHS revisited the Flores Settlement multiple times, most recently in 2015 when the Obama Administration sought to carve out an exception for minors who arrived to the U.S. with a parent during the time known colloquially as the migrant “surge” of 2014–2015.⁸⁸ Wanting to detain some

81. *See id.*; *see also* Lind & Scott, *supra* note 76.

82. *See Reno v. Flores*, 507 U.S. 292, 295 (1993).

83. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1996) [hereinafter Stipulated Settlement Agreement].

84. *Id.* at 7–9.

85. *See* Lind & Scott, *supra* note 76.

86. *See* Stipulated Settlement Agreement, *supra* note 83, at 7, 10.

87. Trafficking Victims Protection Act of 2017, S. 1312, 115th Cong. (2018) (enacted).

88. *See* Olivares, *Intersectionality at the Intersection*, *supra* note 10, at 974 (“ICE confronted a new challenge when, in 2014, thousands of women and children immigrants fleeing from violence in Central

families for as long as it took DHS to process their cases rather than abide by the twenty-day limit, DHS sought to extend the time in which it could imprison children and families under the Flores Settlement.⁸⁹ In 2015, a federal court rejected the government's arguments to extend the detention maximum and upheld the terms of the Flores Settlement.⁹⁰

Yet, the Flores Settlement continues to be a contentious issue between DHS and immigrant advocates, who consistently fight against the imprisonment of families and unaccompanied children, including in its most recent iteration under the Family Separation Policy.⁹¹ After the Flores Settlement, family detention practices ramped up slowly and then reached all-time high rates between 2014–2016.⁹² A recent empirical study regarding family detention outlines its history, noting that the first formal detention facilities opened in 2001 and that five such facilities operated between 2001 and 2016, the timeframe on which the study focuses.⁹³ The study notes the shocking rise in family detention rates during this time:

[O]ver the fifteen years of our study, the number of detention beds reserved exclusively for families has surged. Family detention capacity shot up temporarily between 2006 and 2009 Beginning in 2014, family detention space again increased In 2016, family detention

America entered the United States without inspection.”).

89. Dara Lind, *Why Is the Obama Administration Still Fighting to Keep Immigrant Families Behind Bars?*, VOX (July 29, 2015, 2:20 PM), <https://www.vox.com/2015/7/29/9067877/family-detention-immigration-flores> [<https://perma.cc/MD9W-WRLA>] (“The government argued that key parts of *Flores* didn’t apply because children were being detained with their parents.”).

90. *Flores v. Johnson*, 212 F. Supp. 3d 864 (C.D. Cal. 2015).

91. See Lind & Scott, *supra* note 76.

92. Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 785, 806 (2018).

93. *Id.* at 796–97 (“We begin in 2001 because it is the year that the United States opened the first brick-and-mortar facility to detain exclusively families. Our investigation reveals that between 2001 and 2016 there were five distinct brick-and-mortar family detention facilities in operation in the United States.”) (citing U.S. DEP’T OF HOMELAND SEC., BERKS FAMILY RESIDENTIAL CTR. BI-ANNUAL COMPLIANCE REVIEW REPORT 4 (2009), <https://www.ice.gov/doclib/foia/dfra-ice-dro/compliancereportberksfamilyresidentialcenter0714172008.pdf> [<https://perma.cc/768Q-B47N>]).

centers in the United States had the capacity to hold over 3,500 children with their parents each day.⁹⁴

This represents a 3,400% increase in family detention capacity during the fifteen-year period.⁹⁵

The dramatic increase in family detention was in response to the rise in families and children entering the U.S. in 2014.⁹⁶ In Fiscal Year 2013, CBP apprehended 21,553 unaccompanied children and 7,265 “family units”—typically women and their children—along the South Texas border with Mexico.⁹⁷ In contrast, in 2014, CBP apprehended 49,959 unaccompanied children and 52,326 family units.⁹⁸ ICE, contracting with private prison corporations, Corrections Corporation of America and GEO Group, Inc. in two instances, and the Berks County, Pennsylvania government in another, constructed or repurposed 3,700 bed spaces for family detention units by the first quarter of 2015.⁹⁹ Euphemistically deemed “family residential centers” by DHS, these facilities consistently come under great scrutiny for the conditions that families and children suffer while imprisoned there.¹⁰⁰ Since this time, several lawsuits alleged inadequate medical treatment for the women and children who suffered the physical, mental, and emotional effects of continued detention.¹⁰¹ This wave of litigation continues, most recently in

94. *Id.* at 801.

95. *Id.* at 802.

96. Olivares, *Intersectionality at the Intersection* *supra* note 10, at 974 n.52.

97. *Id.* at 974 (citing U.S. IMMIGRATION AND CUSTOMS ENF’T, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 3 (2014)).

98. *See id.*

99. *See id.* at 975 (citing NAT’L IMMIGRANT JUSTICE CTR., *THE DETENTION OF IMMIGRANT FAMILIES* (2015)).

100. *See id.* (“[T]he Artesia Residential Family Center—which DHS closed in December 2014, transferring the detainees to the newly opened Karnes center—had every appearance of a prison setting: ‘There is a barbed-wire fence and a perimeter security road that enclose the entire . . . facility. There is a secondary razor-wire fence interlaced with plastic slats the color of sand that surrounds the detention center itself. The plastic slats made the detention center invisible.’” (quoting ILG, *The Artesia Report*, INNOVATION LAW LAB, <http://innovationlawlab.org/the-artesia-report/> [https://perma.cc/U9CN-6XL5] (last visited Oct. 7, 2019))).

101. *See* Lisa De Bode, *Rights Groups Challenge DHS Policy Detaining Migrant Women and Children*, ALJAZEERA AM. (Feb. 3, 2015, 4:31 PM),

lawsuits asserting due process violations, inhabitable conditions, medical negligence, and at least one wrongful death suit—asserting that the negligence of detention authorities contributed to the death of a toddler imprisoned with her mother.¹⁰²

Immigrant rights advocates have been fighting against the detention regime for years.¹⁰³ In response to the 2014–2016 increase of arriving children and families, lawsuits aimed to end the licensing of detention facilities, with one lawsuit achieving success in a Texas court and blocking the licensure of one of the centers as a “childcare facility.”¹⁰⁴ DHS, under Obama, convened committees of immigration experts to review its detention practices.¹⁰⁵ They

<http://america.aljazeera.com/articles/2015/2/3/against-no-release-policy-of-central-american-asylum-seekers.html> [https://perma.cc/A29G-ALAW]; Ed Pilkington, *Many Migrant Families Held by US Could Soon Be Free from Detention ‘Nightmare,’* GUARDIAN (May 11, 2015, 5:49 PM), <https://www.theguardian.com/us-news/2015/may/11/undocumented-migrants-detention-held-texas-pennsylvania> [https://perma.cc/742X-MJ3F] (describing investigative reports regarding the family detention facility in Berks County, Pennsylvania, including “allegations of poor medical treatment that saw sick children, including a three-year-old who was throwing up blood, being advised to ‘drink more water’”).

102. See generally Joel Rose, *A Toddler’s Death Adds to Concerns About Migrant Detention*, NPR (Aug. 28, 2018, 7:16 PM), <https://www.npr.org/2018/08/28/642738732/a-toddlers-death-adds-to-concerns-about-migrant-detention> [https://perma.cc/86VD-VW4C] (describing the wrongful death lawsuit filed against the city of Eloy, Texas—which contracts with DHS to provide family detention—after eighteen-month-old Maricee Juarez died from a respiratory infection that was untreated while she and her mother were unnecessarily detained). These lawsuits are part of a long line of similar allegations against ICE and DHS. See Olivares, *Intersectionality at the Intersection*, *supra* note 10, at 975–76.

Complaints against ICE’s treatment of detainees in Karnes assert that women and children have not been given adequate food; guards have harassed mothers for not being able to quiet crying children; children do not have appropriate access to educational and developmentally appropriate outlets; mothers are forced to carry their infants constantly, rather than let the children crawl or toddle; and guards sexually harass and sexually abuse the women. Preliminary reports from the Dilley facility paint an improved picture for detention conditions, though some activists have raised similar concerns for the women and children, including lack of access between lawyers and their detained clients and the prolonged, unnecessary detention of their clients. (internal citations omitted).

Id.

103. See generally Olivares, *Narrative Reform Dilemmas*, *supra* note 14, at 1129–31.

104. *Grassroots Leadership, Inc. v. Tex. Dep’t of Family & Protective Servs.*, No. D-1-GN-15-004336 (Travis Cty. Dist. Ct. Dec. 16, 2016); see also *BREAKING: Texas Court Blocks Licensing of Family Detention Camps as Childcare Facilities*, GRASSROOTS LEADERSHIP (Dec. 3, 2016), <http://grassrootsleadership.org/releases/2016/12/breaking-texas-court-blocks-licensing-family-detention-camps-childcare-facilities> [https://perma.cc/2U7N-4UC8] (describing the outcome of the litigation in *Grassroots Leadership, Inc.*).

105. See, e.g., Press Release, Dep’t of Homeland Sec., Statement by Secretary Jeh C. Johnson on Establishing a Review of Privatized Immigration Detention (Aug. 29, 2016),

ultimately determined that the continued federal use of private prison corporations to run immigrant detention was an inevitable consequence,¹⁰⁶ while also concluding that “DHS’s immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families—and that detention or the separation of families for purposes of immigration enforcement or management, or detention is never in the best interest of children.”¹⁰⁷ Thus, at the end of Obama’s presidency, there were small measures of success. Even so, family detention became a normalized practice that was only more solidified during Obama’s presidency.

This brief history demonstrates that jailing immigrant families and children (indeed, all types of immigrants) is not a new phenomenon and has never been successful at curbing family migration. Yet, DHS has attempted to extend the ways and length of time in which the government can detain families with children, including when DHS, under Obama, sought to expand the Flores Settlement to allow for indefinite or at least long-term detention of children and families.¹⁰⁸ In September 2018, the Trump Administration began a targeted, explicit effort to diminish the protections for children under the

<https://www.dhs.gov/news/2016/08/29/statement-secretary-jeh-c-johnson-establishing-review-privatized-immigration> [https://perma.cc/5TF6-X4B6].

106. See HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 2 (2016), <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf> [https://perma.cc/T6SW-7A7C]. The dissenters to the Report’s “Recommendation 1,” which described a continued reliance on private prison for immigration detention as fiscally inevitable, state:

[Without a] meaningful determination on the best detention model in light of all relevant factors [including] . . . the most effective and humane approach to civil detention. . . . I cannot, in good conscience, agree that status quo reliance on the continuation of the private detention model is warranted or appropriate.

Id. at 11 n.14.

107. DEP’T OF HOMELAND SEC., REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 2 (2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf> [https://perma.cc/D3DY-S4NY].

108. Nick Miroff & Maria Sacchetti, *Trump Administration to Circumvent Court Limits on Detention of Child Migrants*, WASH. POST (Sept. 6, 2018), https://www.washingtonpost.com/world/national-security/trump-administration-to-circumvent-court-limits-on-detention-of-child-migrants/2018/09/06/181d376c-b1bd-11e8-a810-4d6b627c3d5d_story.html?utm_term=.85f243258ff3 [https://perma.cc/6EMZ-FM2V].

Flores Settlement, including proposing new federal regulations terminating the Flores Settlement protections, which would allow the government to detain immigrant children and families for the duration of their immigration proceedings.¹⁰⁹ And, when Trump formally ended the Family Separation Policy in 2018, DHS lauded the use of family (i.e., together) detention as a better alternative.¹¹⁰ This was a strategic move to further normalize the detention of families, quelling the outrage regarding children being forcibly separated from their parents. After all, goes the warped logic, is it not better to keep children with their parents though they are locked together in immigrant prison?

C. A Brief History of Narrative Strategy

A targeted campaign to use derogatory and dehumanizing narratives to characterize immigrant families and children buoyed the strategy to expand family detention. Administrative officials use language to describe families and children as intruders, or worse, parasitic animals.¹¹¹ When Attorney General Sessions formally introduced the Zero Tolerance Prosecution and Family Separation

109. The proposed regulation purports to change more than just the length of time a family can be detained. *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (Sept. 7, 2018) (to be codified at 8 C.F.R. pts. 212, 236, 45 C.F.R. pt. 410).

[T]he Trump [A]dministration is also seeking greater flexibility to decide when to give children snacks or whether to transfer them quickly from the austere border facilities to more family-friendly environments, as the Flores [S]ettlement requires.

The regulations would also strip unaccompanied minors of special protections under the law—such as the right to seek asylum before a trained asylum officer instead of in the more adversarial immigration courts—if they came to America to join parents who are already here.

Over the past two fiscal years, more than 40 percent of unaccompanied minors were released to their parents, according to HHS.

Miroff & Sacchetti, *supra* note 108. As of this writing, there has been no further action on the proposed rulemaking, though there were 32,293 public comments submitted during the comment period. *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. at 45,486.

110. *Id.*

111. Ben Zimmer, *What Trump Talks About When He Talks About Infestations*, POLITICO (July 29, 2019), <https://www.politico.com/magazine/story/2019/07/29/trump-baltimore-infest-tweet-cummings-racist-227485> [<https://perma.cc/ZWE6-CXBW>].

policies, he stated, “Today we are here to send a message to the world: we are not going to let this country be overwhelmed. People are not going to caravan or otherwise stampede our border.”¹¹² The images of caravans of stampeding intruders do not match the pictures of the suffering children and parents who actually enter the U.S. seeking help.¹¹³

Undeniably, the use of demeaning language to describe immigrants is a long-standing governmental and societal practice. The ingrained and long-standing use of dehumanization has been used to more smoothly oppress immigrants of color since the earliest

112. Immigration Remarks, *supra* note 7; see also Alan Gomez et al., *Caravan of Exaggeration: Trump Makes Dubious Claims about Central American Migrants*, USA TODAY (Oct. 24, 2018, 6:53 PM), <https://www.usatoday.com/story/news/politics/2018/10/23/migrant-caravan-president-trump-claims-includes-middle-easterners/1742685002/> [<https://perma.cc/75SD-CXFE>] (reporting about Trump’s false and unsubstantiated claims about the migrants traversing Central America to reach the United States). “Trump tweeted Monday that ‘criminals and unknown Middle Easterners are mixed in’ among those migrants marching in the caravan. Later, he urged a TV reporter to ‘go into the middle and search. You’re gonna [sic] find MS-13, your [sic] gonna [sic] find Middle Eastern, you’re going to find everything.’” *Id.* Trump later admitted there was no proof to his claims. See *id.* Other governmental and Administration officials perpetuated these mythical claims with no solid empirical basis. See, e.g., Bart Jansen & Alan Gomez, *President Trump Calls Caravan Immigrants ‘Stone Cold Criminals.’ Here’s What We Know.*, USA TODAY (Dec. 6, 2018, 2:00 PM), <https://www.usatoday.com/story/news/2018/11/26/president-trump-migrant-caravan-criminals/2112846002/> [<https://perma.cc/H93W-SZCR>] (detailing false statements by DHS Secretary Kirstjen Nielsen, Custom and Border Protection Commissioner Kevin McAleenan, and Vice President Mike Pence about the purported criminality and “Middle Eastern” ethnicity of the migrants crossing Central America to reach the United States).

113. Efrén Olivares, *A Day in the Life of a Lawyer at the Border*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/opinion/immigration-family-separation-zero-tolerance.html> [<https://perma.cc/AR4E-RJX3>]. A lawyer for families separated by the Family Separation Policy describes a typical scene at the immigration court:

The stories they tell are all devastating. But as a father, I was really hit in the gut by one a few weeks back.

I was talking with a single father whose wife left him several years ago when his daughter was [three] years old. They were fleeing violence in Honduras in search of a better life. But it didn’t work out that way. Once they crossed the border, the United States charged him with a crime, and agents told him they had to take his daughter away.

As they were leaving, his daughter asked where she was going. What can a father possibly tell his daughter in that situation? . . . [T]his dad’s priority was to try to shield his little girl from pain. So he made up a story: He told her she was going to summer camp.

The girl, only [seven] years old and oblivious to her plight, walked away with a big smile. She was so excited for her first day of camp.

Id.

time of federal immigration laws.¹¹⁴ More recently, in the period leading up to the 2016 presidential election, political and societal rhetoric surrounding immigration took on an explicitly racial and xenophobic tone.¹¹⁵ Candidate Trump called Mexican immigrants coming to the U.S. “people that have lots of problems. They’re bringing drugs. They’re bringing crime. They’re rapists.”¹¹⁶ He famously and notoriously targeted Muslim immigrants, declaring: “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the U.S. until our country’s representatives can figure out what is going on.”¹¹⁷ This rhetoric painting immigrants seeking to enter the U.S. as non-human, criminal deviants has also especially targeted women and children seeking asylum.¹¹⁸ In 2018–2019, the focus shifted squarely to a group of migrants from Central America walking to reach the U.S., labeled by Trump and the mass media as “the caravan.”¹¹⁹ Evoking images of marauding invaders,

114. See generally Olivares, *Narrative Reform Dilemmas*, *supra* note 14, at 1094–98 (describing the history of discriminatory practices and the use of rhetoric to target Asian, Mexican, and other immigrants of color).

115. See generally *id.* This portion draws from this piece of my prior scholarship.

116. Full Text: Donald Trump Announces a Presidential Bid, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/> [https://perma.cc/GQF2-69H6].

117. Press Release, Donald J. Trump for President, Inc., Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), <https://web.archive.org/web/20151207230751/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> [https://perma.cc/EDA5-W3UE].

118. Olivares, *Intersectionality at the Intersection* *supra* note 10, at 997 (“Public and political outcry labels immigrants as criminal lawbreakers who will steal free education, public benefits and healthcare, and infest schools and public spaces with disease. In one now infamous 2014 protest, people gathered to shout at buses of immigrant mothers and children who were being transported to a detention facility with cries of: ‘Nobody wants you. You’re not welcome. Go home.’”) (citations omitted).

119. See, e.g., Christopher Cadelago & Ted Hesson, *Why Trump Is Talking Nonstop About the Migrant Caravan*, POLITICO (Oct. 23, 2018, 5:05 AM), <https://www.politico.com/story/2018/10/23/trump-caravan-midterm-elections-875888> [https://perma.cc/7CNA-F32Z] (noting the political strategy that created the furor around the caravan ahead of the 2018 midterm elections). Politico described Trump’s statements on “the caravan” including one tweet in which he states, “Every time you see a Caravan, or people illegally coming, or attempting to come, into our Country illegally, think of and blame the Democrats for not giving us the votes to change our pathetic Immigration Laws! Remember the Midterms! . . .” (citing @realDonaldTrump, TWITTER (Oct. 22, 2018, 5:49 AM), <https://twitter.com/realdonaldtrump/status/1054354059535269888?lang=en> [https://perma.cc/5BYU-WQNY]).

Trump and his cohort stoked the fears and anger of Americans with false narratives of the migrants, many of whom reported that their impetus to leave their homes was fleeing violence.¹²⁰ This calculated strategy to invoke fear and deeply entrenched racist and xenophobic attitudes aligned with the 2018 midterm elections to boost Republican participation at the polls and lead to more Republican candidates winning or remaining in office.¹²¹

Similarly, Trump and other Republican politicians proliferated the use of the term “chain migration,” a once politically neutral term, to describe the process by which certain U.S. citizens and lawful permanent residents (LPR) can petition for LPR status for certain family members.¹²² Evoking images of people shackled in literal chains (e.g., American slaves who were perceived and treated as less than human) and captive animals, the use of the term is strategic to further minimize the oppressive nature of anti-immigrant reform. As Leo Chavez elucidates, the use of chain migration is:

“an attempt to sway public opinion,” . . . adding that the once-scholarly term has taken on negative connotations as “if it’s a conspiracy, a plot, a threat to the changing demographics.” It is not unlike “anchor baby,” “the browning of America,” or even “Dreamers,” on the flip side Such phrases have become more common in the ongoing debate about “how you talk about who are citizens, who are members of the nation[,] and who can become Americans.”¹²³

120. Cadelago & Hesson, *supra* note 119.

121. *See generally id.* (noting the work of political strategists in forming the dominant narrative to best appeal to conservative voters, many of whom regard “illegal immigration” as a big problem for the country).

122. Kevin R. Johnson, *Ensuring A Nation of Immigrants: Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 345, 387 (2018) (“The President also has called on Congress to end ‘chain migration,’ which is another way of calling for the end of family reunification as a primary goal of the U.S. immigration laws.”); *see also infra* Part II, which discusses the family visa petitioning process, a hallmark of immigration law.

123. Linda Qiu, *What is ‘Chain Migration’? Here’s the Controversy Behind It*, N.Y. TIMES (Jan. 26,

Indeed, as Chavez notes and other scholars researched, political narratives about immigrants employed seemingly positive affirmative attributes to the young people deemed “Dreamers.”¹²⁴ Similarly, current debates about immigration reform and the need for increased border security evoke false and misleading stories about the need to protect children from human traffickers or adults who lie about parental ties so they can fraudulently gain entry into the U.S. and evade detention.¹²⁵

2018), <https://www.nytimes.com/2018/01/26/us/politics/the-facts-behind-the-weaponized-phrase-chain-migration.html> [<https://perma.cc/PJ9H-L8L4>]; see also Linda Qiu, *These Claims About ‘Chain Migration’ Are Not Accurate*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/chain-migration-immigration-daca-factcheck.html> [<https://perma.cc/D5BP-7EKY>] (detailing a few of the examples in which Trump and lawmakers have misrepresented the ability of LPRs, U.S. citizens, and DACA beneficiaries to sponsor family members for immigration under family unification immigration policies).

124. Qiu, *What is ‘Chain Migration’? Here’s the Controversy Behind It*, *supra* note 123 (quoting Leo Chavez, a professor at the University of California at Irvine); see also Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 207 (2012) (contrasting the “good” versus “bad” immigrant narratives that proliferate in immigration law policy and reform discussions); Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 104 (2013) (discussing the DREAM Act narrative, which affords credibility and positive attributes to “the best and brightest,” like the purported beneficiaries of the DREAM Act).

125. Trump employs these tactics and regularly makes unsupported claims regarding the dangers facing women and children migrants. In his January 8, 2019 Oval Office speech to the nation regarding the need for a border wall, Trump evoked an ethos of compassion in his demand for stricter border controls, stating:

This [illegal immigration] is a humanitarian crisis. A crisis of the heart, and a crisis of the soul. Last month, 20,000 migrant children were illegally brought into the United States, a dramatic increase. These children are used as human pawns by vicious coyotes and ruthless gangs. One in three women are sexually assaulted on the dangerous trek up through Mexico. Women and children are the biggest victims, by far, of our broken system.

Full Transcripts: Trump’s Speech on Immigration and the Democratic Response, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/us/politics/trump-speech-transcript.html> [<https://perma.cc/LME7-WF8B>]. Further, Trump seemed to develop a strange fixation on women and children migrants supposedly bound with tape, a claim that experts with vast experience in the field had never seen or heard. See, e.g., Katie Mettler, *Trump Again Mentioned Taped-up Women at the Border. Experts Don’t Know What He Is Talking About.*, WASH. POST (Jan. 25, 2019), <https://www.washingtonpost.com/politics/2019/01/17/trumps-stories-taped-up-women-smuggled-into-us-are-divorced-reality-experts-say/> [<https://perma.cc/SD45-UJZ3>]. DHS officials also at one point declared that traffickers were falsely claiming unrelated children as their own to avoid detention—a claim that experts deemed dubious. See, e.g., Tim Stelloh, *Experts Cast Doubt on DHS Claim That Traffickers Are Posing as Families at the Border*, NBC NEWS (June 21, 2018, 4:22 PM), <https://www.nbcnews.com/storyline/immigration-border-crisis/experts-cast-doubt-dhs-claim-traffickers-are-posing-families-border-n885241> [<https://perma.cc/YQ59-UU5L>].

The strategic use of political narrative to oppress marginalized people more easily is not a new phenomenon. As discussed above, the incarceration of immigrants is about as old as the federalization of immigration law.¹²⁶ The U.S. government's brutal treatment of people of color mirrors how political and social actors characterized people as undeserving of equal treatment because they were nonhumans. One recent interview of sociolinguist, philosophy, and history experts parallels the current use of demeaning language to describe immigrants with past practices of categorizing Native Americans, Black people, Japanese, and Japanese-Americans as "beasts," "savages," and "lice."¹²⁷ As historian and professor Ibram X. Kendi stated, "I think it's critical for first and foremost people in our time to recognize the seriousness of what this language can do, connecting it to the violence that has already occurred in this country."¹²⁸ The call, then, is for Americans to recognize these narratives for what they are—implicit efforts to change our thinking about people as undeserving, criminals, or, in Trump's words, animals.¹²⁹

D. The Effects of Narratives and Naming on the Normalization of Dehumanizing Marginalized People

Critically, creating this divide between animalistic other and the white majority has historically led to shaping the perceptions of people of color. Representations of Native Americans as savages date to at least the sixteenth century and have proliferated for centuries.¹³⁰

126. See Young, *supra* note 73 (summarizing a brief history of immigration detention).

127. Meraji, *supra* note 16. Meraji notes:

The violence that came after abolition in the form of lynchings when black men were depicted as ferocious animals out to rape and devour white women. Native Americans were called savages, wolves, lice, their children nits, says David Livingstone Smith . . . a philosophy professor who wrote 'Less Than Human: Why We Demean, Enslave, And Exterminate Others.'

Id.

128. *Id.*

129. *Id.* Philosophy professor David Livingstone Smith concludes, "[D]ehumanization was a very, very, very, important feature of the bloody history of this nation. You know, all nations are born in violence, but we Americans have a very difficult time coming to terms with the truth." *Id.*

130. Arlene Hirschfelder & Paulette F. Molin, *I Is for Ignoble: Stereotyping Native Americans*,

Sociologists describe how such stereotypes continue to inform insights: “The ongoing perceptions of Indians as dangerous contributes to negative expectations, interactions, and consequences. Thus, Indians are incarcerated at high rates, encounter discrimination and hate crimes, and experience other negative impacts. Stereotyped Indian violence also leads non-Indians to fear Native people.”¹³¹ Similarly, the connections between dehumanizing racial tropes of Black people and their continued subordination in the U.S. are well-documented. From the narratives to justify slavery, which proclaimed people of African descent as morally and biologically inferior, to the centuries that followed in which Black people were explicitly described as ill-suited for equal treatment, poor, or lazy, the effects of such language remained ingrained in our national psyche.¹³² It is not surprising, then, that this devious rhetorical strategy plays an important role in the continued oppression of immigrants.¹³³

Importantly, beyond the psychological effects of language, tangible, heartbreaking effects exist for parents and children held in U.S. immigrant detention. In one recent comprehensive study, the first of its kind to focus on family detention, the authors conclude: “Over the fifteen years of our study, we find that families have been detained in remote locations, have faced language barriers in

FERRIS ST. U. (Feb. 22, 2018), <https://www.ferris.edu/HTMLS/news/jimcrow/native/homepage.htm> [<https://perma.cc/GR34-ZTLG>].

131. *Id.* (quoting sociologists, who found that such constructed racial stereotypes became catalysts to real-life discrimination, increased stigmatization, and reinforcement of negative perceptions of Native Americans). The report further describes how these stereotypes affect Native-American children, citing a study by “Children NOW,” a child advocacy organization examining children’s perceptions of race and class in the media, in which Native youngsters said they see themselves as “poor,” “drunk,” “living on reservations,” and “an invisible race.” *Id.*

132. See Carol Goodman, *African American Stereotypes*, in *ETHNIC AMERICAN LITERATURE: AN ENCYCLOPEDIA FOR STUDENTS* 52, 52 (Emmanuel S. Nelson ed., 2015). In the text, the author describes various points of historical research, including *Notes on the State of Virginia*, in which Thomas Jefferson asserted that Black people were innately inferior to their White counterparts based on their physical, mental, and moral defects. *Id.* Proponents of slavery used Jefferson’s pseudoscientific beliefs as substantive justification for Black people’s suitability as slaves. *Id.* “Some advocates of slavery went so far as to suggest that the differences between the two races were so insurmountable that White society was doing ‘the Negro’ a favor by enslaving him.” *Id.*

133. I have written at length about the political effects of false and demeaning narratives used against immigrants. See generally Olivares, *Intersectionality at the Intersection*, *supra* note 10.

accessing the courts, and[] despite valiant pro bono efforts to assist them, have routinely gone to court without legal representation.”¹³⁴ Moreover, the report finds that “families have been subjected to overdetection,” a term the authors use to indicate that families are detained essentially without cause and that family cases before immigration courts are more commonly subjected to more stringent procedural requirements, resulting in longer detentions.¹³⁵ Finally, and in addition to documenting the abhorrent conditions that families endure in detention, the study finds that “family members seeking asylum who were released from detention attended their [immigration court] hearings in 96% of cases . . . since 2001. We also find that half (49%) of those who were released and sought legal relief from removal with the help of an attorney were allowed to stay [in the United States].”¹³⁶

Indeed, the Family Separation Policy forcibly separated thousands of children from their parents and some families remain separated in 2019, largely because DHS could not locate parents due to the agency having *no* tracking system when it took children from their parents.¹³⁷ In some instances, children were left in the U.S. while their parents were deported, only to have later reunification incredibly difficult.¹³⁸ In January 2019, the Office of the Inspector

134. Eagly et al., *supra* note 92, at 790–91.

135. *Id.* at 791.

136. *Id.* at 792.

137. See SEPARATED CHILDREN, *supra* note 43. The Office of Inspector General undertook a thorough investigation into the problems plaguing the government’s Family Separation Policy, noting, for example:

In June of 2018, no centralized system existed to identify, track, or connect families separated by DHS. Compliance with the *Ms. L v. ICE* court order therefore required HHS and DHS to undertake a significant new effort to rapidly identify children in ORR care who had been separated from their parents and reunify them. To facilitate this effort, the Office of the Assistant Secretary for Preparedness and Response (ASPR) led a reunification Incident Management Team within HHS, drawing on ASPR’s experience in crisis response and data management and analysis, to assist ORR in identifying and reunifying separated children.

Id.

138. See Alan Gomez, *Judge Temporarily Halts Deportations of Parents Separated from Children*, USA TODAY (July 16, 2018, 4:28 PM), <https://www.usatoday.com/story/news/nation/2018/07/16/judge-halts-deportations-parents-separated-children/788276002/> [<https://perma.cc/M8R4-SRJ3>] (discussing the efforts of DHS to reunify families). American Civil Liberties Union attorney Lee Gelernt, who led a lawsuit against the

General reported that DHS and the Trump Administration—in their efforts to create fear among immigrants and further polarize the country—took at least 2,737 children from their parents.¹³⁹ This collective number is incredible, and the individual stories of children forcibly taken from their parents are heartbreaking and numerous, like that of Mirian, whose story opened this article,¹⁴⁰ and of Arnovis Guidos Portillo, a father deported to El Salvador without his six-year-old daughter, Meybelin.¹⁴¹ Portillo recently recalled what

family separations, accused the administration of preparing a fast-track deportation process for parents shortly after they're reunited with their children. The government gives reunited parents the option of being deported with their children or being deported alone while leaving their children in the USA to make their own claim to stay in the country.

....
[U.S. District Court Judge] Sabraw said he wanted more information about that accusation and asked the government to give him a full briefing by July 23[, 2018]. Until then, Sabraw ordered a stay on all deportations of parents who have been reunited with their children.

Id. One recent report describes the arduous efforts that reunification entails. Cindy Carcamo, *Must Reads: In Mountains of Guatemala, Searching for Parents Deported from U.S. Without Children*, L.A. TIMES (Aug. 31, 2018, 12:10 PM), <https://www.latimes.com/world/la-fg-guatemala-separated-families-20180831-htlstory.html> [<https://perma.cc/ZP3Q-G43Q>] (following the struggles of Juan Carlos Villatoro—a Guatemalan lawyer turned impromptu detective in an urgent search for deported mothers and fathers with children still in the U.S.). With a name sometimes serving as his only clue, Villatoro has traveled twisting trails in cabs, minivans and teeth-rattling old buses to search mountain hamlets where Mayan tongues and suspicion often prevail. *Id.* “We don’t have telephone numbers. We don’t have exact addresses or email addresses,” Villatoro said. *Id.* “There is nothing we can do but move forward and keep fighting and searching for these deported parents.” *Id.*

139. SEPARATED CHILDREN, *supra* note 43, at 1. The U.S. Department of Health & Human Services states:

The total number of children separated from a parent or guardian by immigration authorities is unknown. Pursuant to a June 2018 Federal District Court order, HHS has thus far identified 2,737 children in its care at that time who were separated from their parents. However, thousands of children may have been separated during an influx that began in 2017, before the accounting required by the Court, and HHS has faced challenges in identifying separated children.

Id. In response in part to this report, Judge Sabraw granted plaintiffs’ motion to expand the class of affected families in the *Ms. L.* litigation ongoing in the U.S. District Court. *See Ms. L. v. U.S. Immigration and Customs Enf’t*, 330 F.R.D. 284, 292–93 (S.D. Cal. Mar. 8, 2019) (order granting plaintiffs’ motion to modify class definition) (defining the additional class members as all migrant families separated between July 1, 2017 and June 25, 2018); *see also* Julie Small, *Judge: Immigration Must Account for Thousands More Migrant Kids Split Up from Parents*, NPR (Mar. 9, 2019, 5:49 PM), <https://www.npr.org/2019/03/09/701935587/judge-immigration-must-identify-thousands-more-migrant-kids-separated-from-paren> [<https://perma.cc/MGV3-MAC7>].

140. *See supra* Introduction.

141. Joshua Partlow, *U.S. Officials Separated Him from His Child. Then He Was Deported to El Salvador.*, WASH. POST (June 23, 2018, 11:25 PM), https://beta.washingtonpost.com/world/the_americas/u-s-officials-separated-him-from-his-child-then-

happened when, while the father and daughter were in U.S. immigration detention, the officers took Meybelin from him:

Once she was taken away, yelling and crying, he could get no answers about where she had gone. On May 29, three days after arriving, he pleaded guilty to crossing the border illegally and was sentenced to time served, according to federal court documents. Afterward, he begged for information about his daughter. He recalled one U.S. official telling him: “They may have taken her to Florida or New York.” “That’s when I really felt hell come down on me,” he said.¹⁴²

As Part IV details, this organized protocol of stripping parents of their parental rights without any finding of abuse or neglect is not only traumatic to parents and children but also unconstitutional.¹⁴³ Moreover, as the next Part explains, the Family Separation Policy contravenes the historic foundation of family unity deeply ingrained in immigration law and policy.¹⁴⁴

II. Family Unity is at the Foundation of Immigration Law

As previously established, the contemporary practice of separating children from fit parents is intertwined with the well-established history of racism and discrimination in immigration law and the larger political context of dehumanizing marginalized people, including immigrants. Importantly, however, the foundation of immigration law and policy is built upon a commitment to keeping families *together*.¹⁴⁵ For all its racist and discriminatory past and

he-was-deported-to-el-salvador/2018/06/23/37b6940a-7663-11e8-bda1-18e53a448a14_story.html [https://perma.cc/7795-N5XS].

142. *Id.*

143. *See infra* Part IV.

144. *See generally infra* Part II.

145. Zoya Gubernskaya & Joanna Dreby, *US Immigration Policy and the Case for Family Unity*, 5 J. MIGRATION HUM. SEC. 417, 417–18 (2017).

present—and even though we cannot deny that the norms of family unity only exist within this history of racist immigration law and history—the principle and primacy of family unity has deep roots in immigration law and policy.¹⁴⁶ This Part provides important legislative and political context to understand the procedures and effects of family-based immigration and other immigration law measures aimed at protecting the family. First, this Part discusses the family-based visa system, the process by which most noncitizens obtain lawful permanent residence in the U.S.¹⁴⁷ At the heart of this system is the pronounced and explicit recognition of the importance of family unification principles, favoring (above all) the nuclear family setting and, until very recently, families conferring immigration status through heterosexual marriage only. The history of establishing family as a bedrock of immigration law and policy has gone on to encompass other variations of family ordering while still preferencing marital and parent-child bonds. In this sense, then, the current regime of tearing apart immigrant families goes against an important legal and policy foundation. This sets up the discussion in Part III and Part IV that the Family Separation Policy violates constitutional principles protecting families and parents.¹⁴⁸

A. *Immigration Law's Inclusion of Families*

More noncitizens achieve LPR status in the U.S. through familial ties to a U.S. citizen or other LPR than any other method.¹⁴⁹ The Immigration and Nationality Act (INA) provides the various statutory

146. *Id.*

147. See DEP'T OF HOMELAND SEC., 2017 YEARBOOK OF IMMIGRATION STATISTICS 18 (2018), tbl.6 [hereinafter *Lawful Permanent Resident Status*]. The Table shows that of the 1,127,167 people obtaining LPR status in Fiscal Year 2017, 748,821—or roughly 66%—were admitted by some sort of familial tie (the total is derived by adding the immediate relatives, family preference categories, and the children born abroad to resident aliens for Fiscal Year 2017). *Id.* These numbers do not include the children of victims of crimes who received a U visa and accompanying LPR status, because the charts do not indicate which of the total corresponds to the U visa principal beneficiary and which corresponds to the derivative (i.e., children) beneficiaries. *Id.* The derivative beneficiaries would have achieved LPR status by virtue of that parent-child connection.

148. See discussion *infra* Parts III, IV.

149. See *Lawful Permanent Resident Status*, *supra* note 147.

provisions and processes by which a U.S. citizen or LPR can petition for a visa for a spouse, child, or for (over twenty-one-year-old U.S. citizens only) siblings.¹⁵⁰ The INA sets an annual maximum number of noncitizens who can be admitted for LPR status by virtue of one of the statutorily established eligibility classifications.¹⁵¹ Importantly, one large group exempted from this annual limit are those people categorized as “immediate relatives.”¹⁵² Immediate relatives are the spouses, parents, and children of U.S. citizens (though to sponsor a parent, the U.S. citizen petitioner must be at least twenty-one years old.)¹⁵³ To be a beneficiary child, the noncitizen beneficiary must be unmarried and under twenty-one years old.¹⁵⁴ Those family-based visa petitions, subject to the annual limit and other numerical ceilings, are then split into four preference categories with the first receiving the highest priority and the fourth receiving the lowest priority.¹⁵⁵ The first preference category is for the unmarried sons and daughters of U.S. citizens.¹⁵⁶ The second preference is divided into two subcategories: Preference 2A and Preference 2B.¹⁵⁷ Preference 2A is for the spouses and children of LPRs and receives higher priority than the 2B category.¹⁵⁸ The 2B preference is for unmarried sons and daughters of LPRs (i.e., unmarried children who are over twenty-one years old).¹⁵⁹ The third preference is for the married sons and daughters of U.S. citizens.¹⁶⁰ Finally, the fourth preference is for the brothers and sisters of U.S. citizens age twenty-one and over.¹⁶¹ Although there are myriad nuances, exceptions, and considerations that influence these numbers and

150. See Immigration and Nationality Act § 203(a), 8 U.S.C. § 1153(a) (2018).

151. See generally *id.* §§ 1151–53.

152. *Id.* § 1151.

153. *Id.* § 1151(b)(2)(A)(i).

154. *Id.* § 1101(b)(1).

155. *Id.* § 1153(a).

156. Immigration and Nationality Act § 203(a), 8 U.S.C. § 1153(a)(1) (2018).

157. *Id.* § 1153(a).

158. *Id.* § 1153(a)(2)(A).

159. *Id.* § 1153(a)(2)(B).

160. *Id.* § 1153(a)(3).

161. *Id.* § 1153(a)(4).

eligibility requirements, this process represents the method by which most family-based immigration occurs.¹⁶²

Importantly, the contemporary process is the product of a long history of families in immigration law. David Thronson effectively summarizes this intersection:

Family relationships are integral in the immigration law framework that delineates who is allowed to enter and remain in the United States, and a significant portion of legal immigration is attributable, directly or indirectly, to family relationships. Simply put, much of legal immigration is traceable to a close family relationship.¹⁶³

Further, as evident by the system of preferences, there is a pronounced and clear partiality for nuclear families and for prioritizing the reunification of spouses and minor children. Although there are processes to petition for adult children and siblings in some

162. A mathematical formula outlined in § 203(a) of the INA governs the annual number of family-sponsored visas available (i.e., those family-sponsored immigrants not in the exempt categories (most importantly, the immediate relatives of a U.S. citizen)). 8 U.S.C. § 1153(a) (2018). Certain of these otherwise eligible beneficiaries are also subject to per-country limits. *Id.* § 1152(a). For more information on how this system of ceilings and quotas works in the family-based immigration system, see WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43145, U.S. FAMILY-BASED IMMIGRATION POLICY (2018) (describing the process of family-based immigration). It should be noted that under the INA, the annual level of family preference immigrants shall not fall below the threshold of 226,000, though recent statistics far exceed this number. *Id.* at 4.

[Since fiscal year 1996, the] annual immediate relative immigrants have exceeded 254,000 each year, ranging from a low of 258,584 immigrants in FY1999 to a high of 580,348 immigrants in FY2006.....In addition to annual numerical limits on family preference immigrants, the INA limits LPRs from any single country to 7% of the total annual limit of family preference and employment-based preference immigrants.

Id. at 4–5; see also Evelyn H. Cruz, *Because You're Mine, I Walk the Line: The Trials and Tribulations of the Family Visa Program*, 38 FORDHAM URB. L.J. 155 (2010) (detailing the incredibly long waiting periods for certain family-based visa beneficiaries). One commentator proposes:

[F]amily visa quotas should be correlated with reasonable total waiting time targets instead of total annual admissions.....The inability to know when a family member will be eligible for his or her visa leads to anxiety and an inability to make necessary decisions on education, resources, and future plans.

Id. at 180.

163. David Thronson, *You Can't Get There from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 58–60 (2006) [hereinafter Thronson, *You Can't Get There from Here*].

circumstances, these categories are afforded a lower priority and, usually, must wait a longer time to receive a visa.¹⁶⁴ Moreover, the definition of familial ties is derived from the INA, which prescribes the requirements to be considered—for example, one’s child or parent.¹⁶⁵ The sometimes decades-long process to navigate the eligibility criteria and sponsorship system is in stark contrast to the false narrative that people migrate to the U.S. and easily and quickly sponsor myriad, random relatives—akin to the so-called “chain” effect.¹⁶⁶

Considering the importance of familial-based immigration, it is not surprising that immigration law changed as societal and legal definitions embraced certain families once considered

164. For an example of the wait times, see the Department of State’s monthly publication updating the wait times for family and employment-based visas. BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, PUB. NO. 9514, VISA BULLETIN: IMMIGRANT NUMBERS FOR FEBRUARY 2019 3 (2019) (detailing that, as of February 1, 2019, certain people waiting to file their visa applications based on familial connections can proceed with their applications). For example, the second chart for Family-Sponsored immigrants shows that those from the Philippines in the first preference category who filed visa petitions on or later than March 15, 2008, have a visa available. *Id.* In contrast, those from the Philippines in the *fourth* preference category who filed visa petitions on or later than December 8, 1997, have a visa available. *Id.*

165. The Immigration and Nationality Act defines “child” and states in part that child means an unmarried person under twenty-one years of age who is:

- (A) a child born in wedlock;
- (B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;
- (C) a child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;
- (D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person

Immigration and Nationality Act § 101(b)(1)(A-G), 8 U.S.C. § 1101(b)(1)(A-G) (2018). Immigration and Nationality Act § 101(b)(2) defines “parent,” “father,” and “mother” as that parent, father, or mother:

[O]nly where the relationship exists by reason of any of the circumstances set forth [above] . . . except that [in certain circumstances] . . . the term “parent” does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.

Id. § 1101(b)(2).

166. See *supra* Part I.

“nontraditional,” like same-sex spouses and children born through alternative reproductive technology processes.¹⁶⁷ In the 1982 case of *Adams v. Howerton*, a U.S. citizen man was prohibited from sponsoring his Australian husband through a family-based immigration petition because the INA did not contemplate that *spouses* could be of the same sex.¹⁶⁸ Just as the journey for same-sex marriage equality endured until the landmark Supreme Court decisions of *United States v. Windsor* and *Obergefell v. Hodges*, which overruled the federal definition of spouse (*Windsor*) and deemed state laws prohibiting same-sex marriage as unconstitutional (*Obergefell*), immigration law also underwent parallel transformations.¹⁶⁹ Thus, in *Matter of Zeleniak*, decided just three weeks after *Windsor*, the Board of Immigration Appeals (BIA) cited *Windsor* in holding that a spouse as defined in the INA and used throughout the statute can be a same-sex spouse as long as the marriage is valid under the laws of the state where it was celebrated.¹⁷⁰ Similarly, in cases considering whether the INA provides that a child born through alternative reproductive technology can be a U.S. citizen under *jus sanguinis* principles,¹⁷¹ courts are currently confronting how to place such nontraditional families within the confines of statutory prescriptions and

167. See, e.g., *Dvash-Banks v. Pompeo*, No. CV 18-523-JFW(JCx), 2019 WL 911799, at *7 (C.D. Cal. Feb. 21, 2019); *In re Zeleniak*, 26 I. & N. Dec. 158, 160 (B.I.A. 2013).

168. *Adams v. Howerton*, 673 F.2d 1036, 1038–40 (9th Cir. 1982) (interpreting the INA to exclude same-sex spouses in the definition of “spouse” as used in the INA because “[n]othing in the Act, the 1965 amendments or the legislative history suggests that the reference to ‘spouse’ in section 201(b) was intended to include a person of the same sex as the citizen in question”).

169. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013).

170. *In re Zeleniak*, 26 I. & N. Dec. at 159 (holding “[t]his ruling is applicable to various provisions of the Act, including, but not limited to, sections 101(a)(15)(K) (fiancé and fiancée visas), 203 and 204 (immigrant visa petitions), 207 and 208 (refugee and asylee derivative status), 212 (inadmissibility and waivers of inadmissibility), 237 (removability and waivers of removability), 240A (cancellation of removal), and 245 (adjustment of status)”).

171. See Erin Blakemore, *Why the United States Has Birthright Citizenship*, HISTORY (Aug. 26, 2019), <https://www.history.com/news/birthright-citizenship-history-united-states> [<https://perma.cc/KE93-Z9HA>] (defining “jus sanguinis” as the legal principle recognized in the U.S. as a means for children to obtain their citizenship at birth from being born to parents who are U.S. citizen). The phrase *jus sanguinis* translates to “right of blood.” *Id.* Citizenship is conferred from a parent to a child per the Immigration and Nationality Act § 301. 8 U.S.C. § 1401 (2018).

prohibitions.¹⁷² In this sense, one key foundational component of immigration law is recognizing the primacy of the legally defined family and the importance of parent-child connections.¹⁷³

B. The History of Families in Immigration Law

This foundation is buoyed by the history of immigration law's strong connection with families. As Kerry Abrams outlines, the current system of preferences developed over time and, in some instances, as a result of once held principles of coverture.¹⁷⁴ Abrams

172. See, e.g., *Dvash-Banks*, 2019 WL 911799, at *7 (holding that, pursuant to Ninth Circuit precedent, § 301 of the INA—regarding transmission of citizenship via parentage—“does not condition U.S. citizenship on the existence of a blood relationship with a U.S. citizen parent”); Complaint at 1–2, *Blixt v. Tillerson*, No. 1:18-cv-00124 (D.D.C. Jan. 22, 2018) (arguing the child born to a same-sex couple should be deemed a U.S. citizen because his non-biological mother is a U.S. citizen). In *Blixt*, the child's biological mother, who conceived the child with donated sperm, is not a U.S. citizen, and for that reason, the U.S. Embassy refused to register the child as a U.S. citizen via parentage. *Id.* The case is currently in litigation.

173. Kerry Abrams is one of the preeminent scholars on the intersection between immigration law and family law, including how immigration law incorporates traditional “family values”—like the primacy of marital and parentage ties and rights—but also fails to completely encompass the rights of the family that are differently established and upheld via states' systems. See, e.g., Kerry Abrams, *Immigration's Family Values*, 100 VA. L. REV. 629, 634 (2014) (“[I]mmigration and citizenship law use different parentage tests than family law not because lawmakers have failed to properly incorporate family law principles, but because lawmakers' interests are not the same in diverse contexts.”); Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1632 (2007) (outlining the key importance immigration law plays in regulating marriage).

In a federal system in which states have primary authority over family law issues, and in which the political branches of the federal government, through the plenary power doctrine, have exclusive control over immigration, immigration law provides Congress an unusual opportunity to engage in extensive regulation of an area that would normally be off limits.

Id.; Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 10 (2013) (arguing that preferencing family-based immigration would provide benefits to the United States in various dynamics). See, e.g., Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL'Y & L. 87, 88–89 (2006) (discussing how a parent's immigration status could influence the best interest of the child decision in a custody dispute). Abrams proposes that a court should implement a rebuttable presumption that “immigration status cannot be used as a factor in the best interests analysis. The presumption could be rebutted in specific classes of cases . . . where immigration status is likely to be highly probative and unlikely to be used for prejudicial reasons.” *Id.*

174. Abrams, *What Makes the Family Special?*, *supra* note 173, at 10–14 (discussing the early history of immigration law). Abrams notes: are these changes what Abrams writes?

In the late nineteenth and early twentieth centuries, the ability to relocate one's family was thought of as a male head of household's right. Under coverture, a man had the right to determine the domicile of his wife and children; the right to bring his wife and child with him when he immigrated was analogous.

Id. at 10.

discusses how the early decades of federal immigration law prioritized male citizenship and men's rights to family structure.¹⁷⁵ Policies that focused on westward expansion induced family units to settle the land.¹⁷⁶ Moreover, in its earliest years, the U.S. government's principles of family unification—focusing on the white family as people of color were not considered worthy of equality—rarely conflicted with broader immigration concerns that centered on national security or, in today's terms, border security.¹⁷⁷ In her seminal piece on the racialized restrictions of family-based immigration, Rose Cuison Villazor notes that in the periods during and after World War II, thousands of service members serving abroad faced a daunting task when they sought to sponsor their noncitizen wives for immigration status based on their marriage.¹⁷⁸ The 1945 War Brides Act served to remedy this issue by allowing:

U.S. citizens serving in or honorably discharged from the military to sponsor their spouses to immigrate to the United States in an expedited manner. In the report accompanying

175. *Id.* at 10–12.

176. Kerry Abrams, *Family Reunification and the Security State*, 32 CONST. COMMENT. 247, 252 (2017) (“The national government encouraged westward migration and immigration from Europe through acts such as the Donation Land Act and the Homestead Act. Sometimes these inducements mobilized the unitary family to further the goals of settlement. The Donation Land Act, for example, provided twice as many acres to married settlers as it did to single ones with the intent to ‘produce a population’ through the ‘encouragement of the women to peril the dangers and hardships of the journey.’”).

177. *Id.* at 257 (noting that the concept of family unity did not extend to all families).

The “family” protected by the principle of family unity was married and monogamous. When immigrants—especially those who were nonwhite—did not fit this definition of family, the principle of family unity was no help to them. In these instances, courts questioned the legitimacy of particular family structures, and thus made palatable the exclusion of family members from entry or sometimes even citizenship.

Id.; see also Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1368 (2011) (asserting that the “convergence of immigration and citizenship law with military regulations functioned as a federal counterpart to state antimiscegenation laws”). Villazor further notes, “These race-based restrictions on marriage to Japanese nationals were akin to state antimiscegenation laws because they similarly sought to protect and maintain White racial supremacy through marriage regulation. Additionally, these laws served a specific antimiscegenation purpose, as they were selectively enforced against, and disparately impacted, interracial couples.” *Id.*

178. See Cuison Villazor, *supra* note 177, at 1400.

the bill, Rep[resentative] Mason expressed that one of the reasons for the Act was to protect the right of “service men and women” to have “their families with them.”¹⁷⁹

But, as Cuison Villazor outlines, this preference for family unity did not extend to those noncitizen spouses ineligible for U.S. citizenship because of their race.¹⁸⁰ Indeed, the INA contained racially restrictive eligibility requirements for naturalization until 1952 when all such explicit race-based limits were finally lifted.¹⁸¹

The Immigration and Nationality Act of 1965, the root of the current INA, eliminated racial quotas and restrictions, set the foundation for the current family-preference system, and solidified the importance of family reunification.¹⁸² In his address signing the 1965 Act, President Lyndon B. Johnson declared, “This bill says simply that from this day forth those wishing to immigrate to America shall be admitted on the basis of their skills and their close relationship to those already here” and that no longer would families be “kept apart because a husband or a wife or a child had been born in the wrong place.”¹⁸³ Thus, by this point, the U.S. government honored family ties created through marriage and parentage.

At the same time, mirroring other contemporary political and legislative shifts, immigration law also encompassed global security concerns. This shift began in the early 1900s when fears of anarchism—and, later, communism—strengthened.¹⁸⁴ Kevin Johnson described this early intersection between political movements against

179. *Id.* at 1405.

180. *Id.* at 1406–10 (discussing the confluence and intersections of restrictions in immigration law, state anti-miscegenation laws, and military regulations that made it nearly impossible for the admission of noncitizen spouses from certain countries—targeting especially Japanese spouses).

181. See Immigration and Nationality Act, ch. 477, § 311, 66 Stat. 163, 239 (1952); see also Cuison Villazor, *supra* note 177, at 1391, 1417.

182. See Abrams, *What Makes the Family Special?*, *supra* note 173, at 13–14.

183. Lyndon B. Johnson, U.S. President, Full Remarks: Immigration and Nationality Act of 1965 Signing (Oct. 3, 1965), in LBJ PRESIDENTIAL LIBR., <http://www.lbjlibrary.org/mediakits/immigration/p14.html> [https://perma.cc/FR6N-5GT8].

184. Sacco & Vanzetti: *The Red Scare of 1919-1920*, COMMONWEALTH OF MASS., <https://www.mass.gov/info-details/sacco-vanzetti-the-red-scare-of-1919-1920> [https://perma.cc/Q9Q3-5GH7] (last visited Oct. 12, 2019).

such ideologies and the concerted efforts in immigration law to exclude and deport those people who prescribed to (or were perceived as followers of) these beliefs. He noted:

[T]he U.S. government traditionally has employed the immigration laws, particularly the provisions pertaining to the deportation and exclusion of aliens, to attack perceived threats to the domestic status quo. This history reveals a strong correlation between the severe treatment that politically subversive U.S. citizens received and the constriction of the immigration laws.¹⁸⁵

Similarly, this created a parallel immigration law shift away from family primacy and toward repelling border encroachments. Abrams writes:

[I]n [a period that] began roughly with the quota system in the 1920s and continued roughly through the 1980s, courts shifted to conceiving family rights and the immigration power as conflicting with one another, and when pressed[,] they usually found that the government's interest in restricting immigration and protecting its borders outweighed the interests of individual families in reuniting.¹⁸⁶

Combined with the deep history targeting immigrants of color for increased scrutiny and oppressive legislative, political, and societal

185. Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 SAINT MARY'S L.J. 833, 835 (1997).

186. Abrams, *Family Reunification and the Security State*, *supra* note 176, at 248–49; *see also* Jennifer M. Chacón, *Citizenship and Family: Revisiting Dred Scott*, 27 WASH. U. J.L. & POL'Y 45, 66 (2008) (“U.S. immigration law actually privileges family ties in the ordering of immigration priorities. Nevertheless, . . . [a]s a doctrinal manner, when the rights of family intimacy collide with the government's authority to regulate immigration, Congress' plenary power to regulate immigration routinely trumps all other considerations.”).

measures (and the accompanying virulent rhetoric), the effects on families of color intensified.¹⁸⁷

In the twentieth century, courts and political actors embraced the principles of constitutionally protected rights of families, thereby federalizing the domestic sphere generally reserved to the states. In this sense, then, the conflict between ostensible national security concerns fueling immigration reform and constitutional rights and liberty of the family must be reconciled.¹⁸⁸ Part III further outlines the dilemma created by seemingly competing goals in immigration law (security) and family law (preservation of family integrity).¹⁸⁹ As

187. As one example, the demographic data of families in detention indicate that the majority of detainees are people of color. See BRYAN BAKER, DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2016 8 (2017) (reporting the Office of Immigration Statistics' most recent data collection showing that the majority of detainees at ICE detention facilities were from the following countries of origin: Mexico (134,546), Guatemala (65,757), El Salvador (57,953), Honduras (46,753), Haiti (5,833), India (4,088), Brazil (4,056), Ecuador (3,196), People's Republic of China (3,023), and Dominican Republic (2,783) out of the total 352,882 detained); see also María Pabón López, *A Tale of Two Systems: Analyzing the Treatment of Noncitizen Families in State Family Law Systems and Under the Immigration Law System*, 11 HARV. LATINO L. REV. 229, 236 (2008) ("[E]xperiences in family law matters . . . reaffirm noncitizens' status as outsiders in the United States. Finally, given the fact that most foreign born are ethnic and racial minorities, the documented effect of racial biases in the courtroom and the judicial system cannot be discounted."); *United States Immigration Detention*, GLOBAL DETENTION PROJECT, (May 2016), <https://www.globaldetentionproject.org/countries/americas/united-states> [<https://perma.cc/73DX-7WHH>] (detailing how family detention centers house mostly migrants from Central America). One commentator describes how national security concerns and domestic efforts to target drug offenses affected immigrants—especially those of certain minority communities—and people of color:

[B]oth the war on drugs and the war on terror have most directly affected people of color and noncitizens in the United States. Today, commentators often characterize immigration as a crime problem, a security problem, or a combination of the two. Consequently, noncitizens and racial minorities are disproportionately affected. Indeed, noncitizens, with fewer legal protections under the U.S. Constitution and laws than American citizens, have proven to be the most vulnerable victims in the war on drugs and the war on terror.

Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists Etc.)*, 13 CHAP. L. REV. 583, 589 (2010).

188. See Abrams, *Family Reunification and the Security State*, *supra* note 176, at 265–66. Abrams describes this as the contemporary third period in the national security-family reunification chronology:

First, family rights have become constitutionalized. Second, the Supreme Court has expressed increasing skepticism that plenary power over immigration means that courts have no role whatsoever to play in evaluating the constitutionality of immigration law and enforcement. Together, these two trends have put family rights in a stronger position than they were mid-century.

Id.

189. See *infra* Part III.

Part IV argues, in the Family Separation Policy, congressional and presidential powers should bend to the constitutional rights of families.¹⁹⁰

III. Immigration Law's Precarious Intersection with the Law's Protection of Families and Children

As established in Part II, though there are important caveats, a bedrock of immigration law is family unity. The Family Separation Policy of 2018–2019 represents a drastic shift that undermines this well-established principle.¹⁹¹ This Part provides context about how immigration law and family law intersect. Moreover, this Part places particular focus on how immigration law does not abide by established standards of child protection and well-being.

A. The Intersection of Immigration Law and Family Law

The Family Separation Policy and the exploitive use of family and child detention bring together the interesting and understudied intersection of immigration law and family law. “The Supreme Court has long interpreted the Constitution to protect family relationships from undue government interference” while also providing extensive, largely unreviewable protections of congressional and executive actions in immigration law.¹⁹² This Section addresses this intersection while Section B more carefully examines how immigration law undermines well-established legal protections for children.

As explored by scholars, the plenary power doctrine affords broad and near unassailable, unreviewable powers to the legislature and the executive to establish and implement immigration law and policy

190. *See infra* Part IV.

191. *See* Kristin Collins, Serena Mayeri & Hiroshi Motomura, *Op-Ed: Family Relationships Have Long Been Part of the Bedrock of U.S. Immigration Policy. Then Came Trump*, L.A. TIMES (June 20, 2018, 4:05 AM), <https://www.latimes.com/opinion/op-ed/la-oe-collins-mayeri-motomura-family-separation-20180620-story.html> [<https://perma.cc/KE2U-C6FH>].

192. *Id.*

through statutes and certain types of executive action.¹⁹³ In one of its most recent decisions on the contours of this plenary power, the U.S. Supreme Court upheld Trump's 2017 proclamation that banned the entry into the U.S. of people from certain countries.¹⁹⁴ Sidestepping the issue regarding the Court's ability to even review the claim by asserting that the government did not assert the basis for its nonjusticiable argument, the Court reviewed the decision and held that the power to target certain nationalities for exclusion is within the executive's power to limit admission to the country if the exclusion is in the country's interests.¹⁹⁵ Squarely placing its holding in the familiar territory of upholding executive power to speak definitively on national security concerns, the Court further denied plaintiffs' claims that the presidential proclamation unconstitutionally targeted Muslims for exclusion.¹⁹⁶ Determining that the presidential proclamation was both facially neutral in that the "text says nothing about religion" and evinced no racial or religious animus,¹⁹⁷ the Court upheld the executive action and reversed the lower court's preliminary injunction.¹⁹⁸

More specifically to the focus here, in 2015, the U.S. Supreme Court decided the case of *Kerry v. Din*, which involved the collision of the right to family unity with apparent national security concerns in immigration law.¹⁹⁹ Like it later did in *Trump v. Hawaii*, the Court reviewed the substance of the law rather than deferring to the nonreviewability inherent in earlier plenary power pronouncements.²⁰⁰ Abrams asserts in her 2017 article that although the plenary power doctrine remains strong in immigration law, this is an example of the contemporary movement towards courts

193. This article does not concentrate on the history and practice of the plenary power doctrine, though I have written previously about the use of plenary power in facilitating immigrant detention. See Olivares, *Intersectionality at the Intersection*, *supra* note 10, at 967–70.

194. *Trump v. Hawaii*, 138 S. Ct. 2392, 2400 (2018).

195. See *id.* at 2407, 2409–15.

196. *Id.* at 2415–16 (analyzing plaintiffs' Establishment Clause claims).

197. *Id.* at 2421.

198. *Id.* at 2423.

199. See generally *Kerry v. Din*, 135 U.S. 2128 (2015).

200. *Id.*

considering familial rights of individuals against the stated governmental interests: “This approach leads to a balancing of interests rather than a rigid rule of deference to the political branches.”²⁰¹ Although the Court again upheld the government’s decision in *Din*—here, affirming the denial of a visa to the spouse of a U.S. citizen because of unclear and non-specified national security reasons—at least five justices (three in dissent and two in concurrence) seemingly approved of *Din*’s individual liberty interests inherent in her decision to marry.²⁰² Here, this interest intersected with governmental decision making in exclusion decisions, which were deemed particularly compelling and overriding for national security concerns.²⁰³

Din highlights the question of how to adhere to well-established principles of family reunification and family primacy that underpin immigration law (as discussed in Part II) while confronting national security questions.²⁰⁴ This discussion is enriched with scholarship and analysis on the last century of U.S. law upholding family ordering decisions within the realm of constitutionally protected privacy rights. Family law constitutional scholars extensively write about these issues, noting, for example, that the trend indicates the expansion of certain fundamentally held rights in the family law realm without specifying the effects of such expanded rights to

201. Abrams, *Family Reunification and the Security State*, *supra* note 176, at 271–72. Abrams provides a summary of the U.S. Supreme Court cases that have considered the intersection of immigration law (notably, the cases mostly considered citizenship derivation as opposed to exclusion) from 1970 until 2017 and argues that these precedents show a clear departure from a blind allegiance to plenary power. *See generally id.* at 272–79.

202. *Din*, 135 S. Ct. at 2139. Justice Kennedy’s concurrence (joined by Justice Alito) asserts that, even assuming *Din* has a liberty interest in knowing the details of the visa denial so she can rebut them, the decision of the consular office must stand, “particularly in light of the national security concerns the terrorism bar addresses.” *Id.* at 2141; *see also* Abrams, *Family Reunification and the Security State*, *supra* note 176, at 278–79 (remarking on Kennedy’s important caveat regarding judicial deference to the executive in light of stated national security interests). *See generally* Kerry Abrams, *The Rights of Marriage: Obergefell, Din, and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501, 547–49 (2018) (placing the Kennedy *Din* concurrence in context with his majority decision in *Obergefell v. Hodges*, which was published two weeks after *Din*, and in which Kennedy seemingly reserves marriage as a right of good citizenship and in furtherance of the national interest).

203. *Din*, 135 S. Ct. at 2141.

204. *See generally id.*

immigrants.²⁰⁵ To this point, David Thronson pinpoints the lack of constitutional fealty to family ordering decisions in immigration law:

[A]lthough the word “family” is not found in the U.S. Constitution, the Supreme Court has consistently recognized that the protection of private choices about family integrity is a matter of constitutional dimension. Constraints on family decisions about where to live, therefore, are exceptions and not the rule. Immigration law, by establishing parameters on who is permitted within national borders, is squarely among the exceptions. . . . The application of immigration law routinely conflicts with private decisions about family composition and integrity, and in turn family decisions regarding where to live routinely result in the circumvention of immigration provisions.²⁰⁶

Importantly, this question of what constitutional rights immigrant families receive is at the heart of the current Family Separation Policy and family detention debacle.

Thronson notes that the INA definition of family and the implementation of such a definition in case law can result in differing rights and responsibilities than those afforded or expected of U.S.

205. See, e.g., David D. Meyer, *The Constitutionalism of Family Law*, 42 FAM. L.Q. 529, 531 (2008) (“[C]ourts are likely to recognize still more constitutional rights within families—for children, nonparent caregivers, and same-sex partners, for example. But . . . the effects of broadening constitutional scrutiny will be less disruptive to traditional family law than might be supposed.”). See generally Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 852–55, 882 (2004) (discussing twentieth-century decisions that incorporated constitutional law jurisprudence into family law decision-making). “[A]s we have seen, federal statutory and constitutional law already regulates family relationships, rights, and responsibilities.” *Id.* at 884. Former U.S. Supreme Court Justice, Sandra Day O’Connor, asserts:

The States are subject to constitutional constraints, and the Supreme Court has, when appropriate, struck down state laws that intrude on the core functions of the family or on the individual liberties of family members. . . . [T]he Court has spoken of our common understandings of the family, our common aspirations, and the need to have a deeper understanding of the values that lie at the heart of our tradition.

Sandra Day O’Connor, *The Supreme Court and the Family*, 3 U. PA. J. CONST. L. 573, 575 (2001).

206. Thronson, *You Can’t Get There from Here*, *supra* note 163, at 58–59 (2006).

citizens.²⁰⁷ As the Supreme Court succinctly stated in *Reno v. Flores*, “in the exercise of its broad power over immigration and naturalization, ‘Congress regularly makes rules that would be unacceptable if applied to citizens.’”²⁰⁸ Thus, in practical terms, for example, the INA dictates that a U.S. citizen petitioner must marry a noncitizen fiancé or fiancée within ninety days of the noncitizen’s entry into the U.S. with the temporary K visa, or the visa expires and the noncitizen faces deportation.²⁰⁹ Thus, the visa and immigration status contains a dispositive timeframe—marry within three months or get deported. Moreover, family ordering in immigration law does not necessarily look to affiliative ties; no matter how close a petitioner is to a noncitizen grandparent, aunt, or uncle, there is no direct way for the petitioner to sponsor that person for a family-based immigration visa.²¹⁰ Whereas that person may be one’s family for other social or legal purposes,²¹¹ there is no right to family unification in those instances.

The disconnect between immigration law’s constraints and family law’s provision of rights is especially keen when considering the

207. See generally María Pabón López, *supra* note 187, at 236 (describing how the family court state law system discriminates against immigrant families and unconstitutionally infringes on their parental rights); David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL’Y 45, 53–68 (2005) [hereinafter Thronson, *Of Borders and Best Interests*].

208. *Reno v. Flores*, 507 U.S. 292, 305–06 (1993) (quoting *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)).

209. The INA defines and reads in part:

(i) that an alien is considered a “fiancée” or “fiancé” of a U.S. citizen if the individual seeks to enter the “United States solely to conclude a valid marriage with the petitioner within ninety days after admission.”

Immigration and Nationality Act § 101(a)(15)(K)(i), 8 U.S.C. § 1101(a)(15)(K)(i) (2018). Additionally, complementary provisions are later detailed under subsections (ii) and (iii). § 1101(a)(15)(K)(ii–iii) (defining legitimizing factors of “valid marriage” for U.S. admission, and establishing that “the minor child of an alien described in clause (i) or (ii)” is eligible to accompany the alien).

210. See generally *id.* § 1101(a)(15)(K).

211. See, e.g., *Moore v. E. Cleveland*, 431 U.S. 494 (1977). In *Moore*, the Supreme Court held East Cleveland’s housing ordinance unconstitutional for limiting occupancy of a dwelling unit to members of a single family with a strict definition of “family” essentially as a couple with their dependent children. *Id.* at 504–06. The ordinance in question made it a crime for Appellant Moore to live with her son, first grandson, and second grandson because the grandsons were cousins and not brothers. *Id.* at 496–97. The Supreme Court found that the ordinance was an “intrusion into family life-style decisions.” *Id.* at 512 (Brennan, J., concurring). As such, the Court held that the ordinance failed to advance a tangible state interest, thus violating the Due Process Clause under the Fourteenth Amendment. *Id.* at 506.

welfare of children. Thronson, a preeminent expert on the intersection of immigration law, child custody law, and child protection, observes that the immigration law system does not abide by the important U.S. domestic protections under a best interest analysis and routinely curtails and obstructs parental rights.²¹² He notes that unlike other areas of domestic law, the rights and interests of children are not only not the focus of immigration law's treatment of children, but the law actually harmfully affects children through its construction and implementation.²¹³ The disunion has its strongest implications in the contexts of child and family detention and under the Family Separation Policy. Unlike in domestic family law, which operates under the best interest of the child standard in custodial and child welfare cases, immigration law's treatment of children in these contexts operates as the antithesis of best interest while violating parental rights.²¹⁴

B. The Special Case of the Best Interest of the Child Standard

1. Detaining Immigrant Children Contradicts the Family Law Standard of Best Interest of the Child

As stated Section A, it is important to note that “immigration law is completely unconcerned with the best interests of a child in an immigrant family.”²¹⁵ Thus, although family unity is foundational to

212. See generally Thronson, *Of Borders and Best Interests*, *supra* note 207, at 53, 71; see also Pabón López, *supra* note 187, at 234–36 (detailing the difficulties in the family court system for immigrants, especially those facing parents in custody proceedings).

213. Thronson, *You Can't Get There from Here*, *supra* note 163, at 67–68.

Immigration law devalues children most fundamentally by denying children agency throughout the principle frameworks of immigration law. But immigration law goes beyond merely ignoring the interests of children. Immigration law is systemically and specifically designed to limit the role of children and the value placed on their interests.

Id.

214. See generally *id.* at 69–72.

215. Thronson, *Of Borders and Best Interests*, *supra* note 207, at 61 (“[I]mmigration law treats children as objects, and their voices and concerns are largely ignored. Immigration law concentrates power in the hands of sponsors, i.e., persons with legal immigration status, not the people who they might sponsor, i.e., beneficiaries. In immigration law, children may be beneficiaries, but never sponsors.”).

immigration law, no policy of family unification is derived from or upholds the best interest of the child standard.²¹⁶ Indeed, in *Flores v. Reno*, which upheld the practice of detaining immigrant children as constitutional, the Supreme Court considered the argument that detention was antithetical to the best interest standard and violated the rights of families.²¹⁷ Analogizing detention practice to child custodial disputes and other examples that consider what is in a child's best interest,²¹⁸ even though such examples provide disingenuous and incomplete comparators, the Court stated that providing accommodation outside of institutional detention—even if that is in the child's best interest—is not constitutionally required.²¹⁹ Finally, just like DHS's insistence that it is in the children's best interest to delay their reunion with parents or guardians due to child welfare concerns in the current Family Separation Policy chaos,²²⁰ the dissent in *Flores* noted INS argued that detention was in

216. In somewhat of a contrast, some state courts have expressly noted that immigration status bears no weight in a family court child custody dispute, which encompasses the best interest of the child standard. *See, e.g.*, David B. Thronson & Veronica Tobar Thronson, *Immigrants and the Family Court*, 14 NEV. LAW. 30, 31 (2006) (commenting on the 2005 Nevada case, *Perez Rico v. Rodriguez*, in which the Nevada Supreme Court held that immigration status of a parent could not be a consideration in deciding child custody:

Like other courts that have addressed similar situations the Court . . . acknowledged that the protection of immigrant parents' rights is of constitutional dimension In matters of child custody, all parents stand on equal footing before the court despite differences in immigration status—a person's immigration status is not an indication of his or her fitness as a parent.).

See also Kerry Abrams, *Immigration Status and the Best Interest of the Child Standard*, 14 VA. J. SOC. POL'Y & L. 87, 102 (2006) (noting the dangers of family courts using immigration status of parents or children as a best interest factor in custodial disputes and proposing “a rebuttable presumption against the use of immigration status in child custody determinations that will allow courts to exercise self-restraint while still making the consideration of immigration status available in exceptional circumstances”).

217. *Reno v. Flores*, 507 U.S. 292, 303–05 (1993).

218. *Id.* at 303–04 (discussing custodial disputes, adoption, and the responsibilities of parents in the exercise of their custody over children).

219. *Id.* at 304 (viewing the best interest of the child as not requiring a minimal standard of care per the Constitution). The court stated:

Minimum standards must be met, and the child's fundamental rights must not be impaired; but the decision to go beyond those requirements—to give one or another of the child's additional interests priority over other concerns that compete for public funds and administrative attention—is a policy judgment rather than a constitutional imperative.

Id.

220. *See supra* Section II.B.2.

children's best interest, which vitiated the majority's argument regarding the inapplicability of a best interest analysis.²²¹ As the dissent concludes: "[W]hile the Court goes out of its way to attack 'the best interest of the child' as a criterion for judging the INS detention policy, it is precisely that interest that the INS invokes as the sole basis for its refusal to release these children to 'other responsible adults.'"²²²

Moreover, this approach—embodied in the current practices of detention and the Family Separation Policy—pays no heed to the rights of children as people. In immigration law, as Thronson outlines, children are treated as property (derivative of an adult); wards of a governmental entity and thus subject to its decisions; or the same as adult immigrants (despite their age and vulnerability) and thus, just like adults, not entitled to constitutional protections.²²³ Although Thronson calls for a human rights framework that treats children as people,²²⁴ current immigration policy is far from a humane approach.

Promoting a child-centered, best interest approach in eradicating child detention is not simply a scholar or advocate's dream. The January 2019 Office of Inspector General Report on the Family Separation Policy crisis notes that the ORR, which manages the program for unaccompanied immigrant minors, is bound by federal

221. *Flores*, 507 U.S. at 320 (Stevens, J., dissenting).

222. *Id.*

223. See David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 981–85 (2002) [hereinafter Thronson, *Kids Will Be Kids?*]. Moreover, it is a common occurrence in immigration court for children as young as toddlers to represent themselves in removal proceedings. Thronson notes that "[a]dult immigrants have few rights in immigration court, and child immigrants fare no better. Child respondents, like adult respondents, have the 'privilege of being represented at no expense to the Government, by counsel of the alien's choosing.'" *Id.* at 1001; see also, e.g., Christina Jewett & Shefali Luthra, *Immigrant Toddlers Ordered to Appear in Court Alone*, USA TODAY (July 2, 2018, 2:47 PM), <https://www.usatoday.com/story/news/nation/2018/06/27/immigrant-children-deportation-court/739205002/> [<https://perma.cc/2DZ2-623N>] (reporting that immigrant children as young as three years old are being ordered into court for deportation proceedings and representing themselves—a practice that immigration law attorneys deem "absurd[.]"). Pediatric and behaviorist experts criticize the detrimental impact the deportation proceeding policy has on children—calling the policy "unconscionable" and "grossly inappropriate." *Id.*

224. Thronson, *Kids will be Kids?*, *supra* note 223, at 988.

law to ensure that the children are placed “in the least restrictive setting that is in the best interest of the child.”²²⁵ Under the terms of the Flores Settlement, which govern ORR practice of detaining children while their immigration cases are pending, the first preference is for the child to be timely placed with a parent or close relative living in the U.S. who can care for the child.²²⁶ If ORR cannot identify a sponsor, children may be kept in ORR custody or placed in foster care.²²⁷ Once a child reaches eighteen years of age, ORR transfers the child to DHS custody, meaning that if the child remains in ORR-sponsored detention, the child is transferred to adult detention when the child turns eighteen.²²⁸ Although DHS indicates

225. SEPARATED CHILDREN, *supra* note 43, at 3 (citing 8 U.S.C. § 1232(c) (2018)). The section is titled “Providing safe and secure placements for children” and provides the standards by which the DHS must place and assume the safety and well-being of unaccompanied minor children. 8 U.S.C. § 1232(c). The report describes the ORR as “a Program Office of the Administration for Children and Families (ACF) within HHS [Department of Health and Human Services], [which] manages the UAC [unaccompanied alien children] Program.” SEPARATED CHILDREN, *supra* note 43, at 3.

226. Stipulated Settlement Agreement, *supra* note 83. Moreover, in *Reno v. Flores*, the Court denied the claim that children would be unconstitutionally subjected to indefinite detention, stating, “The period of custody is inherently limited by the pending deportation hearing, which must be concluded with ‘reasonable dispatch’ to avoid habeas corpus. It is expected that alien juveniles will remain in INS custody an average of only 30 days.” *Flores v. Reno*, 507 U.S. 292, 314 (1993) (citations omitted). Yet, reports of much longer detention are common. See John Burnett, *Migrant Youth Go from a Children’s Shelter to Adult Detention on their 18th Birthday*, NPR (Feb. 22, 2019, 5:00 AM), <https://www.npr.org/2019/02/22/696834560/migrant-youth-go-from-a-childrens-shelter-to-adult-detention-on-their-18th-birth> [<https://perma.cc/HX88-GSVW>] (discussing one case of a child who spent more than two and a half months in detention); Yeganeh Torbati & Kristina Cooke, *First Stop for Migrant Kids: For-Profit Detention Center*, REUTERS (Feb. 14, 2019, 10:10 AM), <https://www.reuters.com/article/us-usa-immigration-children/first-stop-for-migrant-kids-for-profit-detention-center-idUSKCN1Q3261> [<https://perma.cc/Y2MZ-97KP>] (discussing the Homestead facility in Florida, which houses hundreds of migrant children).

[I]mmigration rights advocates say the Trump [A]dministration has stranded children there for longer periods by making it more difficult for them to be released to sponsors [Y]oungsters have been there for months, one of them for more than eight. Officials say the children spend an average of 67 days at Homestead before they are released.

Id.

227. See SEPARATED CHILDREN, *supra* note 43, at 3.

228. See *id.* (citing 6 U.S.C. § 279(g)(2) (2018) to define who is considered a minor in immigration law). Children are sometimes transferred to adult detention on their eighteenth birthday, a practice that has come under scrutiny by advocates, who have filed a class action lawsuit to end the practice. See Burnett, *supra* note 226. One commentator highlights such a case:

[O]n the morning of Lisseth’s [eighteenth] birthday—Sept. 23—two uniformed immigration agents showed up at the shelter. They put ankle chains on Lisseth and drove her across town to a frigid holding cell. Thus began her new status as an adult detainee in the custody of Immigration and Customs Enforcement.

that it is complying with the Flores mandate and that continued detention in these cases is the “least restrictive setting that is in the best interest of the child,” advocates and experts—including those previously convened by DHS—effectively argue that imprisoning children is never in their best interest.²²⁹

*2. Forcibly Separating Children from Their Fit Parents
Contradicts the Family Law Standard of Best Interest of the
Child*

Importantly, when families arrive to the U.S. border and ICE forcibly takes the children from their otherwise fit parents under the Zero Tolerance Prosecution Policy and the Family Separation Policy, ICE’s actions directly contravene with the best interest of the child standard. As the January 2019 Office of Inspector General Report detailed, DHS has ineffective—at times, nonexistent—systems to track children and parents and the reasons why they were separated, resulting in what can only be described as chaos when the extent of the policy came to light.²³⁰ As the Report concludes, much work must be done to reform ORR policies to “protect all children in their care from harm and to provide needed physical and mental health services, including efforts to address trauma.”²³¹

DHS officials, including former Secretary Nielsen, responded to criticism about the policies to take children from families and the incredibly slow process to reunify families or place the children with appropriate guardians.²³² Nielsen asserted that separation was the

Id.

229. See *infra* Part IV; *supra* note 106 and accompanying text (discussing the findings of the 2016 report of the DHS Advisory Committee on Family Residential Centers); SEPARATED CHILDREN, *supra* note 43, at 3.

230. See generally SEPARATED CHILDREN, *supra* note 43. In one telling instance of how poorly the ORR managed the detained migrant families, the report notes that, at one point, ORR staff “recorded separated children on an Excel spreadsheet if they were identified by DHS as separated at intake.” *Id.* at 6.

231. *Id.* at 13.

232. See Aaron Blake, *Kirstjen Nielsen’s Mighty Struggle to Explain Separating Families at the Border, Annotated*, WASH. POST (June 19, 2018, 7:43 AM), <https://www.washingtonpost.com/news/the-fix/wp/2018/06/19/kirstjen-nielsen-tries-to-explain-separating-families-at-the-border-annotated/>

best option for the children, concocting stories and misrepresenting data that children were being trafficked or that their parents were unacceptable guardians due to having criminal histories.²³³ Similarly, in its “Frequently Asked Questions Regarding Unaccompanied Alien Children” (FAQ) document, ORR reports that it must perform DNA cheek-swab tests and background checks on “purported [parents] . . . to determine suitability and identity to help to improve the chances that the minors will be well-taken care of when they leave HHS care.”²³⁴ Reiterating the harmful criminality narratives to describe migrant parents, the FAQ notes that efforts are slowed because “[s]ome parents have been found unsuitable for reunification because of issues discovered during a criminal background check, including child cruelty, child smuggling, narcotics crimes, robbery convictions, and a warrant for murder.”²³⁵ It is critical to note, however, that the children only become unaccompanied and require such interventions when ICE forcibly removes them from their parents. These interventions and slow processes of reunification exist only because DHS created the crisis when they began the absurd and shoddy Family Separation Policy.

The OIG Report confirms the ineptitude of DHS in responding to the crisis. The Report cites a *Ms. L.* court order, stating that although DHS was purportedly seeking to streamline the reunification process, it instead used “procedures . . . designed for children who had entered the U.S. unaccompanied and were unnecessarily onerous when applied to parents and children who were apprehended together but

[<https://perma.cc/96EJ-DM2M>].

233. *Id.* Kirstjen Nielsen, the then-acting U.S. Secretary of Homeland Security, stated:

We will separate those who claim to be a parent and child if we cannot determine a familial or custodial relationship exists [W]e do so if the parent is a national security, public or safety risk, including when there are criminal charges at issue and it may not be appropriate to maintain the family in detention together. We also separate a parent and child if the adult is suspected of human trafficking.

Id.

234. *Frequently Asked Questions Regarding Unaccompanied Alien Children*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/faqs/index.html> [<https://perma.cc/Z49X-N6G8>] (last updated Aug. 7, 2018).

235. *Id.*

separated by [g]overnment officials.”²³⁶ Moreover, the OIG Report investigated the reasons why children remained apart from their parents and noted that of the 2,816 children ORR identified as separated pursuant to the Family Separation Policy as of December 2018, ORR did not reunify twenty-eight (or 0.9%) of children with parents because ORR “determined that the parent was unfit or posed a danger to the child.”²³⁷ This directly undermines DHS’s so-called concern for children in separating them from their parents.

Finally, experts confirm that separation from parents and placement of children in detention causes emotional and physical trauma to the children.²³⁸ The American Academy of Pediatrics (AAP) spoke out frequently against detaining children and forcibly separating them from their parents, “outlining the detrimental child health effects of family separation. Pediatricians shared how separation harms children’s short- and long-term health [E]ven short periods of detention can cause psychological trauma and long-term mental health risks.”²³⁹ AAP engaged in direct advocacy with DHS officials, including Nielsen, urging an end to detention and family separation. Dr. Colleen Kraft, the President of AAP wrote in a recent editorial:

Studies overwhelmingly demonstrate the irreparable harm caused by breaking up families. Prolonged exposure to highly stressful situations—known as toxic stress—can

236. SEPARATED CHILDREN, *supra* note 43, at 5 (citing Order Following Status Conference, Ms. L. v. U.S. Immigration and Customs Enf’t, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (order following status conference)).

237. *Id.* at 10.

238. *Federal Advocacy: Family Separation & Detention*, AM. ACAD. OF PEDIATRICS, <https://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Pages/family-separation-and-detention.aspx> [<https://perma.cc/3HE2-XZDK>] (last visited Oct. 12, 2019).

239. *Id.*; see Julie M. Linton, Marsha Griffin & Alan J. Shapiro, *Detention of Immigrant Children*, 139 PEDIATRICS 1, 6 (2017) (“Young detainees may experience developmental delay and poor psychological adjustment, potentially affecting functioning in school. Qualitative reports about detained unaccompanied immigrant children in the United States found high rates of post-traumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems. Additionally, expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children.”); see also *supra* Section I.B.

disrupt a child's brain architecture and affect his or her short- and long-term health. A parent or a known caregiver's role is to mitigate these dangers. When robbed of that buffer, children are susceptible to learning deficits and chronic conditions such as depression, post-traumatic stress disorder[,] and even heart disease. The government's practice of separating children from their parents at the border counteracts every science-based recommendation I have ever made to families who seek to build, and not harm, their children's intellectual and emotional development.²⁴⁰

Faced with the overwhelming research against the use of family separation, it is hypocritical at best—sadistic and terroristic at worst—for DHS to continue to implement such policies while proclaiming them to be compliant with federal regulations and in children's best interests. Not surprisingly, however, the policy continues, in part as a strategic maneuver to normalize the increased detention of families. Finally, as the detained immigrant is most commonly a person of color, the demeaning narratives operate within the context of the racist and discriminatory history of immigration law. As Part IV reports, current litigation against the DHS demonstrates that the policy unconstitutionally violates parental rights, irreparably harms children, and must be terminated.²⁴¹

240. Colleen Kraft, *Op-Ed: Separating Parents from Their Kids at the Border Contradicts Everything We Know about Children's Welfare*, L.A. TIMES (May 3, 2018, 4:15 AM), <https://www.latimes.com/opinion/op-ed/la-oe-kraft-border-separation-suit-20180503-story.html> [<https://perma.cc/UB4M-Z7JW>].

241. See *infra* Part IV.

*IV. A Case Study of the Family Law–Immigration Law Dilemma:
The Family Separation Policy is Unconstitutional*

A. Ms. L. v. ICE et al.

In February 2018, the American Civil Liberties Union (ACLU) sued ICE on behalf of Ms. L., a woman from the Democratic Republic of the Congo (DRC), who entered the U.S. through the port of entry at San Diego, California on November 1, 2017, with her six-year-old daughter, S.S.²⁴² Mother and child presented themselves to the CBP, and Ms. L. explained that she was seeking asylum and feared for her and her daughter's life in the DRC.²⁴³ Although the asylum officer at her initial screening determined that she had a significant chance of proving her asylum case, she and her daughter were detained.²⁴⁴ At first, they were detained together.²⁴⁵ Four days later, her child was taken from her and sent to Chicago, Illinois while Ms. L. remained imprisoned in the San Diego area.²⁴⁶ As officials took the child away, according to her mother, the little girl screamed frantically to remain with her mother.²⁴⁷ In the four months between their forcible separation and the commencement of the ACLU lawsuit, Ms. L. spoke to her daughter six times via phone (without a video connection), trying to reassure her through the child's tears.²⁴⁸ About a month after the ACLU filed the complaint, the detention center released the mother, and she traveled to Chicago to reunite with her daughter.²⁴⁹

242. Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 1, *Ms. L. v. U.S. Immigration and Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18-cv-00428-DMS-MDD).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *supra* note 242, at 7–8.

249. Press Release, ACLU, Asylum-Seeking Mother and Daughter Reunited After ACLU Lawsuit (March 16, 2018), <https://www.aclu.org/news/asylum-seeking-mother-and-daughter-reunited-after-aclu-lawsuit> [https://perma.cc/F5HZ-DR69].

Ms. L. is ongoing in the California district court and presents an important opportunity to examine the extent of immigration law's power over family law protections while challenging the dominant, demeaning narratives used to characterize migrants and immigrant communities. The case tests a foundational component of immigration law—family unity—while considering the strength of plenary power. Abrams asserts that the last fifty years of jurisprudence in this area represents a slow shift towards expanding the purview of fundamental family rights and that, post-*Din*, courts may very well be moving towards finding important family rights for immigrants, too, especially in the face of untenable governmental arguments of purported national security reasons.²⁵⁰ The case of *Ms. L.* demonstrates that the Family Separation Policy violates parents' constitutional rights. But advocates must be cautious about accepting family detention as an appropriate ameliorative alternative because that is one of the strategic maneuvers embedded in the DHS policies.

In *Ms. L.*, plaintiffs argued that ICE's actions against *Ms. L.* and hundreds of other parents who were certified as class members amounted to due process violations.²⁵¹ Plaintiffs asserted that "[t]he separation of S.S. and her mother violates substantive due process because it furthers no legitimate purpose, not to mention a compelling governmental interest."²⁵² Specifically, plaintiffs maintained that unsupported governmental intervention in the parent-child relationship amounted to a violation of the family's liberty interest to preserve such relationships free from intervention. Finally, plaintiffs contended that the separation violated procedural due process "because it was undertaken without any hearing."²⁵³

250. Abrams, *Family Reunification and the Security State*, *supra* note 176, at 271–72, 279–80.

251. See Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *supra* note 242, at 7–8; see also Order Granting Plaintiffs' Motion to Modify Class Definition, *supra* note 139; *Ms. L. v. U.S. Immigration and Customs Enf't*, 331 F.R.D. 529 (S.D. Cal. 2018) (order granting in part plaintiffs' motion for class certification).

252. See Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *supra* note 242, at 8.

253. *Id.* The plaintiffs also stated claims that separating children from parents violated asylum laws and the Administrative Procedure Act. *Id.* The district court granted defendants' Motion to Dismiss as to those two claims. See *Ms. L. v. U.S. Immigration and Customs Enf't*, 302 F. Supp. 3d 1149 (S.D. Cal.

Importantly, defendants did not argue that the parents from whom they were taking the children were unfit, abusive, or neglectful.²⁵⁴ As discussed above, prior DHS practice detained families together rather than enforce forcible separation, a practice that has proven to be equally harmful to children and families.²⁵⁵ Instead, defendants attempted to analogize these facts to those of other cases in which courts deferred to executive authority and decision making in immigration decisions.²⁵⁶ In its order denying in part defendants' motion to dismiss, the district court found that none of these arguments presented an analogous example that supported defendants' claims.²⁵⁷ Instead, the district court found that plaintiffs stated a sufficient claim that "separation from their children while they are contesting their removal and without a determination they are unfit or present a danger to their children violates due process."²⁵⁸

Interestingly, the district court began its detailed analysis of the due process claim by emphasizing that the "parties do not dispute the following bedrock principles" regarding the breadth of the Constitution.²⁵⁹ The court then bases its ultimate holding on probable constitutional violations, stating: "The Constitution protects everyone within the territory of the United States, regardless of citizenship. . . . '[N]on-citizens physically on U.S. soil have constitutional rights, including the right to due process of law.'"²⁶⁰ Gathering and citing cases and relying upon the amicus brief analysis of immigration and constitutional law scholars, the court concluded that "'Aliens,' therefore, have substantive due process rights under

2018) (order granting in part and denying in part defendants' motion to dismiss) [hereinafter Motion to Dismiss Order].

254. See Motion to Dismiss Order, *supra* note 253, at 16.

255. See *supra* Parts I, II.

256. See Motion to Dismiss Order, *supra* note 253, at 14–20.

257. *Id.*

258. *Id.* at 2. The district court did not consider the plaintiffs' procedural due process claims after finding that plaintiffs stated a substantive due process claim. *Id.* at 23 n.10.

259. *Id.* at 13.

260. *Id.* (quoting Brief for Bd. of Scholars of Immigration and Constitutional Law as Amici Curiae Supporting Petitioner, *Ms. L. v. U.S. Immigration and Customs Enf't*, 302 F. Supp. 3d 1149 (S.D. Cal. June 6, 2018) (No. 18-cv-00428-DMS-MDD) (internal citations omitted)).

the Constitution[.]” which the defendants conceded at oral argument.²⁶¹ The court next noted another stipulated principle:

[I]t has long been settled that the liberty interest identified in the Fifth Amendment provides a right to family integrity or to familial association. . . . Indeed, “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by” the Court.²⁶²

Here, the court took as given a proposition that was controversial a generation ago, citing and quoting contemporary case law.²⁶³ Finally, the district court connected these foundational principles and concluded: “[T]here is no dispute the constitutional right to family integrity applies to aliens like Ms. L. . . .”²⁶⁴ Thus, the district court sets an important precedent in determining that immigrant family unity and preservation is a protected right.²⁶⁵

261. *Id.* at 14 & n.6.

262. See Motion to Dismiss Order, *supra* note 253, at 14 (citing the U.S. CONST. amend. V; *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1079 (9th Cir. 2011)).

263. See *supra* Section II.B.

264. Motion to Dismiss Order, *supra* note 253, at 14.

265. At about the same time, in a case presenting similar facts, a federal district court in Chicago granted a plaintiff’s emergency motion for a temporary restraining order and preliminary injunction against the DHS and other defendants, finding that “Plaintiffs have demonstrated some likelihood of success on their claim that continued separation of D.F. from his available, fit parent violates their due-process rights.” *Souza v. Sessions*, No. 18-cv-4412, at *2 (N.D. Ill. June 28, 2018) (order granting preliminary injunction). Like in *Ms. L.*, the court in *Souza* found that “among the liberties protected by [the due process clause] is the right of parents to the custody of their children.” *Id.* Further research did not reveal the status of the case. See also Michael Tarm & Martha Irvine, *Brazilian Boy, 9, Released to Mom After US Judge’s Order*, AP (June 29, 2018), <https://www.apnews.com/ec5090c4b62b4a2699d203d5624c3af4> [https://perma.cc/SCE7-EUGX]. And in an earlier 2018 case from the Western District of Texas considering similar claims, the Court also found that:

[i]f Defendants are in fact separated from their children at the time of their arrest, prohibited from communicating with their children, not given any substantive information about the location and well-being of their children, and effectively barred from participating in their children’s immigration proceedings up until the time of their (or their children’s) deportation, then Defendants’ constitutional rights to familial association may be implicated.

The California district court then considered if the facts presented were within the purview of the constitutional right to family integrity. Reviewing each of defendants' various arguments as to why the separation of families did not amount to a constitutional violation of family integrity, the court ultimately analyzed each argument as being inapposite to the facts in *Ms. L.*²⁶⁶ Thus, the court concluded that the "[p]laintiffs' allegations are . . . sufficient to demonstrate that the guarantee of substantive due process encompasses their assertions"²⁶⁷ Lastly, the court considered whether these facts amounted to an "arbitrary, or conscience shocking" executive action, a necessary component in determining a violation of due process protections.²⁶⁸ Reviewing precedent and highlighting the facts of the case, the court determined that:

Such conduct, if true, as it is assumed to be on the present motion, is brutal, offensive, and fails to comport with traditional notions of fair play and decency. At a minimum, the facts alleged are sufficient to show the government conduct at issue "shocks the conscience" and violates [p]laintiffs' constitutional right to family integrity.²⁶⁹

Litigation in *Ms. L.* continues as of this writing so it is yet to be determined if the important precedent will stand. But the case presents a formidable case study for the arguments that immigrant families deserve the same constitutional protections as citizens and that the government cannot continue detention and separation policies that contravene child welfare standards.

United States v. Dominguez-Portillo, No: EP-17-MJ-4409-MAT, 2018 WL 315759, at *11 (W.D. Tex. Jan. 5, 2018) (determining that although defendants' parental rights are of concern, their motion to dismiss the criminal charges against them could not be sustained based on this finding).

266. See Motion to Dismiss Order, *supra* note 253, at 15–20.

267. *Id.* at 20 (citations omitted).

268. *Id.* at 21.

269. *Id.* at 23. But see *Dominguez-Portillo*, at *11 (noting, although finding a constitutional right to familial association "may be implicated," given the lack of precedent relevant to these circumstances, "Defendants [immigrant parents] have not met the high burden required under the outrageous government conduct doctrine").

B. Next Steps for Advocates: Ending Separations and Avoiding the Concession that Family Detention is an Appropriate Alternative

Immigrant lawyers and advocates have a critical opportunity to establish the groundwork for abolishing not only the Family Separation Policy but also the presumed alternative—family detention. As argued in Part I, the Trump Administration’s strategy in implementing the Zero Tolerance Prosecution Policy, which led to family separations, was partly to offer family detention as a preferred alternative.²⁷⁰ The prosecution of unlawful entrants was used as a nefarious justification for separating parents from their children and for long-term family detention. Yet, separating families, historically, was not a necessary component of prosecuting unlawful entrants.²⁷¹ Advocates must remain steadfast to this truth: even if unlawful entrants are criminally prosecuted (though this, too, is not compulsory), family separation need not be a consequence.²⁷²

Additionally, detaining families and children is not an acceptable or required alternative. Indeed, even when the Supreme Court upheld the detention of children as constitutional in *Reno v. Flores*, the Court narrowed its holding that there existed no due process right against detention in the case when *no* reasonable guardian is available.²⁷³ Thus, at least for arriving families, there are numerous robust arguments against detaining children. And as historical

270. See *supra* Part I.

271. See *id.*

272. Noncitizen defendants contesting their prosecution for misdemeanor illegal entry made an innovative argument in *Dominguez-Portillo* that the Government separating them from their children (in one case, grandchild) amounted to them being unable to make informed, voluntary decisions about the immigration consequences of their decision to plead guilty or not, pursuant to the protections in *Padilla v. Kentucky* and Rule 11 of the Federal Rules of Criminal Procedure. See *Dominguez-Portillo*, at *25–31 (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010); FED. R. CRIM. P. 11).

273. See *Reno v. Flores*, 507 U.S. 292, 302–04 (“[T]he right at issue is the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than a government-operated or government selected child-care institution.”). Further, the Court reiterates, “Where a juvenile has *no* available parent, close relative or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution.” *Id.* at 319 (emphasis added).

practices indicate only a very recent dependence on detention as a default practice,²⁷⁴ there is simply no reason to continue family detention instead of releasing families with notices to appear at later immigration proceedings. In fact, in another 2018 federal court proceeding in which the government again attempted to limit its obligations under the Flores Settlement so that it could indefinitely detain migrant children, the district court denied the request and responded that the government could simply “reconsider[] their current blanket policy of family detention and reinstat[e] prosecutorial discretion.”²⁷⁵

Advocates arguing *Ms. L.*—or any case with relevant similarities—should maintain steadfast to the release of families without detention and, at the very least should release not be viable, a reiteration of the principles and commitments under the Flores Settlement. Recent federal court decisions restated the viability of the Flores Settlement terms, even asserting that the current detention protocol violates such terms.²⁷⁶ Rather than conceding indefinite family detention or a softening or wavering of the Flores Settlement terms, it is imperative to uphold the rights of immigrant families to remain together out of detention.²⁷⁷

274. See Eagley et al., *supra* note 92 (reporting the stark increase in family detention over a relatively short timeframe).

275. *Flores v. Sessions*, No. CV 85-4544-DMG (AGRx), 2018 WL 4945000, at *5–6 (C.D. Cal. July 9, 2018) (in-chambers order denying defendants’ “*Ex Parte* application for Limited Relief from Settlement Agreement”) (internal citations omitted). The district court also rejected the Government’s arguments that the release of families would lead to rampant no-shows of the migrants at their later immigration proceedings, relying upon the Eagley et al. study. *Id.* at *4. “The evidentiary record is unclear as to the accuracy of Defendants’ assertion. Even assuming Defendants are correct, however, this risk was plainly contemplated by the parties when they executed the Flores Agreement in 1997. It does not support a blanket non-release policy or warrant the Agreement’s modification or abrogation.” *Id.* (internal citations omitted).

276. See *id.*; see also *Dominguez-Portillo*, at *11–18. In response to the noncitizen defendants’ assertions regarding the violation of the terms of the Flores Settlement, the district court responds, in part:

The Flores Settlement is binding on the Government. The Government has offered no evidence, nor made any reference to, any effort by the ORR, HSI, or ICE to comply with the provisions regarding contact with family members. The only record on the matter is Defendants’ un rebutted assertion that they have been given no information regarding the well-being and location of their children.

Id. at *16.

277. In a joint motion filed in *Ms. L.*, the plaintiffs apparently agreed that remaining in family

CONCLUSION

The culture of resistance is strong in 2019. Outcry over governmental policies that imprison families and children and tear children away from their parents is warranted and useful. Perhaps, the visions of destroyed families will indeed provide the call to arms, emboldening veteran and new activists to loudly proclaim their anger and support policymakers and organizations that work for change.²⁷⁸ To be sure, the upswell of shock in response to the Family Separation Policy shone a bright light on the treatment of immigrant families. It is imperative to continue the legislative and political fight—while also battling in the courts—against this Administration dedicated to decimating immigrant families. Importantly, this work must incorporate resistance against the rhetoric that normalizes the oppression of immigrants and fosters an ethos of dehumanization, rooted in a history of racism and xenophobia. These policies prevail in part because the narrative surrounding immigrant criminality and dehumanization paves the way to tyrannize immigrant families more easily.

Instead, resistance should build upon the deep foundation of family integrity in immigration law. Although this history is marred by the deeply entrenched legacy of racial and ethnic discrimination and is rooted in erroneous principles of male dominance, it is undeniable that family primacy remains a fundamental principle in immigration law. As this article shows, contemporary family and immigration law jurisprudence has moved towards broader protections of family, even in the face of purported national security concerns. Moreover, policies of detaining immigrant families and

detention while waiving the child's rights to the protections under the Flores Settlement would be a viable alternative to family separation. See Joint Motion Regarding Scope of the Court's Preliminary Injunction at 2, *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133, No. 18-cv-00428-DMS-MDD, 2018 WL 3575385 (S.D. Cal. July 13, 2018). Moreover, the second viable option outlined in the joint motion is that the parent would agree to be separated from the child(ren) and allowed the child(ren) to be placed in HHS custody. See *id.*

278. See generally Mariela Olivares, *Resistance Strategies in the Immigrant Justice Movement*, 39 N. ILL. U. L. REV. 1 (2018).

2020]

THE RISE OF ZERO TOLERANCE

349

children and separating immigrant families are in direct contradiction to the law's established commitment to actions that are in the best interests of children and according to child welfare standards. For these reasons, the current wave of litigation challenging such policies presents critical opportunities for a lasting and important change in the treatment of immigrant families and children. It is for all of us who believe in the Constitution, the rights of family, and the protection of children, to challenge this regime's assault on these important, bedrock principles.