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Why the Legal Strategy of Exploiting Immigrant Families Should Worry Us All

Jamie R. Abrams*

This article applies a family law lens to explore the systemic and traumatic effects of modern laws and policies on immigrant families. A family law lens widens the scope of individuals harmed by recent immigration laws and policies to show why all families are affected and harmed by shifts in state power, state action, and state rhetoric. The family law lens reveals a worrisome shift in intentionality that has moved the state from a bystander to family-based immigration trauma to an incendiary agent perpetrating family trauma.

Modern immigration laws and policies are deploying legal and political strategies that intentionally decouple the parent-child relationship and demonize immigrant families. The family law lens brings into focus how the state is acting under the "parens patriae" power, which positions the state as the "parent of the nation." For the state to intervene using its parens patriae power to perpetrate the exact kinds of harms that would be considered abusive if deployed by a parent, suggests a deep dissonant injustice in the use of state power in certain families. This shift in intentionality exacerbates deep longstanding differences in government family interventions by race, class, and immigration status.

Laws and policies that exploit the hardships of families as political pressure should worry all families under the law because we entrust the state to intervene to protect families. These political strategies threaten the constitutional norms that are the foundation of modern family law. Revealing new insights from family law is a call to action for larger constituencies to engage in immigration advocacy and reform.

INTRODUCTION

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II. THE INTENTIONALITY SHIFT IN STATE ACTION AND RHETORIC

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Electronic copy available at: https://ssrn.com/abstract=3496042
This article applies a family law lens to show why all families are affected and harmed by modern shifts in state power, action, and rhetoric affecting immigrant families.¹ Modern immigration laws and policies, such as the separation of parents and children at the border,² the dismantling of DACA,³ the detention of pregnant women,⁴ and the militarization of the Southern Border⁵ reflect an intentionality shift moving the state from a by-

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² See infra Section IV.A.1.
³ See infra Section V.B.
⁴ See infra Section IV.C.

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stander to family-based immigration trauma to an incendiary agent perpetrating family trauma as political strategy.\textsuperscript{6}

The use of state power to destabilize families undermines the constitutional privacy and autonomy protections to which all families are entitled. This intentionality shift continues and expands deep longstanding disparities in government family interventions by race, class, and immigration status.\textsuperscript{7}

Exploiting the vulnerabilities of families as political pressure contributes to the decoupling of the parent-child relationship and the demonization of immigrant communities.\textsuperscript{8}

Part I explains the value of a family law lens and the fundamental constitutional protections to which families are entitled. Part II describes the intentionality shift in state action. It explores how “immigration blame” is a central piece of the Trump administration’s political strategy, including demonizing immigrant family relationships.

Part III examines the lived realities and vulnerabilities of mixed-status immigrant families particularly. This exploration puts in context how laws and policies map on to immigrant families more broadly. This contextualization then expands the lens beyond the direct targets of President Trump’s policies to include a far broader constituency harmed by state action.

Part IV examines the harms of state interventions, including the family separation policy, the interior orders, and the treatment of pregnant women. Part V concludes that it is constitutionally dissonant for the state to use its powers to intervene in families for intentional harm, not merely as a bystander to collateral consequences of immigration laws and policies on existing stratifications and vulnerabilities. If the state perpetrates the exact harms that would cause the state to invoke its constitutional \textit{parens patriae} power to intervene in a family were it perpetrated by a parent (e.g., neglect, mistreatment, inflicting toxic stress, sexual assault, failure to obtain medical care).

Menjívar & Daniel Kanstroom, \textit{Introduction – Immigrant "Illegality", in Constructing Immigrant “Illegality”: Critiques, Experiences, and Responses} 13 (Cecilia Menjívar & Daniel Kanstroom eds., 2014) (describing how Southern Border security relies on “high-tech surveillance, 650 miles of walls and fences, the deployment of National Guard soldiers, and dramatic increases in spending, calculated at about $10 billion in the ten years post-9/11, tripling the pre-9/11 budget”); \textsc{Matthew Longo, The Politics of Borders} 113 (2018) (quoting an official with the Department of Homeland Security stating “Before it used to be migrants coming across the border, and making sure they move in a humanitarian way. . .


\textsuperscript{7} See generally \textsc{Tanya Washington, Throwing Black Babies Out With the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans, 6 Hastings Race & Poverty L.J. 1 (2008) (documenting the underlying racial disparities in the larger child welfare crisis); see also \textsc{Tonya L. Brito, The Welfarization of Family Law, 48 U. Kan. L. Rev. 229, 246 (2000) (explaining that, for parents receiving welfare, “parental autonomy is not automatic” and “parents are not afforded broad authority over their children’s upbringing”).

care), then it must also be improper for the federal government’s treatment of immigrant families, even acknowledging the sweeping breadth of the federal government’s plenary power over immigration.

Historically, immigrant activists, immigration lawyers, and immigrants have been the strongest champions of immigration reform and advocacy. This article engages a larger dialogue about the effects of modern laws and policies on vulnerable families and the role of the family law field in strengthening immigrant families and reshaping the immigration debate. This family law lens pulls us toward a unifying political strategy that breaks us from current incremental reactions to each Executive Order and inflammatory tweet. It demands that we value all families under the law.

I. THE VALUE OF A FAMILY LAW LENS

A. Defending the Family Law Lens

Adding a family law lens to critiques of modern immigration law and policy reveals how harming families is part of an intentional political strategy. These immigration laws and policies are destabilizing the family law foundations that govern all families, including immigrant families. A family law lens exposes how modern laws and policies do not align with the constitutional norms and values surrounding the family, even if they might be constitutional through a highly deferential immigration law lens. This conclusion exposes how modern immigration laws and policies are harming a much larger group of constituents, beyond the direct targets of the policies (e.g., migrants at the Southern Border).


10 There have been many recent notable legal developments affecting immigrant families deeply. The modern immigration laws and policies highlighted here notably extend before the Trump administration and to the state and local level as well. In 2015, for example, 216 laws and 274 resolutions were passed in 49 states and Puerto Rico relating to immigration, some favorable for immigrants, some restrictive of immigrants. Nat’l Conference of State Legislatures, Report on 2015 State Immigration Laws (2015), http://www.ncsl.org/research/immigration/report-on-2015-state-immigration-laws.aspx [https://perma.cc/9F8B-PW59]. This article highlights the recent federal policies that are most impactful on immigrant families, although undoubtedly other policies, such as those relating to sanctuary cities, health care access, tax policies, public benefits, etc. are also impacting immigrant families significantly. The next section summarizes some key recent legal developments and rhetorical shifts that have had powerful consequences for immigrant families.

11 See, e.g., Subhash Kateel & Aarti Shahani, Families for Freedom Against Deportation and Delegalization, in Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today 276 (David C. Brotherton & Philip Kretsedemas eds., 2008) (“The laws run counter to American assumptions about the kind of justice that families deserve.”). Viet Thanh Nguyen explained in a powerful Op-Ed how important this context might be in the context of separating immigrant families: “I wonder whether whoever decided to take me from my mother considered her pain. Maybe they only saw her alienness and her lack of education, which happened because she was poor and a girl.” Viet Thanh Nguyen, Opinion, Trust me: Separating immigrant families isn’t humane, Chi. Trib. (May 22, 2018).
While immigration status is achieved and held by individuals, not families, family connections provide critical context to understanding the effects of laws and policies. President Trump’s laws and policies have harnessed the relational context of immigrant families as a political tool to try to change migration patterns.\textsuperscript{12}

The United States has a strong modern tradition of family-based immigration that suggests the importance of a family law lens. Today, approximately two-thirds of all lawful immigration to the United States is through the relationship of an immigrant to a United States citizen or Lawful Permanent Resident.\textsuperscript{13} The dominance of family-based immigration developed slowly over time, at first because of the doctrine of coverture through which men could bring their wives and children to the country because of their head of household status.\textsuperscript{14} Since 1965, family reunification is the “cornerstone” of immigration law, particularly privileging the parent-child and spousal relationships, which are the heart of this article’s analysis.\textsuperscript{15}

Yet, the “family as a unit of analysis has been understudied by scholars of migration.”\textsuperscript{16} Professor Kerry Abrams summarized how family law scholarship has undervalued the role of immigration law in shaping families, while immigration law has undervalued the “family law aspects of immigration.”\textsuperscript{17}

At first glance immigration law and family law may seem like unrelated fields.\textsuperscript{18} The norms and guiding principles of family law and immigration law are different and have yielded different approaches to defining and regulating parentage\textsuperscript{19} and marriage.\textsuperscript{20} The essence of family law focuses on family unity, permanence, and the best interests of the child (“BIOC”).\textsuperscript{21}

\textsuperscript{12} See generally Draft Memorandum from U.S. Dep’t of Homeland Sec., Policy Options to Respond to Border Surge of Illegal Immigration (2017) (describing the Administration’s deterrence strategies).

\textsuperscript{13} Alan Hyde, \textit{The Law and Economics of Family Reunification}, 28 GEO. IMMIGR. L.J. 355, 360 (2014).


\textsuperscript{15} Id. (noting an ongoing debate in how to handle the reunification of adult family members).

\textsuperscript{16} \textit{IMMIGRANT CHILDREN: CHANGE, ADAPTATION, AND CULTURAL TRANSFORMATION} (Susan S. Chuang & Robert P. Moreno eds., 2011).

\textsuperscript{17} Kerry Abrams, \textit{Immigration Law and the Regulation of Marriage}, 91 MINN. L. REV. 1625, 1631 (2007) (explaining that immigration law scholarship has tended to focus on labor, constitutional law, and criminal law’s role in immigration law).


\textsuperscript{20} Abrams, supra note 17, at 1634 (noting that immigration law “passes judgment on and influences decision making in marriages involving immigrants throughout the four stages of marriage: courtship, entry, intact marriage, and exit”); Kerry Abrams, \textit{Citizen Spouse}, 101 CALIF. L. REV. 407 (2013) (explaining the complicated relationship between marriage and citizenship).

While principles of immigration law do emphasize family connections, the actualization of these principles is heavily constrained and principles relating to the BIOC are nearly entirely absent from immigration law. In defining parentage and marital relationships in immigration law, immigration law reflects its own very distinct “family values.”

The two fields are also often considered “extreme opposites on the spectrum of state and federal power.” Yet modern politics has revealed how the two fields are connected in critical ways. Family law can endorse the status of certain relationships such as parenthood or marriage. It can enforce rights and obligations within familial relationships. Immigration law can yield that same result too, but without expressly considering the children’s interests or the family as an entity, as modern laws and policies have demonstrated.

Family law is not just of local relevance; it is about the fundamental role of the state in our communities and our lives. There are risks therefore in cabining family law to the local level and ignoring its larger relevance. Family law creates hierarchies, privileging certain familial relationships over others. Families can become politicized with some families valued more than others under the law. Examining the state’s treatment of families is important to understanding the power of the state: “in the increasingly challenging quest for worthiness, the political construction of family plays a key role... an appeal to the family and to the role and worth of the individual in a family context has become an increasingly important way of proving one’s worth as a potential citizen, both in the courtroom and in the social movement sphere.” Thus, the political framing of immigrants has the power to “shift[ ] borders, ... influence[e] public policy, alter[ ] the ways borders affect people, and circumscrib[e] political responses.”

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22 Id. (explaining that immigration law does recognize diverse family structures).
23 See generally Abrams & Piacenti, supra note 19.
25 See, e.g., David B. Thronson & Judge Frank P. Sullivan, Family Courts and Immigration Status, 63 Juv. & Fam. Ct. J. 8 (2012) (“At its extreme, immigration law can function as family law by providing a de facto determination of where family members may live, yet immigration law does so in a manner that does not take children’s interests into account. Family law provides a counter to this devaluation of children only if its own principles and values regarding the centrality of the integrity of family and child’s interests are preserved.”).
26 See, e.g., Courtney Joslin, The Perils of Family Law Localism, 48 U.C. Davis L. Rev. 623, 626 (2014) (explaining how “repeated invocation of the narrative creates conditions that justify or facilitate the departure of family law norms from those applicable in other areas of law.”).
27 Id.
28 Lucinda Ferguson & Elizabeth Brake, Introduction: The Importance of Theory to Children’s and Family Law, in PHILOSOPHICAL FOUNDATIONS OF CHILDREN’S AND FAMILY LAW (Elizabeth Brake & Lucinda Ferguson eds., 2018) (noting that this last role makes family and family law “interdefined”).
Families shape immigration, just as immigration laws and policies are shaping families. Family is at the heart of many lived immigrant experiences. Many migrant parents have proactively weighed the tradeoffs and sacrifices against the benefits.\textsuperscript{31} They arrive because they have calculated that they are acting in their children’s best interests. Reunification with a relative is one of the strongest pull factors to the United States while fear of violence and poverty are some of the strongest push factors that compel families out of their home countries.\textsuperscript{32}

Understanding the state’s power over families is also important because of the paradoxical roles that the government can play in the lives of immigrant families. The government can both sever immigrant families through deportations and unite families through lawful status. It can threaten families through community raids or support families with food stamps. This creates a paradox whereby “the very same government that legally excludes undocumented parents from various social institutions also offers help to their citizen children in the form of benefits and programs.”\textsuperscript{33}

A family law lens also reveals alarming historic parallels that must be part of the critique and the advocacy.\textsuperscript{34} There are critical parallels between the way the United States has detained immigrant children and the lessons previously learned through the child welfare system. The child welfare system long ago concluded, for example, that institutional settings are not appropriate for detaining children.\textsuperscript{35} These perils have re-emerged as viral images showed children in caged detention settings.\textsuperscript{36}

The child welfare system has attempted for over a century to train personnel, develop child-centered practices, and ensure the safety of children in

\textsuperscript{31} See generally \textsc{Joanna Dreiby, Divided by Borders} 203 (2010).


\textsuperscript{33} \textsc{Hirokazu Yoshikawa}, \textit{Immigrants Raising Citizens: Undocumented Parents and Their Young Children} 22 (2011) (noting that this paradox can result in low rates of enrollment). Children who are citizens are eligible for childcare subsidies, welfare (Temporary Assistance for Needy Families—TANF), health care (State Children’s Health Insurance Program—SCHIP); nutritional support (Women, Infants, and Children—WIC); and preschool (Headstart). Id. at 60.

\textsuperscript{34} See generally Mariela Olivares, \textit{Resistance Strategies in the Immigrant Justice Movement}, 39 \textit{N. Ill. U. L. Rev.} 1, 7 (2018) (arguing that “immigrant advocates need to shift the strategy away from a passive normative framing and capitalize on the robust resistance movement currently fueling reform conversations between new collaborators.”).

\textsuperscript{35} Garance Burke & Martha Mendoza, \textit{At least 3 ‘tender age’ shelters set up for child migrants}, \textsc{AP} (June 20, 2018), https://www.apnews.com/7c0b9a5134d4e682ba7c7ad9a811160c [https://perma.cc/H392-MZY2].

custody. In contrast, modern immigration laws and policies have caused the deaths, sexual assaults, and beatings of children in immigrant detention. Yet reports have likewise emerged of children being forced to take psychotropic drugs in immigration detention.

A family law lens brings connectivity to the critique of modern immigration law and policy. Immigrant communities deeply understand the family hardships of modern laws and policies. Many non-immigrants can marginalize or sideline the harms inflicted on immigrant families believing this is something that would never happen to their family or their community. While such rationalizations are plausible if viewed through an immigration law lens, they are not so restrained when viewed through a family law lens. The concerns raised by modern laws are really about how and when the state can use its power to intervene in families and how that power is deployed differently across communities. A family law lens builds bridges to other family hardships and experiences, like divorce, domestic violence, deployment, family geographic separations, and economic hardships. Applying a family law lens calls on us all to defend the foundational constitutional norms governing family-based interventions.

**B. Defining the Family Law Lens**

While the Constitution does not textually provide rights to families or its members, strong judicial protections have emerged and entrenched. Deploying a family law lens focuses the critique of modern immigration laws and policies on the preservation and consistent application of these longstanding constitutional norms respecting family autonomy.

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38 See infra notes 239–58 (providing accounts of the detention conditions).


41 See, e.g., YoshiKawa, supra note 33, at 15 (“This story, ignored in the public and scholarly domains, reframes the undocumented as parents of current and future citizens of the United States.”); Adrienne Pon, *The Dreamer Divide: Aspiring for a More Inclusive Immigrants’ Rights Movement*, 14 STAN. J. C.R. & C.L. 33, 34 (2018) (highlighting the need to “employ inclusive strategies that—whenever possible—avoid advancing the interests of some immigrants at the expense of other immigrants”).

1. The Parent-Child Relationship

Parents hold a fundamental constitutional right to “the care, custody, and control of their children,” an interest that is “perhaps the oldest of the fundamental liberty interests.” The state has only a subordinate role. Prince v. Massachusetts explained, “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” This has also been articulated as the right to “establish a home and bring up children.”

The government can only interfere with this right in compelling circumstances and in ways that are narrowly tailored to achieve a compelling government interest. The premise to this constitutional framework is that fit parents will act to protect and care for their children. When parents do not adequately protect their children, the state can intervene by assuming the parenting role under its parens patriae power. Implicit within these parens patriae constitutional rights and responsibilities, which are explored further in Section I.B.2, is the reality that the state would act as a fit parent to raise and rear children.

Children have a negative liberty right to be free from abuse and harm while in state custody. The government may not use its power as an “instrument of oppression.” The Due Process Clause of the Fourteenth Amendment prohibits the government from depriving individuals of life, liberty, or property without due process of law. This constitutional right is closely related to the family law guiding principle of acting in the best interests of the child (“BIOC”). The BIOC functions as both a “sword” that the state can use to protect children from parental abuse, but also a “shield” protecting children from state-inflicted harms.

2. Parens Patriae Interventions

The constitutional source of the government’s intervention in the parent-child relationship is often its parens patriae power. It means “parent of

43 Troxel v. Granville, 530 U.S. 57, 65 (2000). But see Jeffrey Shulman, The Constitutional Parent 8 (2014) (positioning the fundamental right to raise one’s children as “tenuous” and clarifying that “no Supreme Court holding supports this claim” as a fundamental right).
44 Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflects a strong tradition of parental concern for the nurture and upbringing of their children.”).
47 Washington, supra note 7, at 15.
48 Id. (citing Davidson v. Cannon, 474 U.S. 344, 348 (1986)) for the proposition that the Due Process clause prohibits the government “from abusing [its] power, or employing it as an instrument of oppression”).
49 Id.
50 Id. at 17.
the country.”\textsuperscript{51} The \textit{parens patriae} power has been crudely described as the “power of the state – indeed its responsibility – beyond police power to protect, care for, and control citizens who cannot take care of themselves, traditionally infants, idiots, and lunatics” and those “who have no other protector.”\textsuperscript{52} The \textit{parens patriae} power positions the state as the caretaker consistent with its literal meaning. Thus, paradoxically, the state creates and defines families, but it can also act as a head of family when it intervenes.

\textit{Parens patriae} is a sweeping concept in thinking about the state’s power in relation to families.\textsuperscript{53} The \textit{parens patriae} power often supports the role of the child welfare system and state interventions in minors’ lives. In \textit{Ex Parte Crouse}, the \textit{parens patriae} power was used to justify a child’s detention.\textsuperscript{54} The court held that the rights of the legal parents could be “superseded by the \textit{parens patriae}, or common guardian of the community” when the parents were “unequal to the task of education, or unworthy of it.”\textsuperscript{55} This holding transformed the \textit{parens patriae} doctrine, which had previously focused on property interests in feudal England, to apply to state interventions for children.\textsuperscript{56}

The state’s \textit{parens patriae} powers are notably limited and subordinate to ‘fit’ parents’ constitutional rights to parental autonomy. In \textit{Santosky v. Kramer}, the Supreme Court recognized two state interests when parental rights terminations are involved: “the \textit{parens patriae} interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings.”\textsuperscript{57} The court explained that the \textit{parens patriae} goal when the state is terminating parental rights is to find a permanent placement for the child, but “while there is still reason to believe that positive, nurturing parent-child relationships exist, the \textit{parens


\textsuperscript{52} Id.


\textsuperscript{54} 4 Whart. 9 (Pa. 1839).

\textsuperscript{55} Id.


\textsuperscript{57} 455 U.S. 745. 766 (1982).
patriae interest favors preservation, not severance, of natural familial bonds.”

It quoted Stanley v. Illinois in explaining that the state “registers no gain toward its declared goals when it separates children from the custody of fit parents.”

3. Immigrant Families

The immigration statuses underlying the parent-child relationship do not alter these rights for individuals present in the United States. Even individuals with no lawful presence are still entitled to these family law constitutional guarantees.

Only a few published opinions have even considered whether “immigration status per se might impair parental rights,” and these courts “have rejected the notion, tersely yet uniformly and unequivocally.”

For individuals newly arriving at a U.S. border, the plenary power doctrine demands strong deference to federal action, even state action that might violate traditional constitutional rights and norms. The Supreme Court has protected the right of the federal government to regulate immigration in the interest of national sovereignty through the plenary power doctrine. It limits judicial review of government action in a way that creates a form of exceptionalism. This positions immigration law as a “constitutional oddity” largely immune from the civil liberties revolution of the twentieth century. The lasting strength of the plenary power doctrine is in debate, as strands of scholarship have thoughtfully explored.
Families, particularly parents and children, enjoy strong constitutional protections regardless of immigration status, although the plenary power also governs the regulation of immigration. The state has the power to intervene in families, but when it exercises that power, *parens patriae* acts as a limit on state power and an affirmative duty.

II. THE INTENTIONALITY SHIFT IN STATE ACTION AND RHETORIC

President Trump has shifted the state from a bystander to immigrant traumas and vulnerabilities to an incendiary agent using family vulnerabilities as political pressure points. This section first examines the concept of “immigration blame” and how it led President Trump to power. Then it explores the alarming historic parallels of using state power to intentionally harm families.

A. “Immigration Blame” Fuels President Trump’s Victory

President Trump positioned immigration law, policy, and rhetoric centrally in his campaign to the White House. He seized the general festering discontent and anger of voters and channeled it into electoral success. He did so relying on “immigration blame,” both generalized blame and the more targeted demonizing of immigrant parents and children.

David Rubenstein describes how “immigration blame” carries a “normative force” that is linked to “anger, indignation, or resentment.” Blame explains how we “demonize migrants for crime, the economy, terrorism, and cultural threats.” Trump is not the first politician to target immigrants for hostility and blame. Historic immigration laws and policies were “explicitly and pointedly discriminatory against immigrants of color, reflecting the gen-

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68 Tort law, for example, requires a duty of reasonable care when a child is in the custody of a legal custodian. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40 (Am. Law Inst. 2010).


72 See id. at 137 (“Generally speaking, undocumented migrants attract more blame than lawfully present ones; migrants who commit crimes tend to attract more blame than law-abiding migrants; and migrants of color tend to attract more blame than their Caucasian counterparts.”).
eral racist political and societal climate of the time.” Societal framings of immigrants as outsiders and restrictive legislation can work together, “informing and fueling the other,” making it “easier to legislate against immigrant inclusion when the immigrant is seen as un-American.”

Entire “immigration enforcement bureaucracies” are involved in “promoting concepts of unauthorized migrants as being inferior to persons worthy of respect and dignified treatment.” Political strategy can delegitimize “the migrant as a decent, regular person, and [recreates] the image of migrants as dangerous, illegitimate beings” such that “the migrants become dehumanized, stripped of their human qualities, and left only as bodies to be processed.”

President Trump did not invent these political strategies, but he wielded them perhaps more powerfully and harmfully. Immigration blame does not actually align with the majority of Americans’ views on immigrants. It is a “sizeable minority” that perceives immigrants negatively in communities, but a minority nonetheless.

Yet, “no President has weaponized fear quite like Trump.” He stirred up a toxic cocktail of anger and blame and directed it full throttle at immigrant communities, catapulting him to “front-runner status.” President Trump distinctly deployed rhetoric riling up the threatened masculinities of angry and frustrated white voters and channeled it toward anti-immigrant

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74 Id. at 1099.
76 Id.
79 Alex Altman, No President Has Spread Fear Like Donald Trump, TIME (Feb. 9, 2017), http://time.com/4665755/donald-trump-fear/ [https://perma.cc/LGJ6-7BSN].
sentiment. He used dehumanizing scare tactics that immigrants were “infest[ing]” the country. President Trump infamously emphasized how “drugs are ‘pouring’ across the border. ‘Bad people (with bad intentions)’ are flooding through our airports.” He described immigrant men as “animals,” “rapists,” and other dehumanizing categorizations. He blamed specific immigrants for the weak economy and for crime. He blamed Obama for being too soft on immigration. He blamed states and cities for not working with the federal government.

Immigration blame worked for President Trump. It mobilized his base. Emotions like anger motivate voters, particularly when rising to the level of outrage and directed at a particular issue or group. President Trump increased his support from voters favoring a decrease in immigrants coming to the United States from 58% supporting Romney in 2012 to 74% supporting Trump in 2016. Trump supporters strongly supported building a wall (67%) and held negative views of Muslims (71%), and many supported changing the Constitution to remove citizenship to children born in the United States (49%). The New Yorker concluded, “Trump’s ability to gin up fears about illegal immigration, more than perhaps any other issue, won him the White House.”

Notable partisan divides existed. Of voters polled in 2016 on Election Day, 13% thought immigration was the most important issue facing our

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81 See, e.g., GIMPEL, supra note 77, at 1 (explaining how Trump made immigration central to his campaign); see generally Jamie R. Abrams, Enforcing Masculinities at the Border, 13 Nev. L. J. 564 (2013) (concluding that our immigration laws and policies reinforce dominant masculinities at the border by excluding marginalized masculinities and admitting those who comport with dominant masculinity norms’); Jamie R. Abrams, The Myth of Enforcing Border Security Versus the Reality of Enforcing Dominant Masculinities, 56 Cal. W. L. Rev. ___ (forthcoming 2019-2020) (concluding that President Trump’s immigration politics engage in politics of explicit “othering;” move dominant strands of masculinities from the margins to the mainstream; reflect regressive dominant controlling of women and children; and masculinize the state around a toxic hyper-masculinity regime).


84 See Rubenstein, supra note 71, at 138.

85 See generally id.

86 See id. at 152.

87 Klinkner, supra note 69.

88 Id.

country. The partisan gap in Trump support though was a remarkable 16% differential separating those who identified immigration as "extremely/very important" with 74.1% of Republicans identifying it as such compared to 58% of Democrats.

Political party alone does not explain anti-immigrant policies and rhetoric. Race, class, and gender are also relevant. Many white voters had shifted toward the Republican Party from 2007 to 2016. In 2007, white voters were split almost equally at 44% across Democrats and Republicans. By 2010, white voters had shifted dramatically to the Republican Party 51% to 39%. By 2016, the gap had widened to a 15-point differential of 54% to 39%. This rapid movement also tilted toward white men more than white women shifting, accelerating the “white-male flight from the Democratic Party.”

Education levels helped clarify which white voters had migrated to the Republican Party. White respondents with no college degree were previously split equally across the two major parties from 1992 to 2008, while white voters with no college degree voted for the Republican party by a margin of 57 to 33% by 2015. Respondents with higher education levels and income levels were less likely to position immigration policy as "extremely/very important" than those reporting lower education and also lower income.

Racial politics was a key factor in these migrations. The factor that most predicted the partisan shifts of white voters was their “less favorable attitudes toward African Americans.” While the Republican National Committee reported on the need to bring Latinx and Asian-American voters into the party, others—like candidate Trump—realized that stoking the “racial attitudes of whites, and especially whites without a college education” would energize these voters. President Trump extracted political victory by deploying immigration blame as an intentional political strategy.

B. The Rhetorical Demonizing of Immigrant Families

Narrative gives meaning and shape to the things we observe and experience. It can catapult an issue onto the political agenda and cast heroes and villains within public discourse. It can also serve as a “magic mirror, re-
reflecting the fears and concerns” of various eras. Section II.A introduced some of the dehumanizing narrative used to describe particular immigrant communities. This section highlights how some of this immigration blame has been targeted particularly at immigrant families.

Two examples of the intentionality shift in immigration rhetoric are the highly politicized and pejorative terms of “chain migration” and “anchor baby.” President Trump, and other political figures and entities, uses the term “chain migration” to criticize the ways in which family members who attain lawful status are able to derivatively petition to bring qualifying spouses, parents, or children to the United States. The term “chain migration” strips out familial relationships and dehumanizes the context. It creates imagery of a never-ending set of relationships that lack context and limits. A simple Google “images” search of “chain migration,” for example, reveals images of masses of people, endless lines, and caution, not families being united together.

So-called “anchor babies” are another example of the demonizing of immigrant family relationships. The Fourteenth Amendment guarantees citizenship to those born in the United States, applying the principle of jus soli. This legal principle has come under great political scrutiny. In political narratives of anchor babies, mothers are categorically portrayed as engaged in “birth tourism” and demonized as bad actors. The babies bear no relation or connection to their familial context. For example, Lou Dobbs characterizes how:

Each year, thousands of women enter the United States illegally to give birth, knowing that their child will thus have U.S. citizenship. Their children immediately qualify for a slew of federal, state, and

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103 Olivares, supra note 73, at 1099 (quoting a Second Circuit Court of Appeals opinion).
105 U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside.”). See generally Jamile Kadre, Born in the U.S.: 2016 Presidential Hopefuls’ Stances on Birthright Citizenship and the Electoral Implications of Those Stances, 30 GEO. IMMIGR. L.J. 197 (2015) (articulating competing political and legal views about birthright citizenship); see also Leo R. Chavez, "Illegality" Across Generations, in CONSTRUCTING IMMIGRANT "ILLEGALITY": CRITIQUES, EXPERIENCES, AND RESPONSES 100-01 (Cecilia Menjivar & Daniel Kanstroom eds., 2014) (quoting the Fourteenth Amendment text stating that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside”). Congressional legislative efforts to limit birthright citizenship have failed. Id. at 103. These legislative efforts seek to limit citizenship under the Immigration and Nationality Act to only a person born in the United States with one parent who is a U.S. citizen or national; a lawful permanent resident residing in the United States; or an alien serving in the U.S. military. See MiaLisa McFarland, Evon M. Spangler, A Parent’s Undocumented Immigration Status Should Not Be Considered under the Best Interests of the Child Standard, 35 WM. MITCHELL L. REV. 247, 257 (2008) (summarizing the 2007 legislative efforts).
106 But see Miriam Jordan, 3 Arrested in Crackdown on Multimillion-Dollar ‘Birth Tourism’ Business, N.Y. TIMES (Jan. 31, 2019) (stating that there are no official figures on the frequency of births by tourists on U.S. soil).
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local benefit programs. In addition, when the children turn 21, they can sponsor the immigration of other relatives, becoming ‘anchor babies’ for an entire clan. 107

This rhetoric characterizes “these young people as undeserving citizens.” 108 It also demonizes the motives of the women who birthed them. Dobbs leverages both “chain migration” and “anchor babies” to decouple the parent-child relationship in demonizing rhetoric. The “anchor babies” rhetoric also uniquely demonizes immigrant mothers and attributes ill intent to domestic births. This framing is deeply worrisome to immigrant families broadly.

These examples of “chain migration” and “anchor babies” reveal an intentionality shift in demonizing family relationships as a political strategy. Trump extracted great political leverage from this immigration blame, caused immeasurable harm to immigrant communities, and resurrected larger fears of the power of the state intervening harmfully in families. 109

C. Alarming Historic Parallels

Blame politics and the dehumanization of certain families map on to some of the worst strands of United States history. Separating Black, Brown, and Indigenous children from their families has a long, ignominious history in this country. 110 Bringing historic context to the present expands the lens of why these intentionality shifts in political strategy affect far broader constituencies.

It was standard practice during our nation’s 200-year history of slavery to intentionally separate children from their parents. 111 The parallels to the Trump-era policy of separating parents and children are eerily haunting of this chapter of American history. Slave narratives recount horrific stories of women being beaten for trying to hold on to their children who were being sold away from them. 112

The parallels extend beyond slavery, too. One blogger summarized that “[t]hose who think that America’s practice of cruelly ripping children from their families ended with the Emancipation Proclamation need look no further than the notorious Indian boarding schools – U.S. government or

107 Chavez, supra note 105, at 100.
108 Id.
109 See Klinkner, supra note 69.
112 Id.; see generally HEATHER ANDREA WILLIAMS, HELP ME TO FIND MY PEOPLE: THE AFRICAN AMERICAN SEARCH FOR FAMILY LOST IN SLAVERY (2012).
church run institutions that snatched Indigenous children from their families
to be ‘re-educated’ away from their Native identity.”

This is also a worrisome road in American treatment of the Mexican community. “While the dark history of racism against African Americans is highly documented and well known, such as slavery, Jim Crow and police abuse, public knowledge of racist policies (historical and contemporary) against individuals of Mexican heritage – immigrants and citizens – is desper-
ately lacking.”

All families should be concerned when the state acts intentionally to
harm families. It resurrects worrisome historic parallels. The harsh reality is that, “not only is this who we are, it is who we have always been. The question is, ‘Who do we want to become?’”

This section introduced prelimi-
narily some of the historic parallels between the treatment of certain families under the law and the treatment of modern immigrant families. It revealed
that intentional harms in family relationships have occurred before and surely they will occur again.

III. MAPPING THE INTENTIONALITY SHIFT ON TO IMMIGRANT FAMILIES

Modern immigration debates have not effectively humanized the immi-
grant experience within a familial context. This section first grounds the
discussion of immigration blame and the intentionality shift in the lived real-
ities of immigrant families. It then shows how blame politics affect all mixed-legal status immigrant families.

A. The Intentionality Shift Targets Existing Stratifications and
Vulnerabilities in Immigrant Families

Embedding debates about immigration law and policy in the context of
the family is necessary to ensuring that laws and policies align with constitu-
tional norms and values. Contextualizing immigrant family vulnerabili-
ties and resiliencies is critical to understanding the intentionality shift in Trump-
era laws and policies. The vulnerabilities described in this section are the
exact pressure points of President Trump’s policies.


\[^{114}\text{Huerta, supra note 110.}\]

\[^{115}\text{Ldavis0260, supra note 113.}\]

\[^{116}\text{Olivares, supra note 34.}\]
Immigrant families, in many ways, are part of a universal experience of hardships, joys, and sacrifices. In other ways, immigrant families experience unique stratifications and vulnerabilities. These legal stratifications and vulnerabilities are important because they are the pressure points that modern laws and policies have directly exploited.

Immigrants experience "a system of civic stratification . . . which sorts them into different legal statuses, each with a distinctive set of entitlements, depending on the legal circumstances under which they gain entry into their new environment."\textsuperscript{117} Immigration status can affect "the division of labor in family relationships" and "challenge[ ] and recreate[ ] divisions of power in families."\textsuperscript{118} Legal status "differentiates family members, spouses feel stuck, unauthorized parents feel their legitimacy as parents is undermined, and children seem to feel they grow up ahead of schedule."\textsuperscript{119} Depending on where immigrants sit in this stratification they are "more or less vulnerable to the political decisions of citizens, who can either widen or narrow the gap in rights and entitlements separating the different civic strata, and to similarly heighten or lower the barriers needed to pass from one status to another."\textsuperscript{120}

Stratifications have always existed based on immigration status.\textsuperscript{121} The law itself creates hierarchies in naming which family members can be sponsored for entry and which are excluded.\textsuperscript{122} Policy changes like a border wall, travel ban, or family separation can "significantly alter the options available to those standing outside the circle of citizenship."\textsuperscript{123} The stratifications and vulnerabilities most relevant to this thesis are parent-child relationships and spousal relationships.

1. Parent-Child Relationships

Stratifications create additional “webs of dependency” within immigrant communities.\textsuperscript{124} These dependencies are “reorganizing and redefining the traditional family structure.”\textsuperscript{125} Immigrant parents, for example, describe

\begin{itemize}
\item \textit{DREBY, supra} note 1, at 59.
\item \textit{Id.}
\item Waldinger, \textit{supra} note 118, at 1415.
\item See generally Philip Kretsedemas & David C. Brotherton, \textit{Open Markets, Militarized Borders? Immigration Enforcement Today, in Keeping Out the Other, A Critical Introduction to Immigration Enforcement Today 2} (David C. Brotherton & Philip Kretsedemas eds., 2008) ("Regardless of whether deportation and detention are being used to scare immigrants out of the United States, to separate ‘good’ immigrants from ‘bad’ immigrants, or to manage a growing low-wage immigrant workforce, it is clear that these practices have given rise to new forms of inequality that are tied to immigrant legal status."). The authors note that this tiered system of immigrant hierarchies has not provoked much debate because those most affected are often disempowered facing criminal convictions. \textit{Id.} at 13.
\item See, \textit{e.g.}. 8 U.S.C. § 1153(a) (2012).
\item Waldinger, \textit{supra} note 118, at 1415.
\item \textit{DREBY, supra} note 1, at 97.
\item \textit{LIUSELLI, supra} note 32, at 48.
\end{itemize}
how stratifications create differences in how they organize their households, social networks, and community involvement. Families might lack access to public benefit programs, health care, mental health care, emergency financial support, low-cost legal services, domestic violence services, transportation, and social workers. Undocumented parents, for example, are generally not eligible for any public benefits, including prenatal care or job training programs, other than emergency health care. The household might also lack access to bank accounts, identification, and driver's licenses.

Immigration status can create power shifts within the parent-child relationship that can be further reinforced, exploited, or supported by state apparatuses. Children who have lived apart from their parents can hold feelings of detachment or resentment for the separation, for example. Differing immigration status between parent and child can alter the power structures of the parent-child relationship if the children hold legal status and the parents do not. One member of a mixed-status immigrant family described this context candidly as “an inversion of the normal responsibilities of children and parents.” Interview accounts reveal incidents of kids threatening to call Child Protective Services (“CPS”) on their own parents and examples of kids preventing parents from monitoring school attendance and performance.

Immigration status can also perpetuate issues of trust and candor in family relationships. Parents who lack immigration status might believe they cannot talk with their children about legal status because it is complicated and they want to protect them. When parents do share this information with their children, children may be taught to keep this information private to avoid drawing legal attention to their family. Kids in mixed status im-

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120 See YOSHIKAWA, supra note 33, at 22.
122 See YOSHIKAWA, supra note 33, at 59–60 (noting further that they are not eligible for GED testing or the Earned Income Tax Credit among others).
123 DREBY, supra note 1, at 119–20. There may be gendered differences in how this occurs. The children of migrant parents hold their mothers to a different standard, evaluating the sacrifices of their father to assess whether they have provided for the family financially, while assessing the sacrifices of the mother by her emotional care-giving from afar. See DREBY, supra note 1, at 80 (noting that researchers in Mexico have found that children “experience more negative outcomes, including greater levels of stress, when their primary caregivers, typically mothers, migrate than when fathers do”).
124 DREBY, supra note 1, at 87.
125 Id.
126 Id. at 45.
127 DANE GUERRERO, IN THE COUNTRY WE LOVE 27 (2017) (“When you’re the child of undocumented immigrants, you learn to keep your mouth shut. Someone wants to know where your parents are from? It’s none of their friggin’ business. Like everyone else in our secret network, we followed the First Commandment of life under the radar: Do nothing that might bring the cops to your doorstep.”).
migrant families expressed tangible fears even when their parents had some form of legal status. Children can also experience hierarchies among siblings with different immigration statuses, creating a “pecking order,” for example, with one sibling having health insurance and others not.

2. Spousal Relationships

Spousal hierarchies and stratifications can also exist in immigrant families because of legal status. United States immigration law replaced its national origins quotas with a framework that privileged marital status and embedded marital hierarchies. Differing immigration status can disrupt family hierarchies causing “heightened tensions and conflict in marital relationships” and “augment[ing] the imbalance of power already existing between partners.” Immigration uncertainty for spouses also creates uncertainty for their children, if the status is contingent on the parent’s marriage.

There are notable gendered differences in these spousal stratifications as well. The law has continued to problematically embed and perpetuate dominant historical norms of husbands controlling wives’ immigration status. Wives are more likely than husbands to apply for derivative spouse-based immigration status and have been since 1930. This reinforces traditional societal gender roles and it cuts across class.

135 Dreby, supra note 1, at 46–48.
136 Id. at 126, 129.
138 See, e.g., Abrams, supra note 17, at 1635–36.
139 Dreby, supra note 1, at 60.
140 Id. at 68.
143 See, e.g., id. at 30 (“Historically, female immigrants have been charges of sponsoring male family members, and to this day most women immigrate based on family relationships.”).
144 See Calvo, supra note 141, at 613 (“The citizen or resident spouse can choose whether or not to initiate his alien spouse’s legal residence.”); see also Balgamwalla, supra note 142, at 30. See generally Calvo, supra note 141.
145 See Calvo, supra note 141, at 619 (explaining how this replicates coverture because it gives the husband the “legal ability to control and isolate his alien spouse”).
146 See Balgamwalla, supra note 142, at 37 (“In this way, immigration law replicates the antiquated gender norms of coverture, attempting to recreate a traditional conception of the family, one that is headed by a husband who ‘performs as the head of the household, providing economic support and discipline for the dependent wife and children, who correspondingly owe him duties of obedience and respect.’”).
Women are the majority of the victims of spousal abuse, creating more vulnerability for women.147 Spousal stratification leaves abuse victims in a “precarious legal situation”148 that disincentivizes reporting.149 Abusers can use the indeterminacy of the child custody system to scare their victims into believing that they will not or cannot obtain custody of their kids absent lawful status.150 Abusers without legal status “may act out violently to express and reassert their masculinity”151 while abusers with status may use this status to “further legitimize[] their privileged status as men.”152 Their victims may be less likely to pursue protections such as divorce, protective orders, and child support if they lack legal status.153 These power differentials were exactly what prompted enactment of reforms like the Battered Spouse Waiver, U Visas, and the Violence Against Women Act (VAWA).154 These laws are powerful examples of how the state can use its power to nudge toward supporting families instead of harming them.155

Different immigration statutes between spouses can also affect the division of labor on gendered lines. Unauthorized women will take on more unpaid family labor and depend on their spouses economically.156 Yet, unauthorized men push a “triple burden” on their legal status spouses: “[w]omen work outside the home, they work inside the home, and they bolster their partners’ masculinity, which is so often undermined because of unauthorized men’s marginality in U.S. society.”157 These conclusions demonstrate that “the power of legalization [is] closely linked to masculinity,” but also that “legal-status differences heighten gender inequality.”158

3. Vulnerability Theory

All individuals throughout their lives are dependent on “social relationships and institutions.”159 This universal reality should give all individuals pause to consider how the state is intervening to exploit those vulnerabilities within families. Dependency is a universal construct across cultures, immi-
The state should be “responsive to the realities of human vulnerability and its corollary, social dependency, as well as to situations reflecting inherent or necessary inequality, when it initially establishes or sets up mechanisms to monitor these relationships and institutions,” argues Professor Martha Fineman.

The communities that we support in their vulnerabilities reveal the “historic values and priorities of society.” With this framework in mind, critiques emerge about how the state deploys its resources to respond to vulnerabilities, or—as is happening in modern immigration laws and policies—to exploit vulnerabilities. Fineman’s vulnerability theory thus exposes a powerful critique of the state’s intentionality shift.

If traditional equality theory were applied to modern immigration laws and policies, it might support treating some immigrants as unequal to citizens because of different legal statuses. This would leave some communities less deserving of state protection than others. This method of analysis allows the role of the state to fall out of the critique too easily. Equality theory measures and compares those classifications deemed to be equals, which only “inevitably generates suspicion of unequal or differential treatment” and these “assessments of equality focus on specific individuals and operate to consider and compare social positions or injuries at a particular point in time.” Here, though, we have the state deploying its power, not just unequally—which might be justified in some contexts—but punitively to exploit vulnerabilities.

B. The Intentionality Shift Harms Substantially More Families

Immigration laws and policies do not just affect the direct targets of the enactment (e.g., migrants at the Southern Border); they reverberate to vastly more families, individuals, and communities. Immigrant families can include a diverse range of statuses and contexts. This section particularly focuses on mixed immigration status families. Mixed immigration status families might include parents with immigration status living in the United States seeking to bring family members from their home country here; children who were born United States citizens being raised by undocumented parents living in the United States; unaccompanied minors living in the United States without documentation with parents living abroad; “DREAMer” families in which the children were brought to the United States at a young age without documentation and most of the schooling and development occurred in the

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160 See id. at 145.
161 Id. at 134.
162 Id. at 143.
163 Id. at 134–35.
164 See generally DREBY, supra note 1 (conducting interviews with “transnational families”).
165 See YOSHIKAWA, supra note 34, at 15 (interviewing study participants to “describe the story of how undocumented parents raise their citizen children in the United States”).

Electronic copy available at: https://ssrn.com/abstract=3496042
United States; or any family in which members hold mixed immigration status (e.g., Mom is a lawful permanent resident, the children are United States citizens, and Dad is undocumented).

In 2016, there were an estimated 16.6 million people living in some variation of a mixed immigration status family in which at least one person was undocumented. The Migration Policy Institute estimates that five million children in the United States live with at least one parent who is undocumented and that 4.1 million of these children were U.S. citizens. Nearly 400,000 individuals have been deported every year since 2009, reflecting a two-fold increase since 2001 and securing the modern “deportation regime.” Of those deported between 2003 and 2013, 91% of these individuals were parents of U.S.-citizen children.

As sociologist Joanna Dreby concludes, “the sheer volume of families affected by exclusionary immigration policies during earlier historical periods was relatively small compared to the numbers of unauthorized today” leaving the social impacts of these policies to magnify as more families are negatively impacted by restrictive immigration policies. Approximately two-thirds of all immigrants into the United States arrive through family reunification. Applying this statistic to the countries that send the most immigrants to the United States, this amounts to 95% of the authorized immigrants arriving from Mexico, 43% from India, 59% from Taiwan, 77% from the Philippines, and 68% from Vietnam.

Immigrant families are also distinctly reliant on the family for support, prosperity, and caregiving, further deepening and widening the sting of the intentionality shift. Children in immigrant families are more likely to live with two parents than all-non-immigrant families (84% v. 76%) and they are two to four times more likely to have a grandparent living in the home. Those extended family members are also much more likely to be providing childcare to the family unit, which in turn, is associated with stronger child

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166 See Chavez, supra note 105, at 85 (describing this community as the “1.5-generation children of undocumented immigrants”).

167 See, e.g., Donald J. Hernandez et al., Children in Immigrant Families: Demography, Policy, and Evidence for the Immigrant Paradox, in THE IMMIGRANT PARADOX IN CHILDREN AND ADOLESCENTS: IS BECOMING AMERICAN A DEVELOPMENTAL RISK? 19–20 (Cynthia Garcia Coll & Amy Kervian Marks eds., 2012) (describing how many children of immigrants have both a foreign-born parent and a U.S.-born parent or a parent who has become a naturalized citizen).

168 See Dreby, supra note 1, at 5.


171 Koball, supra note 127, at 1.

172 Dreby, supra note 1, at 185.


174 Dreby, supra note 1, at 185.

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health outcomes.\textsuperscript{176}Family care giving also increases the family’s economic position because the average cost of childcare outside the home is between seven and nineteen percent of family expenses for a couple with children.\textsuperscript{177}Immigrant family members are also instrumental to the development and success of small businesses.\textsuperscript{178}Intentional state action against one family member thus reverberates through a larger family and community network of support.

This section shows how immigration laws and policies might target a narrow community, but the effects reverberate to family members throughout the United States and globally.

IV. IMMIGRATION BLAME BECOMES LAW AND POLICY

This section explores how intentional immigration blame has become law and policy. This section uses the separation of parents and children at the border, the detention of pregnant women, and the deportation efforts within our borders to support these arguments. Communities of immigrant families today have faced great upheaval and marginalization in law and policy under the current administration, although notable roots extend into prior administrations as well.\textsuperscript{179}Immigrant families have been targeted for deportation in unprecedented and systemic ways,\textsuperscript{180}their family stability has been disrupted,\textsuperscript{181}parents and children have been separated at the border,\textsuperscript{182}

\textsuperscript{176}See id. at 382–86 (describing this as the “Latino paradox” by which the health outcomes for Latino immigrants are stronger than their income-levels would otherwise suggest).

\textsuperscript{177}See id. (“Thus, the existence of visas for parents and adult siblings permits immigrant businesses to grow, and immigrant children to thrive in ways not fully understood.”).

\textsuperscript{178}See id. at 385–87 (2014) (noting some critical limitations in the data, but urging for greater study of this).

\textsuperscript{179}See, e.g., Scott Cummings, Law and Social Movements: Reimagining the Progressive Canon, 2018 Wis. L. Rev. 441, 485 (2018) (explaining that while some immigrant rights advocates call Obama “Deporter in Chief,” movement groups disagreed over whether the Obama approach was helpful political cover for moderates, carefully crafted to avoid disrupting families, or a betrayal of his campaign commitment to immigrants, resulting in the deportation of non-serious criminal offenders and unaccompanied minors”); Betsy Woodruff, Thank Obama for Trump’s Child Detentions, Immigrant Advocates Say, DAILY BEAST (May 30, 2018), https://www.thedailybeast.com/thank-obama-for-trumps-child-detentions-immigrant-advocates-say [https://perma.cc/2J65-AQZE] (“For years, immigrants’ rights advocates have pushed for an end to the practice, which existed during George W. Bush’s presidency and expanded dramatically under President Obama.”).


\textsuperscript{181}See Edwards, supra note 180 (explaining that more than 4 million children under the age of 18 have at least one parent who is undocumented and six million Americans live in a mixed status family where someone could be an arrest target).

\textsuperscript{182}See infra Section IV.A.
and pregnant women have been detained at the border.¹⁸³ These laws and policies have decoupled immigrant parent-child relationships and demonized immigrant families as political strategy.

A. The Decoupling of Parents and Children at the Border

1. Historic Context

The separation of parents and children at the border is perhaps the greatest example of how immigrant families have been used as intentional political pressure points.¹⁸⁴ The detention of families at the border is a practice that is not new, but has always been controversial.¹⁸⁵ The practice can be traced much earlier than Trump to Presidents George W. Bush and President Obama for the purpose of deterring border crossings.¹⁸⁶ In 2001, the United States first opened facilities with the sole purpose to detain families.¹⁸⁷ In June 2014, the practice of detaining families and children at the border began again— to great controversy— under President Obama in response to a so-called “surge” in migration from Central America.¹⁸⁸

The detention of families at the border became a multi-million dollar industry and it is growing daily.¹⁸⁹ The practice replicates incarceration and can inflict “medical neglect and psychological trauma.”¹⁹⁰ These detention fa-

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¹⁸³ See infra Section IV.C.
¹⁸⁴ This section addresses the dueling practices of separating parents and children at the border and detaining parents and children indefinitely at the border, each of which raises related concerns. Because these practices are treated as interrelated for policy purposes they are addressed together here.
¹⁸⁵ Historically, fathers crossing the border with children have not been placed in family detention centers, as the centers are only used to house women and children. From 2001 to 2016, there have been five detention facilities designated for family detention. Of the five facilities, only one, Berks Family Residential Center, has ever housed men along with the rest of their family. However, as of 2016, only three family centers remained in operation, each of which only detained mothers and their children. See Ingrid Eagly, et al., Detaining Families: A Study of Asylum Adjudication in Family Detention, 106 Calif. L. Rev. 785, 796–97 (2018); see also ADVISORY COMM. ON FAMILY RESIDENTIAL CTRS, REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS, 3 (2016), https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf [https://perma.cc/9GSY-4LQC].
¹⁸⁶ See Woodruff, supra note 179 (explaining that the Obama administration began to detain families after an increase in immigrant mothers and children began arriving at the border in 2014).
¹⁸⁷ See Eagly, et al., supra note 185, at 796 (noting, however, that the practice began even sooner on an ad hoc basis). See generally id. for a summary of the development of family detention facilities throughout the United States.
¹⁸⁸ See id. at 799 (documenting the opening of Artesia Family Residential Center in New Mexico). See generally Kevin R. Johnson, Lessons About the Future of Immigration Law from the Rise and Fall of DACA, 52 U.C. Davis L. Rev. 345 (2018) (summarizing the history of immigration enforcement under President Barack Obama).
¹⁸⁹ See Woodruff, supra note 179 (noting that CoreCivic obtained a contract in Texas, which it projected would increase annual revenue by $49 million).
¹⁹⁰ Eagly, et al., supra note 185, at 793–94.
Committees in 2015 and 2016 convened by the Department of Homeland Security (DHS) revisited the detention of immigrant families. The report concluded that the “immigration 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 interests of children.” Policy and practices accordingly shifted toward a so-called “catch and release” approach whereby, if a parent and child were detained at the border, they would be given orders to return to court without detention in the interim. This remained the policy until President Trump’s policy reforms in 2018.

2. The Intentionality Shift

A landmark shift in both policy and intentionality occurred for immigrant families in approximately April 2018 when the Department of Homeland Security declared that it would refer for prosecution all crossings at the Southern Border. While announced in April, the policy had been strategically brainstormed far earlier within the administration. The N.Y. TIMES reported in April 2018 that approximately seven hundred children had been separated from their parents since October 1, including more than one hundred children less than four years of age based on data prepared by the Office of Refugee Resettlement within the Department of Health and Human Services (ORR).

191 Id. at 813–14 (“Parents and children in remote detention centers are also far away from nonprofit organizations, social services, and pro bono attorneys.”).
192 ADVISORY COMM. ON FAMILY RESIDENTIAL CTRS., supra note 185, at 1–2.
193 Id. at 1.
196 See Fetters, supra note 70 (quoting John Kelly agreeing that the administration was considering this).
This “zero tolerance” policy, as the policy was described, is the most obvious example of the intentionality shift described above. This policy shifted the intentionality of state action in ways that decoupled the parent-child relationship and undermined fundamental legal norms dominating family law. This decoupling was not just a collateral consequence of a policy; it was the exact pressure point that was politically leveraged to achieve this result.

The “zero tolerance” policy, announced formally on May 7, 2018, related primarily to asylum-seekers who were fleeing persecution in their home country. This policy was intended to address fraud concerns of individuals presenting at the border and to dissuade border crossings. Former Attorney General Jeff Sessions explained the policy further in a way that notably recast immigrant parents particularly in criminal terms and revealed the intentionality of the shift in state action:

> If you smuggle illegal aliens across our border, then we will prosecute you. If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law.

The Secretary of Homeland Security formally approved the prosecution of adults at the border traveling with minors on May 4, 2018. This policy shift amounted to the arresting and prosecution of parents at the border, leaving their children “without supervision” and thus placing children in the custody of the Department of Health and Human Services with the state asserting its parens patriae power.

There are many other examples as well. In some instances, the travel ban led to a physical decoupling of parents and children as family members were blocked from travel or from petitioning for their loved ones. The handling of unaccompanied minors’ abortion access is another example. The state decouples the fetus and asserts an additional legal authority over the child separate from that of the detained minor. Proposals to eliminate birthright citizenship would also decouple the parent-child relationship.

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201 Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration, supra note 195 (sending additional prosecutors and immigration officers to the border to help with the anticipated increased workload).


203 Id. (explaining that minors cannot stay with a parent that has been arrested and detained).
created “strange bedfellows” as the criminal justice, immigration, and child welfare systems were all enlisted simultaneously.\footnote{Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1255–56 (2009).}

A memorandum was later leaked revealing that it was an intentional political strategy to prosecute parents and place the children in state custody. The memo supported the policy of separating family units and treating the children as unaccompanied minors because it “would be reported by the media and it would have substantial deterrent effect.”\footnote{U.S. DEP’T OF HOMELAND SECURITY, POLICY OPTIONS TO RESPOND TO BORDER SURGE OF ILLEGAL IMMIGRATION (2017).} The memorandum also advised targeting sponsors of unaccompanied minors for immigration enforcement, revisiting the *Flores* Settlement that had limited the detention of immigrant children, expanding ICE detention facilities, and more.\footnote{Id. (marking this policy option as underway on a limited basis).}

The ACLU summarized these intentional political strategies: “It appears that [the government] wanted to have it both ways—to separate children from their parents but deny them the full protections generally awarded to unaccompanied children.”\footnote{Julia Ainsley, *Trump Admin Weighed Targeting Migrant Families, Speeding Up Deportation of Children*, NBC NEWS (Jan. 17, 2019, 8:40 PM), https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811 [https://perma.cc/C7KV-BD9P].}

Because affected agencies did not have notice of these directives until they were announced publicly, the departments overseeing the welfare of the children did not have time to prepare or plan for this shift.\footnote{U.S. Gov’t Accountability Office, supra note 202.} This created a “disconnect between state child welfare systems and the federal agencies responsible for unaccompanied minors” because “state officials were not informed about the influx of children into their states.”\footnote{Estin, supra note 60, at 607.}

After the separation policy took effect, a viral Internet and media reaction to the separation of parents and children and the detention of children at the border occurred. Media reports concluded that the state had separated 2,500 children from their parents before President Trump issued his executive order stopping the practice.\footnote{See, e.g., Jeremy Raff, *Kids Describe the Fear of Separation at the Border*, THE ATLANTIC (June 30, 2018), https://www.theatlantic.com/politics/archive/2018/06/kids-describe-the-fear-of-separation-at-the-border/564227/ [https://perma.cc/YN7D-GUYM] (noting that not all families were split up presumably because of lack of space). The practice actually began sooner at certain border sites. See U.S. Gov’t Accountability Office, supra note 202 (explaining that ORR staff had reported seeing an increase in children separated from their parents in 2016 and 2017).}

The number of children affected by the President’s policy shift is now understood through government investigations to be far more than even the 2,737 previously identified in December
Separations have still not entirely stopped and children were being detained in large numbers before the policy officially began too. When separated, the children are sent to federal facilities operated by ORR and treated as “unaccompanied minors,” creating a legal fiction that the children crossed the border alone. ORR, in turn, has agreements in place with care providers for housing. ORR is responsible for “coordinating and implementing the care and placement of unaccompanied alien children” and “ensuring that the interest of the child are considered in decisions and actions.”

Unlike the state courts and child welfare agencies that are trained and specialized in the care and custody of minors, ORR does not have this extended expertise or historical experience. The best interests of the child should nonetheless be informing the placement.

3. The Harms of Family Separation

These family separation policy shifts are particularly worrisome because it is precisely because of the trauma to immigrant families that these policies...
have been enacted. It exploited the traumas of parents and children for political gain.

Separating parents and children is a harmful state action. The head of the American Academy of Pediatrics bluntly stated that the government’s practice of separating parents and children is child abuse and “against everything we stand for as pediatricians.” This practice invokes critical constitutional concerns regarding the “oldest of the fundamental liberty interests” in the “care, custody, and control of their children.”

Separating parents and children can trigger trauma for children and families inflicted through increasingly affirmative state action. The zero tolerance policy cruelly replaced families with fictions. The policy took a parent-child border crossing and pretended the children were unaccompanied because of the state’s filing of criminal charges against the parents for the crossing. Children who were removed from their families were often placed with a nongovernmental organization, which sought to locate a relative or guardian to assume custody. If no guardian was found, however, the child could languish indefinitely awaiting placement. The interior orders described in Section B below have further made sponsors afraid to come for-

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219 See, e.g., Dara Lind, Trump’s DHA is using an extremely dubious statistic to justify splitting up families at the border, Vox (May 8, 2018), https://www.vox.com/policy-and-politics/2018/5/8/17327512/sessions-illegal-immigration-border-asylum-families [https://perma.cc/FS9A-2K9N] (explaining that the Trump and Obama administration are “trying to spare families the often dangerous journey through Central America and Mexico to the US by making the endpoint of the journey less appealing”).

220 See, e.g., Dianne Feinstein, Opinion, Protecting Defenseless Children is Not an Immigration ‘Loophole,’ WASH. POST (Apr. 13, 2017), https://www.washingtonpost.com/opinions/protecting-defenseless-children-is-not-an-immigration-loophole/2018/04/13/11b9012-3e64-11e8-a7d1-c4efec63890_story.html?noredirect=on&amp;utm_term=.78e2911ca2b4 [https://perma.cc/PWZ4-ZVBV] (explaining that children have the right to have their cases heard before trained asylum officers and highlighting legislative efforts to have children in the least restrictive setting that aligns with their best interests).


223 See, e.g., Devin Miller, AAP A Leading Voice Against Separating Children, Parents at Border, AAP NEWS (June 14, 2018), http://www.aappublications.org/news/2018/06/14/washington061418 [https://perma.cc/NL9J-W93M] (“The new policy is the latest example of harmful actions by the Department of Homeland Security against immigrant families, hindering their right to seek asylum in our country and denying parents the right to remain with their children.”); Nguyen, supra note 11 ( recounting how his family was separated in refugee camps).

224 Dickerson, supra note 197.
ward for fear of legal repercussions. Targeting potential sponsors for greater scrutiny is also an intentional strategy of the Trump administration.

The individuals doing the detaining and separating of children were often defense contractors with experience in narcotics, criminal detentions, and national security, as opposed to child welfare. The actual acts of physically separating children from their parents involved repeated accounts of threats and false pretenses. These detentions occurred in facilities that were not licensed as childcare facilities.

Many of these facilities did not retain proper records of separated children and separated parents. During the implementation of the zero-tolerance policy, once a child entered the system, the government lacked a data-entry mechanism to later reunite the child with her parents. Parents were not given a claim number or formal link to their children, until the data entry systems were modified in June 2018.

Some of the state’s conduct was intentionally malicious and harmful. Accounts emerged that government employees and agents “sadistically tease[d] and taunt[ed] parents and children with the prospect of separation, and [did] so using words and tones indicating that [the governments’] em-

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226 See, e.g., Memorandum on Enforcing the Legal Responsibilities of Sponsors of Aliens, Presidential Memoranda (May 23, 2019) (“Financial sponsors who pledge to financially support the sponsored alien in the event the alien applies for or receives public benefits will be expected to fulfill their commitment under law.”).

227 ISACSON, MEYER & HITE, supra note 6.


229 ISACSON, MEYER & HITE, supra note 6.

230 See, e.g., Miriam Jordan, ‘I Can’t Go Without My Son,’ a Mother Pleading as She Was Deported to Guatemala, N.Y. TIMES (June 17, 2018), https://www.nytimes.com/2018/06/17/us/immigration-deported-parents.html [https://perma.cc/W97N-F9MZ] (“[M]igrant parents and children become separate legal cases in the maze of government bureaucracy, and keeping them linked has proved challenging.”). “Once the parent and child are apart, they are on separate legal tracks . . . there is a very high risk that parents and children will be permanently separated.” Id. (quoting John Sandweg, acting ICE Director under President Obama). See also Jordan, Family Separation May Have Hit Thousands More Migrant Children Than Reported, supra note 211 (reporting that the Department of Health and Human Services deleted records connecting children to their parents when separations occurred).

231 U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 202 (explaining that data systems did not designate that the child had been designated as unaccompanied because of the detention of a parent and the subsequent separation); see also Dickerson, supra note 197.

232 Id. (explaining that ORR added a “check box to indicate a child was separated from a parent”); see also ISACSON, MEYER & HITE, supra note 6.
ployees and agents enjoy[ed] the pain and suffering that the very idea of separation cause[d] to parents and children.

The children in detention facilities were often crying and anxious to be reunited with their parents, and their parents were distraught. The sites in which the children were warehoused have been roundly criticized for the inhumane conditions including the use of wire fencing like caging, the use of psychotropic drugs, outright hate and hostility, sexual assaults, and health conditions like lice and illnesses. Accounts have emerged of the state leaving children in an “ice box” subject to frigid temperatures and inhumane conditions for longer than 72 hours and of underfeeding, inadequate access to bathrooms, and lack of sleeping surfaces. Video footage revealed state agents dragging and pushing migrant children. Children have also died in state custody, been denied medical care, and been denied basic sanitation.

Separating children from their parents in detention can cause severe adverse consequences to children, a point for which bipartisan agreement has emerged. Parents can also suffer trauma from separation. The moment of separation is “traumatic and panic-inducing in both children and parents,”


See, e.g., Dickerson, supra note 197; Walsh, supra note 36 (“The parents are beside themselves not knowing what happened to their kids, and they never know if they’ll see them again.”).

235 See, e.g., Cory Booker, I went to the US-Mexico border. What I saw there horrified me, Vox (Jul. 19, 2018), https://www.vox.com/first-person/2018/7/19/17587888/cory-booker-family-separation-border-immigrants-asylum-seekers [https://perma.cc/AES6-HKWW] (“In one section of the detention center, people were packed like sardines into cages from front to back, shoulder to shoulder, with barely any room to move. All you could see were horizontal, exhausted bodies lying on the ground—you could barely see the floor, the rustling of the foil blankets detainees were issued was a constant sound.”).

236 Walsh, supra note 36; see, e.g., Fernandez, supra note 36 (highlighting a number of citations issued against the shelters for migrant children).

237 Schweikart, supra note 40.


239 LUISELLI, supra note 32, at 21. One complaint alleged that 250 children in 2015 in Dilley, Texas were administered adult-dose Hepatitis A vaccines. Id. at 22.


242 See, e.g., Letter from United States Commission on Civil Rights to The Honorable Jeff Sessions and The Honorable Kirstjen M. Nielsen (June 15, 2018), https://www.usccr.gov/
and the impacts can continue for much longer biologically. Separation affects the brain development and physiology of children. It can trigger stress hormones that disrupt the proper functioning of neural circuits. The long-term separation of parents and children “is correlated with increased risk of developing chronic mental health conditions, such as depression and post-traumatic stress disorder (PTSD), and even physical conditions such as cancer, stroke, diabetes, and heart disease.”

The court in Ms. L. held that the separation of a parent from her child constituted irreparable harm for injunctive relief purposes. The court further cited extensive evidence demonstrating how family separation risks cause enduring psychological harms that jeopardize the children’s well-being, safety, and development.

Family separation reflected a shift in state intentionality that has been nearly universally condemned. The United Nations has described the separation practices as a “serious violation of the rights of the child.” International and national observers have described the separation of children and parents at the border as a “form of state terror.” The UN has condemned the practice and concluded it “always constitutes a child rights violation.” The UN High Commissioner for Human Rights described the practice as an arbitrary and unlawful interference in family life, stating that it “runs counter to human rights standards and principles,” which requires that the children’s

243 See, e.g., Jordan, I Can’t Go Without My Son,’ a Mother Pleaded as She Was Deported to Guatemala, supra note 230 (explaining how a mother was deported while her child was still in separate custody, which is “traumatic for parents who now have no clear path to recovering their children”); Jeffrey C. Mays & Matt Stevens, Honduran Man Kills Himself After Being Separated From Family at U.S. Border, Report Says, N.Y. TIMES (June 10, 2018), https://www.nytimes.com/2018/06/10/us/border-patrol-texas-family-separated-suicide.html (describing the suicide of a father who “grew upset after learning that his family would be split up” and citing immigration lawyers who say they have worked with other parents “who have shared suicidal thoughts and who have attempted to take their own lives because of the experience of detention”).

244 Lussenhop, supra note 221.

245 Id.

246 Isaacson, Meyer & Hite, supra note 6 (describing this as “toxic stress”).


248 Id. at 1147 (describing these practices as “highly destabilizing” and “traumatic”).


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best interests come first. "We call on the US authorities to adopt non-custodial alternatives that allow children to remain with their families and fulfill the best interests of the child, their liberty and their right to family life."253 Six hundred United Methodist clergy and church members have brought abuse charges against Jeff Sessions for the separation of parents and children and for their detention conditions.254 Leaders of the Catholic Church have condemned this practice as "immoral."255 The American Bar Association issued a statement that the treatment of immigrant children is "deeply disturbing" and "unacceptable."256

A family law lens reveals that the state has engaged in intentionally harmful conduct that has imposed systemic and enduring harm on immigrant families. These practices have been widely condemned, yet they endure.

4. Backlashes and Legal Challenges to Family Separation

Both systemic lawsuits and individual lawsuits challenging the zero tolerance policy were filed contesting the zero tolerance policy.257 The policy has also been interroged in legislative hearings.258 The ACLU, for example, brought a class action lawsuit on behalf of all adult parents detained by DHS with a minor child separated and detained in ORR custody without evidence that the parent is unfit.259 The ACLU argued the policy violated procedural and substantive due process. It explained that the "forcible separation of parents from their young children for no legitimate reason and notwithstanding the threat of irreparable psychological damage that separa-

259 Complaint at 9, Ms. L. v. United State Immigration & Customs Enf't, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 18 Civ. 0428) [hereinafter ACLU Complaint].
tion has been universally recognized to cause harm to children” is a constitutional violation.

One of the lead plaintiffs in the ACLU suit traveled from the Republic of Congo to Mexico with a seven-year-old daughter and sought asylum at the United States border only to be forcibly separated without any findings of unfitness or neglect. Mother and daughter were separated for months over 2,000 miles. The daughter was placed in a youth shelter in Chicago for “unaccompanied” minors while the mother was detained in an immigration detention center in San Diego. Both the Plaintiff and her daughter submitted evidence of emotional and psychological harm from this separation.

The ACLU argued that this separation violated the parent’s constitutional right to due process by making the “child a pawn in a public policy move by the administration trying to deter other asylum seekers.” The ACLU argued that the overwhelming scientific literature reveals the irreparable harm these children will suffer from parental separation. It requested that the parents and children be released and “reunited in a non-governmental shelter, or alternatively, that they be detained together in a government family detention center.”

With litigation already pending and public pressure mounting, on June 20, 2018, President Trump issued an Executive Order ending the practice of family separation. It ordered the Secretary of Homeland Security “to the extent permitted by law and subject to the availability of appropriations, to maintain custody of the alien families during the pendency of any criminal improper entry or immigration proceedings involving their members.”

260 Id. at 1.
261 Id. at 1, 4–8; see also John Burnett, To Curb Illegal Immigration, DHS Separating Families at the Border, NPR (Feb. 27, 2018), https://www.npr.org/2018/02/27/589792430/activists-outraged-that-u-s-border-agents-separate-immigrant-families [https://perma.cc/KG6K-8RSN] (explaining that the daughter was crying as she was taken from her mother).
262 Id. at 4–8.
263 Burnett, supra note 261.
264 ACLU Complaint, supra note 259, at 6–7.
265 See Burnett, supra note 261 (quoting the ACLU Deputy Director of the Immigrants’ Rights Project). Another named plaintiff is a Brazilian woman who entered the United States seeking asylum with her fourteen-year-old son. ACLU Compl. 7–8. Mom was jailed in Texas and the son was sent to Chicago, leaving them separated for many months. Id.
267 Id. at 19 (emphasis in original).
268 Exec. Order No. 13,841 § 3(e), 83 Fed. Reg. 29,435 (June 20, 2018); see, e.g., Glasser, supra note 91 (noting that this was one of the only times that Trump reversed course in policy).
269 Exec. Order No. 13,841 § 3(e), 83 Fed. Reg. 29,435 (June 20, 2018) (noting, however, that the family cannot be detained together “when there is a concern that detention of an alien child with the child’s alien parent would pose a risk to the child’s welfare”). The order directs the Secretary of Defense to provide existing facilities for the “housing and care of alien families.” Id. §3(e),

Electronic copy available at: https://ssrn.com/abstract=3496042
migration advocates are clear though that this is only an incremental improvement.270

President Trump’s June 20, 2018 Executive Order sought permission to bypass the Flores Settlement to “detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings,” which the Administration requested on June 21, 2018 in the District Court for the Central District of California.271 Flores was a class action suit brought by immigrant children detained by Immigration and Naturalization Services.272 The settlement required the government to release children from immigration detention without unnecessary delay, detain children when necessary in the “least restrictive setting” and implement standards ensuring the proper care and treatment of children in detention.273 Years of litigation ensued seeking to bring the federal government into compliance with the settlement.274 It reflected the longstanding view of child advocates that the long-term detention of children is not in the children’s best interests.275 The Flores Settlement applied the “best interests of the child standard” and held that children should not be held for more than twenty days, unless they are in a facility that is properly licensed.276

The government’s request to set aside the Flores Settlement reasoned that it had three options when parents arrive with children: keep them together in detention, separate the children into HHS custody, or provide a notice to appear.277 The government argued that the Flores Settlement excluded the first option, creating a “powerful incentive for aliens to enter into this country in violation of our criminal and immigration laws.”278 The government asked for immediate relief to allow family detentions during pend-
The court expressed concerns, however, with the Executive Order’s ability to accomplish the necessary corrections because it was not absolute (e.g., “where appropriate and consistent with law and available resources”). The Executive Order is absolute that “rigorous enforcement” of immigration at the border would continue under the current administration.

The Executive Order said nothing of the reunification of the over 2,000 children then still separated from their parents. Litigation further sought to reunite these families. The court enjoined the practice of systemically separating children from parents absent a determination of the parent’s lack of fitness or of a danger to the child. It further ordered the reunification of children currently separated. The court critiqued the separation of children without adequate tracking linking parent and child, without communication in the months after July 2015, when this Court ruled to prevent the Government from detaining families together.” Id. at 3.

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279 Id. at 17–19 (requesting further permission to house families in facilities outside of the state licensure rules).
282 Id. at 1140.
283 Id.
284 Id.
285 M.G.U. v. Nielsen, 325 F. Supp. 3d 111, 114 (D.D.C. 2018) (pleading that the family separation violates the Fifth Amendment due process rights of the plaintiffs because it inflicts punishment on civil detainees and because it violates family integrity).
286 See Ms. L, 310 F. Supp. 3d at 1149–50.
287 Id. at 1149.
enabled between parent and child in the government’s systems, and without timely reunification after the parents are returned to immigration custody.288

Reunification of parents and children began immediately after the ruling,289 but each reunification revealed deep trauma, confusion, and lasting family hardships.290 Reunification has been slow and challenging,291 characterized as “gross incompetence and purposeful chaos.”292 As of a November 2018 status conference, 2,404 children had moved to discharge or reunification.293 Shockingly, the Trump administration argued in February 2019 that it could be “traumatic” to reunite the children who were forcibly separated with their parents because of “grave child welfare concerns.”294 Despite the ongoing legal battles and the cessation of the practice of systemic family separation, the harms and legal questions endure.

B. The Intentionality Shift of Deportations and Detentions

Immigrant families have also experienced a stark shift in intentionality relating to deportations and detentions. The United States presently detains more families than any other country.295 A series of policy reforms relating to detention policies and practices have also powerfully exacerbated the hardships of immigrant families as an intentional political strategy.296

288 Id. at 1139.
292 Robbins, supra note 291.
295 Ingrid Eagly et al., Detaining Families: A Study of Asylum Adjudication in Family Detention, 106 COLUM. L. REV. 785, 787 (2018). Many conclude that these data reflect a regime of over-detention; id. at 791 (concluding that these detentions occur where there is no flight risk or danger).
296 See, e.g., Cummings, supra note 179, at 482 (explaining that the Illegal Immigration Reform and Immigrant Responsibility Act permitted detention of asylum seekers and children).
While the travel ban received the most high-profile attention at the beginning of President Trump’s term, the interior orders had the potential to devastate mixed-status immigrant families in ways far more sweeping than the travel ban. The Border Security and Immigration Enforcement Improvements Executive Order of January 2017 authorized an increase of more than 15,000 agents from Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE). It included directives toward building a wall and increasing detention facilities at the Southern Border. It called for the expanded detentions of any individuals unlawfully present in the United States and increased efforts to enter agreements with local law enforcement agencies enforcing immigration laws. It directed ICE officers to expand the expedited removal process beyond just those within 100 miles of a United States border to anyone lacking documentation who have no lawful status and who have committed fraud or a material misrepresentation.

The Executive Order Enhancing Public Safety in the Interior of the United States had sweeping effects on immigrant families. It rescinded all prior policies governing enforcement policies, leaving all unauthorized noncitizens in the United States vulnerable to detention and removal proceedings. The Executive Order shifted enforcement priorities so dramatically as to effectively cover all immigrants without lawful presence. It included, for example, anyone who committed any acts that are a “chargeable criminal offense,” anyone who is suspected of fraud or willful misrepresentation in immigration matters, and anyone believed to be abusing government benefits.

For the many children who have witnessed the detention of a parent by ICE, this action can be particularly traumatic. Losing a parent to deportation can also be devastating to a child’s development. The deportation of a family member can create a toxic stress event for children, which can have long-term adverse consequences to the brain development and cognitive

298 Id.
299 Id.
302 Id. It also included notable policy changes relating to sanctuary jurisdictions, but these are excluded from the scope of this article.
305 See generally NADINE BURKE HARRIS, THE DEEPEST WELL: HEALING THE LONG-TERM EFFECTS OF CHILDHOOD ADVERSITY (2018) (describing the medical effects of toxic stress events such as the loss of a parent to deportation, incarceration, or death).
growth of children, particularly young children. Children can become depressed, suffer deteriorating physical health, weakened academic performance, self-destructive behaviors, and more. The Center for Law and Social Policy (CLASP) reports that many other collateral consequences can follow further from this trauma, including “irregular sleeping habits, increased anger and withdrawal, and drops in academic achievement.”

The deportation of one parent can also compromise the health of the parental relationship with a parent who was not deported or detained. Children can lash out at the other parent. The non-detained parent can also suffer depression, social isolation, and struggle to support the child’s development.

The interior orders have also harmed the “health, economic security, and overall wellbeing of children in immigrant families.” A deported family member triggers other family harms, such as loss of income, loss of childcare, and difficulty meeting children’s daily needs. The loss of an undocumented parent’s income can reduce a family’s income by 73%, which in turn can cause food and housing insecurity. This also has a chilling effect on children’s educational access, leading children to be absent from school and to forego possible public benefits.

All health effects are further exacerbated by the reality that many undocumented children are uninsured. Over time, longer-term secondary effects can emerge including “social isolation, depressive symptoms and suicidal ideation among remaining caregivers; and anxiety, depression, and post-traumatic stress disorder in children.”

Even for families not affected by deportations or detentions, the interior enforcement Executive Orders forced immigrant families underground. Every encounter of a mixed-status immigrant family with places of worship, school, childcare, bus stops, restaurants, and community events, can become a point of danger potentially to be avoided. Families have “sequestered . . . in their homes, keeping their children out of school, a reaction we usually


308 See id.

309 See id. (highlighting reports from around the country documenting how parents have withdrawn their children from public benefits for fear of attracting legal attention).

311 See DREBY, supra note 1, at 25–26.

313 YOSHIIKAWA, supra note 33, at 54.

314 See id.
associate with armed conflict.” 318 This fearful existence compromises the autonomy of immigrant families and pushes families to the “shadows of citizenship.” 319 Families are then less likely to use the social services that are available to the parents or the children because of immigration status uncertainty, misunderstandings, and paralyzing fear. 320 Families nationwide, for example, have un-enrolled citizen children from benefit programs such as SNAP and school lunches for fear of government surveillance. 321

In the summer of 2019, President Trump ratcheted up considerably the intentionality of deportation threats to immigrant families as a legal and political strategy. 322 These political actions only heightened the risks and concerns facing immigrant families documented in this section. This culture of fear, in turn, empowers other private actors to use the pressure point of immigration status negatively, such as landlords or employers who might skirt laws or mistreat immigrants. 323

The interior orders and the related nationwide raids reflect intentional political strategies that perpetrate harm on immigrant families that are far more sweeping and systemic than just the direct targets of the interior orders. They have shattered immigrant communities, disrupted families, and imposed paralyzing fear. 324

318 See YOSHIKAWA, supra note 33, at 54.
320 See, e.g., Edwards, supra note 180 (explaining that ICE agents are making arrests while dropping kids off at school, that tens of thousands of kids a year see their parents deported, and that parents are now pulling their kids from SNAP, reduced lunches, etc. to hide their names from government databases); DIANE GUERRERO, IN THE COUNTRY WE LOVE 29 (2017) (explaining how her father had a “deep mistrust of its systems” leaving him “just paralyzed by enormous fear”).
321 See Edwards, supra note 180; see also Annie Lowrey, Trump’s Anti-Immigrant Policies Are Scaring Eligible Families Away From the Safety Net, ATLANTIC (Mar. 24, 2017), https://www.theatlantic.com/business/archive/2017/03/trump-safety-net-latino-families/520779/ [https://perma.cc/2HPQ-25EP]; Sara Tiano, Report: Trump’s Immigration Policies are Keeping Kids From Accessing Healthcare and Going to School, CHRON. SOC. CHANGE (Mar. 5, 2018), https://chronicleofsocialchange.org/report/report-trump-immigration-policies-kids-healthcare-school [https://perma.cc/ULD3-ZVU7]. This source relies upon a report based on “interviews with more than 150 parents, educators and staff at community-based service providers” conducted by the Center for Law and Social Policy. Id. It indicates that fear of deportation has resulted in “some families . . . only leaving the house when absolutely necessary, like to go to work or pick up groceries.” Id. Fear of deportation has also caused some immigrant parents to keep their children home from school and not attend regular appointments with doctors. Id. As a result of “[t]his disruption to daily routine and the underlying fear causing these changes,” the children are experiencing fear and anxiety. Id.
Pregnant women in immigration detention have also been intentionally targeted in harmful ways under the Trump administration. Previously, ICE policy was to “consider and address the particular needs and vulnerabilities of pregnant women detained in its custody.”

Under the Obama administration, pregnant women not subject to mandatory release were to be presumptively released. The prior policy directed that a pregnant detainee should not be detained unless she was subject to mandatory detention or “extraordinary circumstances” warranted detention. If detained, a full medical assessment would occur, including referral for prenatal and medical care.

The Trump administration revised this policy in an ICE directive on December 14, 2017. This marks another policy change affecting immigrant families. Between December 2017 and March 2018, ICE detained 506 pregnant women. These women will now be analyzed on a case-by-case basis with those deemed a danger or a flight risk most likely to be detained. ICE stated its commitment to “providing appropriate care for pregnant detainees in ICE custody.” ICE detention centers now provide notice when a pregnant woman falls under its care and then commit to providing “appropriate medical care including effectuating transfers to facilities that are able to provide appropriate medical treatment.”

These policy shifts raise concerns about the conditions of detention for pregnant women, which can be harmful to fetal health. Detained pregnant women are subject to overcrowding, exposed to contagious diseases, and receive little or no prenatal care. At least ten women have filed complaints...
about inadequate prenatal care and miscarriages.\textsuperscript{335} The letter from members of Congress to the Secretary of Homeland Security highlighted several examples of these inadequacies.

One asylum-seeking woman told Customs and Border Patrol that she was pregnant, in pain, and bleeding, but she received no medical care for six days while in ICE custody when she ultimately learned she had miscarried.\textsuperscript{336} Another pregnant woman seeking asylum reported that she was detained for six months of her pregnancy during which she was transferred to six different facilities, including a 23-hour transport with limited food and bathroom access.\textsuperscript{337} She suffered exhaustion and dehydration from the transport and other hardships throughout her pregnancy in detention.\textsuperscript{338} One pregnant woman reported that she accepted deportation back to an abusive partner because she feared that the conditions of detention would harm her child.\textsuperscript{339} The risks to return a pregnant woman home would indeed be dangerous too. For example, NPR profiled a pregnant detainee who ICE planned to put on a flight back to Mexico when she began bleeding in the back of a patrol car.\textsuperscript{340}

The detention of pregnant women is even more concerning and traumatic when understood in the context that many women “are pregnant as a result of rape and violence that they experienced either on the journey to the U.S. or that may be part of an asylum claim.”\textsuperscript{341} Indeed, a letter directed to then-acting Secretary of DHS, from seventy members of Congress explained that “in light of the high rates of sexual assault women and girls experience on their journey, attorneys and advocates are reporting a marked increase in the number of pregnant women with serious medical concerns coming to their attention in recent months.”\textsuperscript{342} The letter summarized “[t]he detention of pregnant women is cruel, high-risk, and almost never appropriate given the danger it poses to the life of both the mother and her unborn child.”\textsuperscript{343}

The treatment of pregnant women in detention is another example of the state moving to practices that intend or at least knowingly accept harmful consequences to pregnant women and their unborn children.

\textsuperscript{335} Jones, supra note 330.
\textsuperscript{337} See id.
\textsuperscript{338} See id.
\textsuperscript{339} See id.
\textsuperscript{340} Jones, supra note 330.
\textsuperscript{342} Letter from Members of Congress to Elaine Duke, supra note 336.
\textsuperscript{343} Id.
V. The Constitutional Dissonance of Harmful Family Interventions

These policy shifts from unintended to intended traumas are deeply worrisome to the fabric of society as it relates to all families and to the overall course of our nation’s history. This is a worrisome – horrific even – road the United States has been down before in its treatment of slave families, among other communities.\textsuperscript{344} Family law doctrine reveals critical dissonance in the state using its custodial powers to perpetrate trauma. Even balanced against the strong constitutional norms granting the federal government discretion to regulate immigration, constitutional norms protecting families merit greater constitutional scrutiny when the state inflicts trauma as an intentional political strategy.

The policies described above, among others, have perpetrated pervasive harms on immigrant families\textsuperscript{345} in ways that are dissonant with the power the constitution entrusts to the state to support families. Many of the harms were notably inflicted while the state exercised its parens patriae power over minors. The harmful targeting of families suggests a glaring constitutional dissonance with the state using its parens patriae power to undermine the “well-rounded growth of young people,” espoused as the rationale for state intervention in \textit{Prince} above. This reality suggests that the state’s use of its parens patriae power with immigrant families is less protective and more punitive and harmful than its interactions with families generally.

Parents have the discretion to raise, rear, and direct the upbringing of their children. The child retains a right to be free from abuse and neglect. When parents commit abuse or neglect, the state asserts its parens patriae power to take custody of the child. In so doing, the parent notably retains some rights and the state’s conduct is subject to scrutiny and regulation. The child retains the same constitutional rights to be free from abuse and neglect that she had under her parent’s care.\textsuperscript{346}

When the state affirmatively acts to take custody of children and deprive them of their personal liberty, the state owes affirmative duties of care. In exercising custody, the state should provide the same “measure of protection against harmful state action as [it] did against harmful parental conduct


\textsuperscript{345} See, e.g., Jordan, supra note 290 (“There is no greater threat to a child’s emotional well-being than being separated from a primary caregiver. Even if it was for a short period, for a child, that’s an eternity.”); Separated Families Report Trauma, Lies, Coercion, HUMAN RIGHTS WATCH, (July 10, 2018), https://www.hrw.org/news/2018/07/26/us-separated-families-report-trauma-lies-coercion [https://perma.cc/LQ7D-V7EQ] (reporting accounts of parents not knowing where their children were, parents being induced to waive their rights, and harms suffered).

\textsuperscript{346} See Washington, supra note 7, at 29.
and ensure that [the child] receives care that serves, promotes, and protects her best interests.\textsuperscript{347}

Professor Tanya Washington powerfully invokes the \textit{DeShaney} case to clarify state responsibility when it takes custody of a child.\textsuperscript{348} \textit{DeShaney} considered the affirmative duties the state owes to protect a child from the abuse of his father when it knows of prior abuse.\textsuperscript{349} While the state generally has no affirmative duty to protect,\textsuperscript{350} \textit{DeShaney} contrasted, “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”\textsuperscript{351} The Supreme Court explained the rationale supporting these affirmative duties:

when the State, by the affirmative exercise of its power, so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.\textsuperscript{352}

When the state is exercising its \textit{parens patriae} custody over the child, a fact-specific assessment governs what is in the BIOC under the circumstances.\textsuperscript{353} This includes a consideration of “administrative and fiscal challenges.”\textsuperscript{354} The BIOC standard operates as a “standard for the quality of care to which a child is entitled.”\textsuperscript{355} Conduct that is harmful emotionally, physically, and mentally falls outside the broad discretion generally granted to parents under the Fourteenth Amendment.\textsuperscript{356}

The BIOC analysis is weighed against the government’s interest, which in the case of undocumented immigrants, is at its most expansive. The plenary power doctrine gives the federal government extraordinary powers in the interest of national sovereignty.\textsuperscript{357} The state interest in national security has been in conflict with the right to family unity throughout history.\textsuperscript{358} Plenary power has become more “malleable and nuanced” over time, often lead-
The thesis of this article reveals that the plenary power doctrine should not be allowed to go so far as to harm families as an intentional political strategy. The separation of parents and children, the interior orders, and the detention of pregnant women have had devastating effects on families that shatter existing constitutional norms. The constitutional protections of family autonomy demand that the state exercise its power to intervene in families more competently than it has in the policies described in this article.

The state should be compelled to intervene at least in ways that do not intentionally harm the BIOC. Applying these balancing tests of family autonomy and federal plenary power to modern policies reveals that historic “catch and release” policies are certainly more consistent with family law constitutional norms, without compromising the national security concerns that trigger plenary review.

The historical approach to family border crossings was to release the parent-child and issue orders to appear. This approach preserved parental autonomy, reduced the state costs, and was more consistent with the child’s best interests. Even President Trump’s executive order ending the practice of family separation used child welfare as the determining factor to determine whether a parent will be detained with her child, reinforcing the relevance of the BIOC as sound policy.

Detaining immigrant family members together costs $161 a day compared to $126 a day for average detentions because of the facilities needed suggesting that the fiscal review lens also leads away from family detention or separate detentions.

When the state exercises its parens patriae powers in the abuse and neglect system, the legal parent still retains limited rights relating to the child. This should apply to children in the immigration system too. The Court expressed in Ms. L. the “startling reality” that the government “readily” tracks, catalogues, and returns property of immigrant detainees immediately upon relief, yet did not enact similar – or better!! – mechanisms for parents and children. The state’s failure to track the records between detained parents and detained children in the immigrant detention system is a constitutional concern given the parent’s ongoing constitutional legal rights. The ACLU briefing further explained how parents were often placed thousands of miles away from their children and were difficult to locate, making it challenging to schedule calls and initiate contact between parents and children.

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dren. This is worrisome because the parent might be the individual with the best knowledge of the immigration claims the child might have.

Codifying protections to link parents and children in the immigration system and to allow parents to retain decision-making roles would be a good policy start to revamping existing practices. Notably, in 2013, ICE issued a directive called Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities (Parental Interests Directive). This directive sought to better facilitate communications between parents in immigration detention with their children and loved ones with a locator system. It sought to ensure that enforcement activities did not “unnecessarily disrupt parental rights.” It worked on improvements in working with the child welfare system, transporting parents to proceedings involving their children, and creating new parental rights coordinators. This model is a good starting point to address some of the concerns raised in this article.

This section highlighted how the state is using its powers in ways that are constitutionally dissonant to harm families instead of to protect families. The next section explores some strategies to ensure that all families are valued under the law.

VI. Valuing All Families Under the Law

This section explores some policy and advocacy directions for the analysis presented in this article. It first considers a preventative measure to evaluate the effects of laws and policies on families as a standard government practice. It next proposes the need for deeper discussions about advocacy shifts in the immigrant justice movement.

A. Preventative Strategies: Imposing a Family Impact Review

Current laws and policies need to be strengthened to hold the state accountable to consider the effects of policies on the family unit as a whole, particularly the parent-child relationship. The Government Accountability Office concluded in 2015, “the interagency process to refer and transfer unaccompanied children from DHS to HHS was inefficient and vulnerable to errors because it relied on emails and manual data entry, and documented standard procedures, including defined roles and responsibilities, did not exist.” It recommended in 2018, after studying the separation of parents and children, that DHS and HHS Secretaries “jointly develop and implement a

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365 Id. at 1138.
366 Id.
368 Id.
369 Id. at 16.
370 Id. at 16–17.
371 See YOSHIKAWA, supra note 33, at 137.

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documented interagency process with clearly defined roles and responsi-
bilities, as well as procedures to disseminate placement decisions, for all agencies
involved in the referral and placement of unaccompanied children in HHS
shelters.”

As new policies and laws are enacted, a process analogous to the Con-
gressional Budget Office’s budget impact statements should be enacted. All
ICE actions need to be informed by the reality that “there will always be
children affected when adults are arrested . . . and [ICE] should develop
appropriate policies.”374 There is an urgent humanitarian need for the devel-
opment of better methods and practices to minimize family trauma in imple-
menting detention and deportation policies.375 A “family impact review”
similar to a budget impact review would be a good starting point to ensure
that families are not the intentional targets of state harms and that traumas
are minimized.

B. Advocacy Shifts

Strategic advocacy shifts may be in order too. Professor Mariela
Olivares has launched a thoughtful and well-researched call to action to
frame an immigrant justice movement robustly and successfully in light of
modern politics.376 Family law advocates and attorneys are one component of
this coalition.

The intentionality shift in immigration law and policy described in this
article requires advocacy tweaks too as revealed by the family law lens.377
Immigrant families of all compositions are in retreat and are increasingly
silenced constituencies.378 As Professor Olivares has poignantly concluded,
“[a]s long as immigrants remain outsiders and their interests do not ade-
quately converge with the interests of the majority while purportedly strain-
ing common resources, traditional reform frameworks are futile.”379 It is
important thus in advocacy efforts to frame a message that is “a powerful
voice in a hostile environment,” but that voice also needs to achieve “consis-
tency in the ways in which thousands of diverse activists and advocates talk

373 Id. (noting that the agencies agreed to establish this process).
374 HERNANDEZ, supra note 167, at 33 (proposing parental release).
375 See, e.g., id. at 33 (proposing an immigration clearinghouse to develop best practices” as
well as better access to telephones, to counsel, and to social services and economic assistance
for families).
376 See generally Olivares, supra note 34.
377 Philip Kretsedemas & David C. Brotherton, Conclusion: Immigration Reform at a Cross-
roads, in KEEPING OUT THE OTHER, A CRITICAL INTRODUCTION TO IMMIGRATION
ENFORCEMENT TODAY 366–67 (David C. Brotherton & Philip Kretsedemas eds., 2008)
(concluding that the book reveals more than “the product of a cyclical, nativist reaction to new
immigration flows,” but rather it is likely that these trends “mark the beginning of a paradigm
shift in the way immigrants are being incorporated into the U.S. economy and society”).
378 See, e.g., ROMAN, supra note 30, at 6 (stating that anti-immigrant rhetoric has “virtually
silenced those in favor of rational prospects for reform”).
379 Olivares, supra note 73, at 1136.
about immigrants and their cause.”\textsuperscript{380} Notably, lifting up connections to the universal experiences of families and to the experiences of family hardships was a critical strand of the successes of the marriage equality movement.

Authentic narratives around immigrant families are likewise needed to cross bridges.\textsuperscript{381} Focusing on immigrant families would expand the scope of concern over state action and show greater historic and modern context for the state’s shift in intentionality. Professor Mariela Oliveras highlights how this strategy of focusing on immigrant children and families was effective somewhat in recent times because “‘[t]he strategy of equating immigrant detention with the practice of jailing children” effectively brought on board other “politicians and other constituencies” similar to the effectiveness of the same sex marriage movement.\textsuperscript{382}

Immigration advocacy groups have already started leveraging the immigrant family framework actively. Rallies were held nationwide with rally cries that “Families Belong Together” advocating for the end to the “zero tolerance” policy.\textsuperscript{383} Petitions and letters have circulated widely, such as an ACLU petition demanding that the Secretary of Homeland Security “[s]top separating children from their parents in immigration detention. This practice is inhumane, unnecessary, and unconstitutional.”\textsuperscript{384}

These framings are in direct response to narrow issues though.\textsuperscript{385} They are rarely integrated systemically in the overall mission and advocacy of the organizations.\textsuperscript{386}

\textsuperscript{380} Nicholls, supra note 9, at 229.

\textsuperscript{381} See Oliveras, supra note 73 (“Importantly then, immigration advocates must vehemently and urgently work towards changing the dominant narrative to stop pervasive and restrictive measures before they are enacted – rather than be forced to fight for their repeal after immigrants and their communities have borne the destructive effects.”); see also Nguyen, supra note 11.

\textsuperscript{382} Oliveras, supra note 73, at 1130.


Some existing messaging can be criticized for reinforcing the worrisome “good immigrant” and “bad immigrant” dichotomy. This messaging extends back to the Obama administration and beyond. Prior narrative framings have been critiqued as “ineffective and outdated.”

DACA advocacy strategies are one example of how risky it can be to decouple the parent-child relationship in advocacy. The Trump administration dismantled Deferred Action for Childhood Arrivals (DACA). Immigration advocates for years had sought an exemption from enforcement for undocumented youth in proposed legislation known as the Development, Relief and Education for Alien Minors (the “DREAM Act”). The DACA program, which began in June 2012 under the Obama administration, had authorized deferred action status to noncitizens without legal status who met certain requirements. This provided a temporary path to relief for DREAMers by executive action, but never offered a permanent path.

While President Trump expressed some early sympathies for DACA as a difficult issue, he announced plans to phase out this program on September 5, 2017. Homeland Security immediately started rejecting applications and requests for renewals received after this day. The stated goal was to incentivize Congress to act. This rescission prompted a string of lawsuits that has left DACA in a state of uncertainty and litigation.
Even strategic advocacy efforts of the immigrant justice community can contribute to the decoupling of parent-child relationships. A dominant theme of the DREAMer movement highlights how DREAMers “embody national values through their cultural dispositions and habits.” The very concept of DREAMer was “a strategy to humanize advocacy strategies to explicitly frame DREAMers as the ‘best and the brightest’ of the immigrant contributors, while distancing them from the accountability of the decisions their parents made to relocate to the United States.”

The term sought to humanize immigrants and achieve empathy. On the one hand, this strategy has positive appeal to many because it lifts up a subsection of the immigrant community and reveals their contributions and value to the community at large and it draws upon notions of the “American Dream.” This framing may have won over some stakeholders, but it does so by drawing upon the relative blame of the parents compared to the blameless children. For example, Senator Dick Durbin, a long-time supporter of the DREAM Act has said the following on the Senate floor: “It was a decision made by their parents and if they were breaking the law, I don’t believe the children should be held responsible.”

In seeking empathy, it decouples parents and children as a family unit subject to constitutional protection. This is a problematic strategic frame. It pits immigrant parents against immigrant children, exalting the children’s contributions by vilifying the par-

Intends to Petition for Immediate Supreme Court Review in DACA Lawsuit (Jan. 16, 2018), https://www.justice.gov/opa/pr/justice-department-files-notice-appeal-and-intends-petition-immediate-supreme-court-review. [https://perma.cc/S8T9-PB2R]. These cases have largely preserved DACA for the time being. The Department of Homeland Security is still accepting renewal applications from DACA candidates. Federal courts have blocked the administration from ending DACA currently, but in May 2018 seven states sued the United States requesting that the court end the program immediately. Currently, U.S.C.I.S. has resumed accepting requests for renewals of DACA status but is not accepting new applications. Any sign of political compromise seems to be fading. The case will be heard by the Supreme Court during its October 2019 term.

The states involved in the suit are challenging the validity of Obama’s 2012 Executive Order that created DACA in the first place on the basis that President Obama did not have the authority within his capacity as the Executive Branch to “exercise a lawmaking role.” Texas v. United States, 328 F. Supp. 3d 662 (S.D. Tex. 2018). While the legal status of DACA remains uncertain, its effect is still to place fear in immigrant families and threaten their stability. This uncertainty problematically undermines its positive effects within mixed-status immigrant families, even if it is technically still in place. Caitlin Patler, Erin Hamilton and Robin Savinar, "DACA Uncertainty May Undermine its Positive Impact on Wellbeing," CTR. POVERTY RES. (May 2018), https://poverty.ucdavis.edu/policy-brief/daca-uncertainty-may-undermine-its-positive-impact-wellbeing [https://perma.cc/V4LY-JCAF]. (“Our study supports the idea that providing undocumented immigrants legal status supports psychological wellbeing. However, it also suggests that undocumented young people are vulnerable to the stress of the uncertainty that characterizes the DACA immigration policy.”).

Nicholls, supra note 9, at 231–33.
399 Id. at 232–33.
401 See generally Rubenstein, supra note 71.
It decouples the children’s successes in education and the workforce from the foundational sacrifices and hardships of their parents to make space for their children’s successes. This is inauthentic to the lived realities of immigrant families and the dependency experiences of families.

Some critics argue that the framing is “rooted in exceptionalism” and makes other groups of immigrants seem “less deserving.” It glorifies a subset of immigrant youth using a narrow lens of “high-achieving youth with clean records who strongly contribute to the economy.” This is particularly true realizing that this strategy has “had only some measure of success” given the failed efforts to pass the DREAM legislation and current struggles to restore DACA. It has been used extensively as a political pawn in connection with Trump’s quest for a border wall.

This section began a larger dialogue about how advocacy strategies might respond to the dissonant injustice created by the state intentionally harming immigrant families. It calls a larger constituency to action and to a moment of strategic reflection.

**CONCLUSION**

There is more at stake in modern immigration law and rhetoric than just ameliorating the direct effects of current laws and policies on immigrant families, which are already deeply harmful. There are also larger constituencies affected by these harmful policies. Adding a family law lens reveals a shift in intentionality in state conduct. The state is not merely a bystander to family traumas, but an incendiary agent using family vulnerability as a political pressure point. Modern laws and policies are harming all families by decoupling the parent/child relationship, using the stratification of immigrant families as political pressure points, and demonizing immigrant familial relationships. A family law lens exposes the profound dissonance in how the state interacts with immigrant families to harm instead of to protect. These conclusions serve as a call to action for family law as a discipline and family law practitioners to engage in immigrant justice advocacy.

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401 Pon, supra note 398, at 41 (quoting an undocumented activist, “Nonprofits pushed a narrative in which we had no agency in coming to this country. So who was to blame? Our parents.”).

402 Pon, supra note 400, at 39–40 (noting that millions of youth are left vulnerable).

403 Id. at 33, 39.

404 Olivares, supra note 73, at 1134–35.


406 See generally Olivares, supra note 34.