

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

2019

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

Jamie Abrams

jamieabrams@wcl.american.edu

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Family Law Commons](#), [Immigration Law Commons](#), [Law and Politics Commons](#), [Law and Race Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Jamie Abrams, *Why the Legal Strategy of Exploiting Immigrant Families Should Worry Us All*, 14 Harvard Law & Policy Review 101 (2019).

Available at: https://digitalcommons.wcl.american.edu/facsch_lawrev/2041

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

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	102	R
I. THE VALUE OF A FAMILY LAW LENS	104	R
A. <i>Defending the Family Law Lens</i>	104	R
B. <i>Defining the Family Law Lens</i>	108	R
1. <i>The Parent-Child Relationship</i>	109	R
2. <i>Parens Patriae Interventions</i>	111	R
3. <i>Immigrant Families</i>	111	R
II. THE INTENTIONALITY SHIFT IN STATE ACTION AND RHETORIC	112	R

* Jamie R. Abrams (LL.M., Columbia University School of Law; J.D., American University Washington College of Law; B.A., Indiana University Bloomington) is a Professor of Law and Assistant Dean for Intellectual Life at the University of Louisville Louis D. Brandeis School of Law. The Author extends her sincerest thanks to participants in the New Voices in Immigration Law Workshop (AALS Annual Meeting, New Orleans, 2019), the Midwest Political Science Association Annual Meeting (Chicago, IL, 2019), the American Constitution Society's Constitutional Law Forum (Barry School of Law, Orlando, FL, 2019), the Law and Society Annual Meeting (Washington, D.C., 2019), and the Family Law Scholars and Teachers Workshop (Cardozo School of Law, N.Y., 2018) for feedback and discussion on earlier drafts. The author's warmest gratitude goes to Kerry Abrams, Adrianna Alfaro Altamirano, Anibal Rosario Lebron, Solangel Maldonado, Nancy Polikoff, JoAnne Sweeny, Enid Trucios-Haynes, and Rose Villazor for providing mentoring and thoughtful commentary on prior versions of this project. Thanks also to Shanna Ballinger for research and editing assistance. Thanks to the University of Louisville Brandeis School of Law Dean's Faculty Development Fund for grant support. Thanks to the Georgetown University Law Library Faculty Support team for invaluable research support during my faculty visit during the 2017-2018 school year.

102	<i>Harvard Law & Policy Review</i>	[Vol. 14]	
	A. "Immigration Blame" Fuels President Trump's Victory	112	R
	B. The Rhetorical Demonizing of Immigrant Families	115	R
	C. Alarming Historic Parallels	117	R
III.	MAPPING THE INTENTIONALITY SHIFT ON TO IMMIGRANT FAMILIES	118	R
	A. The Intentionality Shift Targets Existing Stratifications and Vulnerabilities in Immigrant Families	118	R
	1. Parent-Child Relationships	119	R
	2. Spousal Relationships	121	R
	3. Vulnerability Theory	122	R
	B. The Intentionality Shift Harms Substantially More Families ..	123	R
IV.	IMMIGRATION BLAME BECOMES LAW AND POLICY	125	R
	A. The Decoupling of Parents and Children at the Border	126	R
	1. Historic Context	126	R
	2. The Intentionality Shift	127	R
	3. The Harms of Family Separation	130	R
	4. Backlashes and Legal Challenges to Family Separation ...	135	R
	B. The Intentionality Shift of Deportations and Detentions	139	R
	C. Harms to Pregnant Women	143	R
V.	THE CONSTITUTIONAL DISSONANCE OF HARMFUL FAMILY INTERVENTIONS	145	R
VI.	VALUING ALL FAMILIES UNDER THE LAW	148	R
	A. Preventative Strategies: Imposing a Family Impact Review ..	148	R
	B. Advocacy Shifts	149	R
	CONCLUSION	153	R

INTRODUCTION

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-

¹ See generally JOANNA DREBY, EVERYDAY ILLEGAL: WHEN POLICIES UNDERMINE IMMIGRANT FAMILIES 52 (2015) (explaining how deportation threats not only harm immigrant communities but also undermine the wellbeing of immigrant families).

² See *infra* Section IV.A.1.

³ See *infra* Section V.B.

⁴ See *infra* Section IV.C.

⁵ See, e.g., James Laporta, *Donald Trump Signs Authorization for Border Troops Using Lethal Force as Migrant Caravan Approaches, Document Reveals*, NEWSWEEK (Nov. 21, 2018), <https://www.newsweek.com/donald-trump-memo-migrant-caravan-border-troops-1226945> <https://www.newsweek.com/donald-trump-memo-migrant-caravan-border-troops-1226945> [https://perma.cc/DWE7-WRNC] (quoting Trump, "[A]nybody throwing stones, rocks, like they did to Mexico and the Mexican military, Mexican police, where they badly hurt police and soldiers of Mexico, we will consider that a firearm. We're not going to put up with that. They want to throw rocks at our military, our military fights back. I told them to consider it a rifle."); Cecilia

stander to family-based immigration trauma to an incendiary agent perpetrating family trauma as political strategy.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.⁷ Exploiting the vulnerabilities of families as political pressure contributes to the decoupling of the parent-child relationship and the demonization of immigrant communities.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 by-stander 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 *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

Menjívar & Daniel Kanstroom, *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”); 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. Now the shift is moving toward securing the border. . .”).

⁶ See, e.g., ADAM ISACSON, MAUREEN MEYER & ADELINE HITE, *WASH. OFFICE ON LATIN AM., WOLA REPORT: THE ZERO TOLERANCE POLICY* 5–12 (2018) (concluding that Trump administration officials expected family separation to deter future migration).

⁷ See generally 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 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”).

⁸ See, e.g., Andres Oppenheimer, *Trump is Exploiting Illegal Immigration, Rather than Trying to Stop It*, *MIAMI HERALD* (Oct. 24, 2018, 5:26 PM), <https://www.miamiherald.com/news/local/news-columns-blogs/andres-oppenheimer/article220544550.html> [https://perma.cc/NE4F-K292].

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.⁹ 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.¹⁰ 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,¹¹ 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).

⁹ See generally Walter J. Nicholls, *Voice and Power in the Immigrant Rights Movement, in* CONSTRUCTING IMMIGRANT "ILLEGALITY": CRITIQUES, EXPERIENCES, AND RESPONSES 225–43 (Cecilia Menjivar & Daniel Kanstroom eds., 2014).

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.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.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.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.¹⁵

Yet, the "family as a unit of analysis has been understudied by scholars of migration."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."¹⁷

At first glance immigration law and family law may seem like unrelated fields.¹⁸ The norms and guiding principles of family law and immigration law are different and have yielded different approaches to defining and regulating parentage¹⁹ and marriage.²⁰ The essence of family law focuses on family unity, permanence, and the best interests of the child ("BIOC").²¹

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).

¹³ Alan Hyde, *The Law and Economics of Family Reunification*, 28 GEO. IMMIGR. L.J. 355, 360 (2014).

¹⁴ Kerry Abrams, *What Makes the Family Special*, 80 U. CHI. L. REV. 7, 10–16 (2013).

¹⁵ *Id.* (noting an ongoing debate in how to handle the reunification of adult family members).

¹⁶ IMMIGRANT CHILDREN: CHANGE, ADAPTATION, AND CULTURAL TRANSFORMATION 8 (Susan S. Chuang & Robert P. Moreno eds., 2011).

¹⁷ Kerry Abrams, *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).

¹⁸ See, e.g., Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL'Y & L. 87, 87 (2006).

¹⁹ Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 635–52 (2014).

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, *Citizen Spouse*, 101 CALIF. L. REV. 407 (2013) (explaining the complicated relationship between marriage and citizenship).

²¹ See, e.g., Timothy P. Fadgen & Dana E. Prescott, *Do the Best Interests of the Child End at the Nation's Shores? Immigration, State Courts, and Children in the United States*, 28 J. AM. ACAD. MATRIMONIAL L. 359, 368 (2016).

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.²² In defining parentage and marital relationships in immigration law, immigration law reflects its own very distinct “family values.”²³

The two fields are also often considered “extreme opposites on the spectrum of state and federal power.”²⁴ 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.²⁵

Family law is not just of local relevance; it is about the fundamental role of the state in our communities and our lives.²⁶ There are risks therefore in cabining family law to the local level and ignoring its larger relevance.²⁷ Family law creates hierarchies, privileging certain familial relationships over others.²⁸ 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.”²⁹ Thus, the political framing of immigrants has the power to “shift[] borders, . . . influenc[e] public policy, alter[] the ways borders affect people, and circumscrib[e] political responses.”³⁰

²² *Id.* (explaining that immigration law does recognize diverse family structures).

²³ See generally Abrams & Piacenti, *supra* note 19.

²⁴ David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 456 (2008).

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”).

²⁹ AMALIA PALLARES, *FAMILY ACTIVISM: IMMIGRANT STRUGGLES AND THE POLITICS OF NONCITIZENSHIP* 6–7 (2014).

³⁰ EDIBERTO ROMÁN, *THOSE DAMNED IMMIGRANTS* 18 (2013).

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.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.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."³³

A family law lens also reveals alarming historic parallels that must be part of the critique and the advocacy.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.³⁵ These perils have re-emerged as viral images showed children in caged detention settings.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

³¹ See generally JOANNA DREBY, *DIVIDED BY BORDERS* 203 (2010).

³² Kristen Bialik, *Border Apprehensions Increased in 2018 – Especially for Migrant Families*, PEW RESEARCH CENTER (Jan. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/01/16/border-apprehensions-of-migrant-families-have-risen-substantially-so-far-in-2018/> [<https://perma.cc/E788-33AD>]; see also VALERIA LUISELLI, *TELL ME HOW IT ENDS* 12 (2017).

³³ HIROKAZU YOSHIKAWA, *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.

³⁴ See generally Mariela Olivares, *Resistance Strategies in the Immigrant Justice Movement*, 39 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.").

³⁵ Garance Burke & Martha Mendoza, *At least 3 "tender age" shelters set up for child migrants*, AP (June 20, 2018), <https://www.apnews.com/dc0c9a5134d14862ba7c7ad9a811160e> [<https://perma.cc/H829-LMY2>].

³⁶ Joan Walsh, *What Senator Jeff Merkley Saw at an Immigrant Detention Center for Children*, NATION (June 6, 2018), <https://www.thenation.com/article/senator-jeff-merkley-saw-immigrant-detention-center-children/> [<https://perma.cc/Q4W4-VX7Z>]; see, e.g., Manny Fernandez, *Inside the Former Walmart That Is Now a Shelter for Almost 1,500 Migrant Children*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/us/family-separation-migrant-children-detention.html> [<https://perma.cc/57A3-22B9>] (highlighting a number of citations issued against the shelters for migrant children).

custody. In contrast, modern immigration laws and policies have caused the deaths,³⁷ sexual assaults, and beatings of children in immigrant detention.³⁸ The child welfare system has also already wrestled with the appropriate uses of medications without parental consent.³⁹ Yet reports have likewise emerged of children being forced to take psychotropic drugs in immigration detention.⁴⁰

A family law lens brings connectivity to the critique of modern immigration law and policy.⁴¹ 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.⁴² Deploying a family law lens focuses the critique of modern immigration laws and policies on the preservation and consistent application of these long-standing constitutional norms respecting family autonomy.

³⁷ See, e.g., Dara Lind, *The crisis of children dying in custody at the border, explained*, VOX (May 22, 2019, 10:40 AM), <https://www.vox.com/2019/5/22/18632936/child-died-border-toddler-patrol-three-five> [https://perma.cc/N5VB-HYVL] (reporting that, before December 2018, no children had died in border patrol custody in a decade but that three children had died in custody in the six months preceding the article's publication).

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

³⁹ Declaration of Carlos Holguin in Support of Plaintiffs' Opposition to Defendants' Ex Parte Motion for a Stay, *Lucas R. v. Azar*, 2018 WL 7200716 (C.D. Cal. Dec. 27, 2018) (No. CV 18-5741) (alleging the treatment of children with psychotropic medication without the written consent of their parents to treat depression and other mental health conditions).

⁴⁰ Scott J. Schweikart, *April 2018 Flores Settlement Suit Challenges Unlawful Administration of Psychotropic Medication to Immigrant Children*, AM. MED. ASS'N J. ETHICS (Jan. 2019), <https://journalofethics.ama-assn.org/article/april-2018-flores-settlement-suit-challenges-unlawful-administration-psychotropic-medication/2019-01> [https://perma.cc/L8NE-HPHJ].

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”).

⁴² Kerry Abrams, *Family Reunification and the Security State*, 32 CONST. COMMENT. 247, 249 (2017).

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.”⁴³ The state has only a subordinate role.⁴⁴ *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.”⁴⁵ This has also been articulated as the right to “establish a home and bring up children.”⁴⁶

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.⁴⁷ The government may not use its power as an “instrument of oppression.”⁴⁸ The Due Process Clause of the Fourteenth Amendment prohibits the government from depriving individuals of life, liberty, or property without due process of law.⁴⁹ 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.⁵⁰

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.”).

⁴⁵ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

⁴⁶ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

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.”⁵¹ The *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.”⁵² The *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.

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

The state’s *parens patriae* powers are notably limited and subordinate to ‘fit’ parents’ constitutional rights to parental autonomy. In *Santosky v. Kramer*, the Supreme Court recognized two state interests when parental rights terminations are involved: “the *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.”⁵⁷ The court explained that the *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 *parens*

⁵¹ Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children’s Welfare*, 6 MICH. J. GENDER & L. 381, 382 (2000).

⁵² *Id.*

⁵³ See, e.g., Margaret S. Thomas, *Parens Patriae and the States’ Historic Police Power*, 69 SMU L. REV. 759 (2016) (examining *parens patriae* power historically and “mak[ing] space for a new foundation for *parens patriae* litigation rooted in the historic police powers of the state”); Michael L. Rustad & Thomas H. Koenig, *Parens Patriae Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crimtorts*, 29 UCLA J. ENVTL. L. & POL’Y 45 (2011) (arguing that “*parens patriae* actions are necessary to supplement, but not to supplant,” other mechanisms to address environmental disasters); Anne Puluka, *Parent Versus State: Protecting Intersex Children from Cosmetic Genital Surgery*, 2015 MICH. ST. L. REV. 2095 (2015) (“Protecting intersex children from cosmetic, life-altering surgery is a compelling state interest that would justify acting as *parens patriae* to prevent parents from consenting to the surgery on their children’s behalf.”); Joyce Lind Terres, *Prenatal Cocaine Exposure: How Should the Government Intervene?* 18 AM. J. CRIM. L. 61 (1990) (analyzing the *parens patriae* power of the state to intervene in the use of cocaine by pregnant women); John B. Hoke, *Parens Patriae: A Flawed Strategy for State-Initiated Obesity Litigation*, 54 WM. & MARY L. REV. 1753 (2013).

⁵⁴ 4 Whart. 9 (Pa. 1839).

⁵⁵ *Id.*

⁵⁶ Alison G. Ivey, Comment, *Washington’s Becca Bill: The Costs of Empowering Parents*, 20 SEATTLE U. L. REV. 125, 129 (1996).

⁵⁷ 455 U.S. 745, 766 (1982).

patriae interest favors preservation, not severance, of natural familial bonds.”⁵⁸ 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.”⁵⁹

3. Immigrant Families

The immigration statuses underlying the parent-child relationship do not alter these rights for individuals present in the United States.⁶⁰ Even individuals with no lawful presence are still entitled to these family law constitutional guarantees.⁶¹ 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.”⁶²

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.⁶³ 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.⁶⁴ It limits judicial review of government action in a way that creates a form of exceptionalism.⁶⁵ This positions immigration law as a “‘constitutional oddity’ [] largely immune from the civil liberties revolution of the twentieth century.”⁶⁶ The lasting strength of the plenary power doctrine is in debate, as strands of scholarship have thoughtfully explored.⁶⁷

⁵⁸ *Id.* at 766–67.

⁵⁹ *Id.* at 767 (citing *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)).

⁶⁰ See, e.g., Thronson & Sullivan, *supra* note 25, at 9 (“Though ‘nobody argues that [noncitizens] are treated identically with citizens in every circumstances,’ popular conceptions that parents without authorized immigration status have lesser interests in the parent-child relationship are unfounded.”); see also Ann Laquer Estin, *Child Migrants and Child Welfare: Toward a Best Interests Approach*, 17 WASH. U. GLOBAL STUD. L. REV. 589, 591 (2018).

⁶¹ See, e.g., Plyer v. Doe, 457 U.S. 202, 210 (1982).

⁶² Thronson & Sullivan, *supra* note 25, at 9.

⁶³ See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) (“In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.”).

⁶⁴ Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 23–24 (2015).

⁶⁵ *Id.* at 25.

⁶⁶ *Id.* at 23 (quoting Professor Legomsky); see Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000) (arguing that the laws and statutes that have been upheld even though discriminatory “are inconsistent with fundamental values reflected in domestic constitutional law, yet they continue to constitute the foundation of immigration law” and they may have been decided the same way without going beyond the Constitution).

⁶⁷ See, e.g., Kagan, *supra* note 64, at 23–26 (analyzing how the plurality in *Kerry v. Din*, 135 S. Ct. 2128 (2015), debated an immigrant’s fundamental rights in ways that suggested more judicial review than traditional plenary power would have allowed); David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 56 (2015) (“The relentless critique of the plenary power doctrine, with its exaggerated expectations about how judges deploying constitutional law can cure bad policy and injustices—in the midst of an uncertain, complex, and dangerous world—partakes of that sort of dream. We need instead to

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.⁶⁸

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,”⁶⁹ both generalized blame and the more targeted demonizing of immigrant parents and children.⁷⁰

David Rubenstein describes how “immigration blame” carries a “normative force” that is linked to “anger, indignation, or resentment.”⁷¹ Blame explains how we “demonize migrants for crime, the economy, terrorism, and cultural threats.”⁷² 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-

shoulder the hard responsibility of struggling, collectively, to discern what is good, and then working to achieve a realistic measure of that vision through the political process.”).

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).

⁶⁹ See, e.g., Philip Klinkner, *Yes Trump’s Hard-Line Immigration Stance Helped Him Win the Election – But it Could Be His Undoing*, L.A. TIMES (Apr. 17, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-klinkner-immigration-election-20170417-story.html> [<https://perma.cc/9B85-JUVM>] (relying on data from the American National Election Study to conclude that “[i]mmigration was central to the election, and hostility toward immigrants animated Trump voters”).

⁷⁰ See, e.g., Ashley Fetters, *The Moral Failure of Family Separation*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/trumps-family-separation-policy-causes-national-outrage/579676/> [<https://perma.cc/ZAE8-6UVZ>] (“Separating families was not a rare and unintended consequence of a policy but part of the point of it.”).

⁷¹ See generally David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 134 (2018).

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.”⁷³ 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.”⁷⁴

Entire “immigration enforcement bureaucracies” are involved in “promoting concepts of unauthorized migrants as being inferior to persons worthy of respect and dignified treatment.”⁷⁵ 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.”⁷⁶

President Trump did not invent these political strategies,⁷⁷ 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 minorit[y]” that perceives immigrants negatively in communities, but a minority nonetheless.⁷⁸

Yet, “no President has weaponized fear quite like Trump.”⁷⁹ He stirred up a toxic cocktail of anger and blame and directed it full throttle at immigrant communities, catapulting him to “front-runner status.”⁸⁰ President Trump distinctly deployed rhetoric riling up the threatened masculinities of angry and frustrated white voters and channeled it toward anti-immigrant

⁷³ Mariela Olivares, *Narrative Reform Dilemmas*, 82 MO. L. REV. 1089, 1094 (2017) (describing as examples *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the Chinese Exclusion Act of 1882, and the Bracero Program).

⁷⁴ *Id.* at 1099.

⁷⁵ Nestor Rodriguez & Cristian Paredes, *Coercive Immigration Enforcement and Bureaucratic Ideology*, in CONSTRUCTING IMMIGRANT “ILLEGALITY”: CRITIQUES, EXPERIENCES, AND RESPONSES 75 (Cecilia Menjivar & Daniel Kanstroom eds., 2014).

⁷⁶ *Id.*

⁷⁷ See generally JAMES G. GIMPEL, CTR. FOR IMMIGRATION STUDIES, IMMIGRATION POLICY OPINION AND THE 2016 PRESIDENTIAL VOTE 2 (2017), <https://cis.org/Report/Immigration-Policy-Opinion-and-2016-Presidential-Vote> [<https://perma.cc/5J3M-SPFA>] (explaining how Gallup surveys reveal “a marked partisan difference in support for increased/decreased immigration” dating back much sooner); Jessica Autumn Brown, *Running on Fear: Immigration, Race and Crime Framings in Contemporary GOP Presidential Debate Discourse*, 24 CRITICAL CRIMINOLOGY 315, 316 (2016) (highlighting how conflicts have historically been “filtered through the distorting lens of panics about crime, moral decay, and loss of native-born political, economic, or social control” such as panic surrounding Irish migration, Japanese Americans, etc.).

⁷⁸ Alex Vandermaas-Peeler, et al., *Partisan Polarization Dominates Trump Era: Findings from the 2018 American Values Survey*, PUB. RELIGION RESEARCH INSTITUTE (Oct. 29, 2018), <https://www.prrri.org/research/partisan-polarization-dominates-trump-era-findings-from-the-2018-american-values-survey/> [<https://perma.cc/ZF9K-FUM5>].

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>].

⁸⁰ JOSHUA WOODS & C. DAMIEN ARTHUR, DEBATING IMMIGRATION IN THE AGE OF TERRORISM, POLARIZATION, AND TRUMP 137 (2017). These statements align with larger increases of hate incidents in the United States. See, e.g., FREEDOM FOR IMMIGRANTS, PERSECUTED IN U.S. IMMIGRATION DETENTION: A NATIONAL REPORT ON ABUSE MOTIVATED BY HATE (2018), <https://www.freedomforimmigrants.org/report-on-hate> [<https://perma.cc/D844-FDTS>].

sentiment.⁸¹ He used dehumanizing scare tactics that immigrants were “infest[ing]” the country.⁸² President Trump infamously emphasized how “drugs are ‘pouring’ across the border. ‘Bad people (with bad intentions)’ are flooding through our airports.”⁸³ He described immigrant men as “animals,” “rapists,” and other dehumanizing categorizations.⁸⁴ He blamed specific immigrants for the weak economy and for crime.⁸⁵ He blamed Obama for being too soft on immigration.⁸⁶ He blamed states and cities for not working with the federal government.⁸⁷

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.⁸⁸ 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 2016.⁸⁹ 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%).⁹⁰ 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.”⁹¹

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

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).

⁸² Jonathan Lemire & Jill Colvin, *With Eyes on Midterms, Trump Embraces Immigration Fight*, AP NEWS (June 20, 2018), <https://www.apnews.com/a13439e023e340ee8885b5e43871563d> [<https://perma.cc/SPB4-FFD7>].

⁸³ Altman, *supra* note 79.

⁸⁴ See, e.g., Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 175–76 (2016) (examining Trump’s toxic immigration rhetoric).

⁸⁵ See, e.g., *Here’s Donald Trump’s Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech> [<https://perma.cc/8D4F-L7WQ>].

⁸⁶ See Rubenstein, *supra* note 71, at 138.

⁸⁷ See generally *id.*

⁸⁸ See *id.* at 152.

⁸⁹ Klinkner, *supra* note 69.

⁹⁰ *Id.*

⁹¹ Susan B. Glasser, *Trump’s Cynical Immigration Strategy Might Work for Him—Again*, NEW YORKER (June 22, 2018), <https://www.newyorker.com/news/letter-from-trumps-washington/trumps-cynical-immigration-strategy-might-work-for-himagain> [<https://perma.cc/UT9K-2JH9>] (predicting that this could win the midterms too because he continues to use this strategy to rally his base).

country.⁹² 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.⁹³

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.⁹⁴ By 2010, white voters had shifted dramatically to the Republican Party 51% to 39%.⁹⁵ By 2016, the gap had widened to a 15-point differential of 54% to 39%.⁹⁶ This rapid movement also tilted toward white men more than white women shifting, accelerating the “white-male flight from the Democratic Party.”⁹⁷

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 2015.⁹⁸ 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.⁹⁹

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.”¹⁰⁰ 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.¹⁰¹ 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.¹⁰² It can also serve as a “magic mirror, re-

⁹² David D. Sussman, *Immigration, Trump, and Agenda-Setting in the 2016 Election*, 41 FLETCHER F. WORLD AFF. 75 (2017).

⁹³ JAMES G. GIMPEL, CTR. FOR IMMIGRATION STUDIES, IMMIGRATION OPINION AND THE RISE OF DONALD TRUMP 3 (2016).

⁹⁴ John Sides, Michael Tesler, & Lynn Vavreck, *How Trump Lost and Won*, 28 J. DEMOCRACY 34, 38 (2017).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ GIMPEL, *supra* note 93 (noting that the survey did not inquire about what the solutions were to “illegal immigration”).

¹⁰⁰ Sides, Tesler, & Vavreck, *supra* note 94, at 38.

¹⁰¹ *Id.* at 39.

¹⁰² See *Lennon v. Immigration & Naturalization Serv.*, 527 F.2d 187, 189 (2d Cir. 1975).

flecting the fears and concerns” of various eras.¹⁰³ 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.¹⁰⁴ 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*.¹⁰⁵ 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.¹⁰⁶ 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

¹⁰³ Olivares, *supra* note 73, at 1099 (quoting a Second Circuit Court of Appeals opinion).

¹⁰⁴ See Linda Qiu, *These Claims About ‘Chain Migration’ Are Not Accurate*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/chain-migration-immigration-daca-factcheck.html> [<https://perma.cc/E54D-SPT7>].

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 USA: 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).

2019]

Exploiting Immigrant Families

117

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.

¹¹⁰ Alvaro Huerta, *Latino Immigrants in the Racist Era of Trump*, IMMIGR. PROF. BLOG (May 14, 2018) <https://lawprofessors.typepad.com/immigration/2018/05/latino-immigrants-in-the-racist-era-of-trump-by-alvaro-huerta-phd.html> [https://perma.cc/WUQ7-XZNC] (describing the divisive “us-versus-them” politics).

¹¹¹ DeNeen L. Brown, *Barbaric: America’s cruel history of separating children from their parents*, WASH. POST (May 31, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/05/31/barbaric-americas-cruel-history-of-separating-children-from-their-parents/?noredirect=on&utm_term=.2b5b0136ca09 [https://perma.cc/6ZDV-ZDDJ].

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.”¹¹³

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 desperately lacking.”¹¹⁴

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?’”¹¹⁵ This section introduced preliminarily 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 immigrant experience within a familial context.¹¹⁶ This section first grounds the discussion of immigration blame and the intentionality shift in the lived realities 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 constitutional norms and values. Contextualizing immigrant family vulnerabilities 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.

¹¹³ Ldavis0260, *This is Who We Are*, J. PLAGUE YEARS (Apr. 12, 2019), <https://www.journaloftheplagueyears.com/this-is-who-we-are/> [https://perma.cc/5FDM-WZBE] (citing Charla Bear, *American Indian Boarding Schools Haunt Many*, N.P.R. (May 12, 2008, 12:01 AM), <https://www.npr.org/templates/story/story.php?storyId=16516865> [https://perma.cc/XA3G-NP3P]); see generally *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) for a thoughtful historic summary of Indian removal leading to the Indian Child Welfare Act.

¹¹⁴ Huerta, *supra* note 110.

¹¹⁵ Ldavis0260, *supra* note 113.

¹¹⁶ 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.”¹¹⁷ Immigration status can affect “the division of labor in family relationships” and “challenge[] and recreate[] divisions of power in families.”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.”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.”¹²⁰

Stratifications have always existed based on immigration status.¹²¹ The law itself creates hierarchies in naming which family members can be sponsored for entry and which are excluded.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.”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.¹²⁴ These dependencies are “reorganizing and redefining the traditional family structure.”¹²⁵ Immigrant parents, for example, describe

¹¹⁷ Roger Waldinger, *Immigration and the Election of Donald Trump: Why the Sociology of Migration Left Us Unprepared . . . and Why We Should Not Have Been Surprised*, 41 ETHNIC & RACIAL STUD. 1411, 1414 (2018).

¹¹⁸ DREBY, *supra* note 1, at 59.

¹¹⁹ *Id.*

¹²⁰ Waldinger, *supra* note 118, at 1415.

¹²¹ See generally Philip Kretsedemas & David C. Brotherton, *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. *Id.* at 13.

¹²² See, e.g., 8 U.S.C. § 1153(a) (2012).

¹²³ Waldinger, *supra* note 118, at 1415.

¹²⁴ DREBY, *supra* note 1, at 97.

¹²⁵ LUISELLI, *supra* note 32, at 48.

how stratifications create differences in how they organize their households, social networks, and community involvement.¹²⁶ 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.¹²⁷ Undocumented parents, for example, are generally not eligible for any public benefits, including prenatal care or job training programs, other than emergency health care.¹²⁸ The household might also lack access to bank accounts, identification, and driver's licenses.¹²⁹

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.¹³⁰ 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."¹³¹ 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.¹³²

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.¹³³ 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.¹³⁴ Kids in mixed status im-

¹²⁶ See YOSHIKAWA, *supra* note 33, at 22.

¹²⁷ See generally HEATHER KOBALL, ET AL., URBAN INSTITUTE, MIGRATION POLICY INSTITUTE, HEALTH AND SOCIAL SERVICE NEEDS OF US-CITIZEN CHILDREN WITH DETAINED OR DEPORTED IMMIGRANT PARENTS 19 (2015); see also Karen Hacker, et al., *Barriers to Health Care for Undocumented Immigrants: A Literature Review*, 8 RISK MGMT. & HEALTHCARE POL'Y 175 (2015).

¹²⁸ 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).

¹²⁹ See YOSHIKAWA, *supra* note 33, at 22.

¹³⁰ 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").

¹³¹ DREBY, *supra* note 1, at 87.

¹³² *Id.*

¹³³ *Id.* at 45.

¹³⁴ DIANE 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.¹³⁵ 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.¹³⁶

2. Spousal Relationships

Spousal hierarchies and stratifications can also exist in immigrant families because of legal status.¹³⁷ United States immigration law replaced its national origins quotas with a framework that privileged marital status and embedded marital hierarchies.¹³⁸ Differing immigration status can disrupt family hierarchies causing “heightened tensions and conflict in marital relationships”¹³⁹ and “augment[ing] the imbalance of power already existing between partners.”¹⁴⁰ Immigration uncertainty for spouses also creates uncertainty for their children, if the status is contingent on the parent’s marriage.¹⁴¹ Immigration status can then become an “aspect of coercive control against a spouse or intimate partner.”¹⁴²

There are notable gendered differences in these spousal stratifications as well.¹⁴³ The law has continued to problematically embed and perpetuate dominant historical norms of husbands controlling wives’ immigration status.¹⁴⁴ Wives are more likely than husbands to apply for derivative spouse-based immigration status and have been since 1930.¹⁴⁵ This reinforces traditional societal gender roles and it cuts across class.¹⁴⁶

¹³⁵ DREBY, *supra* note 1, at 46–48.

¹³⁶ *Id.* at 126, 129.

¹³⁷ See Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture’s Diminishment, But Not Its Demise*, 24 N. ILL. U. L. REV. 153, 208 (2004) (“Despite more than a decade of legislative advocacy and action, spouse-based immigration still carries the underpinnings of coverture and chastisement.”).

¹³⁸ See, e.g., Abrams, *supra* note 17, at 1635–36.

¹³⁹ DREBY, *supra* note 1, at 60.

¹⁴⁰ *Id.* at 68.

¹⁴¹ See Janet Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 608 (1991).

¹⁴² Sabrina Balgamwalla, *Bride and Prejudice: How U.S. Immigration Law Discriminates Against Spousal Visa Holders*, 29 BERKELEY J. GENDER L. & JUST. 25, 48 (2014).

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: “[women] 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-

¹⁴⁷ See Calvo, *supra* note 141, at 613 (concluding that the “law has the greatest adverse impact on women immigrants”).

¹⁴⁸ DREBY, *supra* note 1, at 64.

¹⁴⁹ See Balgamwalla, *supra* note 142, at 51.

¹⁵⁰ Thronson, *supra* note 24 at 463.

¹⁵¹ DREBY, *supra* note 1, at 69.

¹⁵² *Id.* at 68.

¹⁵³ See Thronson, *supra* note 24, at 464.

¹⁵⁴ See, e.g., David P. Weber, (*Unfair*) *Advantage: Damocles’ Sword and the Coercive Use of Immigration in a Civil Society*, 94 MARQ. L. REV. 613, 627 (2010); see Balgamwalla, *supra* note 142, at 58–59. See generally Calvo, *supra* note 141; Calvo, *supra* note 137.

¹⁵⁵ See, e.g., Calvo, *supra* note 137, at 175 (acknowledging that VAWA provided some assistance to abused spouses, but it also left out many others).

¹⁵⁶ See DREBY, *supra* note 1 at 95.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133, 134 (2017).

gration status, borders, and communities.¹⁶⁰ 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.¹⁶¹

The communities that we support in their vulnerabilities reveal the “historic values and priorities of society.”¹⁶² 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.”¹⁶³ 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;¹⁶⁴ children who were born United States citizens being raised by undocumented parents living in the United States;¹⁶⁵ 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

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”).

United States;¹⁶⁶ 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).¹⁶⁷

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.¹⁶⁸ 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.¹⁶⁹ Nearly 400,000 individuals have been deported every year since 2009, reflecting a two-fold increase since 2001 and securing the modern “deportation regime.”¹⁷⁰ Of those deported between 2003 and 2013, 91% of these individuals were parents of U.S.-citizen children.¹⁷¹

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.¹⁷² Approximately two-thirds of all immigrants into the United States arrive through family reunification.¹⁷³ 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.¹⁷⁴

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.¹⁷⁵ 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

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 García 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.

¹⁶⁹ RANDY CAPPS ET AL., *MIGRATION POLICY INSTITUTE, A PROFILE OF U.S. CHILDREN WITH UNAUTHORIZED IMMIGRANT PARENTS* 11 (2016).

¹⁷⁰ Joanna Dreby, *The Modern Deportation Regime and Mexican Families*, in *Constructing Immigrant “Illegality”: Critiques, Experiences, and Responses* 182–83 (Cecilia Menjivar & Daniel Kanstroom eds., 2014).

¹⁷¹ Koball, *supra* note 127, at 1.

¹⁷² DREBY, *supra* note 1, at 185.

¹⁷³ Alan Hyde, *The Law and Economics of Family Reunification* 28 *GEO. IMMIGR. L.J.* 355, 358–360 (2014). (noting that the remaining one-third is from employment-related immigration).

¹⁷⁴ DREBY, *supra* note 1, at 185.

¹⁷⁵ See Hyde, *supra* note 13, at 380–82 (2014).

health outcomes.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.¹⁷⁷ Immigrant family members are also instrumental to the development and success of small businesses.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.¹⁷⁹ Immigrant families have been targeted for deportation in unprecedented and systemic ways,¹⁸⁰ their family stability has been disrupted,¹⁸¹ parents and children have been separated at the border,¹⁸²

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).

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.”).

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

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.”).

¹⁸⁰ See, e.g., Haley Sweetland Edwards, *‘No One is Safe.’ How Trump’s Immigration Policy is Splitting Families Apart*, TIME (Mar. 8, 2018), <http://time.com/longform/donald-trump-immigration-policy-splitting-families/> [<https://perma.cc/9PT8-NNAS>]; Nicole Chavez, *Man detained by immigration officers after delivering pizza to Army base*, CNN (June 7, 2018), <https://www.cnn.com/2018/06/07/us/ice-undocumented-immigrant-arrest-pizza-delivery/index.html> [<https://perma.cc/T3TZ-SAPX>].

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).

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-

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.

cilities are often remotely located, further complicating access to legal representation and family visits.¹⁹¹

Committees in 2015 and 2016 convened by the Department of Homeland Security (DHS) revisited the detention of immigrant families.¹⁹² 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.”¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵ While announced in April, the policy had been strategically brainstormed far earlier within the administration.¹⁹⁶ 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).¹⁹⁷

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.

¹⁹⁴ See Tal Kopan, *Trump presses for options to end ‘catch and release’ in immigration policy*, CNN (Apr. 6, 2018, 8:27 PM), <https://www.cnn.com/2018/04/06/politics/trump-catch-and-release-rollback/index.html> [<https://perma.cc/DL53-239F>].

¹⁹⁵ See Memorandum from the Office of the Attorney General to Federal Prosecutors Along the Southwest Border: Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (April 6, 2018) (“This zero-tolerance policy shall supersede any existing policies.”), <https://www.justice.gov/opa/press-release/file/1049751/download> [<https://perma.cc/MZ3R-54BN>]; *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration* (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/4PBV-PLNL>] (stating that this policy was “to send a message to the world: we are not going to let this country be overwhelmed”).

¹⁹⁶ See Fetters, *supra* note 70 (quoting John Kelly agreeing that the administration was considering this).

¹⁹⁷ See Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html> [<https://perma.cc/X2M3-7PW4>] (noting that senior officials in the Department of Homeland Security initially denied the volume of detentions, but ultimately conceded under pressure from the New York Times in reporting).

This “zero tolerance” policy, as the policy was described, is the most obvious example of the intentionality shift described above.¹⁹⁸ 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 border¹⁹⁹ and to dissuade border crossings.²⁰⁰ 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.²⁰¹

The Secretary of Homeland Security formally approved the prosecution of adults at the border traveling with minors on May 4, 2018.²⁰² 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.²⁰³ This policy was fraught with risk and

¹⁹⁸ 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.

¹⁹⁹ Dickerson, *supra* note 197.

²⁰⁰ Amy Wang, *The U.S. Lost Track of 1,475 Immigrant Children Last Year. Here’s Why People are Outraged Now*, WASH. POST (May 29, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/05/27/the-u-s-lost-track-of-1500-immigrant-children-last-year-heres-why-people-are-outraged-now/?noredirect=on> [https://perma.cc/42N6-DEHQ] (reporting on an internal memo to the Secretary of Homeland Security stating that criminal charges against migrants, including parents, would be the “most effective” way to reduce illegal crossings). *But see* John Haltiwanger, *John Kelly proposed separating children from their parents to deter illegal immigration last year, and now the Trump administration can’t get its story straight*, BUS. INSIDER (June 18, 2018), <http://www.businessinsider.com/kelly-proposed-family-separation-to-deter-illegal-immigration-in-2017-2018-6> [https://perma.cc/8YQU-CAGW] (highlighting conflicting reasons for the policy).

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).

²⁰² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER (2018).

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.²⁰⁴

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.”²⁰⁵ 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.²⁰⁶ 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.”²⁰⁷

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.²⁰⁸ 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.”²⁰⁹

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.²¹⁰ 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

²⁰⁴ Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1255–56 (2009).

²⁰⁵ U.S. DEP’T OF HOMELAND SECURITY, POLICY OPTIONS TO RESPOND TO BORDER SURGE OF ILLEGAL IMMIGRATION (2017).

²⁰⁶ *Id.* (marking this policy option as underway on a limited basis).

²⁰⁷ 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>].

²⁰⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 202.

²⁰⁹ Estin, *supra* note 60, at 607.

²¹⁰ 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).

2018.²¹¹ Separations have still not entirely stopped²¹² and children were being detained in large numbers before the policy officially began too.²¹³

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.²¹⁴ ORR, in turn, has agreements in place with care providers for housing.²¹⁵ 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.”²¹⁶

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.²¹⁷ The best interests of the child should nonetheless be informing the placement.²¹⁸

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

²¹¹ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 202 (explaining that there “was no single database with easily extractable, reliable information on family separations”); *see also* Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children Than Reported*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html> [<https://perma.cc/T83L-LBL8>] (reporting that the actual number is “unknown” because of the poor coordination and tracking). The number of children separated from their families spiked from 0.3% of families apprehended to 3.8% from 2016 to 2017.

²¹² U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 202 (explaining that “a parent may still be separated from his or her child in certain circumstances, such as if the parent has a criminal history or communicable disease, or if the parent is unfit or presents a danger to the child”); Jordan, *supra* note 211 (reporting that 118 or more children have been separated from the parents since the court order, which is allowed if there is reason to believe the traveling companion is not the parent or the child’s safety is at risk); *see, e.g.*, Amanda Holpuch, *Thousands More Migrant Children Separated Under Trump than Previously Known*, THE GUARDIAN (Jan. 17, 2019), <https://www.theguardian.com/us-news/2019/jan/17/trump-family-separations-report-latest-news-zero-tolerance-policy-immigrant-children> [<https://perma.cc/E3LQ-WV8D>].

²¹³ *See, e.g.*, Jacob Soboroff and Julia Ainsley, *Trump administration identifies at least 1,700 additional children it may have separated*, NBC News, <https://www.nbcnews.com/news/us-news/1-700-additional-separated-migrant-children-identified-trump-administration-n1007426>.

²¹⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 202.

²¹⁵ *Id.* Figure 1 provides a useful graphic depicting the process transferring custody from Homeland Security to DHS.

²¹⁶ Estin, *supra* note 60, at 599.

²¹⁷ *Id.* (noting that the numbers were initially closer to 6,000 to 8,000 unaccompanied minors but have increased to 68,000 in 2014).

²¹⁸ Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Placement in ORR Care Provider Facilities*, § 1.2.1 (“As mandated by law, ORR places an unaccompanied minor alien child in the least restrictive setting that is in the best interests of the child.”) (Jan. 30, 2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1> [<https://perma.cc/8ZDW-2SE2>].

have been enacted.²¹⁹ It exploited the traumas of parents and children for political gain.²²⁰

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."²²¹ This practice invokes critical constitutional concerns regarding the "oldest of the fundamental liberty interests" in the "care custody, and control of their children."²²²

Separating parents and children can trigger trauma for children and families inflicted through increasingly affirmative state action.²²³ 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.²²⁴ 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-

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/2018/04/13/11bf9012-3e64-11e8-a7d1-e4efec6389f0_story.html?noredirect=on&utm_term=.78e2911ca2b4 [<https://perma.cc/PWZ4-ZBVB>] (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).

²²¹ Press Release, Colleen Kraft, President, American Academy of Pediatrics, AAP Statement Opposing Separation of Children and Parents at the Border (May 8, 2018), <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx> [<https://perma.cc/8HSU-TB57>]; see also Jessica Lussenhop, *The Health Impact of Separating Migrant Children from Parents*, BBC (June 19, 2018), <https://www.bbc.com/news/world-us-canada-44528900> [<https://perma.cc/973N-6FLM>] (explaining the depths of the harms families suffer); Jessica Winter, *The Language of the Trump Administration is the Language of Domestic Violence*, THE NEW YORKER (June 11, 2018), <https://www.newyorker.com/culture/cultural-comment/the-language-of-the-trump-administration-is-the-language-of-domestic-violence> [<https://perma.cc/R4FS-BZDY>] (explaining how Trump's rhetoric mimics that of an abuser).

²²² Ms. L. v. U.S. Immigration and Customs Enforcement ("ICE"), 310 F. Supp. 3d 1133, 1148 (S.D. Cal. 2018) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

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.²²⁵ Targeting potential sponsors for greater scrutiny is also an intentional strategy of the Trump administration.²²⁶

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.²²⁷ The actual acts of physically separating children from their parents involved repeated accounts of threats and false pretenses.²²⁸ These detentions occurred in facilities that were not licensed as childcare facilities.²²⁹

Many of these facilities did not retain proper records of separated children and separated parents.²³⁰ 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.²³¹ Parents were not given a claim number or formal link to their children, until the data entry systems were modified in June 2018.²³²

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-

²²⁵ Press Release, Congresswoman Debbie Wasserman Schultz Statement on Homestead Child Detention Facility's Continued Expansion (Apr. 2, 2019), <https://wasserman-schultz.house.gov/news/documentsingle.aspx?DocumentID=1320> [<https://perma.cc/SDD7-VR2P>].

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.

²²⁸ EMILY RYO & IAN PEACOCK, AM. IMMIGRATION COUNCIL, THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES 14 (2018), https://americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf [<https://perma.cc/R9Q9-YY9P>] (explaining that private detention centers have a "lack of transparency and accountability and substandard or dangerous conditions of confinement").

²²⁹ ISACSON, MEYER & HITE, *supra* note 6.

²³⁰ See, e.g., Miriam Jordan, *'I Can't Go Without My Son,' a Mother Pleaded 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.”²³³

The children in detention facilities were often crying and anxious to be reunited with their parents, and their parents were distraught.²³⁴ The sites in which the children were warehoused have been roundly criticized for the inhumane conditions²³⁵ including the use of wire fencing like caging,²³⁶ the use of psychotropic drugs, outright hate and hostility,²³⁷ sexual assaults,²³⁸ 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.²³⁹ Video footage revealed state agents dragging and pushing migrant children.²⁴⁰ Children have also died in state custody, been denied medical care, and been denied basic sanitation.²⁴¹

Separating children from their parents in detention can cause severe adverse consequences to children, a point for which bipartisan agreement has emerged.²⁴² Parents can also suffer trauma from separation.²⁴³ The moment of separation is “traumatic and panic-inducing in both children and parents,”

²³³ Complaint Seeking Preliminary and Permanent Injunction at ¶ 94, *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111 (D.D.C. 2018) (No. 18-cv-01458).

²³⁴ 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.

²³⁸ Sophie Tatum, *HHS Docs Show Thousands of Alleged Incidents of Sexual Abuse Against Unaccompanied Minors in Custody*, CNN (Feb. 26, 2019), <https://www.cnn.com/2019/02/26/politics/hhs-documents-minors-sexual-abuse/index.html> [<https://perma.cc/WJU6-ZPYS>] (reporting on Department of Health and Human Services data documenting 4,500 complaints of sexual assault against unaccompanied minors from 2014-2018 and 154 accounts of staff as perpetrators).

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.

²⁴⁰ See, e.g., Mary Jo Pitzel, *Videos: Migrant Children Dragged, Pushed at Southwest Key Shelter*, AZCENTRAL (Dec. 28, 2018), <https://www.azcentral.com/story/news/politics/immigration/2018/12/28/migrant-kids-dragged-shoved-video-footage-arizona-shelter/2436296002/> [<https://perma.cc/PPa5-T8AB>].

²⁴¹ See, e.g., Pamela Ren Larson, *2 Migrant Children Died This Month. But Warnings were Documented Long Before That*, AZCENTRAL (Dec. 28, 2018), <https://www.azcentral.com/story/news/politics/immigration/2018/12/28/migrant-children-deaths-health-warnings-came-months-earlier-border-patrol-jaklein-caal-felipe-gomez/2416379002/> [<https://perma.cc/E3RT-JVMU>] (describing how important health screenings are and how medical caregivers are needed).

²⁴² See, e.g., Letter from United States Commission on Civil Rights to The Honorable Jeff Sessions and The Honorable Kirstjen M. Nielson (June 15, 2018), <https://www.usccr.gov/>

and the impacts can continue for much longer biologically.²⁴⁴ Separation affects the brain development and physiology of children.²⁴⁵ 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.”²⁴⁶

The court in *Ms. L.* held that the separation of a parent from her child constituted irreparable harm for injunctive relief purposes.²⁴⁷ 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.²⁴⁸

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.”²⁴⁹ International and national observers have described the separation of children and parents at the border as a “form of state terror.”²⁵⁰ The UN has condemned the practice²⁵¹ and concluded it “always constitutes a child rights violation.”²⁵² 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

press/2018/06-15-18-letter.pdf [https://perma.cc/4HX4-P86Y] (stating that this policy “causes irreparable harm to children and families”).

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> [https://perma.cc/7YDW-QPH8] (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 ISACSON, MEYER & HITE, *supra* note 6 (describing this as “toxic stress”).

²⁴⁷ *Ms. L. v. U.S. Immigration and Customs Enforcement (“ICE”)*, 310 F. Supp. 3d 1133, 1146 (S.D. Cal. 2018).

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

²⁴⁹ Press Release, U.N. High Commissioner for Human Rights, Press Briefing Note on Egypt, United States, and Ethiopia, U.N. Press Release (June 5, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174> [https://perma.cc/CC3Q-XV6Y].

²⁵⁰ Masha Gessen, *Taking Children From Their Parents is a Form of State Terror*, NEW YORKER (May 9, 2018), <https://www.newyorker.com/news/our-columnists/taking-children-from-their-parents-is-a-form-of-state-terror> [https://perma.cc/3H8V-WL7N].

²⁵¹ See, e.g., Nick Cumming-Bruce, *Taking Migrant Children From Parents Is Illegal*, U.N. TELLS U.S., N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html> [https://perma.cc/8YVJ-EU44].

²⁵² See *Children ‘as young as one’ involved in U.S. separation of migrant families – UN rights office*, UN NEWS (June 5, 2018), <http://news.un.org/en/story/2018/06/1011391> [https://perma.cc/5XTG-EBR8].

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 disturb[ing] 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 interrogated 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-

²⁵³ Press Release, U.N. High Commissioner for Human Rights, *supra* note 249.

²⁵⁴ Ramsey Touchberry, *Jeff Sessions Charged with ‘Child Abuse’ by United Methodist Church Members After Implementing Child Separation Policy*, NEWSWEEK (June 19, 2018), <https://www.newsweek.com/united-methodist-charges-jeff-sessions-children-984006> [<https://perma.cc/VR9C-X2MR>].

²⁵⁵ Press Release, Daniel Cardinal DiNardo, President, U.S. Conf. of Catholic Bishops, A Statement from Daniel Cardinal DiNardo (June 12, 2018), <http://www.usccb.org/news/2018/18-098.cfm> [<https://perma.cc/H8U5-P83F>].

²⁵⁶ Statement of ABA President Bob Carlson, Re: Improper Detention of Immigrant Children, AM BAR ASS’N (May 31, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/05/statement-of-aba-president-bob-carlson—re—improper-detention-o/> [<https://perma.cc/2CZ6-2KBM>].

²⁵⁷ See, e.g., Nomaan Merchant, *US Sued for \$60 Million After Infant in Detention Later Died*, WASH. TIMES (Nov. 27, 2018), <https://www.washingtontimes.com/news/2018/nov/27/us-sued-for-60-million-after-infant-in-detention-l/> [<https://perma.cc/J9WZ-VK8A>].

²⁵⁸ See, e.g., Nick Miroff, Maria Sacchetti, and Felicia Sonmez, *Democrats Grill Trump Over Family Separations and Threaten Wider Legal Probe*, WASH. POST (Feb. 26, 2019), https://www.washingtonpost.com/politics/house-panel-to-subpoena-trump-administration-officials-for-records-on-child-separation-policy/2019/02/26/95e71e02-39e8-11e9-a2cd307b06d0257b_story.html?noredirect=ON&utm_term=.e5718565b968 [<https://perma.cc/9QCA-VTR8>].

²⁵⁹ Complaint at 9, *Ms. L. v. United State Immigration & Customs Enft*, 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.²⁶⁰

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.²⁶¹ Mother and daughter were separated for months over 2,000 miles.²⁶² 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.²⁶³ Both the Plaintiff and her daughter submitted evidence of emotional and psychological harm from this separation.²⁶⁴

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.”²⁶⁵ The ACLU argued that the overwhelming scientific literature reveals the irreparable harm these children will suffer from parental separation.²⁶⁶ 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.”²⁶⁷

With litigation already pending and public pressure mounting, on June 20, 2018, President Trump issued an Executive Order ending the practice of family separation.²⁶⁸ 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.”²⁶⁹ Im-

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/2018/02/27/589079243/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.*

²⁶⁶ Memorandum in Support of Classwide Preliminary Injunction at 17, *Ms. L. v. United State Immigration & Customs Enft*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 18 Civ. 0428).

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(c),

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-

²⁷⁰ Family detention is not the answer either. Real questions have emerged about the ethics and effectiveness of these political tactics. See, e.g., Christian Jorgensen, *Family Separation, Harsh Enforcement Tactics Do Not Deter Migration*, IMMIGR. IMPACT (Aug. 10, 2018), <http://immigrationimpact.com/2018/08/10/family-separation-enforcement-migration/> [<https://perma.cc/EN8Z-49SW>] (concluding that recent policies intended to deter migration are not effective).

²⁷¹ Exec. Order No. 13,841 § 3(e), 83 Fed. Reg. 29,435 (June 20, 2018). See also Defendants' Memorandum of Points and Authorities in Support of *Ex Parte* Application for Relief from the Flores Settlement Agreement at 1, *Flores v. Sessions*, No. CV 85-4544-DMG (AGRx) (C.D. Cal. June 21, 2018).

²⁷² See *Flores v. Reno*, 507 U.S. 292 (1993).

²⁷³ HUMAN RIGHTS FIRST, THE FLORES SETTLEMENT: A BRIEF HISTORY AND NEXT STEPS 1 (2018), <https://www.humanrightsfirst.org/resource/flores-settlement-brief-history-and-next-steps> [<https://perma.cc/ZT87-4S4B>].

²⁷⁴ *Id.*

²⁷⁵ See ADAM ISACSON, MAUREEN MEYER, AND ADELINE HITE, WOLA, A National Shame: The Trump Administration's Separation and Detention of Migrant Families 10 (2018), <https://www.wola.org/wp-content/uploads/2018/08/National-Shame-Report-FINAL.pdf> [<https://perma.cc/DVT9-FS9T>].

²⁷⁶ *Id.* at 16.

²⁷⁷ Defendants' Memorandum of Points and Authorities in Support of *Ex Parte* Application for Relief from the Flores Settlement Agreement at 1, *Flores v. Sessions*, 2018 U.S. Dist. LEXIS 115488 (C.D. Cal. July 9, 2018) (No. CV 85-4544).

²⁷⁸ *Id.* at 2 (arguing they "expect to be released from custody") (emphases original). The government argued "[i]llegal family crossings and apprehensions that were in the range of 1,000 to 3,000 per month in early 2015 dramatically increased to a range of 5,000 to 9,000 per month

ing proceedings to allow “limited exemption from [the court’s] construction of the Flores Settlement Agreement’s release provisions so that ICE may detain alien minors who have arrived with their parent or legal guardian together in ICE family residential facilities.”²⁷⁹

Judge Dolly Gee denied this request describing it as a “cynical attempt” to use the courts to modify immigration law and policy following “over 20 years of congressional inaction and ill-considered executive action that have led to the current stalemate.”²⁸⁰ This ruling effectively restored the “catch and release” program.

Shortly after President Trump’s Executive Order was issued rescinding the zero tolerance policy, a Federal Court demanded even greater protections than the Executive Order had provided. On June 26, 2018, the District Court for the Southern District of California granted the plaintiffs’ motion for a class wide preliminary injunction on the practice of separating migrant families.²⁸¹ The court summarized:

This situation has reached a crisis level. The news media is saturated with stories of immigrant families being separated at the border. People are protesting. Elected officials are weighing in. Congress is threatening action. Seventeen states have now filed a complaint against the Federal Government challenging the family separation practice. And the president has taken action.²⁸²

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”).²⁸³ The Executive Order *is* absolute that “rigorous enforcement” of immigration at the border would continue under the current administration.²⁸⁴

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.²⁸⁵ 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.²⁸⁶ It further ordered the reunification of children currently separated.²⁸⁷ 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.

²⁷⁹ *Id.* at 17–19 (requesting further permission to house families in facilities outside of the state licensure rules).

²⁸⁰ *Flores v. Sessions*, 2018 U.S. Dist. LEXIS 115488 (C.D. Cal. July 9, 2018).

²⁸¹ *Ms. L. v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133, 1140 (S.D. Cal. 2018).

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.

²⁸⁹ See Caitlin Dickerson & Manny Fernandez, *First Wave of Migrant Children Reunited with Parents*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/10/us/migrant-children-reunification-immigration.html> [<https://perma.cc/ESA7-Z76V>].

²⁹⁰ See, e.g., Miriam Jordan et al., *As Migrant Families are Reunited, Some Children Don't Recognize Their Mothers*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/10/us/politics/trump-administration-catch-and-release-migrants.html> [<https://perma.cc/VLN6-5GXR>].

²⁹¹ See, e.g., Veronica Stracqualursi, Catherine E. Shoichet, & Eli Watkins, *Government Says It May Need More Time to Reunite Some Separated Families*, CNN (July 6, 2018), <https://www.cnn.com/2018/07/06/politics/justice-department-family-reunification/index.html> [<https://perma.cc/2LYQ-23C3>]; Liz Robbins, *Chaos Marks Effort to Reunite Separated Families, New York Officials Say*, N.Y. TIMES (July 26, 2018), <https://www.nytimes.com/2018/07/26/nyregion/separated-children-new-york-border-parents.html> [<https://perma.cc/LQ5A-WMDQ>]; Miriam Jordan, *A Migrant Boy Rejoins His Mother, but He's Not the Same*, N.Y. TIMES (Jul. 31, 2018), <https://www.nytimes.com/2018/07/31/us/migrant-children-separation-anxiety.html> [<https://perma.cc/N2Q5-6Z87>] (noting how a five-year-old's favorite game after detention is to practice "shackling 'migrants' with plastic cuffs").

²⁹² Robbins, *supra* note 291.

²⁹³ See Joint Status Report at 1, *Ms. L. v. U.S. Immigration & Customs Enft*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18-1458).

²⁹⁴ See Jason Lemon, *Trump Administration Argues it Could be 'Traumatic' to Reunite Thousands of Migrant Children With Their Parents*, NEWSWEEK (Feb. 3, 2019), <https://www.newsweek.com/trump-administration-argues-it-could-be-traumatic-reunite-thousands-migrant-1316093> [<https://perma.cc/UDF6-RRXT>].

²⁹⁵ Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. 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).²⁹⁷ It included directives toward building a wall and increasing detention facilities at the Southern Border.²⁹⁸ 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.²⁹⁹ 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.³⁰⁰

The Executive Order *Enhancing Public Safety in the Interior of the United States* had sweeping effects on immigrant families.³⁰¹ It rescinded all prior policies governing enforcement policies, leaving all unauthorized noncitizens in the United States vulnerable to detention and removal proceedings.³⁰² 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.³⁰³

For the many children who have witnessed the detention of a parent by ICE, this action can be particularly traumatic.³⁰⁴ Losing a parent to deportation can also be devastating to a child's development.³⁰⁵ 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

²⁹⁷ Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 30, 2017).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ See 8 U.S.C. 1225(b)(1) (2012).

³⁰¹ Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

³⁰² *Id.* It also included notable policy changes relating to sanctuary jurisdictions, but these are excluded from the scope of this article.

³⁰³ Paromita Shah, Julie Mao, & Kemi Bello, *FAQ for Community Groups on Immigration Enforcement Executive Actions: Interior Enforcement*, IMMIGRANT JUST. NETWORK (Jan. 26, 2017), <http://immigrantjusticenetowrk.org/resources> [<https://perma.cc/ZN3Y-VXP8>].

³⁰⁴ HEATHER KOBAL ET AL., URBAN INST. & MIGRATION POL'Y INST., HEALTH AND SOCIAL SERVICE NEEDS OF U.S.-CITIZEN CHILDREN WITH DETAINED OR DEPORTED IMMIGRANT PARENTS 6 (2015), <https://www.migrationpolicy.org/research/health-and-social-service-needs-us-citizen-children-detained-or-deported-immigrant-parents> [<https://perma.cc/H9TC-ENSE>].

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.³⁰⁶ Children can become depressed, suffer deteriorating physical health, weakened academic performance, self-destructive behaviors, and more.³⁰⁷ 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.”³⁰⁸

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.³⁰⁹ The non-detained parent can also suffer depression, social isolation, and struggle to support the child’s development.³¹⁰

The interior orders have also harmed the “health, economic security, and overall wellbeing of children in immigrant families.”³¹¹ A deported family member triggers other family harms, such as loss of income, loss of childcare, and difficulty meeting children’s daily needs.³¹² 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.³¹³ This also has a chilling effect on children’s educational access, leading children to be absent from school and to forego possible public benefits.³¹⁴

All health effects are further exacerbated by the reality that many undocumented children are uninsured.³¹⁵ 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.”³¹⁶

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.³¹⁷ Families have “sequestered . . . in their homes, keeping their children out of school, a reaction we usually

³⁰⁶ WENDY CERVANTES & CHRISTINA WALKER, CTR. FOR LAW AND SOC. POLICY, FIVE REASONS TRUMP’S IMMIGRATION ORDERS HARM CHILDREN 3 (2017), <https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/Five-Reasons-Immigration-Enforcement-Orders-Harm-Children.pdf> [<https://perma.cc/C5N5-EBPQ>] (citing Jack P. Shonkoff, Andrew S. Garner, et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, PEDIATRICS 129 (2012)).

³⁰⁷ See KOBALL, ET AL., *supra* note 127, at 5.

³⁰⁸ CERVANTES & WALKER, *supra* note 306, at 3.

³⁰⁹ See KOBALL, ET AL., *supra* note 127, at 5.

³¹⁰ See *id.*

³¹¹ CERVANTES & WALKER, *supra* note 306, at 2.

³¹² See KOBALL, ET AL., *supra* note 127, at 7–8.

³¹³ CERVANTES & WALKER, *supra* note 306, at 4.

³¹⁴ See *id.* (highlighting reports from around the country documenting how parents have withdrawn their children from public benefits for fear of attracting legal attention).

³¹⁵ See DREBY, *supra* note 1, at 25–26.

³¹⁶ YOSHIKAWA, *supra* note 33, at 54.

³¹⁷ See CERVANTES & WALKER, *supra* note 306.

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.

³¹⁸ See YOSHIKAWA, *supra* note 33, at 54.

³¹⁹ See generally IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP (Rachel Ida Buff ed., 2008).

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-health-care-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.*

³²² Caitlin Dickerson & Zolan Kanno-Youngs, *Thousands Targeted as ICE Prepares to Raid Undocumented Migrant Families*, N.Y. TIMES (July 11, 2019), <https://www.nytimes.com/2019/07/11/us/politics/ice-families-deport.html> [<https://perma.cc/2QLY-J6QD>] (reporting that the raids would also include “collateral” deportations of individuals present on the scene, even if not the target of the raid).

³²³ See, e.g., Julia Wick, *L.A. Landlords Exploiting Immigration Fears to Threaten Tenants*, LAIST (Apr. 7, 2017), https://laist.com/2017/04/07/landlords_ice.php [<https://perma.cc/U3S8-LABK>].

2019] Exploiting Immigrant Families 143

C. Harms to Pregnant Women

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.”³²⁴

Under the Obama administration, pregnant women not subject to mandatory release were to be presumptively released.³²⁵ The prior policy directed that a pregnant detainee should not be detained unless she was subject to mandatory detention or “extraordinary circumstances” warranted detention.³²⁶ If detained, a full medical assessment would occur, including referral for prenatal and medical care.³²⁷

The Trump administration revised this policy in an ICE directive on December 14, 2017.³²⁸ This marks another policy change affecting immigrant families. Between December 2017 and March 2018, ICE detained 506 pregnant women.³²⁹ 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.³³⁰ ICE stated its commitment to “providing appropriate care for pregnant detainees in ICE custody.”³³¹ 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.”³³²

These policy shifts raise concerns about the conditions of detention for pregnant women, which can be harmful to fetal health.³³³ Detained pregnant women are subject to overcrowding, exposed to contagious diseases, and receive little or no prenatal care.³³⁴ At least ten women have filed complaints

³²⁴ Memorandum from U.S. Immigration and Customs Enforcement Office of Enforcement and Removal Operations to Field Office Directors, Deputy Field Office Directors, Assistant Field Office Directors, & ICE Health Service Corps on Identification and Monitoring of Pregnant Detainees (Aug. 15, 2016) [hereinafter ICE Memorandum on Identification and Monitoring of Pregnant Detainees], https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2_IdentificationMonitoringPregnantDetainees.pdf [<https://perma.cc/9U4R-XLL3>].

³²⁵ See Dan Levine, *U.S. ends presumed freedom for pregnant immigrants*, REUTERS (Mar. 29, 2018), <https://www.reuters.com/article/us-usa-immigration-women/u-s-ends-presumed-freedom-for-pregnant-immigrants-idUSKBN1H52VK> [<https://perma.cc/67XN-WX93>].

³²⁶ ICE Memorandum on Identification and Monitoring of Pregnant Detainees, *supra* note 324, at 1.

³²⁷ *Id.* at 2 (noting that all decisions to detain should be cleared with a Field Office Director).

³²⁸ U.S. IMMIGRATION & CUSTOMS ENFT, ICE DIRECTIVE 11032.2: IDENTIFICATION AND MONITORING OF PREGNANT DETAINEES (Dec. 14, 2017), <https://www.ice.gov/directive-identification-and-monitoring-pregnant-detainees> [<https://perma.cc/EY6A-LL5B>].

³²⁹ See Levine, *supra* note 325.

³³⁰ See Liz Jones, *Pregnant and Detained*, NPR (Apr. 5, 2018), <https://www.npr.org/2018/04/05/599802820/pregnant-and-detained> [<https://perma.cc/L653-3X8Y>].

³³¹ U.S. Immigration and Customs Enforcement, ICE Directive 11032.2, *supra* note 328.

³³² *Id.*

³³³ See, e.g., April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 154–55 (2007).

³³⁴ See, e.g., *id.*

about inadequate prenatal care and miscarriages.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.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.³³⁷ She suffered exhaustion and dehydration from the transport and other hardships throughout her pregnancy in detention.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.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.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.”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.”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.”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.

³³⁵ Jones, *supra* note 330.

³³⁶ See Letter from Members of Congress to Elaine Duke, Acting Secretary of Homeland Security (Oct. 31, 2017), <https://roybal-allard.house.gov/news/documentsingle.aspx?DocumentID=398366> [<https://perma.cc/2JDF-6QTJ>].

³³⁷ See *id.*

³³⁸ See *id.*

³³⁹ See *id.*

³⁴⁰ Jones, *supra* note 330.

³⁴¹ Tal Kopan, *ICE Paves Way to Detain More Pregnant Immigrants*, CNN (Mar. 29, 2018), <https://www.cnn.com/2018/03/29/politics/ice-immigration-pregnant-women/index.html> [<https://perma.cc/TT6J-QMV8>].

³⁴² Letter from Members of Congress to Elaine Duke, *supra* note 336.

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.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 families³⁴⁵ 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 *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.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

³⁴⁴ See generally HEATHER ANDREA WILLIAMS, *HELP ME TO FIND MY PEOPLE, THE AFRICAN AMERICAN SEARCH FOR FAMILY LOST IN SLAVERY* (2012); *Piecing Together Stories of Families 'Lost in Slavery'*, NPR (July 16, 2012), <https://www.npr.org/2012/07/16/156843097/piecing-together-stories-of-families-lost-in-slavery> [https://perma.cc/L99J-KDTK].

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).

³⁴⁶ See Washington, *supra* note 7, at 29.

and ensure that [the child] receives care that serves, promotes, and protects her best interests.”³⁴⁷

Professor Tanya Washington powerfully invokes the *DeShaney* case to clarify state responsibility when it takes custody of a child.³⁴⁸ *DeShaney* considered the affirmative duties the state owes to protect a child from the abuse of his father when it knows of prior abuse.³⁴⁹ While the state generally has no affirmative duty to protect,³⁵⁰ *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.”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.³⁵²

When the state is exercising its *parens patriae* custody over the child, a fact-specific assessment governs what is in the BIOC under the circumstances.³⁵³ This includes a consideration of “administrative and fiscal challenges.”³⁵⁴ The BIOC standard operates as a “standard for the quality of care to which a child is entitled.”³⁵⁵ Conduct that is harmful emotionally, physically, and mentally falls outside the broad discretion generally granted to parents under the Fourteenth Amendment.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.³⁵⁷ The state interest in national security has been in conflict with the right to family unity throughout history.³⁵⁸ Plenary power has become more “malleable and nuanced” over time, often lead-

³⁴⁷ *Id.* at 30.

³⁴⁸ *See id.* at 31.

³⁴⁹ *See DeShaney v. Winnebago Co. Dept. of Soc. Servs.*, 489 U.S. 189 (1989).

³⁵⁰ *Id.* at 196–97; *see also* Washington, *supra* note 7, at 33 (analyzing the differences in *DeShaney*).

³⁵¹ *DeShaney*, 489 U.S. at 200–01 (1989) (contrasting the holding with other factual scenarios).

³⁵² *Id.* at 200.

³⁵³ *See* Washington, *supra* note 7, at 34–36.

³⁵⁴ *Id.* at 36.

³⁵⁵ *Id.* at 26.

³⁵⁶ *Id.*

³⁵⁷ Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 603 (2013).

³⁵⁸ Kerry Abrams, *Family Reunification and the State*, 32 CONST. COMMENT 247, 248 (2017) (explaining that “their relative strength has waxed and waned over time”).

ing to a “balancing of interests rather than a rigid rule of deference to the political branches.”³⁵⁹

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.³⁶⁰ 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.³⁶¹ 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.³⁶²

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.³⁶³ 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.³⁶⁴ 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 chil-

³⁵⁹ *Id.* at 271–72.

³⁶⁰ See, e.g., Lussenhop, *supra* note 221.

³⁶¹ Exec. Order No. 13,841, 83 Fed. Reg. 29,435–36 (June 25, 2018).

³⁶² Ingrid Eagly, et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 785, 802 (2018).

³⁶³ See, e.g., Peter Wade, *Trump Administration Won’t Stop Lying About Terrorism and Immigration*, ROLLING STONE (Jan. 8, 2018), <https://www.rollingstone.com/politics/politics-news/trump-administration-terrorism-immigration-775387/> [<https://perma.cc/K272-9QD7>].

³⁶⁴ *L. v. U.S. Immigration & Customs Enft.*, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018) (“Certainly, that cannot satisfy the requirements of due process.”).

dren.³⁶⁵ This is worrisome because the parent might be the individual with the best knowledge of the immigration claims the child might have.³⁶⁶

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).³⁶⁷ This directive sought to better facilitate communications between parents in immigration detention with their children and loved ones with a locator system.³⁶⁸ It sought to ensure that enforcement activities did not “unnecessarily disrupt parental rights.”³⁶⁹ It worked on improvements in working with the child welfare system, transporting parents to proceedings involving their children, and creating new parental rights coordinators.³⁷⁰ 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.³⁷¹ 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.”³⁷² It recommended in 2018, after studying the separation of parents and children, that DHS and HHS Secretaries “jointly develop and implement a

³⁶⁵ *Id.* at 1138.

³⁶⁶ *Id.*

³⁶⁷ KOBALL, ET AL., *supra* note 127, at 14.

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 16.

³⁷⁰ *Id.* at 16–17.

³⁷¹ See YOSHIKAWA, *supra* note 33, at 137.

³⁷² U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 202.

documented interagency process with clearly defined roles and responsibilities, as well as procedures to disseminate placement decisions, for all agencies involved in the referral and placement of unaccompanied children in HHS shelters.”³⁷³

As new policies and laws are enacted, a process analogous to the Congressional 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 development of better methods and practices to minimize family trauma in implementing 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 adequately converge with the interests of the majority while purportedly straining 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 “consistency 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 Crossroads*, 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.”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.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.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.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.”³⁸⁴ These framings are in direct response to narrow issues though.³⁸⁵ They are rarely integrated systematically in the overall mission and advocacy of the organizations.³⁸⁶

³⁸⁰ Nicholls, *supra* note 9, at 229.

³⁸¹ See Olivares, *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.

³⁸² Olivares, *supra* note 73, at 1130.

³⁸³ See, e.g., Dakin Andone, *Coast-to-Coast Protests Denounce Trump Immigration Policies*, CNN (June 30, 2018), <https://www.cnn.com/2018/06/30/us/june-30-immigration-protests/index.html> [<https://perma.cc/3YYE-PTKX>]; Joel Rose & Marisa Penaloza, *Protesters Across the U.S. Decry Policy of Separating Immigrant Families*, NPR, (June 1, 2018), <https://www.npr.org/2018/06/01/616257822/immigration-rights-activists-protest-trump-administration-child-separation-policy> [<https://perma.cc/93G8-6VG6>]. These larger protests began with smaller protests such as, for example, UnitedWeDream hosting rallies outside of the Department of Justice called “Rally for the Children/Keep Families Together” demanding the end to separation. See, e.g., UnitedWeDream, <https://unitedwedream.org> [<https://perma.cc/26GV-LMNW>] (last visited April 14, 2019).

³⁸⁴ *Separating Families is Inhumane*, AM. CIVIL LIBERTIES UNION, <https://action.aclu.org/petition/separating-families> [<https://perma.cc/T3CM-693A>].

³⁸⁵ See, e.g., Ingrid Eagly, et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 785, 820 (2018) (highlighting a family detention pro bono project).

³⁸⁶ See, e.g., *Our Mission*, NATIONAL NETWORK FOR IMMIGRANT AND REFUGEE RIGHTS, <http://nnirr.org/drupal/about-us/mission> [<https://perma.cc/CW4N-CBB5>] (last visited July 8, 2018); *Our Vision*, AMERICANS FOR IMMIGRANT JUSTICE, OUR MISSION, <http://www.ajjustice.org/whoweare> [<https://perma.cc/UB2Y-YHGG>] (last visited July 8, 2018); *Mission and Vision*, DETAINED MIGRANT SOLIDARITY COMMITTEE, <https://dmscelpaso.wixsite.com/dmscelpaso/about-us> [<https://perma.cc/5LHW-ENR7>] (last visited July 8, 2018).

Some existing messaging can be criticized for reinforcing the worrisome “good immigrant” and “bad immigrant” dichotomy.³⁸⁷ This messaging extends back to the Obama administration and beyond.³⁸⁸ Prior narrative framings have been critiqued as “ineffective and outdated.”³⁸⁹

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).³⁹⁰ 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.³⁹¹ 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, 2017.³⁹² Homeland Security immediately started rejecting applications and requests for renewals received after this day.³⁹³ The stated goal was to incentivize Congress to act.³⁹⁴ This rescission prompted a string of lawsuits that has left DACA in a state of uncertainty and litigation.³⁹⁵

³⁸⁷ See, e.g. Nicholls, *supra* note 9, at 234.

³⁸⁸ Olivares, *supra* note 73, at 1126 (describing how rhetoric that “confuses criminality with immigrant status is bolstered by Obama’s familiar yet faulty assertion that some immigrants are worthy of relief while others are not”).

³⁸⁹ See Olivares, *supra* note 73, at 1139.

³⁹⁰ See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/G6CY-E2MN>] (last visited Apr. 14, 2019); see generally Johnson, *supra* note 188.

³⁹¹ See U.S. CITIZENSHIP AND IMMIGRATION SERVS., *supra* note 390. Applicants had to be under the age of 31 as of June 15, 2012. They must have entered the United States before their 16th birthday. They must have continuously resided in the United States since June 15, 2007. They had to be physically present in the United States on June 15, 2012. Applicants must have been in school or have completed a qualifying education requirement or have been honorably discharged from qualifying military service. Finally, applicants must not have been convicted of a felony, a significant misdemeanor, or three or more other misdemeanors, and they must not otherwise pose any national security or public safety concerns.

³⁹² See Memorandum from Elaine C. Duke, Acting Secretary, U.S. Department of Homeland Security, to James W. McCament, Acting Director, U.S. Citizenship and Immigration Services, on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>. [<https://perma.cc/EK2Y-6S7U>].

³⁹³ *Id.*

³⁹⁴ *Statement from President Donald J. Trump*, WHITE HOUSE (Sept. 5, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-7/> [<https://perma.cc/LT54-RNV6>].

³⁹⁵ On January 9, 2018, a federal judge ordered President Trump to resume DACA renewals. US DEP’T OF HOMELAND SEC., DEFERRED ACTION FOR CHILDHOOD ARRIVALS: RESPONSE TO JANUARY 2018 PRELIMINARY INJUNCTION (2018), <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction>. [<https://perma.cc/5FJV-47AR>] (last visited July 11, 2018). The Trump administration appealed this case. Press Release, Dep’t of Justice, Justice Department Files Notice to Appeal and

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.”³⁹⁶ 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.”³⁹⁷ The term sought to humanize immigrants and achieve empathy.³⁹⁸

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.³⁹⁹ 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.”⁴⁰⁰ 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.”).

³⁹⁶ Nicholls, *supra* note 9, at 231–33.

³⁹⁷ *Id.* at 232–33.

³⁹⁸ Adrienne Pon, *The Dreamer Divide: Aspiring for a More Inclusive Immigrants’ Rights Movement*, 14 STAN. J. C.R. & C.L. 33, 39 (2018).

³⁹⁹ See generally Rubenstein, *supra* note 71.

⁴⁰⁰ SUSAN J. TERRIO, WHOSE CHILD AM I? UNACCOMPANIED, UNDOCUMENTED CHILDREN IN U.S. IMMIGRATION CUSTODY 3 (2015).

ents.⁴⁰¹ 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."⁴⁰² It glorifies a subset of immigrant youth using a narrow lens of "high-achieving youth with clean records who strongly contribute to the economy."⁴⁰³ This is particularly true realizing that this strategy has "had only some measure of success" given the failed efforts to pass the DREAM legislation⁴⁰⁴ 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.⁴⁰⁵

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.⁴⁰⁶ 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.

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.

⁴⁰⁵ See Nicole Rodriguez, *Trump Is Using DACA Recipients as Bargaining Chips for Border Wall Funds*, NEWSWEEK (Jan. 4, 2018), <https://www.newsweek.com/trump-using-daca-recipients-hostages-border-wall-771032> [https://perma.cc/YZG6-SH44]; Greg Sargent, *The Trump White House's Ugly New Strategy: Use 'Dreamers' as a Bargaining Chip*, WASH. POST (Aug. 22, 2017), https://www.washingtonpost.com/blogs/plum-line/wp/2017/08/22/the-trump-white-houses-ugly-new-strategy-use-dreamers-as-a-bargaining-chip/?utm_term=.958f3a737003. [https://perma.cc/XKL4-3KG6].

⁴⁰⁶ See generally Olivares, *supra* note 34.

