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# A Lineage of Family Separation

Anita Sinha<sup>†</sup>

## INTRODUCTION

*"History, as nearly no one seems to know, is not merely something to be read. And it does not refer merely, or even principally, to the past. On the contrary, the great force of history comes from the fact that we carry it within us . . . ."*<sup>1</sup>

This article is rooted in the belief that the articulation of shared narrative histories advances the pursuit of justice. Acknowledging shared histories, including narratives that justify unjust practices has been a shortcoming in the United States, particularly when it comes to racial injustice.<sup>2</sup> Included in this oversight is the history of executing and sanctioning family separation.<sup>3</sup> The US government's separation of families under the "zero tolerance" policy, which was in effect over approximately two and a half months, drew national and international criticism.<sup>4</sup> In

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<sup>1</sup> JAMES BALDWIN, *The White Man's Guilt*, reprinted in COLLECTED ESSAYS 722, 722–23 (1998).

<sup>2</sup> For an elaboration on the concept of collective histories and its importance to the pursuit of racial justice in the United States, see Matthew Green, *Bryan Stevenson: On Teaching America's Long History of Racial Injustice*, KQED (Mar. 9, 2017), <https://www.kqed.org/lowdown/26077/bryan-stevenson-on-why-we-cant-forget-americas-troubled-racial-history>. [<https://perma.cc/7BPV-B6VT>].

<sup>3</sup> See generally Rachel Johnson-Farias, *Uniquely Common: The Cruel Heritage of Separating Families of Color in the United States*, 14 HARV. L. & POL'Y REV. 531 (2020) (recounting the separation of Black families in the United States over time, from the separation of enslaved families to mass incarceration).

<sup>4</sup> See Ashley Fetters, *Unthinkable: 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/SR7T-TRLZ>]; Fionnuala Ní Aoláin, *Global Responses to President Trump's Family Separation via "Zero Tolerance"*

total, the Trump administration separated over five thousand migrant children from their parents before, after, and during the time when the zero tolerance policy officially was in effect.<sup>5</sup> The sense of shock,<sup>6</sup> however, belied the historical repetition of the practice in the United States.<sup>7</sup>

There are examples of deliberate family separation throughout US history, when the government or private actors intentionally separated children from their parents, caretakers, and communities. These actors' motivations included white nationalism, profit, and charity. The narratives justifying these practices created political, social, and legal conditions for family separation to be deemed acceptable. These justification narratives<sup>8</sup> comprise what philosopher Hilde Lindemann calls "master narratives."<sup>9</sup> Such narratives include those that constitute "oppressive narrative formations,"<sup>10</sup> with the purpose of "reinforc[ing] unjust distributions of social power by pretending to justify them."<sup>11</sup> The justification narratives accompanying the different family separation policies throughout US history share certain themes, such as racial superiority of those executing the separations and moral depravity of separated parents and, in some cases, of the children themselves.

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*Detention Policy*, JUST SEC. (June 30, 2018), <https://www.justsecurity.org/58783/global-responses-president-trumps-family-separation-zero-tolerance-detention-policy/> [<https://perma.cc/UW7H-3XNN>]; see also *infra* Section II.A.

<sup>5</sup> See *infra* note 212 and accompanying text.

<sup>6</sup> See Mariela Olivares, *The Rise of Zero Tolerance and the Demise of Family*, 36 GA. ST. U. L. REV. 287, 291 (2020) ("Wringing their hands, our friends and neighbors wondered: how did we, as a country, arrive at a cultural and political reality in which the government openly and under the guise of law takes children away from capable, loving parents?").

<sup>7</sup> Shaun King, *Separating Migrant Families Is Barbaric. It's Also What the U.S. Has Been Doing to People of Color for Hundreds of Years*, INTERCEPT (June 20, 2018, 1:45 PM), <https://theintercept.com/2018/06/20/family-separation-immigration-history-slavery-massincarceration/> [<https://perma.cc/G2SX-VYUR>] ("You'd have a hard time finding an extended period of American history where children and parents of color weren't forcefully separated from one another by the white power structure in this country."); see also Anita Sinha, *An American History of Separating Families*, AM. CONST. SOC'Y: EXPERT F. (Nov. 2, 2020), <https://www.acslaw.org/expertforum/an-american-history-of-separating-families/> [<https://perma.cc/RT8C-QZLU>]; James Herbert Williams, *Child Separations and Families Divided: America's History of Separating Children from Their Parents*, 42 SOC. WORK RSCH. 141, 141–44 (2018) ("Separating children from their parents is not a contemporary event in American History. There is a long and remarkable history of this practice with indigenous people, slaves, and immigrants.").

<sup>8</sup> RAINER FORST, *On the Concept of Justification Narrative*, in *NORMATIVITY AND POWER: ANALYZING SOCIAL ORDERS OF JUSTIFICATION* 57 (2017) (describing the concept as a "heuristic device to connect the normative dimension of justification that aims at rational persuasion with the dimension of socially effective justifications which are recognized and practiced by those involved as persuasive").

<sup>9</sup> Hilde Lindemann, *Counter the Counterstory: Narrative Approaches to Narratives*, 17 J. ETHICS & SOC. PHIL. 286, 288 (2020).

<sup>10</sup> Mark Lance, *Counterstories, Stock Characters, and Varieties of Narrative Resistance: Response to Lindemann*, 17 J. ETHICS & SOC. PHIL. 299, 299 (2020).

<sup>11</sup> Lindemann, *supra* note 9, at 288.

These historical family separation policies eventually came to an end, in part due to the production and dissemination of narratives of the harm experienced by children, parents, and communities.<sup>12</sup> Importantly, however, the success of these “counterstories”<sup>13</sup> in each example was facilitated by a sociopolitical context that ultimately rendered the justifications unacceptable.<sup>14</sup> And so, while counternarratives played an important role, an essential component to their success was the telling of these stories in alignment with a broader movement for social change—an alignment that finally gave these narratives potency.

In the context of vast power differentials, coupled with racism and xenophobia directed towards the affected families, the ability to generate counterstories that contribute to ending family separation has been a challenging endeavor, allowing devastating practices to persist for prolonged periods.<sup>15</sup> Enslaved families endured hundreds of years of forced family separations.<sup>16</sup> Government policies deliberately separated Indigenous families for almost a century.<sup>17</sup> Private charities through the “orphan trains” movement separated predominately impoverished immigrants for a quarter of a century.<sup>18</sup>

In this context, the end of separating families under the Trump administration’s zero tolerance policy happened quickly. Several factors aligned to contribute to this outcome. The advocacy was impressively rapid, was committed to multiple legal strategies, and was covered by largely sympathetic media outlets.<sup>19</sup> Government officials were explicit about deliberately separating migrant families in order to deter migration from Central America, which drew public condemnation of the policy. Moreover, zero tolerance may have been a low-hanging fruit insofar as the US government admitting culpability, given that it was a discrete policy of family separation within an

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<sup>12</sup> See *infra* text accompanying notes 58–63, 122–130, 149–151, 177–180.

<sup>13</sup> Lindemann, *supra* note 9, at 301 (“A counterstory . . . is a story that is told for the purpose of resisting a socially shared narrative used to justify the oppression of a social group.”); HILDE LINDEMANN NELSON, DAMAGED IDENTITIES, NARRATIVE REPAIR 150 (2001) (“Counterstories, which root out the master narratives in the tissue of stories that constitute an oppressive identity and replace them with stories that depict the person as morally worthy, supply the necessary means of resistance.”).

<sup>14</sup> See *infra* text accompanying notes 73–76, 129, 145–148, 181–186.

<sup>15</sup> See generally Marya Schechtman, *It's Complicated: The Complexity and Power of Lindemann's Narrative Framework*, 17 J. ETHICS & SOC. PHIL. 315 (2020) (discussing the difficulties of creating the conditions for successful counterstories).

<sup>16</sup> See *infra* Section I.A.

<sup>17</sup> See *infra* Section I.B.

<sup>18</sup> See *infra* Section I.C.

<sup>19</sup> See *infra* text accompanying notes 237–251.

immigration system that generally (and continually) separates noncitizen parents from citizen and noncitizen family members.

This history, both distant and recent, brings us to ongoing examples of family separation. The justifications of punishment and deterrence that fuel today's US immigration and criminal legal systems have rendered acceptable the continuation of family separation on a substantial scale. The families separated as a collateral consequence of mass incarceration and widespread detention and deportation largely represent the same communities impacted by deliberate family separation practices. This makes the distinction between deliberate and collateral family separation suspect, and whether the separation is intentional or not does not alter the severe harm it inflicts upon children, parents, and communities. As demonstrated by the historical examples of deliberate family separation policies, narratives from those harmed play an important role in impacting societal understanding and appealing to its values. These counternarratives, however, need to align with a movement for social change to challenge the justifications for the continued separation of mostly marginalized children from their parents.

## I. AN AMERICAN HISTORY OF SEPARATING FAMILIES

Carried out by the government or by private actors, the latter with almost absolute impunity, the practice of separating families is embedded in American history. In his influential essay, *A Case for Reparations*, Ta-Nehisi Coates writes the following about enslaved family separation in the United States:

In a time when telecommunications were primitive and [B]lacks lacked freedom of movement, the parting of [B]lack families was a kind of murder. Here we find the roots of American wealth and democracy—in the for-profit destruction of the most important asset available to any people, the family. The destruction was not incidental to America's rise; it facilitated that rise.<sup>20</sup>

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<sup>20</sup> Ta-Nehisi Coates, *A Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/9ME5-C9KT>].

Soon after the Civil War formally ended slavery,<sup>21</sup> the US government began executing Indigenous family separation.<sup>22</sup> First by boarding school placements and later through adoptions, the separation of Indigenous families was a continuation of the US government's efforts to eradicate Indigenous people and their culture.<sup>23</sup> The preservation of a particular notion of the nation also drove the so-called "orphan trains" movement beginning in the mid-nineteenth century, when child welfare workers removed children often based on "[c]ultural inferiority" . . . whenever families failed to resemble the 'American' values of temperance, wealth, and whiteness."<sup>24</sup> Most children removed from East Coast cities were not orphans, but instead were from impoverished, immigrant families.<sup>25</sup> Disregard for family integrity based on racist, xenophobic, and economic imperatives was a common thread throughout these deliberate family separation histories.

#### A. *Separating Enslaved Families*

The inception of the Atlantic slave trade was, inherently, family separation—parents and children separated in their home country in the African continent through kidnapping or sale, and forcibly brought over as slaves to the American continent.<sup>26</sup> Rooted in "a deeply held belief in white racial superiority,"<sup>27</sup> American slavery was not merely about labor but constituted a comprehensive system of social control. The consistent threat and frequently executed practice of family

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<sup>21</sup> There are different historical narratives of when slavery in the United States began and when it ended. See Nikole Hannah-Jones, *The 1619 Project: America Wasn't a Democracy, Until Black Americans Made It One*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> (last visited Sept. 26, 2021); Ariela Gross, *When Is the Time of Slavery?*, *The History of Slavery in Contemporary Legal & Political Argument*, 96 CALIF. L. REV. 283, 283–84, 286–303 (2008).

<sup>22</sup> One can certainly characterize the genocide of Indigenous people as the first iteration of family separation, but for the purposes of this article, Indigenous family separation is detailed when the US government began its deliberate policy of removing Indigenous children from their parents and tribes.

<sup>23</sup> Roxanne Dunbar-Ortiz, *Yes, Native Americans Were the Victims of Genocide*, HIST. NEWS NETWORK (May 12, 2016), <http://historynewsnetwork.org/article/162804> [<https://perma.cc/7P39-7RYF>].

<sup>24</sup> Kari E. Hong, *Parents Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 16–18 (2003).

<sup>25</sup> See *infra* note 159 and accompanying text.

<sup>26</sup> Brief for Law Professors as Amicus Curiae at 5, D.J.C.V. v. U.S., No. 1:20-CV-05747-PAE (S.D.N.Y. Dec. 23, 2020) [hereinafter D.J.C.V. Amicus Brief]. The D.J.C.V. Amicus Brief details stories of family separation recounted "[a]fter the successful mutiny by the slave cargo of the ship *Amistad* in 1839." *Id.* (citing HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925*, at 329–30 (1976)).

<sup>27</sup> Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1886 (2019).

separation was a central part of this system of control. An article in an 1836 issue of the *Anti-Slavery Record*, an abolitionist publication, “denounced slavery as ‘nothing but a system of tearing asunder family ties.’”<sup>28</sup> Indeed, no law at the time limited an enslaver’s ability to separate families.<sup>29</sup>

Enslaved persons stood a 30 percent chance of being sold by their enslaver,<sup>30</sup> and “[t]wenty-five percent of interstate trades [of enslaved persons] destroyed a first marriage, and half of them destroyed a nuclear family.”<sup>31</sup> The well-known case of *Dred Scott v. Sandford* also implicated family separation, as it involved an enslaved father stolen from his wife and two daughters.<sup>32</sup> The Supreme Court sanctioned their separation via its now-infamous holding that enslaved persons were property and not citizens.<sup>33</sup>

Before the enactment of the Thirteenth Amendment in 1865, enslaved persons were denied the legal rights of personhood.<sup>34</sup> A treatise on slave law expressly rendered them innately incapable of forming family lineage, stating, “[enslaved persons] issue, though emancipated, have no inheritable blood.”<sup>35</sup> In essence, then, there was no family to separate, which justified enslavers commonly separating enslaved children and

<sup>28</sup> D.J.C.V. Amicus Brief, *supra* note 26, at 8; see also Herman N. Johnson, Jr., *From Status to Agency: Abolishing the “Very Spirit of Slavery,”* 7 COLUM. J. RACE & L. 245, 262 (2017) (explaining the different aspects of slavery that freed slaves found barbaric and oppressive, including family separation). Finding that court sales disrupted more families than noncourt or commercial sales, Professor Russell demonstrates that “[t]he operation of the Southern legal system . . . clearly expressed Southern disregard for slave families.” Thomas D. Russell, *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales*, 1996 UTAH L. REV. 1161, 1166 (1996).

<sup>29</sup> Andrew T. Fede, *Gender in the Law of Slavery in the Antebellum United States*, 18 CARDOZO L. REV. 411, 417 (1996) (“No common law state limited the owner’s right to sell slave children away from their parents.”).

<sup>30</sup> Coates, *supra* note 20.

<sup>31</sup> *Id.*; see also Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1330 (1998) (“[T]he best evidence suggests that approximately one in six slave marriages ended in involuntary separation.”).

<sup>32</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 398 (1857); see Jennifer Chacón, *Citizenship and Family: Revisiting Dred Scott*, 27 WASH. U. J.L. & POL’Y 45, 45–46 (2008) (arguing that *Dred Scott*, at its core, was a case about family and a challenge to the denial of the right for slaves to keep their families together); Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1035–36 (1997) (asserting that *Dred Scott* was about “a [B]lack family negotiating the difficult channels of passage to freedom to preserve the family’s integrity against the ravages of slavery” and the lost opportunity “to recognize . . . a freedom of family continuity, cohesion, autonomy, and privacy”).

<sup>33</sup> *Dred Scott*, 60 U.S. at 404–05.

<sup>34</sup> U.S. CONST. amend. XIII; see Fede, *supra* note 29, at 413; Johnson, *supra* note 28, at 261 (“Former slaves defined freedom as family cohesion, bodily integrity, and educational opportunity . . . the enjoyment of rights shared by all human beings.”).

<sup>35</sup> THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 245 (1858).

their parents.<sup>36</sup> Black mothers were *de facto* surrogates for the enslaver, as the children born to enslaved women legally belonged to another person.<sup>37</sup> The experiences of enslaved fathers essentially have been erased, as there are few accounts of family separation told through a male perspective, and enslaved children often did not have memories of their fathers to share.<sup>38</sup> Even emancipation did not guarantee family unity, as proslavers regularly kidnapped legally free adults and children to resell them into slavery.<sup>39</sup>

### 1. The Master Narratives of Enslaved Families, as Told by Their Legal Status

The brutality of slavery in its conversion of people's humanity into property<sup>40</sup> meant that the construction of narratives to justify family separation was intertwined with the narrative endeavors to uphold the system of slavery generally.<sup>41</sup>

<sup>36</sup> Fede, *supra* note 29, at 416; see also Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 55 (1994).

<sup>37</sup> Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139, 144 (1990). Only Louisiana and Alabama adopted laws to cap the ages slaveholders could separate children from their mothers. See HEATHER ANDREA WILLIAMS, *HELP ME FIND MY PEOPLE: THE AFRICAN AMERICAN SEARCH FOR FAMILY LOST IN SLAVERY* 25 (2012).

<sup>38</sup> See WILLIAMS, *supra* note 37, at 32.

<sup>39</sup> Allen, *supra* note 37, at 142–43 (conveying the story of Polly Crocket, who was kidnapped in Illinois, sold into slavery in Missouri, and, later, successfully sued for her freedom and regained possession of her daughters who had been sold to other white families); see also Fede, *supra* note 29, at 414; Jonathan Daniel Wells, *The So-Called 'Kidnapping Club' Featured Cops Selling Free Black New Yorkers into Slavery*, SMITHSONIAN MAG. (Oct. 14, 2020), <https://www.smithsonianmag.com/history/so-called-kidnapping-club-featured-new-york-cops-selling-free-blacks-slavery-180976055/> [<https://perma.cc/3RG2-XQ7M>]. See generally CAROL WILSON, *FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780-1865* (1994) (documenting the kidnapping of free Blacks in the antebellum period and unsuccessful efforts to end it). "Reverse Underground Railroad" is a derisive term for the practice of kidnapping freed Blacks for slavery. See Richard Bell, *Opinion: You Know About the Underground Railroad. But What About the Reverse Underground Railroad?*, WASH. POST (Nov. 7, 2019), <https://www.washingtonpost.com/opinions/2019/11/07/you-know-about-underground-railroad-what-about-reverse-underground-railroad/> [<https://perma.cc/6TYF-EU24>].

<sup>40</sup> The term "chattel slavery" emphasizes how American society, including systems of power, considered human beings as property to distinguish from other forms of forced labor, peonage, or compelled service. See William M. Carter Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1320, 1335–36 (2007). This article will use the term "slavery" to refer to chattel slavery. See Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1489 (2012) (describing how abolitionists in nineteenth century America distinguished between wage and chattel slavery, narrowing the definition of "slavery" in the common vernacular to only refer to the forced enslavement of Black persons as property).

<sup>41</sup> The justification went as far as characterizing African Americans as less capable of emotional pain than white people, and therefore family separation as less harmful. See WILLIAMS, *supra* note 37, at 98.



As humans with a legal status of property, enslaved families were routinely broken up by enslavers for transactional reasons, as a way to settle debts or resolve disputes over estates.<sup>42</sup> Enslaved children were also branded as gifts or inheritances for enslavers' children,<sup>43</sup> so that the death of enslavers often caused enslaved family separation.<sup>44</sup>

Even before the *Dred Scott* decision, state courts upheld the separation of enslaved families based on the notion that they were property.<sup>45</sup> In *Willis v. Willis' Administrators*, two enslavers exchanged ownership of a young boy and a young girl.<sup>46</sup> Notwithstanding this agreement, the slave owners had allowed the children to stay at their respective homes with their own mothers.<sup>47</sup> However, when one of the enslavers passed away, his estate demanded the return of the enslaved boy.<sup>48</sup> The Kentucky Court of Appeals found that this child was legally the possession of the enslaver's estate.<sup>49</sup>

Another legal construct justifying enslaved family separation was the proposition that enslaved persons were not able to marry.<sup>50</sup> Three states did acknowledge one kind of

<sup>42</sup> See, e.g., *M'Vaughters v. Elder*, 4 S.C.L. (2 Brev.) 307, 308, 314 (1809) (asserting in dispute over an estate that "th[e] increase from the female slave and mare[] [wa]s the product of the intestate's personal estate[] which, like the increase of any other stock belonging to the personal estate, are assets to which the administrator has a legal right" and thus should be distributed among heirs); see also Keith N. Hylton, *Slavery and Tort Law*, 84 B.U.L. REV. 1209, 1226 (2004).

<sup>43</sup> See Interview by Anne Ruth Davis with Mom Sara Brown, Marion, S.C. (Sept. 10, 1937), in XIV FEDERAL WRITERS' PROJECT: SLAVE NARRATIVE PROJECT, SOUTH CAROLINA, PART I, ABRAMS-DURANT 141-44 (1941) (narrative of a woman who as a young enslaved girl was given as a gift to her enslaver's daughter), <https://memory.loc.gov/mss/mesn/141/141.pdf> [<https://perma.cc/UFC2-XSE5>]; see also Vanessa M. Holden, *Slavery and America's Legacy of Family Separation*, BLACK PERSPS. (July 25, 2018), <https://www.aaihs.org/slavery-and-americas-legacy-of-family-separation/> [<https://perma.cc/TSG4-CEFP>].

<sup>44</sup> Teri A. McMurtry-Chubb, "Burn This Bitch Down!": *Mike Brown, Emmett Till, and the Gendered Politics of Black Parenthood*, 17 NEV. L.J. 619, 624 (2017) ("Slave families could be separated at any time, through death, sale, or otherwise by the will of their masters . . ."); see also WILLIAMS, *supra* note 36, at 30-31 (citing JOHN BROWN, SLAVE LIFE IN GEORGIA: A NARRATIVE OF THE LIFE, SUFFERINGS, AND ESCAPE OF JOHN BROWN, A FUGITIVE SLAVE (Beehive Press 1991) (1854)). Adolescents were desirable and viewed as more profitable because of their strength and youth. WILLIAMS, *supra* note 37, at 25.

<sup>45</sup> See, e.g., *M'Vaughters*, 4 S.C.L. (2 Brev.) at 308 (equating young slaves to animal assets that could be administered as part of a deceased owner's estate); see also *Nowell v. O'Hara*, 19 S.C.L. (1 Hill) 150, 151-52 (1833) (holding that the sale of an enslaved man was justified).

<sup>46</sup> *Willis v. Willis' Adm'rs*, 36 Ky. (1 Dana) 48, 48 (1837).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 49.

<sup>49</sup> *Id.* at 50. *Willis* provides a rare look into the justice system's outlook on enslaved families and family separation. Unless a Black person was free or had a valid claim to emancipation, the courts were not accessible to them, which is why there were few lawsuits regarding family separation during slavery. COBB, *supra* note 35, at 247.

<sup>50</sup> McMurtry-Chubb, *supra* note 44, at 622 (citing THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 44 (1996)); Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 189 (1987).

relationship within an enslaved family—"that of mothers to very young children."<sup>51</sup> Yet based on the premise that slaves were considered to be property, no state recognized the right of enslaved persons to legally marry prior to the enactment of the Thirteenth Amendment.<sup>52</sup> This inability of enslaved parents to marry meant that their children were illegitimate, which created legal complications for those children post-Emancipation.<sup>53</sup>

Compounding the overall brutal dehumanization caused by the slave system, relationships between enslaved persons were framed as casual and thus of relatively limited importance to the enslaved persons themselves.<sup>54</sup> James Henry Hammond, a well-known slavery apologist, in response to the common practice of enslaved family separation, wrote:

Some painful instances perhaps may occur. Very few that can be prevented. It is, and it always has been, an object of prime consideration with our slaveholders, to keep families together. Negroes are themselves both perverse and comparatively indifferent about this matter. Sometimes it happens that a negro prefers to give up his family rather than separate from his master.<sup>55</sup>

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<sup>51</sup> Russell, *supra* note 28, at 1171 ("Laws protecting any type of slave family relationship existed in only three states—Alabama, Georgia, and Louisiana.").

<sup>52</sup> See McMurtry-Chubb, *supra* note 44, at 622 (explaining how, in the continuation of being treating as property, slaves were not given the right to marry, which would have legitimized their children and recognized them as humans with the right to make familial decisions); Paul Finkelman, *Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican*, 81 MO. L. REV. 1, 22 (2016) ("A marriage, then as now, was a contract between the two spouses and the state. But slaves could never sign a contract."); Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 307 (2006) ("As personalty, slaves lacked the capacity to enter into any form of marital union recognized necessarily or legally by the plantation masters, the government, or the judiciary.").

<sup>53</sup> Guiliiana Perrone, "Back Into the Days of Slavery": Freedom, Citizenship, and the Black Family in the Reconstruction-Era Courtroom, 37 L & HIST. REV. 125, 143 (2019) (explaining how slave marriages may have existed prior to their right to marry and how ex post facto recognition of these marriages was particularly important for free children, who lacked legitimacy at birth); *Marriage and Divorce—Slave Marriage—Effect of Emancipation*, 28 YALE L.J. 516, 516–17 (1919) ("A slave 'marriage' did not in itself produce any of the civil consequences of marriage. But when entered on by the consent of the master and the moral assent of the slave, it did from the moment of freedom produce all those consequences, operating retroactively at least as regards the legitimation of children."); see also McMurtry-Chubb, *supra* note 44, at 623–24 (explaining how many retroactive slave marriage laws required cohabitation, which was inconsistent with the lack of control slaves had over their lives and locations).

<sup>54</sup> Dacia Green, *Ain't I . . . ? : The Dehumanizing Effect of the Regulation of Slave Womanhood and Family Life*, 25 DUKE J. GENDER L. & POL'Y 191, 191 (2018) (criticizing early studies that substantiated the myth that slave relationships were casual rather than serious partnerships and marriages).

<sup>55</sup> Adam Serwer, *Trumpism, Realized*, ATLANTIC (June 20, 2018) (quoting JAMES HENRY HAMMOND & THOMAS CLARKSON, GOV. HAMMOND'S LETTERS ON SOUTHERN SLAVERY: ADDRESSED TO THOMAS CLARKSON, THE ENGLISH ABOLITIONIST 15 (1845)), <https://www.theatlantic.com/ideas/archive/2018/06/child-separation/563252/> [<https://perma.cc/B62H-5UGD>].

Family separation was also justified as a means to an end—a way to control enslaved persons and legitimize the master/slave relationship.<sup>56</sup> In *Nowell v. O'Hara*, a South Carolina jury found that the sale of an enslaved man was justified because “the owners of slaves frequently send them off from amongst their kindred and associates as a punishment, and it is frequently resorted to, as the means of separating a vicious negro from amongst others exposed to be influenced and corrupted by his example.”<sup>57</sup> This framing of enslaved persons as violent and morally depraved offered yet another justification for keeping families apart.

## 2. Firsthand Narratives of Enslaved Family Separation as Counterstories

In the decades leading to the abolition of the US slave system, former slaves began publishing narratives detailing the brutal impact of family separation. The autobiography *Narrative of the Life of Frederick Douglass, An American Slave* opens with Douglass's enslaver separating him from his mother soon after Douglass's birth, as an explanation for his unemotional response to the news of her death years later.<sup>58</sup> In his second autobiography, Douglass wrote: “My poor mother, like many other slave-women had *many children*, but NO FAMILY!”<sup>59</sup>

The use of stories detailing the cruelty of enslaved family separation was a central rhetorical strategy of abolitionists.<sup>60</sup> In addition to Douglass, other well-known fugitive slave authors who offered firsthand narratives of family separation include Sojourner Truth and Harriet Jacobs. In the *Narrative of Sojourner Truth*, Truth wrote of being sold with a flock of sheep

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<sup>56</sup> See Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 220 (1992); see also D.J.C.V. Amicus Brief, *supra* note 26, at 6 (“Eliminating family ties was essential to maintaining the social isolation needed to perpetuate the institution of slavery.”).

<sup>57</sup> *Nowell v. O'Hara*, 19 S.C.L. (1 Hill) 150, 151–53 (1833). In a cruel irony, the terror built into the slave system sometimes kept families together: one interviewee, Mary Ella Grandberry, recounted that her father as an enslaved person desired to escape to freedom, but did not leave out of fear of the violent repercussions she and her siblings would likely face if he left. Interview by Levi D. Shelby, Jr. with Mary Ella Grandberry, Tuscumbia, AL (June 9, 1937), in I FEDERAL WRITERS' PROJECT: SLAVE NARRATIVE PROJECT, ALABAMA, AARONS-YOUNG 157–64 (1941), <https://memory.loc.gov/mss/mesn/010/010.pdf> [<https://perma.cc/4HY8-8K2T>].

<sup>58</sup> FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* 1, 2–3 (1845).

<sup>59</sup> FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 17, 48 (1855).

<sup>60</sup> See Serwer, *supra* note 55 (“In the antebellum United States, abolitionists seized on the separation of families by slave traders to indict the institution of slavery itself.”).

at an auction at the age of nine, separating her from her family,<sup>61</sup> and thereafter "began to beg God most earnestly to send her father to her."<sup>62</sup> She also detailed how her own five-year-old son was captured and sold into slavery, and how her ultimately successful legal fight to get him back involved enduring harassment and mockery.<sup>63</sup>

Harriet Jacobs, in *Incidents in the Life of a Slave Girl*, described how her life took a considerable turn for the worse when her enslaver, who bequeathed Jacobs to her niece, died, causing Jacobs to be sent to the niece's family.<sup>64</sup> Jacobs also wrote about later being separated from her own children for years while she was in hiding, waiting to escape to the North.<sup>65</sup> Written almost a decade earlier by white abolitionist activist Harriet Beecher Stowe, the influential novel *Uncle Tom's Cabin* also featured family separation as a prominent theme.<sup>66</sup>

The documentation of family separation narratives continued after the official end of slavery and persists today. Formerly enslaved persons, like Kate Drumgoold, have published autobiographies chronicling narratives of family separation.<sup>67</sup> "Slave Narratives," a program of the Federal Writers' Project launched during the Great Depression, collected over 2,300 oral histories of African Americans enslaved as children, many including stories of family separation.<sup>68</sup> More recently, Professor Heather Andrea Williams, using slave narratives, interviews, and other documentation, offered details of family separation during slavery in a poignantly humanizing manner and chronicled often unsuccessful searches for lost family members in the post-Civil War era.<sup>69</sup>

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<sup>61</sup> SOJOURNER TRUTH, NARRATIVE OF SOJOURNER TRUTH, A NORTHERN SLAVE 27 (1850).

<sup>62</sup> *Id.* at 28.

<sup>63</sup> Through a series of events, Peter, Truth's son, was sold out of New York into a southern state, which made the sale illegal under New York law. *Id.* at 44–45. Because of this, Truth was able to seek retribution from the court and eventually succeeded in obtaining custody of Peter. *Id.* at 53–54.

<sup>64</sup> HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 15–17 (1861).

<sup>65</sup> *Id.* at 224–25, 233–36.

<sup>66</sup> See generally HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (1852) (fictional account of enslaved man's life that shed light on the cruelty and horrors of slavery).

<sup>67</sup> See KATE DRUMGOOLD, A SLAVE GIRL'S STORY 5 (1898) (describing when her mother was sold by their enslaver to another family). For a compilation of autobiographies of enslaved and formerly enslaved persons, see Univ. Libr., The Univ. of N.C. Chapel Hill, *North American Slave Narratives: Chronological List of Autobiographies*, DOCUMENTING THE AM. S., <https://docsouth.unc.edu/neh/chronautobio.html> [<https://perma.cc/P4P8-QNC5>].

<sup>68</sup> See *Born in Slavery: Slave Narratives from the Federal Writers' Project 1936 to 1938*, LIBR. OF CONG., <https://www.loc.gov/collections/slave-narratives-from-the-federal-writers-project-1936-to-1938/about-this-collection/> [<https://perma.cc/A5GV-VE93>].

<sup>69</sup> See generally WILLIAMS, *supra* note 37 (showing how, after emancipation, family reunification was both easier and harder due to the increased freedom of movement

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The forcible separation of enslaved families was justified through narratives dehumanizing enslaved children and parents who, consistent with then-existing laws, were subjected to white superiority and social control.<sup>70</sup> Enslaved families were erased as not being families at all, lacking the ability to legally marry and being characterized as having an inability to create and prioritize family ties.<sup>71</sup> These racist justifications, along with the economic incentive to separate enslaved families,<sup>72</sup> created a climate in which enslaved persons were denied the right to family integrity for centuries.

Firsthand accounts of enslaved family separation emerged as counternarratives that were important tools in advocating for the end of the US slave system.<sup>73</sup> These narratives gained potency in the three decades leading up to the formal end of slavery in the United States.<sup>74</sup> The timing aligned with the forging of alliances between slaves and abolitionists.<sup>75</sup> It was also a time when slavery was being abolished by most countries around the world.<sup>76</sup> Today, the documentation of the profound harm of family separation practices endemic to the slave system provides critical historical accounting challenging subsequent policies in the United States that both deliberately and as a collateral consequence separated, and continue to separate, families.

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that most formerly enslaved people experienced and that while some were able to reunite with their families, others were unable to locate long-lost family members as individuals migrated to other parts of the United States).

<sup>70</sup> See Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 768 (1988).

<sup>71</sup> See *supra* notes 35, 50–53 and accompanying text; see also James H. Sweet, *Defying Social Death: The Multiple Configurations of African Slave Family in the Atlantic World*, 70 WILLIAM & MARY Q. 251, 251 (2013).

<sup>72</sup> See *supra* notes 40–49 and accompanying text.

<sup>73</sup> See *supra* notes 60–66 and accompanying text.

<sup>74</sup> See *supra* notes 66–69 and accompanying text.

<sup>75</sup> Patrick Rael, *The United States Was Late to End Slavery*, GEO. WASH. U. HIST. NEWS NETWORK (Dec. 8, 2015) (“In the U.S., overcoming the formidable obstacles to abolition required something more—a remarkable alliance between slaves and their abolitionists allies. The process began in earnest in the early 1830s, when a new breed of northern reformers began championing the cause of the slave, calling for the immediate and uncompensated end of slavery.”).

<sup>76</sup> *Id.* (“Slavery . . . ended late in the US. The Spanish colonies of mainland South America destroyed slavery as they became independent (1808–1833), and major European powers ended slavery between 1834 and 1848. Only Cuba (1880) and Brazil (1888) followed the U.S.”).

## B. Separating Indigenous Families

Starting in the 1880s, soon after the formal end of slavery in the United States, the federal government began deliberately separating thousands of Indigenous children from their families and communities.<sup>77</sup> The timing, arguably, was not coincidental, as the US government's targeting of the Indigenous community could be seen as a reaction to the Civil War:

A major policy shift by the BIA [Bureau of Indian Affairs] occurred at the end of the Civil War. When that conflict drew to a close in 1865, Congress was tired of war and dismayed by the lack of unity within the country, so it decided Natives would be forced to assimilate to white society. . . . That could not happen if the government allowed Natives to retain their lands, their culture and their sovereignty.<sup>78</sup>

In an effort to force this notion of national unity, the US government shifted from direct to structural violence against Native Americans by separating Indigenous children from their communities.<sup>79</sup> For most of this period, the policy relied on the brutal and now infamous boarding school system. The objective of the boarding school system was to "erase and replace" Indigenous culture.<sup>80</sup> Children were taught to replace their inferior, "savage" culture with "civilized," that is, white, Christian ways.<sup>81</sup>

<sup>77</sup> See Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. 136, 137–39 (2013).

<sup>78</sup> Ann Piccard, *Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137, 151 (2013) (quoting Darek Hunt, *BIA's Impact on Indian Education Is an Education in Bad Education*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Jan. 30, 2012)).

<sup>79</sup> Maggie Blackhawk, *Federal Indian Law As Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1801–02 (2019) ("[T]he Marshall Trilogy began a period of dormancy similar to that experienced by the Reconstruction Amendments in the late nineteenth century. During this time, American colonialism transformed from direct violence to structural violence as the national government established the reservation system, forced Native children into boarding schools, and attempted to break up tribal sovereignty under the auspices of paternalism.").

<sup>80</sup> Anita Ortiz Maddali, *The Immigrant "Other": Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 652 (2014); see also Grace Hauck, *Mass Grave Provides Reminder of Dark Tale*, USA TODAY (June 1, 2021), <https://www.usatoday.com/story/news/nation/2021/05/30/native-american-boarding-schools-abused-neglected-thousands-us/5263769001/> [<https://perma.cc/HQZ5-ARKX>] ("More than 350 Native American boarding schools were established across 30 states 'to implement cultural genocide through the removal and reprogramming of American Indian and Alaska Native children . . . ."); Mary Annette Pember, *Death by Civilization: Thousands of Native American Children Were Forced to Attend Boarding Schools Created to Strip Them of Their Culture*, ATLANTIC (Mar. 8, 2019), <https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/> [<https://perma.cc/PVC9-E6B3>] (describing boarding schools as "institutions created to destroy and vilify Native culture, language, family, and spirituality").

<sup>81</sup> See Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1308–09 (2021) (discussing federal initiative

While assimilation was the explicit goal, the boarding school system also involved economic exploitation as “local communities often benefitted from cheap or free labor” extracted from Indigenous children.<sup>82</sup> Thus, although it may have been less central than in the context of separating enslaved families, there was nonetheless an economic gain to separating Indigenous families. Additionally, similar to the American slavery system, severe forms of mistreatment, including rampant sexual abuse, were other disturbing pathologies of the boarding school system.<sup>83</sup> Indigenous children were physically abused by staff for speaking their language,<sup>84</sup> as punishment for violating the boarding school system’s English-only policy.<sup>85</sup> They were humiliated and verbally abused by, for example, being called a “dirty Indian.”<sup>86</sup> Many children died in boarding schools, and

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to suppress Indigenous religion that was “aimed at rooting out . . . ‘savagism’ in Indigenous children); Sarah Deer, *(En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States*, 31 YALE J.L. & FEMINISM 1, 9–10 (2019) (detailing government efforts “to formally indoctrinate [Indigenous children] into ‘white’ Christian culture”); Bethany R. Berger, *Savage Equalities*, 94 WASH. L. REV. 583, 609 (2019) (discussing efforts designed for the “denigration” of Indigenous people); Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 819–20 (2019) (summarizing the push for forced assimilation that “decimated the collective, communal life of tribes”); Barbara Stark, *When Genealogy Matters: Intercountry Adoption, International Human Rights, and Global Neoliberalism*, 51 VAND. J. TRANSNAT’L L. 159, 166–67 (2018) (discussing the “Indian Adoption Project” that was intended to “solve the Indian Problem”); Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 201 (2001) (summarizing federal policies “constructed to obliterate [Indigenous] cultures and, in the process, destroy the separate political identity of [Indigenous] people”); Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, reprinted in FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30, at 50, 55, 52–58 (Matthew L.M. Fletcher et al. eds., 2009) (discussing efforts to assess extent of the “Indian child welfare crisis” in the 1970s, including the number of Indigenous children removed from their homes and the major causes and effects of the removals).

<sup>82</sup> Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 667 (2010); see also Lara Roetzel et al., *Beyond the Cages: Sex Trafficking in South Dakota*, 64 S.D. L. REV. 346, 358 (2019).

<sup>83</sup> Deer, *supra* note 82, at 666 (“For many Native people, the boarding school era is synonymous with sexual abuse and sexual exploitation on a grand scale.”); see also Deer, *supra* note 81, at 10 (“Given the high rates of physical and sexual abuse that occurred during the boarding school era, we might even consider that Western gender hierarchies were literally beaten into the children.”). The widespread sexual abuse in the boarding schools is the basis for some to argue that the relocation of Indigenous children was trafficking. See, e.g., Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1479 (2015) (explaining that forced assimilation included sexual abuse at government-sanctioned boarding schools, pushing some Native American minors into prostitution).

<sup>84</sup> Pember, *supra* note 80.

<sup>85</sup> Lindsay Glauner, Comment, *The Need for Accountability and Reparation: 1830-1976 The United States Government’s Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 941 (2002) (quoting the reasoning provided in 1887 by then-commissioner of Indian Affairs, “This language [English], which is good enough for a white man and a [B]lack man, ought to be good enough for the red man. It is also believed that teaching an Indian youth in his own barbarous dialect is a positive detriment to him.”).

<sup>86</sup> Pember, *supra* note 80.

"[a]lthough some were returned to their families at death, others were buried on site, often in unmarked graves."<sup>87</sup>

Starting in the late 1950s, as a cost-effective alternative to the boarding school system, the federal government began promoting and facilitating the adoption of Indigenous children.<sup>88</sup> A majority of the children were placed with white families.<sup>89</sup> These adoptions were brokered by the US government through the BIA and in partnership with private entities such as the Child Welfare League of America (CWLA), the oldest child welfare organization in the United States.<sup>90</sup> State courts and child welfare systems likewise placed Indigenous children in non-Indigenous homes.<sup>91</sup>

According to the Association on American Indian Affairs (AAIA), which conducted two surveys of states with large Indigenous American populations, one in 1969 and the second in 1974, roughly 25 to 35 percent of Indigenous children were separated from their families.<sup>92</sup> The magnitude of the practice has had long-standing effects. Children of those "educated" in boarding schools have witnessed their parents suffer from severe mental illness decades later, reliving and trying to make sense of the cruelty they endured.<sup>93</sup> The intergenerational trauma of Indigenous family separation effectively has meant a continuation of fractured families. As Bethany Berger has observed, "History shapes the material present as . . . [g]enerations of family separation due to boarding schools and casual placement in foster care and adoption disrupt familial bonds and undermine parenting skills for the current generation."<sup>94</sup>

<sup>87</sup> Rebecca Tsosie, *The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship*, 63 UCLA L. REV. 1692, 1715 (2016); see also Pember, *supra* note 80 ("Food and medical attention were often scarce; many students died. Their parents sometimes learned of their death only after they had been buried in school cemeteries, some of which were unmarked.").

<sup>88</sup> Deborah Thibeault & Michael S. Spencer, *The Indian Adoption Project and the Profession of Social Work*, 93 SOC. SERV. REV. 804, 808 (2019).

<sup>89</sup> Arnold R. Silverman, *Outcomes of Transracial Adoption*, FUTURE CHILD., Spring 1993, at 104, 107 ("In 1967 a national survey disclosed that, of 696 Native American children who had been adopted, 84% (584) had been adopted by white families.").

<sup>90</sup> Thibeault & Spencer, *supra* note 88, at 807. In 1968, the CWLA placed hundreds of Indigenous children within non-Indigenous adoptive families through the Adoption Resource Exchange of North America (ARENA), a program for "hard-to-place" or "special needs" children. MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING & ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 20 (2014).

<sup>91</sup> See JACOBS, *supra* note 90, at 20–23.

<sup>92</sup> H.R. Rep. No. 95-1386, at 9 (1978). Neither the AAIA study nor other statistical findings documenting the scope of Indigenous family separation the author found for this article provide actual numbers of children removed from their tribal families and communities.

<sup>93</sup> See Pember, *supra* note 80 (describing how her mother "died while surviving civilization").

<sup>94</sup> Berger, *supra* note 81, at 621 (alteration in original).



# 1. Narratives Justifying Separating Indigenous Families Through Boarding Schools, Adoption, and Foster Placements

In an 1892 speech to Congress, Captain Richard Henry Pratt, who opened the first Indian boarding school in Pennsylvania, justified the removal of Indigenous children to schools often far away from their families and communities with this mandate: “Kill the Indian in him, and save the man.”<sup>95</sup> An aggressive family separation policy by the US government targeting Indigenous communities was thus justified for almost a century by the need to remove children from their communities in order to civilize them.<sup>96</sup> It was a system of forced assimilation casting Native ways as savage,<sup>97</sup> and stripping Indigenous children of their given names, as well as their language, religion, and culture.<sup>98</sup>

Sentiments of needing to protect America against the perils brought on by uncivilized Indigenous communities spiked post-World War II, an era generally fraught with rampant xenophobia.<sup>99</sup> During this time, the US government’s Indigenous family separation policy shifted from boarding schools to placements through adoptions and foster care. The justification of assimilation persisted: “[P]olicymakers continued to identify Indian family life—and its apparent divergence from white American middle-class gender and sexual norms—as an impediment to the resolution of the persistent Indian problem.”<sup>100</sup> In this narrative context, removing Indigenous children from their families and communities was acceptable government policy. Similar to enslaved family separation, separating Indigenous families was deemed warranted because of narratives characterizing them as inferior and morally depraved.

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<sup>95</sup> *Official Report of the Nineteenth Annual Conference of Charities and Correction (1892)*, reprinted in Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN,” 1880-1900, at 260, 261 (1973); *id.* at 260–71; see Lorie Graham & Kathryn E. Fort, *If Truth Be Told*, HILL (June 25, 2015, 7:30 AM), <https://thehill.com/blogs/congress-blog/civil-rights/245996-if-truth-be-told> [<https://perma.cc/ZMM2-JBFL>]; Becky Little, *How Boarding Schools Tried to Kill the Indian Through Assimilation*, HIST. (Nov. 1, 2018), <https://www.history.com/news/how-boarding-schools-tried-to-kill-the-indian-through-assimilation> [<https://perma.cc/836N-W6T6>].

<sup>96</sup> See Graham & Fort, *supra* note 95.

<sup>97</sup> Little, *supra* note 95. Pratt stated in the 1892 speech, “Transfer the savage-born infant to the surrounding of civilization, and he will grow to possess a civilized language and habit.” PRATT, *supra* note 95, at 268.

<sup>98</sup> See Little, *supra* note 95.

<sup>99</sup> See Ruth Lawlor, *Second World War’s Legacy of Racism*, YALEGLOBAL ONLINE (May 2, 2019), <https://archive-yaleglobal.yale.edu/content/second-world-wars-legacy-racism> [<https://perma.cc/YW3H-CBJ2>].

<sup>100</sup> Jacobs, *supra* note 77, at 140.

When the justification shifted to the motives of the actors, that is, the government and private representatives separating Indigenous children from their families, the narrative became one of saving and protecting. Arnold Lyslo, who directed the BIA's Indian Adoption Project (IAP) from 1958 to 1967, asserted that racial discrimination deprived Indigenous children opportunities for adoption, using the term the "forgotten child."<sup>101</sup> President Lyndon B. Johnson, in a speech to Congress in 1968, also referred to "forgotten Americans" to describe Indigenous children.<sup>102</sup> The narrative was one of saving these children from a life that was "the antithesis of a modern-day 'civilized' society."<sup>103</sup>

Embedded in the notion that the separations were for Indigenous children's own good was a vilification of their Indigenous caretakers<sup>104</sup>—a manner of invoking the best-interest-of-the-child standard that often is used against marginalized communities.<sup>105</sup> Those promoting Indigenous children's removal alleged that there was a rise in "unmarried Indigenous mothers with unwanted children."<sup>106</sup> To further fetishize this supposed phenomenon, the CWLA launched a research project designed to learn more about "any significant cultural factors of the Indian unmarried mothers [compared] with the non-Indian unmarried mothers [and] how they plan for themselves and their children."<sup>107</sup> As child welfare workers visited tribes to promote adoption "as an alternative to a life in

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<sup>101</sup> *Id.* at 143 (quoting Indian Adoption Project, Apr. 1960, 1, box 17, folder 3, Child Welfare League of America Papers).

<sup>102</sup> *Id.*; see also Lyndon B. Johnson: *Indians Are Forgotten Americans*, LBJ PRESIDENTIAL LIBR. (Sept. 6, 2016), <http://www.lbjlibrary.org/press/lbj-in-the-news/lyndon-b-johnson-indians-are-forgotten-americans> [<https://perma.cc/CY9L-7T7T>].

<sup>103</sup> Graham, *supra* note 81, at 56.

<sup>104</sup> "But the Indian child has remained the 'forgotten child,' left unloved and uncared for on the reservation, without a home or parents he can call his own." Jacobs, *supra* note 77, at 143 (quoting Indian Adoption Project, Apr. 1960, 1, box 17, folder 3, Child Welfare League of America Papers).

<sup>105</sup> See generally Rachael T. Aminu, *Redefining Best Interest of the Child: The Crushing Impact of Child Support Debts on Low-Income Families in the Minority Communities*, 43 T. MARSHALL L. REV. 561 (2019) (advocating for a new best interest of the child standard for Texas's child support system in light of the current standard's devastating effects); Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL'Y & L. 87 (2006) (arguing against the use of immigration status as a factor in the best interest of the child analysis for child custody cases). The BIA also promoted the adoption and fostering of Indigenous children using the best interest of the child narrative. Jacobs, *supra* note 77, at 137.

<sup>106</sup> Jacobs, *supra* note 77, at 137.

<sup>107</sup> Thibeault & Spencer, *supra* note 88, at 812 (alterations in original) (quoting Child Welfare League of America, Research Schedule on Indian Adoption Project (Sept. 30, 1959) (unpublished research) (on file at the History Archives, Elmer Anderson Library, University of Minnesota, box 17, folder 3)).

poverty for their children,"<sup>108</sup> caretakers who turned down this option down would be criticized for not having the children's best interest in mind.

The narrative of saving forgotten Indigenous children translated directly into the IAP's objective of "stimulat[ing] the adoption of homeless American Indian children by families in non-Indian communities because the opportunities for the adoption in the states of their residence are inadequate."<sup>109</sup> Through this framing of the mission, the harm-doers were cast not just as Indigenous parents and other caretakers, but as the entire Indigenous community. It was a narrative that pushed interstate adoption of Indian children to "bypass the regional prejudices that prevent many homeless [Indigenous] children from being adopted, since prejudice is often a local matter."<sup>110</sup> It also encouraged, not surprisingly, placements of Indigenous children into white families' homes.<sup>111</sup>

Related to white family placements, another justification narrative from the vantage point of the actor orchestrating Indigenous family separation was the actualization of a "color-blind society."<sup>112</sup> This again was framed as being in the children's best interest, when in reality, pushing for the adoption of Indigenous children outside their communities "served the larger policy aims of the period, which sought to terminate the unique tribal status of many Indian communities, to undermine Indian claims to communal land and sovereignty, and to detribalize thousands of Indian people."<sup>113</sup>

All the while, the experiences and points of view of Indigenous children's parents and caretakers were absent from the color-blind society justification. One stark example was in the first systematic study of placement made by the BIA's IAP

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<sup>108</sup> Lila J. George, *Why the Need for the Indian Child Welfare Act?*, in *THE CHALLENGE OF PERMANENCY PLANNING IN A MULTICULTURAL SOCIETY* 165, 172 (Gary R. Anderson et al. eds., 1997).

<sup>109</sup> Thibeault & Spencer, *supra* note 88, at 811 (quoting Arnold Lyslo, *Child Welfare League of America* (Mar. 15, 1967) (unpublished research) (on file at the History Archives, Elmer Anderson Library, University of Minnesota, box 17, folder 4, p. 1). The second objective of the IAP was to research and compare the adoption of Indigenous American children with the adoption of children from other minority races. *Id.*

<sup>110</sup> Jacobs, *supra* note 77, at 140 (alteration in original). "[T]he IAP placed [Indigenous] children primarily from western and Great Lakes states in adoptive homes that were [predominantly] located in northeastern, mid-Atlantic, and midwestern states." *Id.*

<sup>111</sup> See *id.* at 143 (discussing how the Indian Adoption Project supporters and employees used the same narrative of "the forgotten children" to encourage white families to adopt Indigenous American children).

<sup>112</sup> *Id.* at 139, 143 ("IAP advocates implicitly conveyed that racial equality for Indians would eventuate through rescuing *individual* Indian children through *individual* acts of color-blind goodwill on the part of white, middle-class Americans.").

<sup>113</sup> *Id.* at 139.

conducted by David Fanshel. Published in 1972, *Far from the Reservation* was the product of a longitudinal study to examine outcomes resulting from these adoptions.<sup>114</sup> Fanshel followed the white families that adopted through the IAP<sup>115</sup> by interviewing the adoptive parents, but not their adopted Indigenous children.<sup>116</sup> He also did not interview the Indigenous parents or caretakers from whom the children were taken.<sup>117</sup>

The justification narratives for Indigenous family separation expressly relied upon a characterization of the “savage” environment from which children needed to be saved, without consideration of any counterstories for almost a century. The narratives of Indigenous children, parents, and communities only began to emerge in the mid- to late 1960s, the decade leading up to legislation enacted to end family separation for Indigenous communities.

## 2. Counterstories in Congress Leading to the Passage of the Indian Child Welfare Act

The AAIA studies documenting the pervasiveness of Indigenous family separation<sup>118</sup> were conducted at the request of a tribe concerned about the extent to which children were being removed from Indigenous communities.<sup>119</sup> By this time, the federal government was beginning to take notice of the effects of its family separation practices. That same year, in 1974, a report issued by the US Commission on Civil Rights observed that “child-welfare removal of Native children may have resulted in a ‘massive deculturation.’”<sup>120</sup> The revelation of the scope of

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<sup>114</sup> DAVID FANSHIEL, *FAR FROM THE RESERVATION: THE TRANSRACIAL ADOPTION OF AMERICAN INDIAN CHILDREN* 17–19, 339–42 (1972). A longitudinal study means conducting multiple observations over a course of time. Fanshel specifically interviewed adoptive parents three separate times over five years. Silverman, *supra* note 89, at 106–07.

<sup>115</sup> FANSHIEL, *supra* note 114, at 17–18, 50; Silverman, *supra* note 89, at 106.

<sup>116</sup> Nor did he use for comparison a control group of same-race adoptees or nonadopted children. See FANSHIEL, *supra* note 114, at 50–76; see also Silverman, *supra* note 89, at 106–07.

<sup>117</sup> See FANSHIEL, *supra* note 114, at 50. Interestingly, despite this Fanshel concluded the report by advocating for Indigenous self-determination:

It is my belief that only the Indian people have the right to determine whether their children can be placed in white homes. . . . [E]ven with the benign outcomes reported here, it may be that Indian leaders would rather see their children share the fate of their fellow Indians than lose them in the white world. It is for the Indian people to decide.

FANSHIEL, *supra* note 114, at 341–42.

<sup>118</sup> See *supra* text accompanying note 92.

<sup>119</sup> Jacobs, *supra* note 77, at 137 (describing how “the Devils Lake (now Spirit Lake) Sioux Tribe of North Dakota requested that the AAIA conduct an investigation into the practice” of removing Indigenous children from their families for adoption or fostering).

<sup>120</sup> ME. WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM’N, *BEYOND THE MANDATE: CONTINUING THE CONVERSATION* 22 (2015) [hereinafter *BEYOND THE MANDATE*], <https://bit.ly/3JbN5F1> [<https://perma.cc/TTU2-EQP6>].

Indigenous family separation came at a time when narratives detailing the harm found a place to be heard. Congress began hearings on proposed legislation that, years later, would lead to a "multi-pronged" approach aimed at curtailing Indigenous family separation.<sup>121</sup>

Narratives detailing the Indigenous experiences of family separation led to the passage of the Indian Child Welfare Act (ICWA) in 1978,<sup>122</sup> shifting almost a century of justifying narratives. The organizing that brought forward stories of separated Indigenous families and children challenged, in particular, the savior justification narratives: "To thousands of non-Indian Americans, the testimony of Indian activists and the passage of the ICWA came as a shock. Many social workers, adoptive families, and nonprofit agency directors were accustomed to seeing themselves as caring rescuers. Now some perceived themselves anew through Indian eyes: as child snatchers."<sup>123</sup>

The congressional testimony provided narratives countering the unfavorable depictions of Indigenous parents, families, and communities—depictions that had been deployed to argue removal as being in the best interest of the children. The congressional record of the ICWA, in stating its intent, asserted that "an Indian child should remain in the Indian community."<sup>124</sup> The ICWA would "[en]sure that Indian child welfare determinations [we]re not based on a white, middle-class standard."<sup>125</sup> During the first hearing on the ICWA in 1974, opening remarks by Senator James Abourezk of South Dakota made a similar point:

<sup>121</sup> Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 127, 133–35 (2008) (describing ICWA's multi-pronged approach).

<sup>122</sup> Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963); see Atwood, *supra* note 121, at 133 ("Hearings before Congress leading up to the 1978 Act told a tragic picture of the forcible removal of Indian children from their families to non-Indian homes and institutions."); Patrice H. Kunesch, *Borders Beyond Borders—Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act*, 42 NEW ENG. L. REV. 15, 17 (2007) ("[A]fter extensive and often emotional testimony about the pervasive and unchecked removal of thousands of Indian children from their families, Congress enacted the [ICWA] . . .").

<sup>123</sup> JACOBS, *supra* note 90, at 128; see also *id.* at xxviii–xxix ("Listening to the stories of Indian families in the 1960s and 1970s would compel Americans to grapple with the U.S. government's role as a settler colonial power and to examine the legacies of its colonialism. Americans would confront the persistent injustices that still bedevil Indian communities and ponder the place of modern Indian nations within the borders of the United States.").

<sup>124</sup> H.R. REP. NO. 95-1386, at 23 (1978).

<sup>125</sup> Christine Metteer, *The Existing Indian Family Exception: An Impediment to the Trust Responsibility to Preserve Tribal Existence and Culture as Manifested in the Indian Child Welfare Act*, 30 LOY. L.A. L. REV. 647, 654 (1997) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989)); H.R. REP. NO. 95-1386 at 23–24; see also Jacobs, *supra* note 77, at 137 ("Indian families and their advocates charged instead that many social workers were using ethnocentric and middle-class criteria to unnecessarily remove Indian children from their families and communities.").

Because of poverty and discrimination Indian families face many difficulties, but there is no reason or justification for believing that these problems make Indian parents unfit to raise their children . . . Up to now, however, public and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indian.<sup>126</sup>

Unlike the Fanshel report issued a few years prior,<sup>127</sup> the perspectives of the parents and caretakers of removed Indigenous children were part of the narrative presented during the congressional debate: "Many Indian women testified to the intense pressure they had experienced from social workers and missionaries to give up their newborns. Other Indian witnesses claimed that social workers had unfairly removed their children, while still others reported on the veritable kidnapping of their children."<sup>128</sup>

The ICWA embodied the point "when Congress finally realized that Native American families and culture were rapidly being driven toward extinction."<sup>129</sup> The promise symbolized by the legislation was significant, as the movement leading up to the passage of the ICWA reflects "a time when federal Indian policy shifted from termination to self-determination."<sup>130</sup>

The post-ICWA reality, however, has not fully actualized this shift. This lack of progress is attributable, in part, to resistance by state court judges to apply the Act consistently, or at all.<sup>131</sup> A 2015 report issued by the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission aptly remarked that "[a]dopting ICWA marked one step toward upholding tribal

<sup>126</sup> Kunesch, *supra* note 122, at 16 (quoting *Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearing on Indian Child Welfare Program Before the Subcomm. on Indian Affs. of the S. Comm. on Interior and Insular Affs.*, 93d Cong. 1-2 (1974) (statement of Sen. James Abourezk)).

<sup>127</sup> See *supra* text accompanying notes 114-117.

<sup>128</sup> JACOBS, *supra* note 90, at 139.

<sup>129</sup> Peter K. Wahl, *Little Power to Help Brenda? A Defense of the Indian Child Welfare Act and Its Continued Implementation in Minnesota*, 26 WM. MITCHELL L. REV. 811, 814 (2000); see also Atwood, *supra* note 121, at 133 ("Through ICWA, Congress addressed a long history of destructive federal and state governmental practices that decimated the American Indian family and threatened the very existence of Indian tribes."); Metteer, *supra* note 125, at 648 ("[T]he past abuses by state welfare authorities against tribes and Indians . . . and a fear of the 'cultural genocide' they might cause, led to the enactment of the Indian Child Welfare Act in 1978." (footnote omitted)) (quoting *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 162 (Tex. Ct. App. 1995)).

<sup>130</sup> JACOBS, *supra* note 90, at 129. The express objective of the ICWA was "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families." 25 U.S.C. § 1902. Among other things, the Act granted exclusive jurisdiction to Indian tribes over any Indian child custody proceeding. 25 U.S.C. § 1911.

<sup>131</sup> Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward A New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 587 (2002) ("By some accounts the [ICWA] has been the victim of entrenched state court hostility . . .").

rights, but effective implementation was another.”<sup>132</sup> The Commission found that the percentage of Native children in the child welfare system in Maine had changed very little from 1960 to 2015.<sup>133</sup> Similarly stark statistics showed that the disproportionate representation of Indigenous children in child welfare systems exists in other states whose practices were meant to be reformed by the ICWA.<sup>134</sup>

Litigation challenging the statute has also threatened the efficacy of the ICWA.<sup>135</sup> Challenging the statute in courts has largely been a concerted effort by conservative groups based on “ensuring [the] best interest[] of the child.”<sup>136</sup> One such group has characterized the statute as subjecting Indigenous children “to a separate, less-protective set of laws solely because of their race—laws that make it harder to protect them from abuse and neglect and virtually impossible to find them loving, permanent adoptive homes.”<sup>137</sup> Despite such reported intentions, the litigation stripping away the efficacy of the Act resonates with racially-

<sup>132</sup> BEYOND THE MANDATE, *supra* note 120, at 12.

<sup>133</sup> *Id.* at 21 (“In 1960, approximately 4 percent of children in foster care in Maine were Native. On average, from 2002 to 2014, 3.92 percent of children in [state] custody were Native.”).

<sup>134</sup> South Dakota is one of these states. See Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011, 12:00 PM), <https://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system> [https://perma.cc/32LG-EV99] (“In South Dakota, Native American children make up only 15 percent of the child population, yet they make up more than half the children in foster care . . . [A]lmost 90 percent of the kids in family foster care are in non-native homes or group care.”).

<sup>135</sup> For example, the US Supreme Court, in the highly publicized *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), ruled against an interpretation of the ICWA as conferring custody of an Indigenous child to her biological Indigenous father. In a 5–4 decision, the Court held the ICWA did not apply to protect Indigenous American parents who had never been a custodial parent. *Id.* at 653–54. The majority elaborated that reading the ICWA to allow an absentee father to “play his ICWA trump card at the eleventh hour to override the mother’s decision” to place the child for adoption would raise equal protection concerns by causing potential adoptive parents to hesitate to accept placements of children who had Native heritage. *Id.* at 656; see also JACOBS, *supra* note 90, at xxiii–xxiv (discussing how media coverage of *Adoptive Couple* demonized the Indigenous biological father and the Cherokee tribe and casted the white adoptive couple as “innocent victims of an outdated piece of legislation”). “Annually there is an average of 200 appellate cases dealing with the Indian Child Welfare Act (ICWA) . . .” Kathryn Fort & Adrian T. Smith, *Indian Child Welfare Act, Annual Case Law Update and Commentary*, 8 AM. INDIAN L.J. 105, 105 (2020).

<sup>136</sup> See, e.g., *Ensuring Equal Protection for Native American Children: Challenging the Indian Child Welfare Act*, THE GOLDWATER INST. [hereinafter *Challenging the Indian Child Welfare Act*], <https://goldwaterinstitute.org/indian-child-welfare-act/> [https://perma.cc/GUJ5-CFBZ] (overview of Goldwater Institute’s challenges to the ICWA in federal and state court). The Goldwater Institute hails itself as a “watchdog for conservative ideals.” Marc Lacey, *A Watchdog for Conservative Ideals*, N.Y. TIMES (Dec. 25, 2011), <https://www.nytimes.com/2011/12/26/us/goldwater-institute-an-aggressive-conservative-watchdog.html> [https://perma.cc/PTA7-QS35]. For illustrative examples of litigation brought by other types of plaintiffs, see Jehnna Irene Hanan, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U.L. REV. 167, 188–90 (1997).

<sup>137</sup> See *Challenging the Indian Child Welfare Act*, *supra* note 136.

charged motivations of the Indigenous boarding school and adoption systems.<sup>138</sup>

The most recent lawsuit challenging the ICWA, *Brackeen v. Haaland*,<sup>139</sup> represents a revival of earlier litigation challenging the ICWA on the basis of race.<sup>140</sup> In a split *en banc* decision, the US Court of Appeals for the Fifth Circuit left in place a panel decision that the ICWA's preferences for placement with "other Indian families" or with a licensed "Indian foster home" violates constitutional equal protection guarantees.<sup>141</sup> Casting the ICWA as racially discriminatory in this way constitutes an erasure of the history of harm that led to the passage of the Act<sup>142</sup>—harm that is part of the historical trauma Indigenous people continue to struggle with today.<sup>143</sup> In an effort to address this ongoing trauma, the first Indigenous secretary of the US Department of the Interior, Deb Haaland, created an initiative to conduct a "comprehensive review" of the Indian boarding school policy,<sup>144</sup> providing another official platform for the stories of Indigenous family separation to be told and heard.

The momentum giving potency to narratives detailing the harm of Indigenous family separation began about a decade before the enactment of the ICWA, in the context of several civil rights

<sup>138</sup> Addie Rolnick & Kim Pearson, *Racial Anxiety in Adoption: Reflections on Adoptive Couple, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. ST. L. REV. 727, 733 (2017).

<sup>139</sup> *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), *reh'g en banc*, *Brackeen v. Bernhardt*, 942 F.3d 287 (5th Cir. 2019), *aff'g in part, rev'g in part Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018). Indian law scholars regard the *Brackeen* case as having significant overall impact on tribal sovereignty. See Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, ATLANTIC (Jan. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167/> [<https://perma.cc/89Z4-43R3>]. As of the writing of this article, the US Supreme Court has not taken up the case.

<sup>140</sup> Previous challenges to ICWA alleged that the legislation created an unconstitutional racial preference. In those cases, courts held that ICWA's requirement of current tribal membership of at least one party to the proceedings "creates a political, rather than a racial, preference." *K.D. v. M.L. (In re Adoption of C.D.)*, 751 N.W.2d 236, 244 (N.D. 2008); see also *Rice v. Cayetano*, 528 U.S. 495, 519–20 (2000); *Woodbury Cnty. Att'y v. Iowa Att'y Gen. (In re A.W.)*, 741 N.W.2d 793, 810 (Iowa 2007).

<sup>141</sup> Debra Cassens Weiss, *In 325-page Opinion, En Banc 5th Circuit Splits on Preference for Tribes in Native American Adoptions*, ABA J. (Apr. 8, 2021, 12:32 PM), [https://www.abajournal.com/news/article/in-325-page-opinion-5th-circuit-splits-on-federal-provision-giving-tribes-preference-in-native-american-adoptions#google\\_vignette](https://www.abajournal.com/news/article/in-325-page-opinion-5th-circuit-splits-on-federal-provision-giving-tribes-preference-in-native-american-adoptions#google_vignette) [<https://perma.cc/BFT4-JRRK>].

<sup>142</sup> JACOBS, *supra* note 90, at xxiv ("Media coverage of the controversial case [*Baby Girl*] failed to reveal the full back story of ICWA, an act meant to redress the long history of forcible child removal that American families had suffered for generations.").

<sup>143</sup> DONNA MARTINEZ ET AL., URBAN AMERICAN INDIANS: RECLAIMING NATIVE SPACE 117 (2016) (defining historical trauma as "trauma resulting from successive, compounding traumatic events perpetuated on a community over generations").

<sup>144</sup> Press Release, U.S. Dep't of the Interior, Secretary Haaland Announces Federal Indian Boarding School Initiative (June 22, 2021), <https://www.doi.gov/pressreleases/secretary-haaland-announces-federal-indian-boarding-school-initiative> [<https://perma.cc/G38E-QJNE>].



movements in the United States, including one for Indigenous rights—the Red Power movement.<sup>145</sup> In this context, the campaign for the ICWA was “part of a larger quest for Indian self-determination and sovereignty.”<sup>146</sup> While the Red Power movement was known for its attention-grabbing strategies, the movement to pass the ICWA was behind the scenes and grassroots.<sup>147</sup> The Red Power movement garnered broader awareness of the issues facing Indigenous communities which helped the counternarratives that challenged the practice of removing children from families to finally have an impact.

The campaign for the ICWA corresponded with the onset of Indigenous people aligning themselves with the struggles of other marginalized communities in the United States.<sup>148</sup> This identity shift likely contributed to a sense of confidence to challenge the justification narratives with stories of children, parents, and communities ravaged by an almost century-long deliberate family separation policy. Indigenous women, in particular, played an important role in calling for systemic reform.<sup>149</sup> Many having worked in the child welfare system, they were able to recount the harm of separating Indigenous children from their families and challenged the notion that it is in children’s best interest to sever them from their tribal communities.<sup>150</sup> The success of counternarratives leading to the enactment of the ICWA also transpired in the context of a systemic change to addressing child welfare and poverty generally, a shift that ended a deliberate practice of separating predominantly impoverished, immigrant families several decades earlier.

### C. *The “Orphan Train” Movement Targeting Immigrant Families*

A lesser known family separation practice than those inflicted upon enslaved and Indigenous families was a movement called “orphan trains,” which was carried out in the United States by private actors from the mid-nineteenth

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<sup>145</sup> See TROY R. JOHNSON, RED POWER: THE NATIVE AMERICAN CIVIL RIGHTS MOVEMENT 7 (2007) (describing the Red Power movement alongside Black Power, La Raza, and protests against the Vietnam War).

<sup>146</sup> MARTINEZ ET AL., *supra* note 143, at 114.

<sup>147</sup> *Id.*

<sup>148</sup> See JOANE NAGEL, AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE 9 (1996).

<sup>149</sup> MARTINEZ ET AL., *supra* note 143, at 114.

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

through the early twentieth century.<sup>151</sup> Orphan trains executed the removal and relocation of approximately 250,000 children<sup>152</sup> from East Coast cities to rural areas across the country, including into agricultural communities in the Midwest.<sup>153</sup> Charles Loring Brace, a Protestant minister and founder of the Children's Aid Society of New York, conceived of the concept of orphan trains.<sup>154</sup> His mission was to save children from their families in order to make them "good" Americans.<sup>155</sup> Specifically, Brace sought to place<sup>156</sup> children with "good, Christian families where they would be cared for, educated, and employed."<sup>157</sup> Brace and other Protestant missionaries hoped to relocate orphan train children so that they could assimilate into an Anglo-Saxon, Protestant, and white society.<sup>158</sup>

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<sup>151</sup> Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, MOD. AM., Fall 2009, at 3, 10 ("Orphan trains ran from 1854 through 1929, a period in American history of greatest changes in views regarding childhood and laws affecting children.").

<sup>152</sup> Joan Gittens, *Orphan Trains: The Story of Charles Loring Brace and the Children He Saved and Failed*, 64 ANNALS IOWA 80, 80 (2005) (reviewing STEPHEN O'CONNOR, ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED (2004)). Others have estimated the number of children relocated by the Orphan Train movement between 150,000 to 200,000. Trammell, *supra* note 151, at 4.

<sup>153</sup> See Gittens, *supra* note 152, at 80; Trammell, *supra* note 151, at 3–4. One of the misconceptions, fueled by proponents of orphan trains, was that children were placed out to be a part of the "inspiring western life," when in fact they were placed out throughout the United States and, in a few instances, abroad. MARILYN IRVIN HOLT, THE ORPHAN TRAINS: PLACING OUT IN AMERICA 158–59 (1992).

<sup>154</sup> Trammell, *supra* note 151, at 3. But see HOLT, *supra* note 153, at 3–4 ("[Charles] Brace and his New York based Children's Aid Society have been credited as the American originators for the [orphan trains] system, but other organizations, public and private, had either experimented with the idea earlier or soon followed Brace's example. Among these were the Boston's Children's Mission, the New York Foundling Hospital, and the Philadelphia Women's Industrial Aid Association.").

<sup>155</sup> See Michelle Kahan, "Put Up" Platforms: A History of Twentieth Century Adoption Policy in the United States, 33 J. SOCIO. & SOC. WELFARE 51, 54 (2006). Brace wished to prevent the "problem of vagrant and delinquent children" in the urban centers of the East Coast by sending children out of the cities to work, assuming that escaping the city and physical labor would teach the children to change their ways. See Trammell, *supra* note 151, at 4.

<sup>156</sup> The "placing" or "placing out" of orphaned children was a popular alternative to placing the burden of caring for orphans on local governments or private organizations. See Trammell, *supra* note 151, at 3. Note that "placing out" is distinct from foster care because in the former, families do not receive compensation. *Id.* at 9. Additionally, under the foster care system, the state is the primary agent of care, whereas private organizations facilitate the "placing out" process. *Id.*

<sup>157</sup> Kahan, *supra* note 155, at 55 (quoting E. Wayne Carp, *Orphanages vs. Adoption: The Triumph of Biological Kinship, 1800-1933*, in WITH US ALWAYS: A HISTORY OF PRIVATE CHARITY AND PUBLIC WELFARE 123, 128–29 (Donald T. Critchlow & Charles H. Parker eds., 1998)).

<sup>158</sup> See Trammell, *supra* note 151, at 5 ("Catholic clergy maintained that some charities were deliberately placing Catholic children in Protestant homes to change their religious practices."); see also HOLT, *supra* note 153, at 28 ("Brace would have said that his placing-out plan was not one of social control but of moral control, exposing children of the poor to basic Christian instruction."); Kahan, *supra* note 155, at 55–56 ("Not only were these children mostly non-Protestant, but many were considered racially nonwhite . . . [and] by removing them from the city, they could be converted to the ways of white Protestant families."); WILLIAMS, *supra* note 6, at 142 ("Sanitized by the fresh air and wholesome hard

Roughly three-quarters of orphan train children were not actually orphans, but had one or both parents who were still alive.<sup>159</sup> Brace defended the removal of these children by explaining that “the great majority were the children of poor and degraded people.”<sup>160</sup> The characterization of the orphan train movement as a family separation policy is most squarely applicable in the instances where child welfare advocates took the children for relocation based on a judgment about their parents “on the grounds of poverty, immorality, or cultural inferiority.”<sup>161</sup> These justifications resonate with ones that rationalized enslaved and Indigenous family separation. Notably, most orphan train children came from Catholic, immigrant homes.<sup>162</sup>

Regrettably, child welfare workers’ vigilance in removing children from their homes for orphan trains did not extend to ensuring the children’s well-being in their placements:

For 75 years, children made the long journey from New York to western towns, accompanied by workers from Brace’s Children’s Aid Society (CAS). When they arrived at their destination, they were put

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work of rural America, these [children] were also to be cleansed of their parents’ ‘race’ and religion by growing up in Protestant homes that would remove the tarnish of Catholic superstition and idolatry.”)

<sup>159</sup> See Kari E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 17 (2003) (estimating that as many as 75 to 80 percent of orphan train riders had one or both parents who were still alive); Stacy Byrd, *Learning from the Past: Why Termination of a Non-Citizen’s Parent’s Rights Should Not Be Based on the Child’s Best Interest*, 68 U. MIA. L. REV. 323, 341 (2013) (explaining that the majority of children on the trains were not orphans, with many from single mother households); HOLT, *supra* note 153, at 4 (“Often separated from brothers or sisters or, in many instances at least one parent—the myth perpetuated is that all of these children were orphans . . .”). Some children were apprehended for vagrancy and sent west on orphan trains without the knowledge or consent of living family members. See Kahan, *supra* note 155, at 55 (noting that the Children’s Aid Society did not always provide notice of change in guardianship to surviving parents); Trammell, *supra* note 151, at 4 (detailing that some families temporarily surrendered guardianship of their children to organizations such as CAS because they were unable to financially support their children; some law enforcement would also apprehend “vagrant” children on the streets and send them to these orphanages without first attempting to locate the children’s family).

<sup>160</sup> Hong, *supra* note 159, at 17.

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

<sup>162</sup> *Id.* at 16 (“[I]n New York City and Boston, Catholic Church leaders were outraged at what they called the kidnapping of children from Catholic, immigrant homes and their subsequent placement into Protestant families.”). It is important to note that, at this time, newly arriving immigrants from European countries were not deemed to meet standards of “whiteness” in the United States and were seen instead as foreigners, suggesting ties between religion, social class, and the perception or “ranking” of race. HOLT, *supra* note 153, at 47 (quoting one of Brace’s writings: “The class increases; immigration is pouring in its multitude of poor foreigners, who leave these young outcasts everywhere in our midst . . .”). See generally DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS* (2005) (arguing that far from being a set racial category, whiteness is a social construct).

on display in a local church, where the population could view them and choose a child to take home. Some children were adopted, but the CAS did not require that or consider a placement a failure if the child was treated more like a worker than a family member. There was no legal contract and no follow-up. . . . [I]t was clear that the CAS considered its work accomplished when the children were relocated.<sup>163</sup>

A documentary on the orphan train movement highlighted the story of a foster father, Hazen Armstrong, who adopted a child from one of the trains when he himself was only nineteen.<sup>164</sup> Armstrong stated that after he heard that they were bringing children into town for adoption, he decided to look for a child to help him on his farm. He said, "There was eight or ten in that row—different kinds and different expressions and all different places they had come from, some from Italy, some from other countries . . . and they just let me pick the one I wanted."<sup>165</sup> Armstrong's testimonial is indicative of placement families who took in orphan train children for cheap or unpaid labor,<sup>166</sup> as was the fact that both "parents" and "employers" were terms used to describe placement families.<sup>167</sup> Other families, particularly those who were Protestant, were also motivated by the mission of giving children a "better" upbringing.<sup>168</sup>

### 1. Justification Narratives and a Systemic Narrative Shift

Underlying Brace's passion for saving children from the vices of the city streets<sup>169</sup> was a belief that removing them from their environment, and in many cases their parents, was in children's best interest. Similar to the weaponization of the best-interest-of-the-child standard in the context of Indigenous

<sup>163</sup> Gittens, *supra* note 152, at 80; *see also* Hong, *supra* note 159, at 15 (noting that the children mostly were made to do agricultural work); Kahan *supra* note 155, at 55 (noting that placement families generally did not obtain legal guardianship of the children, instead the children remained legally under the care of the private organizations that placed them).

<sup>164</sup> *Transcript of American Experience: The Orphan Trains* (PBS 1995), <https://www.pbs.org/wgbh/americanexperience/films/orphan/#transcript> [<https://perma.cc/QT2B-BC4Y>].

<sup>165</sup> *Id.*

<sup>166</sup> *See* Hong, *supra* note 159, at 15; HOLT, *supra* note 153, at 158; *see also* Julie Snively, Charles Frederick, NAT'L ORPHAN TRAIN COMPLEX, <https://orphantraindepot.org/history/orphan-train-rider-stories/359-2/> [<https://perma.cc/B2VE-M8TM>] (telling the story of an orphan train child named Frederick, who was relocated West at age six, when he was only able to speak German. A farming family in Illinois took custody of Frederick, but predominantly used him for farm work. Frederick was only allowed to attend school for only four years. He ran away at age 17); Trammell, *supra* note 151, at 4 (asserting that many of the rural white families who took in children from orphan trains worked on farms, using the children to provide unpaid labor).

<sup>167</sup> STEPHEN O'CONNOR, ORPHAN TRAINS: THE STORY OF CHARLES LOVING BRACE & THE CHILDREN HE SAVED AND FAILED 96, 154 (2001).

<sup>168</sup> *See id.* at 237 (noting that Protestant families often changed children's religion and names).

<sup>169</sup> *See* Hong, *supra* note 159, at 14–15.

family separations,<sup>170</sup> what drove charities such as the Children's Aid Society to operate orphan trains was an assessment of children's best interest that was often based on cultural bias.<sup>171</sup>

Another narrative strand justifying orphan trains was a child-friendly version of being "tough on crime." Brace sought to protect children from "a life of misery, shame and crime, and ultimately to a felon's doom."<sup>172</sup> Embedded in this claim might be the assumption that "juvenile vagrants [who] are in the daily practice of pilfering wherever the opportunity offers" must be reformed not only for their own benefit, but for the benefit of the greater society.<sup>173</sup> Most disturbing were references to children placed on orphan trains as "human cargoes" and "human freight," images "more reminiscent of America's history of slavery than of humanitarian efforts."<sup>174</sup>

As placed out children became adults and began searching for their family roots, they started sharing stories of their experiences.<sup>175</sup> Some stories are positive, but others are about children working for families who would not let them sleep in the house.<sup>176</sup> Some stories were available during the time when orphan trains were still operating, but most have been shared after they stopped in 1929.<sup>177</sup> There continue to be concerted efforts today to collect and share the stories of those impacted by the orphan train movement.<sup>178</sup>

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In the case of the orphan train movement, it was not public outcry regarding the practice that specifically led to its end. The stories of abuse that were revealed contemporaneously during its operation provided cover for the two main private

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<sup>170</sup> See *supra* note 105 and accompanying text.

<sup>171</sup> See Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 553 (2019).

<sup>172</sup> See Trammell, *supra* note 151, at 4.

<sup>173</sup> See *id.*

<sup>174</sup> HOLT, *supra* note 153, at 181.

<sup>175</sup> *Id.* at 182.

<sup>176</sup> Laura Rice, "Riders of the Orphan Train" Preserves the Unforgettable Stories of Unwanted Children, TEX. STANDARD (July 3, 2018, 12:38 PM), <https://www.texasstandard.org/stories/riders-of-the-orphan-train-preserves-the-unforgettable-stories-of-unwanted-children/> [<https://perma.cc/7VWA-9ENC>].

<sup>177</sup> HOLT, *supra* note 153, at 182.

<sup>178</sup> *Id.*; see also Nina Siegal, *Riders of "Orphan Train" Meet to Tell Life Stories*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2000/05/13/nyregion/riders-of-orphan-train-meet-to-tell-life-stories.html> [<https://perma.cc/HDT9-G9MT>]; Orphan Train Rider Stories, NAT'L ORPHAN TRAIN COMPLEX MUSEUM & RSCH. CTR., <https://orphantraindepot.org/history/orphan-train-rider-stories/> [<https://perma.cc/2HXJ-F52C>].

charities that decided to abandon their programs.<sup>179</sup> What ultimately brought an end to the orphan train movement were the fundamental changes to understandings of charity and child welfare generally.<sup>180</sup> New alternatives for child welfare services such as day care, financial support to mothers in poverty, and other family support programs supplanted the separation of parents and children, in addition to legal reforms protecting the rights of children, eventually bringing an end to the orphan train system in 1929.<sup>181</sup> These programs reflected a narrative shift from “child rescue” to aiding children within their family unit.<sup>182</sup> Relatedly, the “professionalization of social work and the recognition of sociology as a field of study” changed the narrative of how to address poverty and help impoverished people.<sup>183</sup> A shift in the racialization of families targeted by the orphan train movement also likely played a role, as Catholicism and being of European descent became associated with white America.<sup>184</sup>

Similar to the separation of enslaved and Indigenous families, the separation of predominantly impoverished immigrant families through the orphan train movement represents a deliberate family separation policy that was largely fueled by xenophobia and racism. The bias against these marginalized communities was evident and explicit in the justifications of policies that caused considerable trauma across generations. The history of family separation in the United States is one that is carried within us,<sup>185</sup> as demonstrated by US Department of the Interior Secretary Haaland’s new initiative to

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<sup>179</sup> HOLT, *supra* note 153, at 162.

<sup>180</sup> *Id.* at 165–72.

<sup>181</sup> *Id.* at 164–65; see also Dianne Creagh, *Science, Social Work, and Bureaucracy: Cautious Developments in Adoption and Foster Care 1930-1969*, in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE: A HISTORICAL HANDBOOK AND GUIDE 32 (“In 1929, the last of the New York Children’s Aid Society orphan trains deposited their cargos in western communities before finally succumbing to mounting obstacles, including laws barring the interstate traffic of children, a growing tendency among professional social workers to keep troubled families together, and mandatory education statutes that discouraged the use of dependent children as indentured labor.”).

<sup>182</sup> HOLT, *supra* note 153, at 165. This is not to say that the modern US child welfare system operates without deep flaws. The system continues to cause harm by removing children from their homes instead of pursuing alternatives, and generally continues to be problematic particularly for African Americans and other communities of color. See Trivedi, *supra* note 171, at 523; Gloria Ann Whittico, *If the Past Is Prologue: Toward the Development of a New ‘Freedom Suit’ for the Remediation of Foster Care Disproportionalities Among African-American Children*, 43 CAP. U. L. REV. 407, 409–10 (2015); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476–77 (2012).

<sup>183</sup> HOLT, *supra* note 153, at 169–70.

<sup>184</sup> Cybelle Fox & Thomas A. Guglielmo, *Defining America’s Racial Boundaries: Blacks, Mexicans, and European Immigrants, 1890-1945*, 118 AM. J. SOCIO. 327, 343–44 (2012).

<sup>185</sup> See BALDWIN, *supra* note 1, at 722–23.

investigate the Indigenous boarding school era.<sup>186</sup> Policies that separate families, however, are not just in the country's past. Deliberate family separation was carried out against migrant families under the Trump administration.<sup>187</sup> The advocacy and public condemnation of the Trump administration's family separations led to a relatively swift end specifically to the "zero tolerance" policy directing US immigration officials to take migrant children away from their parents.<sup>188</sup> Despite this, modern family separation inflicted upon scores of families, mostly from communities of color, continues with little to no scrutiny.<sup>189</sup>

## II. FAMILY SEPARATION UNDER THE TRUMP ADMINISTRATION

It is on the foundation of these past family separation policies that the Trump administration executed the separation of thousands of migrant families.<sup>190</sup> From the beginning, the administration demonstrated that it was prepared to rigorously enforce immigration laws even if it caused family separation.<sup>191</sup> For example, the first noncitizen deported after the executive orders on immigration went into effect<sup>192</sup> was a mother of two US citizens who had lived almost half of her life in the United States.<sup>193</sup>

The government began separating migrant families crossing the US–Mexico border in March 2017 with the "El Paso

<sup>186</sup> See Press Release, U.S. Dep't of the Interior, *supra* note 144.

<sup>187</sup> See *infra* text accompanying notes 190–197.

<sup>188</sup> Trump signed an executive order ending family separation on June 20, 2018, just over two months after the policy was announced. Q&A: Trump Administration's "Zero-Tolerance" Immigration Policy, HUM. RTS. WATCH (Aug. 16, 2018, 8:00 AM), <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy> [<https://perma.cc/4SSU-GNG2>].

<sup>189</sup> See *infra* Part III.

<sup>190</sup> For other articles on the Trump administration's zero tolerance policy, see Ediberto Roman & Ernesto Sagas, *A Domestic Reign of Terror: Donald Trump's Family Separation Policy*, 24 HARV. LATINX L. REV. 65, 77–78 (2021); Carrie F. Cordero et al., *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 439–41 (2020); Jonathan Todres & Daniela Villamizar Fink, *The Trauma of Trump's Family Separation and Child Detention Actions: A Children's Rights Perspective*, 95 WASH. L. REV. 377, 388–89 (2020); and Olivares, *supra* note 6, at 294–301 (2020).

<sup>191</sup> See Cordero et al., *supra* note 190, at 434.

<sup>192</sup> See Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017), <https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-and-immigration-enforcement-improvements> [<https://perma.cc/6AUU-YXK2>].

<sup>193</sup> Marcela Valdes, *Is It Possible to Resist Deportation in Trump's America?*, N.Y. TIMES MAG. (May 23, 2017), <https://www.nytimes.com/2017/05/23/magazine/is-it-possible-to-resist-deportation-in-trumps-america.html> [<https://perma.cc/9Q99-77NQ>] (telling the story of Guadalupe Garcia Aguilar, the first person deported under one of former President Trump's executive orders ordering the removal of those with a prior order of removal: "[Garcia Aguilar] had been living in the United States for 22 years, since she was 14 years old; she was the mother of two American citizens; she had missed being eligible for DACA [Deferred Action for Child Arrivals] by just a few months. Suddenly, none of that counted anymore.").

Initiative.”<sup>194</sup> By criminally prosecuting adults accompanied by their children who entered the United States without authorization, the Initiative lasted eight months and separated “approximately 280 families.”<sup>195</sup>

The American Civil Liberties Union (ACLU) filed a putative class action, *Ms. L. v. Immigration and Customs Enforcement*, in February 2018 on behalf of families the administration was separating.<sup>196</sup> During this period, and after the official implementation of the zero tolerance policy, the litigation was crucial in obtaining information from the US government regarding to what extent and how it was separating migrant families. This included documenting the failure of Department of Homeland Security (DHS) officers to track separated migrant parents and their children.<sup>197</sup> The federal judge in *Ms. L* characterized this failure as demonstrating that the government gave less care to migrant children than to personal property in its possession:

The government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainee’s release, at all levels—state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*.<sup>198</sup>

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<sup>194</sup> OFF. OF THE INSPECTOR GEN., U.S. DEPT OF JUST., OIG-21-028, REVIEW OF THE DEPARTMENT OF JUSTICE’S PLANNING AND IMPLEMENTATION OF ITS ZERO TOLERANCE POLICY AND ITS COORDINATION WITH THE DEPARTMENTS OF HOMELAND SECURITY AND HEALTH AND HUMAN SERVICES 1, 13 (Jan. 2021) [hereinafter DOJ OIG REPORT 2021], [https://oig.justice.gov/sites/default/files/reports/21-028\\_0.pdf](https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf) [<https://perma.cc/6AUU-YXK2>].

<sup>195</sup> *Id.* at 15.

<sup>196</sup> *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 1133, 1133 (S.D. Cal. 2018).

<sup>197</sup> See *infra* notes 207–211 and accompanying text.

<sup>198</sup> *Ms. L.*, 310 F. Supp. 3d at 1144 (emphasis in original). What could be best described as chaos followed Judge Sabraw’s order. DHS claimed that it, along with HHS, had created a centralized database containing all relevant information regarding parents separated from their children; however, the DHS “OIG found no evidence that such a database exists.” OFF. OF THE INSPECTOR GEN., U.S. DEPT OF HOMELAND SEC., OIG-18-84, SPECIAL REVIEW—INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 1, 10 (Sept. 27, 2018) [hereinafter DHS OIG REPORT 2018], <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> [<https://perma.cc/GG2N-DYW5>]. Whatever data DHS did collect was incomplete, contradictory, and unreliable. *Id.* at 11–12. Because no single database with reliable information existed, the GAO found that agencies were left to resort to a variety of inefficient and ineffective methods to determine which children were subject to Judge Sabraw’s injunction. U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER 1, 24–25 (2018) [hereinafter GAO: UNACCOMPANIED CHILDREN], <https://www.gao.gov/assets/gao-19-163.pdf>



Over the months and years, in courtrooms and through the media, the stories of migrant children “in cages”<sup>199</sup> and in anguish,<sup>200</sup> and of parents not knowing the whereabouts of their children<sup>201</sup> were told. As detailed below, the US government was eventually compelled to reunite families, but by the US government’s own account, approximately 1,700 migrant children remain separated from their parents.<sup>202</sup>

#### A. *The Operationalization of Zero Tolerance*

The Trump administration officially announced its “zero tolerance” family separation policy on April 6, 2018, stating that it was in response to the “migrant caravan” traveling to the United States.<sup>203</sup> Once the separations began to generate public

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[<https://perma.cc/CZB8-6TJY>]. These methods included officers hand sifting through agency data looking for any indication that a child in HHS custody had been separated from his or her parent and calling in the Office of the Assistant Secretary for Preparedness and Responses, an HHS agency whose normal prerogative involves response to hurricanes and other disasters, to review data provided by US Customs and Border Patrol, US Immigration and Customs Enforcement, and HHS’ Office of Refugee Resettlement (ORR). *Id.* at 23–24. The method for determining which family units required reunification changed frequently, sometimes more than once a day, with staff at one ORR shelter reporting that “there were times when [they] would be following one process in the morning but a different one in the afternoon.” *Id.* at 28–29.

<sup>199</sup> Miriam Jordan, *U.S. Shutters Warehouse Where Migrants Were Kept in “Cages,”* N.Y. TIMES (Nov. 25, 2020), [https://www.nytimes.com/2020/11/25/us/border-migrant-children-cages-ursula-warehouse.html?mc=aud\\_dev&ad-keywords=auddevgate&gclid=CjwKCAjw2ZaGBhBoEiwA8pfP\\_jrGybl-r7rpj9IH2hgXtrtbb8WAWL2VqohoW5HmEsEBJ3kHCzxoCQI8QAvD\\_BwE&gclid=aw.ds](https://www.nytimes.com/2020/11/25/us/border-migrant-children-cages-ursula-warehouse.html?mc=aud_dev&ad-keywords=auddevgate&gclid=CjwKCAjw2ZaGBhBoEiwA8pfP_jrGybl-r7rpj9IH2hgXtrtbb8WAWL2VqohoW5HmEsEBJ3kHCzxoCQI8QAvD_BwE&gclid=aw.ds) [<https://perma.cc/L9QF-NJSZ>]; Clara Long, *Written Testimony: “Kids in Cages: Inhumane Treatment at the Border,”* HUM. RTS. WATCH (July 2019, 8:00 AM), <https://www.hrw.org/news/2019/07/11/written-testimony-kids-cages-inhumane-treatment-border#> [<https://perma.cc/JH7D-EM2R>]; *Trump Migrant Separation Policy: Children ‘in Cages’ in Texas*, BBC (June 18, 2018), <https://www.bbc.com/news/world-us-canada-44518942> [<https://perma.cc/C2YP-G2EV>]; *Separation at the Border: Children Wait in Cages at South Texas Warehouse*, GUARDIAN (June 17, 2018), <https://www.theguardian.com/us-news/2018/jun/17/separation-border-children-cages-south-texas-warehouse-holding-facility> [<https://perma.cc/8UCG-8C8Q>].

<sup>200</sup> Suzanne Gamboa, *Children Cry for Their Parents on Audio of Trump’s Border Family Separations*, NBC NEWS (June 18, 2018, 6:23 PM), <https://www.nbcnews.com/news/latino/children-cry-their-parents-audio-trump-s-border-family-separations-n884486> [<https://perma.cc/4APF-F22R>]; Julia C. Wong, *Recording Captures Cries of Children Separated from Parents at US Border*, GUARDIAN (June 18, 2018, 7:36 PM), <https://www.theguardian.com/us-news/2018/jun/18/us-border-families-separated-audio-recording> [<https://perma.cc/K9V3-DRB2>].

<sup>201</sup> Julian Aguilar, *Immigrant Parents Searching for Children After Being Released from Federal Custody*, TEX. TRIB. (June 25, 2018, 9:00 PM), <https://www.texastribune.org/2018/06/25/immigrant-parents-searching-children-after-being-released-federal-cust/> [<https://perma.cc/Z5RH-F4VT>].

<sup>202</sup> DHS reported that 1,703 migrant children remain separated from their parent or parents. See DEP’T OF HOMELAND SEC., INTERIM PROGRESS REPORT: INTERAGENCY TASK FORCE ON THE REUNIFICATION OF FAMILIES 9 (Nov. 29, 2021) [hereinafter DHS TASK FORCE INTERIM PROGRESS REPORT].

<sup>203</sup> DOJ OIG REPORT 2021, *supra* note 194, at 19.

condemnation, former President Trump deflected blame,<sup>204</sup> and the administration even denied that it was separating parents and children.<sup>205</sup>

However, government officials could not repudiate for long the fact that they were deliberately separating families at the US–Mexico border.<sup>206</sup> Among the first details of the administration’s separation of migrant families was that it was clouded in chaos, including the failure to implement a tracking system.<sup>207</sup> Typically, US Customs and Border Protection (CBP) agents are the first to encounter individuals entering the United States.<sup>208</sup> After CBP agents separated migrant children from their parents, they typically transferred parents into the custody of US Immigration and Customs Enforcement (ICE).<sup>209</sup> When the zero tolerance policy went into effect in April 2018, “ICE’s system did not display data from CBP’s systems that would have indicated whether a detainee had been separated from a child.”<sup>210</sup> Consequently, when ICE was processing detained parents for removal, “no additional effort [was made] to identify and reunite families prior to removal.”<sup>211</sup> The government, as a result, deported many parents without their children.

<sup>204</sup> See Donald J. Trump (@realDonaldTrump), Twitter (June 19, 2018, 6:52 AM), (“Democrats are the problem. They don’t care about crime and want illegal immigrants, no matter how bad they may be, to pour into and infest our [c]ountry, like MS-13.”).

<sup>205</sup> Maya Rhodan, *Here Are the Facts About President Trump’s Family Separation Policy*, TIME (June 20, 2018, 10:37 AM), <https://time.com/5314769/family-separation-policy-donald-trump/> [<https://perma.cc/W9EP-VNFK>] (quoting then-DHS Secretary Kirstjen’s tweet: “We do not have a policy of separating families at the border. Period.”).

<sup>206</sup> See Tal Kopan, *‘We Will Not Apologize’: Trump DHS Chief Defends Immigration Policy*, CNN (June 18, 2018, 12:40 PM), <https://www.cnn.com/2018/06/18/politics/kirstjen-nielsen-immigration-policy/index.html> [<https://perma.cc/6P7E-8WXR>] (quoting then-Attorney General Jeff Sessions as saying that the separated migrant children “are taken care of” and calling the immigration system “generous” toward them).

<sup>207</sup> See DHS OIG REPORT 2018, *supra* note 198, at 3. The DHS OIG noted that the “lack of integration between CBP’s, ICE’s and HHS’ respective information technology systems hindered efforts to identify, track, and reunify parents and children separated under the Zero Tolerance policy” and that “[a]s a result, DHS has struggled to provide accurate, complete, reliable data on family separations and reunifications, raising concerns about the accuracy of its reporting.” *Id.* at 9–10; *see id.* at 2 (reporting that the lack of an integrated data system to track separated families across HHS and DHS added to the difficulty in HHS’s identification of separated children).

<sup>208</sup> See *Rising Border Encounters in 2021: An Overview and Analysis*, AM. IMMIGR. COUNCIL (Aug. 2, 2021), <https://www.americanimmigrationcouncil.org/rising-border-encounters-in-2021> [<https://perma.cc/C66Q-KG6G>].

<sup>209</sup> DHS OIG REPORT 2018, *supra* note 198, at 2.

<sup>210</sup> *Id.* at 9–10; *see also* DOJ OIG REPORT 2021, *supra* note 194, at 45 (detailing when a federal judge ordered the U.S. Attorney’s Office in Arizona to submit a list of children separated in coordination with CBP at the end of May 2018, the CBP claimed it did not track information on the children because they were sent to the US Department of Health and Human Services).

<sup>211</sup> DHS OIG Report 2018, *supra* note 198, at 10. In an effort to keep track of the children, officers in DHS’s CBP Office of Field Operations manually entered the children’s identifying information into a Microsoft Word document, which they then

In the end, the government separated more than five thousand migrant children from their parents.<sup>212</sup> The operational crux of zero tolerance was to criminally prosecute migrant parents for the act of entering the United States without authorization: “Zero tolerance” meant “100 percent prosecution.”<sup>213</sup> Then-Attorney General Jeff Sessions invoked a state of crisis<sup>214</sup> to support the prosecutions, a narrative that governments have appealed to recently in the context of migration with particular vigor.<sup>215</sup> Sessions stated the following when announcing the policy:

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e-mailed as an attachment to HHS, a process described by the DHS OIG as particularly “vulnerable to human error,” and one which “increas[ed] the risk that a child could become lost in the system.” *Id.*

<sup>212</sup> Kevin Sieff, *Biden Announces Efforts to Reunite Migrant Families Separated by Trump Administration*, WASH. POST (Feb. 2, 2021, 6:26 PM), [https://www.washingtonpost.com/world/the-americas/family-separation-migrant-biden-executive-order/2021/02/01/ebb6ada8-64bf-11eb-8c64-9595888caa15\\_story.html?request-id=01da7e85-47f4-44fa-ae34-5e36cb2f204d&pml=1](https://www.washingtonpost.com/world/the-americas/family-separation-migrant-biden-executive-order/2021/02/01/ebb6ada8-64bf-11eb-8c64-9595888caa15_story.html?request-id=01da7e85-47f4-44fa-ae34-5e36cb2f204d&pml=1) [<https://perma.cc/74UX-8LPQ>]. The Trump administration admitted to forcibly separating more than 2,800 children from their parents and placing them in government custody. See *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 330 F.R.D. 284, 286 (S.D. Cal. Mar. 08, 2019) (“Pursuant to the Court’s Orders, 2,816 children were identified as having been separated from their parents at the border . . .”). A 2019 HHS OIG report, in addition to other sources, indicated that the actual number of children forcibly separated is “thousands” higher. *Id.* at 286, 292; see, e.g., Sieff, *supra* (“The Trump administration separated at least 5,500 children from their parents along the border . . . in an attempt to deter migration.”). At the start of the Biden administration, a special task force whose first mandate was the reunification of these families was created. See Sieff, *supra*. Within weeks, the special task force’s efforts resulted in identifying more than one hundred parents of these children. See Joseph Guzman, *Parents of More than 100 Separated Migrant Children Have Been Found in Past Month*, HILL (Feb. 25, 2021), <https://thehill.com/changing-america/respect/accessibility/540527-parents-of-more-than-100-separated-migrant-children> [<https://perma.cc/AKS3-8D4R>]. DHS estimated that just over 1,700 migrant children remained separated from their parents as of November 29, 2021. See DHS TASK FORCE INTERIM PROGRESS REPORT, *supra* note 202.

<sup>213</sup> Cordero et al., *supra* note 190, at 441; see also Michael D. Shear et al. *We Need to Take Children Away, No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rostenstein.html> [<https://perma.cc/YG2Z-46VZ>] (quoting then-Deputy Attorney General Rod J. Rosenstein: “The A.G.’s goal . . . was to create a more effective deterrent so that everybody would believe that they had a risk of being prosecuted.”).

<sup>214</sup> Scholars have criticized the casting of an incident as a crisis to be self-serving. See, e.g., BERT SPECTOR, *CONSTRUCTING CRISIS: LEADERS, CRISES, AND CLAIMS OF URGENCY* x–xi (2019) (“Crises aren’t things at all, but constructions made by leaders, claims that insist that their social unit faces an urgent situation . . . [C]laims of urgency are not neutral, scientifically objective readings of the external environment. Rather, they are exercises in power and assertions of interests on behalf of the claims makers.”); ANNE HAMMERSTAD, *The Securitization of Forced Migration*, in *THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES* 265–67 (Elena Fiddian-Qasmiyeh et al. eds., 2014) (discussing how securitization places migration politics into emergency politics, also describing how alarmist “speech acts” have created a perception of increasing migration as a threat to security). See generally Michele L. Landis, *Fate, Responsibility, and Natural Disaster Relief: Narrating the American Welfare State*, 33 LAW & SOC’Y REV. 257 (1999) (providing a historical analysis and demonstrating how political powers can defer blame for harmful or even inhumane policies by constructing a narrative of inevitable “emergencies” or “crises”).

<sup>215</sup> See SPECTOR, *supra* note 214, at ix–x (discussing characterization of 2016 migration to Europe as a crisis that Brexit advocates used in the campaign for the United

[A] crisis has erupted at our Southwest Border that necessitates an escalated effort to prosecute those who choose to illegally cross our border. To those who wish to challenge the Trump Administration's commitment to public safety, national security, and the rule of law, I warn you: illegally entering this country will not be rewarded, but will instead be met with the full prosecutorial powers of the Department of Justice. To the Department's prosecutors, I urge you: promoting and enforcing the rule of law is vital to protecting a nation, its borders, and its citizens. You play a critical part in fulfilling these goals, and I thank you for your continued efforts in seeing to it that our laws—and as a result, our nation—are respected.<sup>216</sup>

The government classified migrant children as “unaccompanied” once they separated them from their parents,<sup>217</sup> creating a narrative that hearkens back to the children who were not orphans sent away from their families on orphan trains.<sup>218</sup> It was a classification that erased not just the agency but the existence of migrant parents. In the context of zero tolerance, the classification enabled the administration's decision to reverse standing policy from keeping migrant parents and children together despite a parent's criminal liability, to separating migrant parents apprehended with their children for criminal prosecution.<sup>219</sup>

By prioritizing the criminal prosecution of migrant parents for unauthorized entry or reentry,<sup>220</sup> the government rendered them unable to provide care and custody of their children per the statutory language that provides for “Unaccompanied Alien Child” (UAC)

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Kingdom to exit the European Union); see also Anita Sinha, *Defining Detention: The Intervention of the European Court of Human Rights in the Detention of Involuntary Migrants*, 50 COLUM. HUM. RTS. L. REV. 176, 187–93 (2019) (critiquing crisis discourse and applying the critique to the characterization of migration to Europe stating in 2016); Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 611–12 (2017) (presenting the media's “migration emergencies” as a “legal construction of crisis”).

<sup>216</sup> Press Release, U.S. Dep't of Just., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/57X6-RRBA>].

<sup>217</sup> DHS deemed separated children as unaccompanied and transferred them to the custody of HHS' ORR, the agency responsible for the long-term custodial care and placement of “unaccompanied [noncitizen] children.” DHS OIG REPORT 2021, *supra* note 194, at 11–12; see *Unaccompanied Children*, ADMIN. FOR CHILD. & FAMS., <https://www.acf.hhs.gov/orr/programs/uc> [<https://perma.cc/S4NV-9727>]. US immigration law specifically defines and designates a process for “Unaccompanied Children.” See U.S. DEPT OF HEALTH & HUM. SERVS., UNACCOMPANIED CHILDREN (UC) PROGRAM (2021) [hereinafter HHS Fact Sheet], <https://www.hhs.gov/sites/default/files/uac-program-fact-sheet.pdf> [<https://perma.cc/W7DA-8UM6>].

<sup>218</sup> See *supra* note 159.

<sup>219</sup> DHS OIG REPORT 2021, *supra* note 194, at 2.

<sup>220</sup> 8 U.S.C. § 1325 makes it a misdemeanor offense subject to fine or imprisonment to enter the US without authority, and 8 U.S.C. § 1326 makes it a felony offense to reenter or attempt to reenter the US after previous removal or deportation from the US. See 8 U.S.C. §§ 1325(a), 1326(a). Criminalizing migration via these and other statutes has been US government policy far before the Trump administration. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281–82 (2010) (“Noncitizens have become the face of federal prisons.”).

status.<sup>221</sup> There was a spike in the criminal prosecutions of immigration offenses during the period corresponding with the execution of zero tolerance,<sup>222</sup> which was the intended consequence of the policy. The data shows that this rise in criminal immigration cases was a direct consequence of the government's family separation practice, rather than a general consequence of increased migrant apprehensions at the border.<sup>223</sup> During this same time period, arrests of Central Americans nearly tripled along the US–Mexico border.<sup>224</sup> It is worth noting, however, that children whose parents were not criminally prosecuted were also labelled UACs.<sup>225</sup> Overall, the government's actual and rhetorical criminalization of migrant parents played a central role in its execution of family separation.

### 1. The Justifying Narratives of Zero Tolerance

The criminalization of migrant parents builds upon the legacy of the historical family separation practices that have been carried out throughout US history. It is also a continuation of the trend in the United States over the past twenty-five years to criminalize immigrants more broadly.<sup>226</sup> Casting migrants as

<sup>221</sup> The definition of UACs includes children who have “no parent or legal guardian in the United States . . . available to provide care and physical custody.” 6 U.S.C. § 279(g)(2)(C)(ii).

<sup>222</sup> See MARK MOTIVANS, BUREAU OF JUST. STATS., OFF. OF JUST. PROGRAMS, U.S. DEPT. OF JUST., IMMIGRATION, CITIZENSHIP, AND THE FEDERAL JUSTICE SYSTEM, 1998-2018, at 16 (2021), <https://www.bjs.gov/content/pub/pdf/icfjs9818.pdf> [<https://perma.cc/XS8H-A38X>]; see also Press Release, U.S. Dep’t of Just., Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 19, 2019), <https://www.justice.gov/opa/pr/departement-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year> [<https://perma.cc/XA9G-JZHW>]. In 2018, “the five crime types for which non-U.S. citizens were most likely to be prosecuted in U.S. district court in 2018 were illegal re-entry (72% of prosecutions), drugs (13%), fraud (4.5%), alien smuggling (4%), and misuse of visas (2%).” MOTIVANS, *supra*, at 2, 18 tbl.14.

<sup>223</sup> See John Gramlich, *Far More Immigration Cases Are Being Prosecuted Criminally Under Trump Administration*, PEW RSCH. CTR. (Sept. 27, 2019), <https://www.pewresearch.org/fact-tank/2019/09/27/far-more-immigration-cases-are-being-prosecuted-criminally-under-trump-administration/> [<https://perma.cc/J5HV-T2DV>] (“While criminal arrests and prosecutions for immigration offenses both reached their highest level in two decades in fiscal 2018, the number of border apprehensions that year (396,579) remained far below the levels recorded throughout most of the 1990s and early 2000s, when the number of apprehensions regularly topped [one] million per year.”); see also U.S. BORDER PATROL, SOUTHWEST BORDER SECTORS, TOTAL ILLEGAL ALIEN APPREHENSIONS BY FISCAL YEAR (2018), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-apps-fy1960-fy2018.pdf> [<https://perma.cc/3KD5-ENZG>].

<sup>224</sup> U.S. BORDER PATROL, *supra* note 223, at 2, 4 tbl.4 (noting criminal immigration arrests of Central Americans in the five judicial districts along the border went from 13,549 in 2017 to 37,590 in 2018).

<sup>225</sup> The author represents two families for whom this was the case.

<sup>226</sup> The increasing criminalization of immigrants is a development Professor Juliet Stumpf coined as “crimmigration.” See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2016).

criminals renders them as threats to the country.<sup>227</sup> The narratives characterizing migrants and where they come from preceding the zero tolerance policy built on this rhetoric and were delivered with racist and xenophobic language.<sup>228</sup> Zero tolerance overwhelmingly impacted Latinx families, as demonstrated by the fact that “more than 95 percent of the members in the *Ms. L* certified class are from Central American countries.”<sup>229</sup>

In addition to criminalizing migration-related acts, the government’s justification for separating families relied on the vilification of migrant parents, similar to the historical vilification of Indigenous parents and the parents of orphan train children.<sup>230</sup> Officials characterized parents as exploiting their children to enter the country, casting them as responsible for bringing upon themselves any bad consequences as a result.<sup>231</sup> The narrative justifying the policy also dehumanized the children impacted—one media outlet that regularly amplified the Trump administration’s narratives defending the

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<sup>227</sup> See SARAH PIERCE ET AL., MIGRATION POL’Y INST., U.S. IMMIGRATION POLICY UNDER TRUMP: DEEP CHANGES AND LASTING IMPACTS 1 (2018), <https://www.migrationpolicy.org/sites/default/files/publications/TCMTrumpSpring2018-FINAL.pdf> [<https://perma.cc/E9K6-QXTC>] (“[T]he White House has framed immigrants, legal and unauthorized alike, as a threat to Americans’ economic and national security, and embraced the idea of making deep cuts to legal immigration.”).

<sup>228</sup> See, e.g., Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html) [<https://perma.cc/326M-VBXF>] (reporting that President Trump included El Salvador as a “shithole” country from which immigration to the US should not be welcomed). Scholars have written about vilifying narratives impacting the treatment of immigrants before the Trump administration. See, e.g., Mariela Olivares, *Narrative Reform Dilemmas*, 82 MO. L. REV. 1089 (2017) (exploring how “the popular vilification of immigrants in the United States has negatively influenced the societal and political environment against immigrants”); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012) (discussing how “polarized narratives [of good and bad immigrants] interact with psychological short-cuts, or heuristics, that affect judicial exercises of discretion [in immigration courts]”).

<sup>229</sup> Complaint at 32, para. 135, *E.S.M. v. U.S.*, No. 4:21-cv-00029-JAS (D. Ariz. Jan. 21, 2021).

<sup>230</sup> See Jamie R. Abrams, *Why the Legal Strategy of Exploiting Immigrant Families Should Worry Us All*, 14 HARV. L. & POL’Y REV. 77, 83–93 (2019) (examining modern laws and policies impacting immigrant families through a family law lens and detailing how “immigration blame” rationalized family separation in the Trump administration).

<sup>231</sup> DOJ OIG REPORT 2021, *supra* note 194, at 39 (providing notes from May 11, 2018, call between then-Attorney General Sessions and southwest border US Attorneys that records Sessions telling the US Attorneys: “[W]e need to take away children; if care about kids, don’t bring them in; won’t give amnesty . . . to people with kids.”); see also Michael D. Shear & Julie Hirschfeld Davis, *How Trump Came to Enforce a Practice of Separating Migrant Families*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html> [<https://perma.cc/XC8Y-7FY5>].

zero tolerance policy casted migrant children as “people from another country.”<sup>232</sup>

Government officials also justified zero tolerance through the invocation of law and order with religious references. Then-Attorney General Sessions claimed that the Christian Apostle Paul commanded people to “obey the laws of government because God has ordained them for the purpose of order,” stating that the zero tolerance policy was necessary to punish criminals.<sup>233</sup> In defending the policy, then-Press Secretary Sarah Huckabee Sanders stated that, “it is very biblical to enforce the law.”<sup>234</sup> These justifications of family separation bear striking similarities with those rationalizing the orphan train movement.<sup>235</sup>

These justification narratives for zero tolerance supported the policy’s overall objective, which was to deter migration into the United States.<sup>236</sup> According to former White House Chief of Staff John Kelly, even the extreme measure of separating children from their parents was warranted: “[A] big name of the game is deterrence . . . [even though it] would be a tough deterrent.”<sup>237</sup>

## 2. Narratives of Harm Humanizing Migrant Families

Compared to the family separation practices preceding it, the counterstories relating the extreme harm of family separation through zero tolerance, by effecting a multi-faceted strategy, were

<sup>232</sup> Justin Wise, *Fox & Friends’ Host on Detained Children: ‘These Aren’t Our Kids’*, HILL (June 22, 2018), <https://thehill.com/latino/393616-fox-friends-host-on-separated-children-these-arent-our-kids> [https://perma.cc/8KJT-8W2S]; see also German Lopez, *The Research on Race that Helps Explain Trump’s Use of Family Separation at the Border*, VOX (June 19, 2018, 1:30 PM EST), <https://www.vox.com/identities/2018/6/19/17478970/trump-family-separation-immigration-policy-racism> [https://perma.cc/Y5YK-9Y3M] (arguing that racism and the dehumanization of minority groups has allowed for family separation and the “zero tolerance” strategy at the US–Mexico border).

<sup>233</sup> Emily Stewart, *Sarah Sanders on Immigrant Family Separation: ‘It Is Very Biblical to Enforce the Law’*, VOX (June 14, 2018, 5:30 PM), <https://www.vox.com/identities/2018/6/19/17478970/trump-family-separation-immigration-policy-racism> [https://perma.cc/K4X3-TS66].

<sup>234</sup> *Id.*

<sup>235</sup> See *supra* note 158 and accompanying text.

<sup>236</sup> See Julia Ainsley & Jacob Soboroff, *Trump Cabinet Officials Voted in 2018 White House Meeting to Separating Migrant Children, Says Officials*, NBC NEWS (Aug. 20, 2020, 3:15 PM), <https://www.nbcnews.com/politics/immigration/trump-cabinet-officials-voted-2018-white-house-meeting-separate-migrant-n1237416> [https://perma.cc/896R-K7TP] (noting that White House Senior Advisor Stephen Miller “saw the separation of families not as an unfortunate byproduct but as a tool to deter more immigration”); Cordero et al., *supra* note 190, at 435 (“In an interview on March 6, 2017, then-Secretary of Homeland Security John Kelly told CNN’s Wolf Blitzer that he was considering separating families at the border as a deterrent to illegal immigration.”).

<sup>237</sup> Transcript: White House Chief of Staff John Kelly’s Interview with NPR, NPR (May 11, 2018, 11:36 AM), <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr> [https://perma.cc/JYV5-E9SG].

successful in ending the policy relatively swiftly. In addition to the media, these narratives were told through domestic and regional human rights litigation. For example, the ACLU's *Ms. L* lawsuit<sup>238</sup> revealed the callous and careless manner in which the government was executing zero tolerance as a way to achieve the objectives of the policy.<sup>239</sup>

The Inter-American human rights system was another site through which condemnation for zero tolerance was vocalized. The Inter-American Commission on Human Rights (IACHR) issued a statement that included its "deep concern" for the policy.<sup>240</sup> In response to petitions filed by nongovernmental organizations and human rights entities in Central and South America challenging zero tolerance, the IACHR issued precautionary measure resolutions,<sup>241</sup> citing violations of both the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.<sup>242</sup> In these resolutions, the IACHR requested that the

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<sup>238</sup> See text accompanying *supra* notes 196–197. The judge in *Ms. L* criticized the agencies for their lack of preparation and coordination at a status conference proceeding on July 27, 2018: "[W]hat was lost in the process was the family. The parents didn't know where the children were, and the children didn't know where the parents were. And the government didn't know, either." Transcript of Status Conference Proceedings at 58, *Ms. L v. Immigr. & Customs Enf't*, No. 18-CV-00428-DMS-MDD (S.D. Cal. July 27, 2018); see also Cordero et al., *supra* note 190, at 441–42, 460–63.

<sup>239</sup> See generally Jeremy Stahl, *The Trump Administration Was Warned Separation Would Be Horrific for Children, Did It Anyway*, SLATE (July 31, 2018), <https://slate.com/news-and-politics/2018/07/the-trump-administration-was-warned-separation-would-be-horrific-for-children.html> [<https://perma.cc/9EXG-U6> <https://perma.cc/D7KV-CVFX> 6R] (reporting on Commander Jonathan White, a former HHS senior official, who testified before Congress that he had warned the administration that implementing a family separation policy would involve a significant risk of harm to children and how the Trump administration nonetheless launched the policy a few weeks after White raised his concerns).

<sup>240</sup> Press Release, Org. of Am. States, Inter-American Comm'n on Hum. Rts., IACHR Expresses Concern Over Recent Migration and Asylum Policies and Measures in the U.S. (June 18, 2010), [http://www.oas.org/en/iachr/media\\_center/PReleases/2018/130.asp](http://www.oas.org/en/iachr/media_center/PReleases/2018/130.asp) [<https://perma.cc/RXD8-W5UM>].

<sup>241</sup> IACHR, Res. 63/2018, Precautionary Measure No. 505-18, Vilma Aracely López Juc de Coc and Others Regarding the United States of America (Aug. 16, 2018) [hereinafter IACHR Resolution: Migrant Families], <https://www.oas.org/en/iachr/decisions/pdf/2018/63-18MC505-18-US-en.pdf> [<https://perma.cc/3F58-XLAA>] (responding to a request for precautionary measures by the Texas Civil Rights Project, the Women's Refugee Commission, the Immigration Clinic of the University of Texas School of Law, and Garcia & Carcia Attorneys at Law, P.L.L.C. to protect rights of five migrant families); IACHR, Res. 64/2018, Precautionary Measure No. 731-18, Migrant Children Affected by the "Zero Tolerance" Policy Regarding the United States of America (Aug. 16, 2018) [hereinafter IACHR Resolution: Zero Tolerance Policy], <https://www.oas.org/en/iachr/decisions/pdf/2018/64-18MC731-18-US-en.pdf> [<https://perma.cc/9KEE-H8PD>] (responding to a request for precautionary measures by the National Commission of Human Rights of Mexico, the Ombudsman's Office of Colombia, the Ombudsman's office of Ecuador, the Attorney General's Office of Guatemala, the National Commissioner of Human Rights of El Salvador, and the National Commissioner of Human Rights of Honduras in favor of migrant children separated from families under the Zero Tolerance Policy).

<sup>242</sup> IACHR Resolution: Migrant Families, *supra* note 241, at 8; IACHR Resolution: Zero Tolerance Policy, *supra* note 241, at 10–11.



United States adopt measures for reunification and to protect the integrity, identity, and right to family life of separated families, as well as adopt measures to guarantee family reunification and stop separations.<sup>243</sup>

Litigation alleging violations under the Federal Tort Claims Act (FTCA) represent a concerted challenge to zero tolerance's family separations.<sup>244</sup> Created in 1946, the FTCA represents a remedy that is based on expressions of moral outrage,<sup>245</sup> by providing redress for contemptible conduct by the US government.<sup>246</sup> The first migrant family filed an FTCA suit based on their separation and detention in 2016, prior to the Trump administration and zero tolerance.<sup>247</sup> In a collective effort to seek compensation for the extreme and intentional harm caused by zero tolerance, advocates have filed at least four hundred administrative complaints on behalf of affected parents and children,<sup>248</sup> some who remain separated, many who are reunited back in their home country, and others who have been reunited in the United States. The opportunity to seek monetary compensation for injuries caused by the US government's zero tolerance policy represents legal recourse that was not available for prior deliberate family separation policies.<sup>249</sup>

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<sup>243</sup> See IACHR Resolution: Migrant Families, *supra* note 241, at 12–13; IACHR Resolution: Zero Tolerance Policy, *supra* note 241, at 11.

<sup>244</sup> 28 U.S.C. § 1346(b).

<sup>245</sup> Cordero et al., *supra* note 190, at 469 (“The central idea behind [the FTCA] is distinctly moral.”).

<sup>246</sup> The statute provides “a remedy to those ‘intentionally or recklessly’ subjected to ‘extreme and outrageous conduct,’ especially from those who hold power over them.” *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 46 (AM. L. INST. 2012)).

<sup>247</sup> *Rodriguez Alvarado v. United States*, ASYLUM SEEKER ADVOC. PROJECT <https://asylumadvocacy.org/ftca-litigation/> [<https://perma.cc/X8NF-B4RP>].

<sup>248</sup> Complaint at 14 n.8, *C.M. v. U.S.*, No. 2:19-cv-05217 (D. Ariz. May 29, 2020), <https://storage.courtlistener.com/recap/gov.uscourts.azd.1203642/gov.uscourts.azd.1203642.40.0.pdf> [<https://perma.cc/H48K-LVVB>] (“[T]here are over four hundred (400) pending administrative claims arising out of the family separations, and many more still may be presented.”). Advocates estimate that there are actually approximately six hundred complaints pending before the relevant federal agencies on behalf of families separated by zero tolerance. Email from Amit Jain, Litig. & Pol’y Couns., Asylum Seeker Advoc. Project, to author (June 2, 2021, 11:02 AM) (on file with author); Letter from Asylum Seeker Advoc. Project to the U.S. Dep’t of Homeland Sec. & U.S. Dep’t of Just. (May 10, 2021) (on file with author). Administrative complaints must be filed within the statute of limitations period of two years from the harm alleged, *see* 28 U.S.C. § 2401(b), and petitioners can pursue their claims in federal court after six months if the agency or agencies have not made a final disposition on their claims, *see* § 2675(a).

<sup>249</sup> This is due to the fact that the FTCA was enacted in 1946 and includes a two-year statute of limitation for filing claims. *See* sources cited *supra* notes 244 and 248. Claims regarding Japanese Internment is the one practice that could have fallen within this time frame, but none were filed during the two-year window after the end of the policy. However, after the congressionally appointed Commission on Wartime Relocation and Internment of Civilians issued its findings in 1982 uncovering previously-concealed evidence of the US government’s justifications for internment, victims of internment pursued FTCA claims, albeit unsuccessfully. *See* *Hohri v. U.S.*, 586 F. Supp. 769, 789–90, 793 (D.D.C. 1984), *aff’d*,

As of the writing of this article, there are seventeen FTCA lawsuits pending in federal courts across the country on behalf of separated families.<sup>250</sup> The filings in these lawsuits include language connecting the separation of families at the US–Mexico border to the histories of US family separation.<sup>251</sup> A powerful example is in an amicus brief filed by family law professors in the FTCA lawsuit, *D.J.C.V. v. U.S. Immigration and Customs Enforcement*:

More than a century ago, Henry Brown wrote of the loss of his child in slavery and the immeasurable horror of children pressed together in carts while being torn from home and family. As [the separated father plaintiff] can attest, [the government's] decision to reintroduce family separation policies into the United States has caused immeasurable

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782 F.2d 227 (D.C. Cir.), *vacated*, 107 S. Ct. 2246 (1987) (ruling that even if plaintiffs complied with statutory exhaustion requirement, the two-year statute of limitations barred their claims); *see also* Kato v. United States, 1 F. App'x 630 (9th Cir. 2001). FTCA complaints for enslavement generally, not specifically on the basis of family separation, similarly have been dismissed on statute of limitations grounds. *See, e.g.*, Cato v. United States, 70 F.3d 1103 (1995) (dismissing claims for damages arising out of slavery because they occurred prior to the 1945 passage of FCTA and thus the suit could not satisfy the two-year statute of limitations). Complaints based on the FTCA have not been attempted in the context of Indigenous family separation. *See generally* Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45 (2006) (exploring options for legal recourse against the US government by boarding school attendees). Families separated by orphan trains, in addition to having a statute of limitations problem, were separated by private actors and not the US government. *See supra* notes 151 and 156 and accompanying text.

<sup>250</sup> Chart tracking FTCA litigation based on information found on PACER (on file with author).

<sup>251</sup> Nonlegal advocacy, as well as the media in covering zero tolerance, has made comparisons between family separation under the Trump administration and histories of family separation in the United States. *See* Ben Fenwick, "Stop Repeating History: Plan to Keep Migrant Children at Former Internment Camp Draws Outrage, N.Y. TIMES (June 22, 2019), <https://www.nytimes.com/2019/06/22/us/fort-sill-protests-japanese-internment.html> [<https://perma.cc/3ZPB-PFZZ>] (quoting a survivor of Japanese Internment: "There are many similarities that resonate through our own experiences . . . [of] [i]mprisoning children without meeting certain standards of care. We had family separation and indefinite detention. We suffered long-term health problems and mental health problems long afterward."); Olivia B. Waxman, *Family Separation Is Being Compared to Japanese Internment. It Took Decades for the U.S. to Admit That Policy Was Wrong*, TIME (June 18, 2018), <https://time.com/5314955/separation-families-japanese-internment-camps/> [<https://perma.cc/BjL6-CKJB>]. These comparisons relate to the internment of Japanese-Americans during World War II, where some families were physically separated. *See* Renee Romano, *The Trauma of Internment*, WASH. POST (June 25, 2019), <https://www.washingtonpost.com/news/made-by-history/wp/2018/06/25/the-trauma-of-internment/> [<https://perma.cc/HG8U-VD5W>] (recounting the story of a family whose parents were arrested while their children were at school, months passing before the children were reunited with their parents in an internment camp). Most, however, were detained together as families, which is not to minimize the profound harm of the government's actions against Americans of Japanese descent, but others have distinguished the Japanese Internment policy from zero tolerance on this basis. *See* George Takei, "At Least During the Internment . . ." *Are Words I Thought I'd Never Utter*, FOREIGN POLY (June 19, 2018), <https://foreignpolicy.com/2018/06/19/at-least-during-the-internment-are-words-i-thought-i-d-never-utter-family-separation-children-border/> [<https://perma.cc/7HCK-LX3C>] ("At least during the Internment, when I was just 5 years old, I was not taken from my parents.").

suffering. It is precisely these horrors that the Reconstruction Congress sought to eradicate when drafting the Thirteenth and Fourteenth Amendments [to the US Constitution].<sup>252</sup>

On June 20, 2018, the administration formally abandoned the practice of separating migrant families through an executive order.<sup>253</sup> The order did not explain whether or how the federal government would reunify children whom they had separated. In fact, a few days after issuing the order, the government admitted that it had no reunification procedure in place.<sup>254</sup> It effectively replaced family separation with family detention,<sup>255</sup> morphing the zero tolerance policy to more resemble the internment of families of Japanese ancestry during World War II.<sup>256</sup>

Just a few weeks after taking office, President Joe Biden established an Interagency Task Force on the Reunification of Families, calling the Trump administration's family separation policies "unconscionable," "abhorrent," and a "human tragedy."<sup>257</sup> DHS Secretary Alejandro Mayorkas, in one of his first interviews as secretary, said: "It is our moral imperative to not only reunite the families, but to provide them with the relief, resources, and

<sup>252</sup> D.J.C.V. Amicus Brief, *supra* note 26.

<sup>253</sup> Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018). The executive order officially ceasing the practice reestablished a policy "to maintain family unity" and directed families to be detained together "during the pendency of any criminal improper entry or immigration proceedings involving their members." *Id.* at 29,435.

<sup>254</sup> See *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1140–41 (S.D. Cal. 2018); see also GAO: UNACCOMPANIED CHILDREN, *supra* note 198, at 22 ("HHS officials told [the GAO] that there were no specific procedures to reunite children with parents from whom they were separated at the border prior to the June 2018 court order."). The only procedure in place capable of reuniting children with their parents was the procedure developed to place unaccompanied children with sponsors in compliance with the Trafficking Victims Protection Reauthorization Act. Under this procedure, however, a parent could only be reunited with his or her child if the government deemed them eligible to be a sponsor. *Id.* Judge Sabraw noted that this procedure was inadequate because it was created to address "a different situation, namely, what to do with alien children who were apprehended without their parents at the border or otherwise," and further, that the procedure was not developed to address situations such as this one where family units were separated by government officials after they crossed the border together. *Id.* at 29 (quoting Order Following Status Conference, *Ms. L. v. Immigr. & Customs Enf't*, No. 18-0428-DMS-MDD (S.D. Cal. July 10, 2018)).

<sup>255</sup> Olivares, *supra* note 6, at 301–09 (detailing "Family Separation as a Strategy to Normalize Imprisoning Immigrant Families").

<sup>256</sup> See *supra* note 251 and accompanying text.

<sup>257</sup> Joe Biden, FACEBOOK (June 20, 2018), <https://www.facebook.com/joe Biden/posts/10155305481581104> (last visited Oct. 2, 2021); Executive Order on the Establishment of Interagency Task Force on the Reunification of Families, Exec. Order No. 14,001, 86 Fed. Reg. 8273 (Feb. 2, 2021). Cosponsors Senator Blumenthal and Representative Castro have introduced a bill in the US Congress addressing harms caused by the zero tolerance policy titled the Families Belong Together Act. *Bill Would Help Separated Families*, ASYLUM SEEKERS ADVOC. PROJECT (Apr. 28, 2021), <https://asylumadvocacy.org/bill-would-help-separated-families/> [<https://perma.cc/LU9P-UCHG>].

services they need to heal.”<sup>258</sup> The Biden administration and lawyers representing separated families pursuing FTCA claims engaged in ten months of settlement negotiations.<sup>259</sup> A leak in late October 2021 disclosing the monetary amount of the US government’s offer for a subgroup of separated families<sup>260</sup> drew sharp negative political reactions,<sup>261</sup> ultimately resulting in the government ending settlement discussions.<sup>262</sup> The political pushback on compensating migrants with reparations commiserate with the harm inflicted upon them ultimately overcame the administration’s will to right what they had characterized as an egregious, abhorrent policy.<sup>263</sup>

Indeed, the relatively swift end to migrant family separations under zero tolerance was momentous.<sup>264</sup> Zero tolerance represented a hybrid between deliberate and collateral family separation, with the purpose of deterring migration generally, and the use of deliberate separation of families as a consequential tactic. This led to considerable national and international condemnation of the policy and also created an opportunity for advocates challenging zero tolerance to connect it to past US family separation histories.<sup>265</sup> At the crux of the resistance to zero tolerance were counterstories

<sup>258</sup> Press Release, Dep’t of Homeland Sec., DHS Secretary Mayorkas Announces Family Reunification (Mar. 1, 2021), <https://www.dhs.gov/news/2021/03/01/dhs-secretary-mayorkas-announces-family-reunification-task-force-principles-and> [<https://perma.cc/XV5C-XRC4>]; see also Jonathan Todres & Daniela Villamizar Fink, *The Trauma of Trump’s Family Separation and Child Detention Actions: A Children’s Right Perspective*, 95 WA. L. REV. 377, 398–408 (2020) (detailing the long-term health effects of separation on children).

<sup>259</sup> Jonathan Blitzer, *Why Biden Refused to Pay Restitution to Families Separated at the Border*, NEW YORKER (Dec. 22, 2021), <https://www.newyorker.com/news/news-desk/why-biden-refused-to-pay-restitution-to-families-separated-at-the-border> [<https://perma.cc/V5J8-4ZMH>].

<sup>260</sup> Michelle Hackman et al., *U.S. in Talks to Pay Hundreds of Millions to Families Separated at Border*, WALL ST. J. (Oct. 28, 2021), <https://www.wsj.com/articles/biden-administration-in-talks-to-pay-hundreds-of-millions-to-immigrant-families-separated-at-border-11635447591> [<https://perma.cc/542H-CPDU>]; see also Priscilla Alvarez, *Families Forcibly Separated at the Border by the Trump Administration Seeking Settlements in Ongoing Negotiations*, CNN (Oct. 29, 2021, 12:56 PM), <https://www.cnn.com/2021/10/29/politics/family-separation/index.html> [<https://perma.cc/PQ69-PJEE>].

<sup>261</sup> See Blitzer, *supra* note 259; see also Kathryn Hampton, *Biden Administration Exiting Family Separation Negotiations ‘Beyond Shameful.’* PHR, PHYSICIANS FOR HUM. RTS. (Dec. 16, 2021), <https://phr.org/news/biden-administration-exiting-family-separation-settlement-negotiations-beyond-shameful-phr/>.

<sup>262</sup> *Id.*; see also Miriam Jordan, *Justice Department Halts Settlement Talks with Migrant Families*, N.Y. TIMES (Dec. 16, 2021), <https://www.nytimes.com/2021/12/16/us/biden-migrant-family-separation-settlement.html> [<https://perma.cc/4EC5-642D>].

<sup>263</sup> See Blitzer, *supra* note 259 (reporting that “officials at the White House argued that moving ahead with a settlement had become a greater political liability than any potential fallout from a broken promise”).

<sup>264</sup> Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 1996 (2020) (“Although family separation had long been known to immigrant communities affected by vigorous enforcement policies, zero tolerance brought it fully into public view . . . . The formal reprieve in the family separation policy was a significant victory . . .”).

<sup>265</sup> See sources cited *supra* note 7; see *infra* text accompanying notes 270 and 273.

detailing, contemporaneously, both the severe harm inflicted upon families and the extreme cruelty by the government in carrying out the policy.<sup>266</sup> These counterstories had potency in a political context where many Americans and people across the globe were grappling with the reality of a US government that was explicit in advancing racist, white nationalist policies.<sup>267</sup>

The reason that the Trump administration was forced to end zero tolerance may have been because government officials expressly stated that children would be separated from their parents in its execution, making it less publicly palatable than family separation as a collateral consequence of deterring migration. In the broader picture, zero tolerance represented a discrete policy within a US immigration system that continues to separate children from their families.<sup>268</sup> Unfortunately, the Biden administration demonstrated that it was not willing to weather the political pushback to see through its promise to provide restitution to the harms caused by the latest deliberate family separation policy under zero tolerance. Moreover, the outrage that helped put an end to the zero tolerance policy has not extended to shift societal acceptance of persistent and pervasive family separation policies that continue to disproportionately impact marginalized communities in the United States.

### III. MODERN FAMILY SEPARATION

The end of deliberate family separation policies targeting enslaved, Indigenous, and immigrant families as discussed above was, of course, progress. But as shown by a dearth of demonstrative evidence of change decades after the ICWA, there are systemic reasons that marginalized families, disproportionately from communities of color, continue to be separated in the United States.<sup>269</sup> The important but partial victory against zero tolerance may be another indication of the limited success to root out family separation policies.

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<sup>266</sup> See *supra* notes 200–202 and accompanying text.

<sup>267</sup> This reality began in the administration's first days by the implementation through an executive order of a travel ban from predominately Muslim countries. See *Timeline of the Muslim Ban*, ACLU OF WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> (last visited Jan. 31, 2022).

<sup>268</sup> See Eagly, *supra* note 264, at 1996 (“[C]hildren traveling with relatives or caretakers other than parents, such as grandparents or aunts and uncles, are still separated in connection with ongoing zero-tolerance prosecutions. Children traveling with parents with criminal records or parents beings prosecuted for felony illegal reentry also continue to endure painful separations from their parents.”).

<sup>269</sup> See *supra* text accompanying notes 131–138.

Modern family separation persists via the criminal legal and immigration enforcement systems, which are two significant mechanisms through which the US government separates children from parents.<sup>270</sup> These separations, often prolonged or permanent, have the same negative social, psychological, and economic impacts on children, adults, and communities as deliberate family separation policies. The difference is that the justifications of punishment and deterrence are formidable narratives that cast family separation as an acceptable collateral consequence within these systems.

When first questioned about the zero tolerance policy, then-DHS Secretary Kirstjen Nielsen said about family separation: "We do it every day in every part of the country. In the United States, we call that law enforcement."<sup>271</sup> The DHS secretary's comment minimized the fact that zero tolerance explicitly relied on inflicting harm by separating migrant families. The comment did, however, accurately acknowledge that the US government today engages in widespread family separation, including as a collateral consequence of enforcing US criminal and immigration laws. The successful campaign to end the zero tolerance policy has not translated into further awareness or condemnation of equally devastating modern US family separation policies, but it should.

#### A. *Family Separation in the US Criminal Legal System and its Mass Incarceration Policies*

The manner in which the criminal legal system operates, particularly the mass incarceration of predominately communities of color,<sup>272</sup> is an indirect but significant way in which the US

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<sup>270</sup> There are a spectrum of views as to the interplay between zero tolerance and the treatment of families generally in US immigration law. Compare Olivares, *supra* note 6, at 317 ("[T]he contemporary practice of separating children from fit parents is intertwined with the well-established history of racism and discrimination in immigration law and the larger political context of dehumanizing marginalized people, including immigrants. Importantly, however, the foundation of immigration law and policy is built upon a commitment to keep families together."), with Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2320, 2323 (2019) ("[A] holistic examination of the broader immigration system shows that the exception of family separations operates much more like the rule . . .").

<sup>271</sup> Shaila Dewan, *Family Separation: It's a Problem for U.S. Citizens, Too*, N.Y. TIMES (June 22, 2018), <https://www.nytimes.com/2018/06/22/us/family-separation-americans-prison-jail.html> [https://perma.cc/2DSS-VTY2].

<sup>272</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6 (2010) (The United States currently "has the highest rate of incarceration in the world, dwarfing the rates of nearly every developed country . . . . No other country in the world imprisons so many of its racial or ethnic minorities."); Angela Davis, *Race and Criminalization: Black Americans and the Punishment Industry*, in RACE, ETHNICITY, AND GENDER: SELECTED READINGS 204, 204-12 (Joseph F. Healey & Eileen O'Brien eds., 2d ed. 2007); Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER (Jan. 30, 2012),

government has continued to separate families. Starting in the mid-twentieth century, progressively punitive criminal legal policies not only increased conviction rates but also lengthened incarceration periods.<sup>273</sup> This increased the number of parents in prison,<sup>274</sup> with a disproportionate impact on children of color: “When we consider disparities between white children and children of color, Latino and [B]lack children are 2.5 and 7.5 times respectively more likely to have a parent in a correctional institution. Similarly, American Indian/Alaska Native and multiracial/ethnic children are over-represented.”<sup>275</sup> Children of color are also disproportionately separated from their families by themselves being incarcerated at higher rates: “In 2013, African American youth were more than four times as likely to be committed to a juvenile facility as white youth. American Indian youth were more than three times as likely to be committed, and Hispanic youth were 61 percent more likely to be committed.”<sup>276</sup>

The incarceration of a parent in many cases creates absolute separation while the parent is serving their sentence, because of barriers to communication and visitations that are particularly difficult for economically disadvantaged families to overcome.<sup>277</sup> In many instances, because of factors such as lack of communication

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<https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america> [<https://perma.cc/A258-HD57>] (“Mass incarceration on a scale almost unexampled in human history is a fundamental fact of our country today—perhaps *the* fundamental fact, as slavery was the fundamental fact of 1850. In truth, there are more [B]lack men in the grip of the criminal-justice system . . . than were in slavery then. Overall, there are now more people under ‘correctional supervision’ in America—more than six million—than were in the Gulag Archipelago under Stalin at its height.”).

<sup>273</sup> ELISA MINOFF, CTR. FOR THE STUDY OF SOC. POL’Y, ENTANGLED ROOTS: THE ROLE OF RACE IN POLICIES THAT SEPARATE FAMILIES 11–12 (2018), <https://cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf> [<https://perma.cc/YF3A-3CX3>].

<sup>274</sup> Roberts, *supra* note 182, at 1482 (“While judges used to show mothers leniency, they are now more often compelled by mandatory sentencing laws to give mothers long prison terms. As a result, the number of children with a mother in prison more than doubled between 1991 and 2007.”).

<sup>275</sup> Keva M. Miller, *Exploring the Intersection of Child Welfare and Criminal Justice*, in CW360: CRIMINAL JUSTICE INVOLVEMENT IN CHILD WELFARE 4 (2018), [https://casw.umn.edu/wp-content/uploads/2018/04/CW360\\_Spring2018\\_WebTemp.pdf](https://casw.umn.edu/wp-content/uploads/2018/04/CW360_Spring2018_WebTemp.pdf) [<https://perma.cc/2L9K-9TKQ>].

<sup>276</sup> MINOFF, *supra* note 273, at 12.

<sup>277</sup> *Id.* at 14 (“Once parents are incarcerated, it can be difficult for them to maintain relationships with their children. Visits are difficult, and phone calls can be prohibitively expensive.”); Chesa Boudin, *Children of Incarcerated Parents: The Child’s Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 102–03 (2011) (“In practice, most children of federal inmates do not maintain active contact with their incarcerated parents. In 2004, 59% of parents in state correctional facilities and 45% of parents in federal correctional facilities reported never having had a personal visit from their children . . . .”); *see also* Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [<https://perma.cc/3ATZ-FDCA>] (“Should the family attempt to stay together through incarceration, the loss of income only increases, as the mother must pay for phone time, travel costs for visits, and legal fees.”).

and length of incarceration, parents lose custody of their children, leading to permanent family separation.<sup>278</sup> Mass incarceration and the accompanying family separation has disproportionately affected Black fathers.<sup>279</sup>

The narratives justifying mass incarceration stoked racialized fear and played on Black women stereotypes. Particularly in the 1980s, government officials amplified many of these narratives through the “War on Drugs”<sup>280</sup> and “Tough on Crime”<sup>281</sup> campaigns. The narrative of the “welfare queen” was amongst those vilifying women of color, and Black women specifically.<sup>282</sup>

Mass incarceration’s collateral consequence of separating families has caused considerable harm to children. Children of incarcerated parents exhibit poor physical and mental health outcomes, demonstrate behavioral issues, and experience traumatic events such as housing insecurity.<sup>283</sup> These effects extend beyond

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<sup>278</sup> See MINOFF, *supra* note 273, at 13 (“Incarcerated parents . . . are at risk of permanently losing their parental rights if their children are in the child welfare system . . . . According to the law, states must file a petition to terminate parental rights on behalf of any child who has been in foster care for 15 of the most recent 22 months . . . . Since parents are often incarcerated for significantly longer than 15 months, their imprisonment means they risk losing their children forever.”); Roberts, *supra* note 182, at 1496 (“A chief threat to reunification is the difficulty of visiting with children while in prison. Child welfare agencies may construe a parent’s failure to visit and communicate with his or her child as abandonment and grounds for terminating parental rights. Despite . . . or because of . . . being the primary caretaker of their children before arrest, incarcerated mothers are less likely than fathers to have family visits.”).

<sup>279</sup> See Coates, *supra* note 277 (“By 2000, more than 1 million [B]lack children had a father in jail or prison—and roughly half of those fathers were living in the same household as their kids when they were locked up.”); Dewan, *supra* note 271 (“[O]ne in four [B]lack children can expect to have their father incarcerated before they turn 14.”); Leila Morsy & Richard Rothstein, *Mass Incarceration and Children’s Outcomes*, ECON. POL’Y INST. (Dec. 15, 2016), <https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/> [<https://perma.cc/766D-58ZX>] (“By the age of 14, approximately 25 percent of African American children have experienced a parent—in most cases a father—being imprisoned for some period of time. The comparable share for white children is 4 percent.”). An estimated 250,000 children have a single mother in jail. Dewan, *supra* note 271.

<sup>280</sup> See ALEXANDER, *supra* note 272, at 5–6. See generally Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381 (2002) (explaining the historical relationship between drugs and racial stereotypes and how and why the war on drugs intentionally targeting African American communities); Benjamin D. Steiner & Victor Argothy, *White Addiction: Racial Inequality, Racial Ideology, and the War on Drugs*, 10 TEMP. POL. & CIV. RTS. L. REV. 443 (2001) (making the case that the “drug war invests in America’s ‘culture of while privilege and the identity of politics of blame and denial’”).

<sup>281</sup> Keelia Lee, *Pandemic, Protests, and Prison Reform? Why 2020 Is a Catalyst to Rethink Drug Policy*, 33 ST. THOMAS L. REV. 1, 2, 4–9 (2020); Heather L. Pickerell, Note, *Critical Race Theory & Power: The Case for Progressive Prosecution*, 36 HARV. BLACKLETTER L.J. 73, 74–78 (2020).

<sup>282</sup> JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY*, at v (1994).

<sup>283</sup> Kara Gotsch, *Families and Mass Incarceration*, in *CW360: CRIMINAL JUSTICE INVOLVEMENT IN CHILD WELFARE* 7 (2018), [https://cascw.umn.edu/wp-content/uploads/2018/04/CW360\\_Spring2018\\_WebTemp.pdf](https://cascw.umn.edu/wp-content/uploads/2018/04/CW360_Spring2018_WebTemp.pdf) [<https://perma.cc/9PEN-GTJ7>] (“Studies report



children directly impacted by their parents' incarceration, causing devastating effects to communities as a whole.<sup>284</sup>

*B. Family Separation Caused by Detention and Deportation in the US Immigration System*

Before and after the Trump administration's zero tolerance policy, enforcement-driven immigration policies have generally<sup>285</sup> caused significant family separation, a consequence that has been described as "multigenerational" punishment<sup>286</sup> or "secondary immigration enforcement."<sup>287</sup> The most lasting consequence of immigration enforcement is deportation. The rate of deportations increased during the Obama administration, when ICE executed more than 350,000 deportations of non-US citizens in 2009, 2010, 2011, and 2013, and more than 400,000 deportations in 2012—the latter being the most in the last decade.<sup>288</sup> During the Trump

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numerous negative outcomes for children as a consequence of parental incarceration, ranging from depression and anxiety to aggression and delinquency . . . . Additional evidence points to children's extreme trauma resulting from the experience of parental arrest . . . ."; Morsy & Rothstein, *supra* note 279 ("Independent of other social and economic characteristics, children of incarcerated parents are more likely to: drop out of school; develop learning disabilities, including attention deficit hyperactivity disorder (ADHD); misbehave in school; [or] suffer from migraines, asthma, high cholesterol, depression, anxiety, post-traumatic stress disorder, and homelessness.").

<sup>284</sup> MINOFF, *supra* note 273, at 11 ("The result may destabilize already disadvantaged communities, decreasing social cohesion and respect for the law and increasing crime. Children and families of color who do not directly experience mass incarceration, therefore, may nonetheless be affected.").

<sup>285</sup> Enforcement-driven immigration policies come in various forms. See Bill Ong Hing, *Ethics, Morality, and Disruption of U.S. Immigration Laws*, 63 KAN. L. REV. 981, 996, 988–1006 (detailing various immigration enforcement strategies, including: enforcement targeting immigrant workers, both on-site workplace raids and more indirect workplace enforcement such as through the Immigration Reform and Control Act compliance; programs such as Secure Communities and the Criminal Alien Removal Initiative that disproportionately deported noncriminal or low-level offenders; and the "Removal of Lawful Permanent Residents Without a Fair Hearing").

<sup>286</sup> HEIDE CASTAÑEDA, *BORDERS OF BELONGING: STRUGGLE AND SOLIDARITY IN MIXED-STATUS IMMIGRANT FAMILIES* 167 (2019) (quoting Laura E. Enriquez, *Multigenerational Punishment: Shared Experiences of Undocumented Immigration Status Within Mixed-Status Families*, 77 J. MARRIAGE & FAM. 168 (2015)).

<sup>287</sup> *Id.*; Nina Rabin, *Understanding Secondary Immigration Enforcement: Immigrant Youth and Family Separation in a Border Country*, 47 J.L. & EDUC. 1 (2018) (examining "secondary immigration enforcement," which signifies the cumulative impact of a heightened immigration enforcement regime aimed at their parents, regardless of the legal status of the children); see also Hing, *supra* note 285, at 983 ("Over the past twenty years, the Immigration and Naturalization Service (INS) or, after 9/11, Immigration and Customs Enforcement (ICE) has engaged in immigration enforcement actions that . . . have crossed the line between what is necessary to enforce the immigration laws and over-zealous tools that wreak unnecessary havoc on communities and a common sense of humanity and decency.").

<sup>288</sup> U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEPT OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2015 (Dec. 22, 2015), <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf> [<https://perma.cc/XXU8-DDZR>].

administration, ICE deported a total of 226,119 non-US citizens in 2017, deported 256,085 non-US citizens in 2018,<sup>289</sup> and deported 267,258 non-US citizens in 2019.<sup>290</sup>

In 2010, Congress mandated that ICE collect data on the deportation of parents with children who are US citizens.<sup>291</sup> Between 2015 and 2017, ICE deported more than 87,000 individuals who said they have at least one US citizen child.<sup>292</sup> In 2018, ICE deported more than 20,000 parents of US citizen children,<sup>293</sup> and in 2019, ICE deported nearly 28,000 citizen children's parents.<sup>294</sup> The number of families separated by deportation, however, is higher than these statistics show, given that the reporting does not capture deported parents who left behind children who are not US citizens, but who nonetheless remained in the United States.<sup>295</sup>

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<sup>289</sup> U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEPT OF HOMELAND SEC., FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 10, <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf> [https://perma.cc/8GYW-3JPW].

<sup>290</sup> U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEPT OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 19, <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf> [https://perma.cc/47BV-M8QD].

<sup>291</sup> H.R. Rep. No. 111-298 (2010) (Conf. Rep.).

<sup>292</sup> Madeline Buiano, *Ice Data: Tens of Thousands of Deported Parents Have U.S. Citizen Kids*, THE CTR. FOR PUB. INTEGRITY (Oct. 12, 2018), <https://publicintegrity.org/inequality-poverty-opportunity/immigration/ice-data-tens-of-thousands-of-deported-parents-have-u-s-citizen-kids/> [https://perma.cc/BP5S-X9VH].

<sup>293</sup> U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEPT OF HOMELAND SEC., REMOVAL OF ALIENS CLAIMING U.S.-BORN CHILDREN, SECOND HALF, CALENDAR YEAR 2018 3 (2019), [https://www.dhs.gov/sites/default/files/publications/ice\\_-\\_removal\\_of\\_aliens\\_claiming\\_u.s.-born\\_children\\_second\\_half\\_cy\\_2018\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/ice_-_removal_of_aliens_claiming_u.s.-born_children_second_half_cy_2018_0.pdf) [https://perma.cc/PQU4-FY3R] (reporting that ICE deported 10,348 parents of US citizens in the second half of 2018); U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEPT OF HOMELAND SEC., REMOVAL OF ALIENS CLAIMING U.S.-BORN CHILDREN, FIRST HALF, CALENDAR YEAR 2018 3 (2019), [https://www.dhs.gov/sites/default/files/publications/ice\\_-\\_removal\\_of\\_aliens\\_claiming\\_u.s.-born\\_children\\_first\\_half\\_cy\\_2018.pdf](https://www.dhs.gov/sites/default/files/publications/ice_-_removal_of_aliens_claiming_u.s.-born_children_first_half_cy_2018.pdf) [https://perma.cc/HVZ2-5UJ4] (reporting that ICE deported 11,180 parents of US citizen children in the first half of 2018).

<sup>294</sup> U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEPT OF HOMELAND SEC., DEPORTATION OF PARENTS OF U.S.-BORN CHILDREN, FIRST HALF, CALENDAR YEAR 2019 3 (2020), [https://www.dhs.gov/sites/default/files/publications/ice\\_-\\_deportation\\_of\\_parents\\_of\\_u.s.-born\\_children\\_first\\_half\\_cy\\_2019.pdf](https://www.dhs.gov/sites/default/files/publications/ice_-_deportation_of_parents_of_u.s.-born_children_first_half_cy_2019.pdf) [https://perma.cc/5NVA-7VJK] (reporting the removal of 14,324 noncitizen parents of US citizen children); U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEPT OF HOMELAND SEC., DEPORTATION OF PARENTS OF U.S.-BORN CHILDREN, SECOND HALF, CALENDAR YEAR 2019 3 (2020), [https://www.dhs.gov/sites/default/files/publications/ice\\_-\\_deportation\\_of\\_parents\\_of\\_u.s.-born\\_children\\_second\\_half\\_cy\\_2019.pdf](https://www.dhs.gov/sites/default/files/publications/ice_-_deportation_of_parents_of_u.s.-born_children_second_half_cy_2019.pdf) [https://perma.cc/AE3D-TXMU] (reporting removal of 13,656 noncitizen parents of US citizen children).

<sup>295</sup> These families include children who are Lawful Permanent Residents (LPRs), who have temporary immigration status such as Deferred Action for Childhood Arrivals (DACA), or who are undocumented. The Obama administration created a pathway for certain parents with US citizens and LPRs children to receive temporary immigration status and thus avoid deportation through the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html> [https://perma.cc/J859-3453]. An equally divided US Supreme Court judgment left in place an appeals court ruling that blocked the implementation of DAPA. *Id.*;

In addition to the US immigration policies producing widespread deportations, over the past decades, the US government has increasingly detained non-US citizens for alleged immigration violations. In fact, a former director of ICE's Office of Detention Policy and Planning characterized the government's modern use of immigration detention as straying from its administrative purpose of facilitating the immigration process, morphing instead into a functionally punitive system.<sup>296</sup> This shift has meant that more immigrant and mixed-status families experience family separation by the US immigration system during the duration of a noncitizen family member's detention.<sup>297</sup>

The government does not provide data specifically on immigration detainee parents,<sup>298</sup> and research on the issue conflates parental detention with deportations. One study, for example, found that in a two-year period, "half a million children experienced the apprehension, detention, and deportation of at least one parent."<sup>299</sup> The number of families separated while the government detains noncitizen parents is likely higher than the conflated data reveals, because not all individuals who are detained are deported. Moreover, absolute separation of detainees from their families is even more likely than in cases of criminal incarceration, since after an arrest DHS can place noncitizens in detention facilities anywhere in the United States.<sup>300</sup>

Like in the context of criminal incarceration, family unity is disrupted, for a prolonged period or permanently, when a

United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam) (mem.). The data also does not capture family separation beyond those of parents and children. See *infra* note 303.

<sup>296</sup> DORA SCHIRO, U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEPT OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 3 (2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> [<https://perma.cc/K9ZK-K4J5>].

<sup>297</sup> Caitlin Patler & Nicholas Branig, *Patterns of Family Visitation During Immigration Detention*, 3 RUSSELL SAGE FOUND. J. SOC. SCIS. 18, 23–24 (2017).

<sup>298</sup> RANDY CAPPS ET AL., MIGRATION POL'Y INST., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES 11, 35 (2015), <https://www.migrationpolicy.org/sites/default/files/publications/ASPE-ChildrenofDeported-Lit%20Review-FINAL.pdf> [<https://perma.cc/JU8N-GS6G>] (listing as an area for future research data on "[h]ow many parents are detained").

<sup>299</sup> Erin R. Hamilton et al., *Growing up Without Status: The Integration of Children in Mixed-Status Families*, 13 SOCIO. COMPASS 1, 8 (2019) (citing CAPPS ET AL., *supra* note 298).

<sup>300</sup> *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, HUM. RTS. WATCH (2009), <https://www.hrw.org/report/2009/12/02/locked-far-away/transfer-immigrants-remote-detention-centers-united-states> [<https://perma.cc/Z3FT-RMHT>]; Nathalie Brinet Molina, U.S. Citizen Children Caught in the Middle: How Extended Family Visit Programs Could Minimize the Short- and Long-term Effects of Parental Detention and Deportation on U.S. Citizen Children 123 (July 31, 2019) (M.A. thesis, Georgetown University), <https://bit.ly/3J29tAE> [<https://perma.cc/5S4S-NXSG>] (noting that "one mother interviewed was placed in a detention [facility] 2,300 miles from her children").

migrant is detained and/or deported.<sup>301</sup> While this disruption is harmful regardless of a child's immigration status, it presents additional issues for US citizen children. A significant number of the approximately eleven million undocumented immigrants living in the United States are in mixed status families.<sup>302</sup> In fact, "[m]ore than 4 million of the approximately 5 million children under age 18 who have an unauthorized immigrant parent are U.S.-born citizens."<sup>303</sup> The decision whether to remain in the United States or reunite with a deported parent is even more fraught for US citizen children. Sometimes there is not even a choice, as "studies find that child welfare departments and courts often move to terminate the

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<sup>301</sup> See generally Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799 (2010) (examining the implications of changes to law enforcement and immigration policies that have caused a significant increase in deportations over the past ten years and offering case studies of disrupted family ties). Not all incidents of detention or deportation involve family separation. Noncitizens subject to detention or deportation may not have children at all or may have children in their country of origin. However, US immigration law renders it considerably difficult for parents to avoid deportation based on hardship to their families. *Id.* at 1804–05. Therefore, increasingly enforcement-driven immigration policies generally will lead to increased incidents of family separation.

<sup>302</sup> Julia Gelatt et al., *Nearly 3 Million U.S. Citizens and Legal Immigrants Initially Excluded Under the CARES Act Are Covered Under the December 2020 COVID-19 Stimulus*, MIGRATION POL'Y INST. (Jan. 2021), <https://www.migrationpolicy.org/news/cares-act-excluded-citizens-immigrants-now-covered> [<https://perma.cc/AA4T-4C4U>] ("About one-fifth of the nation's estimated 11 million unauthorized immigrants are married to citizens or LPRs [lawful permanent residents], while more than one-third have at least one U.S.-citizen child—with considerable overlap between these two groups."). Another scenario is parents of US citizens who have legal status in the United States that places them in limbo, including under the constant threat that the government can revoke their status and force the parent to return to their country of origin. Temporary Protected Status (TPS) is one such kind of status, as its name connotes, that is not permanent. "As of 2017, [TPS] holders from El Salvador, Honduras, and Haiti had an estimated 273,000 U.S.-citizen children." See *U.S. Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (June 24, 2021), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement> [<https://perma.cc/KTU8-SJ92>]; see also Luis H. Zayas & Laurie Cook Heffron, *Disruption Young Lives: How Detention and Deportation Affect US-Born Children of Immigrants*, AMER. PSYCH. ASS'N. (Nov. 2016), <https://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation> [<https://perma.cc/959Z-GRDC>] (addressing the particular stressors US citizen children living in a home with one or more undocumented parents or siblings face, particularly the threat of detention and deportation).

<sup>303</sup> Gelatt et al., *supra* note 302; see also CASTAÑEDA, *supra* note 286, at 167 ("Some 5.3 million children in the United States live with undocumented parents, and 85 percent of them are U.S.-born citizens."). This article's focus is the separation of children and parents when addressing family separation, but of course there are other, equally damaging permutations of family separation. See, e.g., Beth Caldwell, *Deported by Marriage: Americans Forced to Choose Between Love and Country*, 82 BROOK. L. REV. 1 (2016) (addressing spousal separation and the choice deportation presents to US citizens between the constitutional right to marriage and the constitutional right to citizenship); Marcia Zug, *Deporting Grandma: Why Grandparent Deportation May Be the Next Big Immigration Crisis and How to Solve It*, 43 U.C. DAVIS L. REV. 193 (2009) (addressing the issue of grandparent caregivers' deportation).

parental rights of a deported parent even though the child could be safely reunified.”<sup>304</sup>

Children whose noncitizen parents are in the immigration enforcement system, regardless of their own immigration status, suffer considerable mental and physical harm from actual, or even threatened, separation.<sup>305</sup> The effects “are similar to those seen for children with incarcerated parents; they include psychological trauma, material hardship, residential instability, family dissolution, increased use of public benefits, and . . . aggression.”<sup>306</sup> Despite this, US immigration law renders it difficult for parents to invoke the significant harm caused by family separation to prevent their deportation.

### 1. The Legal Narrative of Hardship for Families with Immigrant Parents

The significant number of parents of US citizen children caught in the wave of mass deportations demonstrates that neither family unity nor accounting for the best interest of citizen children is a compelling enough factor to prevent the deportation of noncitizen parents.<sup>307</sup> This is a result of how immigration law constructs the hardship requirement, which is a key element of parents’ defense from deportation.

Undocumented immigrants facing deportation can put forth a defense of cancellation of removal if they have lived in the US for a significant period of time—ten years or more of continued residence.<sup>308</sup> While Lawful Permanent Residents (LPRs) have a less onerous burden to qualify for cancellation of

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<sup>304</sup> Ann Park, *Keeping Immigrant Families in the Child Protection System Together*, AM. BAR ASS’N (Dec. 30, 2020), <https://bit.ly/3HAnHZe> [<https://perma.cc/K4SB-2AJW>]. Even undocumented parents who are not in the immigration enforcement system lose custody of their children merely by virtue of being undocumented. *Id.*

<sup>305</sup> See *U.S. Citizen Children Impacted by Immigration Enforcement*, *supra* note 302; Ranit Mishori, Editorial, *U.S. Policies and Their Effects on Immigrant Children’s Health*, 101 AM. FAM. PHYSICIANS 202, 202 (Feb. 15, 2020); Zayas & Heffron, *supra* note 302; Kalina M. Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496, 499 (2014).

<sup>306</sup> CAPPS ET AL., *supra* note 298, at vi.

<sup>307</sup> Although, as a matter of first impression, it may seem odd that the government failed to protect a US citizen, this collateral damage of US immigration law makes more sense when reminded of how eugenics has played a role in immigration policies. See Rachel Silber, *Eugenics, Family & Immigration Law in the 1920’s*, 11 GEO. IMMIGR. L.J. 859, 881–83 (1997) (summarizing an excerpt of a statement by then Representative Samuel Dickstein at a 1924 congressional hearing on a proposed bill that would set an immigration quota based on genetics principles: “the desire to maintain family ties had been disregarded in the frenzy to prevent national racial quality from deterioration”).

<sup>308</sup> Immigration & Nationality Act (INA) § 240A(b)(1)(A); 8 U.S.C. § 1229b(b)(1)(A). Applicants for cancellation of removal also have to demonstrate good moral character, that they are not inadmissible on criminal or national security grounds. INA § 240A(b)(1)(B)–(C).

removal,<sup>309</sup> undocumented applicants must demonstrate that removal will cause “exceptional and extremely unusual hardship” to a US citizen or LPR child, parent, or spouse.<sup>310</sup>

This hardship requirement was amongst the significant changes made to the Immigration and Nationality Act (INA) by Congress in 1996.<sup>311</sup> With the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),<sup>312</sup> Congress replaced a “suspension of removal” provision of the INA with cancellation of removal.<sup>313</sup> In doing so, it narrowed who could obtain this form of relief.<sup>314</sup> Unlike the previous provision for suspension, hardship to the applicant was no longer relevant per the terms of the statute—the hardship had to be on a qualifying relative.<sup>315</sup>

IIRIRA also changed the hardship requirement by mandating a more severe showing of hardship. The new standard of “exceptional and extremely unusual hardship” previously was one that applied only to non-US citizens deportable on grounds related to crime, fraud, or national security.<sup>316</sup> The devastating harms inflicted by a child being separated from their parent does not automatically suffice.<sup>317</sup>

<sup>309</sup> LPR cancellation requires respondents to (1) have had LPR status for five years; (2) have seven years of continuous residence in the United States; and (3) not be convicted of an aggravated felony conviction or on national security grounds. 8 U.S.C. § 1229b(a). LPR cancellation also bars applicants based on national security grounds. 8 U.S.C. § 1229b(c)(4)(5). Both non-LPR and LPR cancellation can only be granted once, i.e., respondents cannot have had a previous grant of cancellation of removal (or suspension of removal, as it was previously called). 8 U.S.C. § 1229b(c)(6).

<sup>310</sup> INA § 240A(b)(1)(D).

<sup>311</sup> See Rachel E. Rosenbloom, *Beyond Severity: A New View of Crimmigration*, 22 LEWIS & CLARK L. REV. 663, 679–82 (2018).

<sup>312</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

<sup>313</sup> *In re Monreal-Aguinaga*, 23 I & N Dec. 56, 58 (BIA 2001).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* A qualifying relative is a US citizen or LPR spouse, children, or parents who will face hardship if the respondent is deported. Sidra Vitale, *Immigration Equality: How DOMA's Repeal Affected Immigration*, 48 NEW ENG. L. REV. ON REMAND 7, 8 (2013).

<sup>316</sup> *In re Monreal-Aguinaga*, 23 I & N Dec. at 60 n.1; see also Bill Ong Hing & Lizzie Bird, *Curtailing the Deportation of Undocumented Parents in the Best Interest of the Child*, 35 GEO. IMMIGR. L.J. 113, 119 (2020) (“The problem of parental deportation has existed for years but worsened after the introduction of the current hardship standard under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).”).

<sup>317</sup> Case law shows that courts consistently deny cancellation for undocumented parents based on the hardship requirement. Hing & Bird, *supra* note 316, at 119–21 (discussing federal court and BIA decisions after IIRIRA and the BIA's decision in *Monreal-Aguinaga* interpreting the changes made by Congress as replacing suspension with cancellation of removal). Scholars have argued that courts should taper the changes that render non-LPR cancellation more onerous for parents of US citizen children by prioritizing what is best for the children. See, e.g., Hing & Bird, *supra* note 316 (arguing that Adverse Childhood Events Research and the Convention on the Rights of Children should make parents of US citizens' cases for hardship under cancellation stronger than has been adjudicated). For a comparison of immigration court cases that were and were not successful in satisfying the hardship requirement for cancellation of removal, see Connie Oxford, *Qualifying Relatives: US Immigration Policies and Family Reunification or Deunification?*,

When parents are deported to their country of origin, one option is for citizen children to leave the United States to relocate with them. Immigration scholars have referred to this option as “*de facto* deportations,”<sup>318</sup> and courts have determined that there is no constitutional rights violation in cases involving *de facto* deportation.<sup>319</sup> As an alternative, deported parents often choose family separation so that their children can reap the socio-economic benefits of remaining in the United States.<sup>320</sup> As discussed above, in other cases their children are forcibly taken from them.<sup>321</sup>

The number of children in the US child welfare system because their parents are detained or have been deported<sup>322</sup> rivals

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in LIVING TOGETHER, LIVING APART: MIXED STATUS FAMILIES AND US IMMIGRATION POLICY 186, 189–95 (April Schueths & Jodie Lawston eds., 2015).

<sup>318</sup> DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 135 (2012); Lori Nessel, *Deporting America's Children: The Demise of Discretion and Family Values in Immigration Law*, 61 ARIZ. L. REV. 605 (2019).

<sup>319</sup> See, e.g., *Payne-Barahona v. Gonzales*, 474 F.3d 1, 2 (1st Cir. 2007) (“We choose to follow the path of other courts . . . [t]he circuits that have addressed the constitutional issue . . . have uniformly held that a parent’s otherwise valid deportation does not violate a child’s constitutional right.”); *Gallanosa v. United States*, 785 F.2d 116, 120 (4th Cir. 1986) (“The courts of appeals that have addressed this issue have uniformly held that deportation of the alien parents does not violate any constitutional rights of the citizen children.”); *Gonzalez-Cuevas v. INS*, 515 F.2d 1222, 1224 (5th Cir. 1975) (per curiam) (“Legal orders of deportation to their parents do not violate any constitutional right of citizen children . . .”); *Ayala-Flores v. INS*, 662 F.2d 444, 445 (6th Cir. 1981) (per curiam) (“While we recognize that the Ayalas’ child enjoys all the rights of United States citizenship . . . we do not agree that deportation of her parents is an unconstitutional abridgement of those rights.”); *Flores-Quezada v. Gonzales*, 134 F. App’x 202, 202 (9th Cir. 2005) (holding that deportation does not result in deprivation of due process where a child would be denied the Arizona constitutional right to education); *Delgado v. INS*, 637 F.2d 762, 764 (10th Cir. 1980) (“This Court has repeatedly held that the incidental impact visited upon the children of deportable, illegal aliens does not raise constitutional problems.”); see also Nessel, *supra* note 318, at 623 (“Over the years, the circuit courts of appeals have consistently held that deporting a parent of a U.S.-citizen child does not violate the citizen child’s constitutional right to family, to live in the child’s country of citizenship, or to travel.”). Cases involving *de facto* deportation of US citizen children, however, have generated forceful dissents. *Id.* at 623 n.98.

<sup>320</sup> Eunice D. Vargas Valle et al., *Family Separation and Remigration Intentions to the USA Among Mexican Deportees*, INT’L MIGRATION 3 (July 18, 2021), <https://doi.org/10.1111/imig.12905> [<https://perma.cc/ACR8-VASY>] (“Taking their families to Mexico is not an easy decision for deportees. It may mean losing the advantages of US citizenship for their children and decent employment for other adult family members, which may be family goals in which migrants have invested their entire lives.”).

<sup>321</sup> See *supra* text accompanying note 304. This is exacerbated by the fact that immigration officials are not required to inform child welfare authorities of a parent’s whereabouts, rendering it difficult for the latter to locate detained parents and notify them of their children’s custody proceedings. *U.S. Citizen Children Impacted by Immigration Enforcement*, *supra* note 302. In cases where immigrant parents “who maintain their parental rights are subject to” removal, ICE officials should accommodate “to the extent practicable” the parent’s effort to arrange guardianship or to obtain travel documents for his or her children. U.S. IMMIGR. & CUSTOMS ENF’T, POL’Y NO.11064.2, DETENTION AND REMOVAL OF ALIEN PARENTS OR LEGAL GUARDIANS ¶ 5.5.1 (2017), <https://www.ice.gov/doclib/detention-reform/pdf/directiveDetainedParents.pdf> [<https://perma.cc/7E6H-ZPJZ>]. If child custody is still being determined, however, ICE provides no guidance to consider facilitating the travel of a deported parent back to the US to participate in family court proceedings.

<sup>322</sup> Keila E. Molina & Lynne Marie Kohn, “Are We There Yet?” *Immigration Reform for Children Left Behind*, 23 BERKELEY LA RAZA L.J. 77, 78 (2013) (“[M]ore than 5,000 children

the number of children separated under zero tolerance. The former number likely would be higher, but for safety planning protocols that have included undocumented parents executing powers of attorney to designate their children's caretakers in the event that they are detained or deported.<sup>323</sup> While the zero tolerance policy caused broad public outcry, the separation of US citizen children from their parents otherwise caught in the immigration enforcement system has failed to pierce the public consciousness.<sup>324</sup> The trend in modern US immigration law of widespread detention and deportation has had a significant detrimental impact on the ability of migrant families to stay together.<sup>325</sup>

## CONCLUSION

The lineage of US family separation traces back to the American slave system. In part as a reaction to the formal end of slavery centuries later, the US government began the systematic removal of Indigenous children from their caretakers and

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[lived] in foster care as a result of immigration enforcement procedures that separate immigrant families."); see also SETH FREED WESSLER, APPLIED RSCH. CTR. (NOW RACE FORWARD), *SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM* 11 (2011), <https://www.raceforward.org/research/reports/shattered-families> [<https://perma.cc/AGD2-FTLT>]; CAPPS ET AL., *supra* note 298, at 1. Because the Adoption and Foster Case Analysis and Reporting System does not keep information on the immigration status of biological parents, other more recent studies have used the rise of Latinx children in the foster care system as an indication of the impact of immigration enforcement on family separation. See Catalina Amuedo-Dorantes & Esther Arenas-Arroyo, *Immigration Enforcement and Foster Care Placements* 3 (IZA Inst. of Lab. Econ., IZA DP No. 10850, 2017) ("We find that the average increase in interior immigration enforcement over the 2001 through 2015 period contributed to raising the share of Hispanic children in foster care anywhere between 15 and 21 percent.").

<sup>323</sup> Jill Replogle, *What About My Kids if I'm Deported? Immigrants Get Help with Powers of Attorney*, KQED (Mar. 23, 2017), <https://www.kqed.org/news/11371335/what-about-my-kids-if-im-deported-immigrants-get-help-with-powers-of-attorney> [<https://perma.cc/WR6Z-SNCY>]; Kristina Cooke & Mica Rosenberg, *Parents Fearing Deportation Pick Guardians for U.S. Children*, REUTERS (Mar. 3, 2017, 6:23 AM), <https://www.reuters.com/article/us-usa-immigration-parents/parents-fearing-deportation-pick-guardians-for-u-s-children-idUSKBN16A16V> [<https://perma.cc/cV4VK-S6KZ>].

<sup>324</sup> Luis H. Zayas & Mollie H. Bradlee, *Exiling Children, Creating Orphans: When Immigration Policies Hurt Citizens*, 59 SOC. WORK 167, 168 (2014) (noting that despite their large numbers, US born children of undocumented immigrants have "received little attention in the immigration debate").

<sup>325</sup> Elisabeth Malkin, *Pain of Deportations Swell When Children Are Left Behind*, N.Y. TIMES (May 21, 2017), <https://www.nytimes.com/2017/05/20/world/americas/mexico-migrants-immigration-homecoming.html> [<https://perma.cc/Z7RT-H54H>]. While, as of this writing, it is too early to tell what the Biden administration's record on deportations will be, early indicators suggest that the administration seeks to slow down the rate of deportations of non-US citizens. *Deportations of Undocumented Immigrants Are at a Record Low: Joe Biden Does Not Want to Be America's Next "Deporter-in-Chief,"* ECONOMIST (June 12, 2021), <https://www.economist.com/united-states/2021/06/12/deportations-of-undocumented-immigrants-are-at-a-record-low> [<https://perma.cc/5F98-LP9W>]. Families, however, continue to be separated by deportation. See, e.g., Sam Levin, *Deported by Biden: A Vietnamese Refugee Separated from His Family After Decades in US*, GUARDIAN (May 3, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/may/03/biden-deportations-vietnamese-refugee-california-ice> [<https://perma.cc/5JWN-4E8Q>].



communities. Overlapping with Indigenous family separation was the privately-run "orphan train" movement that removed from urban areas approximately a quarter of a million children who were predominantly from impoverished immigrant families. The separation of migrant families under the Trump administration's zero tolerance policy was reminiscent of these family separation histories.

The narratives justifying the separation of children from their parents share common themes such as racial superiority of those executing family separation and moral depravity of the families subjected to the policies. In the context of enslaved and Indigenous family separation, counternarratives of the harm caused by the policies played an important role in bringing them to an end. These stories, however, only gained potency when they aligned with a broader movement for social change. The end of the orphan train movement came about through narrative shifts in the early twentieth century that changed the meanings of child welfare, charity, and social work. For each historical example, therefore, what ended family separation was an alignment of narratives with structural change.

The production and dissemination of counterstories of harm to swiftly end the Trump administration's zero tolerance policy was simultaneously momentous and limited. These narratives played a crucial part in putting a swift end to the particular policy, at a time when there was momentum in US society to limit the explicitly xenophobic and white nationalist agenda of a new administration. The public condemnation, however, did not extend to challenging the widespread separation of families caused by the US immigration system more broadly, and by mass incarceration in the US criminal legal system. This could be because of a perceived moral distinction between deliberate and collateral family separation. It could also, or alternatively, be because the justifications of deterrence and punishment represent widely held values that are greater than the cost of separating families. The devastating consequences of continuing widespread family separation in the United States are evident through the narratives of the children, parents, and communities that are harmed. The lineage of US family separation could come to an end if these stories are aligned with societal will to challenge the legitimacy of the systems that continue to separate marginalized families.