



**Law**

FLORIDA INTERNATIONAL UNIVERSITY

# **A Domestic Reign of Terror: Donald Trump's Family Separation Policy**

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# A DOMESTIC REIGN OF TERROR: DONALD TRUMP’S FAMILY SEPARATION POLICY

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*Ediberto Román\* and Ernesto Sagás\*\**

## ABSTRACT

*Family separation has the dubious distinction of being the most odious measure amongst Donald Trump’s draconian anti-immigrant immigration policies. The policy was introduced by the Trump administration as a way to broadly deter would-be immigrants and asylum seekers by instilling in them the fear of being separated from their children. After its implementation, thousands of immigrant children were taken away from their parents and sent to detention centers where they spent months alone and afraid, being physically and sometimes sexually abused, and in some highly publicized cases, dying while in custody. This article details the legal implementation of the policy, its moral failings, and its political ramifications. The authors argue that Trump’s family separation policy is not only immoral, but essentially un-American, and ought to be firmly rejected by those who defend human rights, the welfare of children, and the most basic norms of decency.*

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1-year-old Maríe Juarez died from respiratory illness contracted while in ICE custody.<sup>1</sup>

2-year-old Wilmer Josue Ramirez Vasquez, died while in Border Patrol custody.<sup>2</sup>

7-year-old Jakelin Amei Rosmery Caal Maquin died from liver failure while in U.S. custody.<sup>3</sup>

8-year-old Felipe Gómez Alonzo died in Border Patrol custody from the flu on Christmas Eve.<sup>4</sup>

10-year-old Darlyn Cristabel Cordova-Valle died from a heart condition while in DHS Custody.<sup>5</sup>

16-year-old Carlos Gregorio Hernandez Vasquez died while in Border Patrol Custody.<sup>6</sup>

## I. INTRODUCTION

Can you imagine having a stranger rip your child from your arms?  
Can you imagine the confusion and terror these children faced?

You are a migrant seeking asylum for you and your child in the land of the free. Upon arriving, instead of being welcomed, your child is taken from you, and you are helpless to stop it. It is difficult to imagine a worst fate for

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<sup>1</sup> Nicole Acevedo, *Why Are Migrant Children Dying in U.S. Custody?*, NBC LATINO (May 29, 2019), <https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316>, archived at <https://perma.cc/8T5K-MUZG>.

<sup>2</sup> *Id.*

<sup>3</sup> Michael Brice-Saddler, *The 7-year-old Girl Who Died in Border Patrol Custody Was Healthy Before She Arrived, Father Says*, WASH. POST (Dec. 15, 2018), <https://www.washingtonpost.com/nation/2018/12/15/year-old-girl-who-died-border-patrol-custody-was-healthy-before-she-arrived-father-says/>, archived at <https://perma.cc/3YVD-2MRZ>.

<sup>4</sup> Daniella Silva, *Guatemalan Boy Who Died in U.S. Custody Had the Flu, Medical Investigator Says*, NBC NEWS (Dec. 27, 2018) <https://www.nbcnews.com/news/latino/doctors-raise-questions-about-medical-care-received-guatemalan-boy-who-n952501>, archived at <https://perma.cc/2L3S-D422>. See also Matt Stieb, *Everything We Know About the Inhumane Conditions at Migrant Detention Camps*, N.Y. INTELLIGENCER (July 2, 2019), <https://nymag.com/intelligencer/2019/07/the-inhumane-conditions-at-migrant-detention-camps.html>, archived at <https://perma.cc/R499-CE8Q> (“... a 2-year-old without diapers had ‘several other little girls’ looking after him. ‘He doesn’t need [diapers]’ and then he immediately peed in his pants and started crying.....[C]hildren are being required to care for other very young children, and they are simply not prepared to do that.”).

<sup>5</sup> Molly Hennessey Fiske, *Six Migrant Children Have Died in U.S. Custody. Here’s What We Know About Them*, L.A. TIMES (May 24, 2019), <https://www.latimes.com/nation/la-na-migrant-child-border-deaths-20190524-story.html>, archived at <https://perma.cc/B36T-ANUH>.

<sup>6</sup> Robert Moore, *Six Children Died in Border Patrol Care. Democrats in Congress Want to Know Why*, PROPUBLICA (Jan. 13, 2020), <https://www.propublica.org/article/six-children-died-in-border-patrol-care-democrats-in-congress-want-to-know-why>, archived at <https://perma.cc/433R-E43E>.

<sup>7</sup> See Guardian News, *Children Separated From Parents Cry at U.S. Detention Centre – Audio*, YOUTUBE (June 19, 2018), <https://www.youtube.com/watch?v=bzbiWJ2er2Y>, archived at <https://perma.cc/86EJ-Z2Z2> (“Audio and photos of young children detained in cages and crying for their family. Tragically, they are utterly unable to understand their plight. If this video does not evoke emotions, nothing written on these pages ever will.”).

any parent.<sup>8</sup> This is a real-world tragedy that too many of us forget or dismiss moments after we read or hear about it.<sup>9</sup> In fact, despite an executive order purportedly halting the practice, children are still separated, and some separated parents have even had their rights terminated by the United States' harsh and unforgiving court system.<sup>10</sup> We call for a full and final end to this practice.<sup>11</sup> Keeping with one of the three pillars of immigration—humanitarianism—this country must continue to welcome asylum seekers and not tear apart migrant families.<sup>12</sup> Despite this administration's pretextual defenses, history will not be kind to this policy.<sup>13</sup> Our immigration system should not be based on fear or terror.<sup>14</sup> If the plea of the authors here fails to capture the harms of this policy, please take a moment to listen to the voices of caged young children crying and pleading for help.<sup>15</sup>

What migrants and asylum seekers have faced at our border is indefensible.<sup>16</sup> Children, some as young as infants, are forcibly taken away,<sup>17</sup> and

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<sup>8</sup> See Christopher Sherman, Martha Mendoza & Garance Burke, *US Held a Record Number of Migrant Children in Custody in 2019*, ASSOCIATED PRESS (Nov. 12, 2019), <https://apnews.com/015702afdb4d4fbf85cf5070cd2c6824>, archived at <https://perma.cc/3YNL-XC72> (documenting nearly 70,000 migrant children taken at the border from their asylum and immigration seeking parents).

<sup>9</sup> See Associated Press, *Deported Parents May Lose Kids to Adoption, Investigation Finds*, NBC NEWS (Oct. 9, 2018), <https://www.nbcnews.com/news/latino/deported-parents-may-lose-kids-adoption-investigation-finds-n918261>, archived at <https://perma.cc/SMQ8-CTGD>; Ruth Brown, *Former ICE Head: Separated Kids May Never See their Parents Again*, N.Y. POST (June 19, 2018, 4:45 PM), <https://nypost.com/2018/06/19/former-ice-head-separated-kids-may-never-see-parents-again/>, archived at <https://perma.cc/WC4L-EXS4>.

<sup>10</sup> Olivia Saldana Shulman, *Now They Robbed Me: The Use of Termination of Parental Rights in Government Fractured Immigrant Families*, 43 N.Y.U. REV. L. & SOC. CHANGE 361, 361 (2019) (“When a parent is detained or otherwise unable to care for his children for more than 15 months, the Adoption and Safe Families Act requires a state to petition to terminate his parental rights—in every case, without any allegation of unfitness, and over the objection of both the parent and the children. In other words, the state imposes enormous physical and temporal distance between a parent and her children by detaining her while her immigration case is pending, and then uses that distance as a justification to extinguish her legal rights to her children.”).

<sup>11</sup> See 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, 427 (2020).

<sup>12</sup> The three pillars of domestic immigration are humanitarianism, family unification, and economics. See Stephen H. Legomsky, *Immigration Policy from Scratch: The Universal and the Unique*, 21 WM. & MARY BILL RTS. J. 339, 355 (2012) (referring to family reunification, labor immigration, and refugees as the “three main pillars” of immigration policy).

<sup>13</sup> See Camila DeChalus, *ICE Arrests 159 Individuals During Immigration Raid in San Francisco*, CONG. Q. (Mar. 1, 2018), [https://1.next.westlaw.com/Document/11e81b0d41da311e89bf099c0ee06c731/View/FullText.html?contextData=\(Sc.Default\)&transitionType=default](https://1.next.westlaw.com/Document/11e81b0d41da311e89bf099c0ee06c731/View/FullText.html?contextData=(Sc.Default)&transitionType=default) (on file with journal).

<sup>14</sup> See Ray Sanchez, *After ICE Arrests, Fear Spreads Among Undocumented Immigrants*, CNN: POLITICS (Feb. 12, 2017), <http://www.cnn.com/2017/02/11/politics/immigration-round-ups-community-fear/index.html>, archived at <https://perma.cc/2L5Y-RJJH>.

<sup>15</sup> Guardian News, *supra* note 7 (Audio depicts children detained and crying for their loved ones. They are helpless and unable to comprehend why they are alone and caged.).

<sup>16</sup> See, e.g., Aris Folley, *Investigation Finds Youngest Migrant Child Separated From Family was 4-Month-Old Baby*, HILL (June 14, 2019), <https://thehill.com/homenews/administration/448540-investigation-finds-youngest-migrant-child-separated-from-family-was>, archived at <https://perma.cc/W6QH-942M> (“Vasile and Florentina Mutu fled Romania to

their parents are not sure where they are, where they are going, or if they will ever see them again.<sup>18</sup> Once taken, these parents do not know anything about their children.<sup>19</sup> They cannot talk to them.<sup>20</sup> They do not know if they are doing well, if they are sick, or even alive, and certainly their children miss (or missed) them.<sup>21</sup> Unbeknown to these parents, their children are taken to detention centers where they are placed in cages, live in filth, and are subject to being abused by the guards and other detainees.<sup>22</sup> To add to this terror, the government shockingly admits that thousands of these minors are sexually abused while in custody.<sup>23</sup>

Family separation is one of this administration's most indefensible policies.<sup>24</sup> While the Trump administration—and others before it—used fear to

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Mexico in 2018 with two of their five children in efforts to seek asylum in the United States. After they both lost track of each other in Mexico, Vasile was taken into custody with infant Constantin at the border in Texas [Vasile] was separated from his son under the 'zero tolerance' policy, which has led to thousands of family separations last year. His son was reportedly placed in the care of a family in Michigan while Vasile was deported back to Romania.”)

<sup>17</sup> See Associated Press, *The U.S. Has Held a Record Number of 69,550 Migrant Children in Government Custody in 2019*, NBC NEWS: LATINO (Nov. 12, 2019), <https://www.nbcnews.com/news/latino/u-s-has-held-record-69-550-migrant-children-government-n1080486?fbclid=IWAR132Hw816YDfKepwfrKwgK1h8EytjKNNRQ159WimJ9WNBRvrTyzBzOLWU>, archived at <https://perma.cc/EE2N-HXWY> (Indeed, the sheer number of innocent children affected by family separation is nothing short of shocking. A recent study exposes that nearly 70,000 children have been separated by their parents in 2019 alone. Are we not more decent than such horrific behavior?).

<sup>18</sup> See *id.*

<sup>19</sup> See Nomaan Merchant & Elliot Spagat, *9 Parents Separated From Families Return to Children in US*, ABC NEWS (Jan. 23, 2020), <https://abcnews.go.com/Politics/wireStory/migrant-parents-separated-kids-2018-return-us-68472318>, archived at <https://perma.cc/Y2X4-BJ7T>. Let that sink in: these parents were separated from their children by this government for nearly two years. Hundreds if not thousands more may wait longer or never even see their children again.

<sup>20</sup> See *id.*

<sup>21</sup> See, e.g., Jacqueline Thomson, *Worker Charged With Sexually Abusing Eight Migrant Children at Detention Facility*, HILL (Aug. 2, 2018), <https://thehill.com/latino/400208-worker-charged-with-sexually-abusing-eight-migrant-children-at-detention-facility>, archived at <https://perma.cc/MJH9-LCJG>; Taylor Mahlandt, *Migrant Children Report Sexual Assault, Abuse at Arizona Border Facility*, SLATE (July 10, 2019), <https://slate.com/news-and-politics/2019/07/migrant-children-arizona-allege-sexual-assault-abuse-border-facility.html>, archived at <https://perma.cc/ZN5X-AYXI>.

<sup>22</sup> Camilo Montoya-Galvez, *Thousands of Migrant Children Were Sexually Abused in U.S. Custody, HHS Docs Say*, CBS NEWS (Feb. 27, 2019), <https://www.cbsnews.com/news/thousands-of-migrant-children-were-sexually-abused-in-u-s-custody-hhs-docs-say>, archived at <https://perma.cc/XAE9-R33Z> (U.S. Congressman Ted Deutch from Florida releases HHS documentation of thousands of migrant children abused upon being taken into US custody; numbers spiked after Trump's family separation policy.).

<sup>23</sup> *Id.*

<sup>24</sup> See Felipe Hernández, *Abolishing the “Tough-On-Immigration” Paradigm*, 31 HARV. KENNEDY SCH. J. HISP. POL'Y 45, 46 (2019) (“The tough-on-immigration toxic cycle, a global phenomenon, begins with the false—but powerfully persuasive—dehumanizing narrative that ‘illegal (criminal) aliens,’ particularly from non-European ‘shithole’ countries, are invaders threatening the economic, social, moral, and political interests of the country’s citizens.”).

racialize “Others” as a way to energize its political base,<sup>25</sup> the Trump administration (indeed, Trump himself) admits that this means to spread fear was intended as a deterrent to dissuade those seeking refuge from coming to the United States.<sup>26</sup> Trump’s hateful words have led to systemic brutality when it comes to the treatment of migrant children.<sup>27</sup> Actually, the former President of the United States proudly declared, “If they feel there will be separation, they don’t come.”<sup>28</sup> Sadly, this brutality—which is unquestionably his worst<sup>29</sup>—is just one of his tactics to deter immigrants.<sup>30</sup> Overall, the Trump administration’s heartless fearmongering strategy and savage implementation of family separation is purportedly designed to stop migratory flows in their tracks and reverse them if possible.<sup>31</sup> Once again, he failed. Trump has not

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<sup>25</sup> See Alex Altman, *No President Has Spread Fear Like Donald Trump*, TIME (Feb. 9, 2017), <https://time.com/4665755/donald-trump-fear/>, archived at <https://perma.cc/5ZU4-2NT5>.

<sup>26</sup> Christina Mendoza, *How Trump’s Land of the Free Turned Into the Home of The Cages For Immigrant Families Seeking Asylum*, 24 LOY. PUB. INT. L. REP. 73, 78–79 (2018) (“The Trump administration stated that over 450 parents may have been deported without their children, and hundreds of minors remain in government custody. The court-mandated deadline to reunite families has long passed, and the Trump administration must be held accountable for its failure to comply with this deadline. As a nation built by immigrants, the United States should welcome refugees and allow them to thrive in a new and secure home.”).

<sup>27</sup> See, e.g., U.S. IMMIGR. & CUSTOMS ENF’T, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 1 (Apr. 2, 2019) (“Together, the EO and implementation memorandum expanded ICE’s enforcement focus to include removable aliens who (1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security. The Department continued to operate under the directive that classes or categories of removable aliens are not exempt from potential enforcement.”).

<sup>28</sup> David Shepardson, *Trump Says Family Separation Deter Illegal Immigration*, REUTERS (Oct. 13, 2018), <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C>, archived at <https://perma.cc/RWH9-3NKH>.

<sup>29</sup> Ediberto Román & Joshua Killingsworth, *Never Forget Child Separation, Trump’s Most Abominable Act*, ORLANDO SENTINEL (July 12, 2020), <https://www.orlandosentinel.com/opinion/guest-commentary/os-op-child-separation-horrific-abuse-20200712-fbou7jzqrrbxfm3u3o36tg5psa-story.html>, archived at <https://perma.cc/8NUR-E9YC>.

<sup>30</sup> Perhaps Trump’s most horrific and heartless practice is his enactment of the family separation policy which at best is inhumane and of questionable constitutional legitimacy. See Sergio Garcia, *The Unconstitutional Prosecution of Asylum-Seeking Parents Under Trump’s Family Separation*, 47 HASTINGS L. Q. 49, 50 (2019) (“... the criminal prosecution and convictions of asylum-seeking parents under the ‘Zero Tolerance Policy,’ like those of the El Paso 5, violate constitutional criminal law principles and constitute outrageous government conduct.”).

<sup>31</sup> See Kimberly Amadeo, *Donald Trump on Immigration*, THE BALANCE (May 28, 2020), <https://www.thebalance.com/donald-trump-immigration-impact-on-economy-4151107>, archived at <https://perma.cc/GND2-633C>; Anna Flagg, *The Myth of the Criminal Alien*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html>, archived at <https://perma.cc/GE5P-RZRZ> (“As of 2017, according to Gallup polls, almost half of Americans agreed that immigrants make crime worse. But is it true that immigration drives crime? Many studies have shown that it does not.”).

stopped migration, but he has warped our fundamental ethos of America as a nation of immigrants. As Trump voiced when complaining about Black and Brown immigrants from “shithole countries,” he lamented, “We should have more people from Norway.”<sup>32</sup>

The Trump administration has dragged its heels at virtually every step of this saga, from responding to court orders to stopping ripping children from the arms of their parents, to utterly inept attempts to reunify these children with their families.<sup>33</sup> As this administration has done with its other anti-immigrant tactics, such as with its attempt to end the Deferred Action for Childhood Arrivals (DACA), it would rather litigate matters all the way to the U.S. Supreme Court than admit to—let alone apologize for—evil and wrong-headed policies.<sup>34</sup> At every turn, the Trump administration was more than willingly engaged in legal scimmages and delays, likely to either pacify his base or simply to witness the effects of such horrendous acts on so many innocent victims. While hopefully the latter motivation is simply too reprehensible for any human—let alone an entire administration—to desire, both this atrocious policy and its end may have been another Trump anti-immigrant effort, which is ending at a snail’s pace to perhaps continue Trump’s efforts to appear strong on law and order for the purposes of reelection.

Trump has caused great and lasting harms to our principles, to our documented and undocumented immigrant communities, and to all other Latinx communities and other outsiders.<sup>35</sup> While the ultimate extent of the effects of family separation will not likely be known for years to come, what we do know is that Trump’s racist and xenophobic use of fear to incentivize acts against migrant and asylum-seeking children and their parents is not only

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<sup>32</sup> Nurith Aizenman, *Trump Wishes We Had More Immigrants From Norway. Turns Out We Once Did*, NPR (Jan. 12, 2018), <https://www.npr.org/sections/goatsandsoda/2018/01/12/577673191/trump-wishes-we-had-more-immigrants-from-norway-turns-out-we-once-did>, archived at <https://perma.cc/SC6Q-8TPM>.

<sup>33</sup> *The Trump Administration Continues to Drag Its Feet and Makes Very Little Progress in Reuniting Separated Families*, AMERICA’S VOICE (Aug. 10, 2018), [https://americasvoice.org/press\\_releases/the-trump-administration-continues-to-drag-its-feet-and-makes-very-little-progress-in-reuniting-separated-families/](https://americasvoice.org/press_releases/the-trump-administration-continues-to-drag-its-feet-and-makes-very-little-progress-in-reuniting-separated-families/), archived at <https://perma.cc/27B4-THG8>.

<sup>34</sup> See, e.g., *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

<sup>35</sup> Donald Trump has shamelessly repeatedly made false and misleading comments concerning the threat of immigration from South of the border, particularly with his association between Mexican immigrants and crime. See Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/>, archived at <https://perma.cc/R88XYX5> (quoting President Trump as saying, “[t]he Mexican Government is forcing their most unwanted people into the United States. They are, in many cases, criminals, drug dealers, rapists.”). Repeated reports demonstrate an utter lack of data or support for Trump’s claims. See Mark Hosenball & Jonathan Landay, *No Evidence for Trump Claim on ‘Terrorist’: Government Sources*, REUTERS (Dec. 11, 2018), <https://www.reuters.com/article/us-usa-trump-border/no-evidence-for-trump-claim-on-terrorists-government-sourcesidUSKBN1OB05Y>, archived at <https://perma.cc/R7M4-BJ9B>.



legally and morally wrong,<sup>36</sup> but its basis for doing so is fundamentally inaccurate.<sup>37</sup> Trump's distorted worldview is ultimately based upon the flawed and thoroughly debunked notion that immigrants are more prone to committing crime.<sup>38</sup> His family separation scheme is unethical and undemocratic<sup>39</sup> and fundamentally unjust.<sup>40</sup>

Thus far, the political and legal literature of Trump's immigration policies often focuses on how it promotes abusive practices towards immigrants.<sup>41</sup> With some notable exceptions, thus far legal scholars have

<sup>36</sup> See Todres & Fink, *supra* note 11 (observing how the family separation policy violates both domestic and international law).

<sup>37</sup> See John Hagan & Alberto Palloni, *Sociological Criminology and the Mythology of Hispanic Immigration and Crime*, 46 SOC. PROBS. 617, 620, 630 (1999) (arguing that Latinxs born outside the United States are less likely to be imprisoned than are whites); see also generally EDIBERTO ROMÁN, *THOSE DAMNED IMMIGRANTS: AMERICA'S HYSTERIA OVER UNDOCUMENTED IMMIGRATION* (2013) (examining empirical work by federal and state governments drawing the conclusion that immigrants are far less likely to commit crimes than domestic residents).

<sup>38</sup> See Mendoza, *supra* note 26, at 78–79; Shulman, *supra* note 10, at 361; Juliet Stumpf, *Justifying Family Separation: Constructing the Criminal Alien and the Alien Mother*, 55 WAKE FOREST L. REV. 1037 (2020); Rebecca Sharpless, "Immigrants Are Not Criminals": *Respectability, Immigration Reform, and HyperIncarceration*, 53 HOUS. L. REV. 691, 695 (2016) ("[I]mmigrants as a group are less likely to commit crimes than native-born U.S. citizens"). See also Sergio Herzog, *Ethnic and Immigrant Residential Concentration, and Crime Rates*, 37 J. CRIM. JUST. 427, 432 (2009) ("[R]esearch has consistently found relatively lower crime rates for immigrants than for their native-born counterparts."); Robert J. Sampson, *Rethinking Crime and Immigration*, 7 CONTEXTS 28, 31 (Winter 2008) ("Immigrant youths committed less violence than natives."); Matthew G. Yeager, *Immigrants and Criminality: A Cross-National Review*, 29 CRIM. JUST. ABSTRACTS 143, 147 (1997) ("[I]mmigrants generally have lower propensities for crime than their native-born counterparts."); Kristin F. Butcher & Anne Morrison Piehl, *Why Are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation* 24–25 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13229, 2007), <http://www.nber.org/papers/w13229>, archived at <https://perma.cc/4UNU-VMLT> ("There is evidence that the process of migration selects individuals who have lower criminal propensity or are more responsive to deterrent effects than the average native."); Alex R. Piquero et al., *Longitudinal Patterns of Legal Socialization in First-Generation Immigrants, Second-Generation Immigrants, and Native-Born Serious Youthful Offenders*, 62 CRIM. & DELINQUENCY 1404, 1416 (Aug. 20, 2014).

<sup>39</sup> See Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 86 (1998) ("The process of problematizing, demonizing, dehumanizing, and criminalizing renders punishment of aliens a part of the American psyche."); Jennifer Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1835 (2007) ("The notion of the outsider as a threat is as old as human history and it transcends national boundaries.")

<sup>40</sup> See Yolanda Vasquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 666–67 (2011); see also Juliana Morgan-Trostle, Kexin Zheng & Carl Lipscombe, *The State of Black Immigrants*, BLACK ALL. FOR JUST IMMIGR. & NYU SCH. OF L. IMMIGRANT RTS. CLINIC (Jan. 22, 2018), <http://www.stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf>, archived at <https://perma.cc/EQ3A-9MJH> (arguing that while Black immigrants represent roughly seven percent of the noncitizen population, more than ten percent of these immigrants are in removal proceedings).

<sup>41</sup> See Zoe Williams, *Totalitarianism in the Age of Trump: Lessons From Hannah Arendt*, GUARDIAN (Feb. 1, 2017), <https://www.theguardian.com/us-news/2017/feb/01/totalitarianism-in-age-donald-trump-lessons-from-hannah-arendt-protests>, archived at <https://perma.cc/Z499-D2WL>; Steve Philipps, *Trump Wants to Make America White Again*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/opinion/trump-wants-to-make-america-white->

undertaken only limited analysis of the issue of family separation in general, and its effect on immigrant victims in particular.<sup>42</sup> While the horrors of family separation have certainly garnered attention in the political realm and literature,<sup>43</sup> scholars have only recently begun to recognize and document the Trump administration's family separation policy.<sup>44</sup> Such scholarship, however, has not addressed how Trump's hateful policies have lasting effects on immigrant communities, and especially on immigrant children. That shortcoming ends today. Policies like family separation create great anxiety and fear within targeted undocumented communities, as well as other Latinx communities, making them hesitant to travel for even the most basic activities and discouraging them from seeking assistance even if they are entitled to it, such as seeking protection from police when they face criminal acts.<sup>45</sup>

Our country is founded on democratic values that all people should be treated with a basic level of dignity, safety, and respect.<sup>46</sup> These values stem from our collective acceptance that all people within this land, including those that are here as asylum seekers, should be viewed as equal. This belief in equality stems from the recognized notion that all within this land possess rights rooted in respect of their humanity. But individuals cannot enjoy rights in relation to others if the government and its top leader repeatedly inform us that these targets of scorn are less than the rest of us, that they are criminals, that they are not worthy of respect or protection, let alone equality, and that they instead only deserve persecution, prosecution, and deportation.<sup>47</sup> It is a vision of the United States imagined by President Trump in

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again.html, archived at <https://perma.cc/BJE5-X4UR>; Amy B. Wang, *Donald Trump Plans to Immediately Deport 2 Million to 3 Million Undocumented Immigrants*, WASH. POST (Nov. 14, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-de-port-2-to-3-million-undocumented-immigrants/?utm\\_term=.7b4567313da0](https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-de-port-2-to-3-million-undocumented-immigrants/?utm_term=.7b4567313da0), archived at <https://perma.cc/HMC5-GTUY>; Camila DeChaluis, *ICE Arrests 150 Individuals During Immigration Raid in San Francisco*, CONG. Q. (Mar. 1, 2018), [https://1.next.westlaw.com/Document/11e81b0d41da311e89bf099c0ee06c731/View/FullText.html?contextData=\(Sc.Default\)&transitionType=default](https://1.next.westlaw.com/Document/11e81b0d41da311e89bf099c0ee06c731/View/FullText.html?contextData=(Sc.Default)&transitionType=default) (on file with law journal).

<sup>42</sup> See generally, e.g., Leo Chavez, *Words Hurt: Political Rhetoric, Emotions/Affect, and Psychological Well-Being Among Mexican-Origin Youth*, SOC. SCI. & MED. 228, 240–51 (May 2019); see also LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* 41–43 (2008) (addressing the alarmist rhetoric concerning immigrants); Bill Ong Hing, *Entering The Trump ICE Age: Contextualizing the New Immigration Enforcement*, 5 TEX. A&M L. REV. 253, 255 (2018); Kevin Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611 (2017).

<sup>43</sup> See generally, JACOB SOBOROFF, *SEPARATED, INSIDE AN AMERICAN TRAGEDY* (2020).

<sup>44</sup> Cf. Todres & Fink, *supra* note 11 (providing a much-needed human rights-based analysis of this tragedy).

<sup>45</sup> See *infra* notes 188–215, and accompanying text.

<sup>46</sup> See Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 23 (2003) (“[T]he inviolable dignity of human beings must be reflected in both the governance structures of a democracy and the way in which individual members are treated.”); Berta Esperanza Hernández-Truyol, *Hope, Dignity, and the Limits of Democracy*, 10 NE. U. L. REV. 654 (2018) (“Care, courtesy, privacy, safety, respect, kindness, choice, humanity, equality, voice, independence, and diversity are words that people use to describe what dignity means to them.”); see also generally Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899 (2009).

<sup>47</sup> See Philips, *supra* note 41.

which whites are the only visible and legitimate members of society—irrespective of the legal status of all others in society.<sup>48</sup> In this new vision, the United States and true Americans are the ones that are privileged and protected,<sup>49</sup> effectively free of immigrants of color unless said immigrants are needed for particular menial tasks.<sup>50</sup>

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<sup>48</sup> See DAVID NEIWERT, *ALT-AMERICA: THE RISE OF THE RADICAL RIGHT IN THE AGE OF TRUMP* 105–115 (2017) (describing how the alt-right, which helped elect President Trump, is informed by conspiracy theories about immigrants as diseased criminals, and how it further promoted fear that whites are becoming a minority); Viet Thanh Nguyen, *In Trump's Vision of a White America, Immigrants Should Be Grateful and Servile*, WASH. POST (July 18, 2019), [https://www.washingtonpost.com/outlook/in-trumps-vision-of-a-white-america-immigrants-should-be-grateful-and-servile/2019/07/18/0afb70c6-a8e3-11e9-a3a6-ab670962db05\\_story.html](https://www.washingtonpost.com/outlook/in-trumps-vision-of-a-white-america-immigrants-should-be-grateful-and-servile/2019/07/18/0afb70c6-a8e3-11e9-a3a6-ab670962db05_story.html), archived at <https://perma.cc/67HP-9NRM>.

<sup>49</sup> See Jonathan Allen, *Five Decades Later, Trump Is Still Pushing Segregationist Policies*, NBC NEWS (July 16, 2020), <https://www.nbcnews.com/politics/donald-trump/five-decades-later-trump-still-pushing-segregationist-policies-n1233983>, archived at <https://perma.cc/TC7U-GJEK>. Despite the rhetoric of the United States being a land of immigrants, this country has a long history of fear being a motivating factor driving immigration policy. For an overview of past xenophobic periods, see U.S. COMM'N ON CIV. RTS., *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* 7 (1980). See also KELLY LYTLE HERNANDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965* 12–13 (2017); PATRICK WOLFE, *TRACES OF HISTORY: ELEMENTARY STRUCTURES OF RACE* 145–146 (2016); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–44 (1993) (addressing the Chinese Exclusion period); Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1357 (2009); Page Act of 1875, Ch. 141, 18 Stat. 477 (repealed 1974); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (“Every sovereign nation has the power, as inherent in sovereignty, and essential to preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895) (rejecting a challenge to the authority of the federal government to detain or arrest a noncitizen); *Chae Chan Ping v. United States*, 139 U.S. 581 (1889) (holding that provisions of the Constitution, securing the right of trial by jury and prohibiting unreasonable searches and seizures, and cruel and unusual punishment, have no application to immigration control); Gabriel Chin, *Chae Chan Ping & Fong Yue Ting: The Origins of Plenary Power*, in *IMMIGRATION STORIES* 7–30 (David A. Martin & Peter H. Schuck eds., 2005); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 853–86 (1987); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1197–1234 (1996); see also JOHN HINGAM, *STRANGER IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925* 160 (rev. ed. 2002); see Act of Feb. 5, 1917, Ch. 29, 39 Stat. 874 (repealed 1952); see also DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 133–134 (ed. 2010); William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37(2) J. SOC. HIS. 411, 411–13 (2003); 29 KELLY LYTLE HERNANDEZ, “MIGRA!”: A HISTORY OF THE U.S. BORDER PATROL 103–24 (2010); Greg Grandin, *The Border Patrol Has Been a Cult of Brutality Since 1924*, THE INTERCEPT (Jan. 12, 2019), <https://theintercept.com/2019/01/12/border-patrol-history/>, archived at <https://perma.cc/XVK5-38PS>; MONICA MUÑOZ MARTINEZ, *THE INJUSTICE NEVER LEAVES YOU: ANTI-MEXICAN VIOLENCE IN TEXAS* 7–8 (2018).

<sup>50</sup> Timothy L. O'Brien, *Trump Demonizes Migrants as He Profits From Them*, BLOOMBERG (Apr. 12, 2019), <https://www.bloomberg.com/opinion/articles/2019-04-12/trump-demonizes-migrants-trump-organization-profits-from-them>, archived at <https://perma.cc/45WG-LTFK>.

## II. SPREADING FEAR

The family separation policy is cruel and wrong. Donald Trump’s presidential bid in 2015 began his unrelenting war against immigrants.<sup>51</sup> From the onset of his presidential bid, then-candidate Trump targeted immigrants, particularly Mexican immigrants, with his now infamous reference concerning the Mexican threat.<sup>52</sup> It did not matter that such claims ran counter to the facts related to undocumented immigration.<sup>53</sup> Trump used incendiary language—the invading rapists, drug dealers, and criminals—to warn and frighten our country.<sup>54</sup> From the onset of his presidency, Trump’s rhetoric had its intended effect to stoke the flames of fear and hatred. He actually introduced his presidential bid with his now infamous statement: “Mexico is not bringing their best; they’re bringing drugs; they’re bringing crime; they’re rapists. . . .”<sup>55</sup>

After the election, Trump continued to remind his base of a purported invasion at the Mexican border, depicting hordes of immigrants preparing to overthrow this country.<sup>56</sup> In response to this imagined threat, he promised to

<sup>51</sup> Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/>, archived at <https://perma.cc/2M83-T8FZ>.

<sup>52</sup> See President Donald Trump, Address at MAGA Rally in Evansville Indiana (Aug. 30, 2018), at 00:32:23–00:33:02 (39 sec) (“But these are people that go into a nest of MS-13. They call it a nest. That’s where it is. It’s a nest. These are evil people in there. These—this is a group of gang members—I can’t say ‘animals’ anymore because Nancy Pelosi got very angry when I called them animals. I called them animals. She went crazy. I can’t do it.”).

<sup>53</sup> See generally ROMÁN, *supra* note 37 (discussing how multiple studies demonstrate that immigrant communities, especially undocumented ones, are far less likely to engage in crime than other residents).

<sup>54</sup> See President Donald Trump, *supra* note 52. See also *Where Does Trump’s Immigration Invasion Rhetoric Come From?*, ATLANTIC (Aug. 6, 2018), <https://www.theatlantic.com/entertainment/archive/2019/08/trump-immigrant-invasion-language-origins/595579/>, archived at <https://perma.cc/H83E-73E3>; see also John Fritze, *Trump Used Words Like ‘Invasion’ and ‘Killer’ to Discuss Immigrants at Rallies 500 Times*, USA TODAY (Aug. 9, 2019), <https://www.usatoday.com/story/news/politics/elections/2019/08/08/trump-immigrants-rhetoric-criticized-el-paso-dayton-shootings/1936742001/>, archived at <https://perma.cc/6FLA-GY9Z>. Michelle Mark, *Trump Just Referred to One of His Most Infamous Campaign Comments: Calling Mexicans ‘Rapists’*, BUS. INSIDER (Apr. 5, 2018), <https://www.businessinsider.com/trump-mexicans-rapists-remark-reference-2018-4>, archived at <https://perma.cc/J5MY-NT3H>.

<sup>55</sup> Ian Schwartz, *Trump: Mexico is Not Bringing their Best; Criminal Drug Dealers, and Rapists are Crossing our Border*, REAL CLEAR POLITICS (June 16, 2015), [https://www.realclearpolitics.com/video/2015/06/16/trump\\_mexico\\_not\\_sending\\_us\\_their\\_best\\_criminals\\_drug\\_dealers\\_and\\_rapists\\_are\\_crossing\\_border.html](https://www.realclearpolitics.com/video/2015/06/16/trump_mexico_not_sending_us_their_best_criminals_drug_dealers_and_rapists_are_crossing_border.html), archived at <https://perma.cc/377K-62N6>.

<sup>56</sup> See Calvin Woodard & Hope Yen, *AP Fact Check: Trump Mocks Migrants, Retreats on Healthcare*, ASSOCIATED PRESS (April 8, 2019), <https://apnews.com/6829b73835f247c4a12f9eac9323b42>, archived at <https://perma.cc/E4WJ-XSD3> (“describing asylum seekers as ‘people that look like they should be fighting for the UFC (Ultimate Fighting Championship). They read a little page given by lawyers that are all over the place,’ coaching them to say ‘I am very fearful for my life. I am very worried that I will be accosted if I’m sent back home.’ Trump then mimics U.S. officials: ‘Oh, give him asylum. He’s afraid. He’s afraid.’ And he adds: ‘We don’t love the fact that he’s got tattoos on his face. That’s not a good sign.’ — speech Saturday to the lobbying group.”)

have a solution: to deport millions upon taking office.<sup>57</sup> While related works by the authors here have previously examined the impact of hateful rhetoric on non-immigrant communities,<sup>58</sup> this article takes the next step and explores the dreadful consequences of creating fear within domestic immigrant communities.<sup>59</sup>

Indeed, Trump's hateful exclusionary policy can be regarded as a ploy to rally his disaffected base.<sup>60</sup> In an ironic political twist, one of the world's most admired democracies has resorted to employing police-state tactics to keep out, terrorize, and abuse the most vulnerable in our society.<sup>61</sup> For decades, the United States inspired hope among those fearing persecution for no other reason than being who they were, or for just thinking differently: for example, Jews escaping pogroms, Cubans fleeing Communism, and Rwandans surviving ethnic cleansing, among many others. Yet, Trump's family separation policy flies in the face of not only basic domestic precedent, but international law as well.<sup>62</sup>

Even the foundational myth of the United States (i.e., a nation started by Puritan pilgrims who longed to be free to practice their religion) feeds into this narrative of the United States as a welcoming host.<sup>63</sup> Yet, the Trump administration has twisted this narrative by announcing that "We can't take

<sup>57</sup> See Amy B. Wang, *Donald Trump Plans to Immediately Deport 2 Million to 3 Million Undocumented Immigrants*, WASH. POST (Nov. 14, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-deport-2-to-3-million-undocumented-immigrants/>, archived at <https://perma.cc/79TB-CYVN>.

<sup>58</sup> See generally Ediberto Román & Ernesto Sagás, *Fear and Loathing in Trump's America: The Consequences of Inspiring Hate and Violence* (Fl. Int'l Univ. Legal Stud. Rsch. Paper No. 20-20) (Sept. 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3698975](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3698975), archived at <https://perma.cc/4VKF-NT6C>.

<sup>59</sup> See *infra* notes 125–228 and accompanying text.

<sup>60</sup> See Kyle W. Kusz, 'Winning Bigly': *Sporting Fantasies of White Male Omnipotence in the Rise of Trump and Alt Right White Supremacy*, 14 J. HATE STUD. 113, 117 (2019) ("Trump enacts a fantasy of an all-powerful and unreformed white masculinity that seems to create a reciprocal feeling of omnipotence and vitality in his followers. It is constituted through an alchemy of social class codes: the language, attitude, and distrust of liberal elites and experts that appeals to white working folk, combined with an unabashed air of elitism, especially relative to people of color and women.")

<sup>61</sup> See Sharpless, *supra* note 38, at 765 ("Rather than serve as foils for 'better' immigrants who deserve membership, [convicted noncitizen] individuals would be subjects situated at the intersection of our criminal and civil immigration systems of hyperincarceration. To resist this reframing is to perpetuate incoherence in how we analyze law enforcement in the criminal and immigration contexts. One cannot accept the racial and class critique of hyperincarceration and continue to treat convicted noncitizens as outsiders in the immigration reform agenda.")

<sup>62</sup> See Deborah Anker, *U.S. Immigration and Asylum Policy A Brief Historical Perspective*, 13 IN DEFENSE OF THE ALIEN 74, 76 (1990); see also generally Sonja Starr, *Family Separation As A Violation of International Law*, 21 BERK. J. INT'L L. 213 (2003).

<sup>63</sup> Mortimer Zuckerman, *Land of the Free . . . and the Immigrant*, NEWSWEEK (July 13, 2013), <https://www.usnews.com/opinion/articles/2013/07/12/welcoming-immigrants-is-an-american-tradition>, archived at <https://perma.cc/L5QK-8F69>; David Agnew, *A Nation of Immigrants: Welcoming New Americans to the United States*, THE WHITE HOUSE ARCHIVES: PRESIDENT BARACK OBAMA (Sept. 20, 2013), <https://obamawhitehouse.archives.gov/blog/2013/09/20/nation-immigrants-welcoming-new-americans-united-states>, archived at <https://perma.cc/XC28-BMFB>. See also WELCOMING AMERICA, <https://www.welcomingamerica.org>, archived at <https://perma.cc/NN87-D2NJ> (last visited Mar. 6, 2021).

you anymore Our country is full.”<sup>64</sup> Former President Trump essentially declared the end of America’s welcoming days and the beginning of a harsh American ethos.<sup>65</sup> Instead of a benevolent, embracing Statue of Liberty, a giant “No Trespassing” sign hanging from an imposing wall seems like a more apt metaphor for our immigration policy.

### III. TRUMP’S FAMILY SEPARATION POLICY

Almost immediately, the Trump administration began its exclusionary practices, issuing an executive order directing federal departments and agencies “to deploy all lawful means to secure the Nation’s southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.”<sup>66</sup> A little over a month into Trump’s presidency, Secretary of Homeland Security John Kelly (Secretary Kelly) drafted a directive to senior Department of Homeland Security (DHS) officials.<sup>67</sup> The Secretary’s memorandum ordered the hiring of thousands of additional immigration/border enforcement agents and officers, and declared that “DHS would no longer exempt classes or categories of removable aliens from potential enforcement,” and it would no longer recognize state law privacy protections for those who were neither U.S. citizens nor lawful residents.<sup>68</sup> In an interview on March 6, 2017, Secretary Kelly informed CNN that DHS was considering separating families at the border as a deterrent to illegal immigration.<sup>69</sup> Implementation of the proposed family separation policy was halted, at least temporarily, due to other controversial administration policies, such as the Muslim Ban. Indeed, the administration’s focus through 2017 and the first part of 2018 was apparently

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<sup>64</sup> Zeke Miller & Jonathan Lemire, ‘Our Country is Full’: Trump Says Migrants Straining Immigration System, PBS NEWS HOUR (Apr. 8, 2019), <https://www.pbs.org/newshour/politics/our-country-is-full-trump-says-migrants-straining-immigration-system>, archived at <https://perma.cc/U6UC-XVXN>. Indeed, Trump has made it his obsession to attack immigrants oft with baseless and unsubstantiated claims. See Lee, *supra* note 50 (quoting President Trump, “[t]he Mexican Government is forcing their most unwanted people into the United States. They are, in many cases, criminals, drug dealers, rapists.”); see also Hosenball & Landay, *supra* note 35 (“People are pouring into our country, including terrorists,” [Trump said] We have terrorists. We caught 10 terrorists over the last very short period of time. Ten. These are very serious people. Our border agents, all of our law enforcement has been incredible what they’ve done. We need the wall.”).

<sup>65</sup> See Steve Phillips, *Trump Wants to Make America White Again*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/opinion/trump-wants-to-make-america-white-again.html>, archived at <https://perma.cc/BJE5-X4UR>.

<sup>66</sup> Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

<sup>67</sup> See Memorandum from Secretary John Kelly to Senior Department of Homeland Security (DHS) Officials (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf), archived at <https://perma.cc/SUWR-H5DP>.

<sup>68</sup> See *id.*

<sup>69</sup> The Situation Room (@CNNSitRoom), TWITTER (Mar. 6, 2017, 2:24 PM), <https://twitter.com/CNNSitRoom/status/838877868453064704>, archived at <https://perma.cc/XJH4-WTZL> (“DHS Secretary says he’s considering separating immigrant children from their parents to deter illegal immigration”).

redirected to legal challenges associated with the Muslim Ban.<sup>70</sup> Eventually, the administration redirected its attention to the southern border,<sup>71</sup> but before that, Secretary Kelly's 2017 memorandum's goals largely remained in limbo. Things changed dramatically in the early summer of 2018.

On April 6, 2018, Attorney General Jeff Sessions announced the administration had a "zero-tolerance policy" regarding the unauthorized entry of immigrants at the southern border.<sup>72</sup> In the months that followed, news arose regarding a "migrant caravan" traveling from Central America toward the United States.<sup>73</sup> Trump almost immediately became enraged by the prospect of hundreds of migrants openly approaching the southern border. He took to Twitter and proclaimed, among a host of outlandish and baseless claims, that "[m]any Gang Members and some very bad people" were part of the caravan, and threatened the governments of Honduras, El Salvador, and Guatemala that "if they allow their citizens, or others, to journey through their borders and up to the United States, with the intention of entering our country illegally, all payments made to them will STOP (END)!"<sup>74</sup>

In preparation for the arrival of the caravan, the Department of Defense deployed over 5,200 active-duty troops to the Mexican border.<sup>75</sup> Then White House Chief of Staff John Kelly signed a "decision memorandum" on November 20, 2018, authorizing U.S. service members at the border to use "a show or use of force (including lethal force, where necessary), crowd control, temporary detention, and cursory search."<sup>76</sup> In two instances in late 2018 and early 2019, U.S. border agents shot tear gas across the border

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<sup>70</sup> See *Timeline of the Muslim Ban, Know Your Rights*, ACLU (Oct. 25, 2020, 3:57PM), <https://www.aclu-wa.org/pages/timeline-muslim-ban>, archived at <https://perma.cc/S6XX-25L2>.

<sup>71</sup> Carrie F. Cordero, Heidi Li Feldman & Chime`ne Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 432, 436 (2020).

<sup>72</sup> See Memorandum from Jefferson Sessions, Att'y Gen., U.S. Dep't of Justice, to Federal Prosecutors Along the Southwest Border (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>, archived at <https://perma.cc/QN2C-NLSD> (noting that Sessions declared in a press release that "a crisis has erupted at our Southwest Border that necessitates an escalated effort to prosecute those who choose to illegally cross our border . . ."). Press Release, Department of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>, archived at <https://perma.cc/VZ8Z-6RZP>.

<sup>73</sup> See Kirk Semple, *What Is the Migrant Caravan and Why Does Trump Care?*, N.Y. TIMES (Oct. 18, 2018), <https://www.nytimes.com/2018/10/18/world/americas/trump-migrant-caravan.html>, archived at <https://perma.cc/2FK8-4XLG>.

<sup>74</sup> See Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2018, 7:41 AM), <https://twitter.com/realDonaldTrump/status/1056919064906469376>, archived at <https://perma.cc/8NUP-BV98>.

<sup>75</sup> See Jim Garamone, *5,200 Active-Duty Personnel Moving to Southwest Border, Northcom Chief Says*, U.S. DEP'T OF DEF. (Oct. 29, 2018), <https://dod.defense.gov/News/Article/Article/1675810/5200-active-duty-personnel-moving-to-southwest-border-northcom-chief-says>, archived at <https://perma.cc/99CR-AJYX>.

<sup>76</sup> James Laporta, *Donald Trump Signs Authorization for Border Troops Using Lethal Force as Migrant Caravan Approaches, Document Reveals*, NEWSWEEK (Nov. 21, 2018), <https://www.newsweek.com/donald-trump-memo-migrant-caravan-border-troops-1226945>, archived at <https://perma.cc/D7RM-ZTVT>.

toward crowds of migrants, including children.<sup>77</sup> Following the second violent encounter, Mexican diplomatic correspondence was sent to U.S. officials expressing that Mexico “deplore[d] the occurrence of any sort of violent act on the border with Mexico” and requesting a “thorough investigation” into the circumstances of the incidents.<sup>78</sup>

Hand in hand with the implementation of the Zero Tolerance policy was the creation of the family separation policy in May 2018.<sup>79</sup> Under this practice, when undocumented migrants were stopped and detained at the border, children were separated from their parents.<sup>80</sup> Sessions warned: “If you are smuggling a child then we will prosecute you, and that child may be separated from you as required by law.”<sup>81</sup> He further added, “If you don’t like that, then don’t smuggle children over our border.”<sup>82</sup>

From April 19 to May 31, 2018, approximately 1,995 children were separated from their parents or other traveling adults with them at the U.S. border.<sup>83</sup> The number of children separated rose to 2,342 children by June 9, 2018.<sup>84</sup> Yet, during this period, the Trump administration denied that DHS had a policy of separating children from their parents until it was caught lying by the media.<sup>85</sup> Photos of children in cages went public,<sup>86</sup> and an audio recording of children begging for their mothers surfaced.<sup>87</sup> ProPublica ob-

<sup>77</sup> See Megan Specia & Rick Gladstone, *Border Agents Shot Tear Gas into Mexico. Was It Legal?*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/world/americas/tear-gas-border.html>, archived at <https://perma.cc/TN33-4ALH>; Alan Yuhas, *U.S. Agents Fire Tear Gas Across Mexican Border*, N.Y. TIMES (Jan. 1, 2019), <https://www.nytimes.com/2019/01/01/world/americas/migrants-border-tear-gas.html>, archived at <https://perma.cc/JT86-2DJZ>.

<sup>78</sup> See Press Release, Mex. Secretaría de Relaciones Exteriores [Mexican Secretariat of Foreign Affairs], Mexico Asks for an Investigation into Incident at Tijuana-San Diego Border (Jan. 3, 2019) (Mex.), <https://www.gob.mx/sre/prensa/mexico-asks-for-an-investigation-into-incident-at-tijuana-san-diego-border>, archived at <https://perma.cc/56YN-LSGQ>.

<sup>79</sup> See Maya Rhodan, *Here Are the Facts About President Trump’s Family Separation Policy*, TIME (June 20, 2018), <http://time.com/5314769/family-separation-policy-donald-trump/>, archived at <https://perma.cc/NC73-K6ZH>.

<sup>80</sup> See Attorney General Jeff Sessions Announces Immigration Laws That Will Separate Children From Their Parents Entering U.S. Illegally, NBC NEWS (May 7, 2018), <https://www.nbcnews.com/video/attorney-general-jeff-sessions-announces-immigration-laws-that-will-separate-children-from-parents-entering-u-s-illegally-1227626563609>, archived at <https://perma.cc/876U-V7LC>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Graham Kates, *Migrant Children at the Border—The Facts*, CBS NEWS (June 20, 2018, 10:32 AM), <https://www.cbsnews.com/news/migrant-children-at-the-border-by-the-numbers/>, archived at <https://perma.cc/6GPR-WLE3>.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.* See also Zachary Mueller, *An Ongoing Timeline of Trump’s Separation of Families*, AMERICA’S VOICE (Aug. 8, 2018), <https://americasvoice.org/blog/family-separation-timeline/>, archived at <https://perma.cc/RR7Y-ZM2R> (finding that the Trump administration considered separating families at the border as early as March 2017, and was taking such steps by October 2017).

<sup>86</sup> See Kates, *supra* note 83.

<sup>87</sup> Guardian News, *supra* note 7; see also Suzanne Gamboa, *Children Cry for Their Parents on Audio of Trump’s Border Family Separations*, NBC NEWS (June 18, 2018), <https://www.nbcnews.com/news/latino/childrencry-their-parents-audio-trump-s-border-family-separations-n884486>, archived at <https://perma.cc/73LX-TMKP>; Julia C. Wong, *Recording Captures Cries of Children Separated from Parents at US Border*, GUARDIAN (June 18, 2018, 7:36 PM),



tained and published an audio recording of children—between four and ten years old—in a detention center crying and calling for their parents.<sup>88</sup> The publication of these photos and the audio recording gave the U.S. public a true sense of the trauma and agony experienced by young children torn from their parents.<sup>89</sup> The underage detainees were held in facilities run by the Office of Refugee Resettlement (housed within the Department of Health and Human Services), and included inadequate facilities such as a converted Walmart in Texas which housed young boys.<sup>90</sup> Other children as young as toddlers were sent to “tender age” shelters in South Texas.<sup>91</sup> Despite the ongoing separations, as late as June 17, 2018, the Trump administration denied that DHS had a policy of separating families at the border.<sup>92</sup> The next day, June 18, public discourse changed when photos of immigrant children being kept in cages were made public.<sup>93</sup>

The American Civil Liberties Union (ACLU) brought a federal court action that eventually led to a positive result for these children and their family members.<sup>94</sup> In June 2018, a federal judge ordered an injunction against the Trump Administration’s family separation policy.<sup>95</sup> United States District Court Judge Dana M. Sabraw granted the ACLU a preliminary injunction in a lawsuit the organization filed challenging family separations.<sup>96</sup> He ordered the federal government to reunite parents with their children within thirty days. Children age five and under had to be reunited within fourteen days.<sup>97</sup> The court emphasized that “[t]he government has the sole obligation and responsibility to make this happen.”<sup>98</sup> Despite these deadlines, the government failed to live up to the court’s mandate. The failures of the government’s efforts to track, account for, and find the separated families quickly came to light. Astonishingly, no one in the government knew where many of the children’s parents were, or how to find them.<sup>99</sup> According to

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<https://www.theguardian.com/us-news/2018/jun/18/us-border-families-separated-audio-recording>, archived at <https://perma.cc/K5NW-GQF2>.

<sup>88</sup> See *id.*

<sup>89</sup> Guardian News, *supra* note 7.

<sup>90</sup> See Rhodan, *supra* note 79.

<sup>91</sup> See *id.*

<sup>92</sup> See Mueller, *supra* note 85.

<sup>93</sup> See *id.*

<sup>94</sup> *L. v. U.S. Immigration Customs & Enf’t*, 302 F. Supp. 3d 1149, 1168 (S.D. Cal. 2018).

<sup>95</sup> See Laura Jarret, *Federal Judge Orders Reunification of Parents and Children, End to Most Family Separations at Border*, CNN (June 27, 2018), <https://www.cnn.com/2018/06/26/politics/federal-court-order-family-separations/index.html>, archived at <https://perma.cc/6PEZ-K2DA>.

<sup>96</sup> Alfonso Serrano, *Judge Orders Trump Administration to Halt Family Separations, Reunite Families*, COLORLINES (June 27, 2018), <https://www.colorlines.com/articles/judge-orders-trump-administration-halt-family-separations-reunite-families>, archived at <https://perma.cc/C HU3-AFAA>.

<sup>97</sup> *Id.*

<sup>98</sup> Pauline Repard, *Judge Says Government Has ‘Sole’ Duty to Find and Reunite Immigrant Families*, L.A. TIMES (Aug. 3, 2018), <https://www.latimes.com/local/lanow/la-me-ln-government-aclu-reunification-20180803-story.html>, archived at <https://perma.cc/NP68-8Y8C>.

<sup>99</sup> See Richard Gonzalez, *Federal Judge Calls Government Plan To Reunify Migrant Families ‘Disappointing’*, NPR (Aug. 3, 2018), <https://www.npr.org/2018/08/03/635502588/federal-judge-calls-government-plan-to-reunify-migrant-families-disappointing>, archived at

Judge Sabraw: “There were three agencies, and each was like its own stove-pipe. Each had its own boss, and they did not communicate.”<sup>100</sup> The judge further observed: “[w]hat was lost in the process was the family.”<sup>101</sup> As one news report observed: “the question hovering over the Trump administration since the ‘zero tolerance’ policy was ended has been, where are the children?”<sup>102</sup>

In January 2019, a report by the Office of Inspector General came to similarly shocking conclusions.<sup>103</sup> It found over 2,700 separated children that needed to be reunited.<sup>104</sup> But even that number was likely an underestimate because that “number does not represent the full scope of family separations. Thousands of children may have been separated during an influx that began in 2017, before the accounting required by the court.”<sup>105</sup> The report also found that the government detained, received, and released thousands of separated children before it was legally required by court order to identify or track separated children released before the court’s order. Because of the limitations of its data systems, the government “was unable to provide a more precise estimate or specific information about these children’s sponsor placements.”<sup>106</sup>

As a result of the findings of the Inspector General’s report, as well as media attention on the issue, the House of Representatives eventually held oversight hearings on the matter. Representative Jerry Nadler was in disbelief over the failure to track the separated children: “How did (Customs and Border Protection) not ensure it had an adequate system before separating them?”<sup>107</sup> Representative Jan Schakowsky observed, “I think what we’re really talking about is state sponsored child abuse, and I would go as far as to say kidnapping.”<sup>108</sup> It was during these hearings that Representative Ted Deutch released HHS documents obtained by his office documenting thousands of allegations of sexual abuse against children in custody.<sup>109</sup>

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<https://perma.cc/5MUM-9BYX> (“The reality is that for every parent who is not located there will be a permanently orphaned child and that is 100 percent the responsibility of the administration.”).

<sup>100</sup> See Amanda Holpuch, *Family separations have ended, but children risk being ‘permanently orphaned’*, GUARDIAN (Aug. 7, 2018), <https://www.theguardian.com/us-news/2018/aug/07/us-family-separations-immigration-migrant-rights>

<sup>101</sup> *Id.*

<sup>102</sup> Pricilla Alvarez, *Five Takeaways from Tuesday’s Family Separation Hearing*, CNN (Feb. 26, 2019), <https://www.cnn.com/2019/02/26/politics/family-separation-hearing-takeaways/index.html>, archived at <https://perma.cc/N9WJ-SRM8>.

<sup>103</sup> *Many Children Separated from Parents, Guardians Before Ms. L. v. Ice Court Order and Some Separations Continue*, OFF. OF INSPECTOR GEN. REP. (Jan. 17, 2019), <https://oig.hhs.gov/newsroom/news-releases/2019/uac.asp>, archived at <https://perma.cc/7XNL-T36L>.

<sup>104</sup> See *id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Alvarez, *supra* note 102.

<sup>108</sup> Camila DeChalus, *Family Separation Blasted by Both Parties at Oversight Hearing*, ROLL CALL (Feb. 7, 2019), <https://www.rollcall.com/2019/02/07/family-separation-blasted-by-both-parties-at-oversight-hearing/>, archived at <https://perma.cc/7YBE-Q9J3>.

<sup>109</sup> *Id.*

The Trump officials stunningly pled both ignorance as well as the classic Nuremberg defense of just following then legal orders. According to the government,

the separations [were] a powerful tool to deter illegal border crossings [but the government] did not anticipate the . . . backlash from separating thousands of families [in order to punish] the parents for crossing the border illegally.<sup>110</sup> . . . The government did not view the families as a discrete group or devise a special plan to reunite them, until [Judge] Sabraw ordered that it be done.<sup>111</sup>

Shockingly, in June 2019, the Trump administration argued before the United States Court of Appeals for the Ninth Circuit that having detained children sleep on concrete floors or failing to provide them with basic necessities such as soap and toothbrushes did not violate the law.<sup>112</sup> The Trump administration argued that such basic necessities were not part of the requirement that the government provide “safe and sanitary” facilities.<sup>113</sup>

World leaders and the media criticized the Trump administration for what many viewed as a gross human rights violation, and some have even characterized his policy as torture.<sup>114</sup> Yet this horror shockingly continues. Indeed, despite the 2018 injunction ordering the end of family separation, a recent study found that nearly 70,000 immigrant children were separated from their parents in 2019 alone.<sup>115</sup> A more conservative estimate by the ACLU found that as late as mid-2019, over 900 families were separated after

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<sup>110</sup> Nick Miroff, Amy Goldstein & Maria Sacchetti, *What Went Wrong With Trump’s Family Separation Effort at the Border*, CHI. TRIB. (July 28, 2018), <https://www.chicagotribune.com/nation-world/ct-trump-immigration-border-separations-analysis-20180728-story.html>, archived at <https://perma.cc/J574-3XR5>.

<sup>111</sup> *Id.*

<sup>112</sup> See Meagan Flynn, *Detained Migrant Children Got No Toothbrush, No Soap, No Sleep. It’s No Problem, Government Argues*, TEX. TRIB. (June 21, 2019), <https://www.texastribune.org/2019/06/21/detained-migrant-children-no-toothbrush-no-soap/>, archived at <https://perma.cc/JF32-ARGP>.

<sup>113</sup> *Detained Migrant Children Must Have Access to Soap and Other Basic Needs, Court Rules*, GUARDIAN (Aug. 15, 2019), <https://www.theguardian.com/us-news/2019/aug/15/immigrant-children-soap-beds-trump-court>, archived at <https://perma.cc/A4TM-M39H>; see also Order Re Plaintiffs’ Motion to Enforce and Appoint a Special Monitor [201, 202] 13, *Flores v. Sessions*, No. 2:85-CV-04544 DMG (AGRx), slip op. (C.D. Cal. June 27, 2017) (order granting in part and denying in part plaintiffs’ motion to enforce agreement), <https://www.aila.org/File/Related/14111359v.pdf>, archived at <https://perma.cc/S4XQ-G75M>.

<sup>114</sup> See USA: *Policy of Separating Children from Parents is Nothing Short of Torture*, AMNESTY INTL. (June 18, 2018), <https://www.amnestyusa.org/press-releases/usa-policy-of-separating-children-from-parents-is-nothing-short-of-torture/>, archived at <https://perma.cc/H4VD-YBWK>.

<sup>115</sup> Associated Press, *The U.S. Has Held a Record Number of 69,550 Migrant Children In Government Custody in 2019*, NBC NEWS (Nov. 12, 2019), <https://www.nbcnews.com/news/latino/u-s-has-held-record-69-550-migrant-children-governmentn1080486?fbclid=IWAR132Hw8l6YDfKewfwrKwgK1h8EytrjKWimJ9WNB>, archived at <https://perma.cc/5CX8-7B4V> (hereinafter “Record Number”).

the injunction was granted.<sup>116</sup> In its 2019 court filing, the ACLU documented several tragic case studies involving the abuse of children:

One man was separated from his three young daughters because he has HIV, although the government has not explained why it believes he is dangerous to his children.

Another man, detained with his one-year-old infant in a facility, was criticized for not changing his daughter's diaper and called a bad father. His infant was taken from him.

A 3-year-old girl was separated from her father when Customs and Border Protection officials disputed his paternity. A DNA test eventually confirmed the father's paternity, but not before the child was sexually abused while in the custody of the Office of Refugee Resettlement.

A 4-year-old boy was separated from his father whose speech impediment prevented him from answering CBP officials' questions. The family was separated even after the father presented a birth certificate showing his paternity.<sup>117</sup>

As of this writing, hundreds, if not thousands, of immigrant children remain separated from their parents.<sup>118</sup> Indeed, as late as April 2019, the Trump administration admitted it could take up to two years to identify separated families and did not identify when these families could be reunited.<sup>119</sup> The government explained that the reason for such a delay was because United States Customs and Border Protection did not collect specific data on migrant family separations before April 2018.<sup>120</sup>

In what is a perhaps perverse twist, Trump's zero tolerance policy has not stopped migration, asylum seekers, or led to mass deportations. This policy and others have served as a means for the domestic populous to believe something forceful is being done with respect to the impending immigrant "threat" and to terrorize immigrant and potential immigrant communities living in or seeking to enter the United States. This is especially true when one considers the recent and well-publicized deaths of im-

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<sup>116</sup> Richard Gonzalez, *ACLU: Administration Is Still Separating Migrant Families Despite Court Order To Stop*, NPR (June 30, 2019), <https://www.npr.org/2019/07/30/746746147/aclu-administration-is-still-separating-migrant-families-despite-court-order-to->, archived at <https://perma.cc/WWE5-SKYU>.

<sup>117</sup> *Id.*

<sup>118</sup> See Tal Copan, *Hundreds of Immigrant Kids Remain Separated From Parents*, CNN (Aug. 30, 2018), <https://www.wral.com/hundreds-of-immigrant-kids-remain-separated-from-parents/17807951/>, archived at <https://perma.cc/SQ6P-9WTX>.

<sup>119</sup> See Julia Jacobs, *U.S. Says It Could Take 2 Years to Identify Up to Thousands of Separated Immigrant Families*, N.Y. TIMES (Apr. 6, 2019), <https://www.nytimes.com/2019/04/06/us/family-separation-trump-administration.html>, archived at <https://perma.cc/6ZGA-R8Y2>.

<sup>120</sup> See *id.*

migrant children in the custody of U.S. Border Patrol authorities.<sup>121</sup> Indeed, as of June 2019, at least seven migrant children are documented to have been killed while in U.S. custody,<sup>122</sup> but some believe the number may in fact be much higher.<sup>123</sup> To add to the horror, in a twisted turn of fate, some refugee and immigrant parents that are ultimately deported may never see their children again (even though these children are alive), and without their biological parents' knowledge or consent, some of these children face being adopted by American parents.<sup>124</sup>

#### IV. FAMILY SEPARATION AND BEYOND: THE EFFECTS OF TRUMP'S HATEFUL POLICIES

The effects of this country's family separation policy on migrant children must never be forgotten. These innocents, some as young as infants,<sup>125</sup> face significant repercussions from having their parents taken from them,<sup>126</sup>

<sup>121</sup> See Norman Merchant, *Deaths of 2 Children Raise Doubts About Border Agency's Ability to Care for Thousands of Minors*, CHI. TRIB. (Dec. 26, 2018), <https://www.chicagotribune.com/nation-world/ct-children-die-border-patrol-custody-20181226-story.html>, archived at <https://perma.cc/44RP-ENEa>.

<sup>122</sup> *US Border: Sixth Death of Migrant Child in US Custody*, BBC NEWS (May 23, 2019), <https://www.bbc.com/news/world-us-canada-48375144>, archived at <https://perma.cc/YD25-PDBG>; Cynthia Pompa, *Migrant Kids Keep Dying in CBP Custody, and BHS Won't Take Accountability*, ACLU (June 14, 2019), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/immigrant-kids-keep-dying-cbp-detention>, archived at <https://perma.cc/2MSD-VD9D>.

<sup>123</sup> Jack Herrera, *Can We Be Sure Only Six Migrant Children Have Died in Government Custody*, PAC. STANDARD (May 28, 2019), <https://psmag.com/news/can-we-be-sure-only-six-migrant-children-have-recently-died-in-government-custody>, archived at <https://perma.cc/YFM9-9XPW>.

<sup>124</sup> See Associated Press, *Deported Parents May Lose Kids to Adoption, Investigation Finds*, NBC NEWS (Oct. 9, 2018), <https://www.nbcnews.com/news/latino/deported-parents-may-lose-kids-adoption-investigation-finds-n918261>, archived at <https://perma.cc/E9X2-R75S>; Ruth Brown, *Former ICE Head: Separated Kids May Never See their Parents Again*, N.Y. POST (June 19, 2018), <https://nypost.com/2018/06/19/former-ice-head-separated-kids-may-never-see-parents-again/>, archived at <https://perma.cc/FED6-UZ4N>.

<sup>125</sup> See Folley, *supra* note 16 (covering a story of a father separated from his four month old infant); see also Drew Thompson, *The Zero Tolerance Immigration Policy: Two Moral Objections*, ETHICS & INT'L AFFS. (June 2018), <https://www.ethicsandinternationalaffairs.org/2018/the-zero-tolerance-migration-policy-two-moral-objections/>, archived at <https://perma.cc/SJH2-YNB8> ("In one, a converted Wal-Mart in McAllen, Texas, children are "plac[ed] 20 or more in a concrete-floor cage and provid[ed] foil blankets, thin mattress pads, bottled water and food." One report describes how a 16-year-old girl in custody was responsible for changing the diapers of an unrelated infant.").

<sup>126</sup> See generally Jonathan Baum, Roshia Jones & Catherine Berry, *In the Child's Best Interest?: The Consequences of Losing a Lawful Immigrant Parent to Deportation*, U.C. BERKELEY, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY (2010), <https://files.eric.ed.gov/fulltext/ED536693.pdf>, archived at <https://perma.cc/6Z25-J8TK>; see also MINDY HERMAN-STAHM, MARNI L. KAN & TASSELLI MCKAY, *INCARCERATION AND THE FAMILY: A REVIEW OF RESEARCH AND PROMISING APPROACHES FOR SERVING FATHERS AND FAMILIES* (2008), <https://aspe.hhs.gov/report/incarceration-and-family-review-research-and-promising-approaches-serving-fathers-and-families/41-negative-effects-child-development>, archived at <https://perma.cc/9HVT-XJ5V> ("Based on a qualitative study of 30 children who had witnessed the arrest of their mothers, Jose-Kampfner posited that the high levels of anxiety

and the extent of the impact of this terror may persist for years. It must nevertheless be understood that the following studies on the effects of hate will invariably fail to grasp the extent of the family separation tragedy and perhaps never will fully comprehend the terror and lasting harms to the thousands of children that have faced sexual abuse,<sup>127</sup> physical violence,<sup>128</sup> and perhaps even witnessed the death of fellow caged children.<sup>129</sup> Furthermore, Trump's policies of hate impact groups far beyond those immediately affected. Based on his own admissions, Trump's policies are intended to discourage immigrants both in and outside the country.<sup>130</sup>

### A. *The Traumatic Consequences of Family Separation*

The traumatic effect on the child victims of abuse (including sexual abuse) is not only unfathomable, but is almost too horrific to imagine, let alone fully elaborate on here. Nonetheless, the trauma of family separation applies to all of its victims, including the children not sexually abused but nonetheless harmed by being incarcerated and detained in cages.<sup>131</sup> The very idea of caging children unquestionably undermines any claim of decency anyone associated with it can ever assert. As the studies below demonstrate, children subject to separation, and especially the victims of Trump's family separation policy, suffer acute physiological trauma that will have lasting effects throughout their lives.

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and depression found among participants were associated with the experience of maternal incarceration and with trauma related to the arrest event itself. In her sample of 56 mothers incarcerated at women's prisons in Kentucky and Washington State and their children, Baunach found that 70 percent of the children exhibited symptoms of social and psychological disorders, such as aggression, hostility, and withdrawal.'").

<sup>127</sup> See Montoya-Galvez, *supra* note 22.

<sup>128</sup> *Id.*

<sup>129</sup> See notes *supra* 1–6 and accompanying text.

<sup>130</sup> See David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, REUTERS (Oct. 9, 2018), <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1M000C>; see also Sessions Admits Policy is a Deterrent, CNN (June 19, 2018), <https://www.cnn.com/videos/politics/2018/06/19/sessions-defends-controversial-immigration-policy-deterrent-sot.cnn>, archived at <https://perma.cc/4WVX-VAF3>.

<sup>131</sup> See Martha Mendoza, 'I Can't Feel My Heart: ' Children Separated from Their Parents at US-Mexico Border Showed Increased Signs of Post-traumatic Stress, According to Watchdog Report, FRONTLINE (Sept. 4, 2019), <https://www.pbs.org/wgbh/frontline/article/children-separated-from-their-parents-at-us-mexico-border-showed-increased-signs-of-post-traumatic-stress-us-report-says/> archived at <https://perma.cc/8QSB-7G8Y>; Sara Goudarzi, *Separating Families May Cause Lifelong Health Damage*, SCI. AMERICA (June 20, 2018), <https://www.scientificamerican.com/article/separating-families-may-cause-lifelong-health-damage/>, archived at <https://perma.cc/2T6U-KBAU>; Amanda Holpuch, *Trump's Separation of Families Constitutes Torture, Doctors Find*, GUARDIAN (Feb. 25, 2020), <https://www.theguardian.com/us-news/2020/feb/25/trump-family-separations-children-torture-psychology>, archived at <https://perma.cc/WYE9-QQ93>; Annamarya Scaccia, *How the Stress of Family Separation May Permanently Damage Migrant Children*, ROLLING STONE (June 22, 2018), <https://www.rollingstone.com/culture/culture-features/how-the-stress-of-family-separation-may-permanently-damage-migrant-children-665997/>, archived at <https://perma.cc/9ESA-4NLS>.

In terms of the trauma to children separated from their parents, Professor Mark Lusk, professor at the University of Texas at El Paso School of Social Work, explains that the individuals who have migrated to the U.S. since 2007 “were not coming to work seasonally or long term. These were people who had their businesses burned, had been extorted, or had extreme acts of violence committed against them.”<sup>132</sup> Lusk further observes family separation leads to toxic stress,<sup>133</sup> and those who arrived in the United States since the implementation of Trump’s family separation policy are now further traumatized.<sup>134</sup>

With respect to the family separation policy, the American Society of Pediatrics concludes that “highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child’s brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress — known as toxic stress — can carry lifelong consequences for children.”<sup>135</sup> Two other medical professionals found that “this kind of stress makes children susceptible to acute and chronic conditions such as extreme anxiety, depression, post-traumatic stress disorder, hypertension and heart disease.”<sup>136</sup>

James Griffith, MD, chair of the department of psychiatry and behavioral sciences at George Washington University School of Medicine and Health Sciences, similarly observes that “the biggest problem is that people think about little children as small adults, but they are not. The brain of the child is still developing, especially in regard to brain systems for memory and relationships.”<sup>137</sup> Griffith further observes that the rate of PTSD for children of survivors of the Holocaust, for instance, was three times that of the general population.<sup>138</sup> Griffith further provides guidance on the long term impact of such abuse: “If you have a parent with an insecure attachment disorder or a parent with chronic trauma symptoms, they may be very limited in their ability to provide stable, nurturing parenting relationships for their children, which can impair the next generation.”<sup>139</sup>

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<sup>132</sup> Sue Coyle, *Children and Families Forum: The Impact of Immigrant Family Separation*, SOC. WORK TODAY (Sept. 22, 2018), <https://www.socialworktoday.com/archive/SO18p8.shtml>, archived at <https://perma.cc/TQP7-GVK2>.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Michael Garcia Bocheneck, *U.S.: Family Separation Harming Children, Families*, HUM. RTS. WATCH (July 11, 2019), <https://www.hrw.org/news/2019/07/11/us-family-separation-harming-children-families>, archived at <https://perma.cc/E4BB-Z9Z2>.

<sup>136</sup> Reshem Agarwal & Marsha Griffin, *Taking immigrant kids from parents shows contempt for families*, HOUS. CHRON. (June 3, 2018), <https://www.houstonchronicle.com/opinion/outlook/article/Taking-immigrant-kids-from-parents-shows-contempt-12963039.php>, archived at <https://perma.cc/X3SV-A66D>.

<sup>137</sup> See Sue Coyle, *The Impact of Immigrant Family Separation*, 18 SOC. WORK TODAY MAG. 8 (2018), <https://www.socialworktoday.com/archive/SO18p8.shtml>, archived at <https://perma.cc/AE43-EFPU>.

<sup>138</sup> *Id.*

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

Trump's anti-family and anti-children policies have undoubtedly terrorized migrant and asylum-seeking children.<sup>140</sup> Wendy Cervantes and Christina Walker, for example, observe: "research shows that harsh immigration enforcement policies have consistently undermined the health, economic security, and overall wellbeing of children in immigrant families."<sup>141</sup>

Moreover, Cervantes and Walker conclude that Trump's policies: (1) tear families apart;<sup>142</sup> (2) harm immigrant children's short-term and their long-term mental health because they increase anxiety of both immigrant parents and their children;<sup>143</sup> (3) undermine the economic security of immigrant children because without one or more parents the children face further economic insecurity;<sup>144</sup> (4) threaten the victim's access to education due to the chilling effect among immigrants and their families;<sup>145</sup> and (5) overall endanger the safety and wellbeing asylum-seeking children and families.<sup>146</sup>

A 2007 study on the impact of families being separated found significant harms to children when their immigrant parents were arrested. While the results of this study did not cover the added trauma of the family separation policy, the findings of this study were nonetheless startling: "children and other family members experienced significant hardship, including difficulty coping with the economic and psychological stress caused by the arrest and the uncertainty of not knowing when or if the arrested parent would be released."<sup>147</sup> This study further found that "hardship increased over time, as families' meager savings and funds from previous paychecks were spent . . . . Hardship also increased among extended families and nonfamily networks over time, as they took on more and more responsibility for taking care of children with arrested parents."<sup>148</sup> Tragically, the study concludes that:

After the arrest or disappearance of their parents, children experienced feelings of abandonment and showed symptoms of emo-

<sup>140</sup> Legal scholars addressing other related issues have observed the negative and long-term impact of such policies effects its intended targets. Further, these writers also observe implicit bias has negative effects in a variety of ways. *See generally*, Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1 (2009) (noting and citing extensive literature and court decision demonstrating the variety of ways implicit bias can affect results of cases and create policies that harm the victims of said bias).

<sup>141</sup> Wendy Cervantes & Christina Walker, *Five Reasons Trump's Immigration Orders Harm Children*, CLASP (April 2017), <https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/Five-Reasons-Immigration-Enforcement-Orders-Harm-Children.pdf>, archived at <https://perma.cc/VY3B-PL6S>.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Randy Capps, Rosa Maria Castañeda, Ajay Chaudry & Robert Santos, *Paying the Price: The Impact of Immigration Raid's on America's Children*, URB. INST. 3 (2007), <https://www.urban.org/sites/default/files/publication/46811/411566-Paying-the-Price-The-Impact-of-Immigration-Raids-on-America-s-Children.PDF>, archived at <https://perma.cc/5EHB-MV5B>.

<sup>148</sup> *Id.*



tional trauma, psychological duress, and mental health problems. Many lacked stability in child-care and supervision. Families continued hiding and feared arrest if they ventured outside, increasing social isolation over time. Immigrant communities faced the fear of future raids, backlash from nonimmigrants, and the stigma of being labeled “illegal.” The combination of fear, isolation, and economic hardship induced mental health problems such as depression, separation anxiety disorder, post-traumatic stress disorder, and suicidal thoughts.<sup>149</sup>

Legal scholars likewise observe that while the long-term effects of a child witnessing a deportation or removal are less understood, these children are likely to have “enduring mistrust of law enforcement and child welfare agencies.”<sup>150</sup> Such victims are seen to develop of a “‘culture of fear,’ and social isolation.”<sup>151</sup> Scholars have nonetheless observed immigrant families persevere in spite of Trump’s traumatizing policies: they go about their lives as best they can, including children continuing to go to school. However, the increased presence of federal immigration officials in communities has a chilling effect on the parents’ and children’s perceptions of their protected access to programs such as “Head Start and public education.”<sup>152</sup>

A study on the effects of children of having a parent incarcerated found that “children of incarcerated parents are much more likely to experience psychological disorders and to exhibit behavioral problems.”<sup>153</sup> This study also found that these children are “more likely to experience trouble in school, including poor grades and behavioral problems,”<sup>154</sup> and further found that “U.S. citizen children separated from [an LPR] parent will suffer economic strain, requiring additional public assistance for the families left behind.”<sup>155</sup> An Urban Institute report on the consequences of the arrest, detention, and deportation of immigrant parents of children in the United States also found that parental arrest results in severe economic hardship for families because they lose a breadwinner,<sup>156</sup> and most households experienced lower incomes, housing instability, and food insufficiency.<sup>157</sup>

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<sup>149</sup> *Id.* at 4.

<sup>150</sup> See Marcella Mendoza, *Advocating for Control and Compassion, The Impact of Raids and Deportation on Children and Families*, 11 OR. REV. INT’L L. 111, 118 (2009); see also Anna Gorman, U.S.-Born Children Feel Effects of Immigration Raids, L.A. TIMES (June 8, 2008), <https://www.latimes.com/la-me-children8-2008jun08-story.html>, archived at <https://perma.cc/X66F-CABJ>.

<sup>151</sup> Mendoza, *supra* note 150.

<sup>152</sup> *Id.*

<sup>153</sup> Baum, *supra* note 126, at 5.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Ajay Chaudry et al., URB. INST., *Facing Our Future: Children in the Aftermath of Immigration Enforcement* 27 (2010). The study examined 190 children in 85 families living in six U.S. cities. See also the work of Families for Freedom, a New York-based multiethnic defense network run by and for families confronting deportation.

<sup>157</sup> Chaudry et al., *supra* note 156, at ix.

Further, the need to protect families and keep them together is a foundational aspect of a host of international laws and norms.<sup>158</sup> In fact, nearly every human rights agreement recognizes the special need for the protection of children.<sup>159</sup> For instance, the International Covenant on Civil and Political Rights (ICCPR) proclaims that the family is “entitled to protection by society and the State.”<sup>160</sup> The right to a family requires states take appropriate measures “to ensure the unity or reunification of families.”<sup>161</sup> Accordingly, states are not to arbitrarily or unlawfully interfere with this essential social unit. The United Nations Human Rights Council, which oversees the compliance of states with the ICCPR, held that states must respect the right to family unity in cases where the deportation of a parent would arbitrarily interfere with this right.<sup>162</sup> The Convention on the Rights of the Child also enshrines the principle that in all legal actions “the best interests of the child shall be a primary consideration.”<sup>163</sup>

The Trump administration either does not know, or more likely, does not care about these conventions. It appears this administration’s conduct toward asylum seekers and migrants can only be rationalized as a plan to discourage migrants and asylum seekers by terrorizing them in unimaginable ways: taking away their children. It appears that this devious plan has had at least some of its intended effect. While not quite stopping migration or leading to Trump’s promise to close our borders and deport millions, the fear Trump promulgated has had significant ripple effects on society in two ways: first, by effectively creating (or resurrecting) a new trope concerning the threat of immigrants, such rhetoric facilitates and justifies the enactment of policies that have devastating impacts on targeted groups;<sup>164</sup> and second, the

<sup>158</sup> See Baum, *supra* note 126, at 6.

<sup>159</sup> See, e.g., International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 10, art. 24, S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967) (hereinafter ICESCR) (every child has “the right to such measures of protection as are required by his status as a minor”). See also U.N. Human Rights Comm., General Comment No. 17: Article 24 (Rights of the Child), ¶ 2, (July 27, 1990) (stating that the ICCPR requires that states adopt “special measures to protect children” to ensure that they enjoy all of the rights provided in the Covenant). See also G.A. Res. 44/25, Convention on the Rights of the Child, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (Nov. 20, 1989) (hereinafter CRC).

<sup>160</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 177, 179, arts. 17, 23.

<sup>161</sup> U.N. Human Rights Comm., General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, ¶ 5, (July 7, 1990).

<sup>162</sup> See, e.g., *Winata v. Australia* (No. 930/2000), 16 August 2001, U.N. Doc. No. CCPR/C/72/D/930/2000 (referring to case of a stateless married couple from Indonesia, where the Human Rights Committee found that deporting the parents would violate articles 17, 23, and 24 of the ICCPR).

<sup>163</sup> See CRC at 46, art. 3 (Nov. 20, 1989).

<sup>164</sup> See Deborah Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 *FORDHAM INT’L L.J.* 141, 147–48, 203 (2015) (discussing the policy impact of narratives painting Mexicans as criminals); see also Nina Bernstein, *In Father’s Memory, Fighting to Stay in Britain*, *N.Y. TIMES* (Aug. 20, 2011), <https://www.nytimes.com/2011/08/21/world/europe/21antonio.html>, archived at <https://perma.cc/HNB5-HHFC> (explaining how detention and deportation have stigmatized immigrants and facilitated treating them as “scapegoats”).

hate also promotes fear from within the membership of the targeted group, isolating them and instilling fear that they soon will be subject to oppressive policies, laws, and enforcement actions.<sup>165</sup>

## V. THE EFFECTS OF TRUMP'S XENOPHOBIA ON THE IMMIGRANT COMMUNITY AT LARGE

The Trump administration's anti-immigrant policies, which go further than family separation, and include practices such as raids at schools and employment locales, have similarly lasting traumatic impacts on the immigrant community as a whole.<sup>166</sup> Scholars have long recognized the stigmatizing effects of this sort of hate speech on both society generally and on the targets of xenophobic rhetoric.<sup>167</sup> In the end, Trump's hateful rhetoric makes it easier to enact laws and policies that not only target immigrant communities, but that ultimately harm this country's economic well-being.<sup>168</sup> Further, his rhetoric and the resulting policies lead to negative impacts on the targeted immigrant communities.<sup>169</sup> Moreover, Trump's caricatures of immigrants as universally more prone to violent crime is simply not borne out by the evidence.<sup>170</sup>

Indeed, almost immediately after his inauguration, Trump's promises to deport millions of immigrants had an impact. For instance, less than a month

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<sup>165</sup> Daniel I. Morales, *It's Time for an Immigration Jury*, 108 NW. U. L. REV. 36, 42 (2013).

<sup>166</sup> Elizabeth Oglesby, *How Immigration Raids Inflict Trauma on Communities*, CITYLAB (June 18, 2018), <https://www.acesconnection.com/blog/how-immigration-raids-inflict-trauma-on-communities-citylab-com-1>, archived at <https://perma.cc/68XK-N4VC> ("The raids created havoc for families and 'first responders,' which in these cases included churches, immigration attorneys, and other community advocates who scrambled to provide legal aid, track down children and missing detainees, and stock food pantries. Local organizations put into place their disaster readiness plans, and churches became de facto relief centers. 'It was like a war zone,' recalls Corinn Williams, director of the Community Economic Development Center in New Bedford. 'Family members were walking around in a daze looking for their loved ones.'").

<sup>167</sup> *Id.* ("Mass deportation stigmatizes all Latinos in the same way that mass incarceration stigmatizes all African Americans."); see generally STEVE BENDER, *RUN FOR THE BORDER: VICE AND VIRTUE IN THE U.S.-MEXICO BORDER CROSSING* 26 (2012) (addressing the inaccurate nature of migration narratives and the effect on domestic laws and policy: "The dominant stereotype of Mexicans has shifted over time from the rural bandido portrayed above to the equally treacherous urban gangbanger or drug dealer.").

<sup>168</sup> The economic impact on xenophobic laws, while mentioned here, is explored in detail in the works of the lead author. See generally, e.g., ROMÁN, *supra* note 37.

<sup>169</sup> See Weissman, *supra* note 164 (discussing the policy impact of narratives painting Mexicans as criminals); see also ROMÁN, *supra* note 37, at 132 ("Studies on the impact of stigma are also useful in understanding how anti-immigrant rhetoric affects immigrants as well as other individuals who are marked as 'foreign,' including Latino and Latina U.S. citizens and legal residents."). Cf. Rubén G. Rumbaut & Walter A. Ewing, *Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-Born Men*, IMMIGR. POL'Y CTR., 13 (2007) (contrary to popular opinion, immigrants in question "were not overrepresented among either homicide victims or offenders.").

<sup>170</sup> See Weissman, *supra* note 164 (discussing the policy impact of narratives painting Mexicans as criminals); see also ROMÁN, *supra* note 37, at 132.

into his first term as president, on February 12, 2017, CNN issued the headline “Fear Spreads Among Undocumented Immigrants”, stating that:

Across the United States, some unauthorized immigrants are keeping their children home from school. Others have suspended after-school visits to the public library. They have given up coffee shop trips and weekend restaurant dinners with family. Some don’t answer knocks on their doors. They’re taping bedsheets over windows and staying off social media. Nervous parents and their children constantly exchange text messages and phone calls. From New York to Los Angeles, a series of immigration arrests this week have unleashed waves of fear and uncertainty across immigrant communities.<sup>171</sup>

A few days later, *The Guardian* published ‘*Psychological warfare*’: *immigrants in America held hostage by fear of raids*, citing an eleven-page draft government enforcement memorandum that would instigate fears among immigrant communities and intended to fulfill Trump’s campaign promise of a hardline clampdown on immigration:

Immigrant communities across the United States are in a state of fear and uncertainty after a week of immigration raids and leaks from the Trump administration that have raised the specter of a mass deportations.

The White House denied the most alarming leak — a draft memo suggesting it considered mobilizing 100,000 national guard troops to round up and deport unauthorized immigrants, including millions living nowhere near the Mexico border — was current administration policy.

However, the 11-page memo has compounded fears among immigrant communities that Trump’s campaign promise of a hardline clampdown on immigration, dismissed by some at the time as little more than heated rhetoric, is about to be realized.<sup>172</sup>

Some viewed the memorandum and related anti-immigrant statements as threats: “It’s almost like it’s psychological warfare that’s being waged against people of color to create a constant feeling of fear and uncertainty.”<sup>173</sup> But immigrants interviewed expressed greater real fear: “I’ve had border patrol ask me for my documents just going for a jog by my house. I’d

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<sup>171</sup> Ray Sanchez, After ICE Arrests, Fear Spreads Among Undocumented Immigrants, CNN (Feb. 12, 2017), <http://www.cnn.com/2017/02/11/politics/immigration-roundups-community-fear/index.html>, archived at <https://perma.cc/B79Y-5X7H>.

<sup>172</sup> Julia Carrie Wong, ‘*Psychological Warfare*’: *Immigrants in America Held Hostage by Fear of Raids*, GUARDIAN (Feb. 18, 2017), <https://www.theguardian.com/us-news/2017/feb/18/us-immigration-raids-fear-trump-mexico>, archived at <https://perma.cc/E6AM-GK87>.

<sup>173</sup> *Id.*

go to get a gallon of milk at the store and have officers stop me and say ‘Well, what are you doing?’ She added: ‘We don’t have just basic freedom of movement.’”<sup>174</sup> These fears are not unfounded, especially when one considers the many high-profile attacks and raids against immigrants from the onset of Trump’s presidency.<sup>175</sup>

In February 2017, the *New York Times* published *Immigrants Hide, Fearing Capture on ‘Any Corner’*, describing the atmosphere among immigrant families after Trump’s election:

No going to church, no going to the store. No doctor’s appointments for some, no school for others. No driving, period — not when a broken taillight could deliver the driver to Immigration and Customs Enforcement.

It is happening on Staten Island, where fewer day laborers haunt street corners in search of work; in West Phoenix’s Isaac School District, where 13 Latino students have dropped out in the past two weeks; and in the horse country of northern New Jersey, where one of the many undocumented grooms who muck out the stables is thinking of moving back to Honduras.<sup>176</sup>

Leo Chavez is a leading scholar on this political rhetoric. In a report entitled *Words Hurt*, Chavez and his co-authors expand upon the damning effects of hateful language.<sup>177</sup> They observe that:

When communications with hateful intent appear to be sanctioned by society by the frequent use of anti-immigrant and anti-Latino rhetoric in political discourse in the media, it can wound or hurt the targeted group in various ways, including having a negative effect on the targeted groups’ health and well-being.<sup>178</sup>

<sup>174</sup> *Id.*

<sup>175</sup> See, e.g., Jacey Fortin & Sarah Mervosh, *ICE Detained Man Who Was Driving His Pregnant Wife to a Hospital*, N.Y. TIMES (Aug. 19, 2018), <https://www.nytimes.com/2018/08/19/us/ice-arrest-man-pregnant-wife.html>, archived at <https://perma.cc/J2WK-C68J> (a soon-to-be father arrested on his way to the hospital); Liz Robbins, *He Delivered Pizza to an Army Base in Brooklyn. Now He Faces Deportation*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/nyregion/pizza-delivery-ice-deportation.html>, archived at <https://perma.cc/K7NV-FHY7> (a pizza delivery man arrested on a military base); Sarah Mervosh, *A Legal Resident, an Arrest by ICE and Father’s Day in Jail*, N.Y. TIMES (June 17, 2018), <https://www.nytimes.com/2018/06/17/us/legal-resident-arrested.html>, archived at <https://perma.cc/5AYK-9VQE> (a grandfather who has been a legal permanent resident since 1980 arrested by ICE on Sunday morning while watering his lawn).

<sup>176</sup> Vivian Yee, *Immigrants Hide, Fearing Capture on ‘Any Corner’*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/immigrants-deportation-fears.html>, archived at <https://perma.cc/U4AT-WAU9>.

<sup>177</sup> Chavez, *supra* note 42.

<sup>178</sup> *Id.* at 241. Such fears are not unfounded. In an era where even minor miscommunications can leave one in legal jeopardy, it is not unreasonable for anxiety to set in. See Liz Robbins, *Driving While Undocumented and Facing the Risks*, N.Y. TIMES (July 18, 2017) <https://www.nytimes.com/2017/07/18/nyregion/driving-illegal-immigration-trump-administration.html>, archived at <https://perma.cc/UC4L-G56F> (“Under a Trump administration that has

The Chavez study states that “[n]egative political rhetoric was associated with higher negative emotions/affect which, in turn, was associated with increased perceptions of stress, and decreased subjective health, and subjective wellbeing.”<sup>179</sup> Moreover, the Chavez study further observes that:

These findings suggest that negative political rhetoric about immigrants and Mexican-origin people adversely affected the emotions and the mental health of the targets of the rhetoric. Such rhetoric elicits feelings of hurt, anger, distress, and anxiety. The findings also help explain the participants’ higher perceived stress and lower subjective well-being after the 2016 presidential election.

[N]egative political rhetoric can make its targets fearful, anxious, hurt, threatened, or angry. Whether or not political rhetoric reaches the level of hate speech, political rhetoric can construct its targets as threatening and dangerous.<sup>180</sup>

The Chavez study eloquently concludes:

If our findings among Mexican-origin youth can serve as a guide, words do matter. In practical terms, how we speak about people in our public and political discourse affects how people view themselves and their mental states. Political rhetoric may inflame the public and result in votes or audiences for talk shows, but negative portrayals of particular groups question their belonging and legitimacy as full-fledged members of society. Being the targets of negative political rhetoric raises stress levels and negative feelings of oneself and the larger social environment. When words wound, they tear at the body of the nation, creating divisions that reinforce systems of prejudice and inequality.<sup>181</sup>

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taken an aggressive stance on illegal immigration, the moving car has become an easy target. A broken headlight, a seatbelt not worn, a child not in a car seat may be minor traffic violations, but for unauthorized immigrants, they can have life-altering consequences. Routine traffic stops have always carried the threat of deportation, but during the last years of the Obama administration, when serious crimes were prioritized, the stops that simply revealed unlawful status often resulted in deferment. No longer.”)

<sup>179</sup> See Chavez, *supra* note 42, at 247–48.

<sup>180</sup> Chavez, *supra* note 42, at 248. See also Hannah Rappleye et al., *Immigration Crackdown Makes Women Afraid to Testify Against Abusers, Experts Warn*, NBC NEWS (Sept. 22, 2018), <https://www.nbcnews.com/politics/immigration/immigration-crackdown-makes-women-afraid-testify-against-abusers-experts-warn-n908271>, archived at <https://perma.cc/D3CR-C8BK> (domestic violence survivor about to testify against her abuser); Tal Kopan, *ICE arrested undocumented adults who sought to take in immigrant children*, S.F. CHRON. (Dec. 10, 2018), <https://www.sfchronicle.com/politics/article/ICE-arrested-undocumentedadults-who-sought-to-13455142.php>, archived at <https://perma.cc/AV6B-ZKMW> (170 caretakers of migrant children); Ana Suda, *Border Patrol Detained Me for Speaking Spanish in Montana. Then My Town Turned Against Me.*, ACLU (Feb. 14, 2019), [https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/border-patrol-detained-me-speaking-spanish?fbclid=IWAR273f7z3YotM66qtaKOnArzcJDTG3HOJSUisw9ACYT2ktCJefvcMjubz\\_AA](https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/border-patrol-detained-me-speaking-spanish?fbclid=IWAR273f7z3YotM66qtaKOnArzcJDTG3HOJSUisw9ACYT2ktCJefvcMjubz_AA), archived at <https://perma.cc/JG7N-XAPY> (arrested for speaking Spanish at a convenience store).

<sup>181</sup> *Id.* at 248.

Political rhetoric can thus become a form of hate speech. “Hate speech” has been defined as “verbal conduct—and other symbolic, communicative action—which willfully ‘expresses intense antipathy towards some group or towards an individual on the basis of membership in some group,’ where the groups in question are usually those distinguished by ethnicity, religion, or sexual orientation.”<sup>182</sup> Hate speech, at its core, is an assault on human dignity.<sup>183</sup> The assault on personal dignity is far from inconsequential, as Robert Mark Simpson observes: “rights are rooted in respect for personhood,” and an “individual cannot enjoy rights in relation to others unless they recognize him as a person.”<sup>184</sup>

Jeremy Waldron, a leading scholar on the subject, looks to renowned theorist John Rawls’ notion that in a well-ordered society, there is an assurance to all citizens that they will be treated equally.<sup>185</sup> Waldron observes that when we address hate speech, “we [are referring to] an environmental good—the atmosphere of a well-ordered society—as well as the ways in which a certain ecology of respect, dignity, and assurance is maintained, and the ways in which it can be polluted and (to vary the metaphor) undermined.”<sup>186</sup> But Waldron observes that hate speech disrupts that assurance:

[W]hen a society is defaced with anti-Semitic signage, burning crosses, and defamatory racial leaflets, that sort of assurance evaporates. A vigilant police force and a Justice Department may still keep people from being attacked or excluded, but they no longer have the benefit of a general and diffuse assurance to this effect [of being treated justly], provided and enjoyed as a public good, furnished to all by each.<sup>187</sup>

Katherine Gelber and Luke McNamara, scholars on the impact of hate speech, have similarly found that hate speech has three defining characteristics.<sup>188</sup> First, it is “directed against a specified or easily identifiable individ-

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<sup>182</sup> Robert Mark Simpson, *Dignity, Harm, and Hate Speech*, 32 L. & PHIL. 701, 701 (2013) (quoting J. Angelo Corlett and Robert Francescotti, *Foundations of a Theory of Hate Speech*, 48 WAYNE L. REV. 1071, 1083 (2002)).

<sup>183</sup> See JEREMY WALDRON, *THE HARM IN HATE SPEECH* 139 (2012).

<sup>184</sup> Simpson, *supra* note 182, at 710–11 (quoting Stephen J. Heyman, *Hate Speech, Public Discourse, and the First Amendment*, in *EXTREME SPEECH AND DEMOCRACY* 159 (2009)). See also Liz Robbins, *Driving While Undocumented and Facing the Risks*, N.Y. TIMES (July 18, 2017), <https://www.nytimes.com/2017/07/18/nyregion/driving-illegal-immigration-trump-administration.html>, archived at <https://perma.cc/H5B8-SG34> (“Under a Trump administration that has taken an aggressive stance on illegal immigration, the moving car has become an easy target. A broken headlight, a seatbelt not worn, a child not in a car seat may be minor traffic violations, but for unauthorized immigrants, they can have life-altering consequences. Routine traffic stops have always carried the threat of deportation, but during the last years of the Obama administration, when serious crimes were prioritized, the stops that simply revealed unlawful status often resulted in deferment. No longer.”).

<sup>185</sup> See WALDRON, *supra* note 183, at 140–41.

<sup>186</sup> *Id.* at 96

<sup>187</sup> *Id.* at 85.

<sup>188</sup> See Katherine Gelber & Luke McNamara, *Evidencing the Harms of Hate Speech*, 22 SOC. IDENTITIES, 324, 324 (2016).

ual or . . . a group of individuals based on an arbitrary and normatively irrelevant feature.”<sup>189</sup> Second, “hate speech stigmatizes the target group by implicitly or explicitly ascribing to it qualities widely regarded as highly undesirable.”<sup>190</sup> Third, “the target group is viewed as an undesirable presence and a legitimate object of hostility.”<sup>191</sup>

Gelber and McNamara recognize constitutive and consequential effects or harms associated with hate speech.<sup>192</sup> Other scholars have argued that constitutive effects/harms is “speech [that] can subordinate in virtue of unfairly ranking women as inferior,”<sup>193</sup> and other scholars have observed a consequential effect that can silence its targets.<sup>194</sup> Critical race theory scholar Mary Matsuda has cataloged the individual harms of hate speech to include psychological distress and risk of destruction to one’s self-esteem and social harms to include restrictions on freedom of movement and association.<sup>195</sup> Other harms found by scholars include indirect ones, such as harms to dignity, “disregard for others whose lives qualitatively depend on our regard,” and the maintenance of power imbalances within social hierarchies of race.<sup>196</sup>

These sorts of consequential harms stemming from hate speech can affect listeners in at least four ways: 1) by persuading them to believe negative stereotypes that lead them to engage in other harmful conduct; 2) by shaping the preferences of listeners so that they come to be persuaded of negative stereotypes; 3) by conditioning the environment so that expressing negative stereotypes and carrying out further discrimination become (often unconsciously) normalized; and 4) by causing listeners to imitate the behavior.<sup>197</sup>

Somewhat related, Jeremy Waldron has argued that a natural result of hate speech is the creation of a toxic environment, an almost contagion-like result, which is not only dehumanizing, but also acts as a silencing mechanism on the targets of the hate speech:

[T]iny impacts of millions of actions—each apparently inconsiderable in itself—can produce a large-scale toxic effect that, even at the mass level, operates insidiously as a sort of slow-acting poison, and that regulations have to be aimed at individual actions with that scale and that pace of causation in mind.<sup>198</sup>

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 325.

<sup>193</sup> *Id.*

<sup>194</sup> Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 CONST. COMMENT. 71, 74, 85 (1996).

<sup>195</sup> See generally Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989).

<sup>196</sup> Gelber & McNamara, *supra* note 188, at 325.

<sup>197</sup> See *id.*

<sup>198</sup> Waldron, *supra* note 183.



Indeed, the use of hateful rhetoric normalizes attacks at the individual level. As Erving Goffman observed:

By definition . . . we believe the person with a stigma is not quite human. On this assumption we exercise varieties of [discriminatory practices], through which we effectively, if often unthinkingly, reduce his life chances. We construct a stigma-theory, an ideology to explain his inferiority and account for the danger he represents, sometimes rationalizing an animosity based on other differences, such as those of social class.<sup>199</sup>

Accordingly, by constructing or resurrecting a stigma of a targeted group, Trump's administration has given license to the "legitimate" members of society to target, even with violence, members of the targeted group. One group of scholars conducted over forty interviews of targets of hate speech.<sup>200</sup> Some interviewees reported that it was common to be subjected to hate speech, e.g., "I think for me . . . every day I get vilified."<sup>201</sup> Further, a majority of these interviewees felt that the media focused on extreme cases and contributed to and reinforced negative stereotypes.<sup>202</sup> These researchers concluded that:

These incidents demonstrate that public expressions of racism are common experiences. We argue that one of the powerful and original contributions made by our presentation of this data is to draw attention to the gap that exists between public racism as it is experienced by Indigenous, racial, ethnic and religious minorities.<sup>203</sup>

Thus, hate speech and its cousin, xenophobic or political rhetoric, have consequences far beyond pointing fingers—they have real consequences for the targeted group.<sup>204</sup> Empirical data highlights the numerous deleterious effect that hate speech has on victims, their families, and communities at large.<sup>205</sup> These effects include the ability to affect the attitudes and behaviors of society towards and against the targeted group.<sup>206</sup> Such attitudes can include the promotion of deep dislike and distrust of the targeted group, and in terms of

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<sup>199</sup> ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 5 (1986).

<sup>200</sup> Gelber & McNamara, *supra* note 188, at 327–28.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See Dr. Naomi Elster, *More than Hurt Feelings: The Real Danger of Hate Speech*, IMPAKTER (Apr. 5, 2017), <https://impakter.com/hurt-feelings-real-danger-hate-speech/>, archived at <https://perma.cc/3KS5-BXPA>.

<sup>205</sup> See Dr. Katarzyna Bojarska, *The Dynamics of Hate Speech and Counter Speech in the Social Media Summary of Scientific Research*, CTR. FOR INTERNET & HUM. RTS., [https://cihr.eu/wp-content/uploads/2018/10/The-dynamics-of-hate-speech-and-counter-speech-in-the-social-media\\_English-1.pdf](https://cihr.eu/wp-content/uploads/2018/10/The-dynamics-of-hate-speech-and-counter-speech-in-the-social-media_English-1.pdf), archived at <https://perma.cc/4B63-JLYX>.

<sup>206</sup> *Id.*

behavior, it can lead to violence against that group.<sup>207</sup> In the worst of cases, societal behavior has even included genocide.<sup>208</sup>

A report from the Office of the United Nations High Commissioner for Refugees (UNHCR) similarly found numerous negative effects on the targeted communities: “governments grapple with the new realities of their multi-ethnic societies, there has been a marked increase in discrimination and violence directed against migrants, refugees and other non-nationals by extremist groups in many parts of the world.<sup>209</sup> The UNHCR report found that “[m]anifestations of anti-foreigner hostility are being widely reported in all regions of the world.”<sup>210</sup> The report further finds, manifestations of anti-foreigner policies include: “incitement to and actions of overt exclusion, hostility and violence against persons explicitly based on their perceived status as foreigners or non-nationals, as well as discrimination against foreigners in employment, housing or health care.”<sup>211</sup>

This research on the impact of hate speech on victims further found a consequential impact on the victims themselves: being deeply disturbed by the attacks and the prospect of facing similar occurrences. A host of interviewed immigrant youth made many similar heartbreaking observations: One observed: “It was like crushing emotionally and spiritually. And physically.” Another noted: “To me the saddest thing [there is] not a recognition of the special status of what we add to this country. Yes, it does hurt and it strikes at your very being.” Another youth noted, “You can never, you can never repair damage in that content once it’s been put out there. It lingers, it stays, it smells, it hangs around. You can’t get rid of it and racism is racism, it builds and feeds on that.” And another concluded, “Our kids also feel hopeless and ask why their parents as Muslims are doing something wrong.<sup>212</sup> Further, the targets of the hate speech often voiced fear of actions by others that may result from the hate speech:

When you see the infection of that kind of hate, that’s scary stuff. Why is it that our Turkish school on Saturday is the only school that has to have a security guard on Saturdays? Because we’re fearful of attack. People yelling hate speech (e.g. ‘fucking Jew’, ‘heil Hitler’) out of car windows when a man walks home from the synagogue on Friday evenings with his children, who get quite scared and intimidated.<sup>213</sup>

The research further found that the reported fears also: 1) affected the communities’ ability to utilize regulatory mechanisms to try and stop the

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUM. RTS. (OHCHR), INT’L MIGRATION, RACISM, DISCRIMINATION AND XENOPHOBIA 1 (2001), <https://www.refworld.org/pdfid/49353b4d2.pdf>, archived at <https://perma.cc/C9JZ-ZELQ>.

<sup>210</sup> *Id.* at 9.

<sup>211</sup> *Id.*

<sup>212</sup> Gelber & McNamara, *supra* note 188, at 333.

<sup>213</sup> *Id.*

conduct from recurring; 2) disempowered its targets' ability to act against hate speech; 3) could lead targets to withdraw from opportunities to express themselves; 4) could render its targets unable to respond directly at the time and could silence them in more diffuse ways; 5) caused, in other instances, the victims to feel silenced by the hate speech; 6) caused feelings of anger in the victims for being targeted; and 7) finally, caused the victims to feel dehumanized.<sup>214</sup>

Another troubling effect of such an environment is that immigrants in these circumstances are less likely to report crimes, including domestic violence, and they are less likely to seek public benefits and health care to which they or their children may be entitled.<sup>215</sup> The Trump administration's efforts have resulted in the creation and solidification of a silenced and terrified underclass. What Trump has achieved thus goes beyond grandstanding to appease his base and giving society the impression that his administration is significantly impacting the number of undocumented immigrants. Trump has actually changed little in terms of the overall statistics of undocumented immigrants within this country,<sup>216</sup> but he has surely made the lives of immigrants substantially more terrifying and insecure.

More recently, an exposé by *USA Today* highlighted the fear that immigrants faced under the Trump administration.<sup>217</sup> Under the title *Endless Fear: Undocumented Immigrants Grapple with Anxiety, Depression Under Trump*, the feature noted that:

Immigrant families that avoid routine activities out of fear of immigration enforcement are more than three times more likely to experience psychological distress than immigrant families who didn't avoid the same activities, according to a recent study by the Urban Institute.<sup>218</sup>

The report further found that “in addition to causing psychological distress, experts say anti-immigration policies and rhetoric negatively impact undocumented immigrants' access to physical and mental health services and [t]he policies, coupled with lasting fear of deportation, often result in depression, anxiety, or trauma related stress.”<sup>219</sup> This story further suggests Trump's hateful policies negatively impact the Latinx community at large: “The anti-immigrant rhetoric is damaging in the daily lives of the Latinx

<sup>214</sup> See *id.* 334–36.

<sup>215</sup> See Sarah Pierce et al, *U.S. Immigration Policy Under Trump: Deep Changes Lasting Impacts*, MIGRATION POL'Y INST. 10 (July 2018).

<sup>216</sup> See Zolan Kanno-Youngs & Michael D. Shear, *ICE Signals Mass Immigration Arrests, but Not the 'Millions' Trump Promised*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/us/politics/trump-immigration-deportations.html>, archived at <https://perma.cc/8AN2-QU DL>.

<sup>217</sup> See Olivia Sanchez, *Endless Fear: Undocumented Immigrants Grapple With Anxiety, Depression Under Trump*, USA TODAY (Aug. 27, 2019), <https://www.usatoday.com/story/news/nation/2019/08/25/undocumented-immigrants-struggle-mental-health-surival-mode/1816672001/>, archived at <https://perma.cc/PLD3-C3TH>.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

community.....regularly hearing negative things about yourself and your community can impact mental health, confidence and self-esteem..... It really impacts your ability to thrive.”<sup>220</sup>

Hate speech and its resulting ripple effects thus have debilitating consequences for the targeted community. In fact, scholars have found large scale exposure to xenophobic policies and practices negatively impacts immigrants’ social and economic ability to integrate into society. “It not only reduces the subjective well-being of immigrants, but it also strengthens intentions to return to their country of origin.”<sup>221</sup> These reactions in turn have “important implications for immigrant behavior, such as decisions on investment in their host country-specific human capital.”<sup>222</sup> Furthermore, these reactions have a significant impact on decisions to not adopt the host country’s native languages, which are skills that are crucial for economic and social integration.<sup>223</sup> Thus, “xenophobic violence not only has direct costs, but also has indirect costs by impairing the integration of those immigrants belonging to the group targeted by hate crimes.”<sup>224</sup>

The pernicious effects of fear on immigrants, communities of color, and other racialized groups at both the group and individual level are well documented outside of the legal literature. For instance, the American Psychological Association (APA), the leading U.S. professional association of mental health practitioners, is a major advocate for the humane treatment of immigrants and their families, and it has been an outspoken critic of deportation policies (and their harmful consequences).<sup>225</sup> Since 1995, the APA has published an academic journal devoted exclusively to the study of mental health issues among cultural and racial minorities: *Cultural Diversity and Ethnic Minority Psychology*.<sup>226</sup> This journal has published dozens of scholarly research articles on the traumatic impacts of fear, xenophobia, scapegoating, and discrimination against racialized Others (and their descendants).<sup>227</sup>

Hate speech in Trump’s xenophobic context results in immigrants feeling under attack, feeling unsafe, and besieged by the government. Trump’s hateful rhetoric has normalized draconian anti-immigrant policies, even ones

<sup>220</sup> See *id.*

<sup>221</sup> Max Friedrich Steinhardt, *The Impact of Xenophobic Violence on the Integration of Immigrants 2*, IZA INST. OF LAB. ECON.: DISCUSSION PAPER SERIES (Aug. 2018) <http://ftp.iza.org/dp11781.pdf>, archived at <https://perma.cc/B5M4-6A3R>.

<sup>222</sup> *Id.*

<sup>223</sup> See *id.* at 2, 4.

<sup>224</sup> *Id.* at 2.

<sup>225</sup> See *Immigration*, AM. PSYCHOL. ASS’N (Feb. 2020), <https://www.apa.org/advocacy/immigration/>, archived at <https://perma.cc/DT23-DMTE>.

<sup>226</sup> See *Cultural Diversity and Ethnic Minority Psychology*, AM. PSYCHOL. ASS’N (Oct. 2019), <https://psycnet.apa.org/PsycARTICLES/journal/cdp/25/4>, archived at <https://perma.cc/9TSC-3N8R>.

<sup>227</sup> For an impressive list of articles on fear, stigma, and stereotyping, see, e.g., *Sample Articles: Cultural Diversity and Ethnic Minority Psychology*, AM. PSYCHOL. ASS’N (Oct. 2019), <https://www.apa.org/pubs/journals/cdp/sample>, archived at <https://perma.cc/H2TL-QJ8Q>.

as horrific as family separation.<sup>228</sup> If great fear and anxiety are the consequences of Trump's hate speech and political rhetoric toward immigrant families residing in this country, how psychologically devastating must it be for a child to be incarcerated without their parents in a detention center? Can one even imagine the impact on a child, let alone thousands of children, held in cages like animals?

## VI. TRUMPISM AND XENOPHOBIC REALITIES

Trump's hate wants to ensure his vision of America is not stained by an "invasion" from beyond our borders.<sup>229</sup> Thus, he not only has targeted a valuable labor force made up of immigrants,<sup>230</sup> but he wants to "cleanse" America of most foreigners.<sup>231</sup>

Trump's vision of America is meant to keep modern-day "invaders" out.<sup>232</sup> In his worldview (and that of some of his followers) Mexicans, Central Americans, Asians, Africans, and other "Others" do not belong in a White America—except under well-defined conditions of subordination.<sup>233</sup> Immigrants, from both within our border and without, according to Trump, are not seen as an investment in America's future or as individuals that bring new talents and energy to a graying nation, but rather as suspect criminals preying on our country's largesse.<sup>234</sup> Rather than contributing to America's

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<sup>228</sup> See Laila Lalami, *How the Trump Administration Is Normalizing Immigrant Internment Camps*, NATION (July 20, 2018), <https://www.thenation.com/article/archive/trump-administration-normalizing-immigrant-internment-camps/>, archived at <https://perma.cc/NZT3-EP4B>.

<sup>229</sup> See Julia Carrie Wong, *Trump Referred to Immigrant 'Invasion' in 2,000 Facebook Ads, Analysis Reveals*, GUARDIAN (Aug. 5, 2019), <https://www.theguardian.com/us-news/2019/aug/05/trump-internet-facebook-ads-racism-immigrant-invasion>, archived at <https://perma.cc/9A95-HCQS>.

<sup>230</sup> ROMÁN, *supra* note 37, at 99–149.

<sup>231</sup> See Michael Mann, *Is Donald Trump a Fascist?*, BROOK. RAIL (May 1, 2017), <https://brooklynrail.org/2017/05/field-notes/Is-Donald-Trump-a-Fascist>, archived at <https://perma.cc/HZQ4-VEDQ>. See also Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/>, archived at <https://perma.cc/2M83-T8FZ>.

<sup>232</sup> See Olivia B. Waxman, *The History of Walls Is Long. Here's Where Donald Trump Fits In*, TIME (Jan. 30, 2017), <https://time.com/4652770/donald-trump-immigration-walls-history/>, archived at <https://perma.cc/CR2M-T54V>; see also Todd Starnes, *Obama Unleashes Hordes of Dangerous Illegals onto American Streets*, FOX NEWS (Mar. 31, 2014), [http://radio.foxnews.com/toddstarnes/top-stories/obama-unleashes-hordes-of-dangerous-illegals-onto-american-streets.html](http://web.archive.org/web/20141126032543/http://radio.foxnews.com/toddstarnes/top-stories/obama-unleashes-hordes-of-dangerous-illegals-onto-american-streets.html), archived at <https://perma.cc/6Y9W-76CU>.

<sup>233</sup> See Paul Waldman, *Trump plays dumb about his long history with undocumented workers*, WASH. POST (July 5, 2019), <https://www.washingtonpost.com/opinions/2019/07/05/trump-just-played-dumb-about-his-undocumented-workers-he-has-long-history-this/>, archived at <https://perma.cc/NE8M-BNCK>.

<sup>234</sup> See Pierre Azoulay et al., *Immigration and Entrepreneurship in the United States* 18 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27778, 2020), [http://conference.nber.org/conf\\_papers/f142369.pdf](http://conference.nber.org/conf_papers/f142369.pdf), archived at <https://perma.cc/WVG5-S46D>. See also Jennifer Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1835, 1842–43 (2007).

greatness, immigrants and their children are here to bring it down if left unchecked.<sup>235</sup> In Trump's Newer Colossus vision,<sup>236</sup> Americans must be vigilant or they stand to lose their place in the world (as a nation) and their place in society (as privileged individuals).<sup>237</sup> In his twisted narrative, the American way of life is imperiled by immigrants, and only nationalist lawmakers, like Trump, can stop them.<sup>238</sup>

The irony is that, despite his rhetoric, once again Trump has failed: he has not come close to deporting millions or closing our borders, for that matter.<sup>239</sup> For instance, the Transatlantic Council for Immigration recently released a report on the effects of Trump's policies.<sup>240</sup> The report observed that Trump's promises of significant changes to immigration enforcement on the ground were substantially more modest than promised.<sup>241</sup> While the report found the Trump administration has arrested over a hundred thousand non-citizens overall, "ICE removal, which include removals of individuals intercepted at the border were much lower than in recent years, partly because fewer people tried to cross the border illegally during Trump's first year in office."<sup>242</sup> Though it is conceivable some may believe the lower migration rates were due to Trump's enforcement policies, research on the matter demonstrates that the migration trends have been ongoing for some time now, and it is a reflection of lower domestic demand for such labor as well as economic conditions in the U.S. and Mexico. Hence, any association between Trump's policies and lower migration rates would be inaccurate.<sup>243</sup>

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<sup>235</sup> See J. David Cisneros, *Contaminated Communities: The Metaphor of "Immigrant as Pollutant" in Media Representations of Immigration*, 11 RHETOR. PUBLIC AFF. 569, 586 (2008).

<sup>236</sup> See *Trump Official Revises Statue of Liberty Poem to Defend Migrant Rule Change*, BBC NEWS (Aug. 14, 2019), <https://www.bbc.com/news/world-us-canada-49323324>, archived at <https://perma.cc/YY34-9QXE>.

<sup>237</sup> See Phillip Rucker, "How Do You Stop These People?": Trump's Anti-Immigrant Rhetoric Looms Over El Paso Massacre, WASH. POST (Aug. 4, 2019), [https://www.washingtonpost.com/politics/how-do-you-stop-these-people-trumps-anti-immigrant-rhetoric-looms-over-el-paso-massacre/2019/08/04/62d0435a-b6ce-11e9-a091-6a96e67d9cce\\_story.html](https://www.washingtonpost.com/politics/how-do-you-stop-these-people-trumps-anti-immigrant-rhetoric-looms-over-el-paso-massacre/2019/08/04/62d0435a-b6ce-11e9-a091-6a96e67d9cce_story.html), archived at <https://perma.cc/MB3J-ENYH>.

<sup>238</sup> See Chavez, *supra* note 42.

<sup>239</sup> See Zolan Kanno-Youngs & Michael D. Shear, *ICE Signals Mass Immigration Arrests, but Not the 'Millions' Trump Promised*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/us/politics/trump-immigration-deportations.html>, archived at <https://perma.cc/H8YP-KSRB>.

<sup>240</sup> See Pierce et al., *supra* note 215.

<sup>241</sup> See *id.* at 3, 15.

<sup>242</sup> *Id.* at 4.

<sup>243</sup> Andres Villareal, *Explaining the Decline in Mexico-U.S. Migration: The Effect of the Great Recession*, DEMOGRAPHY 1, 1 (Dec. 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4252712/pdf/nihms-643502.pdf>, archived at <https://perma.cc/SVQ9-88JV> ("The results [of the study] support an explanation that attributes a large part of the decline to lower labor demand for Mexican immigrants in the United States. Decreases in labor demand in industrial sectors that employ a large percentage of Mexican-born workers, such as construction, are found to be strongly associated with lower rates of migration for Mexican men."); Daniel Chiquiar & Alejandrina Salcedo, *Mexican Migration to the United States: Underlying Economic Factors and Possible Scenarios for Future Flows*, MIGRATION POL'Y INST. (Apr. 2013), <https://www.migrationpolicy.org/research/mexican-migration-united-states-underlying-economic-factors-and-possible-scenarios-future>, archived at <https://perma.cc/S4AU-EALD> ("This

What Trump has done essentially is to silence, stigmatize, and terrorize immigrants within our borders and those seeking to enter our country as migrants and asylum seekers.<sup>244</sup> Through his family separation policy, Trump has made clear that immigrants are not welcome, despite the economic reality that immigrants are of invaluable importance to economic sectors such as agriculture, construction, and the service industries.<sup>245</sup> Trump's discourse has gained traction among hundreds of thousands—perhaps even millions—of Americans left behind by the country's rapid economic, cultural, and demographic changes.<sup>246</sup> In a globalized economy where manufacturing was king a short while ago, blue-collar workers now find themselves without the jobs that once put food on the table; and without a college education, good-paying jobs are out of their reach.<sup>247</sup> Rural areas are bleeding jobs while metro areas on the coasts are making economic gains.<sup>248</sup>

Communities of color have grown in size and visibility, and their leaders are challenging America's racial hierarchy, while destitute immigrants (seen as racially and culturally inferior) are seemingly making it in America as "real Americans" suffer.<sup>249</sup> For Trump's blue-collar base, this is not their father's America anymore.<sup>250</sup> Thus, the focus on blaming immigrants and keeping them out (at all costs) has been a relatively easy sell for Trump, and the wall has become its main symbol.<sup>251</sup> The prescription is simple: we get

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report examines the evolution of migration flows from Mexico to the United States and highlights the key economic factors linked to migration levels that increased significantly during the 1990s, slowed after 2001, and have been declining since 2007. It assesses the role of supply-side factors — Mexico's peso crisis, heightened post-9/11 U.S. immigration enforcement, and the global economic crisis — as well as economic conditions affecting the demand for Mexican labor, with particular focus on the importance of sectoral growth patterns across U.S. sectors of varying skill intensity.”)

<sup>244</sup> See Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 *FORD. L. REV.* 1545, 1569–70, 1576–78 (2011).

<sup>245</sup> See ROMÁN, *supra* note 37, at 63 (As even the CATO Institute, a conservative think-tank, agreed with the conclusions herein: “Immigrants are—as they have been throughout most of our history—beneficial to our economy and assets to our society in other ways as well.”).

<sup>246</sup> Jesse Naranjo, *Trump's Base of Support is Receptive to his Hardline on Immigration*, *WALL ST. J.* (Aug. 13, 2019), <https://www.wsj.com/articles/trumps-base-of-support-is-receptive-to-his-hard-line-on-immigration-11565701632>, archived at <https://perma.cc/Q6B5-FF7S>.

<sup>247</sup> See Christia Freeland, *As Jobs Go Global, U.S. Workers Pay*, *N.Y. TIMES* (Feb. 2, 2012), <https://www.nytimes.com/2012/02/03/us/03iht-letter03.html>, archived at <https://perma.cc/52JJ-3V5>.

<sup>248</sup> Mary Pflum, *Cities to See More Job Growth in Coming Decades, Rural Areas Not So Much*, *Study Says*, *NBC NEWS* (July 12, 2019), <https://www.nbcnews.com/business/economy/cities-see-more-job-growth-coming-decades-rural-areas-not-n1029481>, archived at <https://perma.cc/RW33-BGAU>.

<sup>249</sup> Josh Boak, *AP Fact Check: Trump Plays on Immigration Myths*, *PBS* (Feb. 8, 2019), <https://www.pbs.org/newshour/politics/ap-fact-check-trump-plays-on-immigration-myths>, archived at <https://perma.cc/BC7S-JWYP>.

<sup>250</sup> Gregory Krieg, *Donald Trump Reveals When He Thinks America Was Great*, *CNN* (Mar. 28, 2016), <https://www.cnn.com/2016/03/26/politics/donald-trump-when-america-was-great/index.html>, archived at <https://perma.cc/2BZD-Z6WW>.

<sup>251</sup> See ROMÁN, *supra* note 37 (“In defiance of economic logic, U.S. lawmakers formulate immigration policies to regulate the entry of foreign workers into the country that are largely unrelated to the economic policies they formulate to regulate international commerce. . . . Perpetuating the status quo by pouring ever larger amounts of money into the enforcement of

immigrants out, we build a wall, we keep them out, and we take care of Americans first. In the midst of this clamor and demagoguery, the lives of an estimated eleven to twelve million undocumented immigrants are upended as they fear arrest by ICE or other government law enforcement officials.<sup>252</sup> In this new exclusionary landscape, Trump does not follow facts or data regarding the benefits of immigration to the United States.<sup>253</sup> Trump's xenophobic political rhetoric stokes not only the flames of hate, but also suffocates millions of immigrants with the anxiety of impending arrests and deportation.<sup>254</sup> The paradoxical reality is that immigrants are needed yet unwanted, and separating children from their parents and placing them in cages makes sense to Trump's base because they believe a nation has to defend itself from immigrants who are seen as invaders with no rights.<sup>255</sup> If anyone put these children in danger (the logic goes), it was their law-breaking parents who decided to bring them illegally into the United States.<sup>256</sup> For his base, Trump will stop immigration and restore the (white male) status quo.<sup>257</sup> Trump's border wall with Mexico, like Hadrian's wall during the Roman Empire, will keep the barbarians at bay.

Hadrian's wall, however, had a downside. It marked the limits of the expansion of the Roman Empire. Rome had limits: it could not conquer the whole known world, and the wall was as much a symbol of Rome's weakness as it was of its power. Greg Grandin argues that Trump's wall (and discourse) is a turning point in American history, the end of U.S. expansion, and the signaling of America's retreat from global commitments.<sup>258</sup> But the

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immigration policies that are in conflict with economic reality will do nothing to solve the problem," quoting Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 STAN. L. & POL'Y REV. 445, 445–46 (2005)).

<sup>252</sup> Ishaan Tharoor, *The Ill-fated Symbolism of Trump's Wall*, WASH. POST (Jan. 13, 2019), <https://www.washingtonpost.com/world/2019/01/14/ill-fated-symbolism-trumps-wall/>, archived at <https://perma.cc/3QW4-TJVH> ("Trump's insistence on the 'wall' reportedly began as a kind of mnemonic, a tactic encouraged by advisers as a means to focus right-wing voters."); Perla Trevizo, *How the Border 'Wall' Became a Potent Political Symbol*, TUCSON NEWS (Apr. 25, 2019), [https://tucson.com/news/local/how-the-border-wall-became-a-potent-political-symbol/article\\_2749b87c-dc89-59b1-b4fc-7c6d32274a3f.html](https://tucson.com/news/local/how-the-border-wall-became-a-potent-political-symbol/article_2749b87c-dc89-59b1-b4fc-7c6d32274a3f.html), archived at <https://perma.cc/3QPR-U8VL> ("Call it a fence or a wall, physical barriers have been at the center of border security debate and a potent political symbol for decades. But they have never been part of the country's political consciousness as they are today, experts say."); Amanda Holpuch, *What exactly is Trump's border wall and why does he want \$5.7bn for it?*, GUARDIAN (Jan. 15, 2019), <https://www.theguardian.com/us-news/2019/jan/15/trump-mexico-border-wall-status-migrants>, archived at <https://perma.cc/4DUJ-KVD6> ("The wall became a symbol for Trump's presidency, a promise that he would limit immigration. The thing is, he has been very effective at making immigration more difficult for people trying to enter legally and illegally. . .").

<sup>253</sup> See generally ROMAN, *supra* note 37.

<sup>254</sup> See *id.*

<sup>255</sup> See Sophia Tesfaye, *Trump's New Crackdown on Legal Immigration: His Base Loves the Cruelty*, SALON (Aug. 8, 2019), <https://www.salon.com/2019/08/13/trumps-new-crackdown-on-legal-immigration-his-base-loves-the-cruelty/>, archived at <https://perma.cc/WN62-WQMA>.

<sup>256</sup> See *id.*

<sup>257</sup> See Laila Lalami, *Donald Trump Is Making America White Again*, NATION (Mar. 2, 2017), <https://www.thenation.com/article/archive/who-belongs-in-america/>, archived at <https://perma.cc/X855-XEBB>.

<sup>258</sup> See generally GREG GRANDIN, *THE END OF THE MYTH: FROM THE FRONTIER TO THE BORDER WALL IN THE MIND OF AMERICA* (2019).



majority of liberal Americans still see the United States as a nation of immigrants, generally sympathize with the plight of immigrants, and have recoiled in horror at the scenes of children being separated from their immigrant parents.<sup>259</sup> Hopefully, the pendulum will swing back, and the United States will once again return to a commonsense, humane, family-centered immigration policy. When, how, and under what circumstances remains unclear. However, it is the authors' belief that with writings such as this one, as well as data-based analysis, the country will move away from exclusionary rhetoric and will instead confront issues that will benefit both immigrants and the rest of society.

Even when examining its tamest national security measures, the Trump administration is a cautionary tale on the perils of ignoring disaffected constituencies and the dangers of following the appeal of populism's siren song.<sup>260</sup> Both U.S. political parties ignored (or took for granted) blue-collar America at their own peril. In this vacuum, Donald Trump emerged, and with him, some of the worst impulses in our political culture: racism, xenophobia, and authoritarianism. Immigration was the common thread that united the disaffected in a common cause against the racialized Other. Immigrants would end up getting blamed for everything that was wrong with our political system and paying a high price for doing what so many others have done in the past: pursuing the American Dream. And children, sadly, have been the easiest victims of Trump's twisted plan to save America.<sup>261</sup>

By engaging in fearmongering, Trump takes the easy path that leads to nowhere. While it is true that his policies have created deep concern among immigrants, have separated families by deporting non-criminal aliens, and may have discouraged potential immigrants from coming to the United States, ultimately his policies will fail in "stopping" immigration.<sup>262</sup> Fear, like a wall, is not a long-term deterrent. Immigrants will keep coming as long as there are jobs for them, families that desire to be reunited, and a perception that America is a land of refuge and opportunity.<sup>263</sup> Just as the Berlin Wall was a testament to East Germany's failure to prevent its citizens from escaping from the "workers' paradise" of communism, so will Trump's wall (and his cruel immigration policies) stand as a symbol to the futility of fear-based tactics.<sup>264</sup> Team Trump was not expecting a victory in 2016, and

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<sup>259</sup> See *Polling Update: American Attitudes on Immigration Steady, but Showing More Partisan Divides*, IMMIGR. F. (Apr. 17, 2019), <https://immigrationforum.org/article/american-attitudes-on-immigration-steady-but-showing-more-partisan-divides/>, archived at <https://perma.cc/WBD6-E6N2>.

<sup>260</sup> David S. Rubenstein, *Immigration Blame*, 87 *FORD. L. REV.* 125 (2018).

<sup>261</sup> See Lalami, *supra* note 257.

<sup>262</sup> See Ed Kilgore, *The Flaw in Trump's Intimidation-Based Immigration Strategy*, N.Y. *MAG.* (July 15, 2019), <http://nymag.com/intelligencer/2019/07/the-flaw-in-trumps-intimidation-based-immigration-strategy.html>, archived at <https://perma.cc/B7SK-Q8R2>.

<sup>263</sup> Rafael Carranza, *Border Crossers, and the Wall that Won't Stop Them*, USA *TODAY* (Aug. 15, 2010), <https://www.usatoday.com/story/us-mexico-border-human-smuggling-crossing-methods/605530001/>, archived at <https://perma.cc/E3UP-7VA3>.

<sup>264</sup> See Michael D. Shear & Julie Hirschfeld Davis, *Shoot Migrants' Legs, Build Alligator Moat: Behind Trump's Ideas for Border*, N.Y. *TIMES* (Oct. 1, 2019), <https://www.nytimes.com/>

they were blindsided by the turn of events and had to swiftly put together a number of policies in order to (try to) fulfill campaign promises.<sup>265</sup> This is evident in the hasty, not-well-thought-out nature of Trump's policies, many of which ended up being successfully challenged in federal court.<sup>266</sup> Whether Trump cares about immigration, and whether he knows what he is doing, is irrelevant. His political base cares about immigration because they care about their perceived place in American society, and without his base there would not have been a victory in 2016, and there would have been no prospect for reelection in 2020.<sup>267</sup> So, Trump tries—in order to give the appearance of fulfilling campaign promises—yet, he is but a malignant version of Don Quixote battling the windmills. We cannot but hope that U.S. legal institutions are strong and resilient enough to stop, delay, and entangle the Trump administration's callous immigration policies until the political pendulum swings back to a less partisan status quo.<sup>268</sup>

## VII. CONCLUSION AND PROPOSED SOLUTIONS

Trump's border policies to purportedly protect national security are nothing less than a horrific scheme, the cruelest of which is his family separation policy, and in the end, its wrongs must be brought to light.<sup>269</sup> As critical race scholars have long recognized, one of the primary values of post-modern anti-subordination scholarship is its value in exposing a wrong and thereby creating debate and engagement on the subject.<sup>270</sup> However, the au-

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2019/10/01/us/politics/trump-border-wars.html, archived at <https://perma.cc/Z8KZ-T6UH>. See also Peter Beaumont, *Symbols of Failure: the Deeper Issue that Connects Border Walls*, *GUARDIAN* (Nov. 9, 2019) <https://www.theguardian.com/cities/2019/nov/09/symbols-of-failure-the-deeper-issue-that-connects-the-worlds-border-walls-kai-wiedenhofer>, archived at <https://perma.cc/6TBP-WNTU>.

<sup>265</sup> See Christianna Silva, *Trump Was Horrified When He Won the White House and Melania Cried, Book Claims*, *NEWSWEEK* (Jan. 3, 2018, 2:06 PM) <https://www.newsweek.com/mike-pence-donald-jr-and-melania-never-thought-trump-would-become-president-769701>, archived at <https://perma.cc/7GPG-65MM>.

<sup>266</sup> See James Hohmann, *The Daily 202: Immigration failure shows the ideologues are ascendant in the Trump White House*, *WASH. POST* (Feb. 16, 2018), <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2018/02/16/daily-202-immigration-failure-shows-the-ideologues-are-ascendant-in-the-trump-white-house/5a865bf830fb047655a067ad/>, archived at <https://perma.cc/2CBE-A4SM>.

<sup>267</sup> See Jeet Heer, *Donald Trump Is Not a Populist. He's the Voice of Aggrieved Privilege*, *NEW REPUBLIC* (Aug. 24, 2015), <https://newrepublic.com/article/122590/donald-trump-not-populist-hes-voice-aggrieved-privilege>, archived at <https://perma.cc/FV86-VVLF>.

<sup>268</sup> See Alan I. Abramowitz, et al., *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 *ELECTORAL STUD.* 12, 12–22 (2015).

<sup>269</sup> Jennifer Rubin, *New Report on Trump's Child Separation Policy Makes it Clear: Cruelty Was Always the Point*, *WASH. POST* (Oct. 8, 2020), <https://www.washingtonpost.com/opinions/2020/10/08/cruelty-was-always-point-lies-standard-procedure/>, archived at <https://perma.cc/VCW7-GG2X>.

<sup>270</sup> See, e.g., Janel George, *A Lesson in Critical Race Theory*, 46 *HUM. RTS. MAG.* (Jan. 12, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/), archived at <https://perma.cc/79VE-QQBZ> (“In September 2020, President Trump issued an executive order excluding from federal contracts any diversity and inclusion training interpreted as containing

thors here seek much more than the mere exposure of family separation policy and its consequences to terrorized immigrant communities. Education of an ill is valuable, but much more is needed. For that purpose, *Human Rights First* drafted a useful blueprint as a first step to combat xenophobia.<sup>271</sup> The *Human Rights First* report calls for: (1) “[a]cknowledg[ing] and condemn[ing] acts of bias-motivated violence whenever they occur”;<sup>272</sup> (2) “[e]nact[ing] hate crime laws, strengthen[ing] enforcement, and prosecut[ing] offenders”;<sup>273</sup> (3) “[m]onitor[ing] and [r]eporting on attacks”;<sup>274</sup> (4) “[r]each[ing] out to communities affected by violence to reduce fear, assist[ing] victims, and improv[ing] reporting of incidents”;<sup>275</sup> (5) “[e]nhanc[ing] operational guidance, strategies, and capacity”;<sup>276</sup> (6) “[r]eport[ing] xenophobic and other bias-violence incidents and provid[ing] assistance to victims”;<sup>277</sup> (7) “[r]ais[ing] cases and advocat[ing] with States for improved responses and proactive action”;<sup>278</sup> and (8) “[i]ncreas[ing] collaboration, develop[ing] global, regional, and local strategies, and defin[ing] leadership and other roles.”<sup>279</sup>

While *Human Rights First*’s multi-point plan provides an initial blueprint, the authors here suggest further steps be taken to effectuate a workable set of goals to curb, or at least limit, the deleterious and often devastating effects of xenophobia and the often-resulting violence against immigrant communities. The goal here is not merely to list steps to end Trump’s immoral policies. What such lists fail to acknowledge is how difficult it will be to achieve the desired outcomes. Those steps are not always concrete paths to be taken, but are at their core goals to be followed, much in the vein of Derick Bell:

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‘Divisive Concepts,’ ‘Race or Sex Stereotyping,’ and ‘Race or Sex Scapegoating.’ Among the content considered ‘divisive’ is Critical Race Theory (CRT). In response, the African American Policy Forum, led by legal scholar Kimberle’ Crenshaw, launched the #TruthBeTold campaign to expose the harm that the order poses.”); Cady Lang, *President Trump Has Attacked Critical Race Theory. Here’s What to Know About the Intellectual Movement*, TIME (Sept. 29, 2020), <https://time.com/5891138/critical-race-theory-explained/>, archived at <https://perma.cc/U8GV-D39C> (“Kimberle’ Crenshaw, one of the founding scholars of CRT and the executive director and co-founder of the African American Policy Forum, says that critical race theory ‘is a practice—a way of seeing how the fiction of race has been transformed into concrete racial inequities. It’s an approach to grappling with a history of white supremacy that rejects the belief that what’s in the past is in the past, and that the laws and systems that grow from that past are detached from it.”); David Stovall, *Critical Race Theory as Educational Protest, Power and Praxis*, 237 COUNTERPOINTS 197, 197 (2005) (critical race theory may be viewed as having two primary goals: “to identify White supremacy in education; and to develop praxis to counter its hegemony.”).

<sup>271</sup> See generally *Combating Xenophobic Violence, A Framework For Action*, HUM. RTS. FIRST (Dec. 4, 2011), <https://www.humanrightsfirst.org/resource/combating-xenophobic-violence-framework-action>, archived at <https://perma.cc/Y575-KB77>.

<sup>272</sup> *Id.* at 2.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 3.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

It is, though, not the goal of [Critical Race Theory], to provide a social formula that would solve either all or any of the racial issues that beset the country. Rather, its goal is to review those issues in all and their political and economic dimensions, and from that vantage point enable lawyers and lay people to determine where they might go from here. The goal for us, as it was for all those back to slavery era who labored and sacrificed for freedom, was not to guarantee an end to racism, but to work forcefully toward that end.<sup>280</sup>

As Bell has called upon, first and foremost, this scholarship must be a contribution to intellectual discussions concerning hate in American society.<sup>281</sup> But such discussions must not be limited to scholarly debates amongst intellectuals in general, or legal academics, in particular. This article calls for, and ideally provides a means for further engagement by academics and society as a whole. This first goal, beyond merely identifying avenues for reform, is to promote political activism and community education to effect grassroots and eventually systematic changes to mainstream structures and institutions, such as the media, that have allowed this vile policy to go largely unchecked.<sup>282</sup>

But the above proposals for change are still not enough. President Trump and his agents creating and implementing the human rights violations set forth in great detail herein must be held to account for their wrongs. Those responsible for these wrongs must face international law judgement.<sup>283</sup> International law may provide for such a vehicle.

The authors here believe the International Criminal Court can and should exercise jurisdiction over crimes against humanity pertaining to family separation by utilizing the legal framework of the Rome Statute and adapting it to this context.<sup>284</sup> As one writer recently persuasively observed, “domestic law is not the only legal method to fight the Trump administration’s 2018 policy.”<sup>285</sup> In fact, world leaders, including former British Prime Minister Theresa May, Canadian Prime Minister Justin Trudeau, and Pope Francis, were quick to publicly denounce family separation.<sup>286</sup> Donald Trump and his agents should be subject to international judicial proceedings for implementing family separation. Specifically, Trump should be tried before the International Criminal Court (ICC)—a permanent intergovernmental or-

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<sup>280</sup> See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 1, 155 (2d ed. 1980).

<sup>281</sup> See *id.*

<sup>282</sup> *Id.*

<sup>283</sup> See generally Reilly Frye, *Family Separation Under the Trump Administration: Applying an International Criminal Law Framework*, 110 J. CRIM. L. & CRIMINOLOGY 349 (2020).

<sup>284</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (July 17, 1998).

<sup>285</sup> See Frye, *supra* note 283, at 352.

<sup>286</sup> See Fionnuala Ní Aoláin, *Global Responses to President Trump’s Family Separation Via ‘Zero-Tolerance’ Detention Policy*, JUST SEC. (June 30, 2018), <https://www.just-security.org/58783/global-responses-president-trumps-family-separation-zero-tolerance-detention-policy/>, archived at <https://perma.cc/Z6NA-5HPQ>.

ganization and autonomous international tribunal that prosecutes individuals for atrocity crimes.<sup>287</sup> Deportation can be a type of crime that is prosecutable by the ICC.<sup>288</sup> The ICC, however, has many procedural limitations, not the least of which is that it only prosecutes individuals from a signatory state for crimes against humanity.<sup>289</sup> While the U.S. is not a signatory to the Rome Treaty, and as such, is not a state party, a recent ICC decision could permit the court to exercise jurisdiction over the alleged deportation of the Rohingya people, effectively changing the ICC's jurisdiction limitations.<sup>290</sup> The fact that Myanmar was not a signatory to the Rome Treaty did not prohibit the court from exercising jurisdiction.<sup>291</sup> As Reilly Frye concluded:

This case was monumental in international law because it ruled that if the crime against humanity of deportation occurs in one country that *is not* a State Party to the Rome Statute, but the crime's effects are felt in a country that *is* member to the Rome Statute, the ICC has jurisdiction over the alleged perpetrators of the crime—even in a country that is not a State Party of the Rome Statute.<sup>292</sup>

As suggested previously, it is highly unlikely the U.S. would ever do so. Nevertheless, it would be a value to learn of the ICC's prosecution of Donald Trump and the Trump administration's officials, even if the trial is had in absentia, for implementing the family separation policy.

So, what is the larger context of and much needed reaction to Trump's hate-based attacks on migrant children? Much like Professor Derrick Bell called upon outsiders to confront systematic wrongs,<sup>293</sup> Trump's fallacies must be confronted. First, his wrongs must be exposed in light of what this country and its people should be about. Second, all must be exposed to the realities that Trump's policies are against the best interest of the United States of America. Immigrants, and their children, have not only been good to America; they *are* America. We are, have always been, and will continue to be a nation of immigrants for decades to come. How many should come in, which people should come in, and how should they come in, are questions that we have debated for the past couple of centuries. Yet, most Americans agree on the merits of immigration.<sup>294</sup> Though the 2020 presidential

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<sup>287</sup> See Frye, *supra* note 283.

<sup>288</sup> *Id.* at 376–77.

<sup>289</sup> *Id.* at 354–55.

<sup>290</sup> See Toby Sterling, *International Criminal Court Says it has Jurisdiction over Alleged Crimes against Rohingya*, REUTERS (Sept. 6, 2018), <https://www.reuters.com/article/us-myanmar-rohingya-icc/international-criminal-court-says-it-has-jurisdiction-over-alleged-crimes-against-rohingya-idUSKCN1LM23H>, archived at <https://perma.cc/32WX-FLG6>.

<sup>291</sup> *Id.*

<sup>292</sup> Frye, *supra* note 283, at 356.

<sup>293</sup> See BELL, *supra* note 280.

<sup>294</sup> See Greg Sargent, *Americans Are Growing More Accepting of Immigrants. Take Note, Democrats*, WASH. POST (Aug. 20, 2019, 2:04 PM), <https://www.washingtonpost.com/opinions/2019/08/20/americans-are-growing-more-accepting-immigrants-take-note-democrats/>, archived at <https://perma.cc/N5F9-SEDD>.

election was close—perhaps too close for supporters of an inclusive country—Trump nonetheless represents a hard-line minority that ostensibly wants to stop most immigration into the United States.<sup>295</sup> Moreover, immigrants (in general) represent no national security threat to the United States.<sup>296</sup> Quite the opposite, our immigration and refugee policies help defuse cultural, political, and economic tensions in other countries—a peace dividend of sorts.

In terms of steps that can be taken, Trump's immigration policy is fundamentally undemocratic. It routinely violates democratic norms, laws, and established procedures, such as due process, non-discrimination, and even basic human rights. It is more akin to the hardline measures of authoritarian regimes than to the welcoming embrace of other democracies. Further, Trump's fear-based immigration policy is un-American. It is not within our national character to reject immigrants out of hand, for most of us have all been immigrants at some point. Though it is true that in the past U.S. immigration policy favored some racial/ethnic groups over others (primarily excluding racialized Others), it did not largely reject immigrants. In this vein, Trump is ideologically closer to the Know Nothings of the nineteenth century than to the mainstream of the Republican Party of the twentieth century. Compare Trump to presidents Ronald Reagan, George H. W. Bush, and George W. Bush, each of whom championed immigrant rights,<sup>297</sup> while Trump champions hate and fear. Finally, Trump's family separation policy is beneath all of us and any society. His shame must come to an end, and his policies must be halted. In the end, indefensible policies, such as the family separation policy, which too few scholars have addressed, must be universally condemned and reparations must be made.

Instead of our "Know Nothing" dismissive or cavalier attitudes when learning of the wrongs of family separation, we ask every human being to appreciate the pain that so many are feeling at this very moment; to have your hearts drop at the mere possibility of our depictions being true, or if need be, at the prospect of you losing your children—if you are a parent. As a result of Trump's policy, the United States has become nothing short of a parlor of terror for too many parents begging for political protection from

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<sup>295</sup> Ironically, Trump is connected to immigrants by ties of blood (grandparents) and marriage (two of his wives). See Debanjali Bose, *Meet the Trumps: How America's First Family Arrived in New York on a Steamship From Germany in 1885 and Built a Sprawling Empire in 4 Generations*, BUS. INSIDER (Jan. 7, 2021), <https://www.businessinsider.com/trump-family-history-from-immigrants-to-americas-first-family-2020-6>, archived at <https://perma.cc/P9WX-QLCP>.

<sup>296</sup> See David Kampf, *Keeping Refugees Out Makes the United States Less Safe*, FOREIGN POL'Y (Sept. 13, 2019), <https://foreignpolicy.com/2019/09/13/keeping-refugees-out-makes-the-united-states-less-safe/>, archived at <https://perma.cc/7P9B-PWD7>.

<sup>297</sup> See Ed Mazza, *Reagan Slams Border Fence, Bush Defends Undocumented 'Good People' In 1980 Debate*, HUFFINGTON POST (May 22, 2019), [https://www.huffpost.com/entry/reagan-bush-immigration-debate\\_n\\_5ce4c8d4e4b0d513447c51e7](https://www.huffpost.com/entry/reagan-bush-immigration-debate_n_5ce4c8d4e4b0d513447c51e7), archived at <https://perma.cc/77VN-C62T>; *President Bush's Plan for Comprehensive Immigration Reform*, WHITE HOUSE ARCHIVES, <https://georgewbush-whitehouse.archives.gov/stateoftheunion/2007/initiatives/immigration.html>, archived at <https://perma.cc/V4R6-5JFA> (last visited Jan. 22, 2021).

criminal and political persecution. We must come to terms with this all being true, and we must do something about it.

Trump's fear-based immigration policy is morally and legally wrong,<sup>298</sup> will not work in the long-term, and flies in the face of American traditions.<sup>299</sup> Yet, in the short term, it is wrecking hundreds of thousands of lives, dividing families, endangering lives (at home and abroad), and tarnishing the reputation of the United States as a welcoming nation and beacon of hope for good people all over the world.<sup>300</sup> Although Trump was defeated in the 2020 presidential election, we hope that we will continue to come together as a people, take on the actions mentioned above, and insist that we save these children. Our republic's legal guardrails must stop or steer Trump's most ill-conceived aspects of his national security policy so that they are not repeated again in the future; Congress must exercise its oversight authority with a firm hand; and ultimately, Americans must continue to reject the hateful policies of Trump and his allies at the polls again and again.<sup>301</sup>

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<sup>298</sup> Thompson, *supra* note 125.

<sup>299</sup> *Id.* ("In one, a converted Wal-Mart in McAllen, Texas, children are 'plac[ed] 20 or more in a concrete-floor cage and provid[ed] foil blankets, thin mattress pads, bottled water and food.' One report describes how a 16-year-old girl in custody was responsible for changing the diapers of an unrelated infant."). For statements from Republican legislators opposing family separation, see Melissa Nann Burke, *Where Michigan's Members of Congress Stand on Separating Children, Families at Border*, DETROIT NEWS (June 18, 2018), <https://www.detroitnews.com/story/news/local/michigan/2018/06/18/congress-border-separation-children/711064002/>, archived at <https://perma.cc/C7AP-W5WV>; see In The News, Congressman Denny Heck, *Where Your Lawmaker Stands on Family Separation at the Border* (June 19, 2018), <https://web.archive.org/web/20201021101805/https://dennyheck.house.gov/media-center/in-the-news/king-5>, archived at <https://perma.cc/GR5A-48V4>.

<sup>300</sup> Thompson, *supra* note 125 ("In the last six weeks, at least 2,000 children—100 under the age of four—have been separated from their parents and placed in detention centers. This separation can be abrupt: in one news report a Honduran woman revealed that her baby was taken away from her while she breast-fed. The conditions inside some facilities are grim.").

<sup>301</sup> #Novemberiscoming; #TheRomeTreaty.

