A LINEAGE OF FAMILY SEPARATION

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ABSTRACT

Family separation is a practice rooted in U.S. history. In order to comprehensively examine the most recent execution of separating children from their parents under the Trump Administration’s “zero tolerance” policy, one must follow and understand this history. That is what this Article does. Examining the separation histories of enslaved, Indigenous, and immigrant families, it offers critical context of a reoccurring practice that has had devastating effects largely on communities of color, and across generations. By contextualizing the separation of migrant families crossing the U.S.-Mexico border under zero tolerance, this Article identifies narratives from colonial times to the present that consistently rely on racism, xenophobia, and paternalism to justify a practice that otherwise is extreme in its inhumanity.

These justification narratives are juxtaposed with counterstories that resist and challenge the separation of families, including by humanizing those impacted and articulating the profound harm it causes to children, parents, and communities. These stories have been told through first-hand narratives, Congressional testimonies, research studies, media reports, and facts and allegations in lawsuits. Narratives describing the harm caused by separating families are a powerful element of putting the practices to an end. The historical record suggests that these narratives have typically gained potency in specific socio-political contexts that rendered them compelling enough to overcome the justifications for specific family separation policies.

Although these practices were brought to an end, systemic reform has been elusive. In the case of Indigenous family separation, legislation enacted to cease the practice failed to bring about substantial change, and has been diluted by persistent legal challenges. Historical family separation practices against enslaved and immigrant families have been replaced with systems that separate families for prolonged times or permanently. These include the present-day U.S. criminal legal and immigration systems, where the government separates children from their parents on a substantial scale as a collateral consequence of mass incarceration and widespread detention and

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deportation, with little to no scrutiny. The outrage that ended zero tolerance has not extended to these ongoing examples of family separation. In order to meaningfully address these practices, counterstories urging the valuation of family integrity must be aligned with a societal will to challenge systems that, through racialized justifications, continue to separate mostly marginalized children from their parents.

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INTRODUCTION

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

This Article is rooted in the belief that the articulation of shared narrative histories advances the pursuit of justice. Acknowledging shared histories, including narratives that justify unjust practices, has been a shortcoming in the United States particularly when it comes to racial inequality.2 Included in this oversight is the history of sanctioning and executing family separation.3 The U.S. government’s separation of families under the “zero tolerance” policy, which separated thousands of migrant families over approximately three months in 2018, drew national and international criticism.4 The sense of shock,5 however, belied the historical

5 See Mariela Olivares, The Rise of Zero Tolerance and the Demise of Family, 36 GA. ST. U. L. REV. 287, 291 (2020) (“Wringing their hands, our friends and neighbors wondered: how did we, as a country, arrive at a cultural and political reality in which the government openly and under the guise of law takes children away from capable, loving
There are examples of deliberate family separation throughout U.S. history, when the government or private actors intentionally separated children from their parents, caretakers, and communities. These actors’ motivations, while framed in terms of charitable benevolence, often included White nationalism and profit. The narratives justifying these practices created political, social, and legal conditions for family separation to be deemed acceptable. These justification narratives constitute what philosopher Hilde Lindemann calls “master narratives.” Such narratives include those that constitute “oppressive narrative formations,” with the purpose of “reinforce[ing] unjust distributions of social power by pretending to justify them.” The justification narratives accompanying the different family separation policies throughout U.S. history share certain themes, such as racial superiority of those executing the separations, and moral depravity of separated parents and, in some cases, of the children themselves.

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

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

In this context, the end of separating families under the Trump Administration’s zero tolerance policy happened quickly. Several factors coalesced to contribute to this outcome. Government officials were explicit about deliberately separating migrant families in order to deter migration from Central America. This drew condemnation at a time when there was a significant part of U.S. society that objected to the White nationalist agenda of a new Administration. The advocacy was impressively rapid, pursued multiple legal strategies, and was covered by largely sympathetic media outlets.

This history, both distant and recent, brings us to ongoing examples of family separation. The justifications of punishment and deterrence that fuel today’s U.S. immigration and criminal legal systems have rendered acceptable the continuation of family separation on a substantial scale. The families separated as a collateral consequence of mass incarceration and widespread detention and deportation largely represent the same communities that have been impacted by deliberate family separation practices. This makes the distinction between deliberate and collateral family separation suspect: generally, whether the separation is intentional or not does not alter the severe harm it inflicts upon children, parents, and

shared narrative used to justify the oppression of a social group.”); HILDE LINDEMANN NELSON, DAMAGED IDENTITIES, NARRATIVE REPAIR 150 (2001) (“Counterstories, which root out the master narratives in the tissue of stories that constitute an oppressive identity and replace them with stories that depict the person as morally worthy, supply the necessary means of resistance.”).

communities. As demonstrated by the historical examples of when deliberate family separation policies came to an end, narratives from those harmed played an important role in impacting societal understanding and appealing to its values. These counternarratives, however, must align with a movement for social change to challenge the justifications for the continued separation of mostly marginalized children from their parents.

I. AN AMERICAN HISTORY OF SEPARATING FAMILIES

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

In a time when telecommunications were primitive and blacks lacked freedom of movement, the parting of black families was a kind of murder. Here we find the roots of American wealth and democracy—in the for-profit destruction of the most important asset available to any people, the family. The destruction was not incidental to America’s rise; it facilitated that rise.\(^\text{13}\)

Soon after the Civil War formally ended slavery,\(^\text{14}\) the U.S. government began executing Indigenous family separation.\(^\text{15}\) First by boarding school placements and later through adoptions, the separation of Indigenous families reflected the U.S. government’s ongoing efforts to eradicate Indigenous people and their culture.\(^\text{16}\) The preservation of a particular notion of the nation also drove the so-called “orphan train” movement beginning in the mid-nineteenth century, when child welfare workers removed children often based on “‘cultural inferiority’…whenever

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\(^\text{14}\) There are different historical narratives of when slavery in the United States began and when it ended. See NIKOLE HANNAH-JONES, THE 1619 PROJECT (2019); Ariela Gross, *When is the Time of Slavery?*, The History of Slavery in Contemporary Legal & Political Argument, 96 CALIF. L. REV. 283 (2008).

\(^\text{15}\) One can certainly characterize the genocide of Indigenous people as the first iteration of family separation, but for the purposes of this Article, Indigenous family separation is detailed when the U.S. government began its deliberate policy of removing Indigenous children from their parents and tribes.

\(^\text{16}\) Roxanne Dunbar-Ortiz, *Yes, Native Americans Were the Victims of Genocide* (May 12, 2016), http://historynewsnetwork.org/article/162804.
families failed to resemble the ‘American’ values of temperance, wealth, and whiteness.”17 Most children removed from east coast cities were not orphans, but instead were from impoverished, immigrant families. A disregard for family integrity based on racist, xenophobic, and/or economic imperatives was a common thread throughout these deliberate family separation histories.

A. Separating Enslaved Families

The inception of slavery was, inherently, family separation—parents and children separated in their home country in the African continent through kidnapping or sale, and forcibly brought over as slaves to the American continent.18 Rooted in “a deeply held belief in white racial superiority,”19 slavery was not merely about labor but constituted a comprehensive system of social control. The consistent threat and frequently executed practice of family separation was a central part of this system of control: An article in an 1836 issue of the Anti-Slavery Record, an abolitionist publication, “denounced slavery as ‘nothing but a system of tearing asunder family ties.’”20 Indeed, no law at the time limited an enslaver’s ability to separate families.21

Enslaved persons stood a thirty percent chance of being sold by their enslaver.22 Twenty-five percent of interstate trades destroyed a first marriage, and half of them destroyed a nuclear family.23 The well-known

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20 D.J.C.V. Amicus Brief, supra note 18, at 8. See also Herman N. Johnson Jr., From Status to Agency: Abolishing the “Very Spirit of Slavery” 7 COLUM. J. RACE & L. 245 (2017) (explaining the different aspects of slavery that freed slaves found barbaric and oppressive, including family separation). Finding that court sales disrupted more families than non-court or commercial sales, Professor Russell demonstrates that “[t]he operation of the Southern legal system…clearly expressed Southern disregard for slave families.” Thomas D. Russell, Articles Sell Best Singly: The Disruption of Slave Families at Court Sales, 1996 UTAH L. REV. 1161, 1166 (1996).
21 Andrew T. Fede, Gender in the Law of Slavery in the Antebellum United States, 18 CARDOZO L. REV. 411, 418 (1996) (“[n]o common law state limited the owner’s right to sell slave children away from their parents”).
22 Coates, supra note 13.
23 Id. See also Jill Elaine Hasday, Federalism and the Family Reconstructed, 45 UCLA L. REV. 1297, 1330 (1998) (…the best evidence suggests that approximately one in six
case of *Dred Scott v. Sandford*\(^{24}\) also implicated family separation, as it involved an enslaved father stolen from his wife and two daughters. The U.S. Supreme Court sanctioned their separation via its now-infamous holding that enslaved persons were property and not citizens.\(^{25}\)

Before the enactment of the Thirteenth Amendment, enslaved persons were denied the legal rights of personhood.\(^{26}\) A treatise on slave law expressly rendered them innately incapable of forming family lineage, stating, “[enslaved persons’] issue, though emancipated, have no inheritable blood.”\(^{27}\) In essence, then, there was no family to separate, which justified enslavers commonly separating enslaved children and their parents.\(^{28}\) Black mothers were *de facto* surrogates for the enslaver, as the children born to enslaved women legally belonged to another person.\(^{29}\) The experiences of enslaved fathers essentially have been erased, as there are few accounts of family separation told through a male perspective, and enslaved children often did not have memories of their fathers to share.\(^{30}\) Even Emancipation did not guarantee family unity, as pro-slavers regularly kidnapped legally free adults and children to re-sell them into slavery.\(^{31}\)

\(^{24}\) 60 U.S. 393 (1857).


\(^{26}\) Fede, supra note 21, at 413; Herman N. Johnson, Jr., *From Status to Agency: Abolishing the “Very Spirit of Slavery,”* 7 COLUM. J. RACE & L. 245, 261 (2017) (“Former slaves defined freedom as family cohesion, bodily integrity, and educational opportunity…the enjoyment of rights shared by all human beings.”).

\(^{27}\) THOMAS R. R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA*, 245 (1858).


\(^{30}\) See WILLIAMS, supra note 29, at 33.

\(^{31}\) Anita L. Allen, supra note 29, at 142-143 (1990) (conveying the story of Polly Crocket, who kidnappers took in Illinois and sold into slavery in Missouri. She later was able to successfully sue for her freedom and regain possession of her daughters, who had been sold to other White families.). See also Fede, supra note 26, at 414; Jonathan Daniel Wells, *The So-Called “Kidnapping Club” Featured Cops Selling Free Black New Yorkers Into Slavery*, SMITHSONIANMAG.COM (Oct. 14, 2020); CAROL WILSON, *FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA*, 1780-1865 (1994).
1. The Master Narratives of Enslaved Families, as Told by their Legal Status

The brutality of slavery in its conversion of people’s humanity into property\(^\text{32}\) meant that the construction of narratives to justify family separation were intertwined with the narrative endeavors to uphold the system of slavery generally.\(^\text{33}\) As humans with a legal status of property, enslaved families were routinely broken up by enslavers for transactional reasons, as a way to settle debts or resolve disputes over estates.\(^\text{34}\) Enslaved children were also branded as gifts or inheritances for enslavers’ children,\(^\text{35}\) so that the death of enslavers often caused slave family separation.\(^\text{36}\)

Even before the *Dred Scott* decision, state courts upheld the separation of slave families based on the notion that they were property.\(^\text{37}\) In


\(^\text{32}\) The term “chattel slavery” emphasizes how American society, including systems of power, considered human beings as property, to distinguish from other forms of forced labor, peonage, or compelled service. See William M. Carter Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007). This Article will use the term “slavery” to refer to chattel slavery. See Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1489 (2012) (describing how abolitionists in 19th century America distinguished between wage and chattel slavery, narrowing the definition of “slavery” in the common vernacular to only refer to the forced enslavement of Black persons as property).

\(^\text{33}\) The justification went as far as characterizing African Americans as less capable of emotional pain than White people, and therefore family separation was less harmful. See Williams, *supra* note 5 at 98.


\(^\text{35}\) See Federal Writer’s Project, *Slave Narrative Project: Vol XIV, SOUTH CAROLINA* 141 (1941) (narrative of a woman who as a young enslaved girl who was given as a gift to her enslaver’s daughter); see also Vanessa M. Holden, *Slavery and America’s Legacy of Family Separation*, BLACK PERSPECTIVES (Jul. 25, 2018), https://www.aaihs.org/slavery-and-americas-legacy-of-family-separation/.

\(^\text{36}\) Teri A. McMurtry-Chubb, “Burn This Bitch Down!”: Mike Brown, Emmett Till, and the Gendered Politics of Black Parenthood, 17 NEV. L.J. 619, 624 (2017) (“Slave families could be separated at any time, through death, sale, or otherwise by the will of their masters...”). See also Williams, *supra* note 29, at 30-31 (citing John Brown, *Slave Life in Georgia: A Narrative of the Life, Sufferings, and Escape of John Brown, a Fugitive Slave* (Beehive Press, 1851) (1854)). Adolescents were desirable and viewed as more profitable because of their strength and youth. WILLIAMS, *supra* note 19, at 25.

Willis v. Willis’ Administrators, two enslavers exchanged ownership of a young boy and a young girl. Notwithstanding this agreement, the slave owners had allowed the children to stay at their respective homes with their own mothers. However, when one of the enslavers passed away, his estate demanded the return of the enslaved boy. The court found that this child was legally the possession of the enslavers’ estate.

Another legal construct justifying slave family separation was the proposition that enslaved persons were not able to marry. Three states did acknowledge one kind of relationship within a slave family—“that of mothers to very young children.” Yet based on the premise that slaves were considered to be property, none recognized the right of enslaved persons to marry. This inability of enslaved parents to marry meant that their children were illegitimate, which created legal complications for those children post-Emancipation.
Compounding the overall brutal dehumanization caused by the slave system and its laws, relationships between enslaved persons were framed as causal and thus of relatively limited importance to the enslaved persons themselves. James Henry Hammond, a well-known slavery apologist, in response to the common practice of enslaved family separation, wrote:

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

Family separation was also justified as a means to an end—a way to control enslaved persons and legitimize the master/slave relationship. In Nowell v. O’Hara, a South Carolina jury found that the sale of an enslaved man was justified because “the owners of slaves frequently send them off from amongst their kindred and associates as punishment, and it is frequently resorted to, as the means of separating a vicious negro from amongst others to be influenced and corrupted by his example.”

This framing of enslaved persons as violent and morally depraved offered yet another justification for keeping families apart.

See also McMurtry-Chubb, supra note 36, at 624 (explaining how many retroactive slave marriage laws required cohabitation, which was inconsistent with the lack of control slaves had over their lives and locations).

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

Adam Serwer, Trumpism, Realized: To Preserve the Political and Cultural Preeminence of White America, the Administration Has Settled on a Policy of Systemic Child Abuse, THE ATLANTIC (June 20, 2018), https://www.theatlantic.com/ideas/archive/2018/06/child-separation/563252/.

See Joyce E. McConnell, Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment, 4 YALE J. OF LAW & FEM. 207, 220 (1992). See also D.J.C.V. Amicus Brief, supra note 18, at 6 (“Eliminating family ties was essential to maintaining the social isolation needed to perpetuate the institution of slavery.”).

Nowell v. O’Hara, 19 S.C.L. 150, 151-52 (Ct. App. of Law and Equity of S.C. 1833). In a cruel irony, the terror built into the slave system sometimes kept families together: One interviewee [Mary Ella Grandberry] recounted that her father as an enslaved person desired to escape to freedom, but did not leave out of fear of the violent repercussions she and her siblings would likely face if he left. Id. at 161.
2. First-Hand Narratives of Enslaved Family Separation as Counterstories

In the decades leading to the abolition of the U.S. slave system, former slaves began publishing narratives detailing the brutal impact of family separation. The autobiography *Narrative of the Life of Frederick Douglass, An American Slave* opens with Douglass’s enslaver separating him from his mother soon after Douglass’ birth, as an explanation for his unemotional response to the news of her death years later.\(^4^9\) In his second autobiography, Douglass wrote: “My poor mother, like many other slave-women had many children, but NO FAMILY!”\(^5^0\)

The use of stories detailing the cruelty of slave family separation was a central rhetorical strategy of abolitionists.\(^5^1\) In addition to Douglass, other well-known fugitive slave authors who offered first-hand narratives of family separation include Sojourner Truth and Harriett Jacobs. In *The Narrative of Sojourner Truth*, Truth wrote of being sold with a flock of sheep at an auction at the age of nine, separating her from her family,\(^5^2\) and thereafter “began to beg God most earnestly to send her father to her.”\(^5^3\) She also details how her own five-year-old son was captured and sold into slavery, and how her ultimately successful legal fight to get him back involved enduring harassment and mockery.\(^5^4\)

Harriet Jacobs, in *Incidents in the Life of a Slave Girl, Written by Herself*, describes how her life took a considerable turn for the worse when her enslaver, who bequeathed Jacobs to her niece, died, causing Jacobs to be sent to the niece’s family.\(^5^5\) Jacobs also writes about later being separated from her own children for years while she was in hiding, waiting to escape to the North. Written almost a decade earlier by White abolitionist activist Harriet Beecher Stowe, family separation was also a prominent theme in the

\(^{4^9}\) *Narrative of the Life of Frederick Douglass, An American Slave* (1845).

\(^{5^0}\) *Frederick Douglass, My Bondage and My Freedom* (1855) (emphasis in original).

\(^{5^1}\) See Serwer, *supra* note 46 (“In the antebellum United States, abolitionists seized on the separation of families by slave traders to indict the institution of slavery itself.”).

\(^{5^2}\) *Sojourner Truth, The Narrative of Sojourner Truth, a Northern Slave, Emancipated from Bodily Servitude by the State of New York in 1828* 18-19 (1850).

\(^{5^3}\) *Id.* at 18.

\(^{5^4}\) *Id.* at 34-35. Through a series of events, Peter was sold out of New York into a southern state, which made the sale illegal under New York law. *Id.* at 32. Because of this, Truth was able to seek retribution from the court, and she eventually succeeded in obtaining custody of him. *Id.* at 39.

\(^{5^5}\) *Harrriet Jacobs, Incidents in the Life of a Slave Girl, Written by Herself* (1861).
influential novel, *Uncle Tom’s Cabin*.56

The documentation of family separation narratives continued after the official end of slavery, and continues today. Formerly enslaved persons, like Kate Drumgoold, published autobiographies chronicling narratives of family separation.57 “Slave Narratives,” a program of the Federal Writer’s Project launched during the Great Depression, collected over 2,300 oral histories of African Americans enslaved as children, many including stories of family separation.58 More recently, Professor Heather Andrea Williams, using slave narratives, interviews, and other documentation, offers details of family separation during slavery in a poignantly humanizing manner, and chronicles often unsuccessful searches for lost family members in the post-Civil War era.59

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The forcible separation of slave families was justified through narratives dehumanizing enslaved children and parents who, consistent with then-existing laws, were subjected to White superiority and social control.60 Enslaved persons were not even able to formally establish families, lacking the ability to legally marry and characterized as failing to have the capacity to create and prioritize family ties. These racist justifications, along with the economic incentive to separate slave families, created a climate in which enslaved persons were denied the right to family integrity for centuries.

First-hand counternarratives of enslaved family separation were important tools in advocating for the end of the U.S. slave system.61 These narratives gained potency in the three decades leading up to the formal end of slavery in the United States. The timing aligned with the forging of

56 HARRIET BEECHER STOWE, UNCLE TOM’S CABIN (1852).
57 KATE DRUMGOOLD, A SLAVE GIRL’S STORY 7 (1898) (describing when her mother was sold by their enslaver to another family). A list of autobiographies of enslaved and formerly enslaved persons was compiled by “North American Slave Narratives,” DOCUMENTING THE AMERICAN SOUTH, https://docsouth.unc.edu/neh/chronautobio.html.
58 Federal Writers Project, supra note 35.
59 See, e.g., WILLIAMS, supra note 29. After emancipation, family reunification was both easier and harder due to the increased freedom of movement that most formerly enslaved people experienced. While some were able to reunite with their families, others were unable to locate long-lost family members as individuals migrated to other parts of the United States. Id. at 141-42.
61 See supra note 51.
alliances between slaves and abolitionists allies. It was also a time when slavery was being abolished by most countries around the world. Today, the documentation of the profound harm of family separation practices endemic to the slave system provides critical historical accounting challenging subsequent policies in the U.S. that both deliberately and as a collateral consequence separated, and continue to separate, families.

B. Separating Indigenous Families

Starting in the 1880s, soon after the official end of slavery in the United States, the federal government began executing the deliberate separation of thousands of Indigenous children from their families and communities. The timing arguably was not coincidental, as government’s targeting of the Indigenous community could be seen as a reaction to the Civil War:

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

In an effort to force this notion of national unity, the U.S. government, in separating Indigenous children from their communities, shifted from direct to structural violence against Native Americans. For most of this period,

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62 Patrick Rael, The United States was Late to End Slavery, GEO. WASH. U. HISTORY NEWS NETWORK (Dec. 8, 2015), https://historynewsnetwork.org/article/161375 ("In the U.S., overcoming the formidable obstacles to abolition required something more — a remarkable alliance between slaves and their abolitionists allies. The process began in earnest in the early 1830s, when a new breed of northern reformers began championing the cause of the slave, calling for the immediate and uncompensated end of slavery.").

63 Id. ("Slavery...ended late in the U.S. The Spanish colonies of mainland South America destroyed slavery as they became independent (1808-1833), and major European powers ended slavery between 1834 and 1848. Only Cuba (1880) and Brazil (1888) followed the U.S.").


the policy relied on the brutal and now infamous boarding school system. The objective of the boarding school system was to “erase and replace” Indigenous culture.67 Children were taught to replace their inferior, “savage” culture with “civilized,” i.e., White, Christian ways.68

While assimilation was the explicit goal, the boarding school system was one fueled by economic exploitation, as “commercialization and profit was a byproduct of these boarding school efforts; the local communities often benefitted from cheap or free labor as a result of process.”69 Severe mistreatment, including rampant sexual abuse, were other distinct, disturbing pathologies of the boarding school system.70 Indigenous children were

nineteenth century. During this time, American colonialism transformed from direct violence to structural violence as the national government established the reservation system, forced Native children into boarding schools, and attempted to break up tribal sovereignty under the auspices of paternalism.


69 Id. at 666 (“For many Native people, the boarding school era is synonymous with sexual abuse and sexual exploitation on a grand scale.”). See also Deer, supra note 68, at 10 (“Given the high rates of physical and sexual abuse that occurred during the boarding school era, we might even consider that Western gender hierarchies were literally beaten into

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physically abused by staff for speaking their language, as punishment for violating the boarding school system’s English-only policy. They were humiliated and verbally abused by, for example, being called a “dirty Indian.” Many children died in boarding schools, and “although some were returned to their families at death, others were buried on site, often in unmarked graves.”

Starting in the late 1950s, as a cost-effective alternative to the boarding school system, the government began promoting and facilitating the adoption of Indigenous children. A majority of the children were placed with White families. These adoptions were facilitated by the U.S. government through the BIA, and in partnership with private entities such as the Child Welfare League of America (CWLA), the oldest child welfare organization in the United States. State courts and child welfare systems likewise placed Indigenous children in non-Indigenous homes.

According to the Association of American Indian Affairs (AAIA), which conducted a survey of states with large Indigenous American populations in 1969 and again in 1974, approximately 25 to 35 percent of all

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71 Pember, supra note 67.
72 Lindsay Glauner, The Need for Accountability and Reparation: 1830-1976 The United States Government’s Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans, 51 DEPAUL L. REV. 911, 941 (quoting the reasoning provided in 1887 by then-Commissioner of Indian Affairs: “This language [English], which is good enough for a white man and a black man, ought to be good enough for the red man. It is also believed that teaching an Indian youth in his own barbarous dialect is a positive detriment to him.”).
73 Pember, supra note 67.
74 Rebecca Tsosie, The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship, 63 UCLA L. REV. 1692, 1715 (2016). See also Pember, supra note 67 (“Food and medical attention were often scarce; many students died. Their parents sometimes learned of their death only after they had been buried in school cemeteries, some of which were unmarked.”).
76 Arnold R. Silverman, Outcomes of Transracial Adoption 104, 107, THE FUTURE OF CHILDREN (Spring 1993) (“In 1967 a national survey disclosed that, of 696 Native American children who had been adopted, 84% (584) had been adopted by white families.”).
77 In 1968, the CWLA placed hundreds of Indigenous children within non-Indigenous adoptive families through the Adoption Resource Exchange of North America (ARENA), a program for “hard-to-place” or “special needs” children.
78 Id.
Indigenous American children were separated from their families. The magnitude of the practice has had long-standing effects. Children of those “educated” in boarding schools have witnessed their parents suffer from severe mental illness decades later, reliving and trying to make sense of the cruelty they endured. The intergenerational trauma of Indigenous family separation effectively has meant a continuation of fractured families. Bethany Berger has observed how the separations wrought by boarding schools, foster care placement, and adoption have “disrupt[ed] familial bonds and undermine[d] parenting skills for the current generation.”

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

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

The sense that America needed protection from harmful and uncivilized Indigenous communities spiked post-World War II, an era generally fraught with rampant xenophobia. During this time, the U.S.

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80 See Pember, supra note 67 (describing how her mother "died while surviving civilization.").

81 Berger, supra note 68, at 621.


83 Graham & Fort, supra note 82.

84 Little, supra note 82 (quoting Pratt: "Transfer the savage-born infant to the surrounding of civilization, and he will grow to possess a civilized language and habit.").

85 Id.

86 Ruth Lawlor, Second World War’s Legacy of Racism, YALEGLOBAL ONLINE (May 2, 2019), https://yaleglobal.yale.edu/content/second-world-wars-legacy-racism.
government’s Indigenous family separation policy shifted from boarding schools to placements through adoptions and foster care. As historian Margaret Jacobs has observed, the justification of assimilation persisted: “[P]olicymakers continued to identify Indian family life—and its apparent divergence from white American middle-class gender and sexual norms—as an impediment to the resolution of the persistent Indian problem.”87 In this narrative context, removing Indigenous children from their families and communities was acceptable government policy. Similar to slave family separation, separating Indigenous families was deemed warranted because of narratives characterizing them as inferior and morally depraved.

When the justification shifted to the motives of the actors, i.e., the government and private representatives separating Indigenous children from their families, the narrative became one of saving and protecting. Arnold Lyslo, who directed the BIA’s Indian Adoption Project (IAP) from 1958 to 1967, asserted that racial discrimination deprived Indigenous children opportunities for adoption, using the term the “forgotten child.”88 President Lyndon B. Johnson in a speech to Congress in 1968 also referred to “forgotten Americans” to describe Indigenous children.89 The narrative was one of saving these children from a life that was “the antithesis of a modern-day ‘civilized’ society.”90

Embedded in the notion that the separations were for Indigenous children’s own good was a vilification of their Indigenous caretakers—91—a manner of invoking the best interest of the child standard to critique and disempower marginalized communities.92 Those promoting Indigenous children’s removal alleged that there was a rise in unmarried Indigenous mothers with unwanted children.93 To further fetishize this supposed

87 Jacobs, supra note 64, at 140.
88 Id.
89 Id., at 143; see also Lyndon B. Johnson: Indians are ‘Forgotten Americans, LBJ PRESIDENTIAL LIBRARY (Sept. 6, 2016), http://www.lbjlibrary.org/press/lbj-in-the-news/lyndon-b-johnson-indians-are-forgotten-americans.
90 Graham, supra note 68.
91 “But the Indian child has remained the ‘forgotten child,’ left unloved and uncared for on the reservation, without a home or parents he can call his own.” Jacobs, supra note 64, at 143 n.32 (citing Indian Adoption Project, April 1960, 1, box 17, folder 3, CWLA Papers).
93 Jacobs, supra note 64, at 137.
phenomenon, the CWLA launched a research project designed to learn more about “any significant cultural factors of the Indian unmarried mothers [compared] with the non-Indian unmarried mothers [and] how they plan for themselves and their children.” As child welfare workers visited tribes to promote adoption “as an alternative to a life in poverty for their children,” caretakers who turned down this option down would be criticized for not having the children’s best interest in mind.

The narrative of saving forgotten Indigenous children translated directly into the IAP’s objective of “stimulat[ing] the adoption of homeless American Indian children by families in non-Indian communities” on the grounds that opportunities for local, in-community adoption were “inadequate.” Through this framing of the mission, the harm-doer was cast not just as Indigenous parents and other caretakers, but the entire Indigenous community. It was a narrative that pushed interstate adoption of Indian children to “bypass the regional prejudices that prevent many homeless [Indigenous] children from being adopted, since prejudice is often a local matter.” It also encouraged, not surprisingly, placements of Indigenous children into White families’ homes.

Related to White family placements, another justification narrative from the perspective of the actor orchestrating Indigenous family separation was the actualization of a “color-blind society.” This again was framed as being in the children’s best interest, when in reality pushing for the adoption of Indigenous children outside their communities “served the larger policy aims of the period, which sought to terminate the unique tribal status of many Indian communities, to undermine Indian claims to communal land and sovereignty, and to detribalize thousands of Indian people.”

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94 Thibeault & Spencer, supra note 75, at 812.
96 Thibeault & Spencer, supra note 75, at 807, 808. The second objective of the IAP was to research and compare the adoption of indigenous American children with the adoption of children from other minority races. Id.
97 Jacobs, supra note 64, at 140. The IAP placed Indigenous children primarily from Western and Great Lakes states in adoptive homes that were predominantly located in Northeastern, Mid-Atlantic, and Midwestern states. Id.
98 Id. at 143 (The Indian Adoption Project supporters and employees used the same narrative of “the forgotten children” to encourage white families to adopt indigenous American children.).
99 Id. at 139. “IAP advocates implicitly conveyed that racial equality for Indians would eventuate through rescuing individual Indian children through individual acts of color-blind goodwill on the part of white, middle-class Americans.” Id. at 143.
100 Id. at 139.
All the while, missing were the experiences and points of view of Indigenous children’s parents and caretakers. One stark example was in the first systematic study of placement made by the BIA’s Indian Adoption Project (IAP) conducted by David Fanshel. Published in 1972, *Far from the Reservation* was the product of a longitudinal study to examine outcomes resulting from these adoptions.¹⁰¹ Fanshel followed the White families that adopted through the IAP¹⁰² by interviewing the adoptive parents, but not their adopted Indigenous children.¹⁰³ He also did not interview the Indigenous parents or caretakers from whom the children were taken.¹⁰⁴

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

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

The AAIA studies documenting the pervasiveness of Indigenous family separation¹⁰⁵ were conducted at the request of a tribe concerned about the extent to which children were being removed from Indigenous communities.¹⁰⁶ By this time, the federal government was beginning to take


¹⁰³ Fanshel, *supra* note 101; Silverman, *supra* note 101, at 107. Nor did he use for comparison a control group of same-race adoptees or non-adopted children.

¹⁰⁴ *Id.* Interestingly, despite this Fanshel concluded the report by advocating for Indigenous self-determination: “It is my belief that only the Indian people have the right to determine whether their children can be placed in white homes. . . . Even with the benign outcomes reported here, it may be that Indian leaders would rather see their children share the fate of their fellow Indians than lose them in the white world. It is for the Indian people to decide.” Fanshel, *supra* note 101, at 342.

¹⁰⁵ See *supra* text accompanying note 79.

¹⁰⁶ Jacobs, *supra* note 64, at 138-39 (describing how “the Devils Lake (now Spirit Lake) Sioux Tribe of North Dakota requested that the AAIA conduct an investigation into the practice [of removing Indigenous children from their families for adoption or fostering].”).
notice. A report issued by the U.S. Commission on Civil Rights in 1974 observed that “child-welfare removal of Native children may have resulted in a ‘massive deculturation.”107 Revelation of the scope of Indigenous family separation came at a time when narratives detailing the harm found a place to be heard. Congress began hearings on proposed legislation that, years later, would lead to a “multi-pronged” approach108 aimed at curtailing Indigenous family separation.

Narratives detailing the Indigenous experiences of family separation spurred the passage of the Indian Child Welfare Act (ICWA) in 1978,109 shifting almost a century of justifying narratives. The organizing that brought forward stories of separated Indigenous families and children challenged, in particular, the savior justification narratives: “To thousands of non-Indian Americans, the testimony of Indian activists and the passage of the ICWA came as a shock. Many social workers, adoptive families, and nonprofit agency directors were accustomed to seeing themselves as caring rescuers. Now some perceived themselves anew through Indian eyes: as child snatchers.”110

The testimony provided narratives countering the unfavorable depictions of Indigenous parents, families, and communities – depictions that had been deployed to argue removal as being in the best interest of the children. The Congressional record of the ICWA, in stating the intent behind

109 Id. at 133 ("Hearings before Congress leading up to the 1978 Act told a tragic picture of the forcible removal of Indian children from their families to non-Indian homes and institutions."); see also Patrice H. Kunesh, Borders Beyond Borders--Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act, 42 NEW ENG. L. REV. 15, 17 (2007) ("Four years later, after extensive and often emotional testimony about the pervasive and unchecked removal of thousands of Indian children from their families, Congress enacted the [ICWA].")
110 MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 128 (2014). “Listening to the stories of Indian families in the 1960s and 1970s would compel Americans to grapple with the U.S. government’s role as a settler colonial power and to examine the legacies of its colonialism. Americans would confront the persistent injustices that still bedeviled Indian communities and ponder the place of modern Indian nations within the borders of the United States.” Id., at xxviii-xxix.
the legislation, asserts that “an Indian child should remain in the Indian community...by making sure that Indian child welfare determinations are not based on a ‘white, middle-class standard.’”

Opening remarks by Senator James Abourezk of South Dakota during the first hearing on the ICWA in 1974 made a similar point:

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

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

The enactment of the ICWA represented a moment when Congress came to appreciate the existential threat confronting Native American families and culture. Indeed, the movement leading up to the passage of the ICWA promised a shift in federal Indian policy, “from termination to self-determination.”

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111 Christine Metteer, The Existing Indian Family Exception: An Impediment to the Trust Responsibility to Preserve Tribal Existence and Culture as Manifested in the Indian Child Welfare Act, 30 LOY. L.A. L. REV. 647, 654 (1997) (citing H.R. Rep. No. 95-1386 at 23 (1978)). See also Jacobs, supra note 75, at 137 (“Indian families and their advocates charged instead that many social workers were using ethnocentric and middle-class criteria to unnecessarily remove Indian children from their families and communities.”).

112 Kunesh, supra note 109, at 16.

113 See supra text accompanying notes 101-104.

114 Jacobs, supra note 110, at 139.


116 Jacobs, supra note 110, at 129. The express objective of ICWA was “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families.” 25 U.S.C.A. § 1902. Among other things, the Act granted exclusive jurisdiction to Indian tribes over any Indian child custody proceeding. 25 U.S.C.A.
The post-ICWA reality, however, has not reflected this shift. As stated by a 2015 report issued by the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission: “Adopting ICWA marked one step toward upholding tribal rights, but effective implementation was another.”\textsuperscript{117} The Commission found that the percentage of Native children in the child welfare system in Maine had changed very little from 1960 to 2015.\textsuperscript{118} Similarly stark statistics of Indigenous children’s enduring disproportionate representation in child welfare systems exist in other states whose practices were meant to be reformed by the ICWA.\textsuperscript{119}

Litigation challenging the statute has also threatened the efficacy of the ICWA.\textsuperscript{120} Attacking the statute in courts has been largely a concerted effort by conservative groups based on “ensuring the best interest of the child.” These challenges to the ICWA have characterized the statute as subjecting Indigenous children “to a separate, less-protective set of laws solely because of their race—laws that make it harder to protect them from abuse and neglect and virtually impossible to find them loving, permanent

\textsuperscript{117} Beyond the Mandate, \textit{supra} note 107, at 12.

\textsuperscript{118} \textit{Id.} at 21 (In 1960, approximately 4 percent of children in foster care in Maine were Native. On average, from 2002 to 2014, 3.92 percent of children in [state] custody were Native.

\textsuperscript{119} South Dakota is one of these states. \textit{See} Laura Sullivan & Amy Walters, \textit{Incentives and Cultural Bias Fuel Foster System}, NATIONAL PUBLIC RADIO (Oct. 25, 2011), https://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system. (“In South Dakota, Native American children make up only 15 percent of the child population, yet they make up more than half the children in foster care...[A]most 90 percent of the kids in family foster care are in non-native homes or group care.

\textsuperscript{120} \textit{See} Kathryn Fort & Adrian T. Smith, \textit{Indian Child Welfare Act, Annual Case Law Update and Commentary}, 8 AMER. INDIAN L.J. 105, 105 (2020) (“Annually there is an average of 200 appellate cases dealing with the Indian Child Welfare Act (ICWA)...”). The U.S. Supreme Court, in the highly-publicized \textit{Adoptive Couple v. Baby Girl}, 570 U.S. 637 (2013), ruled against an interpretation of the ICWA as conferring custody of an Indigenous child to her biological Indigenous father. In a 5-4 decision, the Court held the ICWA did not apply to protect Indigenous American parents who had never been a custodial parent. \textit{Id.} at 653-54. The majority elaborated that a reading of the ICWA that allowed an absentee father to “play his ICWA trump card at the eleventh hour to override the mother’s decision” to place the child for adoption would raise equal protection concerns, because this would cause potential adoptive parents to hesitate to accept placements of children who had Native heritage. \textit{Id.} at 656. \textit{See also} Jacobs, \textit{supra} note 110, at xxiii-xxiv (discussing how media coverage of \textit{Adoptive Couple v. Baby Girl} demonized the Indigenous biological father and the Cherokee tribe, and casted the White adoptive couple as “innocent victims of an outdated piece of legislation.”).
adoptive homes. "121 The most recent lawsuit is Brackeen v. Haaland,122 a case representing a revival of earlier litigation challenging the ICWA on the basis of race.123 In a split en banc decision, the U.S. Court of Appeals for the Fifth Circuit left in place a panel decision that the ICWA's preferences for placement with “other Indian families” or with a licensed “Indian foster home” violates Constitutional equal protection guarantees.124 Casting the ICWA as racially discriminatory constitutes an erasure of the history of harm that led to the passage of the Act,125 harm that is part of the historical trauma Indigenous people continue to struggle with today.126 In an effort to address this ongoing trauma, the first Indigenous Secretary of the U.S. Department of the Interior, Deb Haaland, created an initiative to conduct a “comprehensive review” of the Indian boarding school policy,127 providing another official platform for the stories of Indigenous family separation to be told and heard.

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Narratives detailing the harm of Indigenous family separation gained momentum and potency about a decade before the enactment of the ICWA,

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123 Previous challenges to ICWA alleged that the legislation created an unconstitutional racial preference. In those cases, courts held that ICWA’s requirement of current tribal membership of at least one party to the proceedings “creates a political, rather than a racial, preference.” In re Adoption of C.D., 751 N.W.2d 236, 244 (N.D. 2008); see also Rice v. Cayetano, 528 U.S. 495, 519-20 (2000); In re A.W., 741 N.W.2d 793, 810 (Iowa 2007).
125 Jacobs, supra note 110, at xxiv (“Media coverage of the controversial case [Baby Girl] failed to reveal the full back story of ICWA, an act meant to redress the long history of forcible child removal that American families had suffered for generations.”).
126 DONNA MARTINEZ ET AL., URBAN AMERICAN INDIANS: RECLAIMING NATIVE SPACE 117 (2016) (defining historical trauma as “trauma resulting from successive, compounding traumatic events perpetuated on a community over generations.”).
in the context of several civil rights movements in the United States, including one for Indigenous rights—the Red Power movement. In this context, the campaign for the ICWA was “part of a larger quest for Indian self-determination and sovereignty.” While the Red Power movement was known for its attention-grabbing strategies, the movement to pass the ICWA was one that was behind the scenes and grassroots. As the Red Power movement helped raise broader awareness of the issues facing Indigenous communities, counternarratives challenging family separation—and highlighting its xenophobic and racist justifications—finally began to have an impact.

The campaign for the ICWA corresponded with the onset of Indigenous people seeing themselves as aligned with the struggles of other marginalized communities in the United States. This identity shift likely contributed to a sense of confidence to challenge the justification narratives with stories of children, parents and communities ravaged by an almost century-long deliberate family separation policy. Indigenous women in particular played an important role in calling for systemic reform. As many of them had worked in the child welfare system, they were able to give first-hand accounts the harm of separating Indigenous children from their families. The success of counternarratives leading to the enactment of the ICWA also transpired in the context of a systemic change to addressing child welfare and poverty generally, a shift that ended a deliberate practice of separating predominantly impoverished, immigrant families several decades before.

C. The “Orphan Train” Movement Targeting Immigrant Families

A lesser known family separation practice than those inflicted upon slave and Indigenous families, carried out in the United States by private actors from the mid-nineteenth through the early twentieth century, was a movement called “orphan trains.” The orphan trains executed the removal
and relocation of approximately 250,000 children\textsuperscript{135} from East Coast cities to rural areas across the country, including into agricultural communities in the Midwest.\textsuperscript{136} Charles Loring Brace, a Protestant minister and founder of the Children’s Aid Society of New York, conceived of the orphan trains.\textsuperscript{137} His mission was to save children from their families in order to make them “good” Americans.\textsuperscript{138} Brace sought to place\textsuperscript{139} children with “good, Christian families where they would be cared for, educated, and employed.”\textsuperscript{140} Brace and other Protestant missionaries hoped to relocate the orphan train children so that they could assimilate into an Anglo-Saxon, Protestant, and White society.\textsuperscript{141}

Roughly three-quarters of the orphan train children were not actually

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\item changes in views regarding childhood and laws affecting children.”).
\item Id. at 4; Joan Gittens, \textit{Orphan Trains: The Story of Charles Loring Brace and the Children He Saved and Failed}, The Annals of Iowa 64, 80-81 (2005). Others have estimated the number of children relocated by the Orphan Train movement at 150,000 to 200,000.
\item One of the misconceptions, fueled by proponents for the orphan trains, was that children were placed out to be a part of the “inspiring western life,” when in fact they were placed out throughout the United States and, in a few instances, abroad. MARYLIN IRVIN HOLT, \textit{THE ORPHAN TRAINS: PLACING OUT IN AMERICA} 158-59 (1992).
\item Trammell \textit{supra} note 135, at 3. \textit{But see} HOLT, \textit{supra} note 142, at 3-4 (1992) (“[Charles] Brace and his New York based Children’s Aid Society have been credited as the American originators for the [orphan trains] system but other organizations, public and private, had either experimented with the idea earlier or soon followed Brace’s example. Among these were the Boston’s Children’s Mission, the New York Foundling Hospital, and the Philadelphia Women’s Industrial Aid Association.”).
\item Michelle Kahan, \textit{“Put Up” Platforms: A History of Twentieth Century Adoption Policy in the United States}, 33 J. OF SOCIOLOGY & SOC. WELFARE 51 (2006). Brace wished to prevent the “problem of vagrant and delinquent children” in the urban centers of the East Coast by sending children out of the cities to work, assuming that escaping the city and physical labor would teach the children to change their ways. See Trammell, \textit{supra} note 135, at 4.
\item The “placing” or “placing out” orphaned children was a popular alternative to placing the burden of caring for orphans on local governments or private organizations. See Trammell, \textit{supra} note 135, at 3. Note that “placing out” is distinct from foster care because in the former, families do not receive compensation. Additionally, under the foster care system, the state is the primary agent of care, whereas private organizations facilitate the “placing out” process.
\item Kahan, \textit{supra} note 138, at 55.
\item Trammell, \textit{supra} note 135, at 4. \textit{See also} HOLT, \textit{supra} note 142, at 28 (“Brace would have said that his placing-out plan was not one of social control but of moral control, exposing children of the poor to basic Christian instruction.”); Kahan, \textit{supra} note 142, at 55-56; Williams, \textit{supra} note 29 at 142 (“Sanitized by the fresh air and wholesome hard work of rural America, these [children] were also to be cleansed of their parents’ ‘race’ and religion by growing up in Protestant homes that would remove the tarnish of Catholic superstition and idolatry.”).
\end{enumerate}
orphans, but had one or both parents who were still alive. Brace defended the removal of these children by explaining that “the great majority were the children of poor and degraded people.” The characterization of the orphan train movement as a family separation policy is most squarely applicable in the instances where child welfare advocates took the children for relocation based on a judgment about their parents “on the grounds of poverty, immorality, or cultural inferiority.” These justifications resonate with ones that rationalized enslaved and Indigenous family separation. Notably, most of the orphan train children came from Catholic, immigrant homes.

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

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

142 See Kari E. Hong, Parens Patriarchy: Adoption, Eugenics, and Same-Sex Couples, 40 CAL. W. L. REV. 1, 17 (2003) (estimating that as many as seventy-five to eighty percent of orphan train riders had one or both parents who were still alive); Stacy Byrd, Learning from the Past: Why Termination of a Non-Citizen’s Parent’s Rights Should Not Be Based on the Child’s Best Interest, 68 U. MIAMI L. REV. 323, 341 (2013); HOLT, supra note 136, at 4 (“Often separated from brothers or sisters or, in many instances at least one parent—the myth perpetuated is that all of these children were orphans…”). Some children were apprehended for vagrancy and sent west on orphan trains without the knowledge or consent of living family members. Kahan, supra note 138, at 55 (noting that the Children’s Aid Society did not always provide notice of change in guardianship to surviving parents). Trammell, supra note 135, at 4 (detailing that some families temporarily surrendered guardianship of their children to organizations such as CAS because they were unable to financially support their children; however, some law enforcement would also apprehend “vagrant” children on the streets and send them to these orphanages without first attempting to locate the children’s family).

143 Hong, supra note 142, at 17.

144 Id. at 16 (“...in New York City and Boston, Catholic Church leaders were outraged at what they called the kidnapping of children from Catholic, immigrant homes and their subsequent placement into Protestant families.”). It is important to note that, at this time, newly arriving immigrants from European countries were not deemed to meet standards of “Whiteness” in the United States and were seen instead as foreigners, suggesting ties between religion, social class, and the perception or “ranking” of race. HOLT, supra note 142, at 47 (quoting one of Brace’s writings: “The class increases; immigration is pouring in its multitude of poor foreigners, who leave these young outcasts everywhere in our midst…”). See also DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS (2006) (arguing that far from being a set racial category, Whiteness is a social construct).
A documentary on the orphan train movement highlighted the story of a foster father, Hazen Armstrong, who adopted a child from one of the trains when he himself was only nineteen. Armstrong stated that after he heard that they were bringing children into town for adoption, he decided to look for a child to help him on his farm. He said, “There was eight or ten in that row—different kinds and different expressions and all different places they had come from, some from Italy, some from other countries... and they just let me pick the one I wanted.” Armstrong’s testimonial is indicative of placement families who took in orphan train children for cheap or unpaid labor, as was the fact that both “parents” and “employers” were terms used to describe placement families. Other families, particularly those who were Protestant, were also motivated by the mission of giving children a “better” upbringing.

146 Gittens, supra note 135, at 80. See also Hong, supra note 142, at 15 (2003) (noting that the children mostly were made to do agricultural work); Kahan supra note 138, at 55 (noting that placement families generally did not obtain legal guardianship of the children, instead the children remained legally under the care of the private organizations that placed them).

147 AMERICAN EXPERIENCE: THE ORPHAN TRAINS Transcript (Public Broadcasting Systems 1995), https://www.pbs.org/wgbh/americanexperience/films/orphan/#transcript. Another story is of an orphan train child named Frederick, who was relocated West at age six, when he was only able to speak German. A farming family in Illinois took custody of Frederick, but predominantly to use him for farm work. Frederick was only allowed to attend school for only four years. He ran away at age 17. Julie Snively, Charles Frederick, NAT’L ORPHAN TRAIN COMPLEX, https://orphantraindepot.org/history/orphan-train-rider-stories/359-2/. See also Trammell, supra note 135, at 4 (asserting that many of the rural White families who took in children from orphan trains worked on farms, using the children to provide unpaid labor.).

148 See Hong, supra note 142, at 15; HOLT, supra note 136, at 162.


150 Id. at 257 (noting that Protestant families often changed children's religion and names).
1. Justification Narratives and a Systemic Narrative Shift

Underlying Brace’s passion for saving children from the vices of the city streets\textsuperscript{151} was a belief that removing them from their environment, and in many cases their parents, was in the child’s best interest. Similar to the weaponization of the best interest of the child standard in the context of Indigenous family separations,\textsuperscript{152} what drove charities such as the Children’s Aid Society to operate the orphan trains was an assessment of children’s best interest that often was based on cultural bias.\textsuperscript{153}

Another narrative strand justifying the orphan trains was a child-friendly version of being “tough on crime.” Brace sought to protect children from “a life of misery, shame and crime, and ultimately to a felon’s doom.”\textsuperscript{154} Embedded in this claim was the assumption that “juvenile vagrants [who] are in the daily practice of pilfering wherever the opportunity offers” must be reformed not only for their own benefit, but for the benefit of the greater society.\textsuperscript{155} Most disturbing were references to children placed on orphan trains as “human cargoes” and “human freight,” images “more reminiscent of America’s history of slavery than of humanitarian efforts.”\textsuperscript{156}

As placed out children became adults and began searching for their family roots, they started sharing stories of their experiences.\textsuperscript{157} Some stories are positive, but others are about children working for families who would not let them sleep in the house.\textsuperscript{158} Some stories were available during the time when orphan train were still operating, but most have been shared after they stopped.\textsuperscript{159} There continue to be concerted efforts today to collect and share the stories of those impacted by the orphan train movement.\textsuperscript{160}

\begin{itemize}
\item \textsuperscript{151} See Hong, supra note 142, at 14-15.
\item \textsuperscript{152} See supra note 95.
\item \textsuperscript{154} See Trammell, supra note 135, at 4.
\item \textsuperscript{155} See \textit{id}.
\item \textsuperscript{156} HOLT, supra note 136, at 181.
\item \textsuperscript{157} \textit{id}., at 182.
\item \textsuperscript{159} HOLT, supra note 136, at 182.
In the case of the orphan train movement, it was not public outcry regarding the practice that specifically led to its end. The stories of abuse that were revealed contemporaneously during its operation provided cover for the two main private charities that decided to abandon their programs.\footnote{Id. at 162.} What ultimately brought an end to the orphan train movement, however, were the fundamental changes to understandings of charity and child welfare generally. New alternatives for child welfare services such as day care, financial support to mothers in poverty, and other family support programs supplanted the separation of parents and children, eventually bringing an end to the orphan train system.\footnote{Id. at 164-65.} These programs reflected a narrative shift from “child rescue” to aiding children within their family unit.\footnote{Id. at 165.} Relatedly, the “professionalization of social work and the recognition of sociology as a field of study” changed the narrative of how to address poverty and help impoverished people.\footnote{HOLT, supra note 136, at 169-70.} A shift in the racialization of families targeted by the orphan train movement also likely played a role, as Catholicism and being of European descent became associated with White America.\footnote{Cybelle Fox & Thomas A. Guglielmo, Defining America’s Racial Boundaries: Blacks, Mexicans, and European Immigrants, 1890-1945, 118 AM. J. OF SOCIOLOGY 327 (2012).}

Looking at the historic arc of the separation of slave families, Indigenous families, and predominantly impoverished immigrant families through the orphan train movement, a few common themes emerge. All three represent deliberate family separation policies that were fueled by xenophobia and racism, often veiled in terms of charitable benevolence, and driven, to different degrees, by economic imperatives and a desire to maintain social control. The bias against these marginalized communities was palpable, if not explicit in the justifications of policies that caused considerable trauma across generations. These practices came to an end when social movements and/or shifting societal values, often buoyed by...
powerful narratives, gained traction in society and compelled an end to the policies.

The history of family separation in the United States is one that the country carries within its collective memory, as demonstrated by U.S. Department of the Interior Secretary Haaland’s new initiative investigating the Indigenous boarding school era.\textsuperscript{166} Policies that separate families, however, are not just in the country’s past. Varieties of deliberate family separation were carried out against migrant families under the Trump Administration. Powerful advocacy and public outrage led to a relatively swift end to these specific policies. However, modern family separation for scores of families, mostly from communities of color, continues with little to no scrutiny. Historical examples of separating families in the United States, insofar as how the practices were justified and how they were put to an end, serve as guidance for challenging the practice as it exists today.

II. FAMILY SEPARATION UNDER THE TRUMP ADMINISTRATION

It is on the foundation of these past family separation policies that the Trump Administration executed the separation of thousands of migrant families.\textsuperscript{167} From the beginning, the Administration demonstrated that it was prepared to rigorously enforce immigration laws even if it caused family separation, as the first noncitizen deported after its executive orders on immigration went into effect\textsuperscript{168} was a mother of two U.S. citizens who had lived almost half of her life in the United States.\textsuperscript{169}

\textsuperscript{166} See supra note 127.


\textsuperscript{169} Marcela Valdes, \textit{Is It Possible to Resist Deportation in Trump’s America?}, THE N.Y. TIMES MAGAZINE (May 23 2017) (telling the story of Guadalupe Garcia Aguilar, the first person deported under one of former president Trump’s executive orders ordering the removal of those with a prior order of removal: “[Garcia Aguilar] had been living in the United States for 22 years, since she was 14 years old; she was the mother of 2 American citizens; she had missed being eligible for DACA [Deferred Action for Child Arrivals] by
The government began separating migrant families crossing the U.S.-Mexico border in March 2017, prior to the official launch of the zero tolerance policy, through a pilot program called the “El Paso Initiative.” By criminally prosecuting adults accompanied by their children who entered the United States without authorization, the Initiative lasted eight months and separated approximately 280 families.

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

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

just a few months. Suddenly, none of that counted anymore.”).


171 DOJ OIG Report 2021, supra note 170, at 3.


173 *Id.* at 1144 (emphasis in original). What could be best described as chaos followed Judge Sabraw’s order. DHS claimed that it, along with HHS, had created a centralized database containing all relevant information regarding parents separated from their children; however, the DHS OIG found “no evidence that such a database exists.” OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF HOMELAND SECURITY, OIG-18-84, SPECIAL REVIEW—INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO
Over the months and years, in courtrooms and through the media, the stories of migrant children “in cages” and in anguish and parents not knowing the whereabouts of their children were told. As detailed below, the U.S. government was eventually compelled to reunite families, but many migrant children remain separated from their parents.

TOLERANCE POLICY 10 (Sept. 27, 2018) [hereinafter DHS OIG REPORT 2018]. Whatever data DHS did collect was incomplete, contradictory, and unreliable. Id. at 11-12. Because no single database with reliable information existed, the Government Accountability Office found that agencies were left to resort to a variety of inefficient and ineffective methods to determine which children were subject to Judge Sabraw’s injunction. GAO REPORT, supra note 46, at 23-25. These methods included officers hand sifting through agency data looking for any indication that a child in HHS custody had been separated from his or her parent, and calling in the Office of the Assistant Secretary for Preparedness and Responses, an HHS agency whose normal prerogative involves response to hurricanes and other disasters, to review data provided by CBP, ICE, and ORR. Id. at 23-24. The method for determining which family units required reunification changed frequently, sometimes more than once a day, with staff at one ORR shelter reporting that “there were times when [they] would be following one process in the morning but a different one in the afternoon.” Id. at 27.


177 Jacob Soboroff & Julia Ainsley, Lawyers Can’t Find the Parents of 666 Migrant Kids, a Higher Number than Previously Reported, NBC NEWS (Nov. 9, 2020), https://www.nbcnews.com/politics/immigration/lawyers-can-t-find-parents-666-migrant-kids-higher-number-n1247144. More recent statistics put the number at more than 1,500. Miriam Jordan, Separated Families: A Legacy Biden Has Inherited from Trump, N.Y. TIMES
A LINEAGE OF FAMILY SEPARATION

A. The Operationalization of Zero Tolerance

The Trump Administration officially announced its “zero tolerance” family separation policy on April 6, 2018, stating that it was in response to the “migrant caravan” traveling to the United States. Once the separations began to generate public condemnation, former President Trump deflected blame, and the Administration even denied that it was separating parents and children.

Government officials could not repudiate for long the fact that they were deliberately separating families at the U.S.-Mexico border. Among the first details of the Administration’s separation of migrant families was that it was clouded in chaos, including the failure to implement a tracking system. Typically, U.S. Customs and Border Protection (CBP) agents are the first to encounter individuals entering the United States. After CBP agents separated migrant children from their parents, they typically transferred parents into Immigration and Customs Enforcement (ICE)


179 Donald J. Trump (@realDonaldTrump), Twitter (Jun. 19, 2018, 6:52 AM), https://twitter.com/realdonaldtrump/status/1009071403918864385[https://perma.cc/MLC6-8VX5] (“Democrats are the problem. They don’t care about crime and want illegal immigrants, no matter how bad they may be, to pour into and infest our Country, like MS-13.”).
180 Maya Rhodan, Here Are the Facts About President Trump’s Family Separation Policy, TIME (June 20, 2018), https://time.com/5314769/family-separation-policy-donald-trump/(quoting then-DHS Secretary Kirstjen’s tweet: “We do not have a policy of separating families at the border. Period.”).
181 Tal Kopan, "We Will Not Apologize:" Trump DHS Chief Defends Immigration Policy, CNN (June 18, 2018), https://www.cnn.com/2018/06/18/politics/kirstjen-nielsen-immigration-policy/index.html (quoting then-Attorney General Jeff Sessions as saying that the separated migrant children "are taken care of" and calling the immigration system as "generous" toward them.).
182 DOJ OIG Report 2018, supra note 173, at 3. The DHS OIG noted that the “lack of integration between CBP’s, ICE’s and HHS’ respective information technology systems hindered efforts to identify, track, and reunify parents and children separated under the Zero Tolerance policy” and that “[a]s a result, DHS has struggled to provide accurate, complete, reliable data in family separations and reunifications, raising concerns about the accuracy of its reporting.” See id. at 9-10 (noting, among other things, that agencies’ incompatible computer systems erased data that connected children with their families); see also HHS OIG REPORT, supra note 5, at 2, 13 (reporting that the lack of an integrated data system to track separated families across HHS and DHS added to the difficulty in HHS’s identification of separated children).
custody. When the zero tolerance policy went into effect, ICE’s system “did not display data from CBP’s systems that would have indicated whether a detainee had been separated from a child.” Consequently, when ICE was processing detained parents for removal, “no additional effort was made to identify and reunite families prior to removal.” The government consequently deported many parents without their children.

In the end, the government separated more than 5,000 migrant children from their parents. The operational crux of zero tolerance was to criminally prosecute migrant parents for the act of entering the United States without authorization: “Zero tolerance” meant “100 percent prosecution.” Then-Attorney General Jeff Sessions invoked a state of crisis to support

184 Id. at 9-10; DOJ OIG Report, supra note 170, at 45 (detailing when a federal judge ordered the U.S. Attorney’s Office in Arizona to submit a list of children separated in coordination with CBP at the end of May 2018, the CBP claimed it did not track information on the children because they were sent to the U.S. Department of Health and Human Services.).
185 Id. at 10. In an effort to keep track of the children, ICE manually entered the child’s identifying information into a Microsoft Word document, which was then e-mailed as an attachment to HHS, a process described by the DHS OIG as particularly “vulnerable to human error,” and one which “increas[ed] the risk that a child could become lost in the system.”
186 The U.S. Government has admitted to forcibly separating more than 2,800 children from their parents and placing them in government custody. Ms. L. v. U.S. Immigration and Customs Enforcement, 302 F. Supp. 3d 1149, 1162–67 (S.D. Cal. 2018); Ms. L. v. ICE, 310 F. Supp. 3d at 1142-46. A subsequent HHS Office of Inspector General report, in addition to other sources, indicates that the actual number is “thousands” higher. Ms. L. v. Immigration and Customs Enforcement, No. 18-cv-428 DMS MDD (S.D. Cal. Mar. 8, 2019) (“Pursuant to the Court’s Orders, 2,816 children were identified as having been separated from their parents at the border . . . .”). At the start of the Biden Administration, an estimated 600 children remained separated from their parents, prompting the creation of a special task force whose first mandate is the reunification of these families. Kevin Sieff, Biden Announces Efforts to Reunite Migrant Families Separated by Trump Administration, WASH. POST (Feb. 2, 2021), https://www.washingtonpost.com/world/the_americas/family-separation-migrant-biden-executive-order/2021/02/01/ebb6ada8-64bf-11eb-8c64-9595888caa15_story.html. Within weeks, efforts resulted in identifying more than 100 parents of these children. Joseph Guzman, Parents of More Than 100 Separated Migrant Children Have Been Found in Past Month, THE HILL (Feb. 25, 2021), https://thehill.com/changing-america/respect/accessibility/540527-parents-of-more-than-100-separated-migrant-children.
187 Cordero, et al., supra note 170, at 441. See also Michael D. Shear, et al., Border Policy Was Clear: ’We Need to Take Children Away,’ N.Y. TIMES (Oct. 7, 2020) (quoting then-deputy attorney general Rod J. Rosenstein: "The A.G.'s goal…was to create a more effective deterrent so that everybody would believe that they had a risk of being prosecuted.").
188 Scholars have criticized the casting of an incident as a crisis to be self-serving. See
the prosecutions, a narrative that governments have invoked recently in the context of migration with particular vigor. Sessions stated the following when announcing the policy:

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

Immigration officials classified migrant children as an “Unaccompanied Alien Child” (UAC) once they separated them from their parents, creating a narrative that hearkens back to the children who were classified as an “Unaccompanied Alien Child” (UAC) once they separated them from their parents, creating a narrative that hearkens back to the children who were

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189 See SPECTOR, supra note 188, at ix-x (discussing characterization of 2016 migration to Europe as a crisis that Brexit advocates used in the campaign for the United Kingdom to exit the European Union); Anita Sinha, Defining Detention: The Intervention of the European Court of Human Rights in the Detention of Involuntary Migrants, 50 COLUM. HUM. RTS. L. REV. 176, 187-193 (2019) (critiquing crisis discourse and applying the critique to the characterization of migration to Europe stating in 2016); Jaya Ramji-Nogales, Migration Emergencies, 68 HASTINGS L.J. 609, 611 (2017) (presenting the media’s “migration emergencies” as a “legal construction of crisis.”).


191 DHS deemed separated children as unaccompanied and transferred them to the custody of HHS’ ORR, the agency responsible for the long-term custodial care and placement of “unaccompanied [noncitizen] children.” DHS OIG REPORT 2021, supra note
not orphans on the orphan trains.\textsuperscript{192} It was a classification that erased not just the agency but the existence of migrant parents. In the context of zero tolerance, the classification enabled the Administration’s decision to reverse standing policy and to refer migrants parents apprehended with their children for criminal prosecution.\textsuperscript{193}

By prioritizing the criminal prosecution of migrant parents for unauthorized entry or re-entry,\textsuperscript{194} the government rendered them unable to provide care and custody of their children per the statutory language that provides for UAC status.\textsuperscript{195} There was a spike in the criminal prosecutions of immigration offenses during the period corresponding with the execution of zero tolerance,\textsuperscript{196} which was the intended consequence of the policy. The data shows that this rise in criminal immigration cases was a direct consequence of the government’s family separation practice, rather than generally because of increased migrant apprehensions at the border.\textsuperscript{197}

\begin{itemize}
\item \textsuperscript{192} See supra text accompanying note 142.
\item \textsuperscript{193} DHS OIG Report 2021, supra note 170, at 2.
\item \textsuperscript{194} 8 U.S.C. §1325 makes it a misdemeanor offense subject to fine or imprisonment to enter the U.S. without authority. 8 U.S.C. §1326 makes it a felony offense to re-enter or attempt to re-enter after being previously removed or deported from the United States. Criminalizing migration via these and other statutes has been U.S. government policy far before the Trump Administration. See Ingrid V. Eagly, Prosecuting Immigration, 104 NW. U. L. REV. 1281, 1282 (2010) (“Noncitizens have become the face of federal prisons.”).
\item \textsuperscript{195} The definition of UACs includes children who have “no parent or legal guardian in the United States available to provide care and physical custody.” HHS Fact Sheet, supra note 191.
\item \textsuperscript{196} Mark Motivans, Immigration, Citizenship, and the Federal Justice System, 1998-2018, Bureau of Justice Statistics’ Federal Justice Statistics Program, U.S. Dept. of Justice, at 16 (Aug. 2019), \url{https://www.bjs.gov/content/pub/pdf/icfjs9818.pdf}; U.S. Dept. of Justice, Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 17, 2019), \url{https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year}. In 2018, the five crime types for which non-U.S. citizens were most likely to be prosecuted in federal court were illegal re-entry (72 percent of prosecutions), drugs (13 percent), fraud (4.5 percent), alien smuggling (4 percent), and misuse of visas (2 percent). Id. at 21.
\item \textsuperscript{197} John Gramlich, Far More Immigration Cases are Being Prosecuted Criminally under Trump Administration, PEW RESEARCH CENTER (Sept. 29, 2019), \url{https://www.pewresearch.org/fact-tank/2019/09/27/far-more-immigration-cases-are-being-prosecuted-criminally-under-trump-administration/} (While criminal arrests and prosecutions for immigration offenses both reached their highest level in two decades in 2018, the number of border apprehensions that year (396,579) remained far below the levels recorded
\end{itemize}
During this same time period, the number of Central Americans arrested in the five judicial districts along the U.S.-Mexico border almost tripled.\textsuperscript{198} It is worth noting, however, that children whose parents were not criminally prosecuted were also labelled UACs.\textsuperscript{199} Overall, the government’s actual and rhetorical criminalization of migrant parents played a central role in its execution of family separation.

1. The Justifying Narratives of Zero Tolerance

The criminalization of migrant parents builds upon the legacy of the historical family separation practices that have been carried out throughout U.S. history. It is also a continuation of the trend in the United States over the past twenty-five years to criminalize immigrants more broadly\textsuperscript{200} and to frame them as threats to the country.\textsuperscript{201} The narratives characterizing migrants and where they come from preceding the zero tolerance policy built on this rhetoric, and were delivered with racist and xenophobic language.\textsuperscript{202} Zero tolerance overwhelmingly impacted Latinx families, as demonstrated by the fact that “more than 95 percent of the members in the Ms. L certified class are from Central America.”\textsuperscript{203}

\textsuperscript{198} Gramlich, supra note 197, at 2 (noting immigration criminal prosecutions of Central Americans went from 13,549 in 2017 to 37,590 in 2018).

\textsuperscript{199} The author represents two families for which this is the case. \textsuperscript{199} See draft Complaints [on file with author].


\textsuperscript{201} Sarah Pierce et al., \textit{U.S. Immigration Policy Under Trump: Deep Changes and Lasting Impacts}, MIGRATION POLICY INSTITUTE 1 (July 2018) (“[T]he White House has framed immigrants, legal and unauthorized alike, as a threat to Americans’ economic and national security, and embraced the idea of making deep cuts to legal immigration.”).


\textsuperscript{203} \textit{E.M.S. v. U.S.A.}, Case No. 4:21-cv-00029-JAS (Dist. Ct. of AZ) at 32, para. 135 (Jan.
In addition to criminalizing migration-related acts, the government’s justification for separating families relied on the vilification of migrant parents, similar to the historical vilification of Indigenous parents and the parents of orphan train children.204 Officials characterized parents as exploiting their children to enter the country, casting them as responsible for bringing upon themselves any bad consequences as a result.205 The narrative justifying the policy also dehumanized the children impacted—one media outlet that regularly amplified the Trump Administration’s narratives defending the zero tolerance policy described migrant children as “people from another country.”206

Government officials also justified zero tolerance through the invocation of law and order with religious references. Then-Attorney General Jeff Sessions claimed that the Christian Apostle Paul commanded people to “obey the laws of government because God has ordained them for the purpose of order,” stating that the zero tolerance policy was necessary to punish “criminals.”207 In defending the policy as then-press secretary, Sarah Huckabee Sanders stated that, “it is very biblical to enforce the law.”208 These justifications of family separation bear striking similarities with those

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

2. Narratives of Harm Humanizing Migrant Families

Comparatively to efforts to end earlier practices of family separation, the counterstories relating the extreme harm of family separation through zero tolerance were successful in ending the policy relatively swiftly. In addition to the media, these narratives were told through domestic and regional human rights litigation. For example, the ACLU’s Ms. L lawsuit revealed the callous and careless manner in which the government was executing zero tolerance as a way to achieve the objectives of the policy.

209 See text accompanying supra notes 140, 154.


211 See text accompanying supra notes 173-74. The judge in Ms. L criticized the agencies for their lack of preparation and coordination at a status conference proceeding on July 27, 2018: “[W]hat was lost in the process was the family. The parents didn’t know where the children were, and the children didn’t know where the parents were. And the government didn’t know, either.” Joint Status Report, supra note 5, at 58, Ms. L v. Immigration and Customs ENFORCEMENT, NO. 18-CV-00428 DMS MDD (S.D. CAL. JULY 27, 2018). See also Cordero, et al., supra note 167, at 468-69.

212 Jeremy Stahl, The Trump Administration Was Warned Separation Would Be Horrific for Children, Did It Anyway, SLATE (July 31, 2018), https://slate.com/news-and-politics/2018/07/the-trump-administration-was-warned-separation-would-be-horrific-for-children.html. Commander Jonathan White, a former HHS senior official, testified before Congress that he had warned the administration that implementing a family separation policy would involve a significant risk of harm to children. The Trump Administration nonetheless launched the policy a few weeks after White raised his concerns. Id.
The Inter-American human rights system was another site through which condemnation for zero tolerance was vocalized. The Inter-American Commission on Human Rights (IACHR) issued a statement asserting its "deep concerns" with the policy. In response to petitions filed by non-governmental organizations (NGOs) and human rights entities in Central and South America challenging zero tolerance, the IACHR issued precautionary measure resolutions citing violations of both the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. The NGOs’ petition, on behalf of five Guatemalan families separated under zero tolerance, included details of parents detained thousands of miles away from their children, with no process for the children to communicate with them or for the parents to even know of their children’s whereabouts. The human rights bodies’ petition included the fact that a Honduran father died by suicide after the U.S. government separated him from his family. The IACHR resolutions requested that the United States adopt measures for reunification and to protect the integrity, identity, and right to family life of separated families, as well as adopt measures to guarantee family reunification and stop separations.

A concerted challenge to zero tolerance's family separation has been
through litigation alleging violations under the Federal Tort Claims Act (FTCA).\textsuperscript{218} Created in 1946, the FTCA represents a remedy that is based on expressions of moral outrage,\textsuperscript{219} by providing redress for contemptible conduct by the U.S. government.\textsuperscript{220} The first migrant family filed an FTCA suit based on their separation and detention in 2016, prior to the Trump Administration and zero tolerance.\textsuperscript{221} In a collective effort to seek compensation for the extreme and intentional harm caused by zero tolerance, advocates have filed at least four hundred administrative complaints on behalf of affected parents and children,\textsuperscript{222} some who remain separated, many who are reunited back in their home country, and others who have been reunited and remain in the United States. The complaints include stories of government agents physically taking young, crying children from the arms of their parents, and placing the children in shelters thousands of miles away for months after their parents were deported.\textsuperscript{223} FTCA litigation has been a powerful way for migrant families to convey narratives of harm caused by zero tolerance, and has provided legal recourse that was not available for prior deliberate family separation policies.\textsuperscript{224}

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\begin{enumerate}
\item\textsuperscript{218} 28 U.S.C. § 1346(b).
\item\textsuperscript{219} Cordero, et al., \textit{supra} note 167, at 471 (“The central idea behind [the FTCA] is distinctly moral.”).
\item\textsuperscript{220} The statute provides "a remedy to those 'intentionally or recklessly' subjected to 'extreme and outrageous conduct,' especially from those who hold power over them." \textit{Id.} (citing \textsc{Restatement (Third) Of Torts: Liability For Physical \& Emotional Harm § 46 (Am. Law. Inst. 2012)} and \textit{Lashley v. Bowman}, 561 So. 2d 406, 609-10 (Fla. Dist. Ct. App. 1990).
\item\textsuperscript{221} \textit{Rodriguez Alvarado v. United States}, Case No. 2:16-cv-05028 (Aug. 17, 2016), https://asylumadvocacy.org/ftca-litigation/.
\item\textsuperscript{222} \textit{C.M. et al. v. United States}, Case No. 2:19-cv-05217 (May 29, 2020), https://storage.courtlistener.com/recap/gov.uscourts.azd.120364/gov.uscourts.azd.120364.240.0.pdf. (["T]here are over four hundred (400) pending administrative claims arising out of the family separations, and many more still may be pending."). Advocates estimate that there are actually approximately six hundred complaints pending before the relevant federal agencies on behalf of families separated by zero tolerance. Email from Amit Jain, Litigation and Pol'y Counsel, Asylum Seeker Advocacy Project, to author (June 2, 2021 11:02 EST) (on file with author); Advocacy letter from Asylum Seeker Advocacy Project to the U.S. Dept of Homeland Security and U.S. Dept of Justice (May 10, 2021) (on file with author). Administrative complaints must be filed within the statute of limitations period of two years from the harm alleged, and petitioners can pursue their claims in federal court after six months if the agency or agencies have not responded and made a final disposition on their claims. 28 U.S.C. § 2675(a).
\item\textsuperscript{223} See FTCA Administrative Complaints for C.G.H.C. and C.A.H.L., and F.A.C. and A.F.C.L. (on file with author).
\item\textsuperscript{224} This is due to the fact that the FTCA was enacted in 1946, and includes a two-year statute of limitation for filing claims. Claims regarding Japanese Internment is the one practice that could have fallen within this time frame, but none were filed during the two-year window after the end of the policy. However, after the Congressionally appointed
\end{enumerate}
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As of the publication of this Article, there are seventeen FTCA lawsuits pending in federal courts across the country on behalf of separated families. The filings in these lawsuits include language connecting the separation of families at the U.S.-Mexico border to the histories of U.S. family separation. A powerful example is in an amicus brief filed by the Commission on Wartime Relocation and Internment of Civilians (CWRIC) issued its findings in 1982 uncovering previously-concealed evidence of the U.S. government's justifications for internment, victims of internment pursued FTCA claims, albeit unsuccessfully. *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), aff'd in part and rev'd in part, 782 F.2d 227 (D.C. Cir.) rehe'g en banc denied per curiam, 793 F.2d 304 (D.C. Cir. 1986), vacated and remanded, 107 S. Ct. 2246 (1987) (ruling that even if plaintiffs complied with statutory exhaustion requirement, the two-year statute of limitations barred their claims). *See also, Kato v. United States*, 1 F. App'x 630 (9th Cir. 2001), cert denied, 534 U.S. 885 (2001). FTCA complaints for enslavement generally, not specifically on the basis of family separation, similarly have been dismissed on statute of limitations grounds, see, e.g., *Cato v. U.S.*, 70 F.3d 1103 (1995). Complaints based on the FTCA have not been attempted in the context of Indigenous family separation, see Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45 (2006). Families separated by the orphan trains, in additional to having a statute of limitations problem, were separated by private actors and not the U.S. government.

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

More than a century ago, Henry Brown wrote of the loss of his child in slavery and the immeasurable horror of children pressed together in carts while being torn from home and family. As [separated father plaintiff] can attest, [the government’s] decision to reintroduce family separation policies into the United States has caused immeasurable suffering. It is precisely these horrors that the Reconstruction Congress sought to eradicate when drafting the Thirteenth and Fourteenth Amendments [to the U.S. Constitution].

On June 20, 2018, the Administration formally abandoned the practice of separating migrant families through Executive Order (EO). The EO did not explain whether or how the federal government would reunify children whom they had separated. In fact, a few days after issuing the EO, the government admitted that it had no reunification procedure in place. It effectively replaced family separation with family detention, morphing the zero tolerance policy to resemble more the internment of families from Japanese ancestry during World War II.

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227 D.J.C.V Amicus Brief, *supra* note 18.

228 Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13,841, 83 Fed. Reg. 29,435 § 1 (June 20, 2018). The Executive Order officially ceasing the practice reestablished a policy “...to maintain family unity,” and directed families to be detained together “during the pendency of any criminal improper entry or immigration proceedings involving their members. *Id.*

229 See *Ms. L.*, 310 F. Supp. 3d at 1140–41; see also U.S. Gov’t Accountability Off., *GAO-19-163, Unaccompanied Children: Agency Efforts To Reunify Children Separated From Parents At The Border* 21 (2018) (“HHS officials told [the GAO] that there were no specific procedures to reunite children with parents from whom they were separated at the border prior to the June 2018 court order.”). The only procedure in place capable of reuniting children with their parents was the procedure developed to place unaccompanied children with sponsors in compliance with the Trafficking Victims Protection Reauthorization Act. Under this procedure, however, a parent could only be reunited with his or her child if the government deemed them eligible to be a sponsor. *Id.* Judge Sabraw noted that this procedure was inadequate because it was created to address “a different situation, namely what to do with alien children who were apprehended without their parents at the border or otherwise,” and further, that the procedure was not developed to address situations such as this one where family units were separated by government officials after they crossed the border together. *Id.* at 27 (quoting Order Following Status Conference, *Ms. L. v. Immigration and Customs Enforcement*, No. 18-0428-DMS-MDD (S.D. Cal. July 10, 2018)).

230 Olivares, *supra* note 5, at 301-309 (detailing “family separation as a strategy to normalize imprisoning immigrant families.”).

231 See *supra* note 226.
Just a few weeks after taking office, President Joe Biden established an Interagency Task Force on the Reunification of Families, calling the prior Administration’s family separation policies “unconscionable,” “abhorrent,” and a “human tragedy.”232 DHS Secretary Alejandro Mayorkas, in one of his first interviews as Secretary, said: “It is our moral imperative to not only reunite the families, but to provide them with the relief, resources, and services they need to heal.”233

* * *

Indeed, the relatively swift end to migrant family separations under zero tolerance was momentous.234 Zero tolerance represented a hybrid between deliberate and collateral family separation, where the separation of families was used as a deliberate tactic to deter migration. This led to considerable national and international condemnation of the policy, and also created an opportunity for advocates challenging zero tolerance to connect it to past U.S. family separation histories. As described above, the justifications for zero tolerance paralleled its historical antecedents, with emphasis placed on the dangerousness, unworthiness, and otherness of the affected families. And at the crux of the resistance to zero tolerance were counterstories detailing, contemporaneously, both the severe harm inflicted upon families and the extreme cruelty by the government in carrying out the policy. These counterstories had potency in a political context where many Americans and people across the globe were grappling with the reality of a


234 Ingrid V. Eagly, The Movement to Decriminalize Border Crossing, 61 B.C. L. REV. 1967, 1996 (2020) (“Although family separation had long been known to immigrant communities affected by vigorous enforcement policies, zero tolerance brought it fully into public view….The formal reprieve in the family separation policy was a significant victory.”).
U.S. government that was explicit in advancing racist, White nationalist policies.

It is likely that zero tolerance faced such rapid and harsh rebuke because government officials expressly stated that children would be separated from their parents in its execution, making it less publicly palatable than family separation as a collateral consequence of deterring migration. In the broader picture, zero tolerance represented a discrete policy within a U.S. immigration system that continues to separate children from their families.\(^{235}\) Unfortunately, the outrage that helped put an end to separating migrant families under zero tolerance has not extended to shifting societal acceptance of persistent and pervasive family separation policies that continue to disproportionately impact marginalized communities in the United States.

III. MODERN FAMILY SEPARATION

The end of deliberate family separation policies targeting enslaved, Indigenous, and immigrant families as discussed above was, of course, progress. But as shown by a dearth of demonstrative evidence of change decades after the Indian Child Welfare Act, there are systemic reasons that marginalized families, disproportionately from communities of color, continue to be separated in the United States. The important but partial victory vis-à-vis separating migrant families may be another indication of the limited success to root out widespread U.S. family separation policies.

Modern family separation persists via the criminal legal and immigration enforcement systems, which are two significant mechanisms through which the U.S. government separates children from parents.\(^{236}\)

\(^{235}\) Id. ("[C]hildren traveling with relatives or caretakers other than parents, such as grandparents or aunts and uncles, are still separated in connection with ongoing zero-tolerance prosecutions. Children traveling with parents with criminal records or parents beings prosecuted for felony illegal reentry also continue to endure painful separations from their parents.").

\(^{236}\) There are a spectrum of views as to the interplay between zero tolerance and the treatment of families generally in U.S. immigration law. Compare Olivares, supra note 5, at 317 ("...[T]he contemporary practice of separating children from fit parents is intertwined with the well-established history of racism and immigration law and the larger political context of dehumanizing marginalized people, including immigrants. Importantly, however, the foundation of immigration law and policy is built upon a commitment to keep families together." (emphasis in original.)), with Stephen Lee, Family Separation as Slow Death, 119 COLUM. L. REV. 2320, 2323 (2019) ("...[A] holistic examination of the broader immigration system shows that the exception of family separation operates much more like the rule....").
These separations, often prolonged or permanent, have the same negative social, psychological, and economic impacts on children, adults, and communities as deliberate family separation policies. The difference is that the justifications of punishment and deterrence are formidable narratives that have cast family separation as an acceptable collateral consequence within these systems.

When first questioned about the zero tolerance policy, then-Secretary of the Department of Homeland Security (DHS) Kirstjen Nielsen said about family separation: “We do it every day in every part of the country. In the United States, we call that law enforcement.”\(^{237}\) The DHS secretary’s comment, while minimizing the harm inflicted by the policy, accurately acknowledged that the U.S. government today engages in widespread family separation, including as a collateral consequence of enforcing U.S. criminal and immigration laws. As described below, the successful campaign to end the zero tolerance policy has not translated into further awareness or condemnation of equally devastating modern U.S. family separation policies, but it should.

A. Family Separation in the U.S. Criminal Legal System and its Mass Incarceration Policies

The manner in which the criminal legal system operates, particularly the mass incarceration of predominately communities of color,\(^{238}\) is an indirect but significant way in which the U.S. government has continued to separate families. Starting in the mid-twentieth century, progressively


\(^{238}\) MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6 (2010) (The United States currently “has the highest rate of incarceration in the world, dwarfing the rates of nearly every developed country...No other country in the world imprisons so many of its racial or ethnic minorities.”); ANGELA DAVIS, *Race and Criminalization: Black Americans and the Punishment Industry*, in RACE, ETHNICITY, AND GENDER: SELECTED READINGS 204 (Joseph F. Healey & Eileen O’Brien eds.) (2007); Adam Gopnik, *The Caging of America: Why Do We Lock up So Many People?*, NEW YORKER (Jan. 30, 2012), [http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america](http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america) (“Mass incarceration on a scale almost unexampled in human history is a fundamental fact of our country today—perhaps the fundamental fact, as slavery was the fundamental fact of 1850. In truth, there are more black men in the grip of the criminal-justice system... than were in slavery then. Over all, there are now more people under ‘correctional supervision’ in America—more than six million—than were in the Gulag Archipelago under Stalin at its height.”).
punitive criminal legal policies not only increased conviction rates, but also lengthened incarceration periods.239 This increased the number of parents in prison,240 with a disproportionate impact on children of color: “When we consider disparities between [W]hite children and children of color, Latino and [B]lack children are 2.5 and 7.5 times respectively more likely to have a parent in a correctional institution. Similarly, American Indian/Alaska Native and multiracial/ethnic children are over-represented.”241 Children of color are also disproportionately separated from their families by themselves being incarcerated at higher rates: “In 2013, African American youth were more than four times as likely to be committed to a juvenile facility as [W]hite youth. American Indian youth were more than three times as likely to committed, and Hispanic youth were 61 percent more likely to be committed.”242

The incarceration of a parent in many cases creates absolute separation while the parent is serving their sentence, because of barriers to communication and visitations that are particularly prohibitive for economically disadvantaged families.243 In many instances, because of


240 Dorothy E. Roberts, Prison, Foster Care, and the Systemic Punishment of Black Mothers, 59 UCLA L. REV. 1474, 1482 (2012) (“While judges used to show mothers leniency, they are now more often compelled by mandatory sentencing laws to give mothers long prison terms. As a result, the number of children with a mother in prison more than doubled between 1991 and 2007.”).


242 Minoff, supra note 239, at 12 (“In 2013, African American youth were more than four times as likely to be committed to a juvenile facility as white youth. American Indian youth were more than three times as likely to committed, and Hispanic youth were 61 percent more likely to be committed.”).

243 Id. at 14 (“Once parents are incarcerated, it can be difficult for them to maintain relationships with their children….Visits are difficult, and phone calls can be prohibitively expensive…”); Chesa Boudin, Children of Incarcerated Parents: The Child’s Constitutional Right to the Family Relationship, 101 J. CRIM. L. & CRIMINOLOGY 77, 102-103 (2011) (“In practice, most children of federal inmates do not maintain active contact with their incarcerated parents. In 2004, 59% of parents in state correctional facilities and 45% of parents in federal correctional facilities reported never having had a personal visit from their children…”). See also Ta-Nehisi Coates, The Black Family in the Age of Mass Incarceration, ATLANTIC (Oct. 2015), https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/ (“Should the family attempt to stay together through incarceration, the loss of income only increases, as the mother must pay for phone time, travel costs for visits, and legal fees.”).
factors such as lack of communication and length of incarceration, parents lose custody of their children, leading to permanent family separation.\textsuperscript{244} Mass incarceration and the accompanying family separation has disproportionately affected Black fathers.\textsuperscript{245}

The narratives justifying mass incarceration stoked racialized fear, and played on Black women stereotypes. Particularly in the 1980s, government officials amplified many of these narratives through the “War on Drugs”\textsuperscript{246} and “Tough on Crime”\textsuperscript{247} campaigns. The narrative of the “welfare queen” was amongst those vilifying women of color, and Black women specifically, a combination of misogyny and racism similar to the disparagement of Indigenous mothers.\textsuperscript{248}

Mass incarceration’s collateral consequence of separating families has caused considerable harm to children. Children of incarcerated parents

\textsuperscript{244} Minoff, supra note 239, at 13 (“Incarcerated parents…are at risk of permanently losing their parental rights if their children are in the child welfare system….According to the law, states must file a petition to terminate parental rights on behalf of any child who has been in foster care for 15 of the most recent 22 months…Since parents are often incarcerated for significantly longer than 15 months, their imprisonment means they risk losing their children forever.”); Roberts, Prisons, supra note 240, at 1496 (“A chief threat to reunification is the difficulty of visiting with children while in prison. Child welfare agencies may construe a parent’s failure to visit and communicate with his or her child as abandonment and grounds for terminating parental rights. Despite-or because of-being the primary caretaker of their children before arrest, incarcerated mothers are less likely than fathers to have family visits.”).

\textsuperscript{245} See Coates, supra note 142 (“By 2000, more than 1 million black children had a father in jail or prison—and roughly half of those fathers were living in the same household as their kids when they were locked up.”); Dewan, supra note 237 (“One in four black children can expect to have their father incarcerated before they turn 14.”); Leila Morsy & Richard Rothstein, Mass incarceration and children’s outcomes, ECON. POL’Y INST. (Dec. 15, 2016), https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/ (“By the age of 14, approximately 25 percent of African American children have experienced a parent—in most cases a father—being imprisoned for some period of time. The comparable share for white children is 4 percent.”). An estimated 250,000 children have a single mother in jail. Dewan, supra note 237.

\textsuperscript{246} See ALEXANDER, supra note 238; Kenneth B. Nunn, Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks,” 6 J. GENDER RACE & JUST. 381 (2002); Benjamin D. Steiner & Victor Argothy, White Addition: Racial Inequality, Racial Ideology, and the War on Drugs, 10 TEMP. POL. & CIV. RTS. L. REV. 443 (2001);


\textsuperscript{248} See text accompanying supra note 94.
exhibit physical health, mental health, and behavioral issues, and experience traumatic events such as housing insecurity. These effects extend beyond children directly impacted by their parents’ incarceration, causing devastating effects to communities as a whole.

B. Family Separation Caused by Detention and Deportation in the U.S. Immigration System

Before and after the Trump Administration’s zero tolerance policy, enforcement-driven immigration policies generally have caused significant family separation, a consequence that has been described as “multigenerational punishment” or “secondary immigration enforcement.”

249 Kara Gotsch, Families and Mass Incarceration, in CW360: CRIMINAL JUSTICE INVOLVEMENT IN CHILD WELFARE 7 (2018), https://cascw.umn.edu/wp-content/uploads/2018/04/CW360_Spring2018_WebTemp.pdf (“Studies report numerous negative outcomes for children as a consequence of parental incarceration, ranging from depression and anxiety to aggression and delinquency. . . additional evidence points to children’s extreme trauma resulting from the experience of parental arrest.”); Morsy & Rothstein, supra note 245 (“Independent of other social and economic characteristics, children of incarcerated parents are more likely to: drop out of school; develop learning disabilities, including attention deficit hyperactivity disorder (ADHD); misbehave in school; suffer from migraines, asthma, high cholesterol, depression, anxiety, post-traumatic stress disorder, and homelessness.”).

250 Minoff, supra note 239, at 11 (“The result may destabilize already disadvantaged communities, decreasing social cohesion and respect for the law and increasing crime. Children and families of color who do not directly experience mass incarceration, therefore, may nonetheless be affected.”).

251 Enforcement-driven immigration policies come in various forms. See Bill Ong Hing, Ethics, Morality, and Disruption of U.S. Immigration Laws, 63 KANSAS L. REV. 981, 988-1006 (detailing various immigration enforcement strategies, including: Enforcement targeting immigrant workers, both on-site workplace raids and more indirect workplace enforcement such as through the Immigration Reform and Control Act (IRCA) compliance; programs such as Secure Communities and the Criminal Alien Removal Initiative that disproportionately deported non-criminal or low-level offenders; and the removal of lawful permanent residents without a fair hearing).

252 HEIDE CASTAÑEDA, BORDERS OF BELONGING: STRUGGLE AND SOLIDARITY IN MIXED-STATUS IMMIGRANT FAMILIES 167 (2019), citing Laura E. Enriquez, Multigenerational Punishment: Shared Experiences of Undocumented Immigration Status Within Mixed-Status Families, 77 J. OF MARRIAGE & FAMILY 168 (2015); Nina Rabin, Understanding Secondary Immigration Enforcement: Immigrant Youth and Family Separation in a Border Country, 47 J. OF L. & EDUC. 1 (2018) (examining “secondary immigration enforcement,” which signifies the cumulative impact of a heightened immigration enforcement regime aimed at their parents, regardless of the legal status of the children). See also Hing, supra note 251, at 983 (“Over the past twenty years, the Immigration and Naturalization Service (INS) or, after 9/11, Immigration and Customs Enforcement (ICE) has engaged in immigration enforcement actions that...have crossed the line between what is necessary to enforce the immigration laws and over-zealous tools that
The most final of the consequences of immigration enforcement is deportation. The rate of deportations increased during the Obama Administration, when the enforcement arm of DHS, Immigration and Customs Enforcement (ICE), executed more than 350,000 deportations of non-U.S. citizens in 2009, 2010, 2011, and 2013, and more than 400,000 deportations in 2012—the latter being the most in the last decade. During the Trump Administration, ICE deported in 2017 a total of 226,119 non-U.S. citizens, deported 256,085 in 2018, and deported 267,258 non-U.S. citizens in 2019.

In 2010, Congress began requiring ICE to collect data on the deportation of parents of U.S. citizen children. Between 2015 and 2017, ICE deported more than 87,000 individuals who said they have at least one U.S. citizen child. In 2018, ICE deported more than 20,000 parents of U.S. citizen children, and in 2019, ICE deported nearly 28,000 such parents. The number of families separated by deportation, however, are higher than these statistics show, given that the reporting does not capture deported parents who left behind children who are not U.S. citizens but who nonetheless remained in the United States.

wreak unnecessary havoc on communities and a common sense of humanity and decency.


260 These families include children who are Lawful Permanent Residents (LPRs), who
In addition to the high numbers of deportations, over the past decades the U.S. government has increasingly detained non-U.S. citizens for alleged immigration violations. In fact, a former director of ICE’s Office of Detention Policy and Planning characterized the government’s modern use of immigration detention as straying from its administrative purpose of facilitating the immigration process and instead morphing into a functionally punitive system. This shift has caused the U.S. immigration system to increasingly separate families during the duration of parents’ detention.

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

have temporary immigration status such as Deferred Action for Childhood Arrivals, or who are undocumented. The Obama Administration created a pathway for certain parents with U.S. citizens and LPRs children to receive temporary immigration status and thus avoid deportation through the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. An equally divided U.S. Supreme Court judgment left in place an appeals court ruling that blocked the implementation of DAPA. The data also does not capture family separation beyond those of parents and children. See infra note 267.

262 Rand Capps et al., Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families 35 (2015) (listing as an area for future research data on "how many parents are detained.").
263 Erin R. Hamilton, et al., Growing up Without Status: The Integration of Children in Mixed-Status Families, 13 SOCIOLOGY COMPASS 1, 8 (2019).
Like in the context of criminal incarceration, family unity is disrupted, for a prolonged period or permanently, when a migrant is detained and/or deported.\(^{265}\) While this disruption is harmful regardless of children’s immigration status, it presents additional issues for U.S. citizen children. A significant number of the approximately eleven million undocumented immigrants living in the United States are in mixed status families.\(^{266}\) In fact, “[m]ore than 4 million of the approximately 5 million children under age 18 who have an undocumented immigrant parent are U.S.-born citizens.”\(^{267}\) The 2,300 miles from her children.

\(^{265}\) See Jacqueline Hagan, et al., The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives, 88 N. C. L. REV. 1799 (2010) (examining the implications of changes to law enforcement and immigration policies that have caused a significant increase in deportations over the past 10 years, and offering case studies of disrupted family ties). Not all incidents of detention and/or deportation involve family separation. Non-citizens subject to detention and/or deportation may not have children at all, or may have children in their country of origin. However, as discussed in infra section II.B.1, U.S. immigration law renders it considerably difficult for parents to avoid deportation based on hardship to their families. Therefore, increasingly enforcement-driven immigration policies generally will lead to increased incidents of family separation.

\(^{266}\) Julia Gelatt, Randy Capps, & Michael Fix, Nearly 3 Million U.S. Citizens and Legal Immigrants Initially Excluded Under the CARES Act Are Covered Under the December 2020 COVID-19 Stimulus, MIGRATION POL’Y INSTITUTE (Jan. 2021), https://www.migrationpolicy.org/news/cares-act-excluded-citizens-immigrants-now-covered (“About one-fifth of the nation’s estimated 11 million unauthorized immigrants are married to citizens or LPRs [lawful permanent residents], while more than one-third have at least one U.S.-citizen child—with considerable overlap between these two groups.”). Another scenario is parents of U.S. citizens who have legal status in the U.S. that places them in limbo, including under the constant threat that the government can revoke their status and force the parent to return to their country of origin. Temporary Protected Status (TPS) is one such kind of status, as its name connotes, that is not permanent. As of 2017, TPS holders from El Salvador, Honduras, and Haiti had an estimate of 273,000 U.S. citizen children. American Immigration Council, U.S. Citizen Children Impacted by Immigration Enforcement, (Nov. 22, 2019), https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement. See also Luis H. Zayas & Laurie Cook Heffron, Disruption Young Lives: How Detention and Deportation Affect US-Born Children of Immigrants, AMER. PSYCHOLOGICAL ASSN. (Nov. 2016), https://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation (addressing the particular stressors U.S. citizen children living in a home with one or more undocumented parents or siblings face, particularly the threat of detention and deportation).

\(^{267}\) Migration Policy Institute, supra note 266. See also CASTAÑEDA, supra note 252, at 167 (“Some 5.3 million children in the United States live with undocumented parents, and 85 percent of them are U.S.-born citizens.”). This Article’s focus is the separation of children and parents when addressing family separation, but of course there are other, equally damaging permutations of family separation. See, e.g., Beth Caldwell, Deported by Marriage: Americans Forced to Choose Between Love and Country, 82 BROOKLYN L. REV. 1 (2016) (addressing spousal separation and the choice deportation presents to U.S. citizens between the constitutional right to marriage and the constitutional right to
decision whether or not to remain in the U.S. or reunite with a deported parent is even more fraught for U.S. citizen children. Sometimes there is not even a choice, as “studies find that child welfare departments and courts often move to terminate the parental rights of a deported parent even though the child could be safely reunified.”

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

1. The Legal Narrative of Hardship for Families with Noncitizen Parents

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

Undocumented immigrants facing deportation can put forth a defense of cancellation of removal if they have lived in the U.S. for a significant period of time—ten years or more of continued residence. While Lawful Permanent Residents (LPRs) have a less onerous burden to qualify for cancellation of removal, undocumented applicants must demonstrate that removal will cause “exceptional and extremely unusual hardship” to a U.S. citizen or LPR child, parent, or spouse.

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

IIRIRA also changed the hardship requirement by mandating a more severe showing of hardship. The new standard of “exceptional and extremely unusual hardship” previously was one that applied only to non-U.S. citizens deportable on grounds related to crime, fraud, or national security. The

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272 INA § 240A(b). Applicants for cancellation of removal also have to demonstrate good moral character, that they are not inadmissible on criminal or national security grounds. INA § 240A(b)(1)(A)-(C).

273 Pursuant to INA § 240A(a), Lawful Permanent Residents (LPR) cancellation requires respondents: To have had LPR status for five years; to have seven years of continuous residence in the U.S.; to not be inadmissible for an aggravated felony conviction or on national security grounds. Both non-LPR and LPR Cancellation can only be granted once, i.e. respondents cannot have had a previous grant of Cancellation of removal.

274 INA § 240A(b)(1)(D).

275 In re Monreal-Aguinaga, 23 I&N Dec. 56, 58 (BIA 2001).

276 Id.

277 Id.

278 Id. at 60, note 1. See also Bill Ong Hing & Lizzie Bird, Curtaining the Deportation of Undocumented Parents in the Best Interest of the Child, 35 GEORGETOWN IMMIG. L. REV 1, 3-4 (2020) (“The problem of parental deportation has existed for years but became worse after the introduction of the current hardship standard under the 1996 Illegal
devastating harms inflicted by a child being separated from their parent does not automatically suffice.279

When parents are deported to their country of origin, one option is for the citizen children leave the U.S. to relocate with them. Immigration scholars have referred to this option as de facto deportation,280 and courts have determined that there is no Constitutional rights violation in cases involving de facto deportation.281 As an alternative, deported parents often choose family separation so that their children can reap the socio-economic benefits of remaining in the United States. As discussed above, in other cases their children are forcibly taken from them.282
The number of children in the U.S. child welfare system because their parents are detained or have been deported\textsuperscript{283} rivals the number of children separated under zero tolerance. The former number likely would be higher, but for the advent of safety planning protocols that have included undocumented parents executing powers of attorney to designate their children’s caretakers in the event that they are detained or deported.\textsuperscript{284} While the zero tolerance policy caused broad public outcry, the separation of U.S. citizen children from their parents otherwise caught in the immigration enforcement system has failed to pierce the public consciousness.\textsuperscript{285} The modern U.S. immigration law trend of widespread detention and deportation,
in operation before and after the Trump Administration’s deliberate family separation policy, has had a significant detrimental impact on the ability of migrant families to stay together.\textsuperscript{286}

**CONCLUSION**

The lineage of U.S. family separation traces back to the American slave system. Centuries later, in part as a reaction to the formal end of slavery, the U.S. government began the systematic removal of Indigenous children from their caretakers and communities. Overlapping with Indigenous family separation was the privately-run “orphan train” movement that removed from urban areas approximately a quarter of a million children, who were predominantly from impoverish immigrant families. The separation of migrant families under the Trump Administration’s zero tolerance policy was reminiscent of these family separation histories.

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

The production and dissemination of counterstories of harm to swiftly end the Trump Administration’s zero tolerance policy was simultaneously momentous and limited. These narratives played a crucial part in putting a

\textsuperscript{286} Elisabeth Malkin, *Pain of Deportations Swell When Children Are Left Behind*, N.Y. TIMES (May 20, 2017). While, as of this writing, it is too early to tell what the Biden Administration’s record on deportations will be, early indicators suggest that the new Administration seeks to slow down the rate of deportations of non-U.S. citizens. *Deportations of Undocumented Immigrants are at a Record Low: Joe Biden Does Not Want to be America’s Next “Deporter-in-Chief,”* THE ECONOMIST (June 12, 2021), https://www.economist.com/united-states/2021/06/12/deportations-of-undocumented-immigrants-are-at-a-record-low. Families, however, continue to be separated by deportation. See, e.g., Sam Levin, *Deported by Biden: A Vietnamese Refugee Separated From His Family After Decades in US*, THE GUARDIAN (May 3, 2021), https://www.theguardian.com/us-news/2021/may/03/biden-deportations-vietnamese-refugee-california-ice.
rapid end to the particular policy, at a time when there was momentum in U.S. society to limit the explicitly xenophobic and White nationalist agenda of a new Administration. The public condemnation, however, did not extend to challenging the widespread separation of families caused by the U.S. immigration system more broadly, and by mass incarceration in the U.S. criminal legal system. This could be because of a perceived moral distinction between deliberate and collateral family separation. It could also, or alternatively, be because the justifications of deterrence and punishment represent widely-held values that carry greater weight than the cost of separating families.

The devastating consequences of family separation histories in the United States have been told through the narratives of those who were harmed. Continuing to uplift past and present humanizing narratives could help harness forces to change modern family separation practices. The lineage of U.S. family separation could come to an end if these stories are aligned with societal will to challenge the legitimacy of the systems that continue to separate marginalized families.