

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

¹ JAMES BALDWIN, *THE WHITE MAN’S GUILT* (1965).

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

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

⁴ Ashley Fetters, *Unthinkable: The Moral Failure of Family Separation*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/trumps-family-separation-policy-causes-national-outrage/579676/>; Fionnuala Ni Aolain, *Global Responses to President Trump’s Family Separation via “Zero Tolerance” Detention Policy*, JUST SECURITY (June 30, 2018), <https://www.justsecurity.org/58783/global-responses-president-trumps-family-separation-zero-tolerance-detention-policy/>.

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

repetition of the practice in the United States.⁶

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 narratives⁷ constitute what philosopher Hilde Lindemann calls "master narratives."⁸ Such narratives include those that constitute "oppressive narrative formations,"⁹ with the purpose of "reinforc[ing] unjust distributions of social power by pretending to justify them."¹⁰ 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"¹¹ in each example was facilitated by a

parents?").

⁶ Shaun King, *Separating Migrant Families is Barbaric. It's Also What the U.S. Has Been Doing to People of Color for Hundreds of Years*, THE INTERCEPT (June 20, 2018), <https://theintercept.com/2018/06/20/family-separation-immigration-history-slavery-mass-incarceration/> ("You'd have a hard time finding an extended period of American history where children and parents of color weren't forcefully separated from one another by the [W]hite power structure in this country."). See also Anita Sinha, *An American History of Separating Families*, AMER. CONST. SOC'Y EXPERT FORUM (Nov. 2, 2020); James Herbert Williams, *Child Separations and Families Divided: America's History of Separating Children From Their Parents*, 42 SOC. WORK RESEARCH 3, 141-144 (Aug. 21, 2018) ("Separating children from their parents is not a contemporary event in American History. There is a long and remarkable history of this practice with indigenous people, slaves, and immigrants.").

⁷ Rainer Forst, *On the Concept of Justification Narrative*, in RAINER FORST, *NORMATIVITY AND POWER: ANALYZING SOCIAL ORDERS OF JUSTIFICATION* (2017) (describing the concept as a "heuristic device to connect the normative dimension of justification that aims at rational persuasion with the dimension of socially effective justifications which are recognized and practiced by those involved as persuasive...")

⁸ Hilde Lindemann, *Counter the Counterstory: Narrative Approaches to Narratives*, 17 J. ETHICS & SOC. PHIL. 286, 288 (2020).

⁹ Mark Lance, *Counterstories, Stock Characters, and Varieties of Narrative Resistance: Response to Lindemann*, 17 J. ETHICS & SOC. PHIL. 299, 299 (2020).

¹⁰ Lindemann, *supra* note 8, at 288.

¹¹ *Id.* at 286 ("A counterstory... is a story that is told for the purpose of resisting a socially

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.¹² 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.”).

¹² See Marya Schechtman, *It's Complicated: The Complexity and Power of Lindemann's Narrative Framework*, 17 J. ETHICS & SOC. PHIL. 315 (2020) (discussing the difficulties of creating the conditions for successful counterstories).

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.¹³

Soon after the Civil War formally ended slavery,¹⁴ the U.S. government began executing Indigenous family separation.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.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

¹³ Ta’Nehisi Coates, *A Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

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).

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.

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

¹⁷ Kari E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 17-18 (2003).

¹⁸ Brief for Law Professors as Amicus Curiae, *D.J.C.V. v. U.S.A.*, Civ. Action No. 1:20-CV-05747-PAE 5 (Dec. 23, 2020) [hereinafter D.J.C.V. Amicus Brief]. The brief details stories of family separation recounted “after the successful mutiny by the slave cargo of the ship *Amistad* in 1839,” citing HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925* 329-330 (1976).

¹⁹ Daniel Farber, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1886 (2019).

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) (...[T]he 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

slave marriages ended in involuntary separation).

²⁴ 60 U.S. 393 (1857).

²⁵ Jennifer Chacón, *Citizenship and Family: Revisiting Dred Scott*, 27 WASH. U. J.L. & POL’Y 45 (2008) (arguing that *Dred Scott*, at its core, was a case about family and a challenge to the denial of the right for slaves to keep their families together); Lea Vanervelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997).

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).

²⁸ Fede, *supra* note 26, at 416; *see also* Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. OF LAW AND SOC. CHANGE 33, 55 (1994).

²⁹ Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J. L. & PUB. POL’Y 139, 144 (1990). Only Louisiana and Alabama adopted laws to cap the ages slaveholders could separate children from their mothers. *See* HEATHER ANDREA WILLIAMS, HELP ME FIND MY PEOPLE: THE AFRICAN AMERICAN SEARCH FOR FAMILY LOST IN SLAVERY 25 (2012).

³⁰ *See* WILLIAMS, *supra* note 29, at 33.

³¹ Anita L. Allen, *supra* note 29, at 142-143 (1990) (conveying the story of Polly Crockett, 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 property³² meant that the construction of narratives to justify family separation were intertwined with the narrative endeavors to uphold the system of slavery generally.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.³⁴ Enslaved children were also branded as gifts or inheritances for enslavers' children,³⁵ so that the death of enslavers often caused slave family separation.³⁶

Even before the *Dred Scott* decision, state courts upheld the separation of slave families based on the notion that they were property.³⁷ In

“Reverse Underground Railroad” is a derisive term for the practice of kidnapping freed Blacks for slavery. See Richard Bell, *Opinion: You Know About the Underground Railroad. But What About the Reverse Underground Railroad?*, WASH. POST. (Nov. 7, 2019), <https://www.washingtonpost.com/opinions/2019/11/07/you-know-about-underground-railroad-what-about-reverse-underground-railroad/>.

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).

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.

³⁴ *M’Vaughers v. Elder*, 4 S.C.L. 307, 308 (Con. Ct. App. S.C. 1809). See also Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209, 1226 (2004).

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/>

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, 1991) (1854)). Adolescents were desirable and viewed as more profitable because of their strength and youth. WILLIAMS, *supra* note 19, at 25.

³⁷ See *M’Vaughers*, *supra* note 34, at 308; *Nowell v. O’Hara*, 19 S.C.L. 150, 151-52 (Ct. App. of Law and Equity of S.C. 1833).

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.³⁸ However, when one of the enslavers passed away, his estate demanded the return of the enslaved boy.³⁹ The court found that this child was legally the possession of the enslavers' estate.⁴⁰

Another legal construct justifying slave family separation was the proposition that enslaved persons were not able to marry.⁴¹ Three states did acknowledge one kind of relationship within a slave family—"that of mothers to very young children."⁴² Yet based on the premise that slaves were considered to be property, none recognized the right of enslaved persons to marry.⁴³ This inability of enslaved parents to marry meant that their children were illegitimate, which created legal complications for those children post-Emancipation.⁴⁴

³⁸ *Willis v. Willis Adm'rs*, 36 Ky. 48 (Ct. App. Ky. 1837).

³⁹ *Id.*

⁴⁰ *Id.* at 50. *Willis* provides a rare look into the justice system's outlook on slave families and family separation. Unless a Black person was free or had a valid claim to emancipation, the courts were not accessible to them, which is why there are few lawsuits regarding family separation during slavery. Cobb, *supra* note 27.

⁴¹ McMurry-Chubb, *supra* note 36, at 622 (citing THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 44 (1996); Margaret A. Burnham, AN IMPOSSIBLE MARRIAGE: SLAVE LAW AND FAMILY LAW, 5 L. AND INEQUALITY 187 (1987)).

⁴² Russell, *supra* note 20, at 1171 ("[I]aws protecting any type of slave family relationship existed in only three states—Alabama, Georgia, and Louisiana.").

⁴³ McMurry-Chubb, *supra* note 36, at 622 (explaining how, in the continuation of being treating as property, slaves were not given the right to marry, which would have legitimized their children and recognized them as humans with the right to make familial decisions); Paul Finkelman, *Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican*, 81 MO. L. REV. 1, 22 (2016) ("[a] marriage, then as now, was a contract between the two spouses and the state. But slaves could never sign a contract"); Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 307 (2006) ("[a]s personalty, slaves lacked the capacity to enter into any form of marital union recognized necessarily or legally by the plantation masters, the government, or the judiciary").

⁴⁴ Guiliana Perrone, "Back Into the Days of Slavery": Freedom, Citizenship, and the Black Family in the Reconstruction-Era Courtroom, 37 LAW & HIST. REV. 125, 143 (2019) (explaining how slave marriages may have existed prior to their right to marry, and how ex post facto recognition of these marriages was particularly important for free children, who lacked legitimacy at birth); *Marriage and Divorce—Slave Marriage—Effect of Emancipation*, 28 YALE L. J. 516, 516-517 (1919) ("A slave 'marriage' did not in itself produce any of the civil consequences of marriage. But when entered on by the consent of the master and the moral assent of the slave, it did from the moment of freedom produce all those consequences, operating retroactively at least as regards the legitimation of children.").

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.⁴⁵ 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.⁴⁶

Family separation was also justified as a means to an end—a way to control enslaved persons and legitimize the master/slave relationship.⁴⁷ 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.”⁴⁸ 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).

⁴⁵ 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).

⁴⁶ 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/>.

⁴⁷ 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.”).

⁴⁸ *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.⁴⁹ In his second autobiography, Douglass wrote: "My poor mother, like many other slave-women had many *children*, but NO FAMILY!"⁵⁰

The use of stories detailing the cruelty of slave family separation was a central rhetorical strategy of abolitionists.⁵¹ 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,⁵² and thereafter "began to beg God most earnestly to send her father to her."⁵³ 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.⁵⁴

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.⁵⁵ 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

⁴⁹ NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE (1845).

⁵⁰ FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM (1855) (emphasis in original).

⁵¹ 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.").

⁵² 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).

⁵³ *Id.* at 18.

⁵⁴ *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.

⁵⁵ HARRIET 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

* * *

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.

⁶⁰ Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 *VILL. L. REV.* 767 (1988).

⁶¹ *See supra* note 51.

alliances between slaves and abolitionists allies.⁶² It was also a time when slavery was being abolished by most countries around the world.⁶³ 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.⁶⁴ 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.⁶⁵

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.⁶⁶ For most of this period,

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.")

⁶⁴ Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AMERICAN INDIAN QUARTERLY 136, 138–39 (2013).

⁶⁵ Ann Piccard, *Death By Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137, 151 (2013).

⁶⁶ Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1801 (2019) ("[t]he Marshall [Plan] trilogy began a period of dormancy similar to that experienced by the Reconstruction Amendments in the late

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.”).

⁶⁷ Anita Ortiz Maddali, *The Immigrant "Other: " Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L. REV. 643, 652 (2014). See also Grace Hauck, *Mass Grave in 215 Children in Canada a Stark Reminder of the Dark History of Native American Boarding Schools in US*, USA TODAY (May 30, 2021), <https://www.usatoday.com/story/news/nation/2021/05/30/native-american-boarding-schools-abused-neglected-thousands-us/5263769001/> (“More than 350 Native American boarding schools were established across 30 states ‘to implement cultural genocide through the removal and reprogramming of American Indian and Alaska Native children...”); Mary Annette Pember, *Death by Civilization: Thousands of Native American Children were Forced to Attend Boarding Schools Created to Strip them of their Culture*, THE ATLANTIC (Mar. 8, 2019), <https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/> (describing boarding schools as “institutions created to destroy and vilify Native culture, language, family, and spirituality.”).

⁶⁸ Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1308 (2021); Sarah Deer, *(En)gendering Indian Law: Indigenous Feminist Legal Theory in the United States*, 31 YALE J. OF LAW & FEMINISM 1, 10 (2019); Bethany R. Berger, *Savage Equalities*, 94 WASH. L. REV. 583, 609 (2019); Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?* 71 STAN. L. REV. 791, 819-20 (2019); Barbara Stock, *When Genealogy Matters: Intercountry Adoption, International Human Rights, and Global Neoliberalism*, 51 VAND. J. TRANSNAT'L L. 159, 166-67 (2018); Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 201 (2001); Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation* 50, 56, THE INDIAN CHILD WELFARE ACT AT 30 (Matthew L.M. Fletcher, Kathryn E. Fort, Wenona T. Singel, eds.) (2009).

⁶⁹ Lara Roetzel, et al., *Beyond the Cages: Sex Trafficking in South Dakota*, 64 S.D. L. REV. 346, 358 (2019); Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 667 (2010).

⁷⁰ *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

physically abused by staff for speaking their language,⁷¹ as punishment for violating the boarding school system's English-only policy.⁷² They were humiliated and verbally abused by, for example, being called a "dirty Indian."⁷³ 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."⁷⁴

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.⁷⁵ A majority of the children were placed with White families.⁷⁶ 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.⁷⁷ State courts and child welfare systems likewise placed Indigenous children in non-Indigenous homes.⁷⁸

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

the children."). The widespread sexual abuse in the boarding schools is the basis for some to argue that the relocation of Indigenous children was trafficking. *See, e.g.,* Cheryl Nelson Butler, *Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1479 (2015).

⁷¹Pember, *supra* note 67.

⁷²Lindsay 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.").

⁷³Pember, *supra* note 67.

⁷⁴Rebecca 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.").

⁷⁵Deborah Thibeault & Michael S. Spencer, *The Indian Adoption Project and the Profession of Social Work*, 93 SOC. SERV. REV. 804, 808 (2019).

⁷⁶Arnold 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.").

⁷⁷In 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.⁷⁹ 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.⁸⁰ 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.”⁸¹

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.”⁸² 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.⁸³ It was a system of forced assimilation casting Native ways as savage,⁸⁴ and stripping Indigenous children of their given names, as well as their language, religion, and culture.⁸⁵

The sense that America needed protection from harmful and uncivilized Indigenous communities spiked post-World War II, an era generally fraught with rampant xenophobia.⁸⁶ During this time, the U.S.

⁷⁹ H.R. REP. 95-1386, 9, 1978 U.S.C.C.A.N. 7530, 7531. Neither the AAIA study nor other statistical findings documenting the scope of Indigenous family separation provide actual numbers of children removed from their tribal families and communities.

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

⁸¹ Berger, *supra* note 68, at 621.

⁸² Lorie Graham & Kathryn E. Fort, *If Truth Be Told*, THE HILL (June 25, 2015), <https://thehill.com/blogs/congress-blog/civil-rights/245996-if-truth-be-told>; Becky Little, *How Boarding Schools Tried to ‘Kill the Indian’ Through Assimilation*, HISTORY STORIES (Aug. 16, 2017), <https://www.history.com/news/how-boarding-schools-tried-to-kill-the-indian-through-assimilation>.

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 caretakers⁹¹—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).

⁹² Rachael T. Aminu, *Redefining Best Interest of the Child: The Crushing Impact of Child Support Debts on Low-Income Families in the Minority Communities*, 43 T. MARSHALL L. REV. 561 (2019); Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL'Y & L. 87 (2006). The BIA also promoted the adoption and fostering of Indigenous children using the best interest of the child narrative. Jacobs, *supra* note 64, at 137.

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.”⁹⁴ As child welfare workers visited tribes to promote adoption “as an alternative to a life in poverty for their children,”⁹⁵ 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.”⁹⁶ 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.”⁹⁷ It also encouraged, not surprisingly, placements of Indigenous children into White families’ homes.⁹⁸

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.”⁹⁹ 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.”¹⁰⁰

⁹⁴ Thibeault & Spencer, *supra* note 75, at 812.

⁹⁵ Lila J. George, *Why the Need for the Indian Child Welfare Act?*, 5 JOURNAL OF MULTICULTURAL SOCIAL WORK 165, 171–72 (1997).

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

¹⁰¹ DAVID FANSEL, FAR FROM THE RESERVATION: THE TRANSRACIAL ADOPTION OF AMERICAN INDIAN CHILDREN 339-342 (1972). Longitudinal study connotes that Fanshel conducted repeat observations during a course of time. Specifically, he interviewed parents on three separate occasions over five years. Arnold R. Silverman, *Outcomes of Transracial Adoption*, 3 THE FUTURE OF CHILDREN, ADOPTION 104, 106-107 (Spring 1993).

¹⁰² Fanshel, *supra* note 101; Silverman, *supra* note 101, at 106.

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

¹⁰⁷ *Beyond the Mandate: Continuing the Conversation*, Report of the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission 22 (June 14, 2015), https://d3n8a8pro7vhmx.cloudfront.net/mainewabanakireach/pages/17/attachments/original/1468974047/TRC-Report-Expanded_July2015.pdf?1468974047 (hereinafter “Beyond the Mandate”).

¹⁰⁸ Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 127, 133-35 (2008) (describing ICWA's multi-pronged approach).

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.’”¹¹¹ 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.¹¹²

Unlike the Fanshel report issued a few years prior,¹¹³ 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.”¹¹⁴ The enactment of the ICWA represented a moment when Congress came to appreciate the existential threat confronting Native American families and culture.¹¹⁵ Indeed, the movement leading up to the passage of the ICWA promised a shift in federal Indian policy, “from termination to self-determination.”¹¹⁶

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.

¹¹⁵ Peter K. Wahl, *Little Power to Help Brenda? A Defense of the Indian Child Welfare Act and Its Continued Implementation in Minnesota*, 26 WM. MITCHELL L. REV. 811, 814 (2000); see also Atwood, *supra* note 108, at 133 (“Through ICWA, Congress addressed a long history of destructive federal and state governmental practices that decimated the American Indian family and threatened the very existence of Indian tribes.”); Metteer, *supra* note 111, at 648 (citing *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 162 (Tex. Ct. App. 1995)).

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.”¹¹⁷ The Commission found that the percentage of Native children in the child welfare system in Maine had changed very little from 1960 to 2015.¹¹⁸ 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.¹¹⁹

Litigation challenging the statute has also threatened the efficacy of the ICWA.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

§ 1911.

¹¹⁷ Beyond the Mandate, *supra* note 107, at 12.

¹¹⁸ *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.”).

¹¹⁹ South Dakota is one of these states. See Laura Sullivan & Amy Walters, *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]lmost 90 percent of the kids in family foster care are in non-native homes or group care.”).

¹²⁰ See Kathryn Fort & Adrian T. Smith, *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 *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), ruled against an interpretation of the ICWA as conferring custody of an Indigenous child to her biological Indigenous father. In a 5-4 decision, the Court held the ICWA did not apply to protect Indigenous American parents who had never been a custodial parent. *Id.* at 653-54. The majority elaborated that 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. *Id.* at 656. See also Jacobs, *supra* note 110, at xxiii-xxiv (discussing how media coverage of *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.

* * *

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

¹²¹ The Goldwater Institute, <https://goldwaterinstitute.org/indian-child-welfare-act/>.

¹²² *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), *reh'g en banc*, *Brackeen v. Bernhardt*, 942 F.3d 287 (5th Cir. 2019), *aff'g in part, rev'g in part Brackeen v. Zinke*, 338 F. Supp. 3d 514, 523 (N.D. Tex. 2018). Indian law scholars regard the *Brackeen* case as having significant overall impact on tribal sovereignty. See Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, THE ATLANTIC (Jan. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167/>. As of the publication of this Article, the U.S. Supreme Court has not taken up the case.

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).

¹²⁴ Debra Cassens Weiss, *In 325-page Opinion, En Banc 5th Circuit Splits on Preference for Tribes in Native American Adoptions*, ABA JOURNAL (Apr. 8, 2021), https://www.abajournal.com/news/article/in-325-page-opinion-5th-circuit-splits-on-federal-provision-giving-tribes-preference-in-native-american-adoptions#google_vignette.

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.").

¹²⁷ *Secretary Haaland Announces Federal Indian Boarding School Initiative*, U.S. DEPT OF THE INTERIOR PRESS RELEASE (June 22, 2021), <https://www.doi.gov/pressreleases/secretary-haaland-announces-federal-indian-boarding-school-initiative>

in the context of several civil rights movements in the United States, including one for Indigenous rights—the Red Power movement.¹²⁸ In this context, the campaign for the ICWA was “part of a larger quest for Indian self-determination and sovereignty.”¹²⁹ 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.¹³⁰ 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.¹³¹ 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.¹³² 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.¹³³ 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.”¹³⁴ The orphan trains executed the removal

¹²⁸ TROY JOHNSON, RED POWER: THE NATIVE AMERICAN CIVIL RIGHTS MOVEMENT 7 (2007) (describing the Red Power movement alongside Black Power, La Raza, and protests against the Vietnam War).

¹²⁹ MARTINEZ, *supra* note 128, at 114.

¹³⁰ *Id.*

¹³¹ JOANE NAGEL, AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE 9 (1996).

¹³² MARTINEZ ET AL, *supra* note 126, at 114.

¹³³ *Id.*

¹³⁴ Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 MOD. AM. 3, 10 (2009) (“Orphan trains ran from 1854 through 1929, a period in American history of greatest

and relocation of approximately 250,000 children¹³⁵ from East Coast cities to rural areas across the country, including into agricultural communities in the Midwest.¹³⁶ Charles Loring Brace, a Protestant minister and founder of the Children's Aid Society of New York, conceived of the orphan trains.¹³⁷ His mission was to save children from their families in order to make them "good" Americans.¹³⁸ Brace sought to place¹³⁹ children with "good, Christian families where they would be cared for, educated, and employed."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.¹⁴¹

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

changes in views regarding childhood and laws affecting children.”).

¹³⁵ *Id.* at 4; Joan Gittens, *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.

¹³⁶ 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. MARILYN IRVIN HOLT, *THE ORPHAN TRAINS: PLACING OUT IN AMERICA* 158-59 (1992).

¹³⁷ Trammell *supra* note 135, at 3. *But see* HOLT, *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.”).

¹³⁸ Michelle Kahan, “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, *supra* note 135, at 4.

¹³⁹ 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, *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.

¹⁴⁰ Kahan, *supra* note 138, at 55.

¹⁴¹ Trammell, *supra* note 135, at 4. *See also* HOLT, *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, *supra* note 142, at 55-56; Williams, *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.”).

orphans, but had one or both parents who were still alive.¹⁴² Brace defended the removal of these children by explaining that “the great majority were the children of poor and degraded people.”¹⁴³ 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.”¹⁴⁴ These justifications resonate with ones that rationalized enslaved and Indigenous family separation. Notably, most of the orphan train children came from Catholic, immigrant homes.¹⁴⁵

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 Patri[archy]: 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.*

¹⁴⁵ *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).

on display in a local church, where the population could view them and choose a child to take home. Some children were adopted, but the CAS did not require that or consider a placement a failure if the child was treated more like a worker than a family member. There was no legal contract and no follow-up...[I]t was clear that the CAS considered its work accomplished when the children were relocated.¹⁴⁶

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 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.”¹⁴⁷ Armstrong’s testimonial is indicative of placement families who took in orphan train children for cheap or unpaid labor,¹⁴⁸ as was the fact that both “parents” and “employers” were terms used to describe placement families.¹⁴⁹ Other families, particularly those who were Protestant, were also motivated by the mission of giving children a “better” upbringing.¹⁵⁰

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.

¹⁴⁹ STEPHEN O’CONNOR, ORPHAN TRAINS: THE STORY OF CHARLES LOVING BRACE & THE CHILDREN HE SAVED AND FAILED 13 (2001).

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 streets¹⁵¹ 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,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.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."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.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."¹⁵⁶

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

¹⁵¹ See Hong, *supra* note 142, at 14-15.

¹⁵² See *supra* note 95.

¹⁵³ See Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. OF L. & SOC. CHANGE 523, 553 (2019).

¹⁵⁴ See Trammell, *supra* note 135, at 4.

¹⁵⁵ See *id.*

¹⁵⁶ HOLT, *supra* note 136, at 181.

¹⁵⁷ *Id.* at 182.

¹⁵⁸ Laura Rice, "Riders of the Orphan Train" Preserves the Unforgettable Stories of Unwanted Children, TEXAS STANDARD (July 3, 2018), <https://www.texasstandard.org/stories/riders-of-the-orphan-train-preserves-the-unforgettable-stories-of-unwanted-children/>.

¹⁵⁹ HOLT, *supra* note 136, at 182.

¹⁶⁰ *Id.*; see also Nina Siegal, *Riders of "Orphan Train" Meet to Tell Life Stories*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2000/05/13/nyregion/riders-of-orphan-train-meet-to-tell-life-stories.html>; *Orphan Train Rider Stories*, NAT'L ORPHAN TRAIN COMPLEX MUSEUM & RESEARCH CTR., <https://orphantraindepot.org/history/orphan->

* * *

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.¹⁶¹ 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.¹⁶² These programs reflected a narrative shift from “child rescue” to aiding children within their family unit.¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵

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

train-rider-stories/.

¹⁶¹ *Id.* at 162.

¹⁶² *Id.* at 164-65.

¹⁶³ *Id.* at 165. This is not to say that the modern U.S. child welfare system operates without deep flaws. The system continues to cause harm by removing children from their homes instead of pursuing alternatives, and generally continues to be problematic particularly for African Americans and other communities of color. Trivedi, *supra* note 153, at 523;; Gloria Ann Whittico, *If the Past is Prologue: Toward the Development of a New ‘Freedom Suit’ for the Remediation of Foster Care Disproportionalities Among African-American Children*, 43 CAP. U. L. REV. 407 (2015); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012).

¹⁶⁴ HOLT, *supra* note 136, at 169-70.

¹⁶⁵ Cybelle Fox & Thomas A. Guglielmo, *Defining America's Racial Boundaries: Blacks, Mexicans, and European Immigrants, 1890-1945*, 118 AM. J. OF SOCIOLOGY 327 (2012).

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.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.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 effect¹⁶⁸ was a mother of two U.S. citizens who had lived almost half of her life in the United States.¹⁶⁹

¹⁶⁶ See *supra* note 127.

¹⁶⁷ For other articles on the Trump Administration's zero tolerance policy, see Ediberto Roman & Ernesto Sagas, *A Domestic Reign of Terror: Donald Trump's Family Separation Policy*, 24 HARV. LATINX L. REV. 65 (2021); Carrie F. Cordero, et al., *The Law Against Family Separation*, 51 COLUM. HUMAN RTS. L. REV. 434, 435-445 (2020); Jonathan Todres & Daniela Villamizar Fink, *The Trauma of Trump's Family Separation and Child Detention Actions: A Children's Rights Perspective*, 95 WASH. L. REV. 377 (2020); Olivares, *supra* note 5, at 294-301 (2020).

¹⁶⁸ Exec. Order No. 13767, 82 Fed. Reg. 8,793 (Jan. 25, 2017), <https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-and-immigration-enforcement-improvements>.

¹⁶⁹ Marcela Valdes, *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.”¹⁷⁰ 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.¹⁷¹

The American Civil Liberties Union (ACLU) filed a putative class action, *Ms. L. v. Immigration and Customs Enforcement*,¹⁷² 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*.¹⁷³

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

¹⁷⁰ OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, OIG-21-028, REVIEW OF THE DEP’T OF JUSTICE’S PLANNING AND IMPLEMENTATION OF ITS ZERO TOLERANCE POLICY AND ITS COORDINATION WITH THE DEP’TS OF HOMELAND SECURITY AND HEALTH AND HUMAN SERVICES 3 (Jan. 2021) [hereinafter “DOJ OIG Report 2021”], https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf.

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

¹⁷² 310 F. Supp. 1133 (S.D. Cal. 2018).

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”¹⁷⁴ and in anguish,¹⁷⁵ and parents not knowing the whereabouts of their children¹⁷⁶ were told. As detailed below, the U.S. government was eventually compelled to reunite families, but many migrant children remain separated from their parents.¹⁷⁷

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.

¹⁷⁴ Miriam Jordan, *U.S. Shuttles Warehouse Where Migrants Were Kept in “Cages,”* N.Y. TIMES (Nov. 25, 2020), [https://www.hrw.org/news/2019/07/11/written-testimony-kids-cages-inhumane-treatment-border#](https://www.nytimes.com/2020/11/25/us/border-migrant-children-cages-ursula-warehouse.html?mc=aud_dev&ad-keywords=auddevgate&gclid=CjwKCAjw2ZaGBhBoEiwA8pfP_jrGybI-r7rpj9IH2hgXtritbibb8WAWL2VqohoW5HmEsEBJ3kHCzxoCQI8QAvD_BwE&gclsrc=a.w.ds; Clara Long, <i>Written Testimony: “Kids in Cages: Inhumane Treatment at the Border,”</i> HUMAN RIGHTS WATCH (July 2019), <a href=); *Trump Migrant Separation Policy: Children “in Cages” in Texas*, BBC (June 18, 2018), <https://www.bbc.com/news/world-us-canada-44518942>; *Separation at the Border: Children Wait in Cages at South Texas Warehouse*, THE GUARDIAN (June 17, 2018), <https://www.theguardian.com/us-news/2018/jun/17/separation-border-children-cages-south-texas-warehouse-holding-facility>.

¹⁷⁵ Suzanne Gamboa, *Children Cry for Their Parents on Audio of Trump’s Border Family Separations*, NBC NEWS (June 18, 2018, 3:23 PM), <https://www.nbcnews.com/news/latino/children-cry-their-parents-audio-trump-s-border-family-separations-n884486> [<https://perma.cc/4APF-F22R>]; Julia C. Wong, *Recording Captures Cries of Children Separated from Parents at US Border*, THE GUARDIAN (June 18, 2018, 7:36 PM), <https://www.theguardian.com/us-news/2018/jun/18/us-border-families-separated-audio-recording> [<https://perma.cc/K9V3-DRB2>].

¹⁷⁶ Julian Aguilar, *Immigrant Parents Searching for Children After Being Released from Federal Custody*, TEXAS TRIBUNE (June 25, 2018), <https://www.texastribune.org/2018/06/25/immigrant-parents-searching-children-after-being-released-federal-cust/>.

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. 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.¹⁷⁸ Once the separations began to generate public condemnation, former President Trump deflected blame,¹⁷⁹ and the Administration even denied that it was separating parents and children.¹⁸⁰

Government officials could not repudiate for long the fact that they were deliberately separating families at the U.S.-Mexico border.¹⁸¹ 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.¹⁸² 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)

(Feb. 1, 2021), <https://www.nytimes.com/2021/02/01/us/immigration-family-separations-biden.html>.

¹⁷⁸ DOJ OIG Report 2021, *supra* note 170, at 19.

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.¹⁸³ 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."¹⁸⁴ Consequently, when ICE was processing detained parents for removal, "no additional effort was made to identify and reunite families prior to removal."¹⁸⁵ The government consequently deported many parents without their children.

In the end, the government separated more than 5,000 migrant children from their parents.¹⁸⁶ 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."¹⁸⁷ Then-Attorney General Jeff Sessions invoked a state of crisis¹⁸⁸ to support

¹⁸³ DHS OIG Report 2018, *supra* note 173, at 2.

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." *Id.*

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.¹⁸⁹ 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.¹⁹⁰

Immigration officials classified migrant children as an “Unaccompanied Alien Child” (UAC) once they separated them from their parents,¹⁹¹ creating a narrative that harkens back to the children who were

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

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.”).

¹⁹⁰ United States Department of Justice, *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry* (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

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.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.¹⁹³

By prioritizing the criminal prosecution of migrant parents for unauthorized entry or re-entry,¹⁹⁴ the government rendered them unable to provide care and custody of their children per the statutory language that provides for UAC status.¹⁹⁵ There was a spike in the criminal prosecutions of immigration offenses during the period corresponding with the execution of zero tolerance,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.¹⁹⁷

170. U.S. immigration law specifically defines and designates a process for "Unaccompanied Alien Children." See U.S. Dept. of Health & Human Svcs., Unaccompanied Alien Children (UAC) Fact Sheet, <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/program-fact-sheet/index.html> [hereinafter HHS Fact Sheet].

¹⁹² See *supra* text accompanying note 142.

¹⁹³ DHS OIG Report 2021, *supra* note 170, at 2.

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.").

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.

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), <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), <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.

¹⁹⁷ John Gramlich, *Far More Immigration Cases are Being Prosecuted Criminally under Trump Administration*, PEW RESEARCH CENTER (Sept. 29, 2019), <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

During this same time period, the number of Central Americans arrested in the five judicial districts along the U.S.-Mexico border almost tripled.¹⁹⁸ It is worth noting, however, that children whose parents were not criminally prosecuted were also labelled UACs.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 broadly²⁰⁰ and to frame them as threats to the country.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.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.”²⁰³

throughout most of the 1990s and early 2000s, when the number of apprehensions reached one million per year.); *See also* U.S. Border Patrol, *Total Illegal Alien Apprehensions By Fiscal Year* (Oct. 1-Sept. 30, 2018), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-apps-fy1960-fy2018.pdf>.

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).

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

²⁰⁰ The increasing criminalization of immigrants is a development Juliet Stumpf coined as “cimmigration.” Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2016).

²⁰¹ Sarah Pierce et al., *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.”).

²⁰² *See, e.g.* Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html (including El Salvador as a “shithole” country from which immigration to the United States should not be welcomed). Scholars have written about vilifying narratives impacting the treatment of immigrants before the Trump Administration. *See, e.g.*, Mariela Olivares, *Narrative Reform Dilemmas*, 82 MO. L. REV. 1089 (2017); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIG. L. J. 207 (2012).

²⁰³ *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

21, 2021).

²⁰⁴ Jamie R. Abrams, *Why the Legal Strategy of Exploiting Immigrant Families Should Worry Us All*, 14 HARV. L. & POL'Y REV. 77 (2019) (examining modern laws and policies impacting immigrant families through a family law lens and detailing how “immigration blame” rationalized family separation in the Trump Administration).

²⁰⁵ DHS OIG Report 2021, *supra* note 193, at 39 (providing notes from May 11, 2018, call between then-AG Sessions and Southwest border U.S. Attorneys that records Sessions telling the U.S. Attorneys: “[W]e need to take away children; if care about kids, don't bring them in; won't give amnesty to people with kids.”). *See also* Michael D. Shear & Julie Hirschfeld Davis, *How Trump Came to Enforce a Practice of Separating Migrant Families*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html>.

²⁰⁶ Justin Wise, *'Fox & Friends' Host on Detained Children: 'These Aren't Our Kids'*, THE HILL (June 22, 2018), <https://thehill.com/latino/393616-fox-friends-host-on-separated-children-these-arent-our-kids>. *See also* German Lopez, *The Research on Race that Helps Explain Trump's Use of Family Separation at the Border*, VOX (Jun. 19, 2018), <https://www.vox.com/identities/2018/6/19/17478970/trump-family-separation-immigration-policy-racism> (arguing that racism and the dehumanization of minority groups has allowed for family separation and the “zero tolerance” strategy at the U.S.-Mexico border).

²⁰⁷ Emily Stewart, *Sarah Sanders on Immigrant Family Separation: "It is Very Biblical to Enforce the Law"*, VOX (June 14, 2018 5:30 PM EST), <https://www.vox.com/2018/6/14/17465662/sarah-sanders-family-separation-bible-sessions>.

²⁰⁸ *Id.*

rationalizing the orphan train movement.²⁰⁹

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."²¹⁰

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* lawsuit²¹¹ revealed the callous and careless manner in which the government was executing zero tolerance as a way to achieve the objectives of the policy.²¹²

²⁰⁹ See text accompanying *supra* notes 140, 154.

²¹⁰ *Transcript: White House Chief of Staff John Kelly's Interview with NPR*, NAT'L BROADCAST RADIO (May 11, 2018), <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr>. See also Julia Ainsley & Jacob Soboroff, *Trump Cabinet Officials Voted in 2018 White House Meeting to Separating Migrant Children, Says Officials*, NBC NEWS (Aug. 20, 2020), <https://www.nbcnews.com/politics/immigration/trump-cabinet-officials-voted-2018-white-house-meeting-separate-migrant-n1237416> (noting that senior adviser Stephen Miller "saw the separation of families not as an unfortunate byproduct but as a tool to deter more immigration."); Cordero, et al., *supra* note 170, at 435 ("In an interview on March 6, 2017, then-Secretary of Homeland Security John Kelly told CNN's Wolf Blitzer that he was considering separating families at the border as a deterrent to illegal immigration.").

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-warnedseparation-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.²¹³ 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.²¹⁴ 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.²¹⁵ 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.²¹⁶ 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.²¹⁷

A concerted challenge to zero tolerance's family separation has been

²¹³ Organization of American States, Inter-American Commission on Human Rights, *IACHR Expresses Concern Over Recent Migration and Asylum Policies and Measures in the United States* (June 18, 2010), http://www.oas.org/en/iachr/media_center/PReleases/2018/130.asp.

²¹⁴ IACHR, *Resolution No. 63/2018, Precautionary Measure No. 505-18, Vilma Aracely López Juc de Coc and others regarding the United States of America* (Aug. 16, 2018), <https://www.oas.org/en/iachr/decisions/pdf/2018/63-18MC505-18-US-en.pdf> (in response to a request for precautionary measures by the Texas Civil Rights Project, the Women's Refugee Commission, the Immigration Clinic of the University of Texas School of Law, and Garcia & Carcia Attorneys at Law, P.L.L.C) (hereinafter "Texas Civil Rights Project et al. IACHR Resolution"); IACHR, *Resolution No. 64/2018, Precautionary Measure No. 731-18, Migrant Children affected by the "Zero Tolerance" Policy regarding the United States of America* (Aug. 16, 2018), <https://www.oas.org/en/iachr/decisions/pdf/2018/64-18MC731-18-US-en.pdf> (in response to a request for precautionary measures by the National Commission of Human Rights of Mexico, the Ombudsman's Office of Colombia, the Ombudsman's office of Ecuador, the Attorney General's Office of Guatemala, the National Commissioner of Human Rights of El Salvador, and the National Commissioner of Human Rights of Honduras) (hereinafter "National Commission of Human Rights of Mexico et al. IACHR Resolution").

²¹⁵ *Id.*, Texas Civil Rights Project et al. IACHR Resolution, at paras. 6-10.

²¹⁶ National Commission of Human Rights of Mexico et al. IACHR Resolution, *supra* note 214, at para. 5.

²¹⁷ Texas Civil Rights Project et al. IACHR Resolution, *supra* note 214, at para. 41; National Commission of Human Rights of Mexico et al. IACHR Resolution, *supra* note 214, at para 39.

through litigation alleging violations under the Federal Tort Claims Act (FTCA).²¹⁸ Created in 1946, the FTCA represents a remedy that is based on expressions of moral outrage,²¹⁹ by providing redress for contemptible conduct by the U.S. government.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.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,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.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.²²⁴

²¹⁸ 28 U.S.C. § 1346(b).

²¹⁹ Cordero, et al., *supra* note 167, at 471 (“The central idea behind [the FTCA] is distinctly moral.”).

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.” *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 46 (AM. LAW. INST. 2012) and *Lashley v. Bowman*, 561 So. 2d 406, 609-10 (Fla. Dist. Ct. App. 1990).

²²¹ *Rodriguez Alvarado v. United States*, Case No. 2:16-cv-05028 (Aug. 17, 2016), <https://asylumadvocacy.org/ftca-litigation/>.

²²² *C.M. et al., v. United States*, Case No. 2:19-cv-05217 (May 29, 2020), <https://storage.courtlistener.com/recap/gov.uscourts.azd.1203642/gov.uscourts.azd.1203642.40.0.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. Dep’t of Homeland Security and U.S. Dep’t 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).

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).

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

As of the publication of this Article, there are seventeen FTCA lawsuits pending in federal courts across the country on behalf of separated families.²²⁵ 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.²²⁶ A powerful example is in an amicus brief filed by

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.) reh'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 addition to having a statute of limitations problem, were separated by private actors and not the U.S. government.

²²⁵ Chart tracking FTCA litigation based on information found on PACER (on file with author).

²²⁶ 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 descent, 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].²²⁷

On June 20, 2018, the Administration formally abandoned the practice of separating migrant families through Executive Order (EO).²²⁸ 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.²²⁹ It effectively replaced family separation with family detention,²³⁰ morphing the zero tolerance policy to resemble more the internment of families from Japanese ancestry during World War II.²³¹

my parents.”).

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 in order 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

²³² Joe Biden, Facebook (June 20, 2018), <https://www.facebook.com/joebiden/posts/10155305481581104>; Executive Order on the Establishment of Interagency Task Force on the Reunification of Families, Exec. Order No. 14,001, 86 Fed. Reg. 8273 (Feb. 2, 2021). Co-sponsors Senator Blumenthal and Representative Castro have introduced a bill in the U.S. Congress addressing harms caused by the zero tolerance policy titled the Families Belong Together Act. Asylum Seekers Advocacy Project, *Bill Would Help Separated Families* (Apr. 28, 2021), <https://asylumadvocacy.org/bill-would-help-separated-families/>

²³³ Press Release, *DHS Secretary Mayorkas Announces Family Reunification*, DEP'T OF HOMELAND SECURITY (Mar. 1, 2021),

<https://www.dhs.gov/news/2021/03/01/dhs-secretary-mayorkas-announces-family-reunification-task-force-principles-and>. See also Jonathan Todres & Daniela Villamizar Fink, *The Trauma of Trump's Family Separation and Child Detention Actions: A Children's Right Perspective*, 95 WA. L. REV. 377 (2020) (detailing the long-term health effects of separation on children).

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

²³⁷ Shaila Dewan, *Family Separation: It’s a Problem for U.S. Citizens, Too*, N.Y. TIMES (June 22, 2018), <https://www.nytimes.com/2018/06/22/us/family-separation-americans-prison-jail.html>.

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> (“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 be 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

²³⁹ Elisa Minoff, ENTANGLED ROOTS: THE ROLE OF RACE IN POLICIES THAT SEPARATE FAMILIES, CTR. FOR THE STUDY OF SOC. POL’Y 10, 11 (Oct. 2018), <https://cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf>.

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.”).

²⁴¹ Kevin Miller, *Exploring the Intersection of Child Welfare and Criminal Justice*, in CW360: CRIMINAL JUSTICE INVOLVEMENT IN CHILD WELFARE 4, 5 (2018), https://cascw.umn.edu/wp-content/uploads/2018/04/CW360_Spring2018_WebTemp.pdf.

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 be 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.²⁴⁴ Mass incarceration and the accompanying family separation has disproportionately affected Black fathers.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”²⁴⁶ and “Tough on Crime”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.²⁴⁸

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

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.”).

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.

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);

²⁴⁷ Keelia Lee, *Pandemic, Protests, and Prison Reform? Why 2020 is a Catalyst to Rethink Drug Policy*, 33 ST. THOMAS L. REV. 1 (2020); Heather L. Pickerell, *Critical Race Theory & Power: The Case for Progressive Prosecution*, 36 HARV. BLACKLETTER L.J. 73 (2020).

²⁴⁸ See text accompanying *supra* note 94.

exhibit physical health, mental health, and behavioral issues, and experience traumatic events such as housing insecurity.²⁴⁹ These effects extend beyond children directly impacted by their parents' incarceration, causing devastating effects to communities as a whole.²⁵⁰

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 generally²⁵¹ have caused significant family separation, a consequence that has been described as "multigenerational punishment" or "secondary immigration enforcement."²⁵²

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.²⁵³ During the Trump Administration, ICE deported in 2017 a total of 226,119 non-U.S. citizens, deported 256,085 in 2018,²⁵⁴ and deported 267,258 non-U.S. citizens in 2019.²⁵⁵

In 2010, Congress began requiring ICE to collect data on the deportation of parents of U.S. citizen children.²⁵⁶ Between 2015 and 2017, ICE deported more than 87,000 individuals who said they have at least one U.S. citizen child.²⁵⁷ In 2018, ICE deported more than 20,000 parents of U.S. citizen children,²⁵⁸ and in 2019, ICE deported nearly 28,000 such parents.²⁵⁹ 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.²⁶⁰

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

²⁵³ U.S. Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report: Fiscal Year 2015* (Dec. 22, 2015), <https://www.ice.gov/removal-statistics/2015>.

²⁵⁴ U.S. Immigration and Customs Enforcement, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report* 10, <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf>.

²⁵⁵ U.S. Immigration and Customs Enforcement, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report* 19, <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>.

²⁵⁶ H.R. Rep. No. 111-298 (2010).

²⁵⁷ Madeline Buiano, *Ice Data: Tens of Thousands of Deported Parents Have U.S. Citizen Kids*, The Center for Public Integrity (Oct. 12, 2018), <https://publicintegrity.org/inequality-poverty-opportunity/immigration/ice-data-tens-of-thousands-of-deported-parents-have-u-s-citizen-kids/>.

²⁵⁸ U.S. Immigration and Customs Enforcement, *ICE Second Half of 2018, Removal of Aliens Claiming U.S.-Born Children. Second Half, Calendar Year 2018*, at 3 (Sept. 27, 2019), https://www.dhs.gov/sites/default/files/publications/ice_-_removal_of_alien_claiming_u.s.-born_children_second_half_cy_2018_0.pdf (reporting that ICE deported 11,180 parents of U.S. citizens in the first half of the year and 10,348 in the second half).

²⁵⁹ U.S. Immigration and Customs Enforcement, *Deportation of Parents of U.S.-Born Children, First Half, Calendar Year 2019*, 3 (Apr. 13, 2020) (reporting the removal of 14,324 noncitizen parents of U.S. citizen children); U.S. Immigration and Customs Enforcement, *Deportation of Parents of U.S.-Born Children, Second Half, Calendar Year 2019*, 3 (July 22, 2020) (reporting removal of 13,656 noncitizen parents of U.S. citizen children).

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.²⁶¹ 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,²⁶² 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."²⁶³ 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.²⁶⁴

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. Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan* (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html>. The data also does not capture family separation beyond those of parents and children. See *infra* note 267.

²⁶¹ Dora Schriro, *Immigration Detention Overview and Recommendations* 3 (2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

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).

²⁶⁴ *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, HUMAN RIGHTS WATCH (2009), <https://www.hrw.org/report/2009/12/02/locked-far-away/transfer-immigrants-remote-detention-centers-united-states>; Nathalie Brinet Molina, *U.S. Citizen Children Caught in the Middle: How Extended Family Visit Programs Could Minimize the Short- and Long-term Effects of Parental Detention and Deportation on U.S. Citizen Children* iii (2019), https://repository.library.georgetown.edu/bitstream/handle/10822/1057302/Molina_georgetown_0076M_14409.pdf?sequence=1&isAllowed=y ("one mother interviewed was placed

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.”²⁶⁸

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.²⁶⁹ 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.”²⁷⁰ 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.²⁷¹ This is a result of

citizenship); Marcia A. Yablon-Zug, *Deporting Grandma: Why Grandparent Deportation May Be the Next Big Immigration Crisis and How to Solve It*, 43 U.C. DAVIS L. REV. 193 (2009) (addressing the issue of grandparent caregivers deportation).

²⁶⁸ Ann Park, *Keeping Immigrant Families in the Child Protection System Together*, AMERICAN BAR ASSN. (Dec. 30, 2020), https://www.americanbar.org/groups/public_interest/child_law/project-areas/immigration/keeping-immigrant-families-in-the-child-protection-system-together/. Even undocumented parents who are not in the immigration enforcement system lose custody of their children merely by virtue of being undocumented. *Id.*

²⁶⁹ See, e.g., American Immigration Council, *supra* note 266; Ranit Mishori, *U.S. Policies and Their Effects on Immigrant Children's Health*, AMER. FAMILY PHYSICIANS (Feb. 15, 2020), <https://www.aafp.org/afp/2020/0215/p202.html>; American Psychological Association, *Disrupting Young Lives: How Detention and Deportation Affect US-Born Children of Immigrants* (Nov. 2016), <https://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation>; Boston College Human Rights Center, *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families: A Report for the Inter-American Human Rights Court* (Aug. 2013), <https://www.bc.edu/content/dam/files/centers/humanrights/doc/IACHR%20Report%20on%20Psychosocial%20Impact%20of%20Detention%20Deportation-FINAL%208-16-13.pdf>.

²⁷⁰ Capps et al., *supra* note 262, at 1.

²⁷¹ Although, as a matter of first impression, it may seem odd that the government fail

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.²⁷² While Lawful Permanent Residents (LPRs) have a less onerous burden to qualify for cancellation of removal,²⁷³ undocumented applicants must demonstrate that removal will cause “exceptional and extremely unusual hardship” to a U.S. citizen or LPR child, parent, or spouse.²⁷⁴

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.²⁷⁵ In doing so, it narrowed who could obtain this form of relief.²⁷⁶ 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.²⁷⁷

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.²⁷⁸ The

to protect U.S. citizen, this collateral damage of U.S. immigration law makes more sense when reminded of how eugenics has played a role in immigration policies. See Rachel Silber, *Eugenics, Family & Immigration Law in the 1920's*, 11 GEO. IMMIGR. L. J. 859, 883 (1997) (“the desire to maintain family ties had been disregarded in the frenzy to prevent national racial quality from deterioration.”).

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

Immigration Reform and Immigrant Responsibility Act (IIRIRA).”).

²⁷⁹ Case law shows that courts consistently deny Cancellation for undocumented parents based on the hardship requirement. Hing & Bird, *supra* note 278, at 2-5 (discussing federal court and Board of Immigration Appeals (BIA) decisions after IIRIRA and the BIA’s decision in *Monreal* interpreting the changes made by Congress replacing suspension with cancellation of removal). Scholars have argued that courts should taper the changes that render non-LPR cancellation more onerous for parents of U.S. citizen children by prioritizing what is best for their children. Hing & Bird, *supra* note 278 (arguing that Adverse Childhood Events Research and the Convention on the Rights of Children should make parents of U.S. citizens’ cases for hardship under cancellation stronger than has been adjudicated.).

²⁸⁰ DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (2012); Lori Nessel, *Deporting America’s Children: The Demise of Discretion and Family Values in Immigration Law*, 61 ARIZONA L. REV. 605 (2019).

²⁸¹ See, e.g., *Payne-Barahona v. Gonzales*, 474 F.3d 1, 2 (1st Cir. 2007) (“We choose to follow the path of other courts . . . [t]he circuits that have addressed the constitutional issue . . . have uniformly held that a parent’s otherwise valid deportation does not violate a child’s constitutional right.”); *Gallanos v. United States*, 785 F.2d 116, 120 (4th Cir. 1986) (“The courts of appeals that have addressed this issue have uniformly held that deportation of the alien parents does not violate any constitutional rights of the citizen children.”); *Gonzalez-Cuevas v. INS*, 515 F.2d 1222, 1224 (5th Cir. 1975) (“Legal orders of deportation to their parents do not violate any constitutional right of citizen children.”); *Ayala-Flores v. INS*, 662 F.2d 444, 445 (6th Cir. 1981) (per curiam) (“While we recognize that the Ayalas’ child enjoys all the rights of United States citizenship . . . we do not agree that deportation of her parents is an unconstitutional abridgement of those rights.”); *Flores-Quezada v. Gonzales*, 134 Fed. Appx. 202 (9th Cir. 2005) (unpublished opinion) (holding that deportation does not result in deprivation of due process where a child would be denied the Arizona constitutional right to education); *Delgado v. INS*, 637 F.2d 762, 764 (10th Cir. 1980) (“This Court has repeatedly held that the incidental impact visited upon the children of deportable, illegal aliens does not raise constitutional problems.”). See also Nessel, *supra* note 280 at 623 (“Over the years, the circuit courts of appeals have consistently held that deporting a parent of a U.S.-citizen child does not violate the citizen child’s constitutional right to family, to live in the child’s country of citizenship, or to travel.”). Cases involving *de facto* deportation of U.S. citizen children, however, have generated forceful dissents. *Id.* at 623, fn. 98.

²⁸² See text accompanying *supra* note 268. This is exacerbated by the fact that immigration officials are not required to inform child welfare authorities of a parent’s whereabouts, rendering it difficult for the latter to locate detained parents and notify them of

The number of children in the U.S. child welfare system because their parents are detained or have been deported²⁸³ 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.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.²⁸⁵ The modern U.S. immigration law trend of widespread detention and deportation,

their children's custody proceedings. American Immigration Council, *supra* note 266. In cases where immigrant parents "who maintain their parental rights" are subject to removal, ICE officials should accommodate "to the extent practicable" the parent's effort to arrange guardianship or to obtain travel documents for his or her children. ICE Policy 11064.2, ¶5.5.1. If child custody is still being determined, however, ICE provides no guidance to consider facilitating the travel of a deported parent back to the U.S. to participate in family court proceedings. *Id.*

²⁸³ Keila E. Molina & Lynne Marie Kohn, "Are We There Yet?" *Immigration Reform for Children Left Behind*, 23 Berkeley La Raza L. J. 77, 78 (2013) ("[M]ore than 5,000 children [lived] in foster care as a result of immigration enforcement procedures that separate immigrant families."); *See also* Seth Freed Wessler, Applied Research Center (now Race Forward), *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* 22 (Nov. 2, 2011), <https://www.raceforward.org/research/reports/shattered-families>; Randy Capps et al., Urban Institute and Migration Policy Institute, *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families* vii (Sept. 2015), <https://www.urban.org/sites/default/files/alfresco/publication-exhibits/2000405/2000405-Implications-of-Immigration-Enforcement-Activities-for-the-Well-Being-of-Children-in-Immigrant-Families.pdf>. Because the Adoption and Foster Case Analysis and Reporting System does not keep information on the immigration status of biological parents, other more recent studies have used the rise of Latinx children in the foster care system as an indication of the impact of immigration enforcement on family separation. *See* Catalina Amuedo-Dorantes & Esther Arenas-Arroyo, *Immigration Enforcement and Foster Care Placements*, IZA INSTITUTE OF LABOR ECONOMICS 3 (2017) ("We find that the average increase in interior immigration enforcement over the 2001 through 2015 period contributed to raising the share of Hispanic children in foster care anywhere between 15 and 21 percent.").

²⁸⁴ Jill Replogle, *What About My Kids If I'm Deported? Immigrants Get Help With Powers of Attorney*, KQED (Mar. 23, 2017), <https://www.kqed.org/news/11371335/what-about-my-kids-if-im-deported-immigrants-get-help-with-powers-of-attorney>; Kristina Cooke & Mica Rosenberg, *Parents Fearing Deportation Pick Guardians for U.S. Children* (Mar. 3, 2017), <https://www.reuters.com/article/us-usa-immigration-parents/parents-fearing-deportation-pick-guardians-for-u-s-children-idUSKBN16A16V>

²⁸⁵ Luis H. Zayas & Mollie H. Bradlee, *Exiling Children, Creating Orphans: When Immigration Policies Hurt Citizens*, 59 SOC. WORK 167, 168 (2014) (noting that despite their large numbers, U.S. born children of undocumented immigrants have received little attention in the immigration debate).

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.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 impoverished immigrant families. The separation of migrant families under the Trump Administration's zero tolerance policy was reminiscent of these family separation histories.

The narratives justifying the separation of children from their parents 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

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.