

FAMILY DETENTION AND FAMILY SEPARATION: HISTORY, STRUGGLE, AND STATUS

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INTRODUCTION

The United States government has imprisoned immigrant families and children as a method of immigration enforcement and deterrence for decades.¹ In my 2020 article, *The Rise of Zero Tolerance and the Demise of Family*,² I explore family detention (i.e., the imprisonment of immigrant families) and the Trump administration’s expansion of this regime

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1. See Mariela Olivares, *The Rise of Zero Tolerance and the Demise of Family*, 36 GA. ST. UNIV. L. REV. 287, 301–02 (2020).

2. *Id.* at 287.

dedicated to decimating immigrant families in the United States by forcibly separating minor children from their fit parent or adult caregivers.³ In my earlier work, I assert that United States immigration policies targeting immigrant families are anchored in the political rhetoric that serves to oppress immigrants.⁴

This Article reviews the current state of family detention and the continued traumatic effects of the Trump administration's Family Separation Policy from 2017 to 2020. Although child and family detention and separation have been less prominent in media reporting in 2021 and 2022 than during the Trump presidency, children and families are still imprisoned in immigration jail.⁵ This remains an important and relevant discussion. This Article begins with a brief examination of the history of family separation and detention. The Article then shifts to focus on the current state of the detention and separation policies under President Biden. Although the Biden administration has stated that it will move away from policies that punish entering family migrants,⁶ the reality of the situation would suggest otherwise. Finally, this Article discusses the need to permanently end the practice of family detention and to prevent a recurrence of family separation.

I. A BRIEF HISTORY OF FAMILY DETENTION AND FAMILY SEPARATION

Lest we believe that the current assault on immigrant families is new, the United States government has a long and sordid history of imprisoning migrant families—a history that far precedes Donald Trump's presidential win in 2016.⁷ In my earlier article, I provide a detailed history of the Trump administration policies that expanded the detention of migrant families and began the trauma-inducing separation of migrant children from their parents.⁸ In this Article, I discuss the prevalence of contemporary family detention since the 1980s and then note the ramping up of

3. See *id.* at 308.

4. See Mariela Olivares, *Intersectionality at the Intersection of Profiteering and Immigration Detention*, 94 NEB. L. REV. 963, 964 (2016) [hereinafter *Intersectionality at the Intersection of Profiteering and Immigration Detention*].

5. See Satsuki Ina, *A Cage is Still a Cage: President Biden Must End U.S. Detention of Children and Families*, TIME (Mar. 11, 2021, 7:00 AM), <https://time.com/5945307/biden-end-detention-migrant-children/> [<https://perma.cc/ERD4-J3U8>].

6. See Camilo Montoya-Galvez, *Biden Administration to Wind Down Long-Term Detention of Migrant Families – For Now*, CBS NEWS (Mar. 7, 2021, 7:00 AM), <https://www.cbsnews.com/news/immigration-migrant-families-detention-long-term-biden-administration/> [<https://perma.cc/XPE6-6LKN>].

7. See NAT'L IMMIGRANT JUST. CTR., A LEGACY OF INJUSTICE: THE U.S. CRIMINALIZATION OF MIGRATION 2 (2020).

8. See Olivares, *supra* note 1, at 294–308. This part of the Article relies on my previously written history to set the foundation for Part II's contemporary view.

oppressive policies during the Trump presidency.⁹ This Part incorporates a prior historical discussion, updated when relevant.

A. The Prominence of Family Detention Before Trump

The United States government has imprisoned immigrants, who are not charged with any crime (other than, possibly, entry to the country, which is not always a crime), since the late nineteenth century.¹⁰ The imprisonment of migrant children arriving to the United States without a parent or caregiving adult reached a peak in the 1980s with the case of Jenny Flores, a fifteen-year old child from El Salvador, who was apprehended and detained by United States border officials.¹¹ The Immigration and Naturalization Service (“INS”)¹² imprisoned Jenny in California for two months in an old, former motel, surrounded by a barbed-wire fence while her undocumented mother in the United States was fighting for her release.¹³ Reports surfaced that Jenny and other children in the California hotel/detention center were subjected to regular strip searches, had no communication with their parents, were not given any educational instruction, and were imprisoned with detained adults of both sexes.¹⁴ Soon after discovering her conditions of imprisonment, her lawyers

9. To be sure, the United States government’s practices of imprisoning families and separating children from parents far precedes the 1980s “contemporary” practice of formalized regulatory detention of children. Sanctioned by United States law, owners and traders of enslaved people stripped enslaved people away from their families; Native-American children were stolen from their families for “acculturation;” and Japanese immigrants and Japanese Americans were imprisoned in camps during the period around and during World War II, among other practices. *See, e.g.,* Anita Sinha, *A Lineage of Family Separation*, 87 BROOK. L. REV. 445, 468–69 (2022) (“A lesser known family separation practice than those inflicted upon enslaved and Indigenous families was a movement called ‘orphan trains,’ which was carried out in the United States by private actors from the mid-nineteenth through the early twentieth century. Orphan trains executed the removal and relocation of approximately 250,000 children from East Coast cities to rural areas across the country, including into agricultural communities in the Midwest.”). To this point, then, family separation has a solid foundation in law.

10. *See* Olivares, *supra* note 1, at 301.

11. *See* Dara Lind & Dylan Scott, *Flores Agreement: Trump’s Executive Order to End Family Separation Might Run Afoul of a 1997 Court Ruling*, VOX (June 21, 2018, 10:42 AM), <https://www.vox.com/2018/6/20/17484546/executive-order-family-separation-flores-settlement-agreement-immigration> [<https://perma.cc/VFA7-MFNY>].

12. The INS is the predecessor to the current Department of Homeland Security’s immigration agencies, which includes Customs and Border Enforcement (CBP), which covers border law and policy, and Immigration Customs Enforcement (ICE), which covers interior enforcement and policy.

13. *See The History of the Flores Settlement and Its Effects on Immigration*, NPR (June 22, 2018, 4:24 PM), <https://www.npr.org/2018/06/22/622678753/the-history-of-the-flores-settlement-and-its-effects-on-immigration> [<https://perma.cc/7SLU-SYLQ>] [hereinafter NPR, *History of the Flores Settlement*].

14. *See id.*; *see also* Lind & Scott, *supra* note 11.

filed the lawsuit that would become *Flores v. Reno*.¹⁵ After years of litigation, culminating in the 1993 United States Supreme Court decision, the parties reached a settlement in 1997, the “Flores Settlement.”¹⁶ Importantly, the Flores Settlement is still in effect and provides the binding guidelines for how the United States government can detain immigrant children.¹⁷ The Flores Settlement, among other things, limits the amount of time children can be held in federal detention to five days—interpreted to mean twenty days in times of emergency or influx¹⁸—and requires immigration officials to “place each detained minor in the least restrictive setting appropriate” and release immigrants under eighteen “without unnecessary delay.”¹⁹

Since its inception, the United States government and immigrant advocates have consistently fought over the contours of the Flores Settlement. For example, during the Obama administration, the Department of Homeland Security (“DHS”), which oversees all immigration process and enforcement, sought to extend the time in which it could imprison children and families for however long it took for DHS to process the migrants’ immigration cases.²⁰ The federal court denied DHS’s request, reinforcing the terms of the Flores Settlement.²¹ The Flores Settlement has recently been litigated in the context of family separation and, in 2021, when DHS sought to house migrant children in hotels as detention space was even more sparse due to the Covid-19 pandemic. Again, the federal court deemed DHS’s plan a violation of the government’s obligations to the children protected under the terms of the Flores Settlement and denied the government’s request.²²

15. *See Reno v. Flores*, 507 U.S. 292, 295 (1993). In the case, plaintiffs argued that INS should screen available adults (other than legal guardians) and release children to them if they are competent and fit and that INS must improve the living conditions of the minor detention facilities to meet minimum child welfare standards; *id.* at 298.

16. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) [hereinafter Stipulated Settlement Agreement].

17. *See id.* at 7–9; *see also History of the Flores Settlement*, *supra* note 13 (quoted from the interview with Carlos Holguin, original and continued counsel for Plaintiff Flores: “There is a clause in the original Flores settlement that would have sunset-ended the agreement after five years, but it required the government to implement the terms of the settlement as a federal regulation. The government never did that. And they’ve still never done that.”).

18. *See Lind & Scott*, *supra* note 11.

19. *See Stipulated Settlement Agreement*, *supra* note 16.

20. Dara Lind, *Why Is the Obama Administration Still Fighting to Keep Immigrant Families Behind Bars?*, VOX (July 29, 2015, 2:20 PM), <https://www.vox.com/2015/7/29/9067877/family-detention-immigration-flores> [<https://perma.cc/MD9W-WRLA>] (“The government argued that key parts of *Flores* didn’t apply because children were being detained with their parents.”).

21. *Flores v. Johnson*, 212 F. Supp. 3d 864, 886 (C.D. Cal. 2015).

22. *See Flores v. Garland*, 3 F.4th 1145, 1147 (9th Cir. 2021); *see also Lind & Scott*, *supra* note 11.

Although the Flores Settlement ostensibly made governmental detention of children and families more difficult to achieve, family detention practices have only increased since the 1980s, reaching a peak between 2014 and 2016.²³ A recent empirical study outlines the disturbing rise in family detention rates between 2001 and 2016 and concludes that the rate of family detention increased 3,400% in the 15 years of the study.²⁴ This extraordinary rise in family detention coincides with the increase in families and children entering the United States beginning roughly in 2014.²⁵ As I recounted in prior articles: “In Fiscal Year 2013, CBP [Customs and Border Protection] apprehended 21,553 unaccompanied children and 7,265 “family units”—typically women and their children—along the South Texas border with Mexico. In contrast, in 2014, CBP apprehended 49,959 unaccompanied children and 52,326 family units.”²⁶

Under contracts with Immigration and Customs Enforcement (“ICE”), private prison corporations and local governments constructed “Family Residential Centers,” with up to 3,700 beds for families and children.²⁷ As discussed below, although President Biden promised otherwise, his administration has continued the practice of family detention rather than abolishing it completely.²⁸

B. The Trump Assault on Migrant Families: Zero Tolerance and The Family Separation Policy (2017-2018)

Family and child detention were a firmly established immigration control strategy by the time Trump was elected president in 2016. What was new under his administration, though, was the elicited strategy of criminalizing all migrants who crossed the border and to strip accompanying children away from them, putting the parent/caregiver and child(ren) in separate detention facilities.²⁹ Coupled with an ongoing use of family detention, the Trump administration destroyed thousands of families through these policies.³⁰

The strategy of punishing family migrants to deter further migration began in earnest in 2017 when the Zero Tolerance Prosecution

23. Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 785, 806 (2018).

24. *Id.* at 801–02.

25. See *Intersectionality at the Intersection of Profiteering and Immigration Detention*, *supra* note 4, at 974.

26. Olivares, *supra* note 1, at 305 (internal citations omitted).

27. See *Intersectionality at the Intersection of Profiteering and Immigration Detention*, *supra* note 4, at 975.

28. See Ina, *supra* note 5.

29. See *Family Separation Under the Trump Administration – A Timeline*, S. POVERTY L. CTR. (June 17, 2020), <https://www.splcenter.org/news/2020/06/17/family-separation-under-trump-administration-timeline> [<https://perma.cc/F4FC-YQ9X>].

30. Again, much of this historical information is taken from my prior work and research, specifically *The Rise of Zero Tolerance*. See Olivares, *supra* note 1, at 294–301.

policy was implemented.³¹ The policy sought to criminally prosecute adult migrants who were apprehended by CBP.³² Although criminal prosecutions of migrants are not new, this policy *targeted* migrant families crossing the southern border with Mexico.³³ The Zero Tolerance Prosecution policy was the first prong in the effort to stop family migration from Central American countries—most migrants crossing the border are from those countries—and to single them out for oppressive treatment.³⁴ Thus, the number of parents facing prosecution who were also forcibly separated from their minor children at the time of apprehension skyrocketed.³⁵

While the parents faced imprisonment, the children were taken and initially placed with the United States Department of Health and Human Services' Office of Refugee Resettlement ("ORR").³⁶ This was the Family Separation policy, the second prong in the administration's efforts to stop migrants from entering the United States.³⁷ Indeed, then Secretary of Homeland Security John Kelley confirmed that deterring migration was a

31. Joshua Barajas, *How Trump's Family Separation Policy Became What It Is Today*, PBS (June 21, 2018, 12:43 PM), <https://www.pbs.org/newshour/nation/how-trumps-family-separation-policy-has-become-what-it-is-today> [<https://perma.cc/XQ65-7L4P>].

32. Maria Sacchetti, *Top Homeland Security Officials Urge Criminal Prosecution of Parents Crossing Border with Children*, WASH. POST (Apr. 26, 2018) (citing a DHS memo obtained by the Washington Post), https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/a0bdcee0-4964-11e8-8b5a3b1697adcc2a_story.html?noredirect=on&utm_term=.d4ae3d0fbb54 [<https://perma.cc/5PTA-4EFJ>] (citing a DHS memorandum obtained by the Washington Post).

33. *See id.*

34. *See* John Gramlich, *Migrant Encounters at U.S.-Mexico Border Are at a 21-Year High*, PEW RSCH. CTR. (Aug. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/08/13/migrant-encounters-at-u-s-mexico-border-are-at-a-21-year-high/> [<https://perma.cc/8Q5C-RKDX>] (July 2021 data shows that "[m]igrants' origin countries have . . . shifted since May 2019, with Mexican nationals accounting for a larger share of encounters and people from the Northern Triangle countries – El Salvador, Guatemala and Honduras – representing a smaller share. In July, 26% of migrant encounters involved Mexican citizens, up from 13% in May 2019. People from the Northern Triangle countries accounted for 45% of encounters in July, down from 78% in May 2019.").

35. Katherine Hawkins, *Where Family Separation Began: A Case in El Paso Shows Flores is the Solution, Not the Problem*, JUST SEC. (June 22, 2018), <https://www.justsecurity.org/58363/family-separation-began-case-el-paso-shows-flores-solution-problem/> [<https://perma.cc/8MAC-99AA>]. Hawkins describes a federal magistrate judge's reaction to cases before the court:

Miguel Torres, a federal magistrate judge in the Western District of Texas stated during a court hearing on Nov. 1, 2017, that 'with some frequency in the last few months,' defendants being prosecuted for immigration offenses had described being separated from a minor child at the time of their arrest.

Id.

36. *See id.*

37. *See id.*

goal of taking children from their parents.³⁸ When the images and details of the Family Separation policy came to light, the public outcry against it was strong and swift.³⁹ Though Kelly later denied the deterrence goal, a DHS memo confirmed that threatening adults with prison was the “most effective” way to dissuade border crossings as incarceration of parents would inevitably lead to family separation because children could not be held in adult criminal detention.⁴⁰

The result was approximately eighteen months of massive chaos as the United States government forcibly took migrant children from their parents or caregivers.⁴¹ As just one snapshot, from October 2017 to March 2018, more than 100 children younger than four years old were forcibly taken from their parents.⁴² There were feeble and disorganized efforts to hold children in shelters while trying to locate trusted adults in the United States who would take custody of them.⁴³ But, for many families, children were left in inappropriate, unsuitable shelters, parents were deported and, perhaps most infuriating, there was no consistent process to track parents and children to lead to an eventual reunification.⁴⁴

38. See Sacchetti, *supra* note 32 (citing the DHS memo in which DHS officials note that “threatening adults with criminal charges and prison time would be the ‘most effective’ way to reverse the steadily rising number of attempted crossings”). In a CNN interview, Kelly stated, “Yes, I’m considering [that], in order to deter more movement along this terribly dangerous network. I am considering exactly that.” Daniella Diaz, *Kelly: DHS Is Considering Separating Undocumented Children from Their Parents at the Border*, CNN (Mar. 7, 2017, 7:33 AM), <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html> [<https://perma.cc/BE6X-V4AP>].

39. David Smith & Tom Phillips, *Child Separations: Trump Faces Extreme Backlash from Public and His Own Party*, THE GUARDIAN (June 19, 2018, 5:44 PM), <https://www.theguardian.com/us-news/2018/jun/19/child-separation-camps-trump-border-policy-backlash-republicans> [<https://perma.cc/G28K-BVTB>].

40. See Tal Kopan, *Kelly Says DHS Won’t Separate Families at the Border*, CNN (Mar. 29, 2017, 10:15 PM), <https://www.cnn.com/2017/03/29/politics/border-families-separation-kelly/index.html> [<https://perma.cc/3KYU-ULSG>]; see also Jeremy Stahl, *A Moral and Legal Abomination*, SLATE (June 3, 2018, 7:30 PM), <https://slate.com/news-and-politics/2018/06/trumps-child-separation-policy-is-a-moral-and-constitutional-abomination.html> [<https://perma.cc/W6QF-GHP5>] (citing the DHS memo).

41. See generally Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html> [<https://perma.cc/QX4L-SMU9>] (describing inadequate government systems for tracking migrant children in custody).

42. *Id.*

43. *Id.*

44. See Jonathan Blitzer, *The Government Has No Plan for Reuniting the Immigrant Families It Is Tearing Apart*, NEW YORKER (June 18, 2018), <https://www.newyorker.com/news/news-desk/the-government-has-no-plan-for-reuniting-the-immigrant-families-it-is-tearing-apart> [<https://perma.cc/C93R-FDC8>] (stating the government has no protocols “for keeping track of parents and children concurrently, for keeping parents and children in contact with each other while they are separated, or for eventually reuniting them.”); see also Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant->

Despite increasingly loud and bipartisan public outrage, the program continued until President Trump signed an executive order on June 20, 2018, ending the Family Separation prong of the deterrence operation.⁴⁵ The results of this policy are profound and will likely continue to be felt for a lifetime. Information collected in June 2018 from an anonymous source shows that CBP separated nearly 1,800 families between October 2017 and February 2018.⁴⁶ A July 2018 report revealed that approximately 2,342 children were torn from their parents or caregivers between May 5 and June 9, 2018.⁴⁷ And, in a 2021 report from the Biden-created Interagency Task Force on the Reunification of Families (the “Task Force”), the Task Force reports “5,636 total child separations that occurred between July 1, 2017 and January 20, 2021[, and] 3,913 were related to the Zero-Tolerance Policy or similar initiatives.”⁴⁸ Critically, however, the United States government never engaged in any meaningful measures and methods to track separated families.⁴⁹ Thus, the total number of children separated from their parents and caregivers will never be truly known.⁵⁰

children-separation-ice.html [https://perma.cc/QX4L-SMU9]. See generally U.S. DEP’T OF HEALTH & HUM. SERVS., SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf [https://perma.cc/8N27-EU9L] (detailing the bungled implementation of the Family Separation Policy from its inception) [hereinafter SEPARATED CHILDREN]. See Hilary Andersson & Anne Laurent, *Children Tell of Neglect, Filth and Fear in U.S. Asylum Camps*, BBC NEWS (May 24, 2021), https://www.bbc.com/news/world-us-canada-57149721 [https://perma.cc/4HKX-ET2U] (For stories from children detailing their experiences in government facilities: “In late March [2021], CBP released disturbing images of cramped conditions within one particular facility it runs in Donna, Texas – a mass of enormous white tents looming above the small town. The facility was designed to hold 250 people but housed more than 4,000 at peak occupancy. A number of children, including Ariany and Paola, a 16-year-old also released from Donna, told the BBC that they were given food that had expired, or was rotten or not cooked properly.”).

45. Barajas, *supra* note 31 (noting the end of the Family Separation policy, but not the “Zero-Tolerance” policy).

46. See Mica Rosenberg, *Exclusive: Nearly 1,800 Families Separated at U.S.–Mexico Border in 17 Months Through February*, REUTERS (June 8, 2018, 3:40 PM), https://www.reuters.com/article/us-usa-immigration-children-exclusive/exclusive-nearly-1800-families-separated-at-us-mexico-border-in-17-months-through-february-idUSKCN1J42UE [https://perma.cc/RLQ2-QV6X].

47. *Family Separation Under the Trump Administration—a Timeline*, S. POVERTY L. CTR. (June 17, 2020), https://www.splcenter.org/news/2020/06/17/family-separation-under-trump-administration-timeline [https://perma.cc/F4FC-YQ9X] [hereinafter *Family Separation*] (citing Graham Kates, *Migrant Children at the Border – The Facts*, CBS NEWS (June 20, 2018, 10:32 AM), https://www.cbsnews.com/news/migrant-children-at-the-border-by-the-numbers/ [https://perma.cc/PYE9-2WAR]).

48. INITIAL PROGRESS REPORT, INTERAGENCY TASK FORCE ON THE REUNIFICATION OF FAMILIES 6 (2021), https://www.dhs.gov/sites/default/files/publications/21_0602_s1_family-reunification-task-force-120-day-progress-report.pdf [https://perma.cc/U6P2-W6X7] [hereinafter INITIAL PROGRESS REPORT].

49. See SEPARATED CHILDREN, *supra* note 44, at 2, 5–6.

50. See *Family Separation*, *supra* note 47.

II. THE END OF FAMILY SEPARATION AND THE STATE OF FAMILY DETENTION UNDER THE BIDEN ADMINISTRATION

A. Family Separation Litigation and Ongoing Reunification Efforts

The end of the Family Separation policy in June 2018 was only one step in the long journey to reunite families. While public outcry was swift, litigation efforts crucially contributed to the eventual government partnership with litigants and their lawyers to formalize measures to find parents and children. The seminal case of *Ms. L.* set the path forward.

In February 2018, the ACLU sued ICE on behalf of Ms. L, a woman from the Democratic Republic of the Congo (“DRC”), who entered the United States through the port of entry at San Diego, California on November 1, 2017, with her six-year-old daughter, S.S.⁵¹ Ms. L appeared before CBP and asserted her and her daughter’s claim for asylum, stating that she had a fear of returning to her country.⁵² Even though she presented credibly, CBP detained mother and child together in the San Diego, California area.⁵³ But just four days later, officials took S.S. away from Ms. L and sent the child to Chicago, Illinois, leaving Ms. L imprisoned in California.⁵⁴ Ms. L recounts that as officials forcibly took her child from her, S.S. screamed frantically to remain with her mother.⁵⁵ For four months, until the ACLU filed the lawsuit in California federal court, Ms. L only was allowed to speak to S.S. six times via phone, without a video connection.⁵⁶ About a month after the ACLU filed the complaint, ICE released Ms. L, and she traveled to Chicago to reunite with her daughter.⁵⁷

At its heart, *Ms. L.* correctly argues that the Family Separation policy violates parents’ constitutional rights. Specifically, plaintiffs, the certified class of parents affected by the Family Separation policy, argued that ICE’s actions against Ms. L. and hundreds of other parents who were certified as class members amounted to due process violations: “[t]he separation of S.S. and her mother violates substantive due process because it furthers no legitimate purpose, not to mention a compelling governmental interest.”⁵⁸ Moreover, unjustified governmental intervention in the parent–child relationship amounted to a violation of the family’s liberty interest to

51. *Ms. L. v. U.S. Immigr. and Customs Enf’t*, 310 F. Supp. 3d 1133, 1137 (S.D. Cal. 2018).

52. *Id.*

53. *Id.* at 1137–38.

54. *Id.*

55. *Id.* at 1137.

56. *Id.* at 1138.

57. See Press Release, ACLU, *Asylum-Seeking Mother and Daughter Reunited After ACLU Lawsuit* (March 16, 2018), <https://www.aclu.org/news/asylum-seeking-mother-and-daughter-reunited-after-aclu-lawsuit> [<https://perma.cc/F5HZ-DR69>].

58. Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Ms. L. v. U.S. Immigr. and Customs Enf’t*, No. 18-CV0428-DMS-MDD (S.D. Cal. 2018).

preserve such relationships free from intervention.⁵⁹ Finally, plaintiffs contended that the separation violated procedural due process “because it was undertaken without any hearing.”⁶⁰

In its earliest arguments in *Ms. L*, Defendant DHS argued that its creation and enforcement of the Family Separation policy was lawful due to its executive decision-making power in immigration law and policy. Indeed, DHS never asserted that the parents and caretakers were unfit as parents but relied upon its plenary power.⁶¹ In its order denying in part defendants’ motion to dismiss, the district court found that none of these arguments presented an analogous example that supported defendants’ claims.⁶² Instead, the district court found that plaintiffs stated a sufficient claim that “separation from their children while they are contesting their removal and without a determination they are unfit or present a danger to their children violates due process.”⁶³ Importantly, the district court agreed with Plaintiffs that noncitizen parents enjoyed constitutional protections just as citizens, including rights of substantive due process and the fundamental liberty protections of parental rights afforded by precedent.⁶⁴ The district court considered Defendant’s arguments as to why the separation of families was constitutional but ultimately determined that the Family Separation policy amounted to due process violations and that the conduct at issue “shocks the conscience” and violates Plaintiffs’ constitutional right to family integrity.⁶⁵

Ms. L is pending resolution in the California federal court, and, under the Biden administration, the case focus has shifted from litigating the policy itself to reunifying the families.⁶⁶ On February 2, 2021, President Biden signed an executive order establishing the Task Force.⁶⁷ *Ms. L*’s Plaintiff’s counsel, the ACLU, has partnered with Defendant DOJ and the Task Force to locate separated families, reunite parents and children, and allow affected families to remain in the United States under a temporary, renewable grant of parole while they receive social and therapeutic

59. *Id.* at 9.

60. *Id.* at 10 (stating a claim that separating children from parents violated asylum laws and the Administrative Procedure Act); *see also* *Ms. L. v. U.S. Immigr. and Customs Enf’t*, 302 F. Supp. 3d 1149, 1168 (S.D. Cal. 2018) (granting Defendant’s Motion to Dismiss as to those two claims) [hereinafter Motion to Dismiss Order].

61. Motion to Dismiss Order, *supra* note 60, at 1154.

62. *Id.* at 1159.

63. *Id.* at 1154, 1167 (also declining in a footnote to consider the plaintiff’s procedural due process claims after finding that plaintiffs stated a substantive due process claim).

64. Motion to Dismiss Order, *supra* note 60, at 1161.

65. *Id.* at 1156, 1159.

66. Julia Ainsley, *Lawyer for Separated Migrant Families ‘Hopeful’ They Will Soon Be Reunified, Allowed to Stay in U.S.*, NBC (May 5, 2021), <https://www.nbcnews.com/politics/immigration/lawyer-separated-migrant-families-hopeful-they-will-soon-be-reunified-n1266326> [https://perma.cc/X8D7-PZKH].

67. INITIAL PROGRESS REPORT, *supra* note 48, at *i*.

services.⁶⁸ As the Task Force has reported, the work is particularly difficult because of the hasty and completely incompetent manner in which the Trump DHS implemented the Zero Tolerance and Family Separation policies.⁶⁹ In the Task Force initial report, they write:

No comprehensive, interagency system was in place at the time to track separated parents and their minor children to ensure that families could promptly and successfully be reunited once the parents were released from detention. Further, DHS did not coordinate with other affected agencies in implementing this policy.⁷⁰

The result is that years after the first separations took place, thousands of children and parents remain separated, unidentified and/or of an unknown status.⁷¹ To amplify the severity of the ongoing tragedy of the Trump Family Separation policy, I provide here a large portion of the data summary from the Task Force's August 1, 2021 Interim Progress Report:

The Task Force has identified **3,914 children** within the scope of [the Biden Executive Order] who were separated by the Department of Homeland Security (DHS) from their parents at the United States-Mexico Border between July 1, 2017 and January 20, 2021, based on the Zero-Tolerance Policy and related initiatives. The Task Force is aware of **399 children** who were returned to their home country, some with and some without their parents, and **1,695 parents** who were returned to their home country, some with and some without their children. Prior to the establishment of the Task Force, 2,031 children have been confirmed by the Task Force to have been reunified with their parents in the United States pursuant to a court order and the efforts of non-governmental organizations (NGOs). The Task Force has reunified, through close coordination

68. *Id.* at *ii*; see also INTERIM PROGRESS REPORT, INTERAGENCY TASK FORCE ON THE REUNIFICATION OF FAMILIES 1, 8 (2021), https://www.dhs.gov/sites/default/files/publications/21_0826_s1_interim-progress-report-family-reunification-task-force.pdf [<https://perma.cc/ZPB7-65VE>] (outlining the goals of the Task Force process as (1) locating families and explaining options; (2) establishing a mechanism for families to come forward; (3) providing home country support; (4) offering families reunification services; (5) sustaining and improving the availability of behavioral health services; (6) identifying a long-term status option for families; and (7) identifying durable funding sources; noting the confidential settlement negotiations between the ACLU, the DOJ and the Task Force in *Ms. L*, but stating that the parties and Task Force are publicly working together to broadcast messages of governmental support for estranged families) [hereinafter INTERIM PROGRESS REPORT].

69. INITIAL PROGRESS REPORT, *supra* note 48, at 3.

70. INTERIM PROGRESS REPORT, *supra* note 68, at 3.

71. *Id.* at 3.

with the NGOs and attorneys representing the separated families, 42 children with their parents, bringing the total number of known reunified children to 2,073. There are **1,841 children** who have not been reunified, to the Task Force's knowledge, including 45 children who are currently in the process of being reunified by the Task Force.⁷²

The report next notes that the Task Force is also reviewing whatever paltry records have been retained to identify if there are other potential families affected.⁷³ Further, the Task Force is assessing 1,723 *other* parent-child separations, which were previously excluded from the Ms. L class due to allegations of exclusionary conduct (e.g., claims of criminal conduct, which includes non-violent unauthorized re-entry) to determine if those families should be within the realm of the Biden Executive Order.⁷⁴

The Biden administration is quick to put the blame squarely on the prior administration and the tumult that the Zero Tolerance and Family Separation policies created.⁷⁵ As discussed above, the blame is not misplaced. Among the havoc President Trump created, it should not be surprising that thousands of migrant children and parents remain apart. Although it is laudable that President Biden swiftly created the Task Force, which has achieved successes, a change of administration cannot erase the damage caused. Recent reports reveal the severity of the tragedy, including the failures that the United States government is continuing to make in its efforts to reunite families.⁷⁶ Moreover, the Biden administration has failed to end family detention and—to the contrary—is breathing life into this horrific practice.

72. *Id.* (emphasis added).

73. *Id.*

74. INITIAL PROGRESS REPORT, *supra* note 48, at 9; *see also* Order Requiring Return of Certain Class Members to the U. S., Ms. L. v. U.S. Immigr. and Customs Enf't, No. 118-cv-428-DMS-MDD (S.D. Ca. 2021) (ordering the return of certain class members to the United States).

75. Quinn Owen, *DHS Chief Defends Biden Admin On Immigration, Says Trump 'Gutted' System*, ABC (Mar. 1, 2021, 4:03 PM), <https://abcnews.go.com/Politics/dhs-chief-defends-biden-admin-immigration-trump-gutted/story?id=76189428> [<https://perma.cc/42YW-SCDF>].

76. Stef. W. Kight, *Exclusive: Government can't reach one-in-three released migrant kids*, AXIOS (Sept. 1, 2021), <https://www.axios.com/migrant-children-biden-administration-a597fd98-03a7-415c-9826-9d0b5aaba081.html> [<https://perma.cc/9F3Z-GMWS>] (during the first five months of 2021, HHS officials made 14,600 required calls to the adult (usually family) sponsors of formally detained children. "In 4,890 of those instances, workers were unable to reach either the migrant or the sponsor.").

B. The Continued Practices of Family and Child Detention

When Joe Biden became President Biden in January 2021, he promised an overhaul of the immigration system.⁷⁷ His “day one” agenda included the U.S. Citizenship Act of 2021, a proposed plan that “modernizes our immigration system, and prioritizes keeping families together, growing our economy, responsibly managing the border with smart investments, addressing the root causes of migration from Central America, and ensuring that the United States remains a refuge for those fleeing persecution.”⁷⁸ To be sure, the Biden administration has instituted or re-instituted important changes and ended destructive Trump-era practices targeting migrant families.⁷⁹ As one example, in June 2021, President Biden announced the reaffirmation of the Central American Minors program, which allows parents and legal guardians with legal status or pending asylum claims in the United States to petition to bring their minor children from Guatemala, Honduras, and El Salvador.⁸⁰ In another milestone move, United States Attorney General Merrick Garland vacated three rulings from the Trump Attorney General that stripped the opportunity to seek asylum from victims of gender-based or domestic violence, gang violence, and of brutality based in family membership.⁸¹ More recently, DHS has announced new deportation priorities, focusing on removing noncitizens who are threats to national security, threats to public safety, and threats to border security.⁸² These pro-immigrant changes under Biden have provided hope

77. *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*, THE WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/> [https://perma.cc/2FMR-KKQD].

78. *Id.*

79. *Joint Statement by the U.S. Dep’t of State and U.S. Dep’t of Homeland Security on the Expansion of Access to the Central American Minors Program*, OFF. OF THE SPOKESPERSON (June 15, 2021), <https://www.state.gov/joint-statement-by-the-u-s-department-of-state-and-u-s-department-of-homeland-security-on-the-expansion-of-access-to-the-central-american-minors-program/> [https://perma.cc/X7NS-Y4HQ].

80. *Id.*

81. *Attorney General Garland Restores Asylum for Women and Families*, CTR. FOR GENDER & REFUGEE STUD. (June 16, 2021), <https://cgrs.uchastings.edu/news/attorney-general-garland-restores-asylum-women-and-families> [https://perma.cc/B9H9-TAEP] (noting that the Trump-era Attorney General decisions “were legally flawed and injected unnecessary confusion into the decision-making process, leading judges to wrongly deny protection by prejudging cases, rather than providing each case fair consideration on its own facts. . . . [A]sylum approval rates plummeted for people escaping persecution perpetrated by members of their families and communities, with a disproportionate impact on women, children, and LGBTQ+ people.”).

82. *Memorandum on Guidelines for the Enforcement of Civil Immigration Laws*, U.S. DEP’T OF HOMELAND SEC. (Sept. 30, 2021) <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> [https://perma.cc/H2KY-GRY8].

and guidance for immigrants and their advocates. Still, in the context of family and child detention, the Biden administration has not done enough.

As discussed above, the detention of children and families has a long tragic history in the United States. When it ended the Family Separation Policy on June 29, 2018, the Trump administration fortified the use of family detention.⁸³ The United States Department of Justice then announced that, rather than separating parents and children, families will be kept together in detention centers “during the pendency of their immigration cases.”⁸⁴ Not surprisingly, this led to increased rates of detention of unaccompanied children and families (parents or adult caregivers with children). The numbers of both groups peaked in 2019, when, for example, the number of detained children with families rose to almost 250,000, compared with a previous peak of 40,000 in 2014.⁸⁵ These numbers drastically dropped in 2020, with the outbreak of the Covid-19 pandemic.⁸⁶ In response, the Trump administration effectively closed the United States borders and expelled migrants attempting to enter.⁸⁷

Immigrant advocates were hopeful for meaningful changes when Biden took office in January 2021.⁸⁸ Despite statements regarding an about-face of Trump immigration policies, including the diminution of family apprehensions and detention, the Biden administration has sustained the practices in 2021.⁸⁹ The numbers of apprehended migrants demonstrate this continuing trend.⁹⁰ DHS apprehension of families increased in 2020 and, after Biden’s election, grew at a faster rate in 2021.⁹¹ Notably, although rates increased, the rates of family apprehensions in 2021 were lower than the peak in 2019.⁹² In 2021, DHS apprehensions of unaccompanied children increased, following the low 2020 numbers due to the Covid-19

83. Dara Lind, *It’s Official: The Trump Administration Has Replaced Family Separation with Indefinite Family Detention*, VOX (June 30, 2018, 1:39 PM), <https://www.vox.com/2018/6/30/17520820/families-together-detention-separate-camp-military> [https://perma.cc/U5LV-6M6X].

84. *Id.*

85. Anna Flagg & Andrew R. Calderón, *500,000 Kids, 30 Million Hours: Trump’s Vast Expansion of Child Detention*, THE MARSHALL PROJECT (Oct. 30, 2020), <https://www.themarshallproject.org/2020/10/30/500-000-kids-30-million-hours-trump-s-vast-expansion-of-child-detention> [https://perma.cc/2NC6-VMW8].

86. *Id.*

87. *Id.*

88. Silvia Foster-Frau, *First migrant facility for children opens under Biden*, WASH. POST (Feb. 22, 2021), https://www.washingtonpost.com/national/immigrant-children-camp-texas-biden/2021/02/22/05dfd58c-7533-11eb-8115-9ad5e9c02117_story.html [https://perma.cc/Q7LW-2BRT].

89. *Id.*

90. *Id.*

91. AM. IMMIGR. COUNCIL, RISING BORDER ENCOUNTERS IN 2021: AN OVERVIEW AND ANALYSIS 10 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/rising_border_encounters_in_2021.pdf [https://perma.cc/Y2LN-CYMG].

92. *Id.* at 11.

pandemic.⁹³ Indeed, according to a September 2021 Fact Sheet, published by the administration for Children and Families Division of the United States Department of Health and Human Services, as of September 15, 2021, there were still 13,170 unaccompanied children in federal immigration care.⁹⁴ Moreover, despite the Flores Settlement rules regarding how long children can be detained, as of early 2021, DHS records reveal that hundreds of unaccompanied migrant children were detained for ten days.⁹⁵ Finally, in the first half of fiscal year 2021, CPB apprehended 92,000 family members.⁹⁶ This does not include the September crisis in which thousands of migrants took refuge at the Mexican-United States border, overwhelming local and federal authorities.⁹⁷

To be sure, the Biden administration has sought to reform the immigration detention system. In March 2021, DHS announced changes to the family detention protocols, stating that the agency is moving to processes that will drastically shorten the time that families and children will remain in federal care.⁹⁸ Reports indicate that the Family Residential Centers (the euphemistic name given to the family detention centers) would not serve to detain families but would be converted into “rapid-processing hubs” that would quickly screen migrants and release them within 72 hours

93. *Id.* at 10–11 (citing *Southwest Land Border Encounters*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-borderencounters> [<https://perma.cc/VUE5-YPWH>]).

94. FACT SHEET: UNACCOMPANIED CHILDREN (UC) PROGRAM, OFF. OF REFUGEE RESETTLEMENT (2021), <https://www.hhs.gov/sites/default/files/uac-program-fact-sheet.pdf> [<https://perma.cc/N3D3-E2S9>].

95. Franco Odoñez, *Hundreds of Migrant Children Held in Border Detention for More than 10 Days*, NPR (March 18, 2021, 10:19 PM), <https://www.npr.org/2021/03/18/979014713/hundreds-of-migrant-children-held-in-border-detention-for-more-than-10-days> [<https://perma.cc/SY26-6R7T>].

96. RANDY CAPP & DORIS MEISSNER, FROM JAILERS TO CASE MANAGERS: REDESIGNING THE U.S. IMMIGRATION DETENTION SYSTEM TO BE EFFECTIVE AND FAIR, MIGRATION POLICY INSTITUTE 15 (2021), https://www.migrationpolicy.org/sites/default/files/publications/mpi_rethinking-immigration-detention-2021_final.pdf [<https://perma.cc/DPT8-2LMP>].

97. In September 2021, another humanitarian crisis was occurring at the Mexico border with Del Rio, Texas. Thousands of migrants, many from Haiti, arrived at the border seeking United States immigration relief. *See* Sean Sullivan & Nick Miroff, *Amid furor over border images, Biden faces Democratic backlash on immigration*, WASH. POST (Sept. 21, 2021), https://www.washingtonpost.com/politics/biden-immigration-democratic-backlash/2021/09/21/4de126b8-1adf-11ec-a99a-5fea2b2da34b_story.html [<https://perma.cc/5EKF-DN37>]; *id.* (CBP officials, apparently caught off guard by the large numbers of arrivals, responded with violence directed at the migrants, including families and children.); *id.* (Facing political backlash from both political parties, the Biden Administration doubled down, increasing the numbers of migrants it would deport back to Haiti, citing the Title 42 regulations.).

98. Maria Sacchetti et al., *Texas family detention centers expected to transform into rapid-processing hubs*, WASH. POST (Mar. 4, 2021), https://www.washingtonpost.com/immigration/texas-family-detention-centers-changed/2021/03/04/6a0bfa8a-7b6f-11eb-b3d1-9e5aa3d5220c_story.html [<https://perma.cc/9MLC-LM9D>].

of apprehension.⁹⁹ Further, DHS released all detained migrants on February 26, 2021, in one of the three remaining CBP Family Residential Centers, located in Berks, Pennsylvania. DHS reports that it still has plans for the site's use, perhaps using it to detain women migrants.¹⁰⁰

While the efforts to close and repurpose the sites were underway in early 2021, the number of family and children migrants entering the United States continued to grow.¹⁰¹ This presented a conundrum for DHS in reaching its goal of minimizing the use of detention while more families and children seeking asylum or immigration relief arrived. Thus, in the same month that it declared its new fast-track plan (March 2021), CBP apprehended 18,951 unaccompanied children, a new monthly high.¹⁰² This resulted in the inability of the ORR to place the children fast enough and inevitably led to detention sites being overcrowded with children who remained detained for far longer than federal law allows.¹⁰³ Therefore, instead of lessening its reliance on detention as it planned, DHS created more centers.¹⁰⁴ In fact, in February 2021, federal officials opened the first detention center for children under the Biden administration.¹⁰⁵ The Texas location, a former camp for oil field workers, was converted to a center for detaining children.¹⁰⁶ As of February 2021, the Department of Health and Human Services (“HHS”) reported that “there were about 7,000 children in HHS custody, over 90 percent capacity under pandemic-era requirements.”¹⁰⁷

Further, while the numbers of families and children seeking immigration relief soared in early 2021, DHS predicted a continued increase throughout the year, stirring concerns that the agencies would be unable to effectively process the migrants.¹⁰⁸ A March 2021 report noted that, in that month, “hundreds of parents and children have been spending hours at an outdoor processing station next to the Rio Grande, some sleeping on the ground while they wait for agents to formally take them into

99. *Id.*

100. *Id.*

101. Nick Miroff & Maria Sacchetti, *Family groups crossing border in soaring numbers point to next phase of crisis*, WASH. POST (Mar. 28, 2021, 12:14 PM), https://www.washingtonpost.com/national/migrant-families-border/2021/03/28/355c59a2-8d70-11eb-aff6-4f720ca2d479_story.html [<https://perma.cc/QP3J-54GV>].

102. See AM. IMMIGR. COUNCIL, *supra* note 91, at 11.

103. See Silvia Foster-Frau, *First migrant facility for children opens under Biden*, WASH. POST (Feb. 22, 2021), https://www.washingtonpost.com/national/immigrant-children-camp-texas-biden/2021/02/22/05dfd58c-7533-11eb-8115-9ad5e9c02117_story.html [<https://perma.cc/8SVW-23VD>].

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. See Miroff & Sacchetti, *supra* note 101 (“Groups of families—sometimes collectively numbering as many as 400—have been showing up this month along the riverbanks in South Texas, straining CBP’s ability to transport, process and care for so many parents and children without leaving other sections of the border unsupervised.”).

custody.”¹⁰⁹ Indeed, even though DHS continued to expel or turn away migrants based, in part, on a Trump-era spurious public health argument (discussed below), there are still thousands of migrants in federal immigration custody.¹¹⁰

In the ORR programmatic September 17, 2021 Fact Sheet on the Unaccompanied Children Program, the ORR reported that, as of September 15, 2021, there are “approximately 13,179 children in federal care. At the end of July 2021, the average length of [unaccompanied child] care was 35 days.”¹¹¹ Thus, although the Biden administration has provided important changes to the disastrous Trump immigration legacy, the practice of detaining families and children remains robust, and is buttressed by a narrative of expulsion, deportation, and threats of removal.¹¹²

C. The Biden Administration Continues to Expel, Deport and Deter Migrant Families and Children

One year ago, and before his election to the presidency, Biden campaigned on big promises to reverse Trump’s immigration agenda: “If I’m elected president, we’re going to immediately end Trump’s assault on the dignity of immigrant communities. We’re going to restore our moral standing in the world and our historic role as a safe haven for refugees for asylum-seekers.”¹¹³ But even as Biden began his presidency, the increased numbers of migrants, including families and unaccompanied children, put a political strain on his administration.¹¹⁴ Critics have been quick to point out the administration’s broken promises on immigration, including, among others, those he made regarding migrant families, children, and refugees.¹¹⁵

109. *Id.*

110. See FACT SHEET: UNACCOMPANIED CHILDREN (UC) PROGRAM, *supra* note 94, at 2.

111. *Id.*

112. See, e.g., Philip Marcelo & Gerald Herbert, *Immigrant detentions soar despite Biden’s campaign promises*, AP NEWS (Aug. 5, 2021), <https://apnews.com/article/joe-biden-health-immigration-coronavirus-pandemic-4d7427ff67d586a77487b7efec58e74d> [<https://perma.cc/7SQZ-KYQG>] (“In May [2021], the Biden administration terminated contracts with two controversial ICE detention centers. . . . But no other facilities have lost their ICE contracts, and Biden has proposed funding for 32,500 immigrant detention beds in his budget, a modest decrease from 34,000 funded by Trump.”).

113. John Burnett, *Biden Pledges to Dismantle Trump’s Sweeping Immigration Changes—But Can He Do that?*, NPR (Sept. 14 2020), <https://www.npr.org/2020/09/14/912060869/biden-pledges-to-dismantle-trumps-sweeping-immigration-changes-but-can-he-do-that> [<https://perma.cc/3TTN-9BB4>].

114. *Id.*

115. Julia Ainsley, *Five major immigration promises Biden has yet to keep*, NBC NEWS (Apr. 21, 2021), <https://www.nbcnews.com/politics/immigration/five-major-immigration-promises-biden-has-yet-keep-n1264836> [<https://perma.cc/AZM3-V6ER>]; see John Burnett, *supra* note 113; see also Naureen Shah & Jonathan Blazer, *Secretary Mayorkas Pledge to End His Agency’s Anti-immigrant Abuses. Here’s What He’s Delivered*, ACLU (July 21, 2021), <https://www.aclu.org/news/immigrants-rights/secretary-mayorkas-pledged-to-end-his-agencys-anti-immigrant-abuses-heres-what-hes-delivered> [<https://perma.cc/3N99-U9WW>];

Faced with the increasing pressure of mitigating the effects of a record number of migrants seeking immigration relief, President Biden's message to would-be migrants quickly turned to one of, quite literally, "don't come."¹¹⁶

It was a message reinforced by Vice President Kamala Harris in her visit to Guatemala: "I want to be clear to folks in this region who are thinking about making that dangerous trek to the United States-Mexico border: Do not come. Do not come. . . . The United States will continue to enforce our laws and secure our border."¹¹⁷ DHS Secretary Alejandro Mayorkas has overseen important immigration reform—including heading the Task Force and ending the Trump era's disastrous Remain in Mexico Migration Protection Protocol, which forced those seeking asylum to wait in Mexico for their legal process to begin, rather than in the United States as is contemplated in United States asylum laws and policies.¹¹⁸ Yet, Mayorkas has backtracked on promises of reforms aimed at humanitarian relief and has bolstered the use of Trump's "Title 42 policy," even though it operates on legal shaky ground.¹¹⁹

Indeed, the Title 42 policy continues to oppress migrants coming to the United States border for immigration relief. At the outset of the Covid-19 global health crisis on March 20, 2020, HHS issued an emergency regulation to implement United States Code Title 42, Section 265.¹²⁰ This regulation permits the Director of the Centers for Disease Control and Prevention ("CDC") to "prohibit . . . the introduction" into the United States of individuals when the Director believes that "there is serious danger of the introduction of [a communicable] disease into the United States."¹²¹ The Title 42 rule effectively allows any CBP official to turn away anyone attempting to enter the United States from a place that is a

Julia Ainsley, *Despite court filings and public rhetoric, official says Biden administration is 'not ending family detention,'* NBC NEWS, (Mar. 9, 2021), <https://www.nbcnews.com/politics/immigration/despite-court-filings-public-rhetoric-official-says-biden-admin-not-n1260283> [<https://perma.cc/RJX4-B38C>].

116. Maegan Vazquez & Kate Sullivan, *Biden tells migrants not to come to US: 'Don't leave your town'*, CNN (Mar. 16, 2021), <https://www.cnn.com/2021/03/16/politics/joe-biden-migrant-children-border-immigration/index.html> [<https://perma.cc/6494-42VE>].

117. Brian Naylor & Tamara Keith, *Kamala Harris Tells Guatemalans Not to Migrate to the United States*, NPR (June 7, 2021), <https://www.npr.org/2021/06/07/1004074139/harris-tells-guatemalans-not-to-migrate-to-the-united-states> [<https://perma.cc/2VSD-N974>].

118. Shah & Blazer, *supra* note 115.

119. *Id.*

120. *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL 1 (2021) at 1, <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [<https://perma.cc/S8QF-ZD5H>] [hereinafter *A Guide to Title 42 Expulsions at the Border*].

121. *Id.* (citing CTRS. FOR DISEASE CONTROL AND PREVENTION, DEP'T OF HEALTH AND HUMAN SERVS., *Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes*, 85 Fed. Reg. 16,559 (Mar. 24, 2020), <https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-ofcommunicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into> [<https://perma.cc/SYX7-FTC4>].

“Coronavirus Impacted Area” and if those entrants will be placed in a “congregate setting,” like immigration holding or detention.¹²² As a result, and although others traveling into the United States from other means of transport are allowed to enter, thousands of asylum-seekers, including families with children, have been turned away.¹²³ Unaccompanied minors, however, cannot be expelled on Title 42 grounds, an exemption that the Biden administration created in its Title 42 regulation.¹²⁴ Yet even with the Title 42 regulation enforcement, CBP continues to allow families in—as evidenced by the continued reliance on detention and ORR tracking.¹²⁵ The American Immigration Council reports that “[i]n the first five full months of the Biden administration, 64% of all people encountered by the Border Patrol were expelled under Title 42.”¹²⁶

Complicating the Biden policies are the Mexican government’s efforts to keep out migrants seeking to wait in Mexico for their opportunity to enter the United States. The Mexican government passed a law in November 2020, which took effect in January 2021, that prohibits the detention of immigrant children and applies to certain border points in South Texas.¹²⁷ Thus, the United States government is unable to expel such migrants back through these areas. As a result, more migrant families in these South Texas locations are allowed to remain in the United States while processing their claims for relief.¹²⁸ Meanwhile, the United States government has transported migrant families to other points of the border to expel them there.¹²⁹ And, as noted above, the Biden administration continues to expel migrant families per their faulty reliance on Title 42.¹³⁰ Coupled with the rule against expelling unaccompanied children, some parents are making the heart-wrenching decision to send their children by themselves over the border in the hope that they will have a better chance of remaining in the country if they enter alone.¹³¹

The reliance on Title 42 has drawn broad criticism from immigrant advocates and scholars, including Harold Koh, a leading legal advisor to the

122. *Id.*

123. *Id.* (“Citing the new CDC order, that same day the Border Patrol began ‘expelling’ individuals who arrive at the U.S.-Mexico border, without giving them the opportunity to seek asylum. After the CDC order was issued, the Border Patrol began to expel migrants arriving at the border.”).

124. *Id.*

125. *Rising Border Encounters in 2021: An Overview and Analysis*, AM. IMMIGR. COUNCIL 8–9 (2021), <https://www.americanimmigrationcouncil.org/rising-border-encounters-in-2021> [<https://perma.cc/GHP5-VAJH>].

126. *Id.* at 6.

127. Zolan Kanno-Youngs, *Mexican Law Halts U.S. From Turning Back Some Migrant Families*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/us/politics/mexico-united-states-border-immigration.html> [<https://perma.cc/UM2F-9FE5>].

128. AM. IMMIGR. COUNCIL, *supra* note 91, at 11.

129. *Id.*

130. *A Guide to Title 42 Expulsions at the Border*, *supra* note 120, at 1.

131. AM. IMMIGR. COUNCIL, *supra* note 91, at 11.

United States State Department, who left his position out of protest of the policy.¹³² In his public resignation memo, Koh wrote that the Title 42 expulsions, which are “currently being executed to return Mexican, Guatemalan, Honduran, and Salvadoran families and single adults to their countries of origin, and more recently, Haitians to Haiti,” are direct violations of the United States’ legal obligation not to return migrants who “fear persecution, death, or torture.”¹³³ Public health experts also decry the policy as unwarranted for public health concerns as asylum-seekers can otherwise be processed safely during the pandemic.¹³⁴ And although a federal court ruled against the Title 42 expulsions in September 2021, finding that the regulations were in direct contravention to asylum protections, the D.C. Circuit Court of Appeals overturned the lower court and reinstated the reliance on Title 42.¹³⁵ The litigation continues.¹³⁶

CONCLUSION

We would be remiss to forget the invidious, pervasive trauma wrought on vulnerable communities, including migrants and communities of immigrants, by the Trump presidency. As discussed in my previous work, we must remember the images and sounds of children wrenched from their parents, crying in frigid jails, distraught at not being with their beloved guardians, parents, and caretakers.¹³⁷ The robust system of detaining families and children did not begin with Trump—but was fortified and taken to new extremes under his purported leadership. In this way, those who advocate for immigrants are mindful—perhaps grateful—to have a presidential administration that seemingly envelops moral values based in humanity and the uplifting of family.

But while we practice gratitude, we must also hold our leaders to promised actions and reform. It was only due to a groundswell of vehement opposition to the Family Separation policy that Trump and his administration conceded and ended it.¹³⁸ Similarly, in August 2021, images of Afghan people fleeing the Taliban brought Americans to outrage and

132. Harold Koh, *Re: Ending Title 42 return flights to countries of origin, particularly Haiti*, POLITICO (Oct. 2, 2021), <https://www.politico.com/f/?id=0000017c-4c4a-dddc-a77e-4ddb3ae0000> [<https://perma.cc/Z34S-GREE>].

133. *Id.*

134. See Sullivan & Miroff, *supra* note 97.

135. *Huisha-Huisha v. Mayorkas*, 2021 WL 4206688 (D.D.C. Sept. 16, 2021), *rev'd*, *Huisha-Huisha v. Mayorkas*, No. 21-5200 (D.C. Cir. Filed Sept. 30, 2021).

136. ACLU, *ACLU Comment on Federal Appeals Court Ruling in Title 42 Challenge* (Sept. 30, 2021), <https://www.aclu.org/press-releases/aclu-comment-federal-appeals-court-ruling-title-42-challenge> [<https://perma.cc/6K6M-H294>] (“Lee Gelernt, the lead lawyer in the Title 42 challenge [reacted] ‘If the Biden administration really wants to treat asylum seekers humanely, it should end this lawless policy now and withdraw its appeal. We will continue fighting to end this illegal policy.’”).

137. Olivares, *supra* note 1, at 336.

138. *Id.* at 297–98.

calls for governmental action and assistance.¹³⁹ In a matter of weeks, the process of departure and resettlement began for many Afghani refugees, including those who traveled to the United States and were greeted with warmth and empathy.¹⁴⁰ Mere weeks later, similar indignation erupted at images of CBP officers antagonizing and assaulting migrants—many from Haiti.¹⁴¹ Yet these thousands of migrants received no warm welcome or offers of immigration relief.¹⁴² Instead, save for those allowed to remain while pursuing relief, many were summarily deported back to the country they fled.¹⁴³ Likewise, migrant children and families held in United States detention camps deserve compassion and the ability to pursue their legally protected rights to claim asylum or other immigration relief.

Scholars and researchers have long advocated for effective alternatives to detention.¹⁴⁴ As just one example, in their detailed report regarding detention, Capps and Meissner outline the inefficiencies of relying on detention and the overwhelming benefits of a different approach: “The cornerstone of a rebalanced custody system should be supervised release and case management programs, with detention in secure facilities limited to the minority of cases for which it is truly justified.”¹⁴⁵ Moreover, the authors point to an alternative to family detention begun by the Obama administration in 2016 as a model for implementation.¹⁴⁶ The Family Case Management Program (“FCMP”) involved holistic and intensive case management services for migrant families who were released rather than detained.¹⁴⁷ As their report notes, “[t]hrough short in duration (18 months), the FCMP reported 99-percent compliance rates for immigration court proceedings and ICE check-in appointments; just 4 percent of participants

139. Barbara Sprunt, *There's A Bipartisan Backlash To How Biden Handled The Withdrawal From Afghanistan*, NPR (Aug. 17, 2021, 11:11 AM), <https://www.npr.org/2021/08/16/1028081817/congressional-reaction-to-bidens-afghanistan-withdrawal-has-been-scathing> [<https://perma.cc/HW2G-DTZL>].

140. *Americans across the country are welcoming Afghans*, RESCUE (Sept. 17, 2021), <https://www.rescue.org/article/americans-across-country-are-welcoming-afghans> [<https://perma.cc/FL5S-YV2N>].

141. Tim Craig et. al., *Charges of racism swirl as Haitian Americans, allies unite to protest migrants' treatment*, WASH. POST (Sept. 22, 2021, 9:27 PM), https://www.washingtonpost.com/national/haitian-migrants-racism/2021/09/22/e400793e-1be1-11ec-bcb8-0cb135811007_story.html [<https://perma.cc/8G9P-8V9W>].

142. *Id.*

143. Camilo Montoya-Galvez, *U.S. expels nearly 4,000 Haitians in 9 days as part of deportation blitz*, CBS (Sept. 27, 2021, 9:28 PM), <https://www.cbsnews.com/news/haiti-migrants-us-expels-nearly-4000-in-nine-days/> [<https://perma.cc/HA6M-PJKZ>].

144. See CAPPS & MEISSNER, *supra* note 96, at 1; see also Ophelia Field, *Alternatives to Detention of Asylum Seekers and Refugees*, UNHCR (Apr. 2006), <https://www.unhcr.org/en-us/protection/globalconsult/4474140a2/11-alternatives-detention-asylum-seekers-refugees-ophelia-field.html?query=ophelia%20field> [<https://perma.cc/G2ZV-XHW9>].

145. CAPPS & MEISSNER, *supra* note 96, at 13.

146. *Id.*

147. *Id.*

failed to appear for immigration court hearings.”¹⁴⁸ While also costing less than the very large costs of imprisoning families, the move to a safer, more humane practice must be pursued.

Foundationally, there is no space for a policy of family separation in our country. Indeed, President Biden’s executive order establishing the Task Force charges the group to report on “recommendations to ensure that the Federal Government will not repeat the policies and practices leading to the separation of families at the border, no later than 1 year after the date of this order.”¹⁴⁹ The work of the Task Force must be seen through its end—every family reunited; every lead pursued; every affected person provided adequate immigration and economic relief. Most importantly, we must remain vigilant that families are never again destroyed in the name of immigration enforcement and deterrence.

148. *Id.*

149. Exec. Order No. 14,011, 86 Fed. Reg. 8,273 (Feb. 2, 2021).