

## JUSTIFYING FAMILY SEPARATION: CONSTRUCTING THE CRIMINAL ALIEN AND THE ALIEN MOTHER

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*The marriage of discourse and law can reframe whole areas of law into or out of public view, centering some, like crimmigration, and rendering others, like asylum, wholly invisible. This Article analyzes the intercourse between public discourse and law that undergirded the 2018 family separation policy. This intercourse enabled the criminalization of noncitizen parents, paving the way for the notion that the state could step in to displace the “criminal alien” as a more competent parent—as *parens patriae*. These two developments frame family separation not as an unavoidable collateral consequence of border enforcement, but rather as traditional state functions: punishing offenders and caring for the vulnerable. This dual framework constructed of discourse and law—crimmigration and *parens patriae*—pushed formerly robust legal frameworks—*asylum* or discretionary forbearance from exclusion—out of sight and out of reach. By the same means, this discursive framework erased family relationships in racialized and gendered ways. This Article’s analysis holds promise, beyond family separation, for greater understanding of how targeted discourse contributes to the impotence of inclusive areas of humanitarian law like *asylum*.*

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## I. INTRODUCTION

In May 2015, Reina and her twelve-year-old son, Ésteban, and nine-year-old daughter, Zafna,<sup>1</sup> stepped into the colorless cubicle that served as a client interview room inside a grey-walled trailer in rural Texas.<sup>2</sup> The cubicle was empty but for a table, four chairs, and me, an attorney in a suit. I reached into my bag for post-it notes, pens, and highlighters.

I was there, in the heart of the largest family detention center in the nation, to prepare the family for a “credible fear” interview with an asylum officer, the threshold test of their asylum application.<sup>3</sup> The previous summer, the government had broken with the long-established practice of releasing arriving families on recognizance

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1. Some names have been changed to preserve anonymity.

2. Interview with Reina Campos, Ésteban Campos, and Zafna Campos at South Texas Family Residential Center, Dilley, Tex. (May 13, 2015). Names fictionalized to maintain confidentiality.

3. See 8 U.S.C. § 1225(b)(1)(B)(v) (defining “credible fear of persecution” as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum . . .”).

with an administrative notice to appear in court.<sup>4</sup> Instead, mothers who arrived with children were detained.<sup>5</sup>

Under the law at the time, Reina, Ésteban, and Zafna had meritorious asylum claims.<sup>6</sup> Ésteban had turned twelve and was being recruited by the transnational Mara Salvatrucha (“MS-13”) gang.<sup>7</sup> Reina, his mother, had denounced the gang in a written statement to a detective in an anti-gang force.<sup>8</sup> Soon after, Zafna looked out of a window and saw gang members photographing their house. The family left that day, heading north.

At the border, they spent a day and a night in a U.S. Border Patrol holding center: first in extremely cold cells, nicknamed “iceboxes,” and then in chain-link boxes dubbed “dog kennels,” or “cages.”<sup>9</sup> From there, officials transported them to the detention

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4. See LUTHERAN IMMIGR. & REFUGEE SERVS. & WOMEN’S REFUGEE COMM’N, LOCKING UP FAMILY VALUES, AGAIN 2 (Diana Quick & Clarissa Perkins eds., 2014), [https://www.lirs.org/assets/2474/lirswrc\\_lockingupfamilyvaluesagain\\_report\\_141114.pdf](https://www.lirs.org/assets/2474/lirswrc_lockingupfamilyvaluesagain_report_141114.pdf); Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), [https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html?\\_r=0](https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html?_r=0) (discussing the Obama administration’s return to family detention as policy). *But see* Kathryn Abrams, *Family as a Vehicle for Abjection*, 11 J.L. & FAM. STUDIES 359, 364 (2009) (discussing the use of family detention centers under the Bush administration); Margaret Talbot, *The Lost Children: What Do Tougher Detention Policies Mean for Undocumented Immigrant Families?*, NEW YORKER (Feb. 25, 2008), <https://www.newyorker.com/magazine/2008/03/03/the-lost-children>.

5. Margaret H. Taylor & Kit Johnson, “Vast Hordes . . . Crowding in Upon Us”: *The Executive Branch’s Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 185, 201 (2015) (discussing “No-Bond/High-Bond Policies” for women with children detained in Artesia even after passing credible fear interviews); INNOVATION L. LAB, THE ARTESIA REPORT, <https://perma.cc/4CU6-WBWW> (explaining that “ICE initially denied release in nearly 100% of the cases represented by the [Artesia Pro Bono] project”).

6. U.S. DEP’T OF JUST., 23 I. & N. DEC. 951, 959 (B.I.A. 2006) (“Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.”).

7. Bruce Zagaris, *U.S. Treasury Designates MS-13 as Transnational Criminal Organization*, 28 INT’L ENFT L. REP. 452, 452–53 (2012) (explaining the U.S. Department of Treasury’s designation of Latin American gang, MS-13, as a Transnational Criminal Organization for its involvement in “serious transnational criminal activities, including drug trafficking, kidnapping, human smuggling, sex trafficking, murder, assassinations, racketeering, blackmail, extortion, and immigration offenses”).

8. Names fictionalized to maintain confidentiality.

9. See Mariana Alfaro, *Migrants Detained at the Border are Kept in Freezing Cells Nicknamed ‘Iceboxes,’* BUS. INSIDER, (Dec. 27, 2018, 2:05 PM), <https://www.businessinsider.com/migrants-detained-at-border-kept-in-freezing-cells-nicknamed-iceboxes-2018-12>; Martin Garbus, *What I Saw at the Dilley, Texas, Immigrant Detention Center*, NATION, (Mar. 26, 2019), <https://www.thenation.com/article/dilley-texas-immigration-detention>; Molly

center in Dilley, Texas, where we met. Worse for the family than the cold or the chain-link fencing was that they were separated for a day and a night: mothers in one room, boys in another, girls in a third.<sup>10</sup> During our interview in the trailer that day in May 2015, Reina told me that the children would not leave her side.<sup>11</sup>

Within a week of our meeting, they had passed the threshold asylum screening that I had prepared them for and were released to unite with U.S. family members and prepare for their asylum case before a judge.

Three years later, in May 2018, C.M. entered the U.S. with her son, B.M.<sup>12</sup> According to their complaint, mother and son had left Guatemala to elude violence related to their indigenous identity.<sup>13</sup> U.S. Border Patrol apprehended them in Arizona; as with Reina's family, they were taken to an "icebox."<sup>14</sup> There, an immigration officer told C.M. and three other women with her that immigration officers would take away their children and send the mothers back to Guatemala.<sup>15</sup>

"Happy Mother's Day," the officer said.<sup>16</sup>

A few days later, an officer told C.M. to shower and dress B.M. in preparation for immigration officers to take B.M. away from her and send him to a shelter.<sup>17</sup> C.M. begged the immigration officer not to take her son away because he was so young.<sup>18</sup> The officer told her that only mothers with children under four years old could be released with their children.<sup>19</sup> B.M. was five.<sup>20</sup>

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Redden, *Why Are Immigration Detention Facilities So Cold?*, MOTHER JONES, (July 16, 2014), <https://www.motherjones.com/politics/2014/07/why-are-immigration-ice-detention-facilities-so-cold/>. See generally Memorandum from the Office Inspector Gen. to the Acting Secretary of the Department of Homeland Security, OIG-19-51, Management Alert – DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley (2019) (explaining the general overcrowding the Inspector General witnessed when she visited and observed the treatment of detainees at the Rio Grande Valley detention facility).

10. Interview with Reina Campos, Ésteban Campos, and Zafna Campos at South Texas Family Residential Center, Dilley, Tex. (May 13, 2015). Names fictionalized to maintain confidentiality.

11. *Id.*

12. Complaint at 25, C.M. v. United States, No. CV-19-05217-PHX-SRB, 2020 WL 1698191 (D. Ariz. Sept. 19, 2019).

13. *Id.* at 27.

14. *Id.* at 25.

15. *Id.* at 25–26.

16. *Id.* at 26.

17. *Id.* at 26–27.

18. *Id.* at 27.

19. *Id.* at 26–27.

20. *Id.* at 3–4, 26.

There was another reason C.M. was so adamant that B.M. stay with her. B.M. spoke Mam, a Mayan language spoken in Guatemala, and did not understand Spanish or English.<sup>21</sup> He would not be able to understand what anyone said to him.<sup>22</sup> She asked the officer to send her back to Guatemala with B.M. rather than separate them.<sup>23</sup>

When she realized that the officers had resolved to separate them, C.M. spoke directly to her son.<sup>24</sup> She explained that he was going to a shelter and that he would play with lots of other children.<sup>25</sup> She told him she would see him in a few days.<sup>26</sup> B.M. clutched her; the immigration officers pried him away.<sup>27</sup>

C.M. was detained in Arizona and then transferred to Nevada.<sup>28</sup> U.S. officials flew B.M. to New York where he spent two and a half months in two foster homes.<sup>29</sup> The two spoke for the first time four days after they were separated, and then not again for several weeks, with C.M. in Nevada and B.M. in New York.<sup>30</sup> B.M. turned six years old at a New York shelter.<sup>31</sup> They were reunited on July 26, 2018, and transferred to the same Texas family detention center where I had met Reina three years earlier.<sup>32</sup> After four months in detention, C.M. and B.M. were released to prepare for their asylum hearing in immigration court.<sup>33</sup>

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What changed in the three years between May 2015, when Reina and her children experienced their brief but impactful separation, and May 2018, when C.M. and her son spent over two months on opposite sides of the United States? The ready answer is that in 2018, the Trump administration instituted a policy of family separation that impacted close to 3,500 children.<sup>34</sup> The question this Article plumbs

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21. *Id.* at 27.

22. *Id.*

23. *Id.*

24. *Id.* at 28.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 29.

29. *Id.* at 31–32.

30. *Id.* at 29–30.

31. *Id.* at 30.

32. *Id.* at 33.

33. *Id.*

34. OFF. OF REFUGEE RESETTLEMENT, FACTS AND DATA, (Mar. 12, 2020), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>; *see also* U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF THE INSPECTOR GEN., OIG ISSUE BRIEF: SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 1–6 (Jan. 17, 2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>; U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER 21–23 (2018), <https://www.gao.gov/assets/700/694918.pdf>.

is how this was accomplished: what legal and policy frameworks had to be in place to enable mass family separation? The stories of Reina, C.M., and the three children reference alternate legal frameworks that officials and courts have applied to mothers and children who arrive at the border without preauthorization to enter the United States—asylum, removal, prosecution, detention, separation, and assumption of government custody.<sup>35</sup>

Scholarship on the Trump administration's family separation practice has traced the scope and impact of the policy of separating children from adult family members,<sup>36</sup> explored the ethical and moral implications of separating children,<sup>37</sup> and identified relevant legal frameworks, such as international law,<sup>38</sup> children's law,<sup>39</sup> and family law,<sup>40</sup> as well as political interests<sup>41</sup> that provide critical context to

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35. See Carrie F. Cordero et al., *The Law Against Family Separation*, 51.2 COLUM. HUM. RTS. L. REV. 432, 446–48 (2020).

36. Lindsay M. Harris, *Learning in “Baby Jail”: Lessons from Law Student Engagement in Family Detention Centers*, 25 CLINICAL L. REV. 155, 155 (2018) (“The Trump Administration’s ‘zero tolerance’ policy and implementation of wide-scale family separation in 2018 led to increased involvement by professors and students in the shifting landscape of immigration detention.”); Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585, 585 (2019) (laying out “the impact of this Administration’s systemic attacks on Central American asylum seekers, in particular through family separation and zero tolerance, the asylum ban, and *Matter of A-B*”).

37. Allison Crennen-Dunlap, Note, *Abolishing the ICEberg*, 96 DENV. L. REV. 148, 157 (2019); see also David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391, 417 (2008) (opining that “[e]xploiting the fear of family separation should not be the lynchpin of modern immigration enforcement”).

38. See generally Cordero et al., *supra* note 35, at 445–61 (outlining the domestic and international legal framework around family separation).

39. 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, 419–27 (2020) (applying children’s rights law to family separation).

40. See Noa Ben-Asher & Margot J. Pollans, *The Right Family*, 39.1 COLUM. J. GENDER & L. 1, 3–4, 13–16, 22–25, 28–47 (2020) (assessing the role of family in American law in several contexts: the travel ban, family separation at the southern border, agricultural subsidies, and the religious rights of closely held corporations); Cordero et al., *supra* note 35, at 445–61 (outlining the domestic and international legal framework around family separation); Mariela Olivares, *The Rise of Zero Tolerance and the Demise of Family*, 36 GA. ST. U. L. REV. 287, 328–40 (2020) (discussing the competing goals in immigration law (security) and family law (preservation of family integrity)).

41. See Jamie R. Abrams, *Why the Legal Strategy of Exploiting Immigrant Families Should Worry Us All*, 14 HARV. L. & POLY REV. 77, 88–93 (2019) (detailing the centrality of the state’s role in perpetuating family trauma and its function as a political strategy).

family separation.<sup>42</sup> They have connected family separation with other liberty-restricting immigration practices like family detention.<sup>43</sup> Some have proposed legal and policy solutions and practical responses.<sup>44</sup> Thoughtful work explores the racialized resonances of the decision to separate children from parents.<sup>45</sup>

None, however, have deeply explored the interaction between public discourse and law that undergirded the 2018 family separation policy. This Article examines how official discourse about asylum seekers at the southern border employed both the criminalization of parents and themes of child abuse and neglect to reframe family separation as a collateral consequence of border enforcement, one that required the government to step in as a substitute parent. The justifications offered for separating children from parents brought to the foreground enforcement-oriented legal frameworks—crimmigration and *parens patriae*—and pushed traditional legal frameworks like asylum out of sight and out of reach.<sup>46</sup>

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42. See Cordero et al., *supra* note 35, at 436–38 (surveying and assessing the limits on the U.S. government’s ability to enact family separation policies under a range of domestic and international areas of law and finding that “many types of law prohibit this practice,” recommending legislative action); Craig B. Mousin, *Rights Disappear when US Policy Engages Children as Weapons of Deterrence*, 21 *AMA J. ETHICS* 58, 58–61 (2019) (examining the development of the CRC and international refugee law to provide context for family detention and separation; describing the criminalization of children and families).

43. Harris, *supra* note 36, at 155–57 (connecting the issues raised by family separation to the entrenchment of family detention); Olivares, *supra* note 40, at 346–47 (arguing that congressional and presidential powers should bend to the constitutional rights of the family in the context of family separation, and that family separation and family detention should be abolished).

44. Cordero et al., *supra* note 40, at 461–78 (outlining constitutional and statutory bases for declaratory and injunctive relief and Bivens claims, among others); Harris, *supra* note 36, at 155 (“The Trump Administration’s ‘zero tolerance’ policy and implementation of wide-scale family separation in 2018 led to increased involvement by professors and students in the shifting landscape of immigration detention.”); Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 *TUL. L. REV.* 707, 776–85 (2019) (proposing administrative and legislative reforms to address executive overreaching underlying family separation); Mousin, *supra* note 42, at 59–60 (looking to international refugee law).

45. Crennen-Dunlap, *supra* note 37, at 157 (questioning “whether the incarceration and banishment of hundreds of thousands of people annually is morally acceptable, whether the US electorate—largely born into the privilege of citizenship—should endorse the separation of families born without such privilege, and whether a nation founded on a proclamation of equality should continue to accept as inevitable a hierarchy driven by race and birthplace”); Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 *WAKE FOREST L. REV.* 575, 575 (2019).

46. See *infra* notes 276–300 and accompanying text. Crimmigration is the intersection of criminal and immigration law. See Juliet Stumpf, *The*

This Article describes a symbiotic relationship between official discourse and legal change that proceeded in three steps. The discourse around family separation originally centered around the utility of taking children from parents in order to deter Central American mothers and children from seeking asylum in the United States.<sup>47</sup> The first step toward that goal was to apply a crimmigration and securitization lens to Central American family migration to the United States.<sup>48</sup> The executive branch pursued a “zero-tolerance” discourse that criminalized and securitized both the border space and those within it, including parents of children present at the border.<sup>49</sup> Second, within this discursive framework, family separation was justified as a natural and collateral consequence of criminal prosecution of the criminal parent.<sup>50</sup> The third and final move was to replace the criminally exploitative parent with the benevolent state, drawing on child welfare principles to arrive at a discursive point in which the federal government claims to act, in essence, as *parens patriae*.<sup>51</sup>

Hand in hand with these threads of discourse came changes in law and legal policy. These changes removed humanitarian grounds for entry and erased family relationships.<sup>52</sup> Asylum moved out of reach of many Central American mothers due to administrative decisions that uprooted established gender-based asylum grounds by barring the types of asylum claims most accessible to women: claims based on domestic violence, gang violence, and family membership.<sup>53</sup> Policy choices administratively redefined the relationship between

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*Crimmigration Crisis; Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

47. See *infra* notes 263–75 and accompanying text.

48. See Caitlin Dickerson, *Trump Administration Moves to Sidestep Restrictions on Detaining Migrant Children*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/us/trump-flores-settlement-regulations.html>.

49. See *infra* notes 322–44 and accompanying text.

50. See *Kirstjen Nielsen Addresses Families Separation at Border: Full Transcript*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2018/06/18/us/politics/dhs-kirstjen-nielsen-families-separated-border-transcript.html>.

51. See *infra* notes 284–302 and accompanying text.

52. Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2376 (2019) (examining programs and policies to protect migrant children that operate on an in loco parentis basis in which immigration-related benefits inure to minors once they give up any claim or legal relationship to their family).

53. See Arthur C. Helton & Alison Nicoll, *Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In Re Fauziya Kasinga and Prospects for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375, 381 (1997) (mentioning asylum claims related to domestic violence and family relationships); Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827, 830 (2008) (mentioning gang-related asylum claims specific to women).

child and parent, declaring the child to be unaccompanied once the parent was in custody.<sup>54</sup> These policies rendered invisible legal protections for family integrity and erased control over the fundamental question of who, effectively, exercised parental authority and custody.<sup>55</sup> At that point, family separation became merely the effectuation of the narrative and legal frameworks called into existence through discourse and legal change.

The light this Article sheds on how the interweaving of public discourse and law can facilitate and naturalize practices like family separation has larger implications. It highlights how critical it is to see law and legal change not in a vacuum, but as shaped by public discourse in ways that actually move whole areas of law into or out of public view and discard, or make invisible, legitimate legal claims like asylum. As such, the analysis in this Article not only paves the way for greater understanding of immigration law; it also paves the way for greater understanding in other legal arenas where official discourse can highlight one legal framework at the expense of another.

Part II of this Article sets out a chronology of the family separation policy of 2018. Part III describes the steps the U.S. attorney general took to narrow asylum law, stripping significant protections that had been available to Central American women in their roles as mothers. Part IV reveals the three-step discursive journey that policymakers in the Trump administration made to arrive at the practice of separating children from parents. Part V pairs this discourse with changes in the legal rules and policies that facilitated the separation of families, reclassifying children as parentless and redefining asylum law to exclude gendered forms of violence. It explains how the changes in law, paired with the official discourse, *framed in* narratives about crimmigration and chaos at the border that called for a criminalized and securitized response. At the same time, these changes *framed out* narratives and legal claims that recognize harms that Central Americans, women, and families disproportionately experience.

## II. FAMILY SEPARATION UNDER THE TRUMP ADMINISTRATION

Mass separation of arriving immigrant families under the Trump administration was a marked change from prior practices.<sup>56</sup> Until

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54. *Kirstjen Nielsen Addresses Families Separation at Border: Full Transcript*, *supra* note 50.

55. See Abrams, *supra* note 41, at 123–24 (2019) (discussing the historical approach to family border crossings, state use of *parens patriae* powers in the abuse and neglect system, and why the abuse and neglect system approach should now be used in the immigration system as well).

56. Family separation, of course, has a long history in the United States in the institutionalized deconstruction of enslaved families and the establishment of Native American boarding schools, to name two of the most pervasive and

2014, parents with children who were apprehended at the southern U.S. border were usually placed in removal proceedings and released with a notice of their immigration case.<sup>57</sup> Beginning in 2014, immigration officials diverted many arriving families to family detention facilities in the Southwest to undergo threshold asylum screening.<sup>58</sup>

The last decade has seen an increase in family arrivals from Central America, constituting a significant shift in migration patterns to the United States.<sup>59</sup> At the same time that Mexican migration to the United States began to ebb, as educational and economic opportunities in Mexico rose,<sup>60</sup> endemic violence in the Northern Triangle of Central America triggered an evacuation of men and women from those countries, especially mothers with their children and children traveling without parents.<sup>61</sup> The number of

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destructive instances. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 30 (1997); Vinita B. Andrapallayal, *History Repeats Itself: Parallels Between Current-Day Threats to Immigrant Parental Rights and Native American Parental Rights in the Twentieth Century*, 8 U. MASS. L. REV. 562, 582 (2013); Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 374–75 (2007).

57. AUDREY SINGER & WILLIAM A. KANDEL, CONG. RSCH. SERV., R46012, *IMMIGRATION: RECENT APPREHENSION TRENDS AT THE U.S. SOUTHWEST BORDER* 2 (2019).

58. See Stephen Manning & Juliet Stumpf, *Big Immigration Law*, 52 U.C. DAVIS L. REV. 407, 417–19 (2018).

59. E.g., David James Cantor, *The New Wave: Forced Displacement Caused by Organized Crime in Central America and Mexico*, 33 REFUGEE SURV. Q. 34, 60–61 (2014) (calling attention to a “new wave of forced displacement generated by organized criminal groups” in Mexico and Central America).

60. DOUGLASS S. MASSEY, THE RUSSELL SAGE FOUND. & THE STANFORD CTR. ON POVERTY & INEQUALITY, *A GREAT RECESSION BRIEF: IMMIGRATION AND THE GREAT RECESSION* 1 (2012); CARL MEACHAM & MICHAEL GRAYBEAL, CTR. FOR STRATEGIC & INT’L STUD., *DIMINISHING MEXICAN IMMIGRATION TO THE UNITED STATES* 2 (Jul. 2013); JIE ZONG & JEANNE BATALOVA, MIGRATION POL’Y INST., *MEXICAN IMMIGRANTS IN THE UNITED STATES*, (Oct. 11, 2018) <https://www.migrationpolicy.org/article/mexican-immigrants-united-states>.

Empirical research has teased out some of the factors that have tended to lead to family separation. See Nina Rabin, *Understanding Secondary Immigration Enforcement: Immigrant Youth and Family Separation in a Border Country*, 47 J. L. & EDUC. 1, 33–34 (2018) (reporting results of a qualitative study on young people who experienced acute disruptions caused by deportations of family members and family separation as a result of immigration enforcement’s interaction with three other key factors: family dysfunction, extreme poverty, and educational aspirations).

61. See ELIZABETH KENNEDY, AM. IMMIGR. COUNCIL, *NO CHILDHOOD HERE: WHY CENTRAL AMERICAN CHILDREN ARE FLEEING THEIR HOMES* (July 2014); Cantor, *supra* note 59, at 37; Sarah Bermeo, *Violence Drives Immigration from Central America*, BROOKINGS (June 26, 2018), <https://www.brookings.edu/blog/future-development/2018/06/26/violence-drives-immigration-from-central-america>; Amanda Taub, *The Awful Reasons Tens of Thousands of Children are*

border arrests rose spectacularly between 2017 and 2019.<sup>62</sup> U.S. Customs and Border Protection (“CBP”) officials arrested 41,435 unaccompanied children and 75,622 families in 2017; in 2019, CBP apprehensions rose to 76,020 Central American children and 473,682 families.<sup>63</sup>

This movement of a historic number of Central American families and women to the U.S. border discomfited established border policing strategies, which had been aimed largely at Mexican nationals with cross-border employment and family ties.<sup>64</sup> New discourses and new strategies arose.<sup>65</sup>

In 2014, the Obama administration instituted large-scale detention of mothers and children who were crossing the southern border and seeking asylum,<sup>66</sup> most of whom were Central American.<sup>67</sup> The policy followed the Obama administration’s politically controversial announcement that it would not deport undocumented U.S. residents who had grown up in the United States under the Deferred Action for Childhood Arrivals (“DACA”) program.<sup>68</sup> A year later, the federal government had constructed the largest family detention center in existence, with the capacity to detain 2,400 mothers and children in locked, guarded facilities.<sup>69</sup> By then, over 86 percent of the detained mothers were passing the threshold step of their asylum cases, meaning that a government official concluded that the family had established a credible fear of persecution.<sup>70</sup> Most

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*Seeking Refuge in the United States*, VOX (June 30, 2014, 3:10 PM), <https://www.vox.com/2014/6/30/5842054/violence-in-central-america-and-the-child-refugee-crisis>.

62. See reports cited *infra* note 63.

63. Compare U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER MIGRATION (2019), with U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER MIGRATION (2017).

64. Cecilia Menjivar & Leisy J. Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. SOC. 1380, 1390–91 (2012).

65. See *infra* notes 66–73 and accompanying text.

66. PHILIP G. SCHRAG, BABY JAILS: THE FIGHT TO END THE INCARCERATION OF REFUGEE CHILDREN IN AMERICA 132 (2020); Manning & Stumpf, *supra* note 58, at 417.

67. SCHRAG, *supra* note 66, at 123.

68. See *id.* at 130 (discussing political dynamics in the aftermath of President Obama’s announcement of DACA, and quoting Representative Candice Miller as saying, “this humanitarian crisis can be laid directly at the feet of President Obama as a result of his DACA policy”); David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 420–21 (2015); President Barack Obama, Remarks by the President on Immigration (June 15, 2012).

69. HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 3 (2016).

70. USCIS ASYLUM DIVISION, CREDIBLE FEAR AND REASONABLE FEAR FAMILY FACILITIES FY14–FY16 (2016).

were released, often to join family in the United States,<sup>71</sup> with a notice to appear in court to present their asylum case.<sup>72</sup> Family detention, then, was a de facto processing center for Central Americans, an ordeal before release into the United States.<sup>73</sup>

Four years later, government response to the arrival of Central Americans made a significant shift.<sup>74</sup> The Trump administration declared that it would end unauthorized entry through the southern border, promising to erect a physical wall, increase border patrol personnel, and ramp up deportations.<sup>75</sup> The presence of families seeking asylum at the southern border clashed with the vision of repelling noncitizens and with the notion that unauthorized entrants were criminals.<sup>76</sup>

Large-scale separation of children from family members at the border under the Trump administration began far earlier than originally understood.<sup>77</sup> In March 2017, the Trump administration publicly floated the idea of separating families as a means of deterrence.<sup>78</sup> However, prior to the Trump administration's announcement, the Office of Refugee Resettlement ("ORR"), a refugee integration agency within the Department of Health and Human Services ("HHS") that has authority to hold unaccompanied minors in custody, reported that the number of children that border officials had separated from parents before transfer to ORR had risen drastically

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71. JEREMY SLACK ET AL., U. ARIZ. CTR. FOR LATIN AM. STUD., *IN THE SHADOW OF THE WALL: FAMILY SEPARATION, IMMIGRATION ENFORCEMENT AND SECURITY* 7 (2013) ("This report will help us first understand who is being deported, and in particular their family connections to the United States.").

72. HOMELAND SEC. ADVISORY COUNCIL, *supra* note 69, at 3–4 (reporting 99 percent of individuals detained in "Family Residential Centers" between Oct. 23, 2015, and May 16, 2016, were released after less than thirty days).

73. *See generally id.*

74. Nolan D. McCaskill, *Trump Promises Wall and Massive Deportation Program*, POLITICO (Aug. 31, 2016; 10:08 PM) <https://www.politico.com/story/2016/08/donald-trump-immigration-address-arizona-227612>.

75. Garrett M. Graff, *Donald Trump's Army on the Border*, POLITICO (July 18, 2016), <https://www.politico.com/magazine/story/2016/07/2016-donald-trump-mexico-us-border-patrol-immigration-undocumented-illegal-customs-texas-rio-grande-214060>; David A. Graham, *Has Trump Kept His Campaign Promises?*, ATLANTIC (Apr. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/04/trump-promises-cheat-sheet/507347/>; McCaskill, *supra* note 74.

76. Marouf, *supra* note 44, at 759, 768–69.

77. *Id.* at 772–74 (setting out a detailed chronology beginning in 2016).

78. 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>; John Haltiwanger, *John Kelly Proposed Separating Children from Their Parents to Deter Illegal Immigration Last Year, and Now the Trump Administration Can't Get Its Story Straight*, BUS. INSIDER (June 18, 2018, 10:04 AM), <https://www.businessinsider.com/kelly-proposed-family-separation-to-deter-illegal-immigration-in-2017-2018-6>.

between November 2016 and August 2017. ORR had seen a tenfold increase in the rate of separated children.<sup>79</sup>

Two developments drove the increase in separated families.<sup>80</sup> First, in April 2017, U.S. Attorney General Jeff Sessions directed federal prosecutors along the southwest border to prioritize prosecution of criminal immigration offenses,<sup>81</sup> including misdemeanor unlawful entry.<sup>82</sup> This likely had the effect of increasing separation of children from parents charged with unlawful entry. Federal agents already practiced separating families in circumstances when a parent was prosecuted on criminal unlawful entry or unlawful re-entry, rather than being administratively detained or released to await administrative removal proceedings.<sup>83</sup> Second, as reflected in a Department of Homeland Security (“DHS”) press release reporting that aliens were increasingly using children to enter the United States, Border Patrol agents began to demand and scrutinize documents evidencing a relationship between parent and child.<sup>84</sup> They also separated children from accompanying adults who were not legal guardians, including grandparents and adult siblings.<sup>85</sup>

In July 2017, three months after the attorney general’s memo prioritizing criminal immigration prosecutions, the administration implemented a pilot program in New Mexico to prosecute all adults believed to have unlawfully crossed the border, including parents.<sup>86</sup> In connection with those charges, Border Patrol officials separated children from arrested parents.<sup>87</sup> Once a parent was placed in criminal custody by U.S. Marshalls, Border Patrol officials classified the children as “unaccompanied alien children”<sup>88</sup> and transferred them to the custody of ORR.<sup>89</sup> Under this initiative, Border Patrol separated approximately 281 family members.<sup>90</sup> The pilot program ran until November 2017, when family separation was implemented

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79. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 13.

80. See *infra* notes 81–85.

81. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 8; see also Attorney General Jeff Sessions, U.S. Att’y Gen., Meeting with Customs and Border Protection Personnel and Immigration Policy Announcement (Apr. 11, 2017).

82. See 8 U.S.C. § 1325.

83. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 1, 11.

84. See *id.* at 10 n.35.

85. See *id.* at 6.

86. OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-20-06, DHS LACKED TECHNOLOGY NEEDED TO SUCCESSFULLY ACCOUNT FOR SEPARATED MIGRANT FAMILIES 5 (2019).

87. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 14–15.

88. 6 U.S.C. § 279(g)(2).

89. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 2, 17.

90. See *id.* at 14–15.

more broadly.<sup>91</sup> CBP reported to the Secretary of DHS that there had been a 64 percent drop in apprehensions of families in that sector during the pilot period.<sup>92</sup> In fact, that statistic was inaccurate.<sup>93</sup> CBP statistics instead show a 64 percent *increase* in family apprehensions during the pilot program.<sup>94</sup>

In November 2017, ORR sought clarification from border officials about the rise in the number of children who seemed to have been separated.<sup>95</sup> The response was that there was no official policy of separating families.<sup>96</sup> In reliance on that response, ORR did not formally plan for future increases in separated children.<sup>97</sup> No process was put in place for reunifying children with parents after separation.<sup>98</sup>

On February 26, 2018, a class of separated families sued the government to challenge the separations and compel reunification.<sup>99</sup> Nevertheless, on April 6, 2018, U.S. Attorney General Jeff Sessions announced a policy of criminal prosecution for unlawful entry of all adults who entered without inspection through the southwestern

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91. *See id.* at 15; *see also* Dara Lind, *Trump's DHS Is Using an Extremely Dubious Statistic to Justify Splitting up Families at the Border*, VOX (May 8, 2018, 9:30 AM), <https://www.vox.com/policy-and-politics/2018/5/8/17327512/sessions-illegal-immigration-border-asylum-families> (describing the Trump administration's expansion of family separation policy).

92. *See* Lind, *supra* note 91.

93. This statistic came under scathing critique. *Id.* (“The government says its new policy reduced border crossings 64%. They actually increased 64%.”).

94. Rather than falling, between July 2017 and November 2017, the number of family members who border officials apprehended in the El Paso sector rose from 231 to 379, a 64 percent increase. *Compare* U.S. CUSTOMS & BORDER PROT., U.S. BORDER PATROL SOUTHWEST BORDER APPREHENSIONS BY SECTOR FY2017, <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions-fy2017#field-content-tab-group-tab-9> (last modified Feb. 11, 2019) (reporting 231 individuals were apprehended with a family member in the El Paso sector in July 2017), *with* U.S. CUSTOMS & BORDER PROT., U.S. BORDER PATROL SOUTHWEST BORDER APPREHENSIONS BY SECTOR FY2018, <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions#field-content-tab-group-tab-1> (last modified Oct. 23, 2018) (reporting that 379 individuals were apprehended with a family member in the El Paso sector in November 2017).

95. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 34, at 13.

96. *See id.* at 14.

97. *See id.*

98. *See id.* at 21; *see also* Ms. L. v. U.S. Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1137, 1140–41 (S.D. Cal. 2018) (noting that governmental agencies had not yet developed procedures to reunite separated families).

99. *Ms. L.*, 310 F. Supp. 3d at 1141.

border.<sup>100</sup> Sessions dubbed the policy “zero tolerance” of unlawful border crossing.<sup>101</sup>

Officials at CBP, U.S. Immigration and Customs Enforcement (“ICE”), and ORR reported that they were in the dark about the attorney general’s zero-tolerance memo and the practice of separating children of prosecuted parents until the day that it was announced publicly in April 2018.<sup>102</sup> Border officials usually labeled both separated children and children traveling alone as “unaccompanied children” when transferring them to ORR.<sup>103</sup> Border agents were not expected or required to disclose whether the child had been separated when transferring the child to ORR.<sup>104</sup> It was left to the discretion of individual border officials, then, to include or leave out information about separation when drafting referral notes emailed to officials at ORR.<sup>105</sup>

ORR’s lack of foreknowledge about the oncoming increase in separated children had significant consequences.<sup>106</sup> The population of children it had housed previously were mostly teenagers who had come to the United States without an accompanying parent and ranged in average age from thirteen to seventeen years old.<sup>107</sup> The children that border officials separated from their parents were much younger<sup>108</sup> and required specially licensed facilities.<sup>109</sup> Without prior planning, ORR ran out of suitable space for these very young children.<sup>110</sup> Some ORR officials responded locally by, for example, retraining staff on caring for younger children and converting spaces meant for teens such as classrooms to accommodate cribs, furniture, and toys for children under the age of five.<sup>111</sup> On April 19, 2018, for the first time, Border Patrol included in its computer system a yes/no check box to allow agents to indicate that a child was separated from a parent.<sup>112</sup> ORR learned about this checkbox several months later.<sup>113</sup>

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100. U.S. DEP’T OF JUST., *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry* (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

101. U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 34, at 3.

102. *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 12.

103. *Id.* at 17.

104. *Id.*

105. *See id.*

106. *See infra* text accompanying notes 108–13.

107. OFF. OF REFUGEE RESETTLEMENT, *supra* note 34; *see also* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 15–16 (stating that the majority of children in ORR care had previously been thirteen to seventeen years old).

108. *See* U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 34, at 6, 11.

109. *Id.* at 6.

110. *Id.*

111. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 15–16.

112. *Id.* at 17.

113. *Id.* at 16.

On April 11, 2018, DHS Secretary Kirstjen Nielsen testified before Congress that the Department did not have a family separation policy based on deterrence.<sup>114</sup> A little over a week later, the *New York Times* reported that more than seven hundred children had been taken from their parents since October 2017.<sup>115</sup> One hundred of those children, the newspaper reported, were under the age of four.<sup>116</sup>

CBP and ICE officials conferred with the Justice Department about how to implement the attorney general's zero-tolerance memo.<sup>117</sup> On April 23, 2018, Secretary Nielsen signed a directive authorizing border officials at the southwest border to refer all adults arrested between ports of entry, including those arriving with minor children, for criminal prosecution under 8 U.S.C. § 1325(a).<sup>118</sup> On May 7, 2018, Attorney General Sessions confirmed that family separation was a consequence of the zero-tolerance policy.<sup>119</sup> On June 18, 2018, DHS Secretary Kirstjen Nielsen tied family separation to the normal course of criminal prosecution, stating: "[I]f an American were to commit a crime anywhere in the United States, they would go

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114. Tal Kopan, *DHS Secretary Clarifies Circumstances for Separating Immigrant Families*, CNN (Apr. 11, 2018, 4:20 PM), <https://www.cnn.com/2018/04/11/politics/dhs-separating-families-immigrants-kirstjen-nielsen/index.html>.

115. 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>.

116. *Id.*

117. Maria Sacchetti, *Top Homeland Security Officials Urge Criminal Prosecution of Parents Crossing Border with Children*, WASH. POST (Apr. 26, 2018, 7:58 PM), [https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/a0bdcee0-4964-11e8-8b5a-3b1697adcc2a\\_story.html](https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/a0bdcee0-4964-11e8-8b5a-3b1697adcc2a_story.html).

118. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 34, at 15; *Newly Released Memo Reveals Secretary of Homeland Security Signed off on Family Separation Policy*, OPEN THE GOV'T (Sept. 24, 2018), <https://www.openthegovernment.org/newly-released-memo-reveals-secretary-of-homeland-security-signed-off-on-family-separation-policy>; *see also* Sacchetti, *supra* note 117.

119. Richard Gonzalez, *Sessions Says 'Zero Tolerance' for Illegal Border Crossers, Vows to Divide Families*, NPR (May 7, 2018, 8:17 PM), <https://www.npr.org/sections/thetwo-way/2018/05/07/609225537/sessions-says-zero-tolerance-for-illegal-border-crossers-vows-to-divide-families>; Miriam Jordan, *How and Why 'Zero Tolerance' is Splitting Up Immigrant Families*, N.Y. TIMES (May 12, 2018), <https://www.nytimes.com/2018/05/12/us/immigrants-family-separation.html> (last updated June 19, 2018); Joseph Tanfani & Cindy Carcamo, *Children are Likely to be Separated from Parents Illegally Crossing the Border Under New Trump Administration Policy*, L.A. TIMES (May 7, 2018, 12:23 PM), <https://www.latimes.com/politics/la-na-pol-border-crossers-20180507-story.html> (statement of Attorney General Sessions) ("If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law. . . . If you don't like that, then don't smuggle children over our border.").

to jail and they would be separated from their family. This is not a controversial idea.”<sup>120</sup>

Border officials followed instructions to arrest adults for prosecution and deliver any accompanying children to ORR officials of the HHS.<sup>121</sup> Accomplishing this instruction required physically removing children from their accompanying parent or other adult, restraining the adult, and moving the child to another location using a transport van or bus.<sup>122</sup> The sound and spectacle of children undergoing separation flashed through news and social media, inspired protests, and prompted condemnation from community leaders and politicians across party lines.<sup>123</sup>

The absence of agency communication and coordination between DHS and ORR meant that there was no plan in place to track separated children and their parents.<sup>124</sup> CBP policy requires border officials to safeguard, itemize, and document the personal property of people they arrest and detain.<sup>125</sup> No similar policy was in place to document the relationship between the separated children and their parents or track which facilities the children and parents had been taken to after arrest.<sup>126</sup>

Because border officials did not always inform ORR when transferred children had been separated from parents,<sup>127</sup> ORR officials resorted to informally tracking separated children on an excel spreadsheet, relying first on DHS’s informal reporting of separations

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120. See *Kirstjen Nielsen Addresses Families Separation at Border: Full Transcript*, *supra* note 50.

121. *Ms. L. v. U.S. Immigr. & Customs Enft*, 310 F. Supp. 3d 1133, 1137–38 (S.D. Cal. 2018); U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 34, at 3–4; see Jeff Sessions, U.S. Att’y Gen., Attorney General Sessions Delivers Remarks Regarding the Immigration Enforcement Actions of the Trump Administration (May 7, 2018).

122. U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 34, at 4.

123. Julie Hirschfeld Davis & Michael D. Shear, *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>.

124. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 16.

125. See U.S. CUSTOMS & BORDER PROT., NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH 26 (2015). This policy has failed, in a significant proportion of cases, to reunite deported individuals with their belongings. See WALTER EWING AND GUILLERMO CANTOR, DEPORTED WITH NO POSSESSIONS: THE MISHANDLING OF MIGRANTS PERSONAL BELONGINGS BY CBP AND ICE 1 (American Immigr. Council ed., 2016) (41 percent of respondents whose belongings had been confiscated upon detention reported that not all of their belongings were returned).

126. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 16. As described above, until April 2018, the databases that DHS and ORR shared did not include a field to indicate that immigration officials had separated a child in immigration custody from her parents, and even when one was included, ORR was unaware of it for several months. *Id.*

127. *Id.*

and later incorporating information from shelter staff when they discovered that a child in their care had been separated.<sup>128</sup> Matching child with parent thus required a painstaking search by hand through opaque records.<sup>129</sup>

Public condemnation of family separation mounted.<sup>130</sup> The public spectacle of family separation, and the resulting hue and cry reached into President Trump's political base and inspired protest from within his own family.<sup>131</sup> On June 20, 2018, President Trump announced that he would sign an executive order ending the separation of families.<sup>132</sup> The Executive Order, announcing a policy of "maintaining family unity," was widely viewed as ending family separation.<sup>133</sup> The administration would continue to arrest and prosecute adults who unlawfully crossed the border with children; however, instead of being separated, the families would be detained together throughout any criminal or immigration proceedings.<sup>134</sup> The Executive Order was silent about reunifying families and provided no guidance about future family separations other than to permit separation if government officials had "concerns" that a parent posed "a risk to the child's welfare."<sup>135</sup>

Six days later, on June 26, 2020, a district court enjoined the government's family separation practice.<sup>136</sup> The court in *Ms. L. v. Immigration and Customs Enforcement*<sup>137</sup> ordered DHS and ORR to reunify children with their families within thirty days.<sup>138</sup> It barred the deportation of parents without their children and the future separation of children from their parents unless it was in the child's best interest.<sup>139</sup>

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128. *Id.* at 19.

129. U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 34, at 7.

130. Davis & Shear, *supra* note 123.

131. Jessica Taylor, *Melania Trump Pressured President Trump to Change Family Separation Policy*, NPR (June 20, 2018, 2:59 PM), <https://www.npr.org/2018/06/20/621930721/melania-trump-pressured-president-trump-to-change-family-separation-policy>.

132. Exec. Order No. 13,841, 3 C.F.R. § 13841 (2018); Miles Parks et al., *Trump Signs Order to End Family Separations*, NPR (June 20, 2018, 11:51 AM), <https://www.npr.org/2018/06/20/621798823/speaker-ryan-plans-immigration-votes-amid-doubts-that-bills-can-pass>.

133. *E.g.*, Parks et al., *supra* note 132.

134. 3 C.F.R. § 13,841.3.

135. *Id.*; *see also* *Ms. L. v. U.S. Immigr. & Customs Enft.*, 415 F. Supp. 3d 980, 983, 985 (S.D. Cal. 2020) (highlighting that the Executive Order provided no guidance for reunifying families other than instructing children should not be detained with parents who posed "a risk to the child's welfare").

136. Order Granting Pls.' Mot. for Classwide Prelim. Inj., *Ms. L. v. U.S. Immigr. & Customs Enft.*, 310 F. Supp. 3d 1133, 1136, 1149–50 (S.D. Cal. 2018).

137. *Id.*

138. *Id.* at 1149.

139. *Id.* at 1149–50.

President Trump's solution to this conundrum was to propose prolonged detention of families.<sup>140</sup> In declaring a policy of family unity, the Executive Order characterized that unity to include "detaining alien families together where appropriate and consistent with law and available resources."<sup>141</sup> The Order called upon the attorney general to pursue the lifting of judicially enforced restrictions on the amount of time government officials could detain children.<sup>142</sup> Keeping children with parents required that the courts step aside and permit executive officials to expand and protract the detention of children with their parents.<sup>143</sup>

In July 2018, ORR disclosed to the court in *Ms. L. v. ICE* that it had tentatively identified 2,654 children of parents who had been taken into federal immigration agency custody within the time period the court had specified.<sup>144</sup> Of those children, 103 ranged from newborn to four years old.<sup>145</sup> The rest ranged from five to seventeen years of age.<sup>146</sup>

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140. The Trump administration was not alone in entertaining the idea of prosecuting parents, separating families, and indefinitely detaining mothers and children. Executive officials within the two prior administrations had implemented mass prosecutions of illegal entry charges under Operation Streamline, which pioneered a mass prosecution policy. Both the Bush and Obama administrations contemplated expanding mass prosecution to include prosecuting parents and separating children but rejected that approach in favor of mass detention of mothers with their children, or release. See Mary Kay Mallonee, *DHS Considering Proposal to Separate Children from Adults at Border*, CNNPOLITICS (March 4, 2017, 3:31 AM), <https://www.cnn.com/2017/03/03/politics/dhs-children-adults-border/index.html>.

141. Exec. Order No. 13,841, 3 C.F.R. § 13841.1 (2018).

142. *Id.* at § 13841.3; Proposed Order Implementing Remedies Pursuant to the Ct.'s July 24, 2015 Order 2, *Flores v. Lynch*, No. CV 85-4544, (C.D. Cal. Aug. 6, 2015), <https://www.aila.org/File/Related/14111359k.pdf> (limiting detention of children to approximately twenty days); Stipulated Settlement Agreement 9–10, 12, *Flores v. Meese*, No. 85-4544(Px) (C.D. Cal. Jan. 17, 1997), [https://www.aclu.org/files/pdfs/immigrants/flores\\_v\\_meese\\_agreement.pdf](https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf).

143. 3 C.F.R. § 13841.1 ("It is also the policy of this Administration to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources. It is unfortunate that Congress's failure to act and court orders have put the Administration in the position of separating alien families to effectively enforce the law."); see also Daniel Hatoum, *Abolition of Immigrant Family Detention: Tracing an Evolving Standard of Decency from Separation Through Imprisonment*, 47 HOFSTRA L. REV. 1229, 1254–55 (2019) (connecting family separation and family detention).

144. Joint Status Report at 3, *Ms. L. v. U.S. Immigr. & Customs Enf't*, No. 18cv428 (S.D. Cal. Sept. 27, 2018); see U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 34, at 25.

145. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 34, at 25.

146. *Id.* The agency's calculation did not include separated children who had been released to sponsors before June 2018, nor the over five hundred children whom border officials had reunified with parents in June 2018. *Id.*

By early September 2018, ORR had released 2,217 of the 2,654 separated children identified in its preliminary report to the court.<sup>147</sup> The agency reported that it had reunited about 90 percent of them with the parent they were separated from and placed most others with a sponsor.<sup>148</sup> In December 2018, however, ORR told the court in *Ms. L. v. ICE* that the number of class member children believed to have been separated from their parents or guardians had reached 2,737.<sup>149</sup> A month later, the HHS Office of the Inspector General concluded that estimate had significantly undercounted the number of separations.<sup>150</sup> The count of the numbers of separated children rose to nearly 3,500.<sup>151</sup> On the strength of the HHS Inspector General's report, the court in *Ms. L. v. ICE* redefined the plaintiff class to encompass these separated family members, imposing a six-month deadline on the government to identify all separated children.<sup>152</sup>

Interactions between ORR and ICE complicated reunification of the separated children with their families.<sup>153</sup> In April 2018, ORR began to share information with ICE and CBP about potential sponsors for the children, including requiring biographic information and fingerprinting of all adult members of potential sponsors' households.<sup>154</sup> ICE arrested at least 170 of the sponsors based on the information ORR shared.<sup>155</sup> A class of parents sued, claiming that

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147. *Id.*

148. *Id.*

149. U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 34, at 1–2, 8, 10; *see* Joint Status Report 3, *Ms. L. v. U.S. Immigr. & Customs Enft.*, No. 18cv428 (S.D. Cal. June 6, 2019), [https://www.aclu.org/sites/default/files/field\\_document/joint\\_status\\_report.pdf](https://www.aclu.org/sites/default/files/field_document/joint_status_report.pdf).

150. Joint Status Report, *supra* note 149, at 1, 3; Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children Than Reported*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html> (quoting a HHS official saying, “Thousands of children were separated from parents and guardians, referred to H.H.S. and released from H.H.S. care before the court order . . . . The total number is unknown . . . . It is certainly more than 2,737, but how many more, precisely, is unknown”; and that “‘thousands’ more than the 2,737” children were separated).

151. OFF. OF REFUGEE RESETTLEMENT, *supra* note 34; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 34, at 15–16; *see* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 34, at 6, 7.

152. *See* *Ms. L. v. U.S. Immigr. & Customs Enft.*, 330 F.R.D. 284, 292–93 (2019); Order Following Status Conference, *Ms. L. v. U.S. Immigr. & Customs Enft.*, No. 18cv0428 (S.D. Cal. Apr. 24, 2019).

153. *See infra* notes 154–59 and accompanying text.

154. *J.E.C.M. v. Lloyd*, 352 F. Supp. 3d 559, 574 (E.D. Va. 2018).

155. Laura C. Morel & Patrick Michaels, *They used the kids to get to parents like me: How ICE's Human Smuggling Initiative Targeted Parents and Children*, REVEAL (Mar. 4, 2019), <https://www.revealnews.org/article/they-used-the-kids-to-get-to-parents-like-me-how-ices-human-smuggling-initiative-targeted-parents-and-children>.

the information-sharing policy was unlawful, intended to further immigration enforcement rather than facilitate family reunification, and resulted in delay of reunification.<sup>156</sup>

On a motion to dismiss, the court concluded that the information-sharing policy, as described by the plaintiffs, was detrimental to the children and inconsistent with ORR's mission.<sup>157</sup>

A policy that systematically elevates immigration enforcement over child welfare, one whose effects are to destabilize would-be sponsors' home environments and to discourage potential sponsors from applying for reunification, is flatly inconsistent with ORR's statutory responsibility to care for unaccompanied minors in its custody and release them promptly to safe and stable environments.<sup>158</sup>

The court also held the policy violated ORR's obligation under the *Flores*<sup>159</sup> settlement agreement to release children "without unnecessary delay."<sup>160</sup>

As of this writing, no one knows precisely how many families were separated.<sup>161</sup> As late as October 2018, ORR and the immigration enforcement agencies were unable to consistently track family members.<sup>162</sup> By October 2019, the count had risen to over five

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156. See *J.E.C.M.*, 352 F. Supp. 3d at 574–75.

157. *Id.* at 583.

158. *Id.* at 584.

159. See *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016).

160. *J.E.C.M.*, 352 F. Supp. 3d at 584.

161. U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 34, at 1; see OFF. OF INSPECTOR GEN., *supra* note 86 (reporting that "DHS estimated that Border Patrol agents separated 3,014 children from their families while the policy was in place. DHS also estimated it had completed 2,155 reunifications in response to a court order" and explaining that the Office of Inspector General "could not confirm the total number of families DHS separated during the Zero Tolerance period" because the Office had found more than a thousand additional separations and potential separations in its review).

162. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 34, at 18. In July 2018, ORR modified its computer system to include a field to indicate whether a child had been separated from parents. The Border Patrol directed its agents to use the Office's designation and also to provide the parent's alien number when making referrals of separated children to the Office. As of October 2018, border officials' use of this new system was reportedly inconsistent, and the information provided to ORR about the parents, such as names, nationality, and contact information, varied widely. See *id.* at 18–19, 19 n.49. In August 2018, the DHS completed changes to its computer databases that enabled officials to search for separated children and parents. See *id.* at 16. In September 2018, ORR became aware of the database change. See *id.*

thousand children.<sup>163</sup> A year later, the *New York Times* reported that the parents of 545 children had not been found.<sup>164</sup>

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Family separation is not a new phenomenon, and a rich literature existed even before the events of 2018.<sup>165</sup> Scholars have contributed insights about the ways in which, before the 2018 family separation crisis, immigration restrictive policies resulted in officials separating children from parents and other family members.<sup>166</sup> David Thronson, Nina Rabin, Jonathan Todres, and others built the scholarly foundations exploring the relationship between children and immigration law, and that work is expanding.<sup>167</sup> They explained that family separation occurs either as a consequence of migration or as a result of the operation of immigration agencies or other government agencies.<sup>168</sup> They also articulated the division that immigration law creates between children and their parents.<sup>169</sup> Empirical research

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163. Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot Be Found*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html>.

164. *Id.*

165. *See infra* notes 168–71 and accompanying text.

166. *See infra* notes 168–71 and accompanying text.

167. *See infra* notes 168–71 and accompanying text.

168. Cain W. Oulahan, *The American Dream Deferred: Family Separation and Immigrant Visa Adjudications at U.S. Consulates Abroad*, 94 MARQ. L. REV. 1351, 1353, 1363 (2011) (bars to re-entry after a period of unlawful presence: “the lengthy or permanent separation that many families are forced to endure when applying for an immigrant visa at a U.S. consulate abroad”); Carola Suárez-Orozco et al., *Making Up for Lost Time: The Experience of Separation and Reunification Among Immigrant Families*, 41 FAM. PROCESS 625, 626 (2002) (describing family separations as a consequence of migration); *see also* Sarah Rogerson, *Unintended and Unavoidable: The Failure to Protect Rule and Its Consequences for Undocumented Parents and their Children*, 50 FAM. CT. REV. 580, 580–81 (2012) (discussing neglect or abuse proceedings, the loss of immigration relief, and deportation of a parent); Thronson, *supra* note 37, at 398 (discussing raids). Nina Rabin has categorized family separation as a secondary impact of immigration enforcement. *See* Nina Rabin, *Understanding Secondary Immigration Enforcement: Immigrant Youth and Family Separation in a Border Country*, 47 J.L. & EDUC. 1, 1 (2018) (describing the phenomenon of secondary immigration enforcement and its operation based on a qualitative study of thirty-eight young people in Arizona living without either biological parent at least in part because of immigration enforcement policies).

169. Rabin, *supra* note 168, at 1 (“This article challenges the dichotomy between children and parents by studying how young people who are not direct enforcement targets are nevertheless impacted by immigration enforcement policies, regardless of their own immigration status, are harmed by immigration enforcement aimed at their parents. These impacts, which I call ‘secondary immigration enforcement,’ often manifest as family separations.”); David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1165 (2006). Thronson discusses the tensions between children’s and parent’s rights in situations where “immigration law reaches different

has offered data and insights into the prevalence and length of family separation as an aspect of migration, as well as the resulting consequences for children and parents.<sup>170</sup>

In many ways, the family separation policy was a debacle for the Trump administration.<sup>171</sup> It generated national criticism across party lines and brought the faces and individualized stories of families seeking to enter the United States to public light.<sup>172</sup> It humanized the individuals apprehended by border officials, transforming them from criminal aliens to families seeking safety.<sup>173</sup>

Moreover, family separation was a failure as a means of deterrence.<sup>174</sup> Looking back, the emphasis on total prosecution of immigration crimes did not result in a decrease of families apprehended in the United States.<sup>175</sup> By the end of June 2018, prosecution of immigration crimes, like illegal entry, dominated federal prosecution of all crimes, as prosecution of nonimmigration crimes such as narcotics, weapons, environmental or corporate fraud

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conclusions about the legal rights of parents and children to remain in the United States.” *Id.* at 1165. Thronson argues these tensions are exacerbated by immigration law’s conceptualization of adult parents as active rights holders and children as passive objects subject to their control. *Id.* at 1187.

170. See Suárez-Orozco et al., *supra* note 168, at 626 (reporting that “migration separations usually result in two sets of disruptions in attachments—first from the parent, and then from the caretaker to whom the child has become attached during the parent/child separation”); *id.* at 631–33 (reporting on differences in prevalence and length of family separation among different ethnic groups, with Chinese families tending to experience the lowest level of family separation, Mexican families tending to experience the shortest lengths of separation, and Central American and Haitian families tending to experience the highest prevalence (96 percent) and longest lengths of separation from one or more parents); *id.* at 632 (noting 55 percent of the children were separated from mothers at some point during the course of migration); *id.* (noting that for Central American families, 80 percent of those studied experienced separation from both parents during migration).

171. See JM Rieger, *The Trump Administration Changed Its Story on Family Separation No Fewer than 14 Times Before Ending the Policy*, WASH. POST (June 20, 2018, 3:54 PM), <https://www.washingtonpost.com/news/the-fix/wp/2018/06/20/the-trump-administration-changed-its-story-on-family-separation-no-fewer-than-14-times-before-ending-the-policy>.

172. See Hayley Miller, *75 Former U.S. Attorneys to Jeff Sessions: End Inhumane Family Separation Policy Now*, HUFF POST (June 19, 2018, 9:57 AM), [https://www.huffpost.com/entry/us-attorneys-jeff-sessions-family-separation\\_n\\_5b28ef60e4b0a4dc9920a0ba](https://www.huffpost.com/entry/us-attorneys-jeff-sessions-family-separation_n_5b28ef60e4b0a4dc9920a0ba).

173. See, e.g., Bill Hutchinson, *Facebook Campaign Tops \$13 Million to Reunite Immigrant Families Separated at Border* (June 20, 2018, 6:06 PM), <https://abcnews.go.com/US/facebook-campaign-tops-million-reunite-immigrant-families-separated/story?id=55997665>.

174. See *infra* notes 176–77 and accompanying text.

175. See *infra* notes 176–77 and accompanying text.

offenses dwindled.<sup>176</sup> The rate of families arrested by Border Patrol for unlawfully crossing the border remained constant when it would usually have fallen, bucking the annual trend of decreasing during the hotter summer months, and in sharp contrast with a decrease in arrest rates of adults without families and of unaccompanied children.<sup>177</sup>

Finally, family separation under the Trump administration differs from historical U.S. family separation projects, such as the practice of family separation embedded in American slavery and the deculturalization of native peoples through federal boarding schools.<sup>178</sup> In place of the subordination and deculturalization of enslaved black people and native peoples in the United States, the aim of the family separation policy was not to change the culture of the largely Central American families but rather to exact consequences for their presence and ensure their exclusion.<sup>179</sup>

### III. NEUTRALIZING CENTRAL AMERICAN ASYLUM CLAIMS

Justifying government-initiated family separation was complicated by the existence of a competing justification for permitting entry of families at the border: humanitarian grounds embodied in asylum law.<sup>180</sup> U.S. asylum law had previously recognized certain claims that Central American women and families brought.<sup>181</sup> Establishing eligibility for asylum requires the asylum applicant to show that she has been persecuted or has “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>182</sup>

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176. *Stepped Up Illegal-Entry Prosecutions Reduce Those for Other Crimes*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, (Aug. 6, 2018), <https://trac.syr.edu/immigration/reports/524> (reporting that between March and June 2018, the ratio of prosecutions for immigration crimes versus non-immigration crimes such as narcotics, weapons, environmental or corporate fraud offenses had fallen from one in seven prosecutions to one in seventeen). That is, the number of prosecutions of all nonimmigration federal crimes fell from 1,093 in March 2018 to 703 in June 2018. *Id.* at tbl.1, fig. 1.

177. *Id.* Only family unit apprehensions remained uncharacteristically steady during this period. Arrests of unaccompanied children and adults without children declined modestly. *Id.* at tbl.2.

178. See *infra* notes 233–302 and accompanying text.

179. See Todres & Fink, *supra* note 39, at 421 (“The Trump Administration’s family separations at the U.S. border are arguably less about erasing a culture entirely than they are about erasing, or at least reducing, the presence of certain ethnicities in the country.”).

180. See *id.* at 418.

181. See Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, 36 HARV. INT’L REV. 45, 45, 47 (2014).

182. 8 U.S.C. § 1101(a)(42)(A).

Family has long been recognized as a protected group.<sup>183</sup> Over the last few decades, asylum law had also recognized gender-based harms including genital cutting,<sup>184</sup> domestic violence,<sup>185</sup> and gang-related control of female bodies.<sup>186</sup>

Central American women and families fleeing from extraordinary rates of domestic violence,<sup>187</sup> femicide,<sup>188</sup> and gender-related gang violence sought asylum in large numbers, often seeking relief based on political opinion or membership in a particular social

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183. See, e.g., *Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); see also *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (calling family a “quintessential particular social group”); *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (declaring that family is a “prototypical” particular social group); *Gebremichael v. Immigr. & Naturalization Serv.*, 10 F.3d 28, 36 (1st Cir. 1993) (stating that there is “no plainer example of a social group” than family). All of the circuits have come to a similar conclusion. See Note, *Matter of L-E-A: Attorney General Overrules Finding of Family as a Social Group*, 133 HARV. L. REV. 1500, 1505 n.58 (2020) (collecting cases).

184. See, e.g., Helton & Nicoll, *supra* note 53, at 375–78; Karen Musalo, *Ruminations on In Re Kasinga: The Decision’s Legacy*, 7 S. CAL. REV. L. & WOMEN’S STUD. 357, 361 (1998); Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN’S L. J. 221, 227 (2000).

185. See *A-R-C-G-*, 26 I. & N. Dec. 388, 392–94 (B.I.A. 2014), *overruled by A-B-*, 27 I. & N. Dec. 316 (Att’y Gen. 2018) (holding that “married women in Guatemala who are unable to leave their relationship” constitute a cognizable particular social group for purposes of establishing asylum); *R-A-*, 22 I. & N. Dec. 906, 906 (B.I.A. 1999), *vacated*, 22 I. & N. Dec. 906 (B.I.A. 2001), *remanded*, 23 I. & N. Dec. 694 (B.I.A. 2005); Kristen Shively Johnson, *Paving the Way to Better Protection: Matter of A-R-C-G-*, 24 TEX. J. WOMEN, GENDER, & L. 151, 164 (2015).

186. See, e.g., *Cece v. Holder*, 733 F.3d 662, 671 (7th Cir. 2013) (recognizing women who are targeted and trafficked by gang members in Albania as a particular social group); *Ali v. Ashcroft*, 394 F.3d 780, 785–87 (9th Cir. 2005); *D-V-*, 21 I. & N. Dec. 77, 78–80 (B.I.A. 1993) (granting asylum to a Haitian applicant who was gang-raped by soldiers because of support for Aristide); Lister, *supra* note 53, at 831–39.

187. See STEPHANIE LEUTERT, *CENTRAL AMERICAN REFUGEES IN MEXICO: BARRIERS TO LEGAL STATUS, RIGHTS, AND INTEGRATION* 4–5 (2019) (collecting reports of high rates of sexual violence and assault in El Salvador, Honduras, and Guatemala).

188. See Jeffrey Hallock et al., *In Search of Safety, Growing Numbers of Women Flee Central America*, MIGRATION POL’Y INST. (May 30, 2018), <https://www.migrationpolicy.org/article/search-safety-growing-numbers-women-flee-central-america>; see also U.N. High Comm’r for Refugees, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, 8, U.N. Doc. HCR/EG/SLV/16/01 (Mar. 2016), <https://www.refworld.org/docid/56e706e94.html>. (indicating a “five-fold rise in ‘femicides’” in El Salvador during the 2000s); LEUTERT, *supra* note 187, at 4 (“In 2015, El Salvador and Honduras had some of the highest rates of femicide globally, ranking third and fifth in the world respectively.”).

group.<sup>189</sup> They argued that gender-based and family-related gang violence in the Northern Triangle of Central America constituted the basis for individual asylum claims.<sup>190</sup> Advocates reported that gang members used sexual and gender-based violence as a means of exercising control over communities without reprisal from authorities.<sup>191</sup> While asylum outcomes vary based on individualized analysis, gender and family had become accepted elements of the construction of a persecuted class.<sup>192</sup>

In June 2018, just as the government's mass prosecution and family separation practices were ramping up, Attorney General Sessions decided a case that turned back the clock on the types of claims that Central American mothers might bring.<sup>193</sup> In *Matter of A-B*,<sup>194</sup> Sessions sought to reverse the recognition of most gender-based persecution and close off claims involving the transnational gang entities in Central America. Following in Sessions's footsteps a

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189. See *Juan-Pedro v. Sessions*, 740 F. App'x 467, 470–72 (6th Cir. 2018); *Ali*, 394 F.3d at 785–87; Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1, 5 (2016); Musalo, *supra* note 181, at 46–48.

190. See Bookey, *supra* note 189, at 5; Musalo, *supra* note 181, at 48.

191. See KIDS IN NEED OF DEF., NEITHER SECURITY NOR JUSTICE: SEXUAL AND GENDER-BASED VIOLENCE AND GANG VIOLENCE IN EL SALVADOR, HONDURAS, AND GUATEMALA 4–5 (2017) (analyzing interviews of women and girls from Central America and reporting that gang members use sexual and gender-based crimes, including sexual assault and rape, domestic violence, human trafficking, commercial sexual exploitation, and sexual abuse of children to intimidate individuals and gain control over communities). Resistance is met with sexual and other forms of violence, including murder. *Id.*; see also Hallock et al., *supra* note 188 (“Gang members coerce young women and girls into sexual relationships; resistance can lead to death.”).

192. See, e.g., *A-R-C-G-*, 26 I. & N. Dec. 388, 392–94 (B.I.A. 2014), *overruled by A-B-*, 27 I. & N. Dec. 316 (Att’y Gen. 2018) (holding that “married women in Guatemala who are unable to leave their relationship” constitute a cognizable particular social group for purposes of establishing asylum); *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); Johnson, *supra* note 185, at 164–65; see also *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (calling family a “quintessential particular social group”); *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (declaring that family is a “prototypical” particular social group); *Gebremichael v. Immigr. & Naturalization Serv.*, 10 F.3d 28, 36 (1st Cir. 1993) (stating that there is “no plainer example of a social group” than family).

193. See *generally L-E-A-*, 27 I. & N. Dec. 581 (Att’y Gen. 2019) (reasoning that the average family is unlikely to be recognized as a particular social group); *A-B-*, 27 I. & N. Dec. 316 (Att’y Gen. 2018), *abrogated by Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020) (reasoning that groups defined by vulnerability, including victims of domestic violence, likely lack the specificity needed to establish asylum based on membership in a particular social group).

194. 27 I. & N. Dec. 316.

year later, Attorney General William Barr severely narrowed family-based grounds for asylum.<sup>195</sup>

In *Matter of A-B*,<sup>196</sup> Attorney General Sessions employed a rarely used procedural device,<sup>197</sup> certifying to himself a Board of Immigration Appeals (“BIA”) decision brought by an El Salvadoran woman who had alleged she had suffered persecution on account of her membership in a particular social group.<sup>198</sup> In shaping the question presented, the attorney general redefined domestic gender-based violence as a private, criminal matter, framing the issue as “[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.”<sup>199</sup> He then overturned *Matter of A-R-C-G*,<sup>200</sup> a BIA opinion that had recognized particular social group membership in similar circumstances.<sup>201</sup> Acting alone, Sessions reasoned that “[s]ocial groups defined by their vulnerability to private criminal activity,” including victims of domestic violence, “likely lack the particularity required . . . given that broad swaths of society may be susceptible to victimization.”<sup>202</sup>

*Matter of A-B* also took aim at claims of persecution by transnational gang organizations.<sup>203</sup> By defining the violence in question as “private criminal activity,” the opinion undermined asylum claims based on political opinion grounds and membership in a particular social group.<sup>204</sup> These claims had rested on resistance to national and transnational cartels that had taken political and social control of communities.<sup>205</sup> Successful claimants had presented evidence of resistance to cartels that had wrested control of whole territories from governments. These cartels operated like local

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195. See generally *L-E-A*, 27 I. & N. Dec. 581 (holding that generally a family-based group will not constitute a particular social group); *A-B*, 27 I. & N. Dec. 316 (holding that generally claims concerning domestic violence or gang violence will not qualify for asylum).

196. 27 I. & N. Dec. 316.

197. See Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1771 (2010) (reporting an average of 1.7 certified Attorney General decisions per year between 1999 and 2009).

198. *A-B*, 27 I. & N. Dec. at 323, 325 (rejecting the particular social group of “El Salvadoran women who are unable to leave their domestic relationships where they have children in common’ with their partners”).

199. *Id.* at 323.

200. 26 I. & N. Dec. 388 (B.I.A. 2015), *overruled by A-B*, 27 I. & N. Dec. 316.

201. *Id.*

202. *A-B*, 27 I. & N. Dec. at 335.

203. *Id.* at 322–23.

204. *Id.* at 323.

205. See generally Lister, *supra* note 53 (categorizing successful and unsuccessful asylum claims related to gang activity).

governments in that they exacted payment of what they called “taxes,” controlled the local political process, dictated how individuals in the community could function, and directed law enforcement within the region. Resistance to cartels displaying this degree of power was identical, in practice, to resistance to a formally recognized political entity.<sup>206</sup> Reaching beyond the factual circumstances of the case, however, the attorney general asserted that “[g]enerally, claims . . . pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”<sup>207</sup>

In 2019, Sessions’s replacement, Attorney General William Barr, further cropped the legal grounds for family-based asylum claims in *Matter of L-E-A*.<sup>208</sup> Like his predecessor, Attorney General Barr took the rare step of certifying to himself a decision of the BIA, this time to overturn the BIA’s conclusion that the immediate family of the asylum applicant’s father constituted a particular social group.<sup>209</sup> *Matter of L-E-A* not only struck at the foundations of family-based grounds for asylum, but reached further beyond the family to undermine long-standing doctrines of asylum law.<sup>210</sup> The opinion reasoned that mere membership in a nuclear family was unlikely to meet the particularity requirement because “almost every alien is a member of a family.”<sup>211</sup> It further suggested that asylum applicants would no longer be able to rely on social recognition of the nuclear family as a distinct group, unless that particular applicant’s nuclear family was recognized by the society.<sup>212</sup> The opinion asserted that evidence that “nuclear families” are socially distinct “says nothing about whether a specific nuclear family would be ‘recognizable by society at large,’” thereby emphasizing that the “average family . . . is unlikely to be so recognized.”<sup>213</sup>

Together, these cases reached back to overturn long-established doctrine, greatly narrowing the ground for asylum based on violence against women, family, and claims relating to gang intimidation and control.<sup>214</sup> This framed out many, even most, of the political opinion,

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206. *See generally id.* (explaining that many gangs in Central America have nationwide reach and organization, and the size of the affected countries make it easier for a gang to find its victim anywhere within the country in question).

207. A-B-, 27 I. & N. Dec. at 320.

208. *See generally* L-E-A-, 27 I. & N. Dec. 581 (Att’y Gen. 2019) (narrowing the legal grounds for family-based asylum claims by determining that most nuclear families do not qualify as “particular social groups” because they are not inherently socially distinct).

209. *Id.* at 582.

210. *Id.* at 592–94.

211. *Id.* at 593–94.

212. *Id.*

213. *Id.* at 594 (quoting A-B-, 27 I. & N. Dec. 316, 336 (Att’y Gen. 2018)).

214. *See id.* at 582, 592–94; *see also* A-B-, 27 I. & N. Dec. at 320, 322–323, 335.

family, and gender cases regarding gang control of women, goods, and territorial power.<sup>215</sup>

Changing the law by exercising the attorney general's discretion to remove these grounds for asylum was not sufficient, however, to deter individuals from arriving at the border.<sup>216</sup> The family separation practice and the discourse that would justify it were around the corner.<sup>217</sup> The significance of the asylum opinions of both Attorneys General Sessions and Barr is in clearing away humanitarian resolutions to the arrival of Central Americans. This set the stage for justifying family separation through policy and discourse.<sup>218</sup>

#### IV. JUSTIFYING FAMILY SEPARATION

An exchange between Art Del Cueto, a Customs and Border Patrol agent in Arizona and the Vice-President of the National Border Patrol Council, and Michael Barbaro, host of the *New York Times* podcast "The Daily," illustrates the discourse favoring family separation.<sup>219</sup>

Art Del Cueto: As an American citizen, if you break the law in the United States, and you will have a child with you, you will be separated from that child, because you broke the law. . . . I would hope that as individuals, we care enough about our family member to not commit that crime. That way, we're not separated from our family members.

Michael Barbaro: It sounds like you think that given the loopholes, this was the right decision, to separate children.

Art Del Cueto: I didn't say that it was right to separate children. I said it's right to show individuals that there's consequences for committing crimes.<sup>220</sup>

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215. See *Matter of L-E-A: Attorney General Overrules Finding of Family as a Social Group*, *supra* note 183, at 1504–07 (describing how the Attorney General's recent decisions could undermine decades of asylum protections regarding families).

216. See *generally* L-E-A-, 27 I. & N. Dec. 581 (determining that most nuclear families do not qualify as particular social groups for asylum); see *generally* A-B-, 27 I. & N. Dec. 316 (determining that claims concerning private violence such as domestic abuse or gang violence generally do not qualify for as particular social groups for asylum).

217. See *infra* Part IV.

218. See *generally* U.S. DEP'T OF JUST., *supra* note 100 (implementing a zero-tolerance policy for violations of 8 U.S.C. § 1325(a) along the southwest border).

219. The Daily, *A Conversation with a Border Patrol Agent*, N.Y. TIMES (Sept. 24, 2019), <https://www.nytimes.com/2019/09/24/podcasts/the-daily/border-patrol-agent-immigration.html?>

220. *Id.* at 14:05–14:48.

Art Del Cueto is not a high-level official in the U.S. immigration bureaucracy. He is a rank-and-file agent and the voice of the border patrol union.<sup>221</sup> His words reflected his understanding of the border policy that he and his fellow agents were charged with carrying out.<sup>222</sup> This understanding is first, that breaking the law—committing a crime—is what triggered family separation.<sup>223</sup> His second point is that truly caring about a family member means choosing not to break the law, so as to avoid imposing family separation on that family member.<sup>224</sup> Third, Del Cueto does not address whether family separation is right or wrong. Instead, he posits a government obligation to demonstrate that crime has consequences.<sup>225</sup>

These statements carve out roles for the law, the individual, and the state. The role of the law is to define crimes and establish consequences for them.<sup>226</sup> The role of the individual is to choose not to commit crimes and to care for their family members in making that choice.<sup>227</sup> The role of the state is to enforce the law by imposing lawful consequences.<sup>228</sup> Family separation, in this view, is not an ethical problem, so Del Cueto does not respond directly to Barbaro's question about morality. Separation, instead, is a harm invited by a criminal parent and a consequence that a responsible state imposes when neutrally applying the law.<sup>229</sup>

Del Cueto's responses make clear that understanding the policy of family separation requires more than narrating agency actions and tracking the numbers of those separated and the amount of time they were forced apart.<sup>230</sup> Examining the justifications offered for family separation uncovers an intersection between the official discourse about immigrants at the southern border, the legal frameworks that apply to that geopolitical space, and the people who move in and through it.

Key to unlocking the discourse around family separations is uncovering its goal. Criminalization of immigrant parents was a critical step toward the longer goal of deterring Central American families from approaching the border. There is substantial evidence that the Trump administration initiated family separation as a deterrence measure.<sup>231</sup> First, President Trump made no secret of his desire to stop or reduce most immigration into the United States,

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221. *Id.* at 2:20–3:00.

222. *See generally id.* (discussing the experiences of a border patrol agent).

223. *Id.* at 14:05–14:48.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *See infra* notes 272–73 and accompanying text.

especially along the southern border.<sup>232</sup> Second, administration officials explicitly connected deterring Central American migration with separation of their families. For example, in early 2017, White House Chief of Staff John Kelly asserted that “[i]n the effort to enforce U.S. border laws, ‘a big name of the game is deterrence’ and that separating families ‘could be a tough deterrent.’”<sup>233</sup>

This Part traces a three-step discursive journey toward that goal, a process that moved from the long-standing policy of releasing families who arrive at the border to a policy of parental prosecution and family separation.<sup>234</sup> The first discursive move evoked a crimmigration and securitization narrative that characterizes the border and those who move across border spaces as chaotic, risky, and dangerous. The second discursive move criminalized parents in border spaces. It implicates parents as contributing to chaos and criminality that rises to the level of a national security crisis. This sets up for the third theme of official discourse and the final step, which pivoted from crimmigration to endangerment of child welfare. That discourse questioned the capacity of the parent to provide for the care of the child. It concluded by substituting a more capable parental figure: the state itself.

#### A. *Justifying Separation: Crime, Chaos, and Securitization at the Border*

Discourse around family separation begins with the border, and with the evocation of a crimmigration and securitization narrative

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232. Donald Trump, *Remarks by President Trump in Roundtable on Immigration and Border Security*, WHITE HOUSE (Apr. 5, 2019, 12:39 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-immigration-border-security-calexico-california>.

233. See Bump, *infra* note 273; see also Trump, *supra* note 232 (quoting DHS Secretary John Kelly in response to a question about whether DHS was considering family separation: “Yes, I am considering—in order to deter more movement along this terribly dangerous network—I am considering exactly that” and “I would do almost anything to deter the people from Central America to getting on this very, very dangerous network that brings them up through Mexico into the United States.”).

234. See generally Trump, *supra* note 232 (discussing the Trump administration’s policy of family separation and detention compared to policies pursued by past administrations).

that characterizes the border as besieged,<sup>235</sup> inundated with crime.<sup>236</sup> This is best exemplified by President Trump's tweeted declaration that the southern border was "under siege" and that Mexico, just across the line, had a "massive crime problem."<sup>237</sup> Attorney General Jeff Sessions bolstered that narrative through his assertion that: "We are not going to let this country be invaded . . . . We will not capitulate to lawlessness."<sup>238</sup>

This discourse imbues the geographical space at the border with a propensity for lawlessness,<sup>239</sup> shapes it into a haven for terrorists,<sup>240</sup> and depicts it as a habitat for criminal activity. It labels those who move into and across border spaces as chaotic, risky, and dangerous.<sup>241</sup> The exclusive focus on the border strips away meaningful context beyond the two sides of the thin line. It enables

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235. Veronica Stracqualursi, *Trump Says Southern Border Is 'Under Siege,' Despite Latest Crossing Figures*, CNN (May 4, 2018, 9:08 AM) <https://www.cnn.com/2018/05/04/politics/trump-border-illegal-immigration/index.html> (reporting on President Trump's tweet declaring that: "Our Southern Border is under siege. Congress must act now to change our weak and ineffective immigration laws. Must build a Wall. Mexico, which has a massive crime problem, is doing little to help!"); see also Samantha R. Bentley, *Give Me Your Tired, Your Poor (Unless They are from "One of Three Mexican Countries"): Unaccompanied Children and the Humanitarian Crisis at the U.S. Southern Border*, 54 U. RICH. L. REV. 569, 578–79 (2020) (examining the "zero-tolerance" discourse as a means of criminalizing and securitizing the border).

236. Stephanie Leutert, *Who's Really Crossing the U.S. Border, and Why They're Coming*, LAWFARE (June 23, 2018, 10:04 AM), <https://www.lawfareblog.com/whos-really-crossing-us-border-and-why-theyre-coming>.

237. @realDonaldTrump, TWITTER (May 4, 2018, 6:22 AM), <https://twitter.com/realDonaldTrump/status/992348740529815552>.

238. Sari Horwitz & Maria Sacchetti, *Sessions Vows to Prosecute All Illegal Border Crossers and Separate Children from Their Parents*, WASH. POST (May 7, 2018, 6:07 PM), [https://www.washingtonpost.com/world/national-security/sessions-says-justice-dept-will-prosecute-every-person-who-crosses-border-unlawfully/2018/05/07/e1312b7e-5216-11e8-9c91-7dab596e8252\\_story.html](https://www.washingtonpost.com/world/national-security/sessions-says-justice-dept-will-prosecute-every-person-who-crosses-border-unlawfully/2018/05/07/e1312b7e-5216-11e8-9c91-7dab596e8252_story.html).

239. *Id.*

240. Calvin Woodward, *AP Fact Check: Trump's Mythical Terrorist Tide from Mexico*, ASSOCIATED PRESS (Jan. 8, 2019), <https://apnews.com/4a7792c523ab4b5984893b38c988d70b> (disputing President Trump's claim that "We have terrorists coming through the southern border because they find that's probably the easiest place to come through. They drive right in and they make a left."); see also *id.* (disputing statement by White House Press Secretary Sarah Huckabee Sanders that "we know that roughly, nearly 4,000 known or suspected terrorists come into our country illegally, and we know that our most vulnerable point of entry is at our southern border").

241. See Abrams, *supra* note 41, at 88–93 (2019) (highlighting the use of "immigrant blame" and "demonizing migrants" to justify zero tolerance and family separation).

the criminalization and securitization of those caught in the moment and motion of migration.<sup>242</sup>

Discourse about criminalization and security threats laid the groundwork for a resolution to this problem: applying the apparatus of the criminal justice system to seal off the chaos at the border.<sup>243</sup> Attorney General Jeff Sessions made this connection when he announced the zero-tolerance policy.<sup>244</sup> In declaring that “a crisis has erupted at our Southwest Border that necessitates an escalated effort to prosecute those who choose to illegally cross our border,” he explained that the new policy was necessary to further “public safety, national security, and the rule of law.”<sup>245</sup>

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242. The border has been the central geographical point from which the public has viewed the Central American migration. It is also the point at which government power to intervene in the movement of individuals is at its highest. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 603–09 (1889). The U.S.-Mexico border is a geographical stripe along a longer pathway in a larger individual and national narrative, and it has been the stage for an array of conflicting and inconsistent policies. On the U.S. side of the border, these policies have included the “zero tolerance” criminal prosecution policy of 2018 and the related separation of children from parents, and the mass detention of mothers and children in tent cities that began construction in 2018. *See* Jordan, *supra* note 119; Miriam Jordan, *Texas Tent City Housing 2,500 Migrant Children Is Said to Close in January*, N.Y. TIMES (Dec. 23, 2018), <https://www.nytimes.com/2018/12/23/us/tent-city-closing-texas-migrant-children.html>. It includes the mass detention of mothers and children in 2014 in New Mexico and Texas, and the detention of children and mothers in a former medium security prison in Hutto, Texas from 2006 to 2009. *See* Amanda Sakuma, *The Failed Experiment of Immigrant Family Detention*, MSNBC (August 3, 2015, 12:35 PM), <https://www.nbcnews.com/news/latino/failed-experiment-immigrant-family-detention-n403126>. Policies mainly felt across the southern border include the application of the asylum legal frameworks based in international and domestic law and the “Migration Protection Protocol” which deports asylum-seekers to Mexico to await trial on their asylum claims. *Migrant Protection Protocols*, DEP’T. OF HOMELAND SEC. (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>. *See generally* Flores v. Lynch, 828 F.3d 898 (9th Cir. 2016) (discussing INS policy for immigrant minors in custody).

243. *See* Jennifer M. Chacón, *Managing Migration through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137–40 (2009); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1850–53 (2007).

244. Press Release, U.S. Dep’t of Just., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

245. *Id.*; *see also* Daniel Hatoum, *Abolition of Immigrant Family Detention: Tracing an Evolving Standard of Decency from Separation through Imprisonment*, 47 HOFSTRA L. REV. 1229, 1252–53 (2019) (examining the history of the Trump administration’s zero-tolerance and family separation policies). *See also* David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 218 (2018) (comparing appeals to the rule of law under the Obama and Trump administrations and critiquing such calls as unhelpful and costly).

Even the announcement of the end of family separation confirmed the commitment to criminalization of the border and of parents.<sup>246</sup> President Trump's Executive Order declared that one of the administration's policies was to maintain family unity.<sup>247</sup> However, despite widespread public perception that Trump had terminated the family separation policy, the Executive Order did not explicitly mandate that executive officials discontinue family separation. Instead, it noted that Congress and the courts had "put the administration in the position of separating alien families to effectively enforce the law."<sup>248</sup>

While most media attention construed this as an announcement that family separation was at an end,<sup>249</sup> that was not the main focus of the Executive Order. The thrust of the Order was directed toward characterizing unauthorized entry into the United States as a criminal act.<sup>250</sup> It began with a declaration that the administration's policy was to rigorously enforce the immigration laws. It then characterized immigration law narrowly as prohibiting entering the United States in any way other than at a port of entry.<sup>251</sup> Any other kind of entry was a crime.<sup>252</sup>

Illegal entry, or entering the United States outside of a port of entry or other authorized place, is a crime.<sup>253</sup> In characterizing immigration law as co-extensive with illegal entry, however, the Executive Order rhetorically excluded asylum law from its definition of immigration law. In doing so, it overlooked the provision in asylum law that permits noncitizens to seek asylum regardless of how or where they entered.<sup>254</sup>

Executive officials have commonly pursued means other than criminal prosecution to address how individuals enter the United States. The government may choose to address unauthorized entry as an administrative violation in a removal proceeding, exercise prosecutorial discretion not to pursue the matter, or facilitate

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246. Exec. Order No. 13,841, 3 C.F.R. § 13841.1 (2018).

247. *Id.*

248. *Id.*

249. See, e.g., Richard Gonzales, *Trump's Executive Order on Family Separation: What It Does and Doesn't Do*, NPR (June 18, 2018, 9:54 PM), <https://www.npr.org/2018/06/20/622095441/trump-executive-order-on-family-separation-what-it-does-and-doesnt-do>.

250. 3 C.F.R. § 13841.1 ("Under our laws, the only legal way for an alien to enter this country is at a designated port of entry at an appropriate time.").

251. *Id.*

252. *Id.* (declaring that "[w]hen an alien enters or attempts to enter the country anywhere else, that alien has committed at least the crime of improper entry and is subject to a fine or imprisonment").

253. See 8 U.S.C. § 1325.

254. See 8 U.S.C. § 1158(a)(1) (stating that "[a]ny alien who . . . arrives in the United States (whether or not at a designated port of arrival . . .) and . . . irrespective of such alien's status, may apply for asylum").

legalization through established avenues like asylum.<sup>255</sup> Some of these options remove discretion from rank-and-file administrative officials by making the manner of entry irrelevant to the question of lawful presence in the United States.<sup>256</sup>

With asylum law largely neutralized through the attorney general's decisions, the Trump administration resolved this choice in favor of criminalization.<sup>257</sup> Separating children from family members at the southern border of the United States was not the point, according to the Trump administration.<sup>258</sup> Instead, it was presented as a collateral consequence of the main event: prosecution of their parents for entering the United States without authorization.<sup>259</sup>

Criminalization of the families at the border, therefore, begins with a powerful discursive move: a call for protection of the border itself from crime, chaos, and terror.<sup>260</sup> Protecting the border requires prosecuting all who cross without apparent authorization, including parents, in order to reduce unlawful border crossing.<sup>261</sup> Criminalization and securitization of the border and the parents who are present there engages a crimmigration architecture.<sup>262</sup> It draws

255. See KATE M. MANUEL & TODD GARVEY, CONG. RSCH. SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES 10–13 (2013).

256. See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L. J. 243, 272–73 (2010); see also Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1, 7, 9, 15–16 (2016) (describing lawful presence in the context of discretionary grants of deferred action and orders of supervision).

257. See Daniella Silva, *Immigrant Rights Group Decries New Trump Asylum Restrictions as 'Most Egregious,' 'Extreme' to Date*, NBC NEWS (July 15, 2019, 4:55 PM), <https://www.nbcnews.com/news/latino/immigrant-rights-group-decry-new-trump-asylum-restrictions-most-egregious-n1030151>.

258. See Cordero et al., *supra* note 35, at 441–43.

259. See *id.*

260. See César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1503–07 (2013); see also Donald Trump, Immigration Speech in Arizona (Aug. 31, 2016) (available at <https://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614>) (“Countless innocent American lives have been stolen because our politicians have failed in their duty to secure our borders and enforce our laws.”).

261. See Cordero et al., *supra* note 35, at 440–43; see also Sessions, *supra* note 81 (available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>) (“[W]e are not going to let this country be overwhelmed. . . . People are not going to . . . stampede our border. . . . That’s why the Department of Homeland Security is now referring 100 percent of illegal Southwest Border crossings to the Department of Justice for prosecution. . . . If you are smuggling a child, then we will prosecute you and that child will be separated from you . . .”).

262. See Stumpf, *supra* note 46, at 380–81; see also Chacón, *supra* note 244, at 137–39 (examining the creation and enhancement of criminal sanctions for

the parent directly into the intersection of immigration law and the criminal justice system.<sup>263</sup>

*B. Justifying Separation: Criminal Parents and the Value of Deterrence*

The second step characterizes immigrant parents in border spaces as perpetrators of the chaos and criminal networks that endanger both the border and their children. Administration officials took a stark position, declaring that “[p]arents who entered illegally are, by definition, criminals.”<sup>264</sup>

The language of deterrence tarnished parents with a criminality composed of border-related crimes, exacerbated by the presence of the child.<sup>265</sup> This discourse cast migrant parents as fundamentally flawed in their capacity as parents.<sup>266</sup> A DHS spokesperson explained, “[t]he journey north is a dangerous one, with too many situations where children -- brought by parents, relatives or smugglers -- are often exploited, abused or may even lose their lives.”<sup>267</sup> One DHS official reported in early March 2017 that family separation was on the table because children “were being exploited in multiple ways,” including “parents taking them on dangerous journeys and smugglers and non-parents claiming the children as their own in order to enter and stay in the United States.”<sup>268</sup>

This discourse paints parents as contributing to the criminalization of the border both as criminals themselves and through their treatment of their children. These official statements present parents as criminals: committing the immigration crime of crossing the border without authorization, engaging with criminal smugglers, smuggling their children, and more generally through contributing to the official narrative of a border in chaos where criminal aliens and security risks threaten the nation. Worse, these parents turn their children into unwitting instruments of further chaos and criminality by bringing them to the border where they are exposed to criminal networks, and deliberately injecting them into those criminal networks.

Viewed through the lens of criminality, separating children from parents fell into place as a natural consequence of the parent’s

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offenses relating to migration); Hernández, *supra* note 260, at 1471–74 (describing the criminalization of migration).

263. See Stumpf, *supra* note 46, at 380–81.

264. See Katie Rogers & Sheryl Gay Stolberg, *Trump Resisting a Growing Wrath for Separating Migrant Families*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/us/politics/trump-immigration-germany-merkel.html>.

265. See Mallonee, *supra* note 140; Rogers & Stolberg, *supra* note 264.

266. See Mallonee, *supra* note 140.

267. *Id.* (quoting DHS David Lapan).

268. *Id.*

criminal choices, a routine effect of the criminal justice system. In testifying before Congress, DHS Secretary Kirstjen Nielsen characterized family separation as an unfortunate but unavoidable and ordinary effect of prosecution of criminals who have children.<sup>269</sup> “What we’ll be doing,” she said, “is prosecuting parents who’ve broken the law, just as we do every day in the United States of America.”<sup>270</sup>

Mothers incarcerated for serious crimes in the United States are indeed ordinarily separated from their children, and social services may take custody of those children when other caregivers are unavailable or there is abuse or neglect.<sup>271</sup> But ordinarily, family ties are an important consideration in determining whether to order pretrial release.<sup>272</sup>

Moreover, the early discourse around family separation reveals that separating children was meant to play a different role than punishment. Family separation, according to its proponents, would further the goal of deterring Central Americans from undertaking the journey to the U.S.-Mexico border and then seeking asylum in the United States.<sup>273</sup> Family separation as deterrence is in tension with Secretary Nielsen’s assertion that family separation was a collateral effect of a zero-tolerance prosecution policy.<sup>274</sup> Deterrence as a rationale for family separation employs the separation of one family to influence the decision of other families about whether to undertake a future journey. It is not an *ex post* consequence of the criminal process, but rather an *ex ante* strategy to influence whether an act is taken.

Finally, family separation is not a necessary consequence of prosecution, an inevitable matter of law. It is instead a discretionary choice. The criminal justice system presumes that the accused is entitled to freedom until conviction; that is the function of pretrial

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269. *Authorities and Resources Needed to Protect and Secure the United States: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.* 115th Cong. (2018) (statement of Kirstjen M. Nielsen, Sec’y, U.S. Dep’t of Homeland Sec.).

270. *Id.*

271. See, e.g., Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 *CRIME & JUST.* 133, 179 (2008).

272. See Tamar Lerer, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 *NW. J. L. & SOC. POL’Y* 24, 45 (2013).

273. Philip Bump, *Here Are the Administration Officials Who Have Said That Family Separation is Meant as a Deterrent*, *WASH. POST.* (June 19, 2018, 12:14 PM), <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/>.

274. *Kirstjen Nielsen Addresses Families Separation at Border: Full Transcript*, *supra* note 50.

release on recognizance or bail.<sup>275</sup> Even conviction does not lead inexorably to family separation. A criminal sentence, particularly for a misdemeanor like unlawful entry, does not guarantee a term of incarceration.<sup>276</sup> In sum, criminal prosecution does not necessitate pre or postconviction incarceration of the parent and separation of the child—at least not until after conviction of the parent and then only if the judge imposes a term of incarceration and not some other remedy.<sup>277</sup> Moreover, as Carrie F. Cordero and co-authors have pointed out, the children of adults convicted in the criminal justice system do not lose their own liberty without due process, as long as another caregiver is available.<sup>278</sup>

*C. Justifying Separation: Child Welfare and Parental Exploitation*

The third discursive step pivots from crimmigration to themes of child welfare and family law. This step paints parents as abusive and neglectful and raises questions about whether they are authentic parents rather than imposters. Imposing criminal consequences on parents through the zero-tolerance policy, in combination with the threat of family separation, reframed family separation as a step to protect children from the criminal conduct of their parents.<sup>279</sup>

This discourse of abuse may arise obliquely, framed as the result of an irresponsible parental choice to undertake the northward journey, as this statement from the spokesperson for DHS illustrates: “The journey north is a dangerous one, with too many situations where children—brought by parents, relatives or smugglers—are often exploited, abused or may even lose their lives.”<sup>280</sup> A similar strain of official discourse directly implicates parental fault, such as this justification offered by DHS Secretary Nielsen: “By entering our country illegally, often in dangerous circumstances, illegal immigrants put their children at risk.”<sup>281</sup>

In other words, these parents are not just engaging in crime or with criminal networks. Their conduct constitutes a form of abuse or exploitation in which the parents put their children at risk of death or other harms. This discourse suggests that no competent parent

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275. Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329 (1982).

276. See U.S. SENT'G COMM'N, QUICK FACTS: ILLEGAL REENTRY OFFENSES FY18, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal\\_Reentry\\_FY18.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY18.pdf).

277. See Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772>.

278. See Cordero et al., *supra* note 35, at 454–55.

279. Kirstjen Nielsen *Addresses Families Separation at Border: Full Transcript*, *supra* note 50.

280. See Mallonee, *supra* note 140 (quoting an anonymous DHS official).

281. Kirstjen Nielsen *Addresses Families Separation at Border: Full Transcript*, *supra* note 50.

would embark upon a dangerous, uncertain journey with a child across gang-infested territory. No competent parent would choose either to commit the crime of unlawfully crossing or to collude with a criminal—a human smuggler—to arrange an unlawful crossing. Either choice engages the child in a crime both as a participant and as the commodity being smuggled. In this view, the parent is not just a criminal actor, but also the instigator of abuse of the child. Prosecution of such parents and removal of the child follow as natural solutions.<sup>282</sup> Attorney General Sessions delivered that message in remarks he made in May 2018: “If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law. . . . If you don’t like that, then don’t smuggle children over our border.”<sup>283</sup>

These parents perpetrate the abuse or exploitation by placing their children in the hands of abusers, or by posing as authentic parents when, in fact, they are not.<sup>284</sup> These parents have placed their own self-interest in economic well-being over their child’s interest in physical and emotional integrity. Like other abusive, neglectful, and exploitative parents, these parents do not deserve the respect ordinarily accorded to responsible parents.<sup>285</sup> Instead, they are seen as blameworthy on several counts: due to their criminality, their neglect, their exploitation of children, and their failure to live up to the role of a proper parent.<sup>286</sup>

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282. See generally WILLIAM A. KANDEL, CONG. RSCH. SERV., R45266, THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION ENFORCEMENT POLICY (2019) (laying out the Trump administration’s border separation policies).

283. Jeff Sessions, U.S. Att’y Gen., Attorney General Sessions Delivers Remarks to the Association of State Criminal Investigative Agencies 2018 Spring Conference (May 7, 2018) (available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-association-state-criminal-investigative>).

284. *Id.*

285. Other scholars have explored related tensions between family law and immigration law. See Olivares, *supra* note 40, at 348–49; Rogerson, *supra* note 169, at 580 (“The child welfare system and immigration enforcement mechanisms operate independent of one another with little regard to how actions in one can impact a parent’s legal rights in the other, often permanently separating children from their parents.”); Thronson, *supra* note 37, at 393 (exploring “assumptions and misconceptions about the interaction of immigration law with child custody issues” that contribute to the family chaos that often accompanies immigration raids); Thronson, *supra* note 169, at 1202 (placing the immigration framework in broader context of the parent-child relationship and explains ways in which family law does not trump, but rather transcends immigration law).

286. See David Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 179 (2018) (describing separated parents as the Trump administration’s targets of blame in that they “not only entered the country illegally, but also exposed their children to life-threatening dangers”).

#### D. *Parens Patriae*

The final step of this discursive pathway resolves the narrative of neglect and abuse by identifying another, more suitable parent: the federal government.<sup>287</sup> This resolution resonates in doctrines of child welfare, which govern when the state may intervene as *parens patriae*.<sup>288</sup> It rests on the premise that when the best interest of the child lies in governmental custody, separation from the parent is appropriate.<sup>289</sup>

This element of the official discourse moves beyond presenting the government as the prosecuting arm of crimmigration enforcement.<sup>290</sup> It reconstructs the state as the child's protector against the parent's self-interested exploitation of the child.<sup>291</sup> In that light, family separation is not just a collateral consequence of prosecution. Instead, it is a desirable assumption of the state's role as sovereign guardian of the child.<sup>292</sup> Government officials did not make a formal *parens patriae* claim, and in fact, the discourse may well have been a purely defensive response to public critique rather than an affirmative attempt to benefit children. The theme of government protection against the harms from the parent, however, resonated throughout the discourse on the placement of children in the custody of federal agencies.

The positioning of the state as the protector of separated children against parent-induced harms began as early as 2017 when Tyler Q. Houlton, a spokesperson for DHS, declared that: "The dangerous illegal journey north is no place for young children and we need to explore all possible measures to protect them."<sup>293</sup> In May 2018, John Kelly characterized government custody and care of the child as the consequence of parental choice: "The children will be taken care of — put into foster care or whatever. But the big point is they elected to come illegally into the United States . . . ."<sup>294</sup>

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287. See Abrams, *supra* note 41, at 85–87, 104–05 (arguing that separating children from family members was a use of *parens patriae* power).

288. *Id.* at 86–87.

289. See *Louisiana v. Texas*, 176 U.S. 1, 19 (1900); see also Bridgette A. Carr, *Incorporating a 'Best Interests of the Child' Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 124–25, 127 (2009) (exploring how "best interests of the child" is the common legal standard for both domestic and international cases involving children).

290. See generally Caitlin Dickerson & Ron Nixon, *Trump Administration Considers Separating Families to Combat Illegal Immigration*, N.Y. TIMES (Dec. 21, 2017), <https://nyti.ms/2DpiFhJ> (discussing the motives for and consequences of familial separation at the border).

291. *Id.*

292. See *id.*

293. *Id.*

294. See Interview by John Burnett with John Kelly, White House Chief of Staff, (May 11, 2018, 11:36 AM), <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr>.

Later, DHS Secretary Kirstjen Nielsen similarly called upon the legal framework surrounding abuse and neglect when she referenced the best interest of the child, the central tenet of child welfare law.<sup>295</sup> She casts DHS, in the form of CBP and ICE, as the central figure upholding this standard:

C.B.P. and I.C.E. officers are trained to care for minors in their custody. D.H.S. and H.H.S. treats all individuals in its custody with dignity and respect and complies with all laws and policy. This reinforces and reiterates the need to consider the best interest of the children, and mandates adherence to established protocols to protect at-risk populations to include standards for the transport and treatment of minors in D.H.S. and H.H.S. custody.<sup>296</sup>

The more suitable custodian, the parent-substitute, was revealed through official discourse as HHS.<sup>297</sup> The role of HHS as the protector of the child on the one hand and DHS as the crimmigration law enforcer on the other arose in John Kelly's explanation that family separation enabled HHS to take good care of the children "as we deal with their parents."<sup>298</sup> He spoke to the competence of HHS in this role: "We turn them over to HHS and they do a very, very good job of putting them in foster care or linking them up with parents or family members in the United States."<sup>299</sup>

DHS Secretary Nielsen offered a vision of the content of this care when she described how "children in D.H.S. and H.H.S. custody [were] being well taken care of."<sup>300</sup> In sum, "[ORR] provides meals, medical care and educational services to these children. They are provided temporary shelter, and H.H.S. works hard to find a parent, relative or foster home to care for these children."<sup>301</sup> The "parent" that HHS seeks to care for the child in this statement must, by

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295. *Kirstjen Nielsen Addresses Families Separation at Border: Full Transcript*, *supra* note 50.

296. *See id.*

297. *Diaz*, *supra* note 78.

298. *Id.* Empirical research belies the conclusion that family separation is a positive development for children. *See* Suárez-Orozco, et al., *supra* note 168, at 634 (reporting that "[c]hildren who were separated from their parents were more likely to report depressive symptoms than children who were not separated . . . . Children who were separated from both parents had a higher level of reported symptoms compared to children who were not separated . . .").

299. *Diaz*, *supra* note 78. *See also* Stephen Lee, *Growing Up Outside the Law*, 128 HARV. L. REV. 1405, 1445 (2015) (reviewing HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014)) (observing that immigration law "tends to discount the interests of children, trusting that parents or the state will represent those interests on their behalf").

300. *Kirstjen Nielsen Addresses Families Separation at Border: Full Transcript*, *supra* note 50.

301. *Id.*

inference, be distinct from the criminalized, exploitive parent that Kelly tasks DHS to “deal with.”<sup>302</sup> This official insistence on the state as the primary protector of the interest of the child is critical to justifying the separation of parent and child.<sup>303</sup> Regardless of whether officials employing this discourse actually viewed HHS as the superior custodian, the discourse draws on established child welfare doctrine and its central tenet of the best interest of the child. Employing that doctrine in discourse dresses up the separation as an act of benevolence and constitutes the final piece of the public justification for family separation.

Finally, the separation of parent from child is not only physical and emotional. It also represents a divide between the good immigrant and the bad one—the blameworthy and the blameless. This distinction between parent and child manifests even in which agency takes custody of the separated family members.<sup>304</sup> Blameless children are handed into the custody of HHS to receive the care their exploitative and prosecuted parents cannot provide; DHS takes the criminalized parents into custody.<sup>305</sup> Having sorted the blameworthy from the blameless in this way, the failure of the agencies to keep track of the blameless child and the guilty parent begins to seem bona fide.

## V. LAW AND DISCOURSE

Discourse alone was not sufficient to accomplish family separation. This Part explains how official discourse combined with changes in deportation, crimmigration, and asylum law justify the Trump administration’s practices. Pairing law and discourse centered the criminalization and securitization of Central American parents in the public eye. It also *framed out* the preexisting legal pathways to asylum and the legitimacy of parental decisions. These legal changes: (a) applied crimmigration and securitization law to families at the border, (b) erased the relationship between parents and children, and (c) rendered the harms that women and children experience invisible to asylum law.

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302. Diaz, *supra* note 78.

303. Later litigation over the level of care that the government took of the separated children revealed that this discourse around the best interest of the child may have been more instrumental than actual. See Tr. Oral Arg., *Flores v. Barr*, No. 17-56297, 2019 WL 6216660 (9th Cir. June 18, 2019). In *Flores*, DHS took the position that soap, toothbrushes, and blankets may not be required when keeping children in custody, at least when it is intended to be shorter-term. *Id.*

304. See Rubenstein, *supra* note 286, at 160–61 (“[P]erceptions of blame can make the difference of whether a migrant is targeted for deportation or eligible for discretionary release.”)

305. *Id. passim* (examining the attribution of blame and blamelessness across parents, children, officials, and parties relating to the family separation practice).

### A. *Law and the Discourse of Criminalization*

Legal change mirrored and facilitated the aims of the discourse around family separation in several ways. First, crimmigration law acted in service of the discourse around the criminalization of the border.<sup>306</sup> The zero-tolerance policy operated by eliminating prosecutorial discretion to decline to bring criminal charges of “illegal entry”<sup>307</sup> or “illegal re-entry”<sup>308</sup> against individuals suspected of crossing the U.S.-Mexico border without authorization.<sup>309</sup> Established policy already encouraged prosecution of immigration crimes but did not, as a matter of course, include parents or asylum seekers.<sup>310</sup> Blanket prosecution of unauthorized border crossers for these crimes resulted in a much higher rate of Central American parents with criminal records.<sup>311</sup> It bolstered the image of a border space suffused with criminal conduct and criminal actors. It supported the notion that unlawful border crossing was a gateway crime to a criminal future in the shadows of U.S. society. And it constructed a compelling statistic of thousands of convicted Central American aliens, raising the specter of a massive influx of potential criminals averted through zero-tolerance policy prosecutions and removals.<sup>312</sup>

### B. *Law and the Discourse of Separation*

Second, existing law and legal changes facilitated the government’s detachment of the child from the parent.<sup>313</sup> Under the blanket prosecution policy, immigration officials took parents,

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306. See Sessions, *supra* note 121 (describing the increased criminalization and frequency of illegal border crossings).

307. Although colloquially known as “illegal entry,” this misdemeanor is actually titled “improper entry by alien.” See 8 U.S.C. § 1325 (“Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers . . . shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both.”).

308. Although colloquially known as illegal entry, this crime is actually titled “Re-entry of removed aliens.” See 8 U.S.C. § 1326.

309. See Sessions, *supra* note 81.

310. See MANUEL & GARVEY, *supra* note 255 (indicating that courts did not interpret statute as compelling officials to remove everyone who unlawfully entered).

311. See Sherman-Stokes, *supra* note 36, at 604–05 (describing dramatic increase of parents criminally detained at the border with minor children).

312. See generally MOIRA O’NEIL ET AL., FRAMEWORK INST., NEW NARRATIVES: CHANGING THE FRAME ON CRIME AND JUSTICE (2016), [http://frameworksinstitute.org/assets/files/PDF/UKCJ\\_MM\\_July\\_2016\\_Final.pdf](http://frameworksinstitute.org/assets/files/PDF/UKCJ_MM_July_2016_Final.pdf) (describing the influence that narratives have regarding the public’s opinion on criminal prosecution and punishment).

313. See Olivares, *supra* note 40, at 293–308 (discussing the relationship between recent changes to immigration law such as the zero-tolerance policy and the history of imprisoning immigrants and family separation).

without their children, to federal criminal court.<sup>314</sup> If the government did not return parents to their children within seventy-two hours—the length of time Border Patrol may lawfully hold children—agents transferred the children to the custody of HHS.<sup>315</sup>

This transfer of custody rested on an agency reinterpretation of the legal authority for ORR to take custody of children who are accompanied by parents.<sup>316</sup> Minors cannot be held in federal criminal custody with adults, including their parents.<sup>317</sup> Once officials had removed the parents to refer them for criminal prosecution, the children were reclassified as “unaccompanied alien children” and therefore under the jurisdiction of the ORR.<sup>318</sup> The rationale for this reclassification was that, because the parent or guardian was in federal custody, she was no longer “available to provide care and physical custody” under the Trafficking Victims Protection Reauthorization Act.<sup>319</sup> The result was the transformation of the parent-child dyad through subtraction of the parent.<sup>320</sup>

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314. Colleen Long & Ricardo Alonso-Zaldivar, *US Government May Have Split Up Thousands More Migrant Families*, NBC4 WASH. (Jan. 19, 2019, 6:38 PM), <https://www.nbcwashington.com/news/national-international/migrant-families-separated-hhs-watchdog/192/>.

315. *Id.*; see *Reno v. Flores*, 507 U.S. 292, 297–98 (1993); see also 8 U.S.C. § 1232(b) (placing seventy-two-hour limit on length of time CBP may hold minor children before transferring custody to Secretary of Health and Human Services). Sometimes border officials transferred parents directly from the custody of U.S. Marshalls to ICE detention. See OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-18-84, SPECIAL REVIEW - INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 15 (2018) (reporting that CBP officials “arranged to have adults transferred directly from court to ICE custody, rather than readmitting them where they might be reunited with their children. . . . CBP made this change in order to avoid doing the additional paperwork required to readmit the adults”).

316. See generally OFF. OF INSPECTOR GEN., *supra* note 315, at 2–3.

317. *Id.* at 3.

318. See *id.* at 3.

319. 6 U.S.C. § 279(g)(2)(C)(ii).

320. Solutions to the tension between immigration policing and the best interest of the child are challenging. David Thronson has advocated for family courts to determine the resolution of family separation in the operation of immigration laws. Thronson, *supra* note 169, at 1200–02 (placing the immigration framework in broader context of the parent-child relationship and explaining that family courts, not immigration courts, are the ultimate decision makers in the resolution of family differences regarding separation prompted by the operation of immigration laws). Shanta Trivedi has proposed defining a right to family integrity that would be held by the child as well as the parent. See Shanta Trivedi, *A Child’s Constitutional Right to Family Integrity*, S.S.R.N.: U. BALT. SCHOOL L. LEGAL STUD. RSCH. PAPER SERIES (forthcoming), <https://ssrn.com/abstract=3436080> (examining whether and under what legal authority a child has an autonomous right to be with her family). Trivedi also takes into account in any family separation decision the harm to the child of the

The final puzzle pieces in the assembling of legal authority to separate children and transfer custody to the ORR was the key legal principle underlying child welfare and parental neglect: “the best interest of the child.”<sup>321</sup> This legal principle did not authorize the separation; border officials did not hold parental fitness proceedings before separating children. Rather, the “best interest of the child” standard hovered in the background of family separation, framing the border situation as composed of individual parental actions to abuse or exploit and legitimizing the custodial transfer to a government entity.<sup>322</sup> Indeed, as the length of some separations extended, child psychologists raised concerns that younger children should not be removed from their current custodial situation and returned to their parents for fear of causing the child more harm.<sup>323</sup> The consequence of determining that the child not be returned is that the prosecuted parent has not only been criminalized, they have disappeared as a parent altogether.<sup>324</sup>

### C. *Law and the Discourse Around Asylum*

This section reveals how the crimmigration and securitization discourse about the parents at the border, combined with the changes in asylum law, hid from view the particularly gendered and racialized impacts of the prosecution and family separation practices on Central American mothers. It first lays out how the neutral terms of the discourse targeting the border obscures the reality that those arriving at the border were disproportionately female and Central American. The neutrally couched rhetoric around Central American migration to the U.S. border and the social construction of the migrant mother of color justified punitive legal frameworks and the walling off of asylum law.<sup>325</sup>

Second, it describes how that neutral discourse, combined with legal changes that targeted gender-based asylum law, snuffed out asylum claims previously available to Central American women and

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separation itself. Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 571–72 (2019).

321. See David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 458–60 (2008); see also David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1004–06 (2002).

322. See *supra* notes 280–87 and accompanying text.

323. Michael Garcia Bochenek, *US: Family Separation Harming Children, Families*, HUM. RTS. WATCH (July 11, 2019), <https://www.hrw.org/node/331961/printable/print>.

324. See *id.* (quoting multiple children who were separated from their parents, did not know where their parents were, and did not know how long they had been separated from their parents).

325. See *supra* notes 219–29 and accompanying text.

mothers, rendering their lives in their countries of origin, and their experiences as migrants and asylum-seekers invisible to the public and the law.<sup>326</sup>

1. *Zooming In: Race, Gender, and Walling Off Asylum Law*

The discourse of criminalization and securitization employed neutral language that obscured the racial and gender identities of those at and around the border.<sup>327</sup> Examining this discourse and the identity of those at the border is critical to understanding the interaction between the rise of criminalization and the barriers to gender-based asylum claims of Central American women.<sup>328</sup>

The discourse around the dangerousness of the border employed a formalist logic in which neutral rules about border crossing or criminal prosecution applied neutrally to all. “Zero-tolerance,” “border chaos,” “criminal aliens,” and even “family unit” or “parents” as descriptors fall short of identifying who is actually subject to these policies.<sup>329</sup> “Zero-tolerance,” for example, is devoid of context about whose conduct is not being tolerated. It provides no hint of who embarked on the journey to the border or any information about the travelers’ origins or motivations. It also ignores gender, ethnicity, or relational connections to those traveling together or to the country where the journey began.<sup>330</sup> Even the terms Attorney General Sessions used, calling for mass prosecution of “those who choose to illegally cross our border,”<sup>331</sup> disembodied the largely Central American mothers who would be the main targets of prosecution, diminishing them to a mere volition to commit an illegal act.

In fact, people apprehended at the U.S.-Mexico border when family separation began were disproportionately Central American, female, and members of families.<sup>332</sup> Nearly half of those apprehended crossing the U.S. border in 2014 were Central American, up from 25 percent in 2011.<sup>333</sup> That percentage would only rise.<sup>334</sup> Central American migrants who reached the United States were disproportionately female compared to the Mexican migrants who previously dominated apprehensions by U.S. border officials.<sup>335</sup>

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326. See *supra* notes 200–04 and accompanying text.

327. See *supra* notes 245–57 and accompanying text.

328. See generally Lind, *supra* note 91.

329. See generally Sessions, *supra* note 121.

330. See *id.*

331. See DEP’T OF JUST., *supra* note 100.

332. Leutert, *supra* note 236.

333. *Id.* (examining Central Americans as a percent of total southwest border apprehensions, with data through 2017).

334. *Id.*

335. See *id.* (“While female Mexican migrants averaged around 13 percent of all Mexican migrants apprehended by the Border Patrol from FY1995 through FY2017, Central American women averaged between 20 and 32 percent.”).

By 2018, women constituted 48 percent of Salvadoran migrants and 43 percent of Honduran migrants.<sup>336</sup> In addition, families and unaccompanied children constituted between 40 and 60 percent of the Central Americans journeying to the United States.<sup>337</sup> Professor Stephanie Leutert, after analyzing this data, concluded that these statistics are in tension with the discourse of criminalization and securitization of border arrivals.<sup>338</sup> She reported that “the numbers of Central Americans arriving at the border are not near the all-time highs, and there is no infestation or invasion of MS-13.”<sup>339</sup> Instead, the data showed “something far less dramatic: men, women, families, and children who are arriving to seek safety and the basic American dream of a better life.”<sup>340</sup>

In sum, what the discourse obscured is as important as what it revealed. Narratives about crimmigration and border chaos deflected attention from the circumstances that led Central American parents to undertake the decision to journey north.

To see this requires zooming in to identify who was present in the border space, to see with clarity who was the target of the criminalizing discourse and the subject of immigration-related criminal prosecution.

## 2. *Zooming Out: The Silence of Asylum Law*

The changes in asylum law went hand in hand with a meaningful silence about asylum in the discourse about family separation. The Executive Order on family separation, the highest-level pronouncement on government policy, exemplifies that silence.<sup>341</sup> Executive officials have discretion over which of several avenues to use to address how individuals enter the United States.<sup>342</sup> That is, the government may choose to: (1) pursue unauthorized entry as an administrative violation, (2) seek criminal prosecution, (3) exercise prosecutorial discretion not to pursue the matter, or (4) facilitate the application of other legalizing rules like asylum.<sup>343</sup> Some of these

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336. *Id.*

337. *Id.*

338. *See id.*

339. *Id.*

340. *Id.*

341. *See generally*, Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 25, 2018).

342. *See* Shoba Sivaprasad Wadhia, *Immigration Enforcement and the Future of Discretion*, 23 ROGER WILLIAMS U. L. REV. 353, 353–54 (2018).

343. *See id.* at 355–56 (setting out a structural constitutional argument based on the Take Care Clause for limitations on prosecutorial discretion). *See also* Shoba Sivaprasad Wadhia, *Remarks on Prosecutorial Discretion and Immigration*, 123 DICK. L. REV. 733, 735–36 (2019) (noting that limited prosecutorial resources compel prioritization in who to target for removal); Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285, 1286 (2015) (describing favorable and unfavorable exercise of prosecutorial discretion).

options remove discretion from rank-and-file administrative officials by making the manner of entry irrelevant to the question of lawful presence in the United States.<sup>344</sup>

As discussed above, the government resolved this choice in favor of criminalization.<sup>345</sup> The June 2018 Executive Order's characterization of legal entry left no room for the statutory authority to seek asylum in United States regardless of how the individual arrived in the United States.<sup>346</sup> The Order declared that government policy was to rigorously enforce the immigration laws, which it defined narrowly as prohibiting entry into the United States by any means other than at a port of entry. It made no mention of asylum, despite the centrality of asylum as a form of relief from removal.<sup>347</sup> The order simply framed out the existence of asylum law.<sup>348</sup>

Thus, the discourse around families at the border transformed the border space in a way that elevated enforcement-oriented legal frameworks while rendering asylum invisible. Discourse about chaos and criminal activity at the border elevated crimmigration law and national security. Discourse around parental criminality and human smuggling elevated the legal frameworks around child abuse and neglect. Together, these discursive themes pushed out of sight legal avenues for humanitarian migration including asylum law, as well as laws recognizing the integrity of the family and respect for maternal decisions about the safety and well-being of the child.

Realignment of asylum law away from gender-based claims, undermining both domestic violence and the family as a basis for asylum and prohibiting gang-based claims, renders the resistance

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344. See Sivaprasad Wadhia, *supra* note 342, at 360–61 (describing the channeling of prosecutorial discretion through policies such as the “sensitive locations” memo which sets out a stringent process for enforcement actions in places such as schools, and DACA, which required immigration officials to refrain from deporting individuals USCIS had determined fit equitable criteria). See also *Arizona v. United States*, 567 U.S. 387, 396 (2012) (“Discretion in the enforcement of immigration law embraces immediate human concerns . . . . [T]he equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service.”).

345. See Sessions, *supra* note 121.

346. Compare 8 U.S.C. § 1325 (“Any alien who (1) enters or attempts to enter the United States *at any time or place other than as designated* by immigration officers . . . shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both . . . .”) (emphasis added) with 8 U.S.C. § 1158 (“Any alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival . . .*), irrespective of such alien’s status, may apply for asylum . . . .”) (emphasis added).

347. See generally Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 25, 2018) (“Under our laws, the only legal way for an alien to enter this country is at a designated port of entry at an appropriate time.”).

348. *Id.*

that mothers raise to threats to themselves and their children invisible to the law. These changes reorient asylum law away from recognizing claims that protect women as women and mothers as mothers. Restrictions on or reinterpretation of claims based on domestic violence has a readily apparent gender-based impact.<sup>349</sup> Once domestic violence claims lose recognition as asylum claims, they drop out of sight. They then become insignificant, invisible to the law, and walled off from public discourse. Calling into question the inclusion of the family as a particular social group within asylum law has similar impacts.

Recognizing the gender-based harms that had previously led to asylum requires zooming out to see beyond the border. The border is a single point along a greater journey, a moment in a larger individual and national narrative. Bringing asylum law and the discourse of human rights into the frame requires lifting the gaze to see beyond the narrow border line.

Asylum law demands that legal actors—judges, lawyers, policymakers—disengage from the narrative of border chaos that narrows the relevant timeframe to the moment of crossing and arrest. It requires seeing a larger geographical and contextual picture, one that begins not at a mother's moment of arrival but rather at the moment of leaving home, as well as the moments and momentum that led up to departure for the United States.

## VI. CONCLUSION

The family separation policy in the United States illustrates a close symbiotic relationship between discourse and legal rules. On one hand, discourse can *frame in* or *frame out* applicable legal rules, making those legal rules visible or invisible. On the other, changes in legal rules can *frame in* or *frame out* entire discourses and narratives around official policy choices. Understanding how official discourse interacts with law and policy is the first step to identifying what is left out of the frame. That is, studying the justifications that the government offers for official action and related changes in law unveils how legal frameworks that compete with policy decisions are foreclosed and reveals which lines of discourse are closed off when the law changes.

The pairing of discourse and law around family separation is not a one-way street. Law can impact discourse just as discourse sets the stage for legal change. Rewriting the law to close down gender-based asylum claims closes off a whole category of discourse about the choices that mothers make to pick up their children and leave. It

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349. See generally *A-B-*, 27 I. & N. Dec. 316, 320 (Att'y Gen. 2018) (holding that domestic violence or gang violence claims generally will not qualify for asylum).

transforms acts of parenting—evacuating a child from danger, fleeing from home across national borderlines to seek safety and stability—into a reason for punishment.<sup>350</sup> Leaving home itself is a predicate to the criminal conduct of crossing the border; traveling to the U.S. border is itself commission of abuse; arriving with the child is not just collateral to the criminal act of illegal entry but central to the rationale for punishment. The child becomes both the reason for and the means of punishing the parent, which in turn exacts a punishing experience on the child.

Juxtaposing the volume of discourse about the criminal, exploitative mother and the discursive silence about asylum with the discretionary decisions to expand prosecution of mothers and fathers and to close off gender-related asylum eligibility leaves a single pathway for government action and public policy. There is only one discursive and legal frame left: the criminal alien and the alien mother.

Moreover, narrowing the scope of asylum has clear gendered and ethnic impacts on who obtains asylum.<sup>351</sup> Taken together, they have another, cumulative effect. As explained above, the criminalization and securitization of Central American families comes about through an all-consuming focus on the geography of the border.<sup>352</sup> Asylum law requires us to take a broader view, one that looks beyond the border and compels consideration of context. It commands the decisionmaker at every procedural point—from the line officer at the border to the asylum officer and immigration judge—to ask an apprehended individual whether they have a fear of returning.<sup>353</sup> This question expands the lens beyond the border to the individual's past and point of origin, the consequences of returning, and the benefits of remaining. Closing the door to asylum claims closes off these discursive trains and the rich context, complications, and perspectives that they bring.

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350. See generally 8 U.S.C. § 1325 (stating the civil and criminal penalties for improper entry into the United States).

351. See Hallock et al., *supra* note 188 (discussing the risks and vulnerabilities women and those in the northern triangle face when they are denied asylum and entry in the United States).

352. See Bentley, *supra* note 235, at 578–79.

353. See 8 U.S.C. § 1225.