Note – Living the American Nightmare: The Adverse Psychological Effects of Separating Immigrant Children from their Primary Caregivers at the Border

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“This new world hath been the asylum for the persecuted lovers of civil and religious liberty . . . Hither they have fled, not from the tender embraces of the mother, but from the cruelty of the monster . . .”

According to the United States Census Bureau there are 7.5 billion people in the world. As of October 7, 2018, there were 328.7 million people living in the United States, and not all of them were born here. This phenomenon can be attributed to the United States’ long and complex history of immigration, evidenced by the more than 43.7 million immigrants residing in the United States as of 2016.

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2 Thomas Paine, COMMON SENSE 12 (1776) (advocating for independence from Britain for the Thirteen Colonies and for an egalitarian government).
4 See supra note 3.
Immigrants come to the United States for a variety of reasons: (1) to flee the violence and war plaguing their country; (2) to escape political or religious persecution; or (3) to seek economic opportunities. The United States had a reputation of being a welcoming country to immigrants; however, due to certain events over the years, this reputation has become that of a country which views immigration in a restrictive way. This gradual change has become vehemently apparent due to the 2016 presidential election and successive change in administration.

In 2017, the Department of Homeland Security (“DHS”) devised the idea of separating families at the border under an assumption that the policy would deter illegal entry into the United States. On April 6, 2018, Attorney General Jeff Sessions implemented a “zero-tolerance” policy, which physically removed migrant children from their parents at the United States border, thereby making family separations a reality. Although the administration has since retreated from its strict application of the “zero-tolerance” policy, many families remain separated and continue to suffer the adverse consequences derived from the separations.

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7 See Overview of INS History, supra note 5, at 3 (discussing open immigration through the 18th and 19th centuries); see also Sarah Pierce & Andrew Selee, Immigration Under Trump: A Review of Policy Shifts in the Year Since the Election, MIGRATION POLICY INST. (Dec. 2017), https://www.migrationpolicy.org/research/immigration-under-trump-review-policy-shifts (discussing the Trump administration’s changes to immigration since his inauguration on Jan. 20, 2017).
8 See Pierce & Selee, supra note 7.
11 See Joshua Barajas, More Than 400 Migrant Children Remain Separated from Their Parents, Here’s What We Know, PBS NEWS HOUR (Sept. 7, 2018, 5:11 PM), https://www.pbs.org/newshour/nation/more-than-400-migrant-children-remain-separated-from-their-parents-heres-what-we-know (discussing status report giving update on migrant family reunification); Suzanne Gamboa, Nearly 500 Children are Still Separated from Their Migrant Parents, NBC NEWS (Aug. 31, 2018), https://www.nbcnews.com/storyline/immigration-border-crisis/nearly-500-children-are-still-separated-their-migrant-parents-n905461 (noting children are still separated from families even with court ruling on reunification); Michael D. Shear et al.,
This note will examine the adverse psychological effects that family separations at the border have on children. Part I of this note will briefly discuss the relevant history of immigration law in the United States, and also discuss the shift from a tolerant immigration policy to the more restrictive approach that developed following the terrorist attacks that took place on September 11, 2001 (“9/11 Attacks”). Part II of this note will discuss immigration under the current administration and how their restrictive programs were enacted to not only keep immigrants out of the United States, but to frustrate the existing process in order to deter them from ever entering the country. It will also explore how the restrictive policies were a steppingstone to the final determination to separate families at the border. Part III of this note will examine the adverse psychological effects of separating children from their families at the border. This analysis will be conducted through comparisons to children in foster care; children separated from family members due to incarceration; and children dealing with ambiguous loss.

I. HISTORY OF IMMIGRATION AND IMMIGRATION LAW IN THE UNITED STATES

A. HISTORY OF IMMIGRATION 1500’s – 2001

The first major migration event occurred in the 1500’s when European immigrants ventured to the new world seeking political and religious freedom. By the 16th and 17th centuries, thriving communities of British, Dutch, Swedish and Spanish settlers dotted the landscape. These settlers did not come alone, as Europeans forcibly brought indentured servants from Africa and the Caribbean as early as 1619. This combined group of Europeans and their servants became the first immigrants to the United States. After winning its independence from Britain, the United States quickly became “the asylum for the persecuted lovers of civil and religious liberty from every part of Europe.” America had a relatively open policy towards immigrants and immigration

Trump Retreats on Separating Families, but Thousands May Remain Apart, N.Y. TIMES (June 20, 2018) https://tinyurl.com/NYTFamilySeparation (noting Federal Officials initially stated 2,300 children would not be immediately reunited with families).

12 See generally infra Parts I-III.
13 See Immigration Timeline, supra note 5. Crossing the Atlantic during this period meant a two to three-month voyage on a ship plagued by overcrowding, limited food rations, and disease. Id. While some European immigrants had peaceful meetings with the Native American Tribes then occupying the land, in others, cultures clashed leading to violence and disease outbreak. Id. See also U.S. Immigration Before 1965, supra note 5. While many of the first settlers came seeking political and religious freedom, others came for economic opportunities. Id. Due to the cost of immigration, an estimated one-half of white Europeans made the voyage by becoming indentured servants. Id.
14 See Immigration Timeline, supra note 5.
15 See id.; see also U.S. Immigration Before 1965, supra note 5. Although vast majorities of the slaves were African American, thousands of white European convicts were shipped across the Atlantic as indentured servants, forced to work in the United States. Id.
16 See U.S. Immigration Before 1965, supra note 5.
17 See Paine, supra note 2; see also Immigration Timeline, supra note 5. The first Census recorded 3.9 million people of English, German, Scottish, and Irish descent. Id. The census takers did not count Native Americans so the population was likely greater. Id.
throughout the 18th and 19th centuries. As the migrant population began to rise, however, there was a shift toward more restrictive immigration laws.

In 1875, the Supreme Court of the United States ("SCOTUS") declared the regulation of immigration a federal responsibility. Throughout the latter half of the 18th century, Congress enacted immigration laws imposing taxes on immigrants and restricting entry of certain laborers, convicts, and those likely to become a public charge. The federal government assumed direct control over immigration with the implementation of the Immigration Act of 1891, and in 1892 opened the most well-known immigration station, Ellis Island.

Even with the enactment of more restrictive immigration laws throughout the 1920's, over twenty-seven million immigrants entered the United States between 1880 and 1930. As immigrant populations diminished at the onset of the Great Depression, the restrictive policies from the 1920's persisted. With World War II raging across Europe, many immigrants sought refuge in the United States, but were ultimately turned away even though there were quite a few who fought for the United States.

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18 See Overview of INS History, supra note 5 (discussing that Americans encouraged open immigration and rarely questioned the policy until the late 1800's).
19 See generally id.; Immigration Throughout History, supra note 5; Immigration Timeline, supra note 5; U.S. Immigration Before 1965, supra note 5.
20 See Chy Lung v. Freeman, 92 U.S. 275, 280 (1876). The Court held, “[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.” Id. The Court reasoned that since Congress has the power to regulate commerce, “the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.” Id. See also Overview of INS History, supra note 5.
21 See id. The Chinese exclusion Act of 1882 and Alien Contract Labor laws of 1885 and 1887 prohibited certain laborers from immigrating to the United States. Id. The General Immigration Act of 1882 levied a head tax of fifty cents on each immigrant and blocked the entry of idiots, lunatics, convicts, and people likely to become a likely charge. Id. See also Major U.S. Immigration Laws, supra note 5.
22 See Immigration Act of 1891, 25 Stat. 1084 (1891). The Immigration Act of 1891 focused on immigration rules and enforcement. Id. The 1891 Act was the second major immigration legislation and a modification of the first immigration legislation, the Immigration Act of 1882. See also Overview of INS History, supra note 5; Immigration Timeline, supra note 5; U.S. Immigration Before 1965, supra note 5 (discussing that over twelve million immigrants entered through Ellis Island during its operation from 1892-1954). See also Overview of INS History, supra note 5, Immigration Timeline, supra note 5; U.S. Immigration Before 1965, supra note 5.
23 See Emergency Quota Act of 1921, 42 Stat. 5 (1921). This act was Congress’ first attempt to regulate immigration by setting admission quotas based on nationality. See also Immigration Act of 1924, 43 Stat. 153 (1924) (explaining that the 1924 Act set quotas on immigrants from certain countries). See also Immigration Timeline, supra note 5 (explaining that the outbreak of World War I caused American attitudes towards immigrants to shift). See also U.S. Immigration Before 1965, supra note 5; Immigration Throughout History, supra note 5.
24 See id. Very few migrants had the means or incentive to come to the United States during the Great Depression, and many had to return to their homelands. Id. See also U.S. Immigration Before 1965, supra note 5.
25 See Immigration Timeline, supra note 5. World War II sparked a dramatic change in U.S. Immigration practices. Id. When the United States declared war on the Axis Powers, residents of German and Italian descent were detained, but residents of Japanese descent, including
The refugee crisis continued after World War II ended, and in 1965 President Lyndon Johnson signed the Hart-Celler Act into law offering hope to immigrants from all continents seeking refuge in the United States.\textsuperscript{26} The increase in immigrants coming to the United States led to the creation of new federal agencies and the expansion of the Immigration and Nationality Service ("INS").\textsuperscript{27} INS was disbanded in 2003 and subsequently became Customs and Border Protection ("CBP"), Immigration and Customs Enforcement ("ICE"), and U.S. Citizenship and Immigration Services ("USCIS").\textsuperscript{28} While changes in world migration patterns, coupled with the increased ease of modern international travel created a growing emphasis on the control of illegal immigration and the practices we see today, nothing compared to the looming threat of terrorism.\textsuperscript{29}

B. IMMIGRATION AFTER SEPTEMBER 11, 2001

On September 11, 2001, nineteen militants associated with the Islamic extremist group al-Qaeda hijacked four airplanes and used them to carry out suicidal acts of terrorism on the United States.\textsuperscript{30} Two of the planes were flown into the World Trade Center, also referred to as the Twin Towers, in New York City; a third plane hit the Pentagon; and the fourth crashed in a field in Pennsylvania.\textsuperscript{31} A total of 2,996 people Japanese-Americans who were born in the United States, were forced to enter internment camps. \textit{Id.} Although the Supreme Court never explicitly overruled its decisions allowing the internment of Japanese descendant’s, Congress officially apologized in 1988. \textit{Id.}

\textsuperscript{26}See Immigration Timeline, supra note 5; see also The Immigration and Nationality Act of 1965 (also known as the Hart-Celler Act), Pub. L. 89-236, 79 Stat. 911 (June 30, 1968). The Hart-Celler Act abolished the quota system based on national origins that had been the American immigration policy since the 1920s. \textit{Id.}

\textsuperscript{27}See Overview of INS History, supra note 5, at 4. The Immigration Act of 1891 created the Office of the Superintendent of Immigration within the Treasury Office, which oversaw the Immigrant Inspectors stationed at the ports of entry. \textit{Id.} The name changed to the Bureau of Immigration in 1895. \textit{Id.} In 1903, the Bureau of Immigration was transferred from the Treasury Office to the newly created Department of Commerce and Labor. \textit{Id.} The U.S. Border Patrol was created in 1924, and in 1933 the Bureau of Immigration and the Bureau of Naturalization joined together to become the Immigration and Naturalization Service ("INS"). \textit{Id.} at 5, 7.

\textsuperscript{28}See Overview of INS History, supra note 5, at 11.

\textsuperscript{29}See Overview of INS History, supra note 5 (discussing INS adaptation to new challenges in immigration with its rapidly expanding responsibilities).

\textsuperscript{30}See 9/11 Memorial & Museum, FAQ about 9/11, NAT’L SEPT. 11 MEMORIAL MUSEUM, https://www.911memorial.org/faq-about-911 (last visited Oct. 22, 2018). Al-Qaeda is an international Islamist extremist terrorist network founded by Osama Bin Laden. \textit{Id.} Their aim has been to overthrow governments, which do not strictly enforce a religiously-sanctioned political and social order. \textit{Id.} Attacks against the United States were intended to reduce American support for such governments because U.S. support was seen as a major obstacle to creating a global order under Islamic authority. \textit{Id.} See also 9/11 Attacks, HISTORY (Feb. 17, 2010), https://www.history.com/topics/21st-century/9-11-attacks. (discussing the terrorist attacks on the Twin Towers and Pentagon); see also Immigration Throughout History, supra note 5 (discussing post 9/11 increase in immigration enforcement).

\textsuperscript{31}See 9/11 Attacks, supra note 30. The first of four planes crashed into the north tower of the World Trade Center at 8:45 AM. \textit{Id.} Media outlets initially began broadcasting live images of what they believed to be a freak accident, but eighteen minutes after the first plane hit, the second plane appeared, veering into the south tower. \textit{Id.} After the second plane crash there was
were killed in the 9/11 attacks, including the nineteen hijackers aboard the four airplanes.\textsuperscript{32} This event was one of the most catastrophic and deadly terrorist attacks in United States history, and would change the way America viewed immigration forever.\textsuperscript{33}

Susan M. Akram and Kevin R. Johnson describe a correlation between the events of 9/11 and the changes to immigration law that followed, noting that this is not the first time the United States has hidden behind terrorism as a way to insight changes that would otherwise violate Constitutional rights had the individuals affected been United States citizens.\textsuperscript{34}

To the extent that the U.S. response to September 11 can be characterized as regulating immigration, existing case law affords considerable leeway to the political branches of the federal government. The Supreme Court has upheld immigration laws discriminating against noncitizens on the basis of race, national origin, and political affiliation that would patently violate the Constitution if the rights of citizens were at stake. The so-called “plenary power” doctrine creates a constitutional immunity from judicial scrutiny of substantive immigration judgments of Congress and the Executive Branch. The doctrine thus allows the federal government, through the immigration laws, to lash out at any group considered undesirable. Such authority increases exponentially when, as in the case of international terrorism, perceived foreign relations and national security matters are at issue. When immigration law and its enforcement rests primarily in the hands of the federal government, uniform, national civil rights deprivation may result.\textsuperscript{35}

\textsuperscript{32} See 9/11 Attacks, supra note 30. 2,763 people died at the World Trade Center, including 343 firefighters and paramedics, twenty-three New York City police officers, and thirty-seven Port Authority police officers who were all trying to evacuate the Twin Towers and rescue the people trapped inside. Id. 189 people were killed at the Pentagon, and all forty-four passengers on the plane that crashed in Pennsylvania died upon impact. Id.

\textsuperscript{33} See Frequently Asked Questions About Pearl Harbor, PEARL HARBOR VISITORS BUREAU, https://visitpearlharbor.org/faqs-questions-pearl-harbor/ (last visited Nov. 7, 2018). 2,403 people died in the Pearl Harbor attack by Japan on December 7, 1941. Id. 2,335 of those individuals were military personnel and the remaining 68 were civilians. Id. See 9/11 Attacks, supra note 30; see also FAQ about 9/11, supra note 30; see also Immigration Throughout History, supra note 5; Overview of INS History, supra note 5, at 11. See generally Susan M. Akram & Kevin R. Johnson, Race, Civil Rights, And Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims, 58 N.Y.U. ANN. SURV. OF AM. L. 295, 297 (2002) (discussing civil rights violations of Arabs and Muslims after 9/11).

\textsuperscript{34} See Akram & Johnson, supra note 33, at 329-30.

\textsuperscript{35} See id.; see also, e.g., Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952) (allowing for deportation of immigrants based on their political views); Chae Chan Ping v. United States (The Chinese Exclusion Case) 130 U.S. 581, 597 (1889) (upholding racial discrimination in immigration
The events of 9/11 initiated another shift in United States immigration policy. On October 26, 2001, President George W. Bush signed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act into law, which, among other things, broadened the terrorism grounds for excluding aliens from entering the United States and increased monitoring of foreign students. In 2002, Congress enacted the Enhanced Border Security and Visa Entry Reform Act, and the Homeland Security Act ("HSA") of 2002, thereby disbanding INS. The newly formed Department of Homeland Security ("DHS") replaced INS, but kept its individual parts. In 2005, the REAL ID Act expanded the terrorism-related grounds for

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36 See Immigration Throughout History, supra note 5; Overview of INS, supra note 5.
37 See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001, 107 Pub. L. No. 56, 115 Stat. 272 (2001). The USA PATRIOT Act was enacted to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes. Id. The act was swiftly passed by Congress in the wake of 9/11. Id. See also Major U.S. Immigration Laws, 1790-Present, supra note 5.
39 See Overview of INS History, supra note 5. The HSA created three new federal agencies under the Department of Homeland Security: (1) Customs and Border Protection ("CBP"); (2) Immigration and Customs Enforcement ("ICE"); (3) U.S. Citizenship and Immigration Services ("USCIS"). Id. CBP prevents drugs, weapons, and terrorists and other inadmissible persons from entering the country. Id. ICE enforces civil and criminal laws governing border control, customs, trade, and immigration. Id. USCIS oversees lawful immigration to the United States and naturalization of new American citizens. Id.
inadmissibility and deportation even further than the USA PATRIOT Act.\textsuperscript{40}

While many herald the nation’s response to 9/11 as warranted, some believe its implementation was unorthodox.\textsuperscript{41} In the wake of 9/11, persons of Arab and Muslim ancestry became targets of harassment, investigation, and in some cases, detention.\textsuperscript{42} The National Security Entry-Exit Registration System (“NSEERS”) was implemented in 2002 as a counterterrorism policy, but it was used discriminatorily, targeting nationals from 25 countries based on their ethnicity, religion, and national origin.\textsuperscript{43} The NSEERS policy was officially abolished by DHS on December 23, 2016.\textsuperscript{44}

In 2002, the naval base at Guantanamo Bay was repurposed to hold detainees in the “war on terror.”\textsuperscript{45} Guantanamo Bay has been the subject of much controversy over the years with many questioning the constitutionality of indefinite detention of enemy combatants without access to the court system, though there was reluctance when President Obama attempted to shut it down during his presidency.\textsuperscript{46}

The nation’s aggressive response in the wake of 9/11 was not the first time the United States has taken an “unconventional” route in dealing with attacks against the homeland, and it likely will not be the last, as “times of crisis are often accompanied by hostility toward minorities in the United States.”

II. THE CURRENT ADMINISTRATION’S IMMIGRATION PRACTICE AND POLICIES

On April 6, 2018, the Attorney General addressed a memorandum regarding zero-tolerance offenses under 8 U.S.C. § 1325(a) to federal prosecutors along the southwest border. This memorandum was the first concrete evidence of the new administration’s policy of separating migrant children from their primary caregivers at the border; however, it was not the first instance of separation. Further investigation led to

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49 See Memorandum, supra note 10. The Attorney General implemented the zero-tolerance policy after DHS reported a 203 percent increase in illegal border crossings. Id. He threatened, “[t]o those who wish to challenge the Trump Administration’s commitment to public safety, national security, and the rule of law, I warn you: illegally entering this country will not be rewarded but will instead be met with the full prosecutorial powers of the Department of Justice.” Id. See also 8 U.S.C.S. § 1325 (LexisNexis 2019). This section prohibits both attempted illegal entry and illegal entry into the United States by an alien. Id.

50 See Memorandum, supra note 10 (ordering attorney’s office along southwest border to immediately adopt a zero-tolerance policy). See Ainsley, supra note 9 (explaining proposal is to deter mothers migrating to the United States with their children unsafely); see also Miroff, supra note 9 (discussing separating families to protect the border); see Seville & Rappleye, supra note 9 (noting migrant families have been separated since as early as 2016).
the discovery that the Trump administration had been separating migrant children from their primary caregivers throughout 2017, after Trump took office. The ensuing months led to increased public outcry over the unnecessary separations, and the horror stories that began to surface as a result.

Amidst public backlash, the President signed Executive Order 13841, “Affording Congress an Opportunity to Address Family Separation,” to address the situation and the need to preserve the family unit. The order, however, did not discuss reunification of families that were previously separated. Three days later, on June 23, 2018, DHS released a “Fact Sheet” outlining the government’s steps to reunification. The fact sheet ensured that DHS knew the location of all of the children in its custody, and that it had established a process to provide family members with the location of their children and regular contact.

Although the President and DHS publicly addressed the issue, a district court in the Southern District of California did not believe the government was doing enough. On June 26, 2018, the court granted a preliminary injunction preventing the separation of

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50 See Seville & Rappleye, supra note 9. At least 2,342 children were separated from their parents since the zero-tolerance policy took effect on May 5, 2018. Id. Numbers show another 1,768 were separated from their parents between October 2016 and February 2018, bringing the total amount of children separated from their parents to 4,110. Id.

51 See generally Rizzo, supra note 10 (explaining children are treated as unaccompanied minors while their parents are sent to criminal court); see also Gamboa, supra note 11 (describing re-separations after father’s participated in peaceful protests at Karnes detention center); Seville & Rappleye, supra note 9; Sarah Almukhtar et al., How Trump’s Policy Change Separated Migrant Children from Their Parents, THE NEW YORK TIMES (June 20, 2018), https://www.nytimes.com/interactive/2018/06/20/us/border-children-separation.html.

52 See Proclamation No. 13841, 83 Fed. Reg. 29435 (June 20, 2018). The order restricts family separations, ordering DHS to maintain custody of the family unit jointly. Id. See also Gregory Korte, Anatomy of an Executive Order: What President Trump’s Order on Family Separation Does, USA TODAY (June 21, 2018), https://www.usatoday.com/story/news/politics/2018/06/21/trump-executive-order-family-separations-border-explained/721466002/. The order has not solved the problem, but rather placed it in Congress’s lap. Id. The title of the order makes it clear that Trump expects Congress to address the issue with an immigration bill. Id.


54 See Press Release, Fact Sheet: Zero-Tolerance Prosecution and Family Reunification, DEP’T OF HOMELAND SECURITY (June 23, 2018), https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification. “As part of the apprehension, detention and prosecution process, illegal aliens, adults and children, are initially detained by U.S. Customs and Border Protection (CBP) before the children are sent to HHS’ Office of Refugee Resettlement (ORR) and parents to Immigration and Customs Enforcement (ICE) custody.” Id. DHS notes that each entity plays an important role in reunification. Id.

55 See id.

56 See Ms. L v. United States Immigration and Customs Enf’t., 310 F.Supp.3d 1133, 1137 (S.D. Cal. 2018) (granting classes preliminary injunction preventing government from continuing to separate families at the border). Migrant parents brought a class action against Immigration and Customs Enforcement (ICE), alleging that the practice of separating migrant parents and children held in immigration detention without a showing that the parent is unfit or presents a danger to the minor child violates due process. Id. at 1133.
families and ordering reunification of those already separated. Judge Sabraw admonished the government’s attempt at implementing the zero-tolerance policy, stating:

The practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence. This is a startling reality, the judge wrote. The government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainees’ release, at all levels—state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as property. Certainly, that cannot satisfy the requirements of due process . . . . The facts set forth before the Court portray reactive governance -- responses to address a chaotic circumstance of the Government's own making. They belie measured and ordered governance, which is central to the concept of due process enshrined in our Constitution.  

57 Id. at 1149-50. The Court ordered:

“(1) the defendants are enjoined from detaining Class Members in DHS custody without and apart from their minor children; (2) If Class Members are released from DHS custody, Defendants are enjoined from continuing to detain the minor children of the Class Members and must release the minor child to the custody of the Class Member; (3) Unless there is a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child: (a) Defendants must reunify all Class Members with their minor children who are under the age of five within fourteen days of the entry of this Order; and (b) Defendants must reunify all Class Members with their minor children age five and over within thirty days of the entry of this Order; (4) Defendants must immediately take all steps necessary to facilitate regular communication between Class Members and their children; (5) Defendants must immediately take all steps necessary to facilitate regular communication between and among all executive agencies responsible for the custody, detention or shelter of Class Members and the custody and care of their children; (6) Defendants are preliminarily enjoined from removing any Class Members without their child; and (7) the Court retains jurisdiction to entertain such further proceedings and to enter such further orders as may be necessary or appropriate to implement and enforce the provisions of this Order and Preliminary Injunction.”

58 Id. at 1149.
The government was given fourteen days to reunite minor children, under five years old, with their families, and thirty days to reunite all parents with their minor children who were five and older, meaning the government had until July 26, 2018 to reunite all minor children with their parents.\textsuperscript{59} As July 26, 2018 grew closer, it became clear the government would not meet its deadline.\textsuperscript{60} Since June 2, 2018, 104 children were reunited with their parents, and 300 others were discharged “under other appropriate circumstances.”\textsuperscript{61} As of a joint status report filing on November 8, 2018, nearly four months after Judge Sabraw ordered the preliminary injunction, 171 children remained separated from their families.\textsuperscript{62} Additionally, Judge Sabraw approved a settlement agreement on November 15, 2018, that allows hundreds of migrant families separated under the government’s zero-tolerance policy a second chance to seek asylum.\textsuperscript{63}

III. **ADVERSE PSYCHOLOGICAL EFFECTS OF SEPARATION AND CHILD DEVELOPMENT**

The Fifth and Fourteenth Amendments of the United States Constitution require the federal government and the States to provide individuals with due process and equal protection of the laws.\textsuperscript{64} SCOTUS has held that some liberties are so important that they

\textsuperscript{59} Id.


\textsuperscript{63} See Order Granting Preliminary Approval of Proposed Settlement Case No. 3:18-cv-1832-DMS, COURT LISTENER (Nov. 15, 2018), https://www.courtlister.com/recap/gov.uscourts.casd.564097/gov.uscourts.casd.564097.321.0.pdf; see also Kristina Davis, *San Diego Judge OK’s Family Separation Settlement; New Asylum Interviews Already Underway*, THE SAN DIEGO UNION-TRIBUNE (Nov. 15, 2018), https://www.sandiegouniontribune.com/news/immigration/sd-me-asylum-families-20181115-story.html. The agreement grants new interviews to reunited families, whether they are in detention or in the community. Id. The entire family unit will be allowed to remain in the U.S. until every member has completed the process, even if one or more members fail early on. Id.

\textsuperscript{64} See U.S. CONST. amend. V (“nor be deprived of life, liberty, or property without due process of law”); U.S. CONST. amend. XIV (“nor deny to any person within its jurisdiction the equal protection of the laws”). See generally Kenneth L. Karst, *The Fifth Amendment’s Guarantee of Equal Protection*, 55 NORTH CAROLINA LAW REVIEW 544-47; 552-54 (1977) (discussing SCOTUS’ opinions in regard to equal protection in the fifth amendment). The U.S. Supreme Court has noted that even though the Fifth Amendment does not have an equal protection clause as in the Fourteenth Amendment, the Fifth Amendment still requires the federal government to provide individuals with equal protection of the laws. Id.; see also Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (pointing the way to the Court’s adoption of the Fifth amendment’s equal
are deemed to be “fundamental rights,” and that generally the government cannot infringe upon them unless the government shows it has met the strict scrutiny standard. One of the major fundamental rights is family autonomy which includes the right to marry, the right to custody of one’s children, the right to keep the family together, and the right to control the upbringing of one’s children.

The first Supreme Court case to recognize family autonomy as a fundamental right was *Meyer v. Nebraska*. Robert T. Meyer was convicted under a Nebraska statute that made it a crime to teach children any language other than English.

The Court held that the liberty guaranteed by the Fourteenth Amendment includes not only economic rights, but the right to “acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” In a case decided two years after *Meyer*, the Court further explained, “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for his additional obligations.”

SCOTUS has long recognized that “freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.” In *Santosky v. Kramer*, the Court stated:

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67 See *Meyer*, 262 U.S. at 399 (recognizing family autonomy as a fundamental right).

68 *Id.* at 396-97. The Supreme Court of Nebraska affirmed Meyer’s conviction, reasoning that permitting children to be taught in their parents’ native language “naturally inculcate[s] in them the ideas and sentiments foreign to the best interests of this country.” *Id.* at 398.

69 *Id.* at 399.

70 See *Pierce*, 268 U.S. at 535.

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.\(^72\)

The Constitution protects everyone within the territory of the United States, regardless of citizenship, which means immigrants within the territory of the United States deserve the same due process and equal protection of the laws as anyone else.\(^73\) There is no dispute the constitutional right of family autonomy applies to “aliens,” and therefore when the zero-tolerance policy was enacted, the separation of migrant children from their primary caregivers, violated the constitutional rights of these caregivers.\(^74\) Immigrant families not only suffered a violation of their constitutional rights, but also irreparable emotional and psychological harm.\(^75\)

Social-emotional development includes a child’s experience, expression, and management of emotions, as well as their ability to establish positive and rewarding relationships with others.\(^76\) Studies have shown that healthy social-emotional development for infants and toddlers occurs in an interpersonal context, most notably with positive ongoing relationships with familiar, nurturing adults.\(^77\) Separation from

\(^{72}\) See Santosky, supra note 71.

\(^{73}\) See Ms. L., 310 F.Supp.3d at 1161 (citing, among other cases, Mathews v. Diaz, 426 U.S. 67 (1976) (stating “There are literally millions of aliens within the jurisdiction of the United States’ ” and “ ‘The Fifth Amendment ... protects every one of these persons[,]’ ”).

\(^{74}\) See Ms. L., 310 F.Supp.3d at 1161 (finding narrow subset of circumstances in the case triggers the fundamental right to family integrity).

\(^{75}\) See id. at 1146-47 (discussing risk of irreparable harm to parents and children’s physical and mental health).

\(^{76}\) See Social-Emotional Development Domain, CAL. DEP’T OF EDUC., https://www.cde.ca.gov/sp/cd/re/itf09socemodev.asp#top (last reviewed July 26, 2019) (defining social-emotional development); see also Cohen, et.al., Helping Young Children Succeed: Strategies to Promote Early Childhood Social and Emotional Development, WASHINGTON, DC: NATIONAL CONFERENCE OF STATE LEGISLATURES AND ZERO TO THREE (Sept. 2005), https://www.zerotothree.org/resources/136-helping-young-children-succeed-strategies-to-promote-early-childhood-social-and-emotional-development (providing insight on helping children with social-emotional development). “Early childhood social and emotional development are influenced by biology, relationships and environment.” Id. at 2. Biology refers to what a child is born with, such as his or her genetic makeup. Id. Relationships connect children with significant people in their lives and a child’s environment is where a child spends time such as home, early education settings, and other situations a child experiences that can be either warm or hostile.” Id.

primary caregivers can have adverse effects on a child’s social-emotional development, such as depression, anxiety, post-traumatic stress disorder (“PTSD”), and other physical and behavioral deficiencies.⁷⁸

A. AMBIGUOUS LOSS AND MOVING ON

Ambiguous loss occurs when a person experiences a physical or psychological event that is not as concrete as a traditional loss, such as death.⁷⁹ The loss can be of a person or object, or something less recognizable, such as a relationship.⁸⁰ There is rarely ever closure with an ambiguous loss, so it is generally accompanied by feelings of confusion and lack of control due to the uncertainty surrounding the loss.⁸¹ This affects an individual’s ability to grieve, as they may not know the actual status of the person they are grieving.⁸² They may feel their grief is unjustified and attempt to move on without properly mourning, resulting in adverse physical and mental effects.⁸³

Children experience ambiguous loss often.⁸⁴ Adults may have a hard time recognizing when a child is suffering from an ambiguous loss because children tend to integrate their grief with everyday tasks such as attending school and playing, which causes adults to believe the child has moved on while in reality the child is attempting to cope.⁸⁵

⁷⁷ See discussion infra Sections III.A, III.B, III.C and accompanying text.
⁷⁹ See Guidry, supra note 79, at 5 (noting that ambiguous loss can result from the loss of a tangible or intangible thing).
⁸⁰ See id. (noting this may include parental incarcerated, adoption, missing family members, or a separation or divorce).
⁸¹ See id. at 8; see also Betz & Thorngren, supra note 79, at 359. Family members may not know if the missing person is still alive or the state of their wellbeing. Betz & Thorngren, supra note 79, at 359. Although the person is not physically present, they are still a part of the family and constantly in family member’s thoughts. Id. Experiencing ambiguous loss is stressful and oftentimes cruel in its unending torment, because the loss is intangible and uncertain, the mourning process for family members becomes complicated. Id.
⁸² See Guidry, supra note 79, at 8-9. Without the physical presence of a body, such as in the death of a loved one, there is no confirmation that the loss is real, which would allow the individual to properly grieve. Id.; see also Betz & Thorngren supra note 79, at 361. The trauma of loss is hard to understand in itself, even more so when the loss is unclear or uncertain. Betz & Thorngren supra note 79, at 361. When the loss is not recognized socially, individuals may be denied their right to grieve because they are unsure their grief is justified. Id. Such invalidation prevents people from understanding their loss, proper grieving, and asking for help. Id.
⁸³ See Guidry, supra note 79, at 3. Examples include but are not limited to: separation or divorce of parents, losing a pet, a friend moving away, or the destruction of a favorite toy. Id. Grief is a natural reaction to such events. Id.
⁸⁴ See Guidry, supra note 79, at 4 (explaining many adults misinterpret reactions of a child as a lack of understanding or caring).
Ambiguous loss can cause physical, behavioral, cognitive and emotional problems. It is likely that many of the children separated from their primary caregivers at the border have experienced ambiguous loss. A pertinent grief experience resulting from ambiguous loss is when a family member is physically missing or absent from the family, but psychologically present. Many migrant children were taken from their parents or found their parents missing when they returned from everyday activities such as bathing. Though they know their primary caregiver is out there somewhere, the child

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86 See Guidry, supra note 79, at 5; see also Betz & Thorngren, supra note 79, at 361. Physically they may experience fatigue, sleep disruption, headaches, or stomachaches. Betz & Thorngren, supra note 79, at 361. Cognitively they may experience a preoccupation with the loss, forgetfulness, dreaming about the loss, or worrying. Id. Behaviorally they may experience talkativeness, quietness, crying, hyperactivity, inactivity, sighing, support seeking, withdrawal, dependence, or avoidance. Id. Emotionally they may experience loneliness, yearning, anxiety, depression, fear, anger, irritability, apathy, or relief. Id. Individuals may go through cycles of hope only to be disappointed once again. Id. The unpredictable nature of an uncertain future leaves people in a reactive position only able to react to new factors instead of create the outcome themselves. Betz & Thorngren supra note 79 at 361. The individual may feel tremendous guilt and may be unable to make decisions, fearing that the wrong choice will be made and make things worse. Id. Individuals experience conflicting emotions—love and hate, hope and despair, joy and sadness, anger and frustration. Id. Something is wrong, and they don’t know how to fix it. Id. Family members likely differ in their views and emotions in regard to how to handle the situation and the loss. Id. They may withdraw from one another furthering their sense of isolation. Id. The grief can be exhausting. Betz & Thorngren supra note 79 at 361.

87 See Gamboa, supra note 11 (describing re-separations after father’s participated in peaceful protests at Karnes detention center); Seville, supra note 9 (sharing a migrant grandmother’s story of her grandson’s separation from his mother); Letter from Alliance for Strong Families and Communities, et. al. to Secretary Nielsen (Jan. 16, 2018) (raising health and safety concerns in response to administrations plan to separate immigrant families); Letter from Lindsay M. Harris, et. al to Megan Mack, et. al (Mar. 28, 2016) (describing traumatic experiences of children and mothers immigrating to U.S. facing removal). See Fact Sheet, supra note 54, at 1146-47 (discussing irreparable harm to parents and children in regards to their physical and mental health); J.S.R. by and through J.S.G. v. Sessions, No. 3:18-cv-01106-VAB 2018 WL 3421321 (D. Conn. July 13, 2018) (listing physical and mental effects of separation on two migrant children).

88 See Guidry, supra note 79, at 8; see also Betz & Thorngren, supra note 79, at 359-60. A family whose member is physically absent but psychologically present may carry on as if the person is still there, setting a place for them at dinner or purchasing gifts for them during holidays. Betz & Thorngren, supra note 79, at 359-60.

may conclude that the primary caregiver no longer cares about them, abandoned them, or that the child did something wrong to insight such an outcome.90 The secrecy and silence involved regarding the separated families only creates more problems by not providing the children the proper means to comprehend the situation, leading them to be confused, overwhelmed, and for some to even experience symptoms of PTSD.91 The migrant children have very little access to their parents, if any, and many report they don’t know where their parents are or how to contact them.92 This constant uncertainty, exacerbated by the already traumatic experience of traveling to the United States, has caused detrimental physical and psychological effects to migrant children.93

B. SEPARATION THROUGH INCARCERATION

One of the examples of ambiguous loss is separation through incarceration.94 Studies have concluded that separation of family members through incarceration can have adverse effects on a developing child.95 The migrant children separated from their primary caregivers experience similar conditions to those children who have lost a family

90 See Guidry, supra note 79, at 8. This type of loss often leads to confusion, guilt, blame, and other difficult emotions as well as self-destructive behavior. Id. It can also affect the child's self-esteem and ability to build long-lasting relationships in the future. Id.
91 See Guidry, supra note 79, at 9. See also Betz & Thorngren, supra note 79, at 361.
93 See generally Guidry, supra note 79, at 9. See also Betz & Thorngren, supra note 79, at 361; Taxin, supra note 92; Arnold, supra note 92; Gumbel, supra note 92; Voge, supra note 93.
94 See Guidry, supra note 79, at 3. See generally Betz & Thorngren, supra note 79.
member due to incarceration. The child may have witnessed the parents arrest or come home to find them missing. Others may encourage the child to keep the incarceration secret or provide little information to the child about the situation due to the concern the child may not understand even if given all of the information.

Children with incarcerated family members often experience multiple emotional and social difficulties. Migrant children have generally already lived through a traumatic experience prior to or during their travels to the United States, and having their primary caregivers taken away and placed in deportation proceedings only adds to the stress.

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96 See Davis & Shlafer, supra note 96, at 121; Cunningham & Baker, supra note 95, at 2. See also Seville, supra note 9.

97 See Cunningham & Baker, supra note 95, at 2; Murray, supra note 96, at 178. “Arrest often occurs at night or in the early morning when people are likely to be at home with their families.” Id. One incarcerated mother described her son as hysterical after police broke down her doors in order to search the home for drugs. Id. In a study of 192 incarcerated parents in Arkansas, 40% reported their child had been present. Id. In a 1995 study, “of thirty-six children with incarcerated mothers, many children had symptoms of posttraumatic stress disorder, including flashbacks of their mother’s arrest.” Id. See generally Davis & Shlafer, supra note 96, at 120; Arnold, supra note 92.

98 See Davis & Shlafer, supra note 96, at 120; Cunningham & Baker, supra note 95, at 2. After witnessing a parent’s arrest, a child often feels shame, isolation, guilt, abandonment, confusion, grief and loneliness. Cunningham & Baker, supra note 95, at 2. Family members encourage keeping the matter private and a secret from others, which can lead the child to feeling more isolated by not allowing them to seek help from potential supporters. Id. See also Murray, supra note 96, at 178. Some family members attempt to downplay the situation leading a child to be confused about why their parent is missing and their absence may be more difficult to cope with. Id. Family members often do this with good intentions so as not to make life harder for the child, but it often backfires. Id.

99 See Davis & Shlafer, supra note 96. Social and emotional difficulties suffered include: exposure to the parent’s criminal activity, witnessing the parent’s arrest and court proceedings, separation from parents, loss of family income, housing instability, changes in caregiving, stressful visits with the incarcerated parent, and shame or stigma associated with a parent’s involvement in the criminal justice system. Id. Migrant children generally did not see their parents again after separation, and were only allowed sporadic, short phone calls. See generally Seville, supra note 9 (sharing a migrant grandmother’s story of her grandson’s separation from his mother); Maria Sacchetti, Still Separated: Nearly 500 Migrant Children Take from their Parents Remain in U.S. Custody, THE WASHINGTON POST (Aug. 31, 2018) https://www.washingtonpost.com/local/immigration/still-separated-nearly-500-separated-migrant-children-remain-in-us-custody/2018/08/30/6dbd8278-aa09-11e8-8a0c-70b618c98d3c_story.html?utm_term=.5009998e3a9b (recounting stories of traumatic separations and reunions amongst migrant families); Gamboa, supra note 11 (describing migrant children’s pleas to be reunited with family members). See generally Geller, supra note 96.

100 See Gamboa, supra note 11 (describing re-separations after father’s participated in peaceful protests at Karnes detention center); Seville, supra note 9 (sharing a migrant grandmother’s story of her grandson’s separation from his mother); Letter, supra note 88 (raising health and safety concerns in response to administrations plan to separate immigrant families); Letter from the CARA Family Det. Pro Bono Project to the U.S. Dep’t of Homeland Sec. (Mar. 28, 2016) (describing traumatic experiences of children and mothers immigrating to U.S. facing removal). See Ms. L, 310 F.Supp.3d at 1146-47 (discussing irreparable harm to parents and children in regards to their physical and mental health); J.S.R. by and through J.S.G. v. Sessions, No. 3:18-cv-01106-VAB 2018 WL 3421321 (D. Conn. July 13, 2018) (listing physical and mental effects of separation on two migrant children). See also Murray, supra note 96. The arrest of a parent can
Separation often affects children in different ways depending on their age, which family member is incarcerated, and how those around them respond to the event.\textsuperscript{101} Such experiences place children at increased risk for health and behavioral problems that can sometimes be alleviated by strong parent-child relationships.\textsuperscript{102} Maintaining a strong parent-child relationship is hard for migrant children when they are separated and unable to stay in contact with primary caregivers, leading some to not recognize their parents

cause children to feel shocked, bewildered, and scared. \textit{Id.} at 178. The experience can be unexpected and sometimes involve violence, making the already bad situation even worse for the child. \textit{Id.} Following parental arrest, trial in court can be highly anxiety provoking for families and children. \textit{Id.} Uncertainty about the outcome of the trial means that families cannot plan concretely for their future, even more so in deportation proceedings where the outcome could be especially devastating. \textit{Id.} Children cannot be assured of their parent’s availability, and they may not understand court processes relating to their parent’s trial, leaving them more bewildered by the events that surround them. \textit{Id.}

\textsuperscript{101} See Cunningham & Baker, supra note 95, at 2. Infants may be cut off from breast feeding too early, have their routines disrupted, and have to deal with changes in their primary caregivers. \textit{Id.} at 4. Pre-Schoolers will be distressed if they see “mommy” upset. \textit{Id.} at 5. They likely will not understand the connection between crime and punishment and only focus on the outcome and may cause them to put the blame on the wrong person exposing them to a bad image of the justice system at an early age. \textit{Id.} School age children are likely to blame the system rather than the parent for what they did. \textit{Id.} This may lead them to think the system is unfair or biased and produce anti-social rationales for their own criminal behavior in the future. \textit{Id.} They will usually attempt to conceal their parent’s incarceration, preventing them from seeking support and assistance. Cunningham & Baker, supra note 95, at 5. They may experience adjustment difficulties manifesting as aggression, difficulty concentrating, multiple absences and school avoidance. \textit{Id.} Adolescents have some of the most drastic reactions. \textit{Id.} at 6. They will distance themselves from the incarcerated member, feeling angry at them as well as at the system for putting them in this situation. \textit{Id.} They will likely take on adult roles prematurely, such as taking care of younger siblings. \textit{Id.} Other coping strategies may involve: alcohol/drug use, running away, using anger to suppress other emotions, thrill seeking, developing pseudo-family relationships with relative strangers, and seeking sexual intimacy. \textit{Id.} Finally, they may drift away from the care and supervision of responsible adults, living with “friends,” with exploitive adults or on the street. Cunningham & Baker, supra note 95, at 6. They may find it logistically difficult to stay in school. \textit{Id.} See also Murray, supra note 96, at 179. One difficulty children face after parental incarceration can be changes in caregiving arrangements and reduced quality of care. \textit{Id.}

The other parent or the incarcerated parent’s partner can be left depressed, overworked, lonely, and struggling to provide both childcare and support for an incarcerated partner. \textit{Id.} Supervision of children and attention to their needs are likely to be impaired by the considerable stress that caregivers experience during parental incarceration. \textit{Id.} See generally Davis & Shlafer, supra note 96, at 120; Geller, supra note 96.

C. CHILD DETENTION CENTERS REFLECTING FOSTER CARE

There are similarities between the foster care system and the immigrant detention facilities. The Department of Health and Human Services (“HHS”) runs the foster care system in the United States, and most recently, has been contracting with and overseeing the facilities that house migrant children separated from their primary caregivers at the border. The foster care system is designed to provide out of home placement for children in at-risk home environments. While most children in the foster care system are removed from one home and placed in another caring and nurturing environment, the migrant children in detention are placed in large concrete warehouses sectioned off into smaller areas surrounded by chain link fences. The media has likened it to “what

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103 See Sacchetti, supra note 100. Advocates say the effects of separation on migrant children are easy to see during reunification. Id. One reunification video shows a toddler squirming away from his mother after three and a half months apart, seemingly not recognizing her. Id. “‘My love,’ his mother says as the boy refuses to hug her back. ‘I’m your mommy.’ He crawls into a corner, and she dissolves into tears.” Id. See also Gamboa, supra note 11; Seville, supra note 9.
104 See generally Delilah Bruskas, Children in Foster Care: A Vulnerable Population at Risk, 21 JOURNAL OF CHILD AND ADOLESCENT PSYCHIATRIC NURSING 70-77 (2008) (discussing the mental and educational outcomes of placing children in foster care); Vivek Sankaran & Christopher Church, Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care, 207-37 (2016) (“removing children from the custody of their parents harms them emotionally, developmentally, and socially.”); Beth Troutman, Effects of Foster Care Placement on Young Children’s Mental Health: Risks and Opportunities (unpublished manuscript) (available at www.imentalhealth.org); June M. Clauson, et al., Mental Health Problems of Children in Foster Care, 7 JOURNAL OF CHILD AND FAMILY STUDIES 283-96 (1998) (noting children in foster care are at heightened risk for mental health problems); Catherine R. Lawrence, et al., The Impact of Foster Care on Development, 18 DEVELOPMENT AND PSYCHOPATHOLOGY 57-76 (2006) (removing children from families, placing them in foster care, has been associated with negative developmental consequences); Maria Sacchetti, Still Separated: Nearly 500 Migrant Children Take from their Parents Remain in U.S. Custody, WASH. POST (Aug. 31, 2018), https://www.washingtonpost.com/local/immigration/still-separated-nearly-500-separated-migrant-children-remain-in-us-custody/2018/08/30/6dbd8278-aa09-11e8-8a0c-70b618c98d3c_story.html?utm_term=.5009998e3a9b (recounting stories of traumatic separations and reunions amongst migrant families); Taxin, supra note 92; Arnold, supra note 92; Gumbel, supra note 92; Voge, supra note 93.
106 See Lawrence, supra note 105, at 57. “The foster care social service system is designed to ameliorate adverse family and environmental conditions that may interfere with typical child development.” Id. The system provides short and long-term placement to children whose parents are deemed unable to care adequately for them. Id. See also Sankaran & Church, supra note 104, at 210. “Undoubtedly, it sometimes is necessary for a state child welfare agency to remove children from the legal and physical custody of their parents” due to maltreatment, neglect, or other compelling reasons. Id. Courts and legislatures, however, have identified the removal decision as one of the most pivotal points in a child welfare case, given the fundamental right to family integrity. Id. See generally Bruskas, supra note 105, at 70.
107 See Gumbel, supra note 92.
you would keep animals in” or just flat out “cages.”\textsuperscript{108} Children need a healthy environment in order to thrive, with their parents present to help with their social-emotional development.\textsuperscript{109} Placing children in such a hostile environment is not good for their development.\textsuperscript{110}

The administration believed separating families was necessary to deter illegal entry and keep children safe from unfit or dangerous parents.\textsuperscript{111} In the foster care system, decisions regarding the child, such as placements, are often made without the participation of the child and can have lifelong consequences.\textsuperscript{112} The migrant children taken from their primary caregivers are being placed in facilities that are ill-equipped to house them, with little to no information regarding their future.\textsuperscript{113} Individuals interviewed by the media state that guards monitor the facilities, and there is little to no staff on hand to take care of the children and their development.\textsuperscript{114} The government paints a different picture stating, “the allegations made by families about their experiences in detention did not equate with what they knew to be common practice” and they insisted detainees were treated with dignity and respect.\textsuperscript{115} The administration may have believed it was acting appropriately to ensure the safety and security of the United States and the migrant families coming here, but the execution of its immigration policies was flawed and has devastated thousands of immigrants seeking refuge from their home countries.\textsuperscript{116}

\textsuperscript{108} Ewan Palmer, \textit{Border Patrol Objects to Detention Cage Reports: ‘Not Inaccurate, but They’re Not Treated Like Animals}}, \textit{NEWSWEEK} (June 18, 2018), https://www.newsweek.com/border-patrol-uncomfortable-detention-center-cage-descriptions-not-inaccurate-981510. Fox and Friends host Steve Doocy described them as “something you would keep animals in.” \textit{Id.}

\textsuperscript{109} See generally Bruskas, supra note 105, at 70; Sankaran & Church, supra note 104, at 211; Troutman, supra note 105, at 1; Susan Hois, \textit{Effects of Separation and Loss on Children’s Development}, \textit{NURTURING PARENTING} (2019), https://www.nurturingparenting.com/images/cmsfiles/effects_separation_and_loss.pdf (noting children can get psychologically “stuck” at the age of the loss of their primary attachment objects).

\textsuperscript{110} See generally Bruskas, supra note 105, at 70; Sankaran & Church, supra note 104, at 211; Troutman, supra note 105, at 1; Hois, supra note 110.

\textsuperscript{111} See generally Miroff, supra note 9; Ainsley, supra note 9; Seville, supra note 9; Rizzo, supra note 10; Taxin, supra note 92; Arnold, supra note 92; Gumbel, supra note 92; Voge, supra note 93.

\textsuperscript{112} See Bruskas, supra note 105, at 74. Child welfare does not generally provide children with the opportunity to be a part of the decision-making process, which often leads to the feeling of no control over the situation. \textit{Id.} “The powerlessness of children in foster care is dramatically increased when knowledge and information about their future is withheld.” \textit{Id.} See generally Sankaran & Church, supra note 104, at 213. “Researchers described the ‘debilitating effects’ children experience as a result of not knowing why they are entering foster care, the purpose of foster care, where they would be living, with whom they would be living, when they will get to see their birth family, and how long their foster care episode will last.” \textit{Id.}

\textsuperscript{113} See Taxin, supra note 92; Arnold, supra note 92; Gumbel, supra note 92; Voge, supra note 93.

\textsuperscript{114} See generally Taxin, supra note 92; Arnold, supra note 92; Gumbel, supra note 92; Voge, supra note 93.

\textsuperscript{115} See generally Taxin, supra note 92; Arnold, supra note 92; Gumbel, supra note 92. The Department of Homeland Security has continued to defend its practices in response to such public reports and also in court. Gumbel, supra note 92.

\textsuperscript{116} See generally Miroff, supra note 9; Ainsley, supra note 9; Seville, supra note 9; Rizzo, supra note 10; Barajas, supra note 11; Gamboa, supra note 11; Shear, supra note 11; Taxin, supra note 92; Arnold, supra note 92; Gumbel, supra note 92; Voge, supra note 93.
Multiple studies have been conducted to determine the impact of foster care on child development. Children in foster care are a vulnerable population. They are often removed from their primary caregivers after suffering through a traumatic experience of neglect or abuse, which can have immediate and long-lasting effects on the child. Similarly, fleeing their home country and travelling to the United States is often a traumatic experience for migrant children, which is further exacerbated when they are then removed from their primary caregivers and placed in separate facilities. Most children in foster care, and most migrant children in detention facilities, express experiencing feelings of confusion, fear, apprehension of the unknown, loss, sadness, anxiety, and stress. Studies show that children who have already gone through a traumatic experience, that then go through the trauma of being separated from their primary caregivers, are susceptible to PTSD as well as other mental health disorders.

HHS’s motto is “to enhance and protect the health and well-being of all Americans,” but it does not appear to have the same high standards for its operation of

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117 See Bruskas, supra note 105 (discussing the mental and educational outcomes of placing children in foster care); Sankaran & Church, supra note 104. “[R]emoving children from the custody of their parents harms them emotionally, developmentally, and socially.” Id. Beth Troutman, Effects of Foster Care Placement on Young Children’s Mental Health: Risks and Opportunities (2011), (unpublished manuscript) (available at www.icmentalhealth.org); June M. Clauson, et al., Mental Health Problems of Children in Foster Care, 7 JOURNAL OF CHILD AND FAMILY STUDIES 283-96 (1998) (noting children in foster care are at heightened risk for mental health problems); Catherine R. Lawrence, et al., The Impact of Foster Care on Development, 18 DEVELOPMENT AND PSYCHOPATHOLOGY 57-76 (2006) (removing children from families, placing them foster care, has been associated with negative developmental consequences).

118 See generally Lawrence, supra note 105; Sankaran & Church, supra note 104; Bruskas, supra note 105; Troutman, supra note 105; Clauson, supra note 105.

119 See Lawrence, supra note 105, at 57-58, 71; Sankaran & Church, supra note 104, at 211-12; Bruskas, supra note 105, at 72-73; Clauson, supra note 105, at 284. See generally Troutman, supra note 105, at 1.

120 See generally Miroff, supra note 9; Ainsley, supra note 9; Seville, supra note 9; Rizzo, supra note 10; Barajas, supra note 11; Gamboa, supra note 11; Shear, supra note 11; Taxin, supra note 92; Arnold, supra note 92; Gumbel, supra note 92; Voge, supra note 105.

121 See Sankaran & Church, supra note 104, at 211. When state intervention goes so far as to remove a child from her parents’ custody, the intervention is not benign. Id. Removal upsets all aspects of that child’s life. Id. It strips the child of his connection to his birth parents, his siblings, his extended family, his friends, and often, his school. Id. It abruptly disrupts his attachment to his primary caregiver, and it thrusts the child into a foreign system: foster care. Id. In foster care, children often are placed in unfamiliar placements, with unfamiliar caretakers. Sankaran & Church supra note 104, at 211. The experience of removal and placement in foster care traumatizes children. Id. The physical separation of a child from their caretaker is often experienced as a significant rejection or loss. Id. See also Bruskas, supra note 105, at 70. See generally Lawrence, supra note 105; Troutman, supra note 105, at 1-3; Clauson, supra note 105, at 284; Taxin, supra note 92; Arnold, supra note 92; Gumbel, supra note 92; Voge, supra note 105.

122 See Lawrence, supra note 105, at 70. “Children with a history of maltreatment, such as neglect, who additionally endure the trauma of being separated from parents experience feelings, for example, of fear and confusion, are vulnerable and susceptible to posttraumatic stress disorders (PTSD).” Id. Some studies show that over half of children in foster care may experience at least one or more mental disorder.” Id. See also Troutman, supra note 105, at 1-2; Clauson, supra note 105, at 284. See generally Sankaran & Church, supra note 104; Bruskas, supra note 105.
the facilities used to house migrant children.123 Migrant families complain of forced starvation, dehydration, and sleep deprivation.124 Reporters who were able to infiltrate the facilities recount the horrors they witnessed, as well as the mortifying stories from the children that were housed there.125 The government was “uncomfortable” with the media’s characterization of the environment, but it was the government who created it.126

D. MENTAL HEALTH REPERCUSSIONS OF SEPARATING CHILDREN FROM THEIR PRIMARY CARE GIVERS

Immigrants come to the United States for many different reasons.127 Their journeys are often long, difficult, and traumatizing.128 After suffering through the traumatic experience of traveling to the United States, immigrants were then faced with a new trauma, being separated from their family members.129

123 See HHS.gov, About HHS, THE DEPT OF HEALTH AND HUMAN Services (last visited Sep. 6, 2019), https://www.hhs.gov/about/index.html (providing the mission statement of HHS). See generally Taxin, supra note 92; Arnold, supra note 92; Gumbel, supra note 92; Voge, supra note 93.
124 See Taxin, supra note 92. Children sat or lay on cold concrete floors. Id. They say they could not sleep with the lights on above them and guards kicking their feet. Id. They described the food they were given as either frozen or smelly. Id. See also Arnold, supra note 92. Children were given bottled water and chips for sustenance, and foil sheets intended as blankets. Id. A former youth worker described children running away, screaming, throwing things, and attempting suicide. Id. See also Gumbel, supra note 92. Migrants in certain facilities describe the water they were given as having a very strong chlorine smell and taste, upsetting their stomachs when they drank it so they simply stopped drinking it. Id. The facilities were described as ‘hieleras’ or ‘iceboxes’ due to the frigid temperatures. Id. Many individuals state they were verbally harassed by detention staff members. Id. See generally Voge, supra note 93.
125 See Arnold, supra note 92. The teens in the facilities began taking care of the younger children during their stay because they were without parents and too young to care for themselves. Id. A sixteen-year-old girl described one of the younger children as “so traumatized that she wasn’t speaking. She was just curled up in a little ball.” Id. See generally Taxin, supra note 92; Gumbel, supra note 92; Voge, supra note 93.
126 See Arnold, supra note 92; Palmer, supra note 109. The U.S. Border Patrol has objected to the media’s use of the word “cages” when describing the conditions of the detention center in South Texas used to separate migrant children from their parents, arguing “they are not being treated like animals.” Id. The agency admitted that it is not an “inaccurate” way to describe the metal fencing keeping people who attempted to illegally gain entry into the country from Mexico but feel “uncomfortable” with the association.” Id.
127 See generally Nuñez & Sanchez, supra note 6; Krista M. Perreira & India J. Ornelas, The Physical and Psychological Well-Being of Immigrant Children, 21 THE FUTURE OF CHILDREN 195, 197 (2011). In the pre-migration stage, families decide to leave their home country. Id. They often make this decision based on economic hardship, political unrest and persecution, or because of a desire to reunite with family already living in the United States. Id. See also Dr. Giselle Hass, Statement Regarding the Mental Health Needs of Women and Children Detained in Immigration Facilities (Jan. 22, 2015) (discussing traumatizing migration experiences and re-traumatizing events).
128 See Perreira & Ornelas, supra note 127, at 197. Children walk, drive, fly, or come by boat to the United States. Id. (explaining that migrant children often travel with a trusted family member or friend or are smuggled into the country). They may experience detainment, assault, or going without sufficient food for long periods of time while making their way to the United States. Id. See generally Nuñez & Sanchez, supra note 6; Voge, supra note 93.
129 See generally Miroff, supra note 9; Ainsley, supra note 9; Seville, supra note 9; Rizzo, supra note 10; Barajas, supra note 11; Gamboa, supra note 11; Shear, supra note 11; Taxin, supra note 92; Arnold, supra note 92; Gumbel, supra note 92; Voge, supra note 93.
As previously mentioned, many different factors affect a child’s development, from everyday activities like attending school, to irregular occurrences like placement in the foster care system. Children generally need a stable environment for healthy development, but not all children grow up in such an environment, and migrant children are even less likely to do so. Immigrant children are at a greater risk due to the challenges they face such as: migrating to the United States, experiencing racism, living with the constant threat of deportation, and most recently separation from their primary caregivers.

Studies have been conducted on the adverse psychological effects of separating children from their primary caregivers, and most have come to the same conclusion: children separated from their primary caregivers are at risk for physical and psychological health problems. A child’s separation from their primary caregiver, even for a few hours, can lead to adverse effects, and separation for longer periods has been shown to...

130 See generally Social-Emotional Development Domain, supra note 77 (defining social-emotional development); Cohen, supra note 77 (providing insight on how to help children with social-emotional development); Guidry, supra note 80 (defining ambiguous loss, describing its forms and how to address it); Betz & Thornrent, supra note 80 (providing an analysis of ambiguous loss and its effects on families); Bockneck, supra note 80 (discussing children’s stress and coping behaviors in response to ambiguous loss); Davis & Shlafer, supra note 96 (indicating adolescents with incarcerated parents are at an elevated risk for mental health problems); Cunningham & Baker, supra note 95 (discussing the impact of separation on children); Geller, supra note 96 (discussing parental incarceration in relation to the attachment theory and its effect on child development); Bruskas, supra note 105 (discussing the mental and educational outcomes of placing children in foster care); Sankaran & Church, supra note 104 (“removing children from the custody of their parents harms them emotionally, developmentally, and socially”); Troutman, supra note 105; Clauson, supra note 105 (noting children in foster care are at heightened risk for mental health problems); Lawrence, supra note 105 (removing children from families, placing them in foster care, has been associated with negative developmental consequences). But cf Murray, supra note 96 (predicting incarceration increases risk of antisocial behavior in children but not mental health problems).


132 See Gulbas, supra note 132; Perreira & Ornelas, supra note 127, at 197; Luis H. Zayas, et al., The Distress of Citizen-Children With Detained and Deported Parents, J. CHILD FAM. STUD. (2015) (“The constant dread of the possible arrest, detention, and deportation of their parents sets the context that places citizen-children at risk for negative psychological effects and disruption of their developmental trajectories”).

133 See generally Gulbas, supra note 132, at 5; Perreira & Ornelas, supra note 127, at 199; Zayas, supra note 133, at 1; Kimberly Howard, et al., Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families, 12 ATTACH HUM DEV. 5-26 (2011) (findings suggest that early separation has consequences for both children’s aggression and negativity); Suárez-Orozco, et al., I Felt Like My Heart Was Staying Behind: Psychological Implications of Family Separations & Reunifications for Immigrant Youths, 26 JOURNAL OF ADOLESCENT RESEARCH 222-57 (2011) (describing complexity of reunifications after separation and their psychological effects); Hois, supra note 110, at 1. See generally Shanta R. Dube, et al., Health-Related Outcomes of Adverse Childhood Experiences in Texas, 2002, 7 PREV. CHRONIC DIS. 1 (2010). People with childhood adversities are more likely to be socioeconomically disadvantaged, less educated, and have difficulties maintaining employment in adulthood compared to people with no adversities. Id.
have long-lasting consequences. These problems most often manifest as poor physical health, depression, anxiety, PTSD, and other mental health disorders. While strong parent-child relationships have been thought to alleviate some of these risks, maintaining such relationships while in immigration detention facilities appears to be very difficult. Children lose trust in their primary caregivers when separated, even though the primary caregivers often have no control over the separation.

Although the administration has since retreated from its family separation policy, and has begun the process of reunification amongst those separated, reunification presents new problems. Reunification is complex, the effects of separation will linger, and the process of mending these broken relationships is a slow one. Migrant children have been thoroughly traumatized from their experience. They are suffering adverse physical and psychological effects that will not recede simply because they have been

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134 See Howard, supra note 134, at 10. Early separation, even for brief periods of time, has consequences for both children’s aggression and negativity. Id. See also Hois, supra note 110, at 1. Separation and loss during the first year of life can cause regression in terms of dependency needs and undermine a child’s sense of trust and security. Id. Separation and loss during a toddler’s first year can disrupt the balance between age appropriate dependency and independency, child ego development, and regression of recently acquired skills. Id. at 2. Separation and loss during preschool years may cause the child to misunderstand the difference between good and bad and may lead them to believe they are so bad they are a lost cause. Id. Separation and loss in grade school years can lead to a depletion in energy for everyday activities. Id. The child will become aware of differences between themselves and classmates which may lead to behavioral problems. Hois, supra note 110, at 3. Separation and loss during adolescence often leads to fighting against authority figures and control issues. Id. at 4.

135 See Gulbas, supra note 132, at 5; Perreira & Ornelas, supra note 127, at 196; Zayas, supra note 133, at 1; Howard, supra note 134, at 10; Suárez-Orozco, supra note 133. See generally Dube, supra note 134, at 2; Thomas N. Crawford, et al., Early Maternal Separation and the Trajectory of Borderline Personality Disorder Symptoms, 21 DEVELOPMENT AND PSYCHOPATHOLOGY 1013-20 (2009) (“HLM models confirmed that extended separations from mother before age 5 were associated with BPD symptoms in adolescence and adulthood.”).

136 See Davis & Shlafer, supra note 96, at 124-25; Sacchetti, supra note 100; Gamboa, supra note 11; Rioran Seville, supra note 9. See generally Kandel & Davies, supra note 103; Amato, supra note 103; Zweig J, supra note 103; Geller, supra note 96.

137 See Hois, supra note 110, at 1; Suárez-Orozco, supra note 133, at 227.

138 Suárez-Orozco, supra note 133, at 224. Reunification of the entire family can often take many years due to financial complications, emotional detachment, and continued immigration regulations. Id. The separation and reunification processes involve difficult psychological experiences for the children involved. Id.

139 Suárez-Orozco, supra note 133, at 225. “During the reunification stage, children and youth often report ambivalence about leaving behind their beloved extended family, caretakers, and friends and are anxious about meeting members of the biological family who have become strangers over the prolonged separation. Id. Parents often report struggles with asserting their authority and frustration that their financial and emotional sacrifices are not fully appreciated by their children.” Id.

140 See generally Arnold, supra note 92 (describing the conditions in immigrant facilities at the border); Gumbel, supra note 92 (recounting migrant experiences in the detention facilities); Taxin, supra note 92; Voge, supra note 93 (noting traumatic experiences immigrants went through to get to U.S. and then deal with separations); Ms. L, 310 F.Supp.3d 1133; J.S.R. by and through J.S.G. v. Sessions, supra note 88.
reunited with their families.\textsuperscript{141} One of the most notable reunification stories to emerge shows the true detrimental effects of separating children from their primary caregivers at a young age.\textsuperscript{142} In a Washington Post article recounting the stories of traumatic separations and reunions amongst migrant families, Maria Sacchetti describes a reunification in which a toddler squirms away from his mother after three and a half months apart, seemingly not recognizing her.\textsuperscript{143} “‘My love,’ his mother says as the boy refuses to hug her back. ‘I’m your mommy.’ He crawls into a corner, and she dissolves into tears.”\textsuperscript{144}

IV. CONCLUSION

Separating children from their primary caregivers can have adverse psychological effects, especially at a young and impressionable age. While the administration has since terminated its zero-tolerance policy and made efforts to reunite separated families, the long-term effects of these separations are yet to be fully seen. As a country that prides itself on “liberty and justice for all,” our leaders should take actions consistent with such a statement. If they truly wish to make a change and make up for the hardships migrant families have suffered, the administration should do everything in their power to help alleviate the adverse effects their actions have caused and ensure nothing like this happens again. As a country, we should learn from the harm caused to these children who have been vilified and imprisoned by our government, much like Arab immigrants after 9/11 and the Japanese and Italian immigrants during World War II, that government actions against an entire group of people creates long term damage not only to those vilified and imprisoned but to our great country.

\textsuperscript{141} See generally Taxin, supra note 92; Arnold, supra note 92; Gumbel, supra note 92; Voge, supra note 93; Ms. L, 310 F.Supp.3d 1133; J.S.R. by and through J.S.G. v. Sessions, supra note 88.

\textsuperscript{142} See Sacchetti, supra note 100.

\textsuperscript{143} Id.

\textsuperscript{144} Id.