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**Family Separation and Family Detention: The Punitive
Construction of a False Binary along the U.S.-Mexico
Border**

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Abstract

In this paper, I analyze and contextualize the U.S. Department of Homeland Security's emphasis on family separation and family detention policies over the last five years. These two policy options have gained prominence despite their inherent tension with legal restrictions on child detention and the constitutional right to family unity. Through a historical review of the divided immigration detention system and a legal analysis of key policies, I argue that family separation and family detention have become normalized due to an overriding commitment to punitive strategies, rather than logistical constraints or fundamental incompatibilities. A system designed to punish migrant adults and paternalistically protect children has prevailed over a structural and relational understanding of child welfare, resulting in irreversible impacts on the dignity and unity of migrant families.

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Introduction

In June 2018, at the 75th Anniversary Celebration of the National Federation of Independent Business, U.S. President Donald Trump stated, “When you prosecute the parents for coming in illegally, which should happen, you have to take the children away. Now, we don’t have to prosecute them, but then we’re not prosecuting them for coming in illegally. That’s not good” (Wagner et al., 2018). This was at the height of the parent-child separation crisis, which ensued from Attorney General Jeff Sessions’ 2018 Zero Tolerance Policy ordering the criminal prosecution of “illegal” migrant adults, resulting in the separation of at least 2,600 children from their parents (*Ms. L v. ICE*, 2018). Following NGO and media scrutiny of this crisis, and the result of a lawsuit demanding prompt reunification of separated children and their parents, the Trump administration changed course. In 2019, the rhetoric was no longer about separating vulnerable children from parents described as “criminals,” but rather, on keeping families together indefinitely in family detention units.

How did we get to a political situation where the government has to choose between separating children from their parents or detaining them together in cells? This shift from family separation to family detention may appear to demonstrate two opposing strategies towards family migration. However, in the Trump administration’s rhetoric, family separation and family detention have become two sides of the same punitive coin and are both heavily embedded within logics of deterrence and parental punishment. The over-reliance on family separation and family detention, is not, however, a spontaneous manifestation of the Trump administration’s anti-immigrant sentiment. Rather, what I call the family separation/family detention binary is the result of evolving migration patterns, policies and perspectives; such as the expansion of the detention apparatus, the development of a separate protection system for unaccompanied minors, shifting demographics and dichotomous views of migrants as either vulnerable or criminal.

In this paper, I engage in a historical and textual analysis of key policies, including the *Flores* Settlement Agreement, the Trafficking Victims Protection Reauthorization Act (hereafter TVPRA), and more recently, the Trump administration’s Zero Tolerance Policy and Final Rule. Relying on the texts themselves, as well as NGO reporting, media coverage and court interpretations, I explore how policies that punish adults on one hand, and paternalistically protect children on the other, have helped shape the current family separation/family detention binary, at the expense of the best interest of the child and family unity.

This paper is organized as follows. First, I provide a summary of the literature relating to family unity and the best interest of the child. Next, I present an historical overview of the evolution of migration demographics and the consolidation of a securitized immigration enforcement apparatus. In the third section, I outline the development of a dichotomous detention system, one that ostensibly protects children and punishes adults. In the fourth section, I explore the normalization of the family separation/family detention binary in more recent U.S. policies, including the Zero Tolerance Policy and the proposed Final Rule. Finally, the Conclusion will discuss limitations of the project, policy recommendations and areas for future research.

Family Unity and the Best Interest of the Child

Central to the family separation and family detention discourses are principles of family unity and the best interest of the child. Family unity is a primary, legally protected pillar of U.S. society. The due process clauses of the 5th and 14th amendments have been interpreted by the judiciary in several foundational cases as providing a fundamental right to family integrity, one which prohibits the state from interfering in familial relationships “unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse” (*Croft v. Westmoreland County*, 1997: 3).

Family unity is also supported by international human rights conventions. The non-binding Universal Declaration of Human Rights (1948: Article 16) establishes: “the family is the natural and fundamental group unit of society and is entitled to protection by society and the [s]tate.” Similarly, the Convention on the Rights of the Child (1989: Article 9), of which the U.S. is the only non-signatory state, declares that “state parties shall ensure that a child shall not be separated from his or her parents against their will.” In addition, the International Covenant on Civil and Political Rights (1966: Article 17), of which the U.S. is a signatory state, prohibits any unlawful interference in family life.

Domestic and international norms tend to value the family unit as a private social institution protected from unjustifiable government intervention. This conception of the family has not escaped criticism, however. Feminist scholars such as Catherine MacKinnon and Martha Fineman have challenged how the patriarchal construct of the private family has subjected women to a position of oppression and domesticity, perpetuating familial violence and exclusion from professional and public spheres (MacKinnon, 1991; Fineman, 2005). Nonetheless, critical race and intersectional feminist scholars have argued that the privacy of the family is based on a “Western,” white, middle-class conception (Hill Collins, 2008; Roberts, 1999; Appell, 2007). Poor non-white families, they argue, do not have the luxury of this protected sphere, and are often more exposed to interactions with (and interventions from) the state.

The principle of the best interest of the child, on the other hand, is ambiguous and has taken different forms as it relates to divorce, abuse and neglect, and migration. Article 3 of the Convention on the Rights of the Child (1989) presents the principle of the best interest of the child and determines, “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Absent any concerns, the best interest of the child and family unity often overlap. Child welfare experts agree that continuous relationships with and proximity to primary caregivers are crucial to effective child development (Wall and Amadio, 1994). However, in cases of family disintegration (such as divorce), suspected abuse, or, as I argue here, immigration enforcement, the principles of the best interest of the child and family unity are presented in opposition.

In relation to child abuse and neglect, the legal standard for state intervention in the U.S. requires the government to prove, beyond a reasonable doubt, a compelling state interest for interference, such as

protecting the child's safety, which cannot be achieved through alternate means (Legere, 2005). However, there is considerable research in the fields of child welfare, law, and critical race theory, on how child protection agencies intervene on behalf of the best interest of the child predominantly in cases of poor and minority (mainly Black) families (White, 2006; Roberts, 1999; Legere, 2005; Berger, 2007). The disproportionate representation of Black children in the foster care system, for example, has been attributed in part to the socioeconomic inequities that result in greater participation in public, more surveilled spheres (public education, housing, welfare services), and racialized characterizations of deviance and irresponsibility (White, 2006; Appell, 2007; Roberts, 1993).

In this vein, Appell (2007: 765) argues that child welfare is a form of cultural intervention, as “the definitions of good mothers and fathers are constructed according to dominant cultural norms: married; White; Christian; Anglo, and, relatedly, English-speaking; and middle class.” Similarly, she (2009) argues that expectations about childhood vary across time and space, as “Western”¹ societies have constructed a notion of childhood dependency and vulnerability “as private, familial, and developmental” (Ibid: 704). This contrasts with alternate conceptions that prioritize child autonomy, including the participation of children in socioeconomic or political life, responsibility within the family and non-nuclear family structures.

Although childhood does entail certain universal vulnerabilities, treating this vulnerability in isolation risks decontextualizing children's intersectional identities and the conditions that shape their welfare (De Graive, 2015). Neoliberal approaches to the best interest of the child opt for punitive, rather than structural solutions, which equate child protection with parental blame. This, however, ignores the fact that children's welfare is inextricably tied to the welfare of their families, and overall communities. Dorothy Roberts explains how discussing family preservation as opposed to children's rights ignores the realities in which children live, as “policies that devalue Black families also hurt individual Black children because their societal status, welfare and identity are intricately tied to the status and welfare of the group” (Roberts, 1999: 77). Similarly, Guggenheim (2000) argues that conditions of neglect (the most common reason for foster care placements) are the product of social and political, rather than parental, failings, and thus that child welfare is a public health and societal problem that must be addressed structurally, rather than individually and punitively.

The principles of the best interest of the child and family unity also appear in the context of migration. In fact, the best interest of the child is cited in the Trafficking Victims Protection Reauthorization Act (2008) in order to protect children from detention in inadequate conditions, while also contributing to the punitive pursuit of supposed smugglers. On the other hand, family unity has recently been invoked by immigration enforcement agencies to argue for the detention of the whole family unit (DHS and HHS, 2019). As will be shown ahead, both family unity and the best interest of the child have been used selectively by immigration authorities² to achieve punitive aims.

Violations of these principles have become particularly apparent in recent years. Lori Nessel's (2008) work describes how an increasingly punitive approach to immigration enforcement has taken precedence over

discretionary decisions that prioritize family unity and child welfare. Similarly, Susan Terrio's (2014) overview of unaccompanied minors in the U.S. describes a system that, in certain circumstances, views child migrants as innocent victims in need of protection, but which in other contexts, treats them as functional adults, having to defend themselves in an adversarial court structure that ignores best interest considerations (Terrio, 2014). She argues that this duality represents the oppositional agendas of the immigration system: welfare and protection on one hand, and detention and punitive enforcement on the other (Ibid). This duality, I argue, is even more stark when comparing the treatment of children with that of adults in the family migration context.

My research draws on critiques of child welfare as an interventionist principle that separates the interests of children from the welfare of their families and communities, and over-assigns responsibility to Black and Brown individuals, rather than structural conditions. This is not to say that there are not cases of abuse in which it is essential for the safety and survival of a child to be separated from a caregiver. Nonetheless, my research adopts a holistic and relational understanding of child (and community) welfare, one that is connected to the social, economic, and political forces that shape it. I acknowledge that both childhood and family are social constructs. However, in this dissertation I accept that, although not natural nor universally defined, they have become meaningful categories of social practice (Brubaker and Cooper, 2000), that in the case of families, serve an important function through which inter-connected individuals gain access to rights, protection, and often, though not always, mutual belonging.

A History of Family Migration and Securitized Immigration Enforcement

In order to understand current approaches to family migration, it is important to recognize the historical and political developments preceding and steering them. Institutionalized family separation and long-term family detention policies are relatively new in the history of migration to the U.S. As migration to the country has evolved over the last several decades, both demographically and politically, so too have reactions to it. In this section, I will outline these developments, which serve as the foundation for the current dichotomous legal framework on detention.

A Brief History of Immigration Enforcement in the U.S.

Much has been written about the history of migration to the United States. As this analysis focuses on migration along the U.S. southern border, I am interested in the shift from largely adult, male, labor migration from Latin America (mainly Mexico) to the rise in family unit migration from Central America, as well as the development of a heavily enforced border.

These trajectories are, in fact, deeply intertwined. In *Beyond Smoke and Mirrors*, Massey et al. (2002) explain that, although migration from Mexico has existed since the U.S.'s conquest of formerly Mexican territory, the Mexico-U.S. border has not always existed as a "practical reality." Rather, "it was defined slowly but steadily

through a process of social construction” (Ibid: 25). For much of the first half of the 20th century, migration from Mexico was predominantly economically motivated and circular, with single, male migrants temporarily working in agriculture or other labor-intensive sectors, particularly during domestic labor shortages, such as military drafts (Ibid). These sectors came to rely on foreign labor, as social stigma associated with these industries grew, and wages remained stagnant (Ibid). Thus, Mexican migration during this time was not only legal, but was frequently encouraged by the public and private sectors, through recruitment initiatives such as the Bracero Program from 1942 to 1966 (Ibid).

In the 1980s, the situation began to change. As a result of growing anti-immigration sentiment and strategic political campaigns, immigration became a “high politics” issue (Andreas, 2009). Consequently, the U.S. visa system was re-structured and the number of visas available to Mexicans went from being unlimited in 1968, to only 20,000 per year by 1980 (Massey et al., 2002). The reduction in legal channels for migration following decades of recruitment caused an influx of undocumented movements (Ibid), increasingly through the use of smugglers (Andreas, 2009). During this time, the U.S.-Mexico border, which had previously been a largely symbolic delineation, became securitized.

Simultaneously, this period also saw the beginning of prolonged detention as a deterrence strategy, including for asylum seekers (Mountz and Loyd 2018). During this period, the Reagan administration began funding the construction of detention centers across the country in order to deter unwanted asylum seekers from the Caribbean and Central America (Ibid). In part to justify the construction of these detention complexes, and in response to the politicized concern over the rise in undocumented migration, enforcement operations along the U.S.-Mexico border expanded (Mountz and Loyd, 2018). In 1986, Congress passed the Immigration Reform and Control Act, which increased the immigration enforcement budget by 50% (Massey et al., 2002). Accordingly, between 1986 and 1996, “the Border Patrol went from a backwater agency with a budget smaller than that of many municipal police departments” (Ibid: 96) to a robust organization “with more officers authorized to carry a gun and make arrests than any other branch of the federal government” (Andreas, 2009: 90). An unexpected, and certainly, unintended, consequence of this heavier enforcement, was that it incentivized greater permanency and family migration rather than the high-risk circular and temporary labor movements that had previously been the norm (Massey et al., 2002).

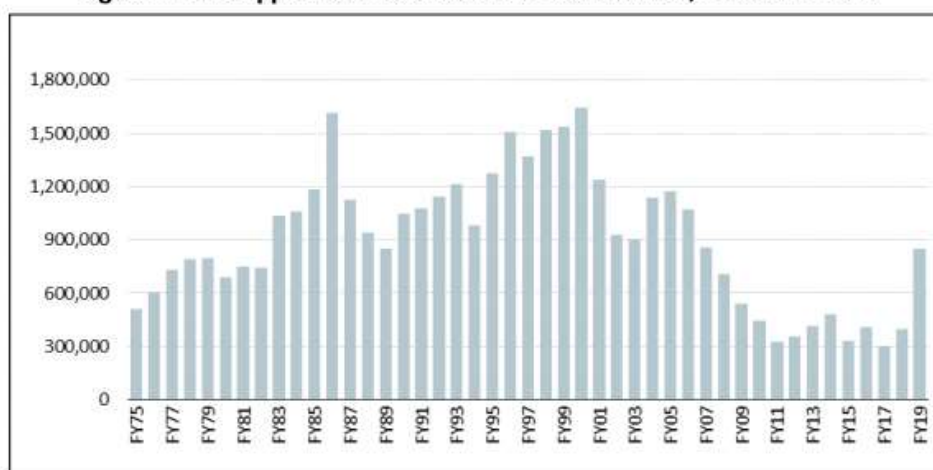
This bureaucratic growth increased throughout the 1990s and early 2000s. Beginning with the Illegal Immigration Reform and Responsibility Act (1996) and heightened in the post-9/11 environment with the passage of the Homeland Security Act (2002), terrorism, drug control and immigration enforcement became increasingly conflated under the guise of “national security,” resulting in the creation of more deportable offenses and a more consolidated border control apparatus. From 1990 to 2010, Border Patrol appropriations rose from \$1 billion to \$3 billion, and the number of Border Patrol agents increased from 4,000 in 1992 to over 16,000 in 2008 (Blanchard et al., 2011). The 2019 budget for Border Patrol was \$4.7 billion (DHS 2019a).

Ultimately, migration across the southern border during the 20th and early 21st centuries was largely composed of lone, adult migrant laborers in key economic sectors. For much of the 20th century, this was advantageous for U.S. economic interests, and thus, restrictions were minimal. However, as economic, foreign policy, and racist concerns became more salient in the 1980s (Andreas, 2009; Mountz and Loyd, 2018), strategic political actors began to bolster the state immigration enforcement apparatus, in part to appear “in control,” as well as to justify the expansion of a deterrence-motivated detention system. Today, this infrastructure along the U.S.-Mexico border is firmly, and perhaps irreversibly, entrenched.

Recent Migration Trends: Different Demographics, Same Punitive Infrastructure

The migration enforcement apparatus described above was created in response to specific migratory patterns and political dynamics in the 1980s and 1990s. Nonetheless, it has continued to expand until the present day, despite significant shifts in migration trends since then. Since reaching its peak in fiscal year 2000, the number of border apprehensions (used by Border Patrol to approximate the number of incoming undocumented migrants) has decreased to pre-1980s levels, as shown in Figure 1.

Figure 1. Total Apprehensions at the Southwest Border, FY1975-FY2019



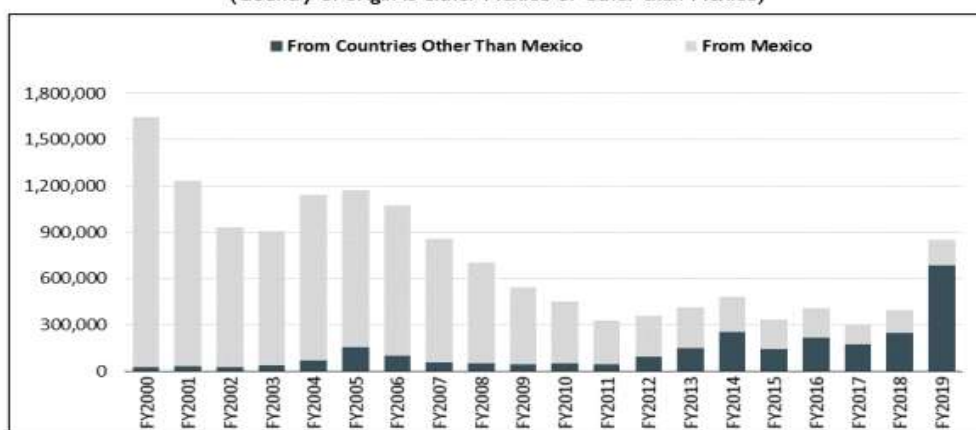
Source: U.S. Customs and Border Protection. FY1975-FY2018: “U.S. Border Patrol Fiscal Year Southwest Border Sector Apprehensions (FY 1960 - FY 2018),” <https://www.cbp.gov/newsroom/media-resources/stats>; FY2019: “Southwest Border Migration FY2019,” <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

Source: Singer and Kandel, 2019: 6

This decrease has also coincided with a shift in who is migrating. According to Villareal (2014), reduced U.S. demand for Mexican labor, and to a lesser extent, improvements in the Mexican economy and lowering fertility rates, as well as heavier border enforcement, have been correlated with a decrease in Mexican migration since the early 2000s. As the most sizable migrant group in the U.S., this has caused an overall reduction in migrant

numbers. By contrast, migration from Central American countries has been on the rise (Singer and Kandel, 2019). As shown in Figure 2, in fiscal year 2014, non-Mexican migration outnumbered Mexican migration for the first time in the 21st century, and has since continued to grow. Analysts have suggested that a combination of poverty, environmental degradation, persistent gang related violence, and state instability have accounted for this increase in Central American migration (Cheatham, 2019). Over one third of asylum cases filed in 2018 were from Central American migrants³ (Mossad, 2019).

Figure 2. Total Apprehensions at the Southwest Border, by Country of Origin, FY2000-FY2019
(Country of origin is either Mexico or other-than-Mexico)

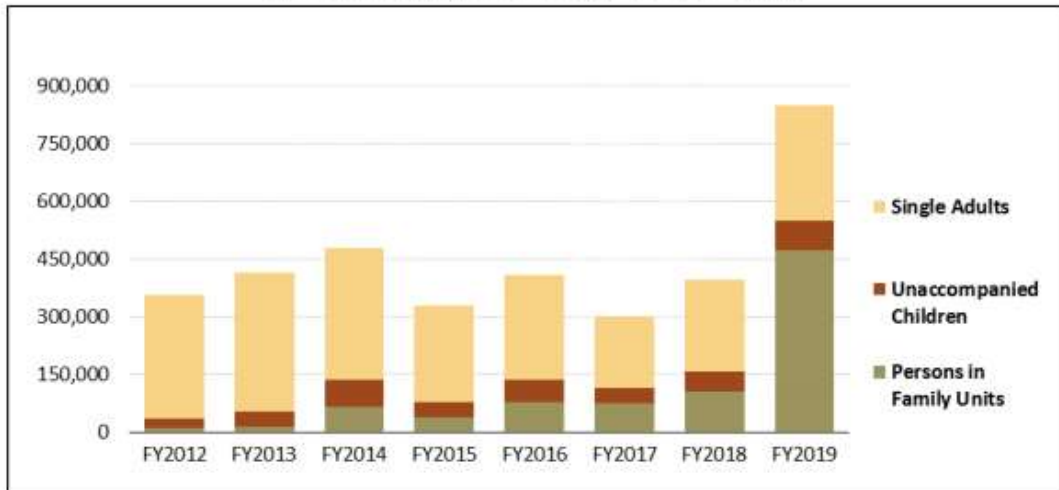


Source: U.S. Customs and Border Protection. FY2000-FY2018: "U.S. Border Patrol Apprehensions From Mexico and Other Than Mexico (FY 2000 - FY 2018)," <https://www.cbp.gov/newsroom/media-resources/stats>; FY2019: "U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019," <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019>. The FY2019 "From Countries Other than Mexico" figure was computed by summing apprehensions of Mexican national single adults, family units, and unaccompanied alien children, and subtracting that sum from total apprehensions.

Source: Singer and Kandel, 2019: 8

Unlike their Mexican counterparts, these flows of Central American migrants frequently travel in family units, as demonstrated by Figure 4. This is the result of both the increased prevalence of non-economic migration motivations (Singer and Kandel, 2019) and the trend towards permanent resettlement (Massey et al., 2002). With the risks posed by heavy border enforcement and conditions in their countries of origin, Central American migrants are opting for family resettlement, rather than temporary or circular movements. For the first time in U.S. Border Patrol history, in fiscal year 2019, family unit migration even outnumbered the migration of single adults, as shown in Figure 3.⁴ In addition, migration among unaccompanied minors seeking to reunify with family members already in the U.S. rose significantly between fiscal years 2013 and 2014, as demonstrated in Figure 5, and has since stabilized.

Figure 3. Total Apprehensions at the Southwest Border, by Demographic Category, FY2012-FY2019

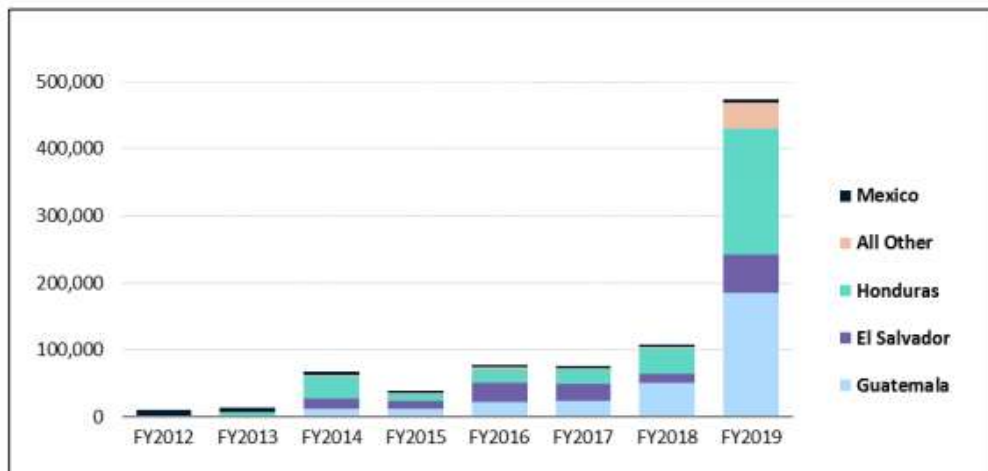


Source: U.S. Customs and Border Protection. FY2012-FY2016: "United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, Statement by Secretary Johnson on Southwest Border Security," <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>; FY2017-FY2019: "U.S. Border Patrol Southwest Border Apprehensions by Sector," <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions>.

Notes: Family unit apprehensions represent apprehended individuals in family units, not apprehended families.

Source: Singer and Kandel, 2019: 9

Figure 4. Family Unit Apprehensions at the Southwest Border, by Country of Origin, FY2012-FY2019

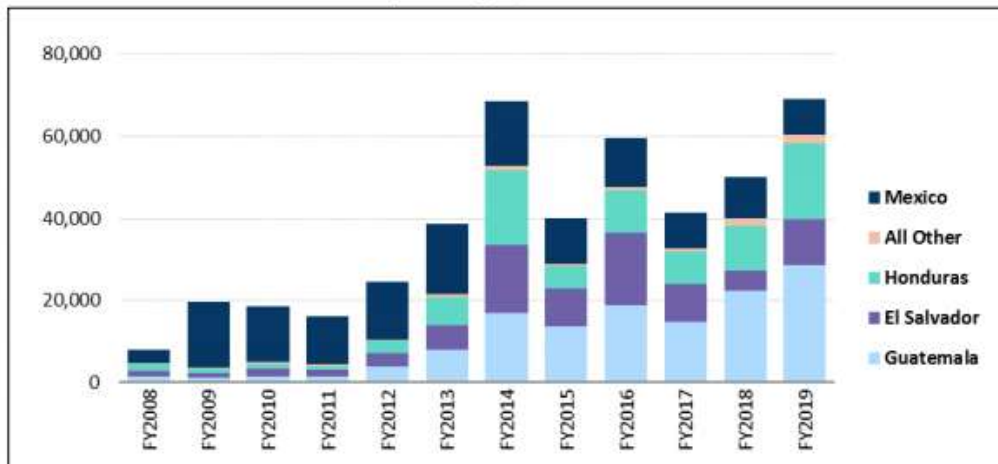


Source: U.S. Customs and Border Protection. FY2012-FY2016: "United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, Statement by Secretary Johnson on Southwest Border Security," <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>; FY2017-FY2019: "U.S. Border Patrol Southwest Border Apprehensions by Sector," <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions>.

Notes: Family unit apprehensions represent apprehended individuals in family units, not apprehended families.

Source: Singer and Kandel, 2019: 10

Figure 5. Unaccompanied Alien Children Apprehensions at the Southwest Border, by Country of Origin, FY2008-FY2019



Source: U.S. Customs and Border Protection. FY2008-FY2009: "Juvenile and Adult Apprehensions—Fiscal Year 2013;" FY2010-FY2018: "U.S. Border Patrol Total Monthly UAC Apprehensions by Sector," <https://www.cbp.gov/newsroom/media-resources>; FY2019: "U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019," <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions>.

Source: Singer and Kandel, 2019: 11

This data demonstrates that, in the last ten years, there have been significant changes in the magnitude, composition and motivations of southern migration to the U.S. The shift from primarily single, adult labor migrants to family units seeking humanitarian protection has not, however, brought about corresponding changes to border enforcement and the reliance on detention.

Rather, the average daily population of migrants held in U.S. detention has steadily increased, from around 10,000 in 1995 to 50,000 in 2018; the average length of stay in detention centers has gone from under 5 days in 1980 to 35 in 2018; and the federal budget on detention has risen from \$1.8 billion in 2010 to \$3.1 billion in 2018 (Kassie, 2019). Furthermore, immigration detention has also become heavily privatized, such that nearly 70% of detainees are in privately owned facilities, as opposed to 20% in county jails, and 10% in Immigration Customs Enforcement (ICE) centers (Ibid). Detention has proved profitable for private prison companies such as CoreCivic, which in 2018 received ¼ of its profits from ICE (Ibid). Thus, despite lowering numbers and changing demographics, the U.S. immigration response has continued to be defined by the heavy hand of detention.

The Widening Gap between Child and Adult Detention

As the infrastructure of U.S. immigration enforcement became consolidated, legislation on detention and immigration proceedings developed into two separate systems. One, created for detained youth, is primarily protective; and the other, directed towards adults, is punitive. Although family detention centers (known as

Family Residential Centers) have internal regulatory guidelines, there is no overarching legal framework for family unit migration.

In fact, the Immigration and Nationality Act (1952, most recently amended 2010) does not include specific protocols for migrant families undergoing removal proceedings (Peck and Harrington, 2018). In dealing with adults seeking admission into the U.S., it establishes a clear preference for detention, stating that “any alien subject to [an asylum proceeding]...shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed” (Immigration and Nationality Act 1952: 150). Separately, the TVPRA and the *Flores* Settlement Agreement establish that children should be “placed in the least restrictive setting appropriate to the minor’s age and special needs” (The Stipulated Settlement Agreement, 1997: 7). In this section, I will provide an overview of these legal frameworks and how they have contributed to the creation of two seemingly separate, although mutually reinforcing, immigration agendas.

The Protective Agenda: The System for Unaccompanied Minors

The *Flores* Settlement Agreement was a result of a class-action lawsuit on behalf of unaccompanied minors apprehended in adult detention facilities in the 1980s (*Flores v. Meese*, 1988). After nine years of litigation, the District Court Judge issued the Stipulated Settlement Agreement (1997) consent decree, binding both parties (the U.S. Immigration and Naturalization Service and the plaintiffs) to agreed-upon standards of care for detained minors, to be terminated upon publication of appropriate federal regulations codifying the provisions of the Agreement. As such, regulations have not been issued; *Flores* remains intact as the guiding framework for regulating the treatment of minors in immigration detention.

The Agreement mandates that once children are apprehended, they should be separated from unrelated adults and if possible, immediately released to a parent, other family member or designated adult in the U.S. who is able to provide for their wellbeing and ensure their appearance in immigration court (Ibid). If no such sponsor is available, the minors must be transferred to a state-licensed facility⁵ within 3-5 days, where they are to receive appropriate sanitary, medical, educational, legal, recreational, psychosocial and case management services (Ibid). In addition to this preference for release and family reunification, the Agreement also embraces non-detention, such that only those who pose a significant danger to themselves or others, are a flight risk, or have committed certain criminal offenses are to be held in facilities with strict security and supervision measures (Ibid). Ultimately, this Settlement Agreement was transformative, as it created for the first time a series of protections for unaccompanied minors,⁶ based on the notion that it is in the best interest of the child to be held in the community with family members rather than in detention facilities.

This launched a juridical, and conceptual, distinction between adults and unaccompanied migrant minors. Accompanied minors (i.e. family units) are notably not mentioned in the *Flores* Settlement Agreement. At the time of the Agreement, 70% of children apprehended by Border Patrol were unaccompanied minors (*Flores v.*

Lynch, 2016). This is to be expected, given that minors traveling at this time were likely to be older, male teenagers, moving to the U.S to work or to reunify with existing family members (Terrio, 2014).

The system overseeing unaccompanied minors grew as a result of several policies in the early 2000s, further separating the two immigration approaches. In 2002, following the 9/11 attacks and the declared “War on Terror,” the U.S. revamped its immigration system, replacing the Immigration and Naturalization Service (INS) of the Department of Justice with the Department of Homeland Security (DHS), with subdivisions including Immigration and Customs Enforcement (law enforcement agency responsible for enforcing the Immigration and Nationality Act), Customs and Border Patrol (responsible for protecting U.S. international borders) and US Citizenship and Immigration Services (overseeing legal residence and naturalization procedures), among other non-immigration bodies (Homeland Security Act, 2002).

In addition to establishing these new divisions, the Homeland Security Act also determined that the custody of unaccompanied minors would thereafter no longer be under the auspices of the Immigration and Naturalization Service, but rather, would fall to the Department of Health and Human Services’ Office of Refugee Resettlement (ORR), already responsible for coordinating the resettlement of refugee populations (Ibid). The separation of migrant custody into these two agencies exemplifies the dual agendas described by Terrio (2014). While the ORR agenda is based on child welfare, protection, and individualized assessment, the other, better-funded DHS approach⁷ focuses on security, enforcement, and punishment.

ORR’s role has grown over time, especially as a result of the passage of the TVPRA in 2008, which both codified certain aspects of the *Flores* Settlement Agreement and increased the protective prerogative of the agency. Part of a wider initiative to combat human trafficking globally, the TVPRA (2008) identifies unaccompanied minors as a vulnerable category at risk of smuggling and exploitation by dangerous trafficking networks. As such, this law bolstered protections for migrant minors’ welfare by establishing a firm 72-hour deadline for minors to be transferred from DHS detention centers to appropriate ORR programs (Ibid). While the TVPRA embraces the “best interest of the child” to not be detained in restrictive settings as per *Flores*, implicit in this policy is the notion that for children to be protected, adult migrants, including their family members, must be assessed as potential criminals.

In its purported effort to protect children from potentially threatening adults, the TVPRA increased the requirements for sponsor suitability, such that for children to be released from ORR to their sponsor (usually a family member, who will care for the child as they undergo court proceedings), the sponsor must be able to prove their identity, their relationship to the child, and undergo background checks and safety screenings (Ibid). For sponsors, many of whom are undocumented, registering in public databases may put them at risk.⁸ Furthermore, in contrast to previous INS protocol and the language of the Stipulated Settlement Agreement (1997), the implementation of these safety requirements has meant that even children with parents available to immediately take custody of them are designated “unaccompanied minors” and transferred to ORR programs. As a complex bureaucracy with extensive regulations, ORR’s process of assessing potential sponsors

can take months, with little documented evidence of safety improvements (Terrio, 2014). In 2019, the average length of stay in ORR custody was 66 days (ORR, 2020).

The TVPRA's purported focus on tackling increased smuggling ignores the much-researched phenomenon that it was greater U.S. border enforcement that increased demand for, and thus, the profitability of smuggling services that help migrants cross the border (Andreas, 2009). Moreover, simplistic anti-trafficking narratives present children as the exclusive victims of traffickers, rather than the structural economic conditions, violence, and restrictive border policies that make children, and their families, vulnerable to exploitation (Sharma, 2005). As will be explored below, this trafficking narrative is doubly advantageous for immigration authorities. On one hand, it expands the population served by ORR; and on the other, it builds on concomitant law-and-order responses that restrict the mobility of adult migrants.

The Punitive Agenda: The System for Adult Migrants

The 1990s and early 2000s saw an increase in punitive measures towards undocumented adult migrants. While officers previously had a great deal of discretion in implementing detention or using alternative supervision strategies, following the passage in 1996 of the Anti-terrorism and Effective Death Penalty Act (AEDPA) and the Immigration Reform and Immigrant Responsibility Act (IIRIRA), the situation changed. Together, these two acts expanded previous grounds for the mandatory detention of non-citizens for minor crimes, including presumed smuggling (Mountz and Loyd, 2018). The IIRIRA also introduced the practice of expedited removals, allowing for the immediate removal of inadmissible migrants⁹ (excluding those with a credible fear of return or asylum seekers), rather than the standard process of undergoing removal proceedings before an immigration judge (Human Rights Watch, 2014). Moreover, even those who do have a credible fear of return must be mandatorily detained until they are deemed to have passed the credible fear hearing, conducted by DHS officials trained in asylum law, rather than an external judge (Ibid). In all of these proceedings, the burden is on the migrant to prove, beyond a reasonable doubt, that they are entitled to release (IIRIRA, 1996).

Since the 1990s, there has also been a rise in the criminal prosecution of immigration offenses. Although unauthorized presence in the U.S. is considered a civil offense that initiates removal and, perhaps, a fine, the Immigration Nationality Act (1952) identifies illegal entry (entry outside designated ports of entry, making fraudulent statements, etc.) and illegal re-entry (entry following a previous removal) as criminal offenses. Historically, first time entrants with no criminal history were rarely prosecuted for these violations (American Immigration Council, 2020).

However, the IIRIRA represented a turning point at which migration became increasingly criminalized. In the early 2000s, Operation Streamline was implemented in designated border districts in Arizona and Texas to criminally prosecute undocumented entrants (Ibid). By 2011, immigration offenses, predominantly for misdemeanor illegal entry and felony re-entry, constituted the largest category of federal criminal prosecutions

(Chacón, 2017). The prosecution of migration offenses has a high rate of conviction, in part, because immigration judges do not operate under the separate judiciary branch, but rather, they are appointed (and can be removed) by the Executive branch's law enforcement agency, the Department of Justice. Conviction results in the mandatory detention of migrants in federal prison prior to removal and restrictions on future opportunities to legally migrate or seek asylum in the U.S. (American Immigration Council, 2020).

As adults are expected to be detained and removed, their accompanying children pose an inconvenience. In addition, in the context of increasingly pervasive anti-trafficking rhetoric, non-parent family members traveling with children are viewed with greater suspicion. This combination has led to a situation in which the “government affirmatively renders children ‘unaccompanied’ by physically separating and transferring children away from their accompanying family members” (Terrio, 2014: 3). According to interviews with DHS, prior to 2006, DHS officers tended to “keep individuals with close family ties together” (Haddal, 2006: 6). This is consistent with the language in *Flores*, which requires only the separation of unaccompanied minors from unrelated adults while in DHS custody (The Stipulated Settlement Agreement, 1997). However, due to trafficking concerns and fears of legal reprisal, DHS began using a more limited definition of the family unit,¹⁰ based on proof of parental ties or legal guardianship (Haddal, 2006).

The separation of children from their family members, including grandparents, older siblings, and other potential primary caretakers in the supposed best interest of the child (KIND et al., 2017), reveals the intersection, and feedback loop, between a protective agenda seeking to guard children from potentially threatening adults, and an enforcement one, seeking to prosecute adults without discretionary considerations. Both agendas rely on a conception of migrant adults as dangerous, and both undermine the actual welfare of the children at hand. In addition, these separations also demonstrate a tendency to view the family unit through a “Western” perspective, ignoring alternative, non-normative conceptions of the nuclear family, most notably the frequency of non-parent caretakers, especially in high emigration or conflict environments (Terrio, 2014). Together, rigid preferences for detention and the “Western” definition of the “family,” have deepened the interventionist and paternalistic treatment of migrant children. Simultaneously, by only affording high standards of care and a preference for release to those protected by ORR's custody, the due process of adult migrants can be steadily undermined. Through this “divide-and-conquer” strategy, both agencies are able to complete their assigned functions, while families are deprived of protection and integrity.

The Construction of the Family Separation/Family Detention Binary

The growth in family migration over the last five years has occurred in a context, as described above, largely unprepared to manage it. Beginning with the Obama administration, the U.S. immigration response has largely centered on family detention, leading to repeated court battles with the District Court responsible for overseeing the *Flores* Settlement Agreement. In one of these court decisions, *Flores* was reinterpreted to apply to family settings, creating higher standards of care and limits on the duration of family detention. With

prolonged family detention off the table, the Trump administration turned to a policy of family separations, arguing that this was the only way to comply with *Flores*, while still implementing its immigration enforcement responsibilities. In this chapter, I provide an overview of how, within a dichotomous immigration system, the emphasis on a punitive enforcement agenda has forced family migration policies into a false binary of family separation and family detention.

Escalated Family Detentions and Flores' Response

Prior to 2001, as a result of limited appropriate space, families who were apprehended together were often released if there were no criminal or safety concerns (*Flores v. Lynch*, 2016). However, following 9/11 and the securitization of immigration enforcement, family detention became more widespread. In 2007, a lawsuit on behalf of children detained with their parents at the Hutto Family Residential Center was brought against the government in a Texas District Court, arguing that the substandard conditions violated the children's rights to be held in the least restrictive setting under the *Flores* Settlement Agreement (*Bunikyte v. Chertoff*, 2007). A psychological expert affirmed that "there [is] no question but that Hutto is a correctional facility" both in appearance and operation (Ibid: 15). As a result, upon taking office, the Obama administration stopped holding families at Hutto (Martin, 2012), until the increase in family unit migration in 2014, which changed their approach.

As the 2014 surge in family migration overlapped with an unprecedented rise in unaccompanied minors (Singer and Kandel, 2019), whom were unequivocally protected by the *Flores* Settlement Agreement and the TVPRA, family detention was reinstated in an effort to "control" inflows by processing and deporting families expeditiously. As a result, a new lawsuit arose as detained plaintiffs argued that ICE had a "no release policy" of family units in order to deter future migrants from making the journey (*RILR v. Johnson*, 2015). In *RILR v. Johnson* (2015), the District Court concluded that deterrence could not be used as a factor in detention decisions. Although ICE announced later that year that it would no longer let its deterrence strategy influence its detention practices, family detention persisted (ACLU, 2015). Concerns over the standards of care in family detention facilities invoked renewed attention on the applicability of *Flores* to minors in family units.

In 2015, Judge Gee of the California District Court, which is responsible for overseeing the *Flores* decision, responded to the dispute. In her decision, Judge Gee concluded that, although *Flores* did not foresee the current use of family detention because most minors at the time were unaccompanied, the language of the agreement is sufficiently general in demonstrating purview over "all minors who are detained in the legal custody of the INS" (Settlement Agreement, 1997 in *Flores v. Johnson*, 2015: 4). To that end, she affirmed that there is no legal or moral justification for arbitrarily excluding accompanied minors from receiving appropriate standards of care while in custody, being held in the least restrictive setting, and benefitting from a preference for release (Ibid). She determined that, as Family Residential Centers do not meet the requirements for safe and sanitary, non-secure, state-licensed and externally monitored centers of care, children should not be held there

indefinitely (Ibid). As such, she ruled that ICE has up to 20 days to detain families together in ICE facilities, before determining whether there are concerns requiring prosecution of the adults (and thus, separation and transfer to ORR for the children), or whether the family unit can be released. She went on to propose that as *Flores* established preferential custodial release of minors to their parents, ICE was required to release minors *along* with their accompanying parents, barring any dangers or flight risks (Ibid).

The U.S. government appealed Judge Gee's decision, and in 2016, the 9th Circuit Court in *Flores v. Lynch* upheld the District Court's decision that the standards in *Flores*, and its preference for release, apply to accompanied minors. This instituted a 20-day limit on family unit detention. However, the Court remanded the extension to parental release rights, arguing that *Flores* does not provide any affirmative rights to parents, and that the burden of proof is on the adult migrant to determine their eligibility for release (*Flores v. Lynch*, 2016). This decision marked an important step in combatting inadequate standards of care and the indefinite detention of all children. Nonetheless, by not extending rights to accompanying parents, it further distinguished the needs of children as separate from those of the family unit, which in most other contexts, is seen as a crucial part of a child's safety and welfare. Thus, in evaluating the child's best interest to not be detained, the child's simultaneous interest to be in close proximity to their family was largely ignored. This set the stage for a system in which accompanied minors could be redirected into the protective framework of ORR, while adults could be detained and removed.

Divide and Conquer: The Zero Tolerance Policy and Child Separations

Almost immediately after Trump took office in 2017, following a campaign heavy with anti-immigrant sentiment, top cabinet officials were already discussing the possibility of parent-child separations. Then Secretary of Homeland Security John Kelly stated, "I'm considering [parent-child separations], in order to deter more movement along this terribly dangerous network ... [the children] will be well cared for as we deal with their parents" (Diaz, 2017). This approach aptly demonstrates a compartmentalized "divide-and-conquer" immigration strategy—remove children to child welfare providers and clamp down on the adults separately.

Thus, it was not surprising that in May 2018, Attorney General Jeff Sessions formally announced that the Department of Homeland Security would be implementing a Zero Tolerance Policy, in which all undocumented adult entrants would be subjected to immediate criminal prosecution and mandatory detention along the southwest border (Office of the Attorney General, 2018). In the wake of the court decision prohibiting indefinite family detention, separation from the *Flores*-protected children was deemed necessary in order to prosecute undocumented parents. Nonetheless, parent-child separations were not an unintended consequence of this policy; they were integral to it as a deterrence strategy. As Trump said in an interview, "if they feel there will be separation, they won't come" (Shepardson, 2018).

Nonetheless, the language of the Zero Tolerance Policy strategically avoids this subject, and instead focused on the threat “criminal” migrants pose to the rule of law and child welfare (Office of the Attorney General, 2018). In the Attorney General’s presentation of the policy, he said: “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” (Department of Justice, 2018). Although there were only 191 instances of child smuggling in 2018 (0.61% of apprehensions) (Bump, 2019), the threat of smuggling helped justify the separations that, for the first time, were implemented as standard practice for all undocumented parent entrants nation-wide (KIND et al, 2017).

This policy had immediate effects. Advocates estimate that over 2,648 children¹¹ were separated from their parents over the course of only three months (U.S. House Committee on Oversight and Reform, 2019). This does not include those children who were separated from non-parent primary caregivers (Lind, 2019). Furthermore, those separated also included a high number of tender aged children, including 18 children under the age of 2, and 480 under the age of 7 (U.S. House Committee on Oversight and Reform, 2019). The separated children were transferred to ORR facilities without a system in place to track, enable communication between, or reunite parents and children after the completion of sentences, whereas personal property is systematically tracked (*Ms. L v. ICE*, 2018). Accustomed to releasing unaccompanied children to potential sponsors in the U.S., ORR programs were widely unequipped to make arrangements for children whose only potential caregiver was detained in ICE custody (*Ms. L v. ICE*, 2018).

As a result of the uncertainty of custody arrangements, and the lack of coordination between DHS and ORR, the length of stay of these children was disproportionately high. Separated children were held in ORR care for an average of 90 days, as opposed to 60 days among unaccompanied minors (U.S. House Committee on Oversight and Reform, 2019). The separations also induced parents to revoke their asylum applications, favoring deportation over the indefinite separation from their children (Isaacson et al., 2018). ICE and ORR inadequately coordinated the joint deportation of parents and children together. According to ICE, of the parents of the 2,648 separated children, 545 were deported back to their home countries, and at least 158 of them were deported without their children (*ibid*).

In response to public pressure and criticism, including 17 states who filed complaints against the federal government, the Trump administration reversed this policy on 20 June 2018, announcing that families would be held together during proceedings (*Ms. L v. ICE*, 2018). However, by this time, several plaintiffs had already filed suit against ICE in *Ms. L v. ICE* (2018). On 26 June 2018, the California District Court issued a class-wide injunction in favor of all parents in DHS custody who had been or would be unfairly separated from their children (*ibid*). In this decision, the District Judge concluded that separations violated the due process clause of the 5th amendment of the Constitution, protecting family integrity (*ibid*). As the separations were instituted without demonstrable evidence of parental unfitness or any dangers to the child, the Judge concluded that they were unjustified.

The Judge did not discuss the legality of the Zero Tolerance Policy's deterrence-motivated, indiscriminate prosecution of adult entrants, and the implications of this for fair asylum proceedings. Rather, she stated: "the Government would remain free to enforce its criminal and immigration laws and to exercise its discretion in matters of release and detention consistent with law" (*Ms. L v. ICE*, 2018: 20). Moreover, the decision only briefly cites *Flores*, without making explicit reference to the standards of and limitations on detention.

Ultimately, as the decision focused specifically on the constitutionality of parent-child separations, the Judge largely avoided the wider context in which separations became the favored option to achieve punitive enforcement goals. The plaintiffs even suggested placement in the three ICE-operated Family Residential Centers as reasonable alternatives to the practice of separation (*Ibid*). Without elaborating on the legal and ethical implications of prosecuting immigration offenses as criminal ones and disincentivizing the discretionary release of adults, the decision inevitably presented indefinite family detention as the alternative to separations within the existing punitive status quo.

In the short term, however, the Judge's decision was crucial. It called for the immediate reunification of those who had already been separated and prohibited future separations "absent a finding the parent is unfit or presents a danger to the child" (*Ibid*). This caveat, however, provided ample room for ICE to use its discretion to continue separations. In fact, advocacy groups have documented continued separations following the *Ms. L* decision, such that between 28 June 2018 and 29 June 2019, more than 900 children continued to be separated by ICE, including babies and toddlers (*Ms. L v. ICE*, 2020). Interpreting the "danger to the child" conception loosely, ICE used any criminal history, no matter how minor, or any appearance of potential parental irresponsibility, to exclude parents from the *Ms. L* class (*Ibid*). The ACLU found that many of these separations were due to traffic violations, minor drug convictions, fraud, and other offenses that presented no indication of dangers to the child (*Ibid*). Even more concerning are instances where ICE preemptively determined that a parent without any criminal record was unfit to care for the child. For example, the ACLU documented a case in which a child was separated from her parent due to suspected neglect because the child merely appeared "undernourished" (*Ibid*).

This abuse of appropriate discretion demonstrates not only a commitment to pursuing a "divide-and-conquer" prosecution strategy encouraged by the Zero Tolerance Policy, but also a heightened scrutiny of "parental fitness" with regards to migrants. In practice, the burden of proof is rarely on the officer to demonstrate the dangers posed by the parent as required by standard child welfare laws. Rather, it is on the migrant to counter existing biases about their irresponsibility, and prove their legitimacy as an undocumented parent.

Despite the efforts of advocates, in January 2020 the District Court from the *Ms. L* case upheld the government's discretionary use of separations. The Judge concluded that typical child welfare standards do not apply, as national security and immigration concerns required additional factors to be considered (*Ms. L v. ICE*, 2020). Separations could be justified on the basis of evidence beyond parental unfitness or dangers posed to the child, to encompass criminal history (of any degree), dubious parentage, reentry charges, gang affiliation

and communicable diseases (Ibid). This decision confirms that for migrant families, the standards for separation and the sanctity of unity are measured differently.

Like the *Flores v. Lynch* ruling, the *Ms. L* decision provided crucial protections, while still neglecting the broader context in which adult migrants are criminalized and the multiplicity of “best interests” a child might have. The discretionary freedom given to DHS Officers, in a context that views undocumented migrants as inherently criminal, allows for unjustified separations to continue to take place, despite the formal end to the Zero Tolerance Policy. Furthermore, by focusing on the right to family unity, while ignoring the still undeniable interest of children (and their families) to not be detained in prison-like facilities, this decision opened up the possibility of ICE returning to prolonged detention.

The Final Rule and Indefinite Family Detention

In the aftermath of the parent-child separation crisis and concomitant negative press, the government swiftly changed its focus to family unity, although, as mentioned above, children continued to be separated under discretionary circumstances. The Trump administration’s rhetoric returned to family detention, staying consistent with their punitive agenda, while demonstrably adhering to the constitutionally protected and socially accepted right to family unity.

To that end, in August 2019, DHS and HHS announced regulations, known as the Final Rule that would finally end the terms of the *Flores* Settlement Agreement and the District Court’s power to preside over its compliance. According to DHS Secretary Kevin McAleelan, this Final Rule would allow DHS to “hold families together and improve the integrity of the immigration system” (DHS, 2019b). The Rule, according to its text, sought to “codify the purposes of the FSA in regulations, namely, to establish uniform standards for the custody and care of alien juveniles during their immigration proceedings and to ensure they are treated with dignity and respect” (DHS and HHS, 2019: 44393). Nonetheless, it deviated from *Flores*’ stipulations in several respects.

Most notably, it challenged the preference for release provision, applied to both unaccompanied and accompanied minors as of 2015, in favor of expanded family detention. The document states (Ibid: 44394):

The application of the FSA’s requirement for ‘state’ licensing to accompanied minors has effectively required DHS to release minors and—to avoid family separation—their parents from detention in a non-state licensed facility, even if the parent/legal guardian and child could and would otherwise continue to be detained together during their immigration proceedings...

In order to avoid release, as a result of the 20-day limit on the detention of accompanied minors, the Final Rule states that ICE Family Residential Centers would be considered state-licensed (Ibid). This, in effect, allows for the indefinite detention of families until the end of court proceedings or their removal. Although DHS denied that this Rule would necessarily result in longer periods of detention or require additional Family

Residential Centers to be built to meet increased demand (Ibid), immigrant advocacy groups argued that with longer lengths of stay, the Rule would inevitably result in an expansion in the family detention apparatus, with lower estimates suggesting a \$2 billion increase in expenditure over a decade (Wolgin, 2018).

The Rule was swiftly challenged. In September 2019, Judge Gee concluded that the government's proposal breached the terms of the Settlement Agreement, and as such, would not be able to terminate and replace it (*Flores v. Barr*, 2019). Specifically, the Judge pointed to the Final Rule's violation of minors' protection against indefinite placement in non-licensed facilities (Ibid). As a result of this decision, DHS was unable to implement its Final Rule by October 2019 as intended. Instead, as of July 2020, *Flores* still stands as the primary legal guideline on child detention. However, three Family Residential Centers continue to operate.

Family migration policies during the last five years have thus alternated between two options—indefinite family detention, and parent-child separations (and back to family detention) as a result of perpetual punitive aims in a dichotomous immigration context that separates the treatment of children and adults. Both policies, according to rights advocates, are flawed and have thus been subject to criticism. *Flores v. Lynch* protected the best interest of all children to not be detained, while the *Ms. L* decision reaffirmed the constitutional protection of family unity for migrants. However, neither decision considered the underlying contextual factors that bound immigration authorities to this flawed policy binary. Furthermore, by focusing on either the right to family unity or the best interest of the child to not be detained, these court decisions neglected to acknowledge that both of these principles are essential, composite elements of child welfare. Ultimately, it is the punitive focus of immigration policies that has made the best interest of the child and family unity appear incompatible.

There are, in fact, additional policy options beyond the family separation/family detention binary. However, these are in tension with the assumptions of migrant criminality and the dominant punitive approach to undocumented migration. For example, between January 2016 and June 2017, ICE funded a family case management program, based on an “alternative to detention model” (Women's Refugee Commission, 2019). The program, approved during the Obama administration, operated in five cities across the country to provide 2,000 participants with direct case management oversight, information on legal services and community resources (Ibid). The program not only cost \$38 per family per day, as opposed to the \$798 per family per day cost of detention, but also had a 99.4% appearance rate in ICE check in appointments and 99.3% compliance with court hearings (Ibid). Nonetheless, in the spring of 2017, ICE decided to terminate the program to focus on more punitive approaches, including the separation policy (Ibid). Ignoring the aforementioned results, ICE has argued that the program was too expensive (Ibid) and that “family units who are released often abscond” (DHS and HHS, 2019).

Similarly, detention reformers have also promoted the shelter model. Shelters such as Casa Marianella in Texas, for example, provide housing and facilitate access to local services (Martin, 2012), without enforcing the physical restrictions and constant supervision of detention centers. Nonetheless, release through either of these alternatives to detention would mean acknowledging the responsibility and equal human rights of migrant

families, and challenging the expense and power of the detention apparatus fortified, and privatized, over decades. Relying instead on punitive responses, despite being more expensive and eliciting public criticism, emphasizes the irresponsibility and criminality that makes detention necessary. Punishment, rather than logistical or existential constraints, has forced family migration policies into a false binary.

Conclusion

The binary approach to family migration by way of family separations and family detention did not come out of nowhere. Rather, it resulted from a staunch commitment to maintaining punitive migration policies, rather than consistently adopting the domestic and international norm of family unity and a holistic understanding of the best interest of the child. This punitive approach, however, is not inevitable.

A historical overview reveals that the U.S. did not always rely on mandatory detention and the criminal prosecution of migration-related offenses. For much of its history, the U.S. permitted, and even encouraged, labor migration across the southern border. As aforementioned, it was not until the 1980s that the U.S. began to consistently adopt detention as a deterrence strategy (Mountz and Loyd, 2018). Furthermore, limitations on this system of detention have been enacted. The 1997 *Flores* Settlement Agreement provided a unique opportunity to protect children from this increasingly punitive immigration apparatus, and created standards of care, which, in the spirit of the best interest of the child, prioritize non-detention and psychosocial support.

U.S. immigration authorities have been hesitant to apply such protections to adults. Moreover, although family migration has increased over the past decade, immigration laws and enforcement procedures have not adapted to provide comprehensive protections for family units. Instead, *Flores* and the anti-trafficking rhetoric of the TVPRA have protected children, at the expense of their adult family members. There are alternative policy approaches available, which would allow the U.S. immigration system to prioritize family unity, the best interest of the child, and human rights norms.

For example, rather than its current, expansive role, the Office of Refugee Resettlement should serve only those children who arrive to the U.S. border unaccompanied, or for whom there are well-founded concerns about dangers presented by their accompanying adult. For all other family units, including non-parent caregivers with proper documentation, there should be a comprehensive framework to ensure they undergo their administrative migration proceedings together, under appropriate, non-restrictive settings. This may take various forms, including release into the community under family case management programs (Women's Refugee Commission, 2019b) or transfer to non-governmental and non-carceral family shelters (Martin, 2012). In accordance with international guidance (Working Group on Arbitrary Detention, 2018), detention should be used as a last resort, especially for families seeking humanitarian protections.

Furthermore, any reform regarding the treatment of family units must also address migration overall. Policies that de-incarcerate family units without addressing the overall criminalization of migrant adults, risk creating

protection gaps that may put children at risk of smuggling. Increasing legal channels for labor migration, expanding the quota and criteria for asylum applications, and reversing the widespread implementation of mandatory detention and criminal prosecution of administrative migration offenses are all crucial for reforming the immigration system.

This project has several limitations. With a focus on macro-level legal, historical, and rhetorical analysis, I did not examine the lived experiences of migrants, nor did I explore the well-documented traumatic impacts (Lobel, 2020; Schweitzer et al., 2006) of separation and detention policies (Lobel, 2020; Schweitzer et al., 2006). Furthermore, without widespread data acquisition, none of the claims made in this paper can be presumed to reflect causal conclusions. Rather, the legal, historical, and rhetorical processes presented seek to contextualize recent policy dynamics and encourage a deeper analysis of choices presented as inevitable. Furthermore, as a segment of a larger dissertation, this paper does not include a deeper analysis of the underlying political and economic aims of punitive immigration policies.

At a time when movements across the country are seeking to defund racist internal policing and punitive enforcement systems (Levin, 2020), academics and policymakers must challenge ingrained assumptions about the necessity of detention and the increasing criminalization of migration. This requires critiquing the punitive core of a system that separates the interests of children from that of their adult relatives and devalues both the migrant family, and the individuals that constitute it.

Endnotes

¹ I adopt “Western,” as used by Appell (2009), to refer to characteristically U.S./European conceptions of dependent childhood and the nuclear family born from Enlightenment philosophy.

² When discussing immigration authorities, the immigration system, or the immigration arms of specific administrations, I am referring to a variety of state immigration bodies and actors, which devise and/or implement U.S. immigration policies. This includes, but is not limited to, Immigration and Customs Enforcement (ICE), Customs Border Patrol (CBP), the U.S. Attorney General, the Secretary of the Department of Homeland Security and executive policy advisors on immigration.

³ Drawing on the mixed migration literature (Van Hear et al., 2009; Castles, 2007), I choose the broader term “migrant,” rather than asylum seeker, to encompass a multiplicity of mixed and intersecting motivations and decisions over the course of the migration process.

⁴ DHS only began publishing statistics by demographic category (family unit, single adults, unaccompanied minors) in 2012.

⁵ State-licensed facilities are authorized by appropriate child welfare agencies to care for dependent children (The Stipulated Settlement Agreement, 1997).

⁶ The term “unaccompanied minor” is defined as any person under the age of 18, without legal status in the U.S., who does not have a parent or legal guardian in the U.S. who can provide for the minor’s care or physical custody at that time (ORR, 2019).

⁷ In FY 2019, 1.149 billion USD were allotted to the Unaccompanied Minors Program within the Office of Refugee Resettlement (HHS, 2019). On the other hand, the FY 2019 budget for the Immigration and Customs Enforcement branch was 8.816 billion USD (DHS, 2019a). This does not take into account the budget for Customs and Border Patrol responsible for patrolling the U.S. border and maintaining and constructing detention facilities.

⁸ A 2019 Washington Post article outlined how ICE used information registered about rejected ORR sponsors for immigration arrests. See more [here](#).

⁹ There are numerous grounds for “inadmissibility” in the Immigration and Naturalization Act, including various criminal offenses, smuggling, re-entry following a deportation or outstanding order of removal, contagious health condition, likelihood of becoming a public charge, labor migrants deemed unnecessary, etc. See more [here](#).

¹⁰ Internal DHS Regulations define the family unit as a group that includes one or more non-US citizen minors and at least one of their parents/legal guardians (DHS, 2014).

¹¹ Some numbers estimate up to 4,200 children separated from their parents, taking into account those children already released from ORR prior to the *Ms. L* decision (ACLU, 2020).

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