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AMILY SEPARATION AT THE UNITED STATES SOUTHERN BORDER UNDER THE TRUMPADMINISTRATION

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**FAMILY SEPARATION AT THE UNITED STATES SOUTHERN BORDER UNDER  
THE TRUMP ADMINISTRATION**

**By**

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**A capstone project submitted for Graduation with University Honors.**

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**University Honors**

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## ABSTRACT

Family Separation occurred during the 21st century under the Trump Administration's 2018 Zero-Tolerance Policy. Upon arrival to the southern border, families were separated by the Department of Homeland Security. Adults were placed in federal criminal facilities where children are not allowed. Children were separated from their families or guardianships left unaccompanied and placed in detention centers leaving the children with mental illness and psychological lifetime issues. This article introduces the history of family separation in the United States, international family separation policies, and a critical case *Mrs. L vs. Immigration Customs Enforcement (ICE)* to answer the following questions: *What are the consequences of the 2018 Zero-Tolerance policy? What is the future of family separation policies in the United States?* Furthermore, the Trump Administration and various actors have not been held accountable for their actions committed against these families, and after 5 years, many families have not been unified with their children. It's imperative to provide these families with a form of reparations to obtain true justice for the actions committed against them by the United States Government.

## ACKNOWLEDGMENT

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## INTRODUCTION

Between January 20, 2017, and January 20, 2021, over 2000 immigrant families were separated at the United States Southern Border by Immigration Customs Enforcement (ICE). Many of these immigrant families came from the Northern Triangle countries of El Salvador, Honduras, and Guatemala seeking refuge from turmoil in their home countries. The 2018 Zero Tolerance Policy enactment led to lifetime consequences for the U.S. government and the children's impact with mental and separation issues. The U.S. government received tremendous backlash for violating international humanitarian laws. In 2018, the U.S. state's branches of government reconciled with the consequences of the policy, looking at different policy measures to reunify the separated families. A class-action case, *Ms. L v. Immigration Customs Enforcement (ICE)*, is currently addressing the issue of immigrant discrimination committed after implementing the Zero-tolerance policy. The alienage classification allows the courts to decide the future of immigration policy, precisely the outcome of the children involved and future asylum reform. The Zero-Tolerance policy not only broke families apart but tarnished the lives of a very vulnerable population, immigrant children.

## **BACKGROUND: HISTORY OF FAMILY SEPARATION IN AMERICA**

The United States has a history of family separation, and unfortunately, history has repeated itself in the 21st century. Alongside immigrants coming into the United States, Native Americans, African Americans, and Japanese Americans have suffered injustices related to family separation from the United States government. From 1880 to the 1920s, the United States government enforced the "Indian Problem" highlighted by the Hoover Commission, stating that Native Americans did not meet American societal standards. Hence assimilation into American culture was the solution. The government separated Native American children from their families and placed them in boarding schools (Levine, 2019). African-Americans suffered the same trauma. At the age of seven, former slave Harriet Mason from Bryantsville, Kentucky, remembered that "when we got to Lexington, I tried to run off and go back to Bryanstville to see my mammy." Mason was a slavey legacy, being exploited like property rather than treated like human beings (Federal Writers' Project, n.d.). Again, in 1942 during World War II, President Franklin D. Roosevelt signed Executive Order 9066: Resulting in the Relocation of Japanese expresses, "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense..." The executive order then allowed military discretion on the strategies to enforce tactics for the relocation of Japanese families. In most cases, the father of a family was separated first, leaving the children and partners behind (Blankenship, 2016). All three groups have common trauma of family separation caused by the United States Government rooted in racism, classism, and prejudice. Now a fourth group is enduring the pain of family separation, immigrants.

One of the most significant challenges for immigrants coming into the United States from the southern border is access to asylum. According to the U.S. Immigration and Nationality Act (N.I.A.), a person is allowed refugee status in the United States because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," within their country of origin ([8 U.S.C. § 1101\(a\)\(42\)\(A\)](#)). Asylum seekers, unlike refugees, are granted status after entering the country or while seeking asylum at a port of entry. The challenge of receiving asylum from a friendly regime in the United States is that the accepting government acknowledges the country's human rights problems (Salehyan and Rosenblum, 2008). In addition, people coming into the U.S. to seek asylum is tremendous. In 2018, the U.S. claimed 63,278 people were seeking asylum, and many were families with children (Vuleta, 2022). The influx of asylum seekers created an issue under the Trump Administration. The primary way to discourage immigrants from traveling to the southern border is to deteriorate their hopes of coming into the country. In 2018, the Trump Administration successfully diminished immigrants to reach the American dream of asylum by announcing the 2018 Zero Tolerance Policy, where any person entering the United States without proper documentation would be criminalized.

## **THE ZERO-TOLERANCE POLICY**

The U.S. Customs Border Patrol conducted a pilot program to increase the prosecution of undocumented migrants from the southern border. The program started in March 2017 until February 2018, when the American Civil Liberties Union (ACLU) filed a lawsuit against ICE (referred to as "Ms. L. v. ICE") on behalf of two families separated at the Southwest border. Not



until May of 2018 does Attorney General Jeff Session announce the Zero-Tolerance policy (Kandel, 2021). In June of 2018, all hell broke loose with photos of children being separated from their parents. The negative attention brought up many humanitarian issues that directed the Trump Administration to issue an executive order mandating the Department of Homeland Security to maintain undocumented families together. However, the Executive order did not propose a solution to the reunification of families but rather promoted family detention (Paoletti and Mayeri, 2018). According to a monthly report from the Department of Health and Human Services, 5,349 recorded children were separated from their families between March 2017 and November 30, 2020 (Families (ACF), 2019). Family separation under the Trump Administration has many various components in which many leading officials and government agencies were involved. To keep the United States government accountable for its actions, constituents from all over the nation need to acknowledge and hold their policy makers responsible. Hence, it was up to massive public opinion in 2018 that halted family separation and acknowledged the unjust actions committed against these children.

President Trump increased the xenophobia rhetoric, specifically with the Zero Tolerance Policy of 2018. The policy was implemented to prosecute immigrants coming into the United States without proper documentation. The Department of Justice ordered the apprehension of adults crossing the border illegally, placing them in Federal Criminal facilities where children were not allowed. Children were transferred to the Department of Health and Human Services Office of Refugee Resettlement (ORR). The Department of Justice and Homeland Security follow strict guidelines when placing children under U.S. custody, such as following the Flores Settlement Agreement (FSA) which highlights the living conditions of the children while placed in custody, and the Homeland Security Act of 2002 where unaccompanied children are

transferred to ORR. In addition, under a 2015 court rule, children may not remain in family detention for more than 20 days (Kandel, 2019).

The news of family separation at the United States southern border created a national uproar. Children as young as four months were separated from their families, and many children were placed in inhumane conditions (Dickerson and Heisler, 2019). When reconnected with their families, other children did not remember their adult guardians or caregivers because of the prolonged time of separation. The ACLU highlighted a story of a three-year-old boy named Sammy. In April 2018, Sammy and his father Ever arrived at McAllen Bridge in Texas, seeking asylum. Sammy was sleeping next to his father at the Texas Detention Center Ever, yet later taken across the country to Bethany Christian Services, a foster care agency in Michigan. Once reunited with his family in July 2018, Sammy did not recognize his parents. The Zero Tolerance Policy created many consequences, such as mental instability for detained immigrant families, international problems with neighboring countries, and constitutional due process violations under the 14th Amendment.

Since 2018 has shown the consequences of children being detained within the U.S. immigration detention centers. Sarah MacLean and her colleagues interviewed children held in detention during mid-2018. The majority of survey responses came from mothers and children from Honduras, El Salvador, or Guatemala. The children in the survey suffered from high emotional trauma and peer problems. Similarly, Kathryn Hampton clinically assessed 31 individuals involved in family separation. Hampton reported that children were separated without any explanation and were never notified of the children's location after separation or notice of reunification. Hampton said that 100% of the children ages 6 to 17 exhibited post-traumatic stress disorder (PTSD), major depression, and functional impairment due to

separation. In Hidalgo and Danaher's published case, a seven-year-old girl separated from her mother for two months while in U.S. immigration detention suffered from catastrophic thinking, separation anxiety, and irritability.

Unfortunately, the articles are not a holistic analysis of all the children separated from their families in 2018, yet they show the severity of the policy. The United States has created unnecessary trauma for the children of families looking for asylum. The families of these children were looking for refugees, but the United States exacerbated these children's mental trauma, leaving them with issues they have to live with for the rest of their lives. The consequences do not just end with the children's mental problems but also the legality of physically separating children from their families.

## **INTERNATIONAL FAMILY-SEPARATION POLICY**

In the Columbia Human Rights Law Review article "The Law Against Family Separation," Cordero et al. express the international legality of the Zero-Tolerance policy. The authors highlight the United States' stance on international policies under the Trump Administration. Unfortunately, international policies were not on top of President Trump's priorities as he criticized the Paris Climate Agreement, the Joint Comprehensive Plan of Action (JCPOA), and international organizations like the North Atlantic Treaty Organization (NATO). Hence, his stance on international policy connected with children was no different, as he violated various treaties ratified with the United Nations before he took office. The authors call attention to 1999 the International Covenant on Civil and Political Rights (ICCPR) states that "[e]very child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the rights to such measure of protection as are required by status

as a minor." Hence, no matter the circumstance under international law, children must be protected. Under the Zero-Tolerance policy, children were detained as a family unit termed accompanied refugees, later turned into unaccompanied without guardianship protection.

Unfortunately, the United States' violation of provisions regarding children's rights and those of refugees and migrants are "soft-laws." The legal repercussions of violating international law are countries imposing sanctions, losing a positive reputation, or future international agreements (Guzman, 2002). Although they received negative feedback from ally countries reminding U.S. leaders about the fundamental human rights of a very vulnerable population, the families directly impacted by the United States were never given any form of reparations. The possible reparations may be in the form of gaining a path to residency in the United States or monetary compensation. Furthermore, the United States must create regulations restricting future presidents from enacting inhumane executive policies like family separation.

#### **MS. L V. IMMIGRATION CUSTOMS ENFORCEMENT (ICE)**

A possible way to create a legal rule to stop future family separation is through judicial rule under the Equal Protection Clause of the 14th Amendment or the Due Process Clause of the 5th Amendment. According to constitutional law scholar Dean Erwin Chemerinsky of Berkeley Law, "Aliens are protected from discrimination because the Equal Protection clause explicitly says that no "person" shall be denied equal protection of the laws." According to Chemerinsky, looking at alienage classification, the Zero-Tolerance policy is a form of discrimination against non-citizens. Non-citizens were treated inhumanely and forced to separate from their families to receive asylum. The case will be reviewed under strict scrutiny as discrimination is an arbitrary classification.

A precedent case connecting children and alienage is seen in 1982's *Plyler v. Doe* case, reviewing the issue of violation of the 14th amendment (Chemerinsky, 2013). Undocumented school-age children were denied free educational access in Texas, and the court ruled that the state of Texas violated the children's rights and had no substantial state interest. Separated families may sue state jurisdictions similar to *Plyler v. Doe* as the state is stripping fundamental rights like guardian protection from a vulnerable population. Fortunately, a non-going and class action Federal lawsuit, *Ms. L v. Immigration Customs Enforcement (ICE)*, hopes to reunite the thousands of children separated from their families under the Due Process Clause of the 5th amendment.

*Ms. L v. ICE* was filed in the U.S. District Court for the Southern District of California by the American Civil Liberties Union (ACLU). The case sought to reunite an asylum-seeking mother and her 7-year-old daughter fleeing violence in the Democratic Republic of Congo. However, she was forcibly separated 2,000 miles apart by U.S. Immigration Customs Enforcement. In February 2018, the plaintiff sued the U.S. Immigration and Customs Enforcement (ICE) and its parent agency, the U.S. Department of Homeland Security (DHS), and several other government entities, all under federal asylum statutes and the Administrative Procedure Act (APA). In addition, the plaintiff asserted violation of the Due Process Clause of the Fifth Amendment. The Fifth Amendment due process clause prohibits the federal government from discriminating against non-citizens. The main objective of the case was to gain reunification between the child and her guardian. Although the child and her mother were reunited in March 2018, on July 3, 2018, the plaintiffs filed a second amended complaint stating that the government separated thousands of families over the past year without a legitimate purpose. The state's interest was to deter future families from seeking refuge in the United States.

Dean Erwin Chemerinsky of Berkeley Law filed an amicus brief alongside the plaintiff, issuing a temporary restraining order (TRO) to demand family reunification. The TRO would prevent the government from deporting parents that have been reunited with their children, so parents can make "an informed, "an informed, non-coerced decision if they are going to leave their children behind" after the child's separate immigration proceedings. Unfortunately, the TRO was denied as a TRO was granted for another family separation lawsuit *M.M.M. et al v. Sessions*, keeping the deportation orders of Ms. L pending. The court courted the parties from both cases *M.M.M. et al v. Sessions* and *Ms. L v. I.C.E.* to meet with the government and propose a solution (University of Michigan Law, 2022).

The last status report of the case was filed on March 2, 2022 (Document 634, 2022). In the Joint Report of the Parties the court asked for the following information and provided that:

- “(1) the total number of children whose parents are currently confirmed to be members of the original and expanded classes: **3810**
- (2) the total number of children in item (1) the parents of whom the parties confirm have been located: **3574**
- (3) the total number of children in item (2) that the parties can confirm<sup>4</sup> have been reunified with their separated parent: **2762**”

As for settlement negotiations the two parties will be discussing at the next formal Settlement Conference scheduled for April 7, 2022.

What makes the case more complex are the Executive Orders after the originally filed suit in February 2018. In June 2018, the original Zero Tolerance Policy was abandoned through

President Trump Executive Order 13841, maintaining family unification of future detainees. However, the Executive Order did guide the reunification of the already separated families. In February 2021, President Joe Biden signed the Executive Order on the Establishment of Interagency Task Force on the Reunification of Families. The policy created the establishment of a Task Force to identify children separated from their families at the United States-Mexico border between January 20, 2017, and January 20, 2021, in connection with the operation of the Zero-Tolerance Policy.

The case's outcome may go in either direction, in favor of the plaintiff or the defendant. The settlement negotiations are pending as 1048 parents confirmed to be members of the original and expanded cases have not been reunited with their children. Although the reunification process is still ongoing under Biden's Executive order, the U.S. Immigration and Customs Enforcement (ICE) and its parent agency, the U.S. The Department of Homeland Security has no legal fault for the consequences of the Zero-Tolerance Policy if the court does not rule in favor of the plaintiff. If the defendant wins the lawsuit, the plaintiff may appeal to the United States Court of Appeals for the Ninth Circuit. If the court were to reach The U.S. Supreme Court, the plaintiff could also take the lawsuit one step further by adding the violation of the Equal Protection Clause of the 14th Amendment to include the legal obligation of all states.

## **THE FUTURE OF FAMILY SEPARATION POLICIES**

The outcome of *Ms. L v. ICE* is crucial for the future of immigration policy and the reparations for the families separated since 2017. The executive branch has taken measures for family reunification. President Biden signed Executive Order (E.O.) 14011 on February 2, 2021, which created the *Interagency Task Force on the Reunification of Families*. The task force aims

to identify and provide service recommendations for children separated from their families by the previous administration's Zero-Tolerance policy. The task force plans to achieve this by identifying nearly all the separated children, establishing a reunification process, and beginning reunifying parents and legal guardians within the United States (U.S. Department of Homeland Security, 2021). Executive Order 14011 does not have a direct strategy on how to prevent children's separation at the border. The Task Force must write a report before February 2, 2022, on recommendations to ensure that the Federal government will not repeat the horrendous acts of the Zero-Tolerance policies (*Executive Order on the Establishment of Interagency Task Force on the Reunification of Families*, 2021).

The task force is a multi-governmental team composed of the U.S. Department of Homeland Security, Department of State, Department of Health and Human Services, and the Department of Justice. The department with the most significant impact is the U.S. Department of Homeland Security, with the authority to grant families the option to return to the United States for child reunification and receive behavioral services. Alongside these government agencies, nonprofits and community leaders gather their insights to understand and bring a diplomatic perspective to the issue. The task force director, Michelle Brané, was senior director of the Migrant Rights and Justice program at the Women's Refugee Commission. One of the main stakeholders in bringing children and their families together are nonprofits like Brané's. Nonprofits are on the ground talking with immigrant communities and having a valuable impact by spreading government information and resources (*DHS Secretary Mayorkas Announces Family Reunification Task Force Principles and Executive Director*, 2021).

The progress of E.O. 15011 is essential to hold the task force accountable for child reunification. Under statutory law, an initial 120 progress reports and interim progress reports



every 60 days after that are reported to the executive cabinet. On June 02, 2021, the task force identified 3,913 families separated; however, only 1,786 were reunified, leaving 2,127 children without reconnection to a legal guardian or sponsor. The Task Force's main objectives are as follows: identifying separated children, facilitating reunifications, and providing additional services to support children and their families, including behavioral health and case management services. One of the primary and crucial steps in the process is children's identification, as this may be the most difficult with many children being separated from different facilities between January 20, 2017 to July 1, 2017, when Zero-Tolerance was enacted. The Task Force collected overlapping data from several federal departments and the NGOs working with separated families. The facilitation of reunification, however, is not done by the task force but by the Ms. L. Steering Committee comprised of three non-profits *Kids In Need of Defense (KIND)*, *Justice in Motion* and the *Women's Refugee Commission*, and the law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Steering Committee in National Lawsuit Representing Separated Migrant Families Seeks Help in Locating Additional Separated Parents and Children," n.d.).

On March 31, 2022, the Interagency Task Force reported their Interim Progress Report on the Reunification of Families (Task Force). The report highlights that families can reunify with their families via the website [together.gov](https://www.together.gov). The application process requires various steps, such as contacting the International Organization for Migration to approve the reunification. Once an application has been accepted, families are allowed three years to stay within the United States and apply for work authorizations and services to help alleviate the stress caused by the Zero-Tolerance policy.

However, the U.S. government must enact a law to prevent policies like Zero-Tolerance from being implemented. After Biden's term in 2024, former president Trump may win

re-election, or other presidential candidates with xenophobia agendas can continue the cycle of negative attitudes towards immigrants and even, to the extreme, implement similar immigration policies like Zero-Tolerance. If *Ms. L v. ICE* reaches the Supreme Court in the judicial branch, the case will create a precedent for future immigration policy involving children's immigrant discrimination.

The future of the Family Separation Laws does not end with the executive or judicial branch, as the legislative branch has also made efforts to enact reunification provisions and implement asylum reform. Representative Pete Sessions from Texas, during the 115th Congress, introduced H.R. 6204 “Families First Act of 2018” by implementing reform under the juvenile immigration court and increased funding for ICE. The bills were introduced yet never made it to committees. The 116th Congress introduced bills for humanitarian parole or keeping families together through all processing stages at the U.S. border. Representatives also added legislative proposals for detention programs and family case management alternatives (Peck, 2018).

## **ACCOUNTABILITY AND REPARATIONS**

A significant factor that needs to be addressed is the accountability for the people and departments that created the Zero Tolerance Policy. The Trump Administration has not been held accountable for their actions committed against the children and families separated by the policy. In addition, the person who announced the policy was Attorney General Jeff Sessions. Since 2018, nothing has been done to hold the past president and attorney general accountable. A significant way for accountability is suing President Donald Trump and Attorney General Jeff Sessions under a Civil lawsuit, specifically for intentional infliction of emotional distress (Cornell Law School, 2022). The decision of Attorney Jeff Sessions and with the approval of

Donald Trump did not account for a level of appropriate care for the families separated at the border. Before issuing the Zero-Tolerance policy sessions, his staff should have reviewed the consequences of the policy. The leaders did not account for the age demographics coming to the southern border, precisely the strict guidelines of placing children under U.S. custody once seeking asylum. Lastly, as reported by the *New York Times*, top Justice Department officials were “deeply concerned” about the children’s welfare; however, Jeff Session was adamant about pushing the policy (Shear et al., 2021).

U.S. Government accountability is not enough to receive justice for the families affected by the Zero-Tolerance policy. To obtain true justice for the actions committed against these families, the United States Government must create a law similar to the Civil Liberties act of 1998. The act acknowledged the fundamental injustice of Japanese-Americans' evacuation, relocation, and internment during World War II. In Sec. 104, titled Trust Fund the Treasury of the United States, the Civil Liberties Public Education Fund was established under the Secretary of the Treasury. The fund provided eligible individuals a sum of \$20,000. The fund essentially is an apology for establishing internment camps only for Japanese Americans.

The reparations given to families affected by the Zero-Tolerance policy provide monetary support for the next steps after reunification. Families may inquire about the necessary psychological support desperately needed after enduring family separation. In addition, the end goal for these families is to seek asylum in the United States. The reparations allow them legal access to apply for residency for a pathway to citizenship.

## CONCLUSION

Since 2017, 1048 families are still not reunited, now reaching the five-year mark. Many of these children perhaps never remember their parents and will soon forget them. The evidence from journal articles MacLean, Hampton, and Hidalgo demonstrated children's trauma even after reunification. Just imagine the consequences of the children still separated from their families. No children should have to endure the psychological pain of being ripped from their mother, father, or family member. Overall, the only way the United States may be held accountable is through the decisions made in *Ms. L v. ICE*. If *Ms. L v. ICE* reaches the Supreme Court, rules about immigration policies involving children will be discussed, and hopefully, asylum reform. It may be a couple of years until the court decides a verdict on the case, yet the children of separated families will have to live with the consequences of the Zero-Tolerance policy forever.

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