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Donna Coltharp
dcoltharp@stmarytx.edu

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ESSAY

IT IS TIME TO GET BACK TO BASICS ON THE BORDER

DONNA F. COLTHARP*

When the Trump Administration’s Zero-Tolerance Policy—and the resulting family separations—caught the nation’s attention, I was working as the First Assistant Federal Public Defender in a border district.¹ Attorneys in our office represented some of the arrested asylum-seekers, and I naturally had strong feelings about the merits of the policy and the harm it caused.² But, as our attorneys worked to craft

* Donna Coltharp is an assistant Professor of Law at St. Mary’s University School of Law. Before coming to St. Mary’s, she served as an assistant federal public defender in the Western District of Texas and was First Assistant Federal Public Defender in the district from 2013 to 2019. The author dedicates this essay to the defense attorneys who serve immigrant clients in criminal proceedings, as policies shift, and resources dwindle.

1. See Press Release, U.S. Dep’t of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/E7C9-KYSH>] [hereinafter *Zero-Tolerance Policy Press Release*] (reporting then-Attorney General Jeff Sessions’ notice to all United States Attorney’s Offices along the United States–Mexico border to prosecute violations of Chapter 8, Section 1325 of the United States Code to the fullest extent); see also Jonathan Blitzer, *A New Report on Family Separations Shows the Depths of Trump’s Negligence*, NEW YORKER (Dec. 9, 2019), <https://www.newyorker.com/news/news-desk/a-new-report-on-family-separations-shows-the-depths-of-trumps-negligence> [<https://perma.cc/5J6V-BEBP>] (“In early May 2018, just as the Zero-Tolerance Policy was taking effect, D.H.S. shared an estimate with the White House that more than twenty-six thousand migrant children would be separated from their families *over the course of that summer*.”).

2. See Jacob Weisberg, “*We Don’t Know Because They Won’t Tell Us*” *What It’s Like To Be a Federal Public Defender on the Texas Border Right Now*, SLATE (June 20, 2018), <https://slate.com/news-and-politics/2018/06/a-federal-public-defender-on-child-separations-and-immigration-cases-on-the-texas-border-right-now.html> [<https://perma.cc/XU5P-RPP9>] (quoting

legal arguments that could assist their clients both in their criminal cases and in finding their children, I saw that the family separations were part of a broader, systemic crisis.³ I often thought, during those months, of a conversation I had on a train ride from New York City to Pennsylvania—years before then-candidate Donald Trump announced he would build a wall.⁴ A passenger sitting next to me asked me what I did; I told him and said that a large part of my practice involved defending folks accused of reentering the United States without permission.⁵ He was in favor of such prosecutions.⁶ After all, he said, we only prosecute people with criminal histories, and we do not prosecute people the first time they cross.⁷ If you commit a crime, you should get punished. He said, “at least they’re in America. We give them a fair trial.”⁸ We talked about that for a while. I told him that an immigrant’s first unauthorized entry is, in fact, a crime, and that thousands of people are prosecuted every year for it.⁹ I asked him if he knew that, in many cases, the “criminal

Federal Public Defender Erik Hanshew, “[P]rior to these new policies, individuals—of which most of these separated parents fall into this group—had had no prior criminal history in the United States.”).

3. Cf. Blitzer, *supra* note 1 (quoting Immigration Reform Expert Michelle Brané, “[The latest Inspector General’s] report just shows that they did not even plan to reunify.”).

4. Cf. Anna Brand, *Donald Trump: I Would Force Mexico to Build Border Wall*, MSNBC (June 28, 2015), <http://www.msnbc.com/msnbc/donald-trump-i-would-force-mexico-build-border-wall> [https://perma.cc/4HY5-HQHX] (reporting President Trump’s announcements to build a border wall).

5. Cf. JUDITH A. GREENE ET AL., INDEFENSIBLE: A DECADE OF MASS INCARCERATION OF MIGRANTS PROSECUTED FOR CROSSING THE BORDER 61 (July 2016) (reporting that the majority of the cases in the Western District of Texas’ docket are Section 1326—or reentry after deportation (removal)—charges); Brian L. Owsley, *Distinguishing Immigration Violations from Criminal Violations: A Discussion Raised by Justice Sonia Sotomayor*, 163 U. PA. L. REV. ONLINE 1, (2014), <http://www.penlawreview.com/online/163-U-Pa-L-Rev-Online-1.pdf> [https://perma.cc/VB47-VNS2] (“As a U.S. Magistrate Judge [for the Southern District of Texas], the charges that I encountered most were subsection (1) charges, where a person crossed the Rio Grande River instead of appearing before a customs officer at a Border Patrol checkpoint.”).

6. See 8 U.S.C. § 1326 (2012) (outlining the statute that penalizes individuals who have unlawfully reentered the United States).

7. See *id.* § 1325 (outlawing generally improper or unauthorized entry into the United States).

8. See Jane H. Aiken, *Beyond the Disorienting Moment*, 26 CLINICAL L. REV. 37, 45–46 (2019) (providing a description of Operation Streamline, a judicial procedure that expedites migrants’ cases that are clogged in the federal courts).

9. 8 U.S.C. § 1325 (2012); see *Prosecuting People for Coming to the United States*, AM. IMMIGR. COUNCIL (Jan. 10, 2010), <https://www.americanimmigrationcouncil.org/research/>

histories” we hear about are just prior immigration entries and reentries, so calling immigrants “criminals” can be misleading.¹⁰ And I asked him if he knew that, on the border, defendants were pleading guilty and being sentenced in proceedings that could involve forty or more defendants, all standing in front of the same judge—who struggle to keep their names, charges, criminal histories, and personal circumstances separate.¹¹ We did not discuss whether reentry should be a crime.¹² Rather, we talked about how this country delivers justice and about the process it provides to persons in its custody.¹³ On that question, we were in general agreement. As the man said, before we let the subject drop, “well, it shouldn’t be like that.”¹⁴

I suspect if I ran across the same man again, he would concur with some—or all—of the Trump Administration’s goals at the border.¹⁵ The President, and many of those who voted for him, want tighter borders.¹⁶ They are not wrong that increasing numbers of immigrants, many accompanied by children, are seeking asylum from countries south of

immigration-prosecutions [<https://perma.cc/KZY2-FNM6>] (detailing how the number of Chapter 8, Section 1325 United States Code charges have increased from 15,461 in 2004 to 80,886 in 2019).

10. See AM. IMMIGR. COUNCIL, *supra* note 9 (“Once convicted of an entry-related offense, migrants often become a higher priority for future criminal prosecution or deportation . . .”).

11. See, e.g., Aiken, *supra* note 8 at 46 (“I saw 75 people prosecuted and sent to prison in less than 85 minutes.”).

12. Cf. 8 U.S.C. § 1326 (2012) (providing the criminal penalties for reentry of certain removed aliens).

13. See U.S. CONST. amend. XIV, § 1 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

14. Cf. Aida V. Nieto, *Immigration: A Human Rights Issue, Not a Political Issue*, AMNESTY INT’L, <https://www.amnestyusa.org/immigration-a-human-rights-issue-not-a-political-issue/> [<https://perma.cc/J2X5-6CKA>] (“Politics must no longer be permitted to prevent the United States from fulfilling its human rights obligations. It is time to change the rhetoric from “illegal aliens crawling across the border that come here to take our jobs and commit crimes” to “individuals looking for a better life.”).

15. See generally *Immigration*, WHITE HOUSE, <https://www.whitehouse.gov/issues/immigration/> [<https://perma.cc/GA95-5CZ4>] (expressing President Trump’s commitment to construct a border wall and swiftly remove immigrants who enter the county unlawfully).

16. Cf. George Hawley, *Ambivalent Nativism: Trump Supporters’ Attitudes Toward Islam and Muslim Immigration*, BROOKINGS (July 24, 2019), <https://www.brookings.edu/research/ambivalent-nativism-trump-supporters-attitudes-toward-islam-and-muslim-immigration/> [<https://perma.cc/48PR-EJQ6>] (stating that many of President Trump’s supporters have indicated their top concern is immigration).

Mexico,¹⁷ and, in winning the 2016 election, the President won the right to pursue policies that seek to stem those numbers.¹⁸ Nor, is the current administration the first to attempt to raise higher and more formidable walls (metaphorical and literal) between this nation of immigrants and those immigrants who seek refuge here.¹⁹

For example, both Presidents George W. Bush and Barack Obama relied on punitive consequences—especially increased discretionary removals and criminal prosecutions for entries and reentries into the country—to regulate and restrict immigration.²⁰ President Bush dramatically increased prosecutions of even first-time crossers at the U.S.–Mexico border after the September 11, 2001 attacks on the World Trade Center.²¹ President Obama detained mothers and children in

17. See OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-20-06, DHS LACKED TECHNOLOGY NEEDED TO SUCCESSFULLY ACCOUNT FOR SEPARATED MIGRANT FAMILIES 1 (Nov. 25, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf> [<https://perma.cc/75J3-THAV>] (noting a thirty-four percent increase in the number of families and children crossing the border from 2017 to 2018).

18. See Exec. Order No. 13,767, 82 Fed. 8,793 (Jan. 25, 2017) (issuing an order for all executive departments and agencies to secure the border and prevent further illegal immigration—reasoning the order is to protect the United States' security interest); see also SARAH PIERCE & ANDREW SELEE, IMMIGRATION UNDER TRUMP: A REVIEW OF POLICY SHIFTS IN THE YEAR SINCE THE ELECTION, MIGRATION POL'Y INST. 3–6 (Dec. 2017), <https://www.migrationpolicy.org/research/immigration-under-trump-review-policy-shifts> [<https://perma.cc/C278-UK2N>] (highlighting that President Trump enacted policies and procedures within a year that decreased and deterred both legal and illegal immigration—such as limiting deferral of removals; ending refugee and parole program for Central American children; enhancing the vetting of applicants applying for visas; reducing Deferred Action for Childhood Arrivals; and ending Temporary Protected Status for certain countries); see generally *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (holding that Presidential Proclamation No. 9,645 is constitutional, allowing specific migrants from certain Arab countries to be prohibited from legally entering the United States because of national security concerns).

19. See, e.g., Dara Lind, *What Obama Did with Migrant Families vs. What Trump is Doing*, VOX (June 21, 2018), <https://www.vox.com/2018/6/21/17488458/obama-immigration-policy-family-separation-border> [<https://perma.cc/8SFJ-ZCT9>] (stating that Obama's move prompted outrage from immigration advocates, who filed a lawsuit claiming the children were being held under “appalling conditions”).

20. See Natasha Arnpriester, *Trumping Asylum: Criminal Prosecutions for 'Illegal' Entry and Reentry Violate the Rights of Asylum Seekers*, 45 HASTINGS CONST. L. Q. 3, 13–14 (2017) (detailing how the “Operation Streamline” prosecutions—which detained mothers and children in order to deter families from seeking asylum in the United States—peaked during the Obama Administration, but the detentions were civil and did not involve family separations).

21. See Anne Flaherty, *Origins of Family Separation Issues Stretch Back Many Years*, AP NEWS (June 18, 2018), <https://apnews.com/26b88518310f47018b724e200b28e88f/Origins-of-family-separation-issue-stretch-back-many-years> [<https://perma.cc/URE7-YQ9X>] (“In 2008,

special detention centers in order to deter families from seeking asylum in the United States.²²

This is something I try to remember when talking to friends, colleagues, and students about the border—some of what we are seeing is about winning and losing in a democratic system.²³ Citizens play their role in that system when we vote, and when the system is working there are procedural checks along the way to keep our elected representatives more or less in line.²⁴

But I wondered, as the family-separation crisis progressed, how the man on the train would feel about *how* the administration was pursuing its goals.²⁵ Its implementation of the now-abandoned Zero-Tolerance Policy produced some of the most striking stories and visual images from President Trump’s presidency—children sleeping on concrete floors, under foil blankets; family reunions that were not joyous, but instead marked by anger and hostility from young children who felt betrayed by the people they had trusted most; cautionary words from pediatricians and mental health professionals about the long-lasting effects of the separations; and debates in court about whether the government was required to provide toothpaste to children in its custody.²⁶ Those images

President George W. Bush focused on the problem of minors crossing the border without their parents and signed a law unanimously passed by Congress that called for such ‘unaccompanied minors’ to be released into the ‘least restrictive setting.’”).

22. *Cf.* *Flores v. Lynch*, 828 F.3d 898, 901–04 (9th Cir. 2016) (holding that the Obama Administration could not hold even accompanied children in detention centers for more than twenty days).

23. *See generally* CRAIG KAFURA & BETTINA HAMMER, *REPUBLICANS AND DEMOCRATS IN DIFFERENT WORLDS ON IMMIGRATION* 1, 4 (2019) (illustrating the ideological divide between Democrats and Republicans, the latter believing the border is out of control and needs strict security measures).

24. *See* Andrew Daniller, *Americans’ Immigration Policy Priorities: Divisions Between—and Within—the Two Parties*, PEW RES. CTR. (Nov. 12, 2019), <https://www.pewresearch.org/fact-tank/2019/11/12/americans-immigration-policy-priorities-divisions-between-and-within-the-two-parties/> [<https://perma.cc/2VCL-X9HM>] (illustrating how the issue of immigration has stirred up Americans—some of whom favor stricter laws while others favor a pathway to citizenship—who will vote on candidates who will best serve their view); *see generally* THE FEDERALIST NO. 51 at 293–94 (James Madison) (emphasizing how it is the citizenry where Congress gets its power and it has to make sure that power is not abused, but instead used in the citizenry’s favor).

25. *See generally* Lind, *supra* note 19 (drawing a stark contrast between the Trump Administration’s and the Obama Administration’s efforts within the same body of law).

26. *See Zero-Tolerance Policy Press Release*, *supra* note 1 (declaring the United States Department of Justice will use their “full prosecutorial powers” by way of implementing the “Zero-Tolerance Policy” whereby federal border agents will enforce the rule of law and apprehend illegal

and stories will stay with us, but behind them is a reality that is more difficult to convey—the administration’s willingness to exploit, ignore, or erode minimal procedural protections even while enacting policies that implicate fundamental familial and liberty interests.²⁷

The predicament these families found themselves in—having the most fundamental rights at stake with no procedural safeguards—resulted from the complicated web of criminal and civil laws governing the border.²⁸ Over the past century, the United States has created two tracks for

immigrants who cross the border); Meagan Flynn, *Detained Migrant Children Got No Toothbrush, No Soap, No Sleep. It’s No Problem, Government Argues.*, WASH. POST (June 21, 2019), <https://www.washingtonpost.com/nation/2019/06/21/detained-migrant-children-no-toothbrush-soap-sleep/> [<https://perma.cc/H9M4-C2EK>] (stating the government argued the Flores Settlement Agreement did not discuss providing basic sanitary items—thereby making it not liable for the lack of providing such items when accused of holding children in dirty, crowded, biting cold conditions); Miriam Jordan, et al., *As Migrant Families are Reunited, Some Children Don’t Recognize Their Mothers*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/10/us/politics/trump-administration-catch-and-release-migrants.html> [<https://perma.cc/2EQW-2UQN>] (explaining how the “Zero-Tolerance Policy” resulted in children expressing negative emotions towards their parents, which were caused and exacerbated by the Trump Administration’s failure to properly reunite children and their families after they were separated at the border); Collen Kraft, *AAP Statement Opposing Separation of Children and Parents at the Border*, AM. ACAD. PEDIATRICS (May 8, 2018), <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx> [<https://perma.cc/KPT2-UNPC>] (cautioning the government about the long-term negative consequences the “Zero-Tolerance Policy” will have on children and highlighting how it will affect a child’s development and growth).

27. See OFF. OF INSPECTOR GEN., U.S. DEP’T OF HEALTH AND HUM. SERV., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 6, 13 (Jan. 2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> [<https://perma.cc/3NGL-7QH9>] (reporting the estimates of the number of children who were separated from their families due to the “Zero-Tolerance Policy” were substantially larger than what the government anticipated, and six months after the policy was ended by executive order, there are still children left unaccounted—making the reunification process challenging due to the lack of care shown by the government to keep proper records of the families they separated); cf. *Hawaii*, 138 S. Ct. at 2441–42 (Sotomayor, J., dissenting) (holding that President Trump’s proclamation, which banned the entry of Muslims from predominately Arab countries, does not pass rational basis scrutiny because it expresses his hostility of Muslims and because the government provided no legal reasoning or analysis for how such a ban was constitutional).

28. See Memorandum from Jefferson Sessions, Att’y Gen., U.S. Dep’t. of Just., to All Federal Prosecutors (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download> [<https://perma.cc/QS36-Q3L3>] [hereinafter *Criminal Immigration Enforcement Memo*] (explaining how the Department of Justice prosecutes immigrants who come into the country illegally and providing a list of provisions within the United States Code that provide justification for criminal immigration enforcement); see generally Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367, 379–80 (2006) (explaining how both criminal law and civil law, which immigration law is a part of, are not so different from each other and are even linked closely because both deal with the inclusion and exclusion of individuals).

addressing and deterring unlawful immigration—a criminal track and a civil track.²⁹ Thus, a person who enters the country unlawfully may be placed in civil removal proceedings or may be criminally prosecuted.³⁰

Moreover, as the Supreme Court recognized in *Padilla v. Kentucky*, a criminal conviction in state or federal court can result in a person's removal.³¹ For that reason, the *Padilla* Court held that a criminal defense attorney's obligation to provide effective assistance of counsel includes the obligation to provide correct advice about the immigration consequences of a guilty plea.³² But *Padilla*, while significant for recognizing the seriousness of removal, is slim protection for immigrants in criminal proceedings.³³ *Padilla* requires only that defense counsel apprise clients of the certain (or near-certain) immigration consequences of a guilty plea.³⁴ It does not require a criminal defense attorney to “jump

29. See Stumpf, *supra* note 28 at 380 (describing how both criminal and immigration law can be seen as intertwined because both “determine whether and how to include individuals as members of society or exclude them from it”); see generally *Padilla v. Kentucky*, 559 U.S. 356, 360–61 (2010) (providing a history of the immigration system when, at one point, immigration law was lenient when it came to the types of offenses that resulted in the deportation of immigrants from the country, however, that changed when the Immigration Act of 1917 was passed making “classes of noncitizens deportable based on conduct committed on American soil”).

30. See Stumpf, *supra* note 28 at 380–81 (explaining how, because of changes made by legislators on the two fields, both criminal and immigration law are so comingled with each other that a person who came into the country illegally can either be deported or be sent to jail if they violate an immigration law that is also a criminal law).

31. See 559 U.S. at 360 (“[I]mmigration reforms have expanded the class of deportable offenses and limited judges’ authority to alleviate deportation’s harsh consequences.”).

32. See *id.* at 388 (“[A]n alien defendant’s Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, . . . and that the client should consult an immigration specialist if the client wants advice on that subject.”).

33. See *id.* at 377 (“Because many criminal defense attorneys have little understanding of immigration law, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms.”); see also Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STANFORD J. C.R. & C.L. 237, 246 (2015) (describing how a criminal conviction can extend into every aspect of one’s daily life and deprive them of basic civil rights); Darryl K. Brown, *Why Padilla Doesn’t Matter (Much)*, 58 UCLA L. REV. 1393, 1415 (2011) (stating that “*Padilla* will only modestly improve the legal representation such defendants receive, and better lawyering or more creative plea bargaining are not up to the task of subverting the severity of America’s law of criminal sentencing and collateral consequences.”).

34. 559 U.S. at 357; see Brown, *supra* note 33 at 1394–96 (“*Padilla* requires counsel to advise clients whether a conviction triggers mandatory deportation under certain immigration laws.”).

tracks” and litigate an immigrant’s asylum request or removal proceeding.³⁵

The Trump Administration’s Zero-Tolerance Policy exploited the gap between civil and criminal immigration law.³⁶ Before the policy was implemented, when an immigrant accompanied by a child was found entering the United States unlawfully—at a point other than an official port of entry—and made an asylum claim, the Customs and Border Protection’s (CBP) policy was to place the families in civil asylum proceedings.³⁷ Parents and their children were detained together and were often released while they awaited a hearing on their claims—the “catch and release” policy the President has often criticized.³⁸ Under the Zero-Tolerance Policy, officers arrested and United States attorneys prosecuted all persons who crossed illegally—whether or not the individuals asserted an asylum claim and whether or not

35. See Padilla, 559 U.S. at 369 (“When the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”).

36. See Maria Sacchetti, *Top Homeland Security Officials Urge Criminal Prosecution of Parents Crossing Border with Children*, WASH. POST (Apr. 26, 2018), https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/a0bdcee0-4964-11e8-8b5a-3b1697adcc2a_story.html [<https://perma.cc/PB78-242X>] (referencing a memo from the Trump Administration advocating for a change from civil penalties to criminal prosecution of people who cross the border illegally).

37. See *id.* (“If approved, the zero-tolerance measure could split up thousands of families, although officials say they would not prosecute those who turn themselves in at legal ports of entry and claim asylum.”)

38. See Rick Su, *Making Room for Children: A Response to Professor Estin on Immigration and Child Welfare*, 17 WASH. U. GLOB. STUD. L. REV. 633, 635–36 (2018) (describing Congress’ grant of authority to oversee unaccompanied minors seeking asylum to the Office of Refugee Resettlement); see also Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 611 (2019) (“[T]he Trump Administration responded to Central American asylum-seekers through measures tougher than policies pursued by any modern president.”); Josh Delk, *Trump Blames Democrats for Separating Migrant Families at the Border*, THE HILL (May 26, 2018), <https://thehill.com/blogs/blog-briefing-room/389503-trump-calls-for-end-to-immigrant-family-separation-blames-democrats> [<https://perma.cc/9PZ7-GNK5>] (quoting a Twitter post from Trump where he blames Democrats for separating children from their parents at the border).

they were crossing with minor children.³⁹ This decision triggered separations.⁴⁰

The administration was, of course, entitled to make this choice.⁴¹ But the decision of which route to take had significant procedural consequences.⁴² Before the Zero-Tolerance Policy went into effect, when an asylum-seeker was put into civil proceedings, she was not entitled to an attorney at the government's expense.⁴³ Chances were good that she would not be detained for a lengthy period of time.⁴⁴ Her asylum claim would be heard.⁴⁵ And, importantly, if she entered with a child, the family likely would not be separated.⁴⁶

39. See Arnpriester, *supra* note 20 at 14 (“This means that everyone apprehended within the sector, with few exceptions (e.g., minors), will be prosecuted for immigration infractions—which Border Patrol has confirmed includes asylum-seekers.”); see also Sacchetti, *supra* note 36 (“Attorney General Jeff Sessions ordered U.S. attorneys along the border from Texas to California to prosecute ‘to the extent practicable’ all illegal border crossers referred to them by the Department of Homeland Security.”).

40. See Tal Kopan, *New DHS Policy Could Separate Families Caught Crossing the Border Illegally*, CNN (May 7, 2018), <https://www.cnn.com/2018/05/07/politics/illegal-immigration-border-prosecutions-families-separated/index.html> [<https://perma.cc/SKC9-UB8T>] (statement of then-Attorney General Jeff Sessions) (“If you’re smuggling a child, we’re going to prosecute you, and that child will be separated from you, probably, as required by law.”); Lind, *supra* note 19 (“Seven hundred families were separated between October 2017 and April 2018.”).

41. See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (“Legislation for such regulation, limitation, or suspension [of the immigration of Chinese migrants] was entrusted to the discretion of our government with the condition that it should only be as might be necessary for that purpose, and that the immigrants should not be maltreated or abused.”); see also *United States v. Brizuela*, 605 Appx. 464, 465 (5th Cir. 2015) (holding that an immigrant may be prosecuted for an immigration offense even if he makes an asylum claim); cf. *Hawaii*, 138 S. Ct. at 2423 (“President [Trump] has lawfully exercised the broad discretion granted to him under § 1182(f) to suspend the entry of aliens into the United States.”).

42. See Lind, *supra* note 19 (“Trump made separating families a matter of standard practice.”).

43. See Immigration and Nationality Act of 2018 § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A)(2012) (listing an asylum-seeker’s rights in proceedings); see also *Chae Chan Ping*, 130 U.S. at 609 (holding that the government has broad discretion to exclude immigrants); *Brizuela*, 605 Appx. at 465 (holding that an immigrant may be prosecuted for an immigration offense even if he makes an asylum claim).

44. Cf. *Villazor & Johnson*, *supra* note 38 at 612 (discussing alternatives to separation and detainment—such as ankle monitors for those who are not flight risk or dangers to the community).

45. Cf. *id.* at 611 (reasoning asylum claims would be heard even if immigrants are not detained).

46. See Emily Goldstein & Mandi Cai, *Broken Border: What Do Migrants Experience When They Request Asylum at the Texas-Mexico Border?*, TEX. TRIB. (July 22, 2019), <https://www.texastribune.org/2019/07/22/asylum-seekers-experience-texas-mexico-border/>

When an asylum-seeker is charged with a crime, however, she is entitled to the significant constitutional protections afforded to all criminal defendants, including a court-appointed attorney.⁴⁷ But she will almost certainly be detained without bail.⁴⁸ Her asylum claim will be addressed after the prosecution, or not at all.⁴⁹ She will be separated from her children.⁵⁰ In this context, the administration's choice to pursue criminal prosecutions inevitably exacted great harm.⁵¹

The administration knew that it would cause harm.⁵² Months before news of the Zero-Tolerance Policy exploded into the national media, the administration took it for a test run in El Paso, Texas.⁵³ In spring 2018, immigrants appearing in federal criminal court there began reporting that

[<https://perma.cc/J2F7-WFGW>] (explaining that once asylum-seekers presented a "credible fear of persecution or torture" in their home country, a hearing is ordered, and, at that point, CBP has the discretion to send the immigrants to Mexican border cities to await a hearing or to hold the immigrant in a detention facility for no more than twenty days; any accompanying minors could be placed in shelters run by private companies or sent to live with sponsors in the United States, but families were usually kept together).

47. See AM. IMMIGR. COUNCIL, *supra* note 9 (explaining individuals facing criminal charges have the right to an attorney).

48. See Zolan Kanno-Youngs, *Federal Judge Blocks Barr's Attempt to Deny Asylum Seekers Bail*, N.Y. TIMES (July 2, 2019), <https://www.nytimes.com/2019/07/02/us/politics/federal-judge-asylum-seekers.html> [<https://perma.cc/93JZ-4MWN>] (reporting that a federal judge blocked the Trump Administration's order to deny bail to asylum-seekers).

49. See, e.g., Natasha Arnpriester & Olga Byrne, *Punishing Refugees and Migrants: The Trump Administration's Misuse of Criminal Prosecutions*, HUM. RTS. FIRST (Jan. 2018), <https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf> [<https://perma.cc/NPL3-8FAB>] (explaining how a decision to plead guilty could result in waiver of an asylum claim or immediate removal from the United States).

50. See *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp.3d 1133, 1139 (S.D. Cal. 2018) (discussing the family separation process that was implemented at the southern border of the United States).

51. See *id.* at 1138 ("Migrant families that lawfully entered the United States at a port of entry seeking asylum were separated. And families that were separated due to entering the United States illegally between ports of entry have not been reunited following that parent's completion of criminal proceedings and return to immigration detention.").

52. See Lisa Riordan Seville & Hannah Rappleye, *Trump Admin Ran 'Pilot Program' for Separating Migrant Families in 2017*, NBC NEWS (June 29, 2018), <https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616> [<https://perma.cc/T3Y9-DEX8>] (implying the government's knowledge on the harmful effects this new policy would cause on immigrants).

53. See *id.* ("[T]he government was separating migrant parents from their kids for months prior to the official introduction of zero[-]tolerance, running what a U.S. official called a 'pilot program' for widespread prosecutions in Texas . . .").

they had been separated from their children when they were arrested.⁵⁴ Even more disturbing, the parents could not get answers on the whereabouts of their children.⁵⁵ In many cases, the defendants' files made no mention of children.⁵⁶ Court-appointed attorneys did not know of the family separations until their clients showed them the slip of paper the government had provided when the families were separated—slips that provided a 1-800 number for assistance in locating children.⁵⁷ And in some instances, the government failed to provide these parents with any information about their children.⁵⁸

The fact that the children could not be located was a procedural lapse exceeding comprehension.⁵⁹ It was unfathomable that a child in government custody could simply be lost.⁶⁰ Yet, whether or not the

54. See Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html> [<https://perma.cc/XP7Z-NJCM>] (detailing the story of a young woman testifying in federal court who was separated from her 18-month-old son); see also Katherine Hawkins, *Where Family Separation Began: A Case in El Paso Shows the Flores Settlement is the Solution, Not the Problem*, SLATE (June 24, 2018), <https://slate.com/news-and-politics/2018/06/miguel-torres-decision-shows-family-separation-policy-violates-flores-settlement.html> [<https://perma.cc/2C4C-TLVM>] (narrating immigrants' personal stories from when they were separated from their families).

55. See Transcript of Record at 3, *United States v. Dominguez-Portillo*, No. EP:17-MJ-4409(1)-MAT (W.D. Tex. 2017) [hereinafter *Dominguez-Portillo Transcript*] (“[I]ndividuals indicate they were accompanied by a minor, they don’t know where they are, they have not been made aware of the whereabouts or the well[-]being, and some . . . indicate they were not provided information at the time of their arrest and separation from the minor child.”); see also Hawkins, *supra* note 54 (highlighting how defendants are receiving a “total lack of information” about their children after the families are separated).

56. Cf. Erik Hanshew, *Families Will No Longer Be Separated at the Border. But Where Are My Client’s Kids?*, WASH. POST (June 20, 2018), https://www.washingtonpost.com/outlook/families-will-no-longer-be-separated-at-the-border-but-where-are-my-clients-kids/2018/06/20/9d9e59a0-74b6-11e8-805c-4b67019cfe4_story.html [<https://perma.cc/2FU2-UKXE>] (drawing attention to prosecutors’ lack of knowledge regarding separated children).

57. See Colleen Long et al., *Reunification Prospects Unclear for Freed Immigrant Parents*, ASSOCIATED PRESS (June 24, 2018), <https://apnews.com/a84af52626514b01be8b6ea108bb16b8/Trump-Administration-says-it-knows-location-of-all-children> [<https://perma.cc/S2L9-G8FE>] (providing a 1-800 number and email address for parents of separated children to contact in order to receive information regarding the status and location of their children).

58. See Hanshew, *supra* note 56 (showing that the typical response to requested information regarding separated children is usually “no or unknown”).

59. See generally *id.* (describing the government’s procedure of family separation as “chaotic and byzantine”).

60. See generally Ron Nixon, *U.S. Loses Track of Another 1,500 Migrant Children, Investigators Find*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/us/>

government intended this consequence, we know that it expected it.⁶¹ The Department of Homeland Security (DHS) knew, as it put the Zero-Tolerance Policy into effect, that defects in its information technology systems would make it impossible for it to keep track of the separated children.⁶² The Department implemented the policy anyway.⁶³

El Paso's criminal defense attorneys, federal judges, and federal magistrate judges witnessed firsthand the anguish caused by these separations, but their efforts to address that anguish would prove unsuccessful.⁶⁴ United States Magistrate Judge Miguel Torres was among the first to try.⁶⁵ In a June 2017 bond hearing for a man accused of unlawful reentry into the United States and separated from his child at arrest, Judge Torres lost his temper when the government had no answers regarding the whereabouts of the child.⁶⁶ After asking repeatedly for information about children in shelters, Judge Torres slammed his hand on the bench and said, "I can't understand this. If someone at the jail takes your wallet, they give you a receipt. They take your kids, and you get nothing? Not even a slip of paper?"⁶⁷

politics/us-migrant-children-whereabouts-.html [https://perma.cc/TSZ9-ZG4G] (explaining the Trump Administration's inability to account for 1,500 migrant children separated from parents and placed with sponsors).

61. See Eric Hargan, *We Didn't Lose 1,500 Migrant Children. Most Are With Family*, WHITE HOUSE (May 30, 2018), <https://www.whitehouse.gov/articles/didnt-lose-1500-migrant-children-family/> [https://perma.cc/773V-A6RP] (explaining the loopholes and flaws—which could be the reason why there are 1,500 “missing” children in the system).

62. See OFF. OF THE INSPECTOR GEN., *supra* note 17 at 8; see also Blitzer, *supra* note 1 (reviewing the findings of the DHS Inspector General).

63. See generally OFF. OF THE INSPECTOR GEN., *supra* note 17 at 8 (finding that DHS was aware of the deficiencies prior to implementing the policy).

64. See Patrick Timmons, *One Judge's Quiet Struggle to Reunite Migrant Families*, UPI (July 6, 2018), https://www.upi.com/Top_News/US/2018/07/06/One-judges-quiet-struggle-to-reunite-migrant-families/8941530815069/ [https://perma.cc/XKP2-XCT6] (showing a judge's frustration with the government's inability to answer questions regarding a child separated from her father).

65. See *id.* (“Torres is one of four magistrate judges in the El Paso federal court of the Western District of Texas.”).

66. See *id.* (“At Herrera's bail hearing, Torres became visibly impatient with the prosecutors' inability to provide him with answers about children in shelters contracted by the government's Office of Refugee Resettlement . . .”).

67. Hanshew, *supra* note 56.

Judge Torres looked to trusted procedural protections.⁶⁸ He told parents to, “frankly, take advantage of the fact they have a lawyer that can make phone calls and ask questions for them just to find out” about their children.⁶⁹ He appointed the Federal Public Defender’s Office to represent five defendants who were charged with unlawful entry and separated from their children.⁷⁰ Judge Torres appointed the Defender’s Office because it had more resources and more time than local private attorneys to assist parents in tracking down their children.⁷¹ He wanted the attorneys and the government to flesh out what role, if any, the separations played in the criminal prosecutions, and to assist him in deciding whether the prosecutions provided a forum for addressing the separations or the parents’ inability to obtain information about their children.⁷² He wondered, “is it something I should even be considering? If I have no authority, I have no authority and that’s that.”⁷³

As it turned out, the defendants’ criminal proceeding was a woefully inadequate forum.⁷⁴ On the separation front, the defense attorneys were unable to get answers even as to what should have been the easy questions: where the children were and how best the parents could reunite with them.⁷⁵ An attorney representing a parent in a reentry case described an encounter with a client who wanted to know where her son

68. *Dominguez-Portillo Transcript*, *supra* note 55 at 5–8.

69. *Id.* at 3.

70. See Sergio Garcia, *Prosecution of Asylum-Seeking Parents*, 42 HASTINGS CONST. L. Q. 49, 53 (2019) (explaining how all but one of the defendants made credible asylum claims when they initially encountered immigration agents).

71. See *Dominguez-Portillo Transcript*, *supra* note 55 at 5–6 (noting that the Defender’s Office would not be subject to limitations on billing hours the way a private office would); see also Timmons, *supra* note 64 (observing that public defenders’ extra resources—such as having their own private investigators—does not make much of a difference).

72. *Dominguez-Portillo Transcript*, *supra* note 55 at 16.

73. See *id.* (displaying Judge Torres’ desire to inquire into the relatedness of separation to the voluntariness of the defendant’s pleas and his discomfort with not knowing if it is within his power).

74. See Timmons, *supra* note 64 (summarizing the conclusion of the proceedings which ultimately were unchanged by the inquiries of the judge as four of the five defendants were deported without their children).

75. See Hanshew, *supra* note 56 (identifying a consistent pattern of prosecutors attempting to exclude discussion of the children from whom the defendants are separated and giving wholly inadequate answers when forced to answer).

was.⁷⁶ The attorney could not answer because the people at the end of the 1-800 number the Office of Refugee Resettlement (ORR) provided had no answer.⁷⁷ The attorney later recalled, “she stared me in the eye, indignant.⁷⁸ ‘Why don’t you know? . . . You’re my lawyer.’”⁷⁹

Sergio Garcia, the attorney appointed by Judge Torres, was also not able to identify legal arguments regarding the separations that found any purchase in the immigrants’ criminal proceedings.⁸⁰ He advanced mainly due process arguments, contending that the government had engaged in outrageous conduct by separating parents from their children in violation of the Due Process Clause—DHS’s own policies—and the 1997 *Flores* Settlement Agreement that governed treatment of unaccompanied immigrant children.⁸¹ He also argued that, with no knowledge of where the missing children were, he could not satisfy his ethical obligation, under *Padilla*, to advise his clients of the immigration consequences of any plea.⁸² In spite of his early concerns, Judge Torres rejected each of these arguments.⁸³

76. *See id.* (finding parents who have been charged after crossing the border with their children have little interest in their own outcomes while the well-being of their children is the most prominent of their concerns).

77. *See id.* (explaining the massive effort the office has to go through to receive even the most vague information by getting investigators, paralegals, administrative staffers, and interns to call and wait on hold for the ORR); *see also* Ryan Devereaux, *The U.S. Has Taken More Than 3,700 Children From Their Parents—And Has No Plan for Returning Them*, INTERCEPT (June 19, 2018), <https://theintercept.com/2018/06/19/children-separated-from-parents-family-separation-immigration/> [<https://perma.cc/JHW7-C8XL>] (revealing parents in detention often have little access to phones—making the ORR’s 1-800 number an entirely inadequate solution).

78. Hanshew, *supra* note 56.

79. *Id.*

80. *See* Brief of Defendants-Appellants at 12, *United States v. Dominguez-Portillo*, 2018 WL 4830279 (W.D. Tex. 2017) [hereinafter *Dominguez-Portillo Brief of Defendants-Appellants*] (asserting the practice of separating children from parents upon entry is not reasonably related to the goals and purposes of asylum law in these proceedings).

81. *See id.* at 2–19 (defining “outrageous conduct” as violating fundamental unfairness and conduct that shocks the conscious); *see also* Stipulated Settlement Agreement at 9–10 *Flores v. Reno*, No. CV-85-4544-RJK(Px) (C.D. Cal. 1997) [hereinafter *Flores Settlement Agreement*] (stating the general policy favoring release to be when the detention of the child is not necessary to ensure their safety or their appearance at court—in these circumstances, the child should be released without delay to a parent or legal guardian).

82. *See* *United States v. Dominguez-Portillo*, Nos. EP-17-MJ-4409-MAT; EP-17-MJ-4456-MAT; EP-17-MJ-4461-MAT; EP-17-MJ-4462-MAT; EP-17-MJ-4499-MAT, 2018 WL 315759, at *25–26 (W.D. Tex. Jan. 5, 2018) (arguing a fully voluntary plea becomes an impossibility).

83. *See id.* at *32–33 (ruling that the government’s actions were not violations that would constitute outrageous government conduct).

A single conclusion led nearly inevitably to all the rest—the government was entitled to place the asylum-seekers in criminal proceedings rather than civil ones.⁸⁴ And, once in criminal proceedings, the government had no obligation to even find out where the children were.⁸⁵ While the parents may have due process rights to receive information about their children, those rights did not affect the central question in their criminal cases: whether the defendants had entered the United States without authorization.⁸⁶

The court found no evidence that the separations were being used to “purposefully try to coerce a guilty plea or gain a litigation advantage—indeed these defendants did not plead guilty.”⁸⁷ It rejected the defendants’ argument that *Padilla* had any application.⁸⁸ Judge Torres recognized a potential role for the decision: “who can doubt,” he queried, “that the immigration consequences and any possibility of seeking legal relief for their minor children who accompanied them would not be a critical, if not determinative consideration” in the defendants’ decisions regarding a plea?⁸⁹

But, Garcia was operating in an information vacuum, uncertain about what options were available to his clients as rules and policies regarding asylum claims shifted daily.⁹⁰ There was no basis to conclude that he was misadvising his clients or doing anything other than what

84. *See id.* at *25–26 (refusing to recognize a right to exhaust civil immigration remedies before criminal charges can be brought in Section 1325 cases).

85. *See id.* at *6 (claiming that while criminal cases are pending for the parent, there is no requirement that the government give any information on the well-being and whereabouts of their children).

86. *See id.* at *11 (declining to recognize the relationship between the right to have information about their children and the underlying Section 1325 claim).

87. *See id.* at *18, *26 (clarifying that while there was no need to evaluate the voluntariness of the pleas as there were none, the ability to warn clients of the consequences of their pleas would be implicated if there were any).

88. *See id.* at *26–27 (noting Federal Rule of Criminal Procedure 11 requires federal courts who accept a guilty plea to warn the defendant about immigration consequences—which is deportation).

89. *See id.* at *28–29 (admitting parents’ decisions in criminal cases are tightly intertwined with the fate of their children, which makes information about their well-being, location and immigration cases critically important).

90. *Cf. id.* at *25–26 (indicating Attorney Garcia was like many other defendants who made decisions without full knowledge of the resulting consequences).

Judge Torres had appointed him to do.⁹¹ Unable to point to a specific deficient performance, the claim regarding the plea became, as the district court recognized in adopting the magistrate judge's decision, an incognizable claim that the defendants had "a right to enter a guilty plea."⁹²

In the end, District Judge Cardone concluded it was not her place to decide the wisdom of the Zero-Tolerance Policy; she merely had to decide whether it violated any rights inherent in a criminal trial.⁹³ She concluded it did not.⁹⁴ Within two months of Judge Cardone's decision, four of the defendants were removed to their home countries—without their children.⁹⁵ According to attorney Garcia, the families have not yet been reunited.⁹⁶

The district court and Fifth Circuit Court of Appeals affirmed both Magistrate Judge Torres's and District Judge Cardone's decisions—in opinions that further underscored the poor fit between the separations and the criminal courts.⁹⁷ In those courts, the defendants made additional arguments, contending that their children had been material witnesses in their cases and that therefore, the government was required by the Sixth

91. *See id.* ("Defense counsel, too, would be in the unenviable position of being unable to provide even the most basic information on what could easily be the most important consideration for a defendant such as those in this case.").

92. *See id.* (recognizing the rights from a voluntary-plea agreement had not been violated).

93. *See* United States v. Vasquez-Hernandez, 314 F.Supp. 3d 744, 749 (W.D. Tex. 2018) ("Although Appellants' separation from their children is a cause of great concern not only for the Appellants but also for many in public at large, the soundness of the government's policies regarding arriving asylum-seekers and their minor children is not before the Court in this appeal.").

94. *Id.*

95. *See* Reply Brief of the Defendants-Appellants at 14–15, United States v. Dominguez-Portillo, 924 F.3d 164 (5th Cir. 2019) [hereinafter *Dominguez-Portillo Reply Brief*] (revealing the appellants were not only convicted, but four of them were deported *without* their children as a result of their guilty verdicts) (emphasis added); *see also* Garcia, *supra* note 70 (indicating the four individuals were deported to Central America and still did not have any notice on the location of their children).

96. Garcia, *supra* note 70; *see* Email interview with Sergio Garcia, Assistant Federal Public Defender (Dec. 5, 2019) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) [hereinafter *Sergio Garcia Interview*] ("[A]s far as I know, the families have not been reunited.").

97. *See* United States v. Vasquez-Hernandez, 924 F.3d 164, 172 (5th Cir. 2019) (affirming the District Court and Magistrate Judge's decision that the policies might not be sound, but they have not been violated); Vasquez-Hernandez, 314 F.Supp.3d at 749 (holding that the Magistrate Judge correctly denied the appellants' motions and the government did not violate any constitutional rights).

Amendment to produce the children at trial.⁹⁸ Had the defendants sought answers about their children in civil proceedings, they would have been entitled to discovery.⁹⁹ In criminal court, of course, the right to discovery is limited.¹⁰⁰ The defendants' ability to compel the presence of witnesses depended on their ability to demonstrate their necessity.¹⁰¹ And the court of appeals, in a somewhat surreal twist, gave another reason for rejecting the argument: the defendants had not sought the children through subpoena.¹⁰²

Of course, the parents (and their attorneys) did not know where the children were, had been told the children would not be produced, and, as the defendants' attorney pointed out, they had been told throughout the proceedings that the government had no obligation to locate them or bring them to court.¹⁰³ These criminal proceedings made the children's presence difficult for parents in another way: bringing them only to testify would mean disrupting their lives, forcing them to see their parents in orange jumpsuits and shackles, and then sending them back to wherever they were being housed, again without their family.¹⁰⁴

Although the Zero-Tolerance Policy officially ended in October 2018,¹⁰⁵ criminal defense attorneys on the border continue to grapple

98. See Brief of Defendants-Appellants at *27–28, *United States v. Vasquez-Hernandez*, 924 F.3d 164 (5th Cir. 2019) [hereinafter *Vasquez-Hernandez Brief of Defendants-Appellants*] (concluding the government acted in bad faith by not producing the children for trial).

99. See *id.* at *25 (suggesting that the defendants would not have been entitled to an attorney in a civil proceeding).

100. See *Vasquez-Hernandez*, 924 F.3d at 171 (quoting *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2005)) (discussing how the government is not required to disclose certain types of evidence).

101. See *United States v. Allen*, 31 M.J. 572, 611 (1990) (“[The] right to compel the attendance of a material witness . . . is not absolute.”).

102. *Vasquez-Hernandez*, 924 F.3d at 172.

103. See *Garcia*, *supra* note 70 at 60–61, 64 (highlighting the effect of family separation on witness availability at asylum proceedings).

104. See *id.* (stating the horrific consequences of producing children as witnesses—even if it was an option).

105. See generally Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 20, 2018) (describing how after the end of the Zero-Tolerance Policy, the Trump Administration attempted to enact policies that would permit CBP Agents to detain children indefinitely); see also Sarah Collins, *Kids in Cages and the Regulations that Protect Them*, 97 DEN. L. REV. FORUM 230, 233–36 (2019) (highlighting Judge Gee's efforts to stop the Trump Administration from eliminating the Flores Settlement Agreement).

with new policies that affect their clients.¹⁰⁶ For example, a new policy permits border patrol agents to do “on the spot” DNA testing of immigrants traveling with children to identify “fake families.”¹⁰⁷ An attorney told me of a recent case in which, minutes after conducting the test, agents informed an immigrant that the boy he was traveling with was not his son (the immigrant had produced a birth certificate), separated the two, and charged the adult with illegal entry.¹⁰⁸ His attorneys doubt the DNA results but have been unable to get them through discovery and believe they would have a better chance of working out the separation issue in civil proceedings.¹⁰⁹

Immigrants harmed by the Zero-Tolerance Policy who, after their criminal prosecutions, were able to secure paid or pro bono counsel have fared better.¹¹⁰ Indeed, the named defendant in *Vasquez-Hernandez* was assisted by a non-profit organization after her conviction and granted an immigration bond while she awaited a ruling on her asylum claim.¹¹¹ Numerous lawsuits have been filed challenging the Trump Administration’s policies, and many have been, at least in part, successful.¹¹² These successes correspond with data showing that, even

106. See Julia Preston, *Zero Tolerance Lives On*, MARSHALL PROJECT, <https://www.themarshallproject.org/2018/09/14/zero-tolerance-lives-on> [https://perma.cc/RU3P-NHJ2] (expanding on the ways the new policies affect criminal defense attorneys and their clients at the border).

107. See Priscilla Alvarez, *ICE Ramps up DNA Testing for Migrant Families Along the Southern Border*, CNN (July 22, 2019), <https://www.cnn.com/2019/07/22/politics/ice-deploys-dna-testing-at-border/index.html> [https://perma.cc/5FXX-KRW9] (providing information about the new DNA testing policy).

108. See Email interview with Kristin Kimmelman, Assistant Federal Public Defender (Dec. 13, 2019) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) [hereinafter *Kristin Kimmelman Dec. Interview*] (discussing a recent immigration case where the family was DNA tested and the test results claimed there was a zero percent chance the family members were related; however, the attorney on the case was determined to do their own testing to determine accurate results).

109. *Id.*

110. See generally *Vasquez-Hernandez Brief of Defendants-Appellants*, *supra* note 98 at *1–48 (noting how a non-profit organization was able to help defendants obtain an immigration bond).

111. *Id.*

112. See, e.g., *Jacinto-Castanon de Nolasco v. U.S. Immigration and Customs Enf't*, 319 F. Supp.3d 491, 505 (D.D.C. 2018) (granting a temporary injunction against further removals while parents litigate due process claims); *W.S.R. and C.D.A. v. Sessions*, 318 F. Supp.3d 1116, 1128 (N.D. Ill. 2018) (ordering reunification of fathers and sons separated by the Zero-Tolerance Policy); *Ms. L.*, 310 F. Supp.3d at 1149 (granting a class wide injunction preventing family separations).

in routine immigration matters, represented immigrants are detained for less time and are more likely to obtain immigration relief than those without counsel.¹¹³

The Trump Administration's efforts to end most immigration at the United States–Mexico border are by no means over.¹¹⁴ Deciding—probably correctly—that it cannot advance its goals through a legislative process with an intractably divided Congress, the administration continues to act through executive orders and changes in agency policy.¹¹⁵ Its most recent efforts have transformed the way in which asylum claims at the border are handled.¹¹⁶ Those efforts include a “Remain in Mexico” program, requiring asylum-seekers from Central and South America to await their proceedings on the Mexican side of the border;¹¹⁷ a rule prohibiting applications from asylum-seekers who pass through another country, other than their own, on the way to the United States;¹¹⁸ expediting and streamlining consideration of asylum claims; limiting the number of people seeking asylum from Mexico;¹¹⁹ and prohibiting asylum for anyone who has not already been denied a request

113. See Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 846 (2018) (comparing data percentages between those that succeeded with counsel versus those without counsel).

114. See, e.g., *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, WHITE HOUSE (Nov. 9, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/> [<https://perma.cc/AC76-KFTA>] (demonstrating the executive's efforts to end immigration by suspending the entry of certain undocumented individuals traveling through Mexico to enter our country).

115. See generally Dara Lind, *Judge Stops Trump from Enforcing Asylum Ban*, VOX (Nov. 20, 2019), <https://www.vox.com/2018/11/20/18102879/asylum-trump-lawsuit-judge> [<https://perma.cc/RFW9-RDNE>] (discussing how rulings against the Trump Administration do not guarantee positive change through their executive orders).

116. See Jason Kao & Denise Lu, *How Trump's Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. TIMES (Aug. 18, 2019), <https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html> [<https://perma.cc/8KZ4-HZZK>] (discussing the “Remain in Mexico” policies).

117. *Id.*

118. Nicole Narea, *Trump's Policies at the Border Weren't Designed to Keep Out Mexican Asylum Seekers—Until Now*, VOX (Nov. 27, 2018), <https://www.vox.com/policy-and-politics/2019/11/27/20982671/trump-border-mexican-asylum-seeker-migrant-metering-harp-pacr-pilot-program-el-paso-camps> [<https://perma.cc/VH5K-UXVX>].

119. See *id.* (discussing the Trump Administration's ways of limiting the number of Mexican immigrants seeking asylum).

in another country.¹²⁰ The administration also tried to ban immigrants seeking asylum by limiting the request to official ports of entry.¹²¹

It may be, as it was with the decision to use criminal rather than civil proceedings for asylum-seekers, that the executive branch has the authority to do all these things.¹²² But, in pursuing its goals at the border, the administration is taxing, or expressly limiting, the structures and procedures in place that test that authority—among them, notice and comment periods for rule changes;¹²³ access to lawyers; time to prepare a case; and the availability of courtrooms and judges.¹²⁴ And its willingness to remove those protections is resulting in due process violations that demean the nation.¹²⁵

The administration is aware that the system has reached a breaking point; the signs are inescapable.¹²⁶ At the most basic level, there are not

120. See Azam Ahmed & Paulina Villegas, *'This Takes Away All Hope': Rule Bars Most Applicants for Asylum in U.S.*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/world/americas/asylum-seekers.html> [<https://perma.cc/5XHY-D5PA>] (“The rule is among the most stringent measures taken by this administration in its battle to halt migration, upending decades of asylum and humanitarian norms.”); see also *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019) (explaining the recent decision by the Supreme Court granting the government’s request to stay a preliminary injunction of this change).

121. See *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 745–55 (9th Cir. 2018) (upholding a temporary restraining order barring this rule until its validity could be litigated).

122. See *id.* at 755–56 (analyzing the amount of power that is vested in the executive branch); see generally U.S. CONST. art. II (demonstrating the powers generally vested in the President—which includes the power to regulate the entry of aliens into the United States).

123. *E. Bay Sanctuary Covenant*, 140 S. Ct. at 4 (Sotomayor, J., dissenting from grant of stay); see *E. Bay Sanctuary Covenant*, 932 F.3d at 775.

124. See Kara A. Naseef, *How to Increase the Immigration Backlog: Expand Representation and End Unnecessary Detention*, 52 U. MICH. J.L. REFORM 771, 783 (2019) (“Access to counsel decreases detention time, thereby reducing administrative strain and financial costs to the U.S. government.”).

125. See Katie Benner & Charlie Savage, *Due Process for Undocumented Immigrants, Explained*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/politics/due-process-undocumented-immigrants.html> [<https://perma.cc/6TCQ-YGXS>] (explaining that non-citizens generally have the right to appeal deportation or asylum decisions, but ultimately Congress can place more limited procedures for noncitizens detained at the border).

126. See Michael D. Shear et al., *The U.S. Immigration System May Have Reached a Breaking Point*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/10/us/immigration-border-mexico.html> [<https://perma.cc/6CXQ-8SSM>] (“The resulting crisis has overwhelmed a system unable to detain, care for and quickly decide the fate of tens of thousands of people who claim to be fleeing for their lives.”).

enough bodies to deliver even basic due process guarantees.¹²⁷ It is difficult to procure an attorney, and adequate access to counsel is complicated by distance to detention facilities.¹²⁸ During the separation crisis, children as young as three years old were appearing alone in immigration proceedings.¹²⁹ Even when asylum-seekers are able to obtain counsel, the “Remain in Mexico” program is making access to their attorneys difficult and, in some cases, impossible.¹³⁰ But, just as it acted with the sure knowledge that it would not be able to keep track of the children separated during the Zero-Tolerance Policy, the administration continues to test the country’s ability to execute its immigration policies fairly.¹³¹

For example, the “expedited asylum” program, an experimental program begun in October 2019, compresses an asylum claim into ten days or fewer by rejecting any person who cannot prove to an immigration official’s satisfaction that she has a credible fear of harm in

127. See Naseef, *supra* note 124 at 783–92 (highlighting the disparity between the number of people seeking immigration relief and those who are represented by counsel).

128. See *id.* at 787 (explaining how the remote locations of detentions centers make it more difficult and costly to obtain representation).

129. Christina Jewett & Shefali Luthra, *Immigrant Toddlers Ordered to Appear in Court Alone*, TEX. TRIB. (June 27, 2018), <https://www.texastribune.org/2018/06/27/immigrant-toddlers-ordered-appear-court-alone/> [<https://perma.cc/Z3TE-DRY9>].

130. See Miriam Jordan, *In Court Without a Lawyer: The Consequences of Trump’s “Remain in Mexico” Plan*, N.Y. TIMES (Aug. 3, 2019), <https://www.nytimes.com/2019/08/03/us/migrants-court-remain-in-mexico.html> [<https://perma.cc/3WVGJ-EGSZ>] (noting the staggering statistics under the migrant protection protocols, where just over one percent had legal representation among the 1,155 cases); see also Kristina Davis, *Judge Orders Guatemalan Family Access to Lawyer for Remain in Mexico Interview*, SAN DIEGO UNION-TRIB. (Nov. 12, 2019), <https://www.sandiegouniontribune.com/news/courts/story/2019-11-12/judge-orders-guatemalan-family-access-to-lawyer-during-remain-in-mexico-interview> [<https://perma.cc/2G8G-S9DM>] (ordering a temporary restraining order in a case challenging lack of access to counsel); Email Interview with Kristin Kimmelman, Assistant Federal Public Defender (Nov. 22, 2019) (on file with *The Scholar: St. Mary’s Law Review on Race and Social Justice*) [*Kristin Kimmelman Nov. Interview*] (proving how individuals are forced to choose between awaiting an asylum determination from crowded and dangerous tents in Mexico or entering the United States without authorization, which may result in unlawful crossings that might otherwise not have occurred).

131. See generally Laura C. N. Wood, *Impact of Punitive Immigration Policies, Parent-Child Separation and Child Detention on the Mental Health and Development of Children*, 2 BMJ PAEDIATRICS OPEN 1–2 (Aug. 30, 2018), <https://bmjpaedsopen.bmj.com/content/bmjpo/2/1/e000338.full.pdf> [<https://perma.cc/7UVP-TCUX>] (demonstrating the complex and detrimental outcomes involving separation, return, and repatriation of children as a result of the zero-tolerance immigration strategy).

her home country.¹³² Individuals are permitted to speak with attorneys only by telephone and only in the twenty-four hours preceding their interviews.¹³³ Without notice, the administration entered into agreements with Guatemala, Honduras, and El Salvador—permitting it to deport asylum-seekers not only to the countries they came from, but also to countries they merely passed through on their way to the United States.¹³⁴ The administration is now experimenting with similar strategies designed to reduce the number of asylum-seekers from Mexico.¹³⁵

Perhaps the administration intends to dismantle procedural protections for immigrants at the border; perhaps not.¹³⁶ But it has demonstrated a willingness to tolerate conditions that are, frankly, beneath even the least of this country's aspirations for itself.¹³⁷ Loose ends from the family separations alone include children who are still not reunited with their parents,¹³⁸ and children, who though reunited, have suffered intense psychological harm.¹³⁹ Ending the “catch and release” approach to asylum-seekers resulted in overcrowded detention facilities and a

132. See Sarah McConnell, *Trump Administration Begins Testing Expedited Asylum Program in El Paso*, TEXAN (Oct. 30, 2019), <https://thetexan.news/trump-administration-begins-testing-expedited-asylum-program-in-el-paso/> [<https://perma.cc/FGF3-2ZLY>] (acknowledging the secret institution of an experimental program to expedite asylum proceedings).

133. See *id.* (“[T]he pilot program is designed to allow detainees access to a phone 24 hours prior to their initial asylum interview during which time they can consult with an immigration attorney.”).

134. See generally Narea, *supra* note 118 (discussing the effectiveness of several new policies rolled out by the Trump Administration to impede migrants).

135. See, e.g., *id.* (introducing initiatives such as “metering,” which aims to limit the number of migrants processed daily at ports of entry).

136. See *id.* (providing that while the intention is unclear behind some of the initiatives, the effectiveness and impact of the new programs in place are profound).

137. See Jack Herrera, *Can We Be Sure Only Six Migrant Children Have Recently Died in Government Custody?*, PAC. STANDARD (May 23, 2019), <https://psmag.com/news/can-we-be-sure-only-six-migrant-children-have-recently-died-in-government-custody/> [<https://perma.cc/SSV3-YFDJ>] (articulating the abysmal conditions and circumstances involving some of our country's most vulnerable human beings).

138. See Julia Ainsley, *Former ICE Director: Some Migrant Family Separations are Permanent*, NBC NEWS (June 19, 2018), <https://www.nbcnews.com/storyline/immigration-border-crisis/former-ice-director-some-migrant-family-separations-are-permanent-n884391> [<https://perma.cc/QE59-2RFV>] (reporting the permanent separation ensuing from the inability for some migrant parents to relocate their child).

139. Cf. Wood, *supra* note 131 at 5 (commenting on the psychological trauma children experience through these adverse actions).

wholesale failure to provide even minimal care for detainees.¹⁴⁰ At least six children have died in CBP custody.¹⁴¹ Under the more recent initiatives, immigrants are forced to remain in tent camps in Mexico in poor conditions, are unable to find work to support themselves, and are in considerable danger from the elements and from violent gangs.¹⁴² As I am preparing this essay for submission, CBP is resisting efforts, supported by the Centers for Disease Control and Prevention, to vaccinate immigrants against the flu in initial detention centers rather than wait until they are more permanently placed.¹⁴³

140. See Bart Jansen, *Government Watchdog Photos Show Dangerous Conditions at Border Patrol Sites for Migrants*, USA TODAY (July 2, 2019), <https://www.usatoday.com/story/news/politics/2019/07/02/dhs-inspector-general-cbp-migrant-detention-facilities-overcrowded-dangerous/1633984001/> [<https://perma.cc/9GVX-S9RZ>] (detailing the report made by the Inspector General where the conditions inside the detention facilities were deplorable because the facilities were not meant to house large amounts of individuals at once, and the overcrowded facilities pose an immediate health risk to not only the immigrants, but also the federal agents who are tasked to keep the facility running); see also U. S. COMM’N ON CIV. RTS., *TRAUMA AT THE BORDER: THE HUMAN COST OF INHUMANE IMMIGRATION POLICIES* 81–82 (Oct. 2019), <https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf> [<https://perma.cc/KNS3-N4DR>] (reporting on the conditions of the facilities where the United States Commission on Civil Rights received testimony from the immigrants that detailed the lack of personal care and hygiene immigrants received).

141. Herrera, *supra* note 137.

142. See Letter from Robert Menendez et al., Sen., United States, to Mike Pompeo, Sec’y of St., United States & Kevin McAleenan, Sec’y, Dep’t of Homeland of Sec. (Aug. 27, 2019), <https://www.foreign.senate.gov/imo/media/doc/08-27-19%20DEms%20letter%20to%20State%20&%20DHS%20re%20Remain%20in%20Mexico%20policy.pdf> [<https://perma.cc/6SQH-5AVK>] [hereinafter *Senate Remain in Mexico Policy Letter*] (writing to Secretary of State Mike Pompeo and Acting Secretary Kevin McAleenan about how the Remain in Mexico Policy—which the federal government has in place—is doing more harm than good because it is placing asylum-seekers in harm’s way by having them return back to Mexico where they face gang violence on a daily basis); see also Nomaan Merchant, *Tents, Stench, Smoke: Health Risks Are Gripping Migrant Camp*, ASSOCIATED PRESS (Nov. 14, 2019), <https://apnews.com/337b139ed4fa4d208b93d491364e04da> [<https://perma.cc/2RRT-T4HV>] (describing the tents along the United States-Mexico border where there are piles of human waste which leave the air smelling like feces, and such conditions are breeding grounds for E. coli and other infectious bacteria); see also John Burnett, *Employers Struggle With Hiring Undocumented Workers: ‘You Cannot Hire American Here,’* NPR (Aug. 21, 2019, 5:00 AM), <https://www.npr.org/2019/08/21/752336132/employers-struggle-with-hiring-undocumented-workers-you-cannot-hire-american-her> [<https://perma.cc/9YH2-32ZA>] (explaining the ramifications of President Trump’s “Buy American and Hire American” Executive Order on employers—making it difficult for employers to hire immigrants).

143. Miriam Jordan, *Why Border Patrol Refuses to Offer Flu Shots to Migrants*, N.Y. TIMES (Dec. 11, 2019), <https://www.nytimes.com/2019/12/11/us/migrants-flu-vaccines-border-patrol.html> [<https://perma.cc/ZRP6-YBQQ>].

I no longer have a front-row seat to the border crisis.¹⁴⁴ Instead, I teach students about constitutional criminal procedure.¹⁴⁵ I tell my students that the limits we place on government action are a sign of this nation's courage.¹⁴⁶ I regret to say that signs of that courage are in short supply right now.¹⁴⁷ Our government should not pursue, condone, or even turn a blind eye to policy "solutions" that are more akin to brute force than to the measured governance this country has prided itself on.¹⁴⁸ As others have pointed out, the significant problems at the border require more process, not less—more judges, more lawyers, or at least advisors, for all families and unaccompanied children who enter the country.¹⁴⁹ If the administration cannot provide more resources, then it must do only what fair process permits until it can—just as it should not have taken children from parents before it was certain it could house, protect, and *find* them.¹⁵⁰ If it cannot provide minimal shelter and protection for detainees, it should limit the number of people it assumes

144. Donna Coltharp, *Assistant Professor of Law*, ST. MARY'S U. SCH. LAW, <https://law.stmarytx.edu/academics/faculty/donna-coltharp/> [<https://perma.cc/27GK-5BTH>].

145. *Id.*

146. *See generally*, *Founding Principles and Virtues*, BILL OF RTS. INST., <https://billofrightsinstitute.org/founding-documents/founding-principles/> [<https://perma.cc/56CQ-CJ9T>] (explaining how the United States was founded on certain principles and virtues, such as courage, and when taken together "help form the conscience of the nation against which Americans judge the justice of their laws").

147. *See generally* Aiken, *supra* note 8 at 46–47 (explaining the story of how a lawyer, who witnessed a trial, was shocked and stunned to see that seventy-five migrants were prosecuted and sent to prison in less than eighty-five minutes even though they had access to lawyers, and the lawyer concluded that justice nor due process was given to the migrants).

148. *See generally* TOM JAWETZ, *RESTORING THE RULE OF LAW THROUGH A FAIR, HUMANE, AND WORKABLE IMMIGRATION SYSTEM* (2019), <https://cdn.americanprogress.org/content/uploads/2019/07/19122622/RuleOfLaw-report.pdf> [<https://perma.cc/5T5B-PH6F>] (reporting on the issue that the debate on immigration has been divided into two schools of thought where one pays homage to this country's history and traditions as an immigrant nation, and the other is about enforcing the rule of law and prosecuting immigrants who cross into the country illegally—which President Trump has voraciously advocated).

149. *See* Naseef, *supra* note 124 at 783–84 (explaining how the need for more representation of immigrants, along with more immigrant judges, will help immigration proceedings because of the huge backlog of cases).

150. *See generally id.* at 783–85 (addressing the positive impact that resources have on reaching both fair and efficient outcomes within the immigration system).

custody over.¹⁵¹ It should have the courage to tell itself “no.”¹⁵² And, perhaps that limitation will force it—and Congress—to find solutions that do not require causing such wholesale harm.¹⁵³ It is the President’s prerogative to pursue his (and his voters’) goals at the border.¹⁵⁴ But I think that most citizens, when made aware of the way in which their business is being conducted, would, like the man on the train in Pennsylvania, object that “it shouldn’t be like” this.¹⁵⁵

151. See also Madeline Joung, *What Is Happening at Migrant Detention Centers? Here’s What to Know*, TIME (July 12, 2019, 2:01 PM), <https://time.com/5623148/migrant-detention-centers-conditions/> [<https://perma.cc/EUL4-L76M>] (indicating poor shelter conditions and insufficient protection through illustrations of overcrowded and unsanitary detention centers).

152. See *id.* (reporting the overcrowded conditions of migrant detention centers and describing how one DHS inspector general reported 900 people crammed into a space which was only supposed to accommodate 125 people at most).

153. See Jodi Ziesemer, *A Solution to the US Border Crisis? Treat Detained Migrants as Refugees*, GUARDIAN (Aug. 5, 2018), <https://www.theguardian.com/commentisfree/2018/aug/05/solution-border-crisis-detained-migrants-refugees> [<https://perma.cc/7LYQ-KYX7>] (articulating how the alternative program is more cost effective and humane in contrast to the Zero-Tolerance Policy).

154. See Ted Hesson & Quint Forgey, *Trump Promises Mass Deportations of ‘Millions of Illegal Aliens’ Next Week*, POLITICO (June 18, 2019, 12:59 PM), <https://www.politico.com/story/2019/06/18/trump-deportation-illegal-aliens-1367012> [<https://perma.cc/W8GT-2EGL>] (providing President Trump’s promise to the country regarding deportation).

155. Cf. Nieto, *supra* note 14 (“It is time to change the rhetoric from ‘illegal aliens crawling across the border that come here to take our jobs and commit crimes’ to ‘individuals looking for a better life.’”).