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## The Trauma of Trump's Family Separation and Child Detention Actions: A Children's Rights Perspective

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# THE TRAUMA OF TRUMP’S FAMILY SEPARATION AND CHILD DETENTION ACTIONS: A CHILDREN’S RIGHTS PERSPECTIVE

Jonathan Todres\* & Daniela Villamizar Fink\*\*

*Abstract:* In April 2018, the Trump Administration publicly announced a new zero-tolerance policy for illegal entries at the U.S. border. This action kicked off a wave of family separations that made headlines and drew criticism from around the globe. Despite resounding condemnation of these actions, the Trump Administration defended its family separation policy as a “tough deterrent.” At least 2,600 families were torn apart in the ensuing months. And subsequent reports—from both the government and others—have detailed widespread abuses of and substandard conditions for children held in detention centers. The consequences of these separations and the maltreatment of children in detention are pronounced. The trauma that children have endured potentially has lifelong ramifications. This Article provides an in-depth, children’s rights-based analysis of the Trump Administration’s family separation and child detention policies and actions. A children’s rights perspective offers several critical insights. First, children’s rights are rooted in a legal mandate. Second, examining the Trump Administration’s actions from a children’s rights perspective reveals the breadth of rights violations occurring. This more nuanced understanding of the events can help in devising appropriate strategies to respond to such violations. Third, a children’s rights perspective helps place the Trump Administration’s actions in their historical context to better understand the gravity of these actions. Children’s rights law is as close to universally accepted as any human rights law, and thus any departures from such widely embraced standards are particularly revealing. Finally, the authors discuss the implications of this children’s rights assessment, urging action on several fronts to address this harm and prevent violations of children’s rights in the future.

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“Please, Mom, communicate. Please, Mom. I hope that you’re OK and remember, you are the best thing in my life.”

— Girl detained in a shelter in South Texas<sup>1</sup>

“At Ursula, we are kept in a cage. It is very crowded, with about 50 boys and young men ranging in age from about 5 to 20 years old. There is no room to move without stepping over the others. We were not given a mat to sleep on, so we had to sleep on the cold, concrete floor. The lights are on all the time. We were both very cold last night. I did not get any sleep, I stayed up worried about my nephew and making sure he was safe.”

— Seventeen-year-old boy detained at a border patrol station with his eight-year-old nephew<sup>2</sup>

## INTRODUCTION

In June 2019, before the United States Court of Appeals for the Ninth Circuit, the Trump Administration argued that having detained children sleep on concrete floors or failing to provide them with basic necessities such as soap and toothbrushes did not violate the law.<sup>3</sup> Specifically, the Trump Administration contended that such basic necessities were not necessarily included in the requirement that the government provide “safe and sanitary” facilities.<sup>4</sup> The combination of the fact that the U.S. government is holding children, including infants and toddlers, in squalid, overcrowded conditions in border patrol stations and detention centers,<sup>5</sup> and openly arguing in federal court that it is acceptable to do so, prompts the question: how did we get here? The seeds of these Trump Administration policies and actions date back to at least 2017, as detailed in a confidential Trump Administration draft memo that was leaked to

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1. Dan Barry et al., *Cleaning Toilets, Following Rules: A Migrant Child’s Days in Detention*, N.Y. TIMES (July 14, 2018), <https://www.nytimes.com/2018/07/14/us/migrant-children-shelters.html> [https://perma.cc/592M-R9NT].

2. Declaration of E. at 1, *Flores v. Sessions*, No. 2:85-CV-04544 DMG (AGRx) (C.D. Cal. June 26, 2019).

3. Meagan Flynn, *Detained Migrant Children Got No Toothbrush, No Soap, No Sleep. It’s No Problem, Government Argues*, TEX. TRIB. (June 21, 2019, 8:00 AM), <https://www.texastribune.org/2019/06/21/detained-migrant-children-no-toothbrush-no-soap/> [https://perma.cc/JF32-ARGP].

4. Order Re Plaintiffs’ Motion to Enforce and Appoint a Special Monitor [201, 202] at 13, *Flores v. Sessions*, No. 2:85-CV-04544 DMG (AGRx), slip op. (C.D. Cal. June 27, 2017) (order granting in part and denying in part plaintiffs’ motion to enforce agreement), <https://www.aila.org/File/Related/14111359v.pdf> [https://perma.cc/S4XQ-G75M].

5. Caitlin Dickerson, *‘There is a Stench’: Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html> [https://perma.cc/6RXY-DAZ7].

Senator Jeff Merkley, which outlined a breadth of immigration-related strategies under consideration, including family separations.<sup>6</sup> The official family separation policy was not declared publicly until months later.

On April 6, 2018, then Attorney General Jeff Sessions announced the new zero-tolerance policy for illegal entries at the U.S. border.<sup>7</sup> This action kicked off a wave of family separations that made headlines and drew criticism from around the globe.<sup>8</sup> Despite resounding condemnation of these actions, the Trump Administration defended its family separation policy as a “tough deterrent.”<sup>9</sup> The Administration’s actions tore apart at least 2,600 families in the ensuing months, although the government has acknowledged that it does not know the precise number of children separated from their families.<sup>10</sup> The consequences of these separations for children are pronounced. The trauma that children (and their families) have experienced will likely have lifelong ramifications.

This Article examines the Trump Administration’s family separation policy and corresponding actions from a children’s rights perspective. A children’s rights lens provides important insights. First, unlike ethical or moral arguments, children’s rights—or human rights—perspectives are rooted in a legal mandate and carry the force of law.<sup>11</sup> Second, examining

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6. Policy Options to Respond to Border Surge of Illegal Immigration, J.E.C.M. v. Lloyd, No. 1:18-CV-00903-LMB-MSN (E.D. Va. Jan. 18, 2019); see also Zachary Mueller, *An Ongoing Timeline of Trump’s Separation of Families*, AM.’S VOICE (Aug. 8, 2018), <https://americasvoice.org/blog/family-separation-timeline/> [<https://perma.cc/X9KA-6PWB>] (finding that the Trump Administration considered separating families at the border as early as March 2017, and was taking such steps by October 2017). Enumerated in the memo are sixteen short and long-term goals including: increase prosecution of family unit parents, separate family units, revise the definition of an “unaccompanied minor” to strip children who cross the border with their families of added protections such as the right to be heard before an immigration judge or to seek asylum, terminate the *Flores* Settlement Agreement via legislation, expand ICE detention facilities, and more.

7. OFFICE OF THE ATT’Y GEN., MEMORANDUM FOR FEDERAL PROSECUTORS ALONG THE SOUTHWEST BORDER (2018) [hereinafter OFFICE OF THE ATT’Y GEN., MEMORANDUM].

8. While this event garnered significant attention as a formal policy announcement, there is evidence that the Trump Administration started separating children from their families in 2017. Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border*, N.Y. TIMES (April 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html> [<https://perma.cc/RT5N-VFCA>] (“But new data reviewed by The New York Times shows that more than 700 children have been taken from adults claiming to be their parents since October [2017], including more than 100 children under the age of 4.”).

9. William Cummings, *John Kelly Defends Separating Immigrant Families, Saying ‘Name of the Game is Deterrence’*, USA TODAY (May 11, 2018, 4:16 PM), <https://www.usatoday.com/story/news/politics/2018/05/11/john-kelly-splitting-migrant-families-laws-trump/602982002/> [<https://perma.cc/7ELJ-5FFH>].

10. Jonathan Blitzer, *The Uncounted Families Torn Apart at the Border by the Trump Administration*, NEW YORKER (Jan. 18, 2019), <https://www.newyorker.com/news/dispatch/the-uncounted-families-torn-apart-at-the-border-by-the-trump-administration> (last visited Feb. 3, 2020).

11. On the force of law generally, see, for example, Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 RATIO JURIS 164, 165 (2016), explaining, “[t]he force of law is not one thing but three: the imposition of duties, the use of coercion, and the exercise of power.” See also FREDERICK SCHAUER, *THE FORCE OF LAW I* (2015) (“Law makes us do things we do not want to do.

the Trump Administration's actions from a children's rights perspective reveals both the nature and breadth of rights violations occurring. This more nuanced understanding of the events and the range of rights implicated can help in devising appropriate strategies to respond to such violations.<sup>12</sup> Third, a children's rights perspective helps place the Trump Administration's actions in their historical context to better understand the gravity of these actions. Children's rights law is as close to universally accepted as any human rights law,<sup>13</sup> and thus any departures from such widely embraced standards are particularly revealing. Moreover, as discussed below, the rights violations occurring in this context parallel actions taken by some of the most notorious regimes of the past century.

Part I of this Article summarizes the Trump Administration's actions and looks at their impact on children at three stages of this process: separation, detention, and reunification. Part II then assesses the consequences of these actions for children's well-being and, in particular, explores the trauma and the immediate and long-term health effects children face when forcibly separated from their families, even if temporarily. Part III applies a children's rights framework to the Trump Administration's actions, drawing in particular on the United Nations Convention on the Rights of the Child (CRC).<sup>14</sup> The CRC is both the most comprehensive treaty on the rights and well-being of children and the most widely ratified human rights treaty in history.<sup>15</sup> Every country in the world has accepted the legal mandate of the CRC, with the exception of one: the United States.<sup>16</sup> Although the United States is the lone holdout, it was arguably the most active government delegation during the CRC's drafting,<sup>17</sup> and thus the content of the CRC actually reflects a framework

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It has other functions as well, but perhaps the most visible aspect of law is its frequent insistence that we act in accordance with its wishes, our own personal interests or best judgment notwithstanding.”).

12. Elizabeth S. Barnert et al., *Long Journey Home: Family Reunification Experiences of the Disappeared Children of El Salvador*, 37 HUM. RTS. Q. 492, 493 (2015) (“Understanding how family separation and reunification impact a child’s health and well-being is critical, as children may be especially vulnerable to effects of prolonged separation from their families.”).

13. See Jonathan Todres & Shani M. King, *Introduction*, in THE OXFORD HANDBOOK OF CHILDREN’S RIGHTS LAW 1, 1 (Jonathan Todres & Shani M. King eds., Oxford Univ. Press 2020).

14. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 44 U.N.T.S. 25 [hereinafter CRC] (entered into force Sept. 2, 1990).

15. *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en) [<https://perma.cc/A7N2-DX3D>] (196 states parties); see also Todres & King, *supra* note 13, at 1.

16. R. Brian Howe & Katherine Covell, *Human Rights Education: Education about Children’s Rights*, in THE OXFORD HANDBOOK OF CHILDREN’S RIGHTS LAW 699, 700 (Jonathan Todres & Shani M. King eds., 2020).

17. See Cynthia P. Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT’L L. REV. 185, 190 (2006) (noting that the United States influenced the text of nearly every article of the CRC and that “U.S. influence was so strong that some people referred to the Convention as the ‘U.S. child rights treaty’”); Cynthia P. Cohen, *Role of the United*

that the United States did support when the treaty was adopted.<sup>18</sup> Finally, Part IV discusses the implications of this children’s rights assessment, urging action on several fronts to address these harms and prevent similar ones from occurring in the future.

## I. TRUMP ADMINISTRATION’S FAMILY SEPARATION ACTION

Although the Trump Administration had contemplated separating children from their families at the border as early as March 2017<sup>19</sup> and started implementing the practice in July 2017,<sup>20</sup> Attorney General Jeff Sessions’ announcement in April 2018 converted the practice into public policy.<sup>21</sup> In response to families presenting at or entering the U.S. southern

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*States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, 4 LOY. POVERTY L.J. 9, 25–26 (1998) (“The United States was by far the most active, making proposals and textual recommendations for thirty-eight of the forty substantive articles.”).

18. The CRC was adopted unanimously. Maria Grahn-Farley et al., *New York’s Compliance with the Convention on the Rights of the Child*, 12 N.Y. CITY L. REV. 473, 487 (2009). Furthermore, although the United States has not ratified the CRC, it did sign the treaty in 1995, during the Clinton Administration. See Megan Smith-Pastrana, *In Search of Refuge: The United States’ Domestic and International Obligations to Protect Unaccompanied Immigrant Children*, 26 IND. INT’L & COMP. L. REV. 251, 263 (2016). On the U.S. approach to human rights treaties generally, see, for example, Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 421 (1979), explaining that,

[t]he United States has been active in promoting human rights in the United Nations, in the Organization of American States, and in other international institutions. But the United States has not been a pillar of human rights, only a ‘flying buttress’—supporting them from the outside . . . [W]e have not accepted international human rights for ourselves.

19. COMM. ON OVERSIGHT & REFORM, U.S. HOUSE OF REPRESENTATIVES, CHILD SEPARATIONS BY THE TRUMP ADMINISTRATION 10 (2019) [hereinafter COMM. ON OVERSIGHT & REFORM], <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf> [https://perma.cc/6L8H-L3SF] (“In an interview on March 7, 2017, Secretary of Homeland Security John F. Kelly was asked whether DHS personnel were going to ‘separate the children from their moms and dads.’ He responded: ‘Yes, I am considering, in order to deter more movement along this terribly dangerous network, I am considering exactly that.’”).

20. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER 14–15 (2018), <https://www.gao.gov/assets/700/694918.pdf> [https://perma.cc/YX38-9Q6V] (noting that at least 281 children were separated from their families by November 2017).

21. OFFICE OF THE ATT’Y GEN., MEMORANDUM, *supra* note 7. The memorandum essentially urges criminal prosecution of all persons presenting at or crossing the U.S. border. DHS refers for prosecution offenders of 8 U.S.C. § 1325(a) (2012), which reads,

[a]ny alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact. *Id.*

.What the “zero-tolerance policy” fails to take into consideration is the *legality* of entering the United States without inspection when seeking asylum. Our law stipulates in 8 U.S.C. § 1158(a)(1) that “[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien’s status, may apply for asylum.”

border, some of whom were seeking asylum,<sup>22</sup> the Trump Administration argued that this separation policy was necessary because there had been a surge in illegal immigration—even though statistics show overall that the number of apprehensions had declined in the years prior to the new Trump Administration policy.<sup>23</sup> After the policy declaration, from mid-April to the end of May 2018, 1,995 children were separated from their adult caregivers.<sup>24</sup> That number rose to 2,342 children by June 9, 2018.<sup>25</sup>

Despite these numbers, as of June 17, 2018, the Trump Administration was still denying that the Department of Homeland Security (DHS) had a policy of separating families at the border.<sup>26</sup> The next day, June 18, public discourse changed when photos of children being kept in cages were made public.<sup>27</sup> In addition, *ProPublica* obtained and published an audio recording of children between four and ten years old in a detention center, in which children can be heard crying and calling for their parents.<sup>28</sup> The publication of these photos and the audio recording gave the U.S. public a true sense of the trauma and agony experienced by young children torn from their parents.

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*Id.* To be prima facie eligible to apply for asylum, persons *must* be physically present in the United States, irrespective of their status.

22. Camila Domonoske & Richard Gonzalez, *What We Know: Family Separation and 'Zero Tolerance' at the Border*, NPR (June 19, 2018, 2:17 PM), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> [<https://perma.cc/4KHZ-DPWJ>].

23. Anna Giaritelli, *DHS: 2,342 Kids Separated from Adults at the Border over Five-week Period*, WASH. EXAMINER (June 19, 2018, 12:03 PM), <https://www.washingtonexaminer.com/news/dhs-2-342-kids-separated-from-adults-at-the-border-over-five-week-period> [<https://perma.cc/NW9Q-HTTS>]; Rebecca Hersher & Vanessa Qian, *3 Charts That Show What's Actually Happening Along the Southern Border*, NPR (June 22, 2018, 5:15 PM), <https://www.npr.org/2018/06/22/622246815/ unauthorized-immigration-in-three-graphs> [<https://perma.cc/G8T9-C5FH>].

24. *1,995 Minors Separated from Adults During 6-week Period, DHS Says*, CBS NEWS (June 15, 2018, 3:14 PM), <https://www.cbsnews.com/news/1995-minors-separated-from-adults-during-six-week-period-dhs-says/> [<https://perma.cc/37S7-6NX6>].

25. Graham Kates, *Migrant Children at the Border—The Facts*, CBS NEWS (June 20, 2018, 10:32 AM), <https://www.cbsnews.com/news/migrant-children-at-the-border-by-the-numbers/> [<https://perma.cc/BBZ2-FDX9>]. The number of apprehensions began to increase steadily around the time of the Trump Administration's policy to separate family units at the border, specifically February to March 2018, and climbed throughout 2019, peaking in May 2019. U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER MIGRATION FY 2020 (2020) <https://www.cbp.gov/newsroom/stat/s/sw-border-migration> [<https://perma.cc/L3NT-X3SL>].

26. Mueller, *supra* note 6.

27. *See id.*

28. Suzanne Gamboa, *Children Cry for Their Parents on Audio of Trump's Border Family Separations*, NBC NEWS (June 18, 2018, 3:23 PM), <https://www.nbcnews.com/news/latino/children-cry-their-parents-audio-trump-s-border-family-separations-n884486> [<https://perma.cc/4APF-F22R>]; Julia C. Wong, *Recording Captures Cries of Children Separated from Parents at US Border*, THE GUARDIAN (June 18, 2018, 7:36 PM), <https://www.theguardian.com/us-news/2018/jun/18/us-border-families-separated-audio-recording> [<https://perma.cc/K9V3-DRB2>].

Two days later, after mounting criticism, President Donald Trump issued an executive order that purported to end family separations (replacing it with a policy allowing for detention of families).<sup>29</sup> The DHS then began placing children in detention cells with their parents for extended periods, in violation of the *Flores* Agreement.<sup>30</sup> The *Flores* Agreement is the 1997 settlement agreement that “sets out nationwide policy for the detention, release, and treatment of minors in the custody of” the federal government.<sup>31</sup> Equally important, family separations did not cease completely. As of December 2018, the DHS had identified 2,737 children who had been separated from their parents and families.<sup>32</sup>

Meanwhile, in response to the Trump Administration’s punitive actions toward children and their families, legal advocacy groups sought to assert the rights of separated children and their families through the courts. Their efforts resulted in a federal court ordering the end of family separations and the reunification of those families already torn apart by the Trump Administration.<sup>33</sup> On June 26, 2018, Judge Sabraw of the Southern District of California recognized that families seeking to file for asylum relief at a port of entry are protected under the Fifth Amendment’s due process clause, which provides a right to family integrity.<sup>34</sup> That is, the government violates parents’ substantive due process rights if it separates

29. Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018); *see also* AV Press Releases, *As Written, Trump’s Executive Order Fails to End Family Separation, Calls for Kids and Their Families to be Detained, Together or Separately*, AM. VOICE (June 20, 2018), [https://americasvoice.org/press\\_releases/trump-executive-order-fails-to-end-family-separation-calls-for-kids-and-their-families-to-be-detained-together-or-separately/](https://americasvoice.org/press_releases/trump-executive-order-fails-to-end-family-separation-calls-for-kids-and-their-families-to-be-detained-together-or-separately/) [<https://perma.cc/7YXN-XP4M>].

30. *See* Stipulated Settlement Agreement ¶ 12, *Flores v. Reno*, No. 2:85-CV-04544 RJK (Px), slip op. (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores* Agreement], [https://cliniclegal.org/sites/default/files/attachments/flores\\_v\\_reno\\_settlement\\_agreement\\_1.pdf](https://cliniclegal.org/sites/default/files/attachments/flores_v_reno_settlement_agreement_1.pdf) [<https://perma.cc/LS9K-ZXN2>] (“The INS will transfer a minor from a placement under this paragraph . . . (i) within three (3) days, if the minor was apprehended in an INS district in which a licensed program is located and has space available; or (ii) within five (5) days in all other cases . . . .”); *Flores v. Sessions*, No. 2:85-CV-04544 DMG (AGRx), slip op. (C.D. Cal. June 27, 2017), <https://www.aila.org/File/Related/14111359v.pdf> [<https://perma.cc/S4XQ-G75M>] (discussing the 20-day rule and its applicability); 8 U.S.C. § 1232(b)(3) (2012) (“[A]ny department or agency of the Federal Government . . . shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.”).

31. *See Flores* Agreement, *supra* note 30, ¶ 9.

32. Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children than Reported*, N.Y. TIMES [hereinafter Jordan, *Family Separation*] (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html> [<https://perma.cc/DT9F-M9WE>].

33. *See generally* Order Granting Plaintiffs’ Motion for Classwide Preliminary Injunction, *Ms. L. v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1149 (S.D. Cal. June 26, 2018) (No. 18-CV-00428 DMS (MDD)).

34. *Ms. L.*, 310 F. Supp. 3d at 1142–44. The court did not define what constitutes a family but did focus on the Petitioner’s parent/child relationship, leaving unaddressed whether extended caregivers, which are integral parts of many family units from Central America, receive the same protection.

families without a determination that the parents are unfit to care for, or otherwise a danger to, their children.<sup>35</sup> The court issued an order with a series of family reunification deadlines: children ages zero to five had to be reunited with their families within fourteen days of the order, and children over the age of five within thirty days.<sup>36</sup> The court emphasized that “[t]he government has the sole obligation and responsibility to make this happen.”<sup>37</sup> Furthermore, the court order required phone contact within ten days if a child had not already had contact with their parents.<sup>38</sup> The court criticized the Trump Administration for the manner in which children were separated from their parents stating:

[T]he practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence. . . . Certainly, that cannot satisfy the requirements of due process.<sup>39</sup>

The response by the Trump Administration was minimal, and it failed to meet the first two deadlines set by the court for reunification in July 2018.<sup>40</sup> Indeed, by the second deadline, fewer than half of the children separated had been reunited.<sup>41</sup> Given the administration’s inability, or unwillingness to reunify those affected in a timely manner, in August 2018, the plaintiffs in *Ms. L. v. ICE* created a steering committee with members including the American Civil Liberties Union (ACLU), Women’s Refugee Commission (WRC), Kids in Need of Defense (KIND), Justice in Motion, and others to work with representatives of the Department of Homeland Security, Department of Health and Human

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35. *Id.* at 1142–44.

36. *Id.* at 1149; Laura Jarrett, *Federal Judge Orders Reunification of Parents and Children, End to Most Family Separations at Border*, CNN (June 27, 2018, 11:04 AM), <https://www.cnn.com/2018/06/26/politics/federal-court-order-family-separations/index.html> [<https://perma.cc/5BPR-XYHP>].

37. Pauline Repard, *Judge Says Government Has ‘Sole’ Duty to Find, Reunite Immigrant Parents, Children*, SAN DIEGO UNION TRIB. (Aug. 3, 2018, 6:30 PM), <http://www.sandiegouniontribune.com/news/immigration/sd-me-reunite-ruling-20180803-story.html> [<https://perma.cc/D78G-333C>]; *see also* Order Granting Classwide Preliminary Injunction, *Ms. L.*, 310 F. Supp. 3d at 1145.

38. Order Granting Classwide Preliminary Injunction, *Ms. L.*, 310 F. Supp. 3d at 1150.

39. *Id.* at 1144.

40. *See* Press Release, U.S. Dep’t of Health & Human Servs., *The Trump Administration Plan for Reunifying Children* (July 18, 2018), <https://www.hhs.gov/about/news/2018/07/18/the-trump-administration-plan-for-reunifying-children.html> [<https://perma.cc/8FN2-GMNG>]; Mueller, *supra* note 6.

41. Mueller, *supra* note 6.

Services, State Department, and Department of Justice to reunify families.<sup>42</sup>

Despite these efforts, the government has dragged its feet and, as a result, more than a year later, children and their families are still being subjected to this harmful treatment. A July 2019 U.S. House of Representatives report found that “[h]undreds of additional children have been separated from their parents since the end of the Administration’s zero tolerance policy in June 2018.”<sup>43</sup> And in some cases—at least twenty-five—children had been detained for over a year.<sup>44</sup> The prolonged separations and detentions, which contravene the court order, reflect a lack of both interest and action on the part of the Administration to address the harm it created. Indeed, on February 1, 2019, the Trump Administration filed a declaration in federal court stating it simply does not have the resources to make reunification possible<sup>45</sup> and is not sure how many children have been separated from their families.<sup>46</sup>

42. Amrit Cheng, *More Than 500 Children Are Still Separated. Here’s What Comes Next*, ACLU (Aug. 21, 2018, 5:15 PM), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/more-500-children-are-still-separated-heres> [https://perma.cc/Y9AU-XD3M]. The court flatly rejected the government’s argument that the ACLU and other non-governmental entities should be responsible for reuniting families the government tore apart. See Tal Kopan, *Judge Slams Trump Admin for Suggesting ACLU, Others Should Find Deported Parents*, CNN (Aug. 3, 2018, 7:32 PM), <https://www.cnn.com/2018/08/03/politics/trump-administration-aclu-deported-parents/index.html> [https://perma.cc/967V-KHEV]; see also Joint Status Report at 7, *Ms. L. v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18-cv-428 DMS MDD) (filed on Aug. 9, 2018).

43. COMM. ON OVERSIGHT & REFORM, *supra* note 19, at 2; see also Press Release, U.S. Dep’t of Health & Human Servs. Office of Inspector Gen., HHS OIG: Many Children Separate from Parents, Guardians Before *Ms. L. v. Ice* Court Order and Some Separations Continue (Jan. 17, 2019), <https://www.oig.hhs.gov/newsroom/news-releases/2019/uac.asp> [https://perma.cc/6G6B-47UZ] (identifying 118 children who had been separated from their parents between July 1, 2018 and November 7, 2018).

44. COMM. ON OVERSIGHT & REFORM, *supra* note 19, at 1.

45. In her declaration, the Deputy Director for Children’s Programs for the Office of Refugee Resettlement states,

it would take 188,332 to 376,664 hours (4 to 8 hours per case multiplied by 47,083 children in ORR care between July 1, 2017 and June 25, 2018) for ORR analysts to review all of the UAC case management records for indicia of separation. This would translate into 100 ORR analysts working 8 hours per day, for between 235 and 471 consecutive calendar days, before they could even begin reconciling the information from the UAC case management . . . ORR does not have the requisite staff for such a project. Declaration of Jallyn Sualog at 6–7, *Ms. L. v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133 (S.D. Cal. Feb. 1, 2019) (No. 18-CV-00428 DMS MDD).

46. See Sarah Jones, *Trump Administration: Reuniting Some Separated Migrant Families Might Be Too Hard*, N.Y. MAG.: INTELLIGENCER (Feb. 4, 2019), <http://nymag.com/intelligencer/2019/02/hhs-reuniting-separated-migrant-families-hard.html> [https://perma.cc/F64S-X2KC]; Lauren Pearle, *Trump Administration Admits Thousands More Migrant Families May Have Been Separated than Estimated*, ABC NEWS (Feb. 4, 2019, 11:59 AM), <https://abcnews.go.com/US/trump-administration-unsure-thousands-migrant-families-separated-originally/story?id=60797633> [https://perma.cc/DZX7-GJ27].

While the official numbers of family separations are troubling enough, investigative reports indicate that the total number of children separated from their parents well exceeds the number reported by the government.<sup>47</sup> Some reports state that as many as 15,000 migrant children are in detention in the United States (some of whom crossed the border alone, and others who were separated from their parents by U.S. officials).<sup>48</sup> And the U.S. government's actions suggest it intends to continue this harmful practice of detaining children, even infants and toddlers, indefinitely—irrespective of any court order. For example, on May 30, 2019, U.S. Customs and Border Protection (CBP) issued a new solicitation, seeking to purchase, among other things: 2,224,000 diapers, 20,000 baby bottles, and 36,000 pairs of extra-small size shower shoes.<sup>49</sup> Such a solicitation clearly anticipates continued detention. And that purchase is for only one tent city<sup>50</sup> where children will be detained.<sup>51</sup>

From the moment of apprehension, the conditions and treatment of children by the U.S. government has been traumatizing for many, and even deadly for some. As of May 24, 2019, six migrant children—ranging in age from two-and-a-half to sixteen years old—had died in U.S. custody since this crisis began.<sup>52</sup> At least three of these six children died from the influenza virus, a typically non-fatal virus.<sup>53</sup> These deaths in custody highlight the unsanitary and unsafe conditions to which detained children are subjected. Moreover, there are numerous sworn declarations by children detained at border stations and others who visited them attesting

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47. Jordan, *Family Separation*, *supra* note 32; Pearle, *supra* note 46.

48. Miriam Jordan, *Thousands of Migrant Children Could Be Released After Sponsor Policy Change*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/migrant-children-release-policy.html> [https://perma.cc/P986-RZRC].

49. Justin Rohrlich, *Customs and Border Protection is Buying 2.2 Million Baby Diapers for Its New Migrant Tent City*, QUARTZ (May 31, 2019), <https://qz.com/1632690/cbp-buying-2-2-million-pairs-of-diapers-for-tent-city/> [https://perma.cc/93NT-KX23].

50. *Id.* Tent cities are temporary housing facilities operated by ICE that are designed to address the overcrowding problem at border patrol detention centers. The U.S. military plans to build new tent cities along the U.S. Mexico border that can each accommodate approximately 7,500 people. The acting deputy chief patrol agent, John Morris, states that tent-cities are “Band-Aid” fixes to a much larger problem. See The Week Staff, *What You Need to Know About: Tent Cities at the Border*, THE WEEK (May 25, 2019), <https://theweek.com/articles/843166/what-need-know-about-tent-cities-border> [https://perma.cc/NWA8-WTNH].

51. See Rohrlich, *supra* note 49.

52. Molly Hennessy-Fiske, *Six Migrant Children Have Died in U.S. Custody. Here's What We Know About Them*, L.A. TIMES (May 24, 2019, 2:10 PM), <https://www.latimes.com/nation/la-na-migrant-child-border-deaths-20190524-story.html> [https://perma.cc/U6W2-GMAF].

53. Graham Kates, *Doctors Call for Investigation After 3 Migrant Children in Custody Die of Flu*, CBS NEWS (Aug. 1, 2019, 4:08 PM), <https://www.cbsnews.com/news/doctors-call-for-investigation-after-3-migrant-children-in-custody-die-of-flu/> [https://perma.cc/8YYJ-7P8F].

to the harmful conditions and treatment the children have endured.<sup>54</sup> And the children who have provided sworn declarations likely represent only a portion of those who have suffered such abuses, as underreporting is commonplace in such circumstances.<sup>55</sup> The harms inflicted are described below.

### A. *Apprehension and Separation*

Typically, a migrant or refugee child's first encounter with a U.S. official on arrival at the U.S. border is with a CBP agent. According to the CBP, after the child's arrest, the agency collects biographical information, in some cases fingerprints, and records the claimed familial relationship between the adults and children "into appropriate electronic systems of records."<sup>56</sup> During the Trump Administration's zero-tolerance policy, the DHS was instructed to refer adults for prosecution for unlawful entry into the United States.<sup>57</sup> Adults were separated from their children and taken into U.S. Marshals Service custody and transferred to pre-trial detention where they awaited prosecution—a process independent from immigration removal proceedings.<sup>58</sup> Since President Trump's executive

54. See Gaby Del Valle, *Flu, Lice, and Open Toilets: What Attorneys Saw at Migrant Child Processing Centers*, VICE NEWS (June 22, 2019, 6:54 AM), [https://www.vice.com/en\\_us/article/43jppj/flu-lice-and-open-toilets-what-attorneys-saw-at-migrant-child-processing-centers](https://www.vice.com/en_us/article/43jppj/flu-lice-and-open-toilets-what-attorneys-saw-at-migrant-child-processing-centers) [<https://perma.cc/8XFX-ST4S>]; *Here Are the Children's Declarations*, PROJECT AMPLIFY, <https://www.project-amplify.org/declarations> [<https://perma.cc/4UJ3-SNCK>]; *infra* notes 86–93, 117, 142–150, 165–169, 175–181, and accompanying text.

55. See ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 44 (2016) ("Physicians for Human Rights has found that many asylum seekers and survivors of torture are overlooked, ignored, or inadequately treated because of ICE medical staff's high caseloads and because these detainees are generally unable or afraid to advocate for themselves."); Tom K. Wong, *Every Aspect of America's Asylum System Now Seems Broken*, L.A. TIMES (Sept. 4, 2019, 3:00 AM), <https://www.latimes.com/opinion/story/2019-09-03/asylum-migrants-immigration-detention-border-trump> [<https://perma.cc/R2A5-AAPL>] ("[A]buses or problems in detention may be underreported by asylum seekers who are afraid that raising complaints may negatively affect their asylum case.").

56. *Zero Tolerance Immigration Prosecutions—Family Fact Sheet*, U.S. CUSTOMS & BORDER PROT. (June 15, 2018), <https://www.cbp.gov/newsroom/zero-tolerance-immigration-prosecutions-family-fact-sheet> [<https://perma.cc/SW72-WPQQ>].

57. Sarah Frostenson et al., *Families Will No Longer Be Separated. Here's What's Supposed to Happen Next*, POLITICO (June 20, 2018, 6:15 PM), <https://www.politico.com/interactives/2018/family-separation-at-the-border-explained/> [<https://perma.cc/N6LX-5FAG>].

58. See Press Release, Dep't of Homeland Sec., DHS Secretary Nielsen's Remarks on the Illegal Immigration Crisis (June 18, 2018) [hereinafter Secretary Nielsen's Remarks], <https://www.dhs.gov/news/2018/06/18/dhs-secretary-nielsens-remarks-illegal-immigration-crisis> [<https://perma.cc/85WV-VMAZ>]. Entry-related prosecution entails the federal government arresting, charging, sentencing and imprisoning migrants for violating criminal codes, such as *entering* or *re-entering* the United States at an undesignated port without admission or inspection, in violation of 8 U.S.C. §§ 1325, 1326 (2012), respectively (by law those who express fear of returning to their country to CBP officers should be given a preliminary screening interview with an asylum officer, but instead many

order,<sup>59</sup> the new policy is to keep families detained together.<sup>60</sup> The zero-tolerance era policy of separating families by referring adults for criminal prosecution, however, is a powerful loophole that the DHS continues to utilize if it finds the adult poses a danger to the child.<sup>61</sup> As a result, since the Trump Administration purported to end its family separation policy, it has separated more than 200 additional migrant children from their families.<sup>62</sup> At the point of separation, each child is reclassified as an Unaccompanied Alien Child (UAC), regardless if they entered the United States alone or with a family unit.<sup>63</sup>

During the separation phase, the DHS protocols for sharing information with parents regarding their children's future destination have been unclear. According to reports collected by the Texas Civil Rights Project, there are recorded cases where the DHS transferred parents to detention centers without advising them of where their children were being sent.<sup>64</sup> The Texas Civil Rights Project represents five adults separated from their children.<sup>65</sup> According to one of the parents, when the parent asked where agents were taking his son, "the agents refused to answer."<sup>66</sup> In another case, a mother said that "[a]fter she was processed, the agents took her children away without giving her a reason, and told her she would see

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government officials are referring asylum seekers to criminal prosecution). *Prosecuting Migrants for Coming to the United States*, AM. IMMIGR. COUNCIL, (May 1, 2018), <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions> [https://perma.cc/7XHF-HHJG]. Removal/deportation proceedings, however, are civil in nature. *Id.* Merely being present in the United States without lawful status does not violate any criminal code. *Id.* Unlawful status within the United States is a civil infraction. *Id.* The federal government can detain undocumented persons, hold them at ICE detention centers, initiate removal/deportation proceedings against them, and potentially deport them. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY 3 (2019). This distinction is important because the federal government has discretion in deciding whether to criminally prosecute entry-related offenses. *Id.* Prior to the Trump Administration's "zero-tolerance" policy, the federal government primarily elected to prosecute those with multiple entries or with past criminal convictions, "only in part to avoid having DOJ resources committed to prosecuting sizeable numbers of misdemeanors." *Id.* at 1.

59. Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (2018).

60. Frostenson et al., *supra* note 57.

61. See Miriam Jordan & Caitlin Dickerson, *U.S. Continues to Separate Migrant Families Despite Rollback of Policy*, N.Y. TIMES (Mar. 9, 2019), <https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html> [https://perma.cc/FH7Q-KSQH].

62. *Id.*

63. See Secretary Nielsen's Remarks, *supra* note 58.

64. Press Release, Texas Civil Rights Project, Civil & Human Rights Groups File Emergency Request to Inter-American Commission on Human Rights to Stop Family Separations, Reunite Families (May 31, 2018), <https://texascivilrightsproject.org/civil-rights-groups-family-separations/> [https://perma.cc/R7ZQ-FQVG] [hereinafter Press Release, Texas Civil Rights Project].

65. *Id.*

66. *Five Families Torn Apart by Customs and Border Patrol*, TEX. CIVIL RIGHTS PROJECT, [https://texascivilrightsproject.org/wp-content/uploads/2018/05/IACHR-Request\\_-Families-Story.pdf](https://texascivilrightsproject.org/wp-content/uploads/2018/05/IACHR-Request_-Families-Story.pdf) [https://perma.cc/H39U-8PYD].

them again at some point after her court hearing.”<sup>67</sup> In yet another case, “Border Patrol agents told a mother they were taking her daughter to give her a bath, but they never returned the child.”<sup>68</sup> By not allowing migrant families to maintain continued communication after separation, the DHS is in violation of the *Flores* Agreement, which stipulates that minors in custody have “contact with family members who were arrested with the minor.”<sup>69</sup>

Children who are separated from parents are initially placed in CBP detention holding cells, but theoretically for no more than seventy-two hours, as mandated by law.<sup>70</sup> CBP holding cells are the temporary border stations where children are first processed. Despite the seventy-two-hour rule, the DHS has kept at least 240 children detained in CBP holding cells for longer than the mandated time.<sup>71</sup> During their temporary placement, children are subjected to harsh conditions, in violation of their rights under the *Flores* Agreement.<sup>72</sup> The degrading treatment is discussed below in section B.

Following their confinement at border patrol detention stations, children are taken to longer-term facilities run by the U.S. Department of Health and Human Services (HHS), specifically under the auspices of the Office of Refugee Resettlement (ORR).<sup>73</sup> Reports of the children’s transportation from the temporary border stations to the longer-term detention facilities are troubling. Children have been woken up in the middle of the night and packed into buses to be driven cross-country<sup>74</sup> or flown on airlines, some of which have since balked at participating in such separation of children from their families.<sup>75</sup>

These longer-term housing facilities run by HHS house children from ages “zero to 17.”<sup>76</sup> Once a child is placed in an ORR/HHS shelter, ORR

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67. *Id.*

68. Press Release, Texas Civil Rights Project, *supra* note 64.

69. *Flores* Agreement, *supra* note 30, ¶ 12.

70. *See id.*

71. COMM. ON OVERSIGHT & REFORM, *supra* note 19, at 1; *see also* Chantal Da Silva, *More Than 150 Migrant Children Are Being Held at the Border Beyond Legal 72-Hour Limit*, NEWSWEEK (June 27, 2019, 4:36 AM) <https://www.newsweek.com/migrant-children-held-border-facilities-past-72-hour-limit-1446207> [<https://perma.cc/W4SQ-6ZL8>].

72. *See Flores* Agreement, *supra* note 30, ¶ 12.

73. *See* Secretary Nielsen’s Remarks, *supra* note 58.

74. Caitlin Dickerson, *Migrant Children Moved Under Cover of Darkness to a Texas Tent City*, N.Y. TIMES (Sept. 30, 2018), <https://www.nytimes.com/2018/09/30/us/migrant-children-tent-city-texas.html> [<https://perma.cc/3Z8U-8WDJ>].

75. Tanya Snyder, *DHS Attacks Airlines After They Balk at Flying Separated Children*, POLITICO (June 20, 2018, 4:46 PM), <https://www.politico.com/story/2018/06/20/american-airlines-migrant-children-656231> [<https://perma.cc/DED9-DWD6>].

76. *See* Domonoske & Gonzalez, *supra* note 22.

sets out to reunify the child with family members or other relatives, or place the child in other appropriate care arrangements.<sup>77</sup> Although the *Flores* Agreement does not expressly state a maximum time that a child can be detained at a secure facility, courts have relied on a 20-day “rule,” which was proffered by the government as an example of a reasonable delay that would comport with the *Flores* Agreement.<sup>78</sup> Yet the government has exceeded 20-day detentions in numerous cases.<sup>79</sup> Not only is the Trump Administration not in compliance with the *Flores* Agreement, but it is also moving to terminate the agreement so that it has flexibility to hold children in detention for longer periods of time.<sup>80</sup>

### B. Detention

Children are being detained at both CBP facilities and ORR/HHS facilities. As noted above, the detention of children at CBP facilities often exceeds the seventy-two-hour maximum amount of time allowed under law.<sup>81</sup> In addition, the conditions at the temporary CBP facilities are alarming. CBP claims that children receive “appropriate care, including medical care, mental health care, and educational programs,”<sup>82</sup> but witnesses, including the children themselves, have reported that the detention conditions are unsanitary and even harmful.<sup>83</sup> Many children have not had access to basic necessities and have had to sleep on concrete floors.<sup>84</sup> Moreover, there are “[l]imited medical, dental, and mental health services,” and the sub-contracted facilities are not equipped to treat wide ranges of physical and mental ailments.<sup>85</sup> As one physician who visited a

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77. *Id.*

78. *Flores v. Sessions*, No. 2:85-CV-04544 DMG (AGRx) (C.D. Cal. June 27, 2017), slip. op. at 29–31 <https://www.aila.org/File/Related/14111359v.pdf> [<https://perma.cc/S4XQ-G75M>].

79. COMM. ON OVERSIGHT & REFORM, *supra* note 19, at 1–2.

80. Maria Sacchetti, *Trump Administration Moves to Terminate Court Agreement, Hold Migrant Children and Parents Longer*, WASH. POST (Aug. 21, 2019, 6:30 AM), [https://www.washingtonpost.com/immigration/trump-administration-moves-to-terminate-court-agreement-hold-migrant-children-and-parents-longer/2019/08/21/c268bb44-c28b-11e9-9986-1fb3e4397be4\\_story.html](https://www.washingtonpost.com/immigration/trump-administration-moves-to-terminate-court-agreement-hold-migrant-children-and-parents-longer/2019/08/21/c268bb44-c28b-11e9-9986-1fb3e4397be4_story.html) [<https://perma.cc/NB4X-UZTG>]; see also STAFF OF H.R. COMM. ON OVERSIGHT AND REFORM, *supra* note 19, at 1–2.

81. See COMM. ON OVERSIGHT & REFORM, *supra* note 19, at 1.

82. See Zero Tolerance Immigration Prosecutions—Family Fact Sheet, *supra* note 56.

83. See Blake Ellis et al., *Handcuffs, Assaults, and Drugs Called ‘Vitamins’: Children Allege Grave Abuse at Migrant Detention Facilities*, CNN (June 21, 2018, 9:59 PM), <https://www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html> [<https://perma.cc/FR3V-GXKS>]; Michel Martin, *Whistleblowers Warn of Harmful Conditions for Children in Migrant Detention Centers*, NPR (Dec. 8, 2018, 5:32 PM), <https://www.npr.org/2018/12/08/674327419/whistleblowers-warn-of-harmful-conditions-for-children-in-migrant-detention-cent> [<https://perma.cc/7CR5-8E4L>].

84. See Flynn, *supra* note 3.

85. Julie M. Linton et al., *Detention of Immigrant Children*, 139 PEDIATRICS 1, 5 (2017).

CBP facility stated in a sworn declaration, “The conditions within which [these children] are held could be compared to torture facilities. That is, extreme cold temperatures, lights on 24 hours a day, no access to medical care, basic sanitation, water, or adequate food.”<sup>86</sup>

Sworn declarations from many children support this finding and offer concrete examples of the abuse endured in CBP holding centers, including harsh limitations on communicating with family members,<sup>87</sup> severe violations of privacy,<sup>88</sup> extreme temperatures within the cells,<sup>89</sup> linguistic isolation,<sup>90</sup> and little to no access to basic hygienic products.<sup>91</sup> A seventeen-year-old child detained at the Clint Border Patrol Station described having only a single one-minute long conversation with her mother throughout seven days in detention (which exceeds the maximum amount of time legally permitted), being placed in a freezing room to sleep without a blanket, having to sleep in a room which has eight bunk beds for about forty children, having only a single open toilet in the same room, being hungry all the time, and feeling that the water was making her sicker.<sup>92</sup> Another teenager, a sixteen-year-old from Honduras, also reported being in a “hielera,” a Spanish term that translates to an “ice-box,” having her toothbrush taken away after only two uses, having officers throw away her spare clothes, and sharing a room with seven other girls, two of whom are linguistically isolated—unable to communicate with anyone else who understands their indigenous languages.<sup>93</sup>

After being held at CBP detention centers, often for longer than permitted under law, children are then transferred to the custody of HHS, and specifically the ORR. The Office of Refugee Resettlement has more than 100 detention facilities in seventeen states housing children separated

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86. Declaration of Dolly Lucio Sevier, M.D., Ex. 13, at 1, *Flores v. Sessions*, No. 2:85-CV-04544 DMG (AGRx), slip op. (C.D. Cal. Jun. 26, 2019).

87. Declaration of L. at 1–2, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op. (“[I]t is not possible to eat your lunch and make a phone call. We have to choose between eating lunch and making a phone call. I don’t know why.”).

88. Declaration of E. at 1, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op. (“The toilet is in out in the open in the cage, there is no door for any privacy.”); Declaration of G. at 1–2, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op. (“The toilet is in the same room [we sleep in]. There is no curtain or anything.”).

89. Declaration of K. at 1, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op. (“I was taken into a building nearby that was freezing cold that was called the Ice Box. . . . We slept on the floor. It was freezing.”).

90. Declaration of M. at 1, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op. (“The officers here speak to me in Spanish. . . . I am actually Mayan, and my first language is ‘Chuj.’ No one here can speak Chuj.”).

91. Declarations of [REDACTED], Exs. 1–64 at 23, 23–271, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op. (numerous children reporting that they are not allowed to shower regularly, that there is no soap in the bathrooms, that there are no toothbrushes, and that other basic hygiene products are not provided).

92. Declaration of G., *Flores*, *supra* note 88, at 1–2.

93. Declaration of K., *Flores*, *supra* note 89, at 1–2.

from their families.<sup>94</sup> These detention facilities are run by local government agencies or nonprofit entities that operate as ORR/HHS shelter contractors.<sup>95</sup> An ORR/HHS facility can range from a repurposed Walmart to a juvenile detention center, and many locations are not disclosed to the public, making it difficult for third-parties to investigate conditions within facilities.<sup>96</sup>

Conditions at these facilities and their treatment of children appear to range from substandard to harmful or worse. Although educational curriculums are regulated within roughly 100 ORR/HHS shelters, tent cities<sup>97</sup> that have housed these separated children—like that which operated in Tornillo, Texas, through January 2019<sup>98</sup>—are unregulated (as well as in violation of the *Flores* Agreement).<sup>99</sup> The tent city in Tornillo was not required to provide schooling, despite there being about 2,300 children detained there in December 2018 (the tent city was originally created as a temporary solution to overcrowded shelters and was only meant to house 360 children).<sup>100</sup> While the Tornillo tent city no longer houses children, others continue to do so.<sup>101</sup> And in June 2019, the Trump Administration announced that it was suspending educational and recreational programs, as well as legal services, for migrant children in its custody (by comparison, adults who have felony convictions can access educational services at many correctional facilities).<sup>102</sup>

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94. Ellis et al., *supra* note 83.

95. *Id.*

96. *Id.*

97. The Week Staff, *supra* note 50.

98. The Tornillo tent city closed after widespread criticism of the conditions at the facility, which were built to house just over 300 children, but held as many as 2,700 at one point. Madlin Mekelburg, *Official: No Migrant Children Remain at Tornillo Tent Shelter as It Heads Toward Closure*, EL PASO TIMES (Jan. 11, 2019, 9:17 AM), <https://www.elpasotimes.com/story/news/politics/2019/01/11/tornillo-shelter-no-migrant-children-closed-january/2547461002/> [<https://perma.cc/4JMX-LJST>].

99. Dickerson, *supra* note 74. See generally Julián Aguilar, *Tornillo Facility for Migrant Kids Will Remain Open into 2019, Federal Government Confirms*, TEX. TRIB. (Dec. 27, 2018, 9:00 AM), <https://www.texastribune.org/2018/12/27/tornillo-facility-migrant-children-will-remain-open-2019-feds-confirms> [<https://perma.cc/L4E4-9GD2>].

100. Dickerson, *supra* note 74; *The Latest: US Nixed FBI Checks for Teen Migrant Camp Staff*, AP NEWS (November 27, 2018), <https://www.apnews.com/dc435c2047fe4b10a91f33003fa1cd27> [<https://perma.cc/3DUY-WCWW>] [hereinafter *The Latest*].

101. See Edwin Delgado, *Tornillo: Detention Site for Migrant Children to Close Amid Safety Fears*, THE GUARDIAN (Jan. 12, 2019, 1:00 PM), <https://www.theguardian.com/us-news/2019/jan/11/immigration-migrant-children-tornillo-camp-closing> [<https://perma.cc/8TQD-4LLM>]; Manny Fernandez, *Two New Tent Cities Will Be Built in Texas to Hold Migrants*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/us/mcaleenan-migrants-border-texas.html> [<https://perma.cc/U5WF-TV2J>].

102. Kristina Cooke & Mica Rosenberg, *Trump Administration Suspends U.S. Educational Programs for Migrant Children*, REUTERS (June 5, 2019, 12:20 PM), <https://www.reuters.com/article/us-usa-immigration-children/trump-administration-suspends-u-s-educational-programs-for-migrant-children-idUSKCN1T62GB> [<https://perma.cc/PS79-K7H9>]. This step would violate, among other things, children's

While the denial of education has significant adverse consequences for children, the harms inflicted on the children in detention go well beyond lack of access to education. The Trump Administration has failed to accommodate the exponential number of apprehended children in appropriate housing.<sup>103</sup> In addition, in places like Tornillo, none of the 2,100 hired staff underwent screening for child abuse, nor were they required to submit fingerprints for FBI screening, leaving thousands of children under the protection of potentially unqualified or even dangerous staff.<sup>104</sup>

Inside the detention facilities, the children have been subjected to a variety of harsh measures. The children are expected to follow a strict schedule filled with rules.<sup>105</sup> The children have wake up calls, bed times, set hours for recreation, school hours, scheduled chores, and more.<sup>106</sup> They must walk in straight, single-file lines.<sup>107</sup> There is no touching, not even contact between siblings is permitted,<sup>108</sup> meaning a child could be punished for comforting a younger sibling. Children are instructed to behave, to not share food, to not sit on the floor, to not use nicknames, and to not cry.<sup>109</sup> They are not allowed to write, so there is no access to mail, only phone calls.<sup>110</sup> Many children, however, do not know where to call, as their parents' location has not been disclosed.<sup>111</sup>

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right to education under the CRC. See CRC, *supra* note 14, art. 28. For more detailed discussion of the CRC and how the administration's actions conflict with children's rights law, see *infra* Part III.

103. In a June 2019 statement, the CBP acknowledged that it had to *return* 100 children to a border patrol station, Clint, after unsuccessfully placing them in a temporary tent city. In response to overcrowding border patrol stations, the Trump administration is shuffling to open three emergency shelters, one in a compound formerly used to house oil-field workers in south Texas and on two military bases, reportedly in Ft. Benning, Georgia and Malmstrom Air Force Base in Montana. The children will be placed in dormitory-style buildings and will continue to not have access to education programming or recreational activities. See Abigail Hauslohner, *U.S. Returns 100 Migrant Children to Overcrowded Border Facility as HHS Says It is Out of Space*, WASH. POST (June 25, 2019, 7:09 PM), [https://www.washingtonpost.com/immigration/us-returns-100-migrant-children-to-overcrowded-border-facility-as-hhs-says-it-is-out-of-space/2019/06/25/397b0cb6-96b6-11e9-830a-21b9b36b64ad\\_story.html](https://www.washingtonpost.com/immigration/us-returns-100-migrant-children-to-overcrowded-border-facility-as-hhs-says-it-is-out-of-space/2019/06/25/397b0cb6-96b6-11e9-830a-21b9b36b64ad_story.html) [https://perma.cc/R2AA-XNU4]; Maria Sacchetti, *HHS to House Thousands of Unaccompanied Minor Migrants on Military Bases and at Texas Facility*, WASH. POST (June 7, 2019), [https://www.washingtonpost.com/immigration/hhs-to-house-thousands-of-unaccompanied-minor-migrants-on-military-bases-at-texas-facility/2019/06/07/a6c2c95c-8938-11e9-a491-25df61c78dc4\\_story.html](https://www.washingtonpost.com/immigration/hhs-to-house-thousands-of-unaccompanied-minor-migrants-on-military-bases-at-texas-facility/2019/06/07/a6c2c95c-8938-11e9-a491-25df61c78dc4_story.html) [https://perma.cc/P8V4-59L4]; The Week Staff, *supra* note 50.

104. *The Latest*, *supra* note 100.

105. Barry et al., *supra* note 1.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *See id.*

111. *See* Press Release, Texas Civil Rights Project, *supra* note 64.

Additionally, there are reports of physical abuse of the detained children by shelter staff, forced medication, and use of psychotropic drugs.<sup>112</sup> There was also a spike in reports made to the ORR alleging that guards sexually abused children in custody.<sup>113</sup> From March 2018 to July 2018 alone, the ORR received 859 complaints, the largest reported number of sexual misconduct allegations during any given five-month span in the last four years.<sup>114</sup> And as arguments before the Ninth Circuit revealed, many children in detention are living in squalid, unsanitary conditions that lack even the most basic necessities.<sup>115</sup>

Finally, as noted above, at least six children have died in U.S. custody, three of whom died from influenza.<sup>116</sup> This alarming mortality rate in children due to the flu highlights the unsanitary conditions that children in custody are enduring. There are many sworn declarations by children detained at border stations attesting to the poor conditions, like one teenage mother from Guatemala who stated,

[t]he bathrooms here are very dirty because there are so many people using them. The toilets clog and cannot be used. And the smell goes everywhere, even to where we are sleeping. Since the time my baby and I arrived, I have been permitted to shower only once, five days after I have arrived. I haven't had a shower since then, and it has been six days. The soap in the showers is for hands and not for hair, so my hair is itchy and dirty.<sup>117</sup>

Attorneys who visited border patrol stations also report witnessing flu and lice outbreaks.<sup>118</sup>

In short, the conditions and treatment of children in detention have inflicted trauma upon them, exposed them to a range of health hazards, and, in some cases, even resulted in their deaths.

### C. Reunification

In addition to inflicting harmful treatment on children in detention, the Trump Administration has failed to comply with the court ordered

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112. Ellis et al., *supra* note 83 (describing reports of children being dosed with “cocktails of psychotropic drugs disguised as vitamins” and other children being subject to physical punishment).

113. Mathew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html> [<https://perma.cc/F6K5-M5V9>].

114. *Id.*

115. Flynn, *supra* note 3.

116. Kates, *supra* note 53.

117. Declaration of O. at 1–2, *Flores v. Sessions*, No. 2:85-CV-04544 DMG (AGRx), slip op. (C.D. Cal. June 27, 2017).

118. Del Valle, *supra* note 54.

reunification deadline. The Administration has claimed that 120 parents waived reunification.<sup>119</sup> Some parents elected to waive reunification in hopes of giving their children an opportunity to remain in the United States; however, there are reports of parents who unknowingly waived reunification.<sup>120</sup> The Administration has cited a number of other reasons for failing to reconnect children with their families, including twenty-one instances of red flags from background checks of adults, forty-six instances of red flags from other case file reviews, ninety-four adults whose location is unknown, seventy-nine adults having already been released, and 431 adults outside of the United States, implying at least some adults were deported without their children.<sup>121</sup>

In response to the reunification chaos, the ACLU brought suit against the DHS and the Department of Justice, and successfully reached a negotiated settlement to allow families a second opportunity to apply for asylum,<sup>122</sup> essentially undoing their waiver of reunification. It also allows a parent who failed their credible or reasonable fear interviews<sup>123</sup> to

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119. Emma Platoff, *As Reunification Deadline Lands, Hundreds of Migrant Families Remain Divided*, TEX. TRIB. (July 26, 2018), <https://www.texastribune.org/2018/07/26/migrant-families-separated-court-deadline/> [<https://perma.cc/6F43-E9PB>].

120. Joint Status Report at 2, *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18-cv-428 DMS MDD) (filed on July 27, 2018); Sasha Ingber, *Parents Were 'Coerced' to Waive Reunification Rights with Children, Complaint Says*, NPR (Aug. 23, 2018, 9:39 PM), <https://www.npr.org/2018/08/23/641315568/parents-were-coerced-to-waive-reunification-rights-with-children-complaint-says> [<https://perma.cc/2Z2F-B8ZE>].

121. See Joint Status Report, *supra* note 120, at 2.

122. Order Certifying the Settlement Classes and Granting Final Approval of Class Action Settlement, *M.M.M. v. Sessions*, No. 3:18-cv-1832-DMS (C.D. Cal. Nov. 15, 2018), <https://www.muslimadvocates.org/files/2018.11.15-Ms.-L-final-settlement-order.pdf> [<https://perma.cc/8DJ4-LQKR>]; Order Granting Preliminary Approval of Proposed Settlement; Preliminary Certifying the Settlement Classes; and Approving Class Notice, *M.M.M.*, No. 3:18-cv-428-DMS.

123. When a person claims fear of returning to their home country at a port of entry, asylum officers conduct *credible fear* interviews pursuant to the Immigration and Nationality Act (INA). 8 U.S.C. § 235(b)(1)(A)(ii) (2012). Asylum officers will find credible fear when there is a “significant possibility” the individual could prove before an Immigration Judge that they have been persecuted or have a “well-founded fear of persecution on account of” a protected ground. See 8 U.S.C. § 1225; U.S. CITIZENSHIP & IMMIGRATION SERVS., PM 602-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* (2018). Asylum officers conduct *reasonable fear* interviews when a person expresses fear of returning to their home country but are subject to either a final administrative removal order under INA § 238(b) or a prior reinstated order of removal, exclusion, or deportation under INA § 241(a)(5). See 8 C.F.R. § 208.31 (2019). Although the procedures are similar for credible fear and reasonable fear interviews, there is a higher burden on the applicant under the reasonable fear standard. See CONCHITA CRUZ ET AL., *THE ASYLUM SEEKER ADVOCACY PROJECT, VINDICATING THE RIGHTS OF ASYLUM SEEKERS AT THE BORDER AND BEYOND: A GUIDE TO REPRESENTING ASYLUM SEEKERS IN EXPEDITED REMOVAL AND REINSTATEMENT OF REMOVAL PROCEEDINGS* 13–14, 26 (2018), <https://asylumadvocacy.org/wp-content/uploads/2018/06/ASAP-Expedited-Removal-Guide.pdf> [<https://perma.cc/N2BA-C9BC>].

remain in the United States to assist their child with asylum proceedings if their child passes a credible fear interview.<sup>124</sup>

Still, many barriers to reunification remain. In conjunction with the ACLU-led litigation described above, Justice in Motion, KIND, the Women's Refugee Commission and other organizations were chosen to provide assistance in tracking down parents who were deported without their children, primarily in Honduras, El Salvador, and Guatemala.<sup>125</sup> Logistically, the task of simply finding the previously deported parent has been monumental. For example, one organization member spent "two full days combing through public records, driving across unpaved mountain roads and through the jungle, and knocking on doors" to find a single separated parent in one case.<sup>126</sup>

The reality of reunification is messy. Separated adults signing legal documents without fully understanding the ramifications is a notable theme throughout the process. Many of the parents who agreed to an order of removal are illiterate and did so under the impression that it would speed up the process of reunification with their children, not knowing they would be removed without their children.<sup>127</sup> There is no clear system in place regarding family reunification for families where the government has already deported the parents.<sup>128</sup> And the government's failure to collect relevant data before separating families has exacerbated the problem; in some cases, the government shared only the deported parent's country of origin with the ACLU and other organizations helping to reunify families.<sup>129</sup>

Even for families who were approved for reunification by the government, the actual reunification has faced roadblocks and unexpected delays.<sup>130</sup> The DHS remains far short of fully complying with the federal court order. In addition to battling bureaucratic hurdles for reunification,

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124. *What You Need to Know about Dora v. Sessions, Ms. L v. ICE, and M.M.M. v. Sessions Preliminary Settlement Agreement*, CATHOLIC LEGAL IMMIGR. NETWORK (Oct. 19, 2018), <https://cliniclegal.org/training/archive/what-you-need-know-about-dora-v-sessions-ms-l-v-ice-and-mmm-v-sessions-preliminary> [<https://perma.cc/4FZJ-ZWVB>]. However, removed parents do not get such relief, though there is an exception for rare and unusual cases brought within thirty days of the settlement being finalized. *Id.*

125. *Family Separation*, JUST. MOTION, <http://justiceinmotion.org/family-separation/> [<https://web.archive.org/web/20181121175533/http://justiceinmotion.org/family-separation/>] [hereinafter JUSTICE IN MOTION].

126. *Id.*

127. Miriam Jordan & Caitlin Dickerson, *More Than 450 Migrant Parents May Have Been Deported Without Their Children*, N.Y. TIMES (July 24, 2018), <https://www.nytimes.com/2018/07/24/us/migrant-parents-deported-children.html> [<https://perma.cc/Ry8G-2LJW>].

128. *Id.*

129. JUSTICE IN MOTION, *supra* note 125.

130. *See* Jordan & Dickerson, *supra* note 127.

there are still some children for whom the government has no parental information, including fundamentals like names and location.<sup>131</sup> And as the Trump Administration announced in February 2019, it is reluctant to dedicate the resources necessary to reunite children with their families—the very children the government took away from their families.<sup>132</sup> This stance is especially alarming given that a federal court held that the right to family integrity under the Fifth Amendment’s due process clause extends to migrant families in these circumstances.<sup>133</sup>

## II. THE TRAUMA OF SEPARATION

All aspects of these events—from separation to detention to lack of reunification—have significant adverse consequences for children’s wellbeing. Pursuant to widely agreed upon international norms, migrant children “should be treated with dignity and respect and should not be exposed to conditions that may harm or traumatize them.”<sup>134</sup> Yet the reality at the southern border strays far from these principles. One immigration attorney, who regularly witnesses the government’s treatment towards children inside of detention facilities, said, “There seems to be a level of cruel intent I’ve never seen before and a real indifference to the well-being of a child.”<sup>135</sup> This is not to say that every government agent working directly with the children is indifferent to children’s suffering, but the Trump Administration’s overall policies regarding family separation, detention, and delays in reunification violate the rights of children and their families and inflict significant harm. This Part details the adverse consequences of the Trump Administration’s actions for child wellbeing. It begins by discussing in detail the breadth of harms inflicted on these children by the government. It then examines the impact of that trauma on children’s health and development to demonstrate the far-reaching effects of these policies and actions.

### A. *Degrading Treatment*

Despite having the responsibility to ensure the care of children in its custody, the Trump Administration has failed to protect these children and, in many respects, subjected them to further harm. Formerly detained children, immigration attorneys, and other interested parties have filed

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131. See Joint Status Report, *supra* note 120, at 6–7.

132. See *supra* notes 45–46 and accompanying text.

133. *Ms. L. v. U.S. Immigration & Customs Enf’t*, 302 F. Supp. 3d 1149, 1161–65 (S.D. Cal. 2018).

134. Linton et al., *supra* note 85, at 1; see also CRC, *supra* note 14, arts. 2, 3, 6, 19, 22, 24, 27, 28, 34, 37.

135. See Ellis et al., *supra* note 83.

complaints against detention facilities citing to violations of children's rights while under the supervision of ORR.<sup>136</sup> Reports of violations point to failures to perform background checks on staff, over-crowding, lack of air-conditioning, limited to no access to fresh air, unsanitary conditions, physical restraints, verbal abuse, invasion of privacy, false accusations of gang affiliations, neglect, physical punishment, and administration of medication without consent of the child or parent.<sup>137</sup>

As documented in sworn declarations by children who were housed in border patrol stations and detention centers, the living conditions are appalling and violate their rights under the *Flores* Agreement.<sup>138</sup> Overcrowding is a major issue in border patrol stations, despite there being hundreds of empty beds available at longer-term ORR/HHS detention centers.<sup>139</sup> Some ORR/HHS detention centers, like the one in Karnes City, Texas, were designed with children in mind, but in Karnes City, only adults occupy the detention center.<sup>140</sup> And the family detention center in Dilley, Texas, had 1,200 of its 2,400 beds filled as of late June 2019, leaving plenty of space to relieve the overcrowding at the border patrol stations.<sup>141</sup>

At one CBP station, a twelve-year-old child reported the cell being very cold and being given only a mylar blanket and no mat, forcing her and the other children to sleep on the concrete floor.<sup>142</sup> Another child, a thirteen-year-old, said, "They left the lights on all day and night. We lost track of day and night. We did not see sunlight for days and could not sleep."<sup>143</sup> Hunger and dehydration due to lack of edible food and clean water has also been reported. In border patrol stations, agents were feeding children frozen food that was "not fit for consumption."<sup>144</sup> A sixteen-year-old from Honduras reported that the food "smelled so bad that we went hungry

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136. *Id.*

137. *Id.*

138. *See infra* notes 142–150.

139. Dan Frosch & Alicia A. Caldwell, *As Border Crisis Worsens, a Detention Center Designed for Children Has None*, WALL STREET J. (July 5, 2019, 5:30 AM), <https://www.wsj.com/articles/as-border-crisis-worsens-a-detention-center-designed-for-children-has-none-11562319003> [<https://perma.cc/FTU3-NFXA>].

140. *Id.*

141. *See id.*

142. Declaration of Ducesa B., *Flores v. Sessions*, No. 2:85-CV-04544 DMG (AGRx), slip op. (C.D. Cal. Jan. 12, 2018); Exhibits in Support of Plaintiffs' Response to Defendants' First Juvenile Coordinator Reports Volume 1 of 2 at 91, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op. [hereinafter Exhibits January 2018].

143. Exhibits January 2018, *supra* note 142, at 95.

144. Exhibits in Support of Plaintiffs' Response to Defendants' First Juvenile Coordinator Reports Volume 1 of 12 at 38, *Flores v. Sessions*, No. 2:85-CV-04544 DMG (AGRx) (C.D. Cal. Jul. 19, 2018) [hereinafter Exhibits July 2018]; Declaration of Keylin M., *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

instead of eating it.”<sup>145</sup> Other children reported that the food made their stomach ache, and that they did not drink the water because it “seems bad and not clean”<sup>146</sup> and tastes like Clorox.<sup>147</sup> Children also described not being able to shower and not having access to basic hygienic products like toothbrushes, toothpaste, or towels.<sup>148</sup> In his sworn declaration, a twelve-year-old from Guatemala stated he and his four-year-old brother were allowed to shower only once in the thirteen days they were detained at the Clint CBP facility.<sup>149</sup> Another child stated that she was able to brush her teeth only twice in the seventeen days she was detained at the Clint Border Patrol station.<sup>150</sup>

The combination of overcrowding, neglect, and extreme temperatures has led to widespread ailments and illnesses including “vomiting, diarrhea, respiratory infections and other communicable diseases.”<sup>151</sup> Children have reported not receiving medical attention within a reasonable amount of time, or at all.<sup>152</sup> A three-year-old who came down with the flu had to wait “for hours with nowhere to sit or lie down, and no blankets, before receiving medication.”<sup>153</sup> In an extreme example, a seven-year-old girl from Guatemala died in CBP’s custody less than two days after her apprehension.<sup>154</sup> The young girl was reportedly suffering from dehydration and shock, and “had not eaten or consumed water for several days.”<sup>155</sup> And less than three weeks after that tragedy, an eight-year-old boy from Guatemala died in U.S. detention at the southern border.<sup>156</sup> As of late May 2019, six children have died in U.S. custody.<sup>157</sup>

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145. Declaration of Keylin M., *supra* note 144, at 1.

146. Declaration of Anghelo at 422, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

147. Declaration of Manuel A. at 369, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

148. Declaration of Brandon at 263, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

149. Declaration of W. at 54, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

150. Declaration of J.V. at 229, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

151. Andrew Gumbel, *‘They Were Laughing at Us’: Immigrants Tell of Cruelty, Illness, Filth in US Detention*, THE GUARDIAN (Sept. 12, 2018, 4:00 PM), <https://www.theguardian.com/us-news/2018/sep/12/us-immigration-detention-facilities> [<https://perma.cc/7PL3-FS95>].

152. See Angelina Chapin, *Drinking Toilet Water, Widespread Abuse: Report Details ‘Torture’ for Child Detainees*, HUFFINGTON POST (July 17, 2018, 8:49 PM), [https://www.huffingtonpost.com/entry/migrant-children-detail-experiences-border-patrol-stations-detention-centers\\_us\\_5b4d13ffe4b0de86f485ade8](https://www.huffingtonpost.com/entry/migrant-children-detail-experiences-border-patrol-stations-detention-centers_us_5b4d13ffe4b0de86f485ade8) [<https://perma.cc/V58S-472Q>].

153. Gumbel, *supra* note 151.

154. Amanda Holpuch, *Guatemalan Migrant Girl, Seven, Dies in US Border Patrol Custody*, GUARDIAN (December 14, 2018, 1:57 PM), <https://www.theguardian.com/us-news/2018/dec/14/guatemalan-girl-aged-seven-dies-in-custody-on-us-mexican-border> [<https://perma.cc/2PJJ-A67Z>].

155. *Id.*

156. Miriam Jordan, *8-Year-Old Migrant Child from Guatemala Dies in U.S. Custody*, N.Y. TIMES (Dec. 25, 2018), <https://www.nytimes.com/2018/12/25/us/guatemalan-boy-dies-border-patrol.html> [<https://perma.cc/5RMY-ZLVT>].

157. Hennessy-Fiske, *supra* note 52.

Of the six deaths, at least three were due to influenza virus.<sup>158</sup> The flu virus is rarely fatal in the United States, where there is one death per 600,000 children who contract the flu.<sup>159</sup> These string of deaths appeared after eight years of no reported children's deaths in CBP custody; previously, the last child to die while in custody was in 2010.<sup>160</sup> In response to these alarming tragic cases, Harvard and Johns Hopkins University physicians wrote to members of Congress calling for an investigation and expressing concern that "the Department of Homeland Security (DHS) and Department of Health and Human Services (HHS) may not be following best practices with respect to screening, treatment, isolation, and prevention of influenza."<sup>161</sup>

In addition to degrading, dangerous, and unsanitary living conditions,<sup>162</sup> children have reported rampant abusive contact from detention facility staff in both CBP stations and ORR/HHS detention centers. The government has hired staff who are not fit to care for children and who are potentially dangerous. CBP officers have not complied with their own policy that requires "additional care or oversight" for "at-risk populations" such as juveniles and unaccompanied minors.<sup>163</sup> And, as stated above, the Trump Administration waived formal screening for all staff members hired to work in the largest ORR/HHS children's detention center.<sup>164</sup> A sixteen-year-old girl from Honduras who was previously detained at one of ORR/HHS's facilities, Shiloh, stated in court records that during her detention, the staff required her to take seven pills that were "supposed to help with [her] epilepsy and anxiety," but instead made her feel "dizzy and sometimes [made] it hard to concentrate" and left her with no appetite.<sup>165</sup> Another youth stated that he had to take eight to ten pills a day, but "[did not] know what all the pills [were] for," and does not believe ORR asked his mother for permission to administer the medication.<sup>166</sup> Another child reported, "I don't like taking the medicine because it makes me sleepy and dizzy. But, if I don't take the pills, they

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158. *Id.*

159. Kates, *supra* note 53.

160. Patricia S. Lovera, *How Did Six Migrant Children Die on the US Border?*, BBC NEWS (May 23, 2019), <https://www.bbc.com/news/world-us-canada-48346228> [<https://perma.cc/9527-3GFB>].

161. Kates, *supra* note 53.

162. Recall that the *Flores* Agreement requires the government to keep children's living conditions as "safe and sanitary." See *Flores* Agreement, *supra* note 30, ¶ 12.

163. U.S. CUSTOMS AND BORDER PROT., NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH 19 (2015) <https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/CBP%20TEDS%20Policy%20Oct2015.pdf> [<https://perma.cc/DS2V-Y72M>].

164. The Latest, *supra* note 100.

165. Declaration of Isabella M. at 62, *Flores v. Sessions*, No. 2:85-CV-04544 DMG (AGRx), slip op. (C.D. Cal. Apr. 23, 2018).

166. Declaration of David I. at 81, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

will give me a report and I will have to stay at Shiloh longer.”<sup>167</sup> Yet another child detailed examples of the abusive practices she witnessed, including seeing a girl receive “a forced injection because she was not controlling herself. Two people had to hold her down while she got the injection.” After the injection, the young girl, “sat in a chair and fell asleep for about an hour and a half.”<sup>168</sup> She also saw another girl who was administered a “strong pill” for getting into an argument with another child, and after being forced to consume the pill, she “put her head on the desk and fell asleep for about three hours. When she woke up, she told me she had a headache.”<sup>169</sup> On July 30, 2018, Judge Dolly Gee outlawed routine drugging at Shiloh Detention Center without the consent of parents or court authorization.<sup>170</sup> Reports as late as October 20, 2018, however, reveal that Shiloh continued to administer drugs without the consent of the parents, or permission from a court.<sup>171</sup>

Children have also reported verbal and physical abuse. Children have described being kicked for being too loud or for crying, and even being kicked in their sleep.<sup>172</sup> Staff also lower air temperatures as a way of punishing children for being loud or for crying.<sup>173</sup> Some children were even transferred to more restrictive facilities for “acting out.”<sup>174</sup> One child recounted not having outside time while at the more restrictive facility, and declared in a sworn legal statement:

They will grab my hands and put them behind my back so I can't move. Sometimes they w[ould] use pens to poke me in the ribs, sometimes they w[ould] grab my jaw with their hands. They are bigger than me. Sometimes there will be three or four of them using force against me at the same time.<sup>175</sup>

An eleven-year-old from Honduras says staff has said things to her like, “I’m going to f\*\*\* her up” or “I’m going to kick your little a\*\*\*” when she cries.<sup>176</sup> She also recounted a time when guards forcibly pulled her out of the bathroom for crying, or another time when one placed her two thumbs on her throat and her hands around her neck, leaving the eleven-year-old

167. Declaration of Rosa L. at 95, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

168. Declaration of Sofia O. at 229, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

169. *Id.*

170. *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op. at 20–24.

171. Laura C. Morel, *Immigrant Children Still Being Drugged at Shelter Despite Judge’s Order, Lawyers Say*, REVEAL NEWS (Oct. 20, 2018), <https://www.revealnews.org/blog/immigrant-children-still-being-drugged-at-shelter-despite-judges-order-lawyers-say/> [<https://perma.cc/WRS5-CWN>].

172. See Chapin, *supra* note 152.

173. See Gumbel, *supra* note 151.

174. See Ellis et al., *supra* note 83.

175. Declaration of John Doe No. 2 at 471, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

176. Declaration of Maricela J. at 263, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

hurting and “gasping for breath.”<sup>177</sup> In her sworn declaration, she reported wanting “to kill [her]self” but has not learned how to cut herself yet.<sup>178</sup> A fifteen-year-old boy from Mexico described being tied to a chair as punishment for not wanting to go to his room.<sup>179</sup> The staff pushed him to the ground, handcuffed him, and “put a white bag of some kind onto my head.”<sup>180</sup> Afterwards, the staff stripped his clothes off, restrained him to a chair with a strap across his chest, and left him there, naked, restrained, and alone for two and a half days.<sup>181</sup>

### B. *Developmental Harm*

The degrading and harmful treatment discussed above can have a far-reaching, detrimental impact on children’s well-being and development. Research finds a strong correlation between detention and poor mental health outcomes in children.<sup>182</sup> Children separated from their parents experience the harmful consequences of toxic stress—“intense, repetitive or prolonged adversity without an adult’s intervention.”<sup>183</sup> This type of stress typically is linked to children who are placed in orphanages, survive natural disasters, or live in poverty, war zones, or refugee camps.<sup>184</sup> In many cases, a child who is detained will likely have already endured traumatic experiences prior to detention such as witnessing violence in their home countries or during their migration, and is already at heightened risk of adverse health consequences.<sup>185</sup> For example, one seventeen-year-old from Honduras stated in his sworn declaration that he came to the United States to escape gangs.<sup>186</sup> He said that his best friend was killed to serve as a “message” to him to join the gang, and when he did not, gang members beat him in the head with a bat, which caused him “problems with [his] mental capacity.”<sup>187</sup> During his journey to the United

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177. *Id.*

178. *Id.*

179. Declaration of Diego E. at 271, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

180. *Id.*

181. *Id.*

182. Matthew Hodes, *The Mental Health of Detained Asylum Seeking Children*, 19 EUR. CHILD & ADOLESCENT PSYCHIATRY 621, 622 (2010); see also Derrick Silove, Zachary Steel & Charles Watters, *Policies of Deterrence and the Mental Health of Asylum Seekers*, 284 J. AM. MED. ASS’N 604, 605 (2000).

183. Laura Santhanam, *How the Toxic Stress of Family Separation Can Harm a Child*, PBS (June 18, 2018), <https://www.pbs.org/newshour/health/how-the-toxic-stress-of-family-separation-can-harm-a-child> [<https://perma.cc/NC5R-2PZR>].

184. *Id.*

185. See Hodes, *supra* note 182, at 621.

186. Declaration of Luis D. at 188, *Flores*, No. 2:85-CV-04544 DMG (AGRx), slip op.

187. *Id.*

States, he “was assaulted three times” and “witnessed the rape of a woman and the machete slaughter of a road companion.”<sup>188</sup>

Children’s vulnerability can be, and often is, exploited. And when they are exposed to additional stressors and traumatic events, serious negative health consequences can result.<sup>189</sup> The harm can be shorter-term or it can last for a lifetime. Experts from the American Medical Association and the National Council of Juvenile and Family Court Judges report that even brief periods of separation and detention can lead to long-lasting harm.<sup>190</sup> Separation can be devastating, as Dr. Jack Shonkoff, Director of Harvard University’s Center on the Developing Child, testified before Congress:

strong scientific consensus supported by decades of peer-reviewed research [tells us that:] Sudden, forcible separation of children from their parents is deeply traumatic for both the child and the parent. Above and beyond the distress we see “on the outside,” this triggers a massive biological stress response “inside” the child, which remains activated until the parent returns and provides comfort. Continuing separation removes the most important protection a child can possibly have to prevent long-term damage—a loving adult who’s totally devoted to his or her well-being.<sup>191</sup>

Even children who have not experienced the trauma of separation from their families are still significantly affected by detention. For example, data from case studies of detained children seeking asylum in Australia show that “[m]ost of the detained infants showed developmental delays, and disturbed emotional states.”<sup>192</sup> The older children showed signs of “posttraumatic stress disorder, depression, . . . high levels of hopelessness, deliberate self-harm, and oppositional defiant disorder.”<sup>193</sup> According to a similar psychological assessment of the mental health of detained children in the United Kingdom, all the detained children showed

188. *Id.*

189. Ann Lorek, *The Mental and Physical Health Difficulties of Children Held within a British Immigration Detention Center: A Pilot Study*, 33 CHILD ABUSE & NEGLECT 573, 573 (2009).

190. See Ellis et al., *supra* note 83.

191. *Hearing on Migrant Family Separation Policy, U.S. House of Reps., Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 116th Cong. 1 (2019) (statement of Jack Shonkoff, M.D., Dir. of the Ctr. on the Developing Child at Harvard Univ.), <https://developingchild.harvard.edu/about/press/migrant-family-separation-congressional-testimony-dr-jack-p-shonkoff/> [<https://perma.cc/NBM2-GQW7>].

192. See Hodes, *supra* note 182, at 622.

193. *Id.*; see also Yvonne Andersson, Rolf Holmqvist & Doris Nilsson, *Child Evacuations During World War II: This Should Not Happen Again*, 24(3) J. LOSS & TRAUMA 213, 214 (2019), <https://www.tandfonline.com/doi/full/10.1080/15325024.2018.1549198> (reporting on longitudinal studies showing that children separated from parents during World War II developed “mental and somatic problems” and symptoms of “depression and psychiatric disorders”).

signs of depression and anxiety that affected their diet and sleep.<sup>194</sup> The developmental concerns highlighted in the U.K. study included examples of withdrawn behavior; food refusal; refusal to feed self; regression to bedwetting; language delay; refusal to speak; loss of previously acquired cognitive skills, such as being able to count; and more.<sup>195</sup>

Similar behaviors have been noted in the children detained by the Trump Administration. Attorneys who are witnessing this phenomenon first-hand have documented problematic behaviors that are “exacerbated by the conditions they endure” inside of the detention facilities.<sup>196</sup> The associate director of the Young Center for Immigrant Children’s Rights who is working with social workers on site said the children “[a]re in crisis. . . . We’ve seen young kids having panic attacks, they can’t sleep, they’re wetting the bed. They regress developmentally, where they may have been verbal but now they can no longer talk.”<sup>197</sup> These symptoms are the biological response to overproduction of stress hormones.<sup>198</sup> Children who are in a constant state of toxic stress are especially vulnerable to developmental delays because the harm is occurring while their brains are still developing, and the toxic stress triggers the brain into survival mode which “takes priority over things like academic development and physical growth,” and results in permanent changes.<sup>199</sup>

Unlike the above case studies of detained children, the children who have been detained by the Trump Administration face a unique set of challenges because they are detained, or were detained, apart from their families. The U.K. study, which found significant harmful effects of detention, covered children who were detained *with* their parents.<sup>200</sup> Babies and young children require special care, and it is estimated that over 2,400 children of “tender age”—twelve years old and under—are in DHS custody.<sup>201</sup> With the DHS separating and detaining children as young as eight months old, the consequences for healthy child development can be devastating.<sup>202</sup> According to a statement made by the American Public Health Association and Trust for America’s Health,

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194. See Lorek, *supra* note 189, at 578.

195. See *id.* at 580.

196. See Ellis et al., *supra* note 83.

197. Caitlin Dickerson & Manny Fernandez, *What’s Behind the ‘Tender Age’ Shelters Opening for Young Migrants*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/tender-age-shelters-family-separation-immigration.html> [<https://perma.cc/C5G4-Y25W>].

198. See Santhanam, *supra* note 183.

199. *Id.*

200. See Lorek, *supra* note 189, at 579.

201. See Dickerson, *supra* note 74.

202. Declaration of Dolly Lucio Sevier at 88–91, *Flores v. Sessions*, No. 2:85-CV-04544 DMG (AGRx), slip op. (C.D. Cal. June. 26, 2019) (detailing two medical examinations of nursing mothers

children living without their parents face immediate and long-term health consequences. Risks include the acute mental trauma of separation, the loss of critical health information that only parents would know about their children's health status, and in the case of breastfeeding children, the significant loss of maternal child bonding essential for normal development.<sup>203</sup>

Research on trauma—both children's experience of it, and its impact on child wellbeing—can shed further light on the far-reaching consequences of the Trump Administration's actions. As Dr. Jack Shonkoff explains,

[w]ithout exaggeration, thousands of studies converge on the following two core scientific concepts: (1) [a] strong foundation for healthy development in young children requires a stable, responsive, and supportive relationship with at least one parent or primary caregiver [and] (2) [h]igh and persistent levels of stress activation (known as “toxic stress”) can disrupt the architecture of the developing brain and other biological systems with serious negative impacts on learning, behavior, and lifelong health.<sup>204</sup>

Migrant children who were forcibly detained and separated from their parents suffer a “double whammy” in brain development because not only are they deprived of positive stimulates (parents and family unity), but they also endure highly stressful situations perpetuated by the degrading treatment inflicted by the Trump Administration.<sup>205</sup> These conditions can “disrupt brain circuits that affect memory and the ability to focus attention and regulate behavior” and “increase[] the risk of heart disease, diabetes, depression, and many other chronic illnesses in the adult years.”<sup>206</sup> Shonkoff warned that those children most likely to be “seriously impaired for the rest of their lives” are those who are younger, those who have

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with low milk supply and finding they were not being given access to sufficient amounts of water to produce enough milk for their infants).

203. News Release, Am. Pub. Health Ass'n, Separating Parents and Children at U.S. Border is Inhumane and Sets the Stage for Public Health Crisis (June 15, 2018), <https://www.apha.org/news-and-media/news-releases/apha-news-releases/2018/parent-child-separation> [<https://perma.cc/R3RA-GDIT>].

204. “*Examining the Failures of the Trump Administration's Inhumane Family Separation Policy*” *Before the H. Comm. on Energy and Commerce, Subcomm. on Oversight and Investigations*, 116th Cong. 1–3 (2019) (statement of Jack P. Shonkoff, M.D., Dir. of the Ctr. on the Developing Child at Harvard Univ.). Shonkoff is Director of the Center on the Developing Child at Harvard University, Julius B. Richmond FAMRI Professor of Child Health and Development at the Harvard T.H. Chan School of Public Health and Harvard Graduate School of Education, and Professor of Pediatrics at Harvard Medical School and Boston Children's Hospital.

205. *Id.*

206. *Id.*

suffered previous harm from adversity, and those who endure longer periods of separation from their parents or caregivers.<sup>207</sup>

This analysis comports with, and reflects, the research on attachment. Attachment theory concludes that children develop attachment, or a sense of security, when around their parent(s), which allows them to internalize a safe space in order to be explorative.<sup>208</sup> When separated from their parent(s), “children may lack the ability to explore and adapt to their environment. Implications may be lifelong.”<sup>209</sup> The theory of ambiguous loss expands on the theory of attachment by addressing the uncertainty the child feels after separation.<sup>210</sup> The feeling of not knowing can be “tormenting” and “infinite” because there are no clear answers for the children who experience family separation, especially those who are forcibly separated.<sup>211</sup> In the event of a disruption in the family dynamic, children are forced to redefine what roles family members have in the family system, which leaves children in a confusing and ambiguous gray area.<sup>212</sup>

Even after children are reunited with their families, the exposure to degrading treatment and high stress can permanently impact healthy development.<sup>213</sup> The overproduction of stress hormones blocks neural circuits, essentially disrupting and damaging the “pathways necessary to carry information to and from the brain,” which does not allow for normal development.<sup>214</sup> Therefore, not only are the adverse health consequences evident today (PTSD symptoms, crying, weakened immune system, weight loss, language regression, etc.), but these children are also more likely to “experience behavioral problems, drop out of school, struggle with substance abuse or be diagnosed with chronic illnesses, such as diabetes or heart disease.”<sup>215</sup> In short, these separations by the Trump Administration have the potential to alter children’s development and wellbeing for a lifetime. In addition, the separations, mistreatment of

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207. *Id.*

208. *See* Barnert et al., *supra* note 12, at 494.

209. *Id.*

210. *Id.*

211. *Id.*

212. Anja Taanila et al., *Effects of Family Interaction on the Child’s Behavior in Single-Parent or Reconstructed Families*, 41 FAM. PROCESS 693, 695 (2002).

213. *See, e.g.*, Andersson et al., *supra* note 193, at 214 (discussing a study of Scandinavian children separated from their parents during World War II and finding that the children later developed “mental and somatic problems” and symptoms of “depression and psychiatric disorders”).

214. *See* Santhanam, *supra* note 183.

215. *Id.*

children in detention, and failure to reunite children with their families violate numerous provisions of international human rights law.<sup>216</sup>

### III. A CHILDREN'S RIGHTS LAW PERSPECTIVE

Although the United States—like any sovereign State—has broad authority to devise its own immigration policies and regulate its borders, it also has a “duty to respect and ensure the human rights of migrants while enacting and implementing immigration policies and laws.”<sup>217</sup> Indeed, the origins of the international human rights movement, which came out of the aftermath of World War II and the Holocaust, were an attempt by the international community—including the United States—to clarify that sovereignty does not mean unfettered power to treat human beings however the State wants.<sup>218</sup> Rather, universal recognition of human dignity and the rights inherent in every individual put limits on how a government can treat individuals subject to its jurisdiction.<sup>219</sup> Thus, human rights law, and in this case children’s rights law, provides an important check on the power of the state. In this Part, we provide a children’s rights law assessment of the Trump Administration’s border actions—drawing primarily on the Convention on the Rights of the Child (CRC), the most comprehensive children’s rights treaty. It bears noting that there is a wealth of other relevant international instruments, including treaties that the United States has ratified.<sup>220</sup> Arguments under other

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216. The adverse impact on children’s development most clearly implicates—and violates—the obligation to ensure children’s right to life, survival and development under article 6 of the CRC and children’s right to the highest attainable standard of health under article 24 of the CRC. *See* CRC, *supra* note 14, arts. 6, 24. A breadth of other rights are implicated and discussed in more detail in Part III.

217. U.N. Comm. on the Rights of the Child, 2012 Day of General Discussion, The Rights of All Children in the Context of International Migration 8 (Aug. 2012), <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/2012DGDBBackgroundPaper.pdf> [<https://perma.cc/2BAP-CZGE>].

218. *See* Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 66 *FORDHAM L. REV.* 1, 4 (1999) (“The international human rights movement, born during the Second World War, has represented a significant erosion of state sovereignty. And it took Hitler and the Holocaust to achieve that. Since 1945, how a state treats its own citizens, how it behaves even in its own territory, has no longer been its own business; it has become a matter of international concern, of international politics, and of international law.”).

219. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948) (“All human beings are born free and equal in dignity and rights.”).

220. Of the major international human rights treaties, the United States has ratified the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Prevention and Punishment of the Crime of Genocide. The United States has also ratified two of the optional protocols to the CRC: the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography, and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict. *See Multilateral Treaties Deposited with the Secretary-General*, UNITED NATIONS TREATY DATABASE, [https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=\\_en](https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en) [<https://perma.cc/A7N2-DX3D>].

treaties that the United States has ratified—such as the International Covenant on Civil and Political Rights or the Convention against Torture—are important;<sup>221</sup> however, as the most comprehensive treaty on children’s rights, and one of a small number of treaties that unify civil, political, economic, social and cultural rights, a CRC lens offers critical, more comprehensive insights into the human rights implications of the Trump Administration’s actions.

Adopted in 1989, the CRC has been ratified by every country, except for the United States.<sup>222</sup> Despite the United States’ departure from rest of the world in ratifying the CRC, the United States played a prominent role in shaping the content of the CRC and signed the treaty over two decades ago.<sup>223</sup> In other words, a CRC analysis is relevant both because it is the most authoritative statement on children’s rights,<sup>224</sup> and because its

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221. U.S. HUMAN RIGHTS NETWORK, *ADVANCING HUMAN RIGHTS: A STATUS REPORT ON HUMAN RIGHTS IN THE UNITED STATES* 30–33 (2018), <https://ushrnetwork.org/uploads/Resources/USHRN%202018%20Status%20of%20Human%20Rights%20in%20the%20US.pdf> [<https://perma.cc/7764-PHXK>]; Jillian Blake, *Trump Administration’s Family Separation Policy Violates International Law*, INTLAWGRRLS (June 10, 2018), <https://ilg2.org/2018/06/10/trump-administrations-family-separation-policy-violates-international-law/> [<https://perma.cc/L36F-3XVZ>].

222. Jonathan Todres, *Analyzing the Opposition to U.S. Ratification of the U.N. Convention on the Rights of the Child*, in *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION* 19 (Jonathan Todres, Mark E. Wojcik, & Cris R. Revaz eds., 2006); *Depositary*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtsdg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtsdg_no=IV-11&chapter=4&lang=en) [<https://perma.cc/A7N2-DX3D>]. For more on the U.S. position, see, for example, Susan Kilbourne, *Opposition to U.S. Ratification of the United Nations Convention on the Rights of the Child: Responses to Parental Rights Arguments*, 4 *LOJ. POVERTY* L.J. 55, 111–12 (1998) (“In fact, a thorough examination of the Convention’s text, legislative history, and interpretation demonstrates that the Convention is both deferential to and supportive of families and the primary role of parents. Although most of the issues raised by Convention opponents are of vital importance to American society, the oppositions’ claims about the Convention are almost entirely based on misconceptions or distortions of the Convention’s text . . . [C]ritics’ mischaracterization of the Convention is divisive and serves only to mislead the very citizens who want and need to be well-informed about this most personal of international human rights instruments.”).

223. Signing an international treaty is a preliminary endorsement that shows willingness to review and ratify; however, a signature does not bind the signing State to the terms of the treaty. The United States signed the CRC on February 16, 1995. Ratification of an international treaty constitutes an agreement to be bound by the terms of the treaty. See *Implementing and Monitoring the Convention on the Rights of the Child*, UNICEF, [https://www.unicef.org/crc/index\\_30207.html](https://www.unicef.org/crc/index_30207.html) [<https://perma.cc/GZL9-3YSD>]; see also UNITED NATIONS TREATY COLLECTION, *supra* note 15.

224. See Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied*, 50 *HARV. J. ON LEGIS.* 331, 349 (2013) (“The CRC, the most authoritative legal instrument involving children’s rights, highlights the fundamental dignity of children, demonstrates the urgency of protecting children, and enshrines children as bearers of human rights.”); Carole J. Petersen & Susan M. Chandler, *Sex Offender Registration and the Convention on the Rights of the Child: Legal and Policy Implications of Registering Juvenile Sex Offenders*, 3 *WM. & MARY POL’Y REV.* 1, 3 (2011) (“The CRC is widely recognized as the most comprehensive and authoritative international treaty on the rights of children.”).

content largely reflects a vision for children's rights that the United States helped forge.<sup>225</sup>

This Part starts by discussing the provisions of the CRC that are recognized as its “general principles”—articles 2, 3, 6, and 12—as they are applicable to all stages of a child's life and to all rights of the child. We then turn to the specifics of the Trump Administration's actions, examining the range of rights—including both general principles and more specific provisions of the CRC—implicated at the stages of apprehension and separation, detention, and reunification.

#### A. *General Principles*

Four articles of the CRC—articles 2, 3, 6, and 12—are recognized as the foundational principles of the treaty and thus are broadly applicable to all situations concerning children.<sup>226</sup> First, the rights in the CRC must be assured to all children subject to that State's jurisdiction without discrimination of any kind (article 2). Second, in all actions concerning children, the best interests of the child shall be a primary consideration (article 3). Third, each child has the inherent right to life, survival, and development (article 6). Fourth, children have the right to be heard in matters that affect them, and their views must be given due weight in accordance with their age and maturity (article 12).

These core principles establish the idea that every child matters regardless of where they are from or who they are, that the best interests of the child must be at the forefront of decision-makers' minds so that children can realize their full potential, and that children should have the opportunity to participate in decisions that affect and shape their lives.

The Trump Administration's policies at the border conflict with all of these foundational rights of children. The principle of nondiscrimination is one of the most widely-accepted concepts in international human rights law.<sup>227</sup> The CRC's non-discrimination clause (article 2) establishes that governments cannot discriminate against children based on the traits or

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225. Price Cohen, *supra* note 17, at 36 (noting that United States was “a major player” at every one of the CRC's negotiating sessions).

226. U.N. Comm. on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, ¶ 12, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003).

227. Most treaties have a nondiscrimination clause. *See, e.g.*, International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3. Of the treaties that do not, many of those address the topic of discrimination itself, making a nondiscrimination clause superfluous. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 216; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

views of the child or their parents. The Trump Administration declared that this separation policy was a “tough deterrent” and thus a vehicle for punishing parents.<sup>228</sup> The targeting of families implicates protections in the CRC and other human rights law against discrimination on the basis of national origin, birth status, and other protected traits.<sup>229</sup>

Given the short- and long-term health implications, the Trump Administration policies are clearly not in the “best interests” of these children. Not only is it clear that these children’s best interests have not been afforded the priority consideration required under article 3 of the CRC, but they appear not to have been considered at all.<sup>230</sup> Moreover, the trauma inflicted on these children almost certainly has adverse implications for the child’s survival and development, in contravention with article 6 of the CRC. The evidence overwhelmingly demonstrates that tearing a child from their parents, detaining/incarcerating children, and failing to reunite children with families all have adverse consequences for child survival and development.

Finally, although it is unclear whether the U.S. government has sought and considered the views of these children in making these decisions, it is implausible to suggest that any of these children would have chosen to be abruptly separated from their parents. Article 12 of the CRC provides that governments must ensure that children are heard and must give “due weight” to their views.<sup>231</sup> The Trump Administration is in clear violation of children’s rights law by refusing to hear the pleas of the children and by failing to give the children’s views due weight in matters affecting them. Indeed, the audio recording that was leaked from a CBP detention center in which painful cries can be heard from children is heartbreaking evidence. Children screaming for their “mami” and “papá” and pleading to the officers to stop their father’s deportation demonstrates how much these actions by the Trump Administration conflict with what children want (or need).<sup>232</sup> In fact, the audio recording captures an officer referring to the children’s cries as an “orchestra” that is only missing the “conductor.”<sup>233</sup>

Applying the general principles of the CRC to the current situation reveals numerous rights violations. Any yet that is only the tip of the

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228. See Cunnings, *supra* note 9, at 1.

229. CRC, *supra* note 14, art. 2.

230. *Id.* art. 3(1).

231. *Id.* art. 2.

232. Ginger Thompson, *Listen to Children Who’ve Just Been Separated from Their Parents at the Border*, PROPUBLICA (June 18, 2019), <https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy> [<https://perma.cc/TAR7-6N6J>].

233. *Id.*

iceberg. Reviewing each stage of the Trump Administration's actions provides further evidence of the breadth and depth of rights violations.

*B. Apprehension and Separation*

As noted above, the children's rights law—and human rights law more broadly—prohibits discrimination. CRC article 2's prohibition on discrimination based on “national, ethnic or social origin” clearly is implicated by Trump's Administration's actions against immigrant and asylum-seeking children from Central America.<sup>234</sup> The children coming to the United States to lawfully seek asylum come primarily from Central American countries, specifically El Salvador, Guatemala, Honduras, as well as from Mexico.<sup>235</sup> Interpreting article 2 within the context of child migration, the Committee on the Rights of the Child explained that while States can exercise control over their borders, “[p]olicing or other measures concerning unaccompanied or separated children relating to public order are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option.”<sup>236</sup>

In deliberately choosing to separate selected children from their families on the basis of national origin, the U.S. government is violating the CRC's article 2. The practice following the “zero-tolerance” policy was a mass detention of children; it was not rooted in existing law, it was not proportional to the effects on public order, and it was not the least intrusive option.<sup>237</sup> Official data collected by the Executive Office for Immigration Review (EOIR) over a fifteen-year period from 2001 to 2016, show high compliance rates for asylum-seekers who posted immigration bonds.<sup>238</sup> The data reveal that ninety-six percent of asylum applicants attended all their immigration court hearings,<sup>239</sup> leaving little

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234. CRC, *supra* note 14, art. 2.

235. U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2020, U.S. CUSTOMS & BORDER PROTECTION (Feb. 11, 2020), <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions> [<https://perma.cc/L3NT-X3SL>].

236. U.N. Comm. on the Rights of the Child, *General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, U.N. Doc. CRC/GC/2005/6 (2005), <https://www.refworld.org/docid/42dd174b4.html> [<https://perma.cc/F2GP-GXQG>].

237. See also CRC, *supra* note 14, art. 37(b) (“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time . . . .”).

238. INGRID EAGLY, STEVEN SHAFER & JANA WHALLEY, AMERICAN IMMIGRATION COUNCIL, *DETAINING FAMILIES: A STUDY OF ASYLUM ADJUDICATION IN FAMILY DETENTION* (Aug. 2018), [https://www.americanimmigrationcouncil.org/sites/default/files/research/detaining\\_families\\_a\\_study\\_of\\_asylum\\_adjudication\\_in\\_family\\_detention\\_final.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/detaining_families_a_study_of_asylum_adjudication_in_family_detention_final.pdf) [<https://perma.cc/7MF4-KRB4>].

239. *Id.*

or no need for the Trump Administration to separate children from their families and detain them. Indeed, prior to the Trump Administration's policy, families who entered the border without admission and inspection were normally released together with a Notice to Appear (NTA)<sup>240</sup> or they were issued ankle monitors and/or further instructions on how to report to ICE under a supervised monitoring program.<sup>241</sup> These actions are more proportional and exponentially less intrusive. Furthermore, even after President Trump signed the executive order halting family separation, he replaced one practice with another that is contrary to law.<sup>242</sup>

Another vital component of article 2 is its protection against discrimination by association—that is, article 2 prohibits discriminating against a child on the basis of their parents' attributes.<sup>243</sup> This unique provision in international law provides protection to a breadth of young people, from children of political dissidents to children orphaned by AIDS.<sup>244</sup> In the context of the U.S. government's actions at its southern border, particularly in cases involving very young children who do not have the capacity to have made the decision to migrate (e.g., infants and toddlers), the Trump Administration is violating the rights of children as a way of punishing these children's parents.<sup>245</sup>

Beyond article 2, many other provisions of the CRC are implicated by the act of separating children from their parents and families. Article 7, one of the many family-supportive principles of the CRC, establishes that a child has “the right to know and be cared for by his or her parents.”<sup>246</sup> By separating children from their parents—often without providing the parents or the child any information about one another's whereabouts—the government is violating children's rights to know and be cared for by their parents. The government is also contravening article 5 which mandates that governments “shall respect the responsibilities, rights and

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240. A Notice to Appear (“NTA”) is a legal document issued by the Department of Homeland Security to non-citizens that instructs them to appear before an Immigration Judge on a specified date and time.

241. Lori Robertson, *Fact Check: Did the Obama Administration Separate Families?*, USA TODAY (June 23, 2018), <https://www.usatoday.com/story/news/politics/2018/06/23/trump-obama-administration-separate-families-immigration/728060002/> [<https://perma.cc/KB8L-W9RT>].

242. Such detention is inconsistent with the *Flores* Agreement and other provisions of U.S. law. See *Flores* Agreement, *supra* note 30.

243. CRC, *supra* note 14, art. 2.

244. U.N. Comm. on the Rights of the Child, *General Comment No. 7 (2005) Implementing Child Rights in Early Childhood*, ¶¶ 11–12, U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006), <https://www.refworld.org/docid/460bc5a62.html> [<https://perma.cc/SW6C-7QCZ>]; Jonathan Todres, *Rights Relationships and the Experience of Children Orphaned by AIDS*, 41 U.C. DAVIS 417, 439–40 (2007).

245. The Trump Administration itself admitted that the policy was aimed at deterring others who might seek to enter the United States. See Cunnings, *supra* note 9 and accompanying text.

246. CRC, *supra* note 14, art. 7(1).

duties of parents . . . to provide . . . appropriate direction and guidance” to their children.<sup>247</sup>

Furthermore, when separation is contemplated—under any circumstances—children’s rights law establishes important protections. Article 9 of the CRC states a child shall not be separated from their parents against their will, unless it is necessary for the child’s best interests and all parties are afforded their proper procedural due process rights.<sup>248</sup> As the Trump Administration has admitted, the separations were a message to others who might try to reach the United States. Separation was not in the child’s best interests. Moreover, children’s rights law requires that no separation shall occur without providing parents and the child a meaningful opportunity to challenge the proposed separation.<sup>249</sup> Here again there is no indication that families were provided that opportunity.

Next, article 9 holds that if

separation results from any action initiated by a State Party such as the detention . . . [or] deportation . . . of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child, or if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family.

As previously mentioned, the DHS failed to inform family members as to one another’s whereabouts upon separation.<sup>250</sup>

### C. *Detention*

Given the trauma of detention, the reports of abusive detention practices, and the long-term implications of this trauma, the Trump Administration’s actions clearly violate both the obligation to make the child’s best interests a primary consideration and the mandate to ensure children’s rights to life, survival, and development.<sup>251</sup> But similar to the breadth of rights implicated by separation, additional provisions of children’s rights law are relevant to detention.

Children’s rights law recognizes that in certain circumstances children may be “temporarily or permanently deprived of [their] family environment” and establishes that such children are “entitled to special

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247. Even for the parents detained with their children, the act of pre-adjudication detention may restrict parents and children in ways that encroach on parental rights.

248. CRC, *supra* note 14, art. 9.

249. *Id.*

250. *See* Ms. L. v. U.S. Immigration and Customs Enf’t, 310 F. Supp. 3d 1133, 1142–44 (S.D. Cal. 2018); *supra* notes 64–68, 125–127 and accompanying text.

251. CRC, *supra* note 14, arts. 3, 6.

protection and assistance provided by the State.”<sup>252</sup> The obligation under article 20 of the CRC is that the State will “ensure alternative care for such a child.”<sup>253</sup> Institutional settings are recognized as a last resort and they must be “suitable.”<sup>254</sup> The U.S. detention facilities almost certainly fail this human rights obligation to ensure special protection, assistance, and suitable alternative care.

The detention also violates core principles of children’s rights which establish that children should be “presumed innocent until proven guilty according to law”<sup>255</sup> and that detention “shall be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>256</sup> Not only was it unnecessary to detain these children, the fact that the Trump Administration failed to meet court-ordered deadlines for family reunification is glaring evidence of the failure to keep detention of children to the shortest possible period of time.

The trauma inflicted by the Trump Administration also violates children’s rights “to the enjoyment of the highest attainable standard of health.”<sup>257</sup> The act of detaining children, even if detained with their parents, is detrimental to their health as it puts them at “risk of exploitation and abuse, denies them access to meaningful health care, and harms their ability to play and learn.”<sup>258</sup> The relocation of many migrant children to unregulated detention centers where there are no schooling facilities, only textbooks with no instruction, denies them their right to education.<sup>259</sup> The facilities and their restrictions also violate the right to rest, leisure, and play.<sup>260</sup> The children are expected to follow strict scheduling from when to wake up, when to play, when to speak, when to eat, when to use the restroom, and when to sleep.<sup>261</sup> Even when children are allotted outside “play” time, children have described it as “unbearable” because there is no escape from the direct sunlight,<sup>262</sup> and recreation spaces are sometimes just grassless compounds.<sup>263</sup> On top of this, in June 2019 the Trump

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252. *Id.* art. 20.

253. *Id.* art. 20(2).

254. *Id.* art. 20(3)

255. *Id.* art. 40(2)(b)(i).

256. *Id.* art. 37(b).

257. *Id.* art. 24.

258. Marion Hart, *Why Detaining Children Is Harmful*, UNICEF USA (June 21, 2018), <https://www.unicefusa.org/stories/why-detaining-children-harmful/34488> [<https://perma.cc/L55Y-7LTM>].

259. CRC, *supra* note 14, art. 28; *see also* Dickerson, *supra* note 74.

260. CRC, *supra* note 14, art. 31.

261. *See* Barry et al., *supra* note 1.

262. *See* Chapin, *supra* note 152.

263. *See* Barry et al., *supra* note 1.

Administration announced that it was ending educational, recreational, and other services for migrant children being held in detention.<sup>264</sup>

The CRC further establishes that “[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.”<sup>265</sup> The extensive reports of verbal and physical abuse and the cases of forced medication of children indicate persistent violations of this mandate, as well as violation of children’s right to be protected “from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”<sup>266</sup>

The significant trauma inflicted on the children raises the question whether the United States has violated the international human rights law prohibition on torture or cruel, inhuman, and degrading treatment.<sup>267</sup> Not only is this prohibition enshrined in the CRC, it is also recognized in the ICCPR and Convention against Torture, both of which the United States has ratified.<sup>268</sup> Moreover, the prohibition on torture and cruel, inhuman, and degrading treatment is so widely accepted that it has not only achieved customary international law status, but it is recognized as jus cogens, or a peremptory norm, from which no derogation is permitted under any circumstances.<sup>269</sup> Yet the Trump Administration’s practices are consistent with actions deemed cruel, inhuman, and degrading.

#### D. Reunification

The news on reunification is deeply discouraging. The Trump Administration has failed to meet court ordered deadlines, and now, there are reports that many of these families may never be reunified.<sup>270</sup> More than a year after the Trump Administration was ordered by a federal court to reunite children with their families, there are still children who have not

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264. Cooke & Rosenberg, *supra* note 102.

265. CRC, *supra* note 14, art. 37(c).

266. *Id.* art. 19. Article 19(2) calls for adequate investigation of such cases. *Id.*

267. CRC, *supra* note 14, art. 37.

268. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, S. TREATY DOC. No. 24841, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171; *see also* U.S. CONST. art. VI, § 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”).

269. Matthew Garrod, *Unraveling the Confused Relationship Between Treaty Obligations to Extradite or Prosecute and “Universal Jurisdiction” in the Light of the Habré Case*, 59 HARV. INT’L L.J. 125, 142–43 (2018).

270. Steve Benen, *Trump Admin: Reuniting Migrant Families May Not be Possible*, MSNBC (Feb. 5, 2019, 9:20 AM), <http://www.msnbc.com/rachel-maddow-show/trump-admin-reuniting-migrant-families-may-not-be-possible> [https://perma.cc/5PW8-QGLS].

been reunited with family. And in response, the Trump Administration has stated that it does not have the resources to ensure reunification happens for all families.<sup>271</sup>

The U.S. government's lack of effort to reunite the families that it tore apart conflicts with the clear mandate of children's rights law. Children's rights law—under article 8 of the CRC—establishes the “right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”<sup>272</sup> And it demands, “[w]here a child is illegally deprived of some or all of the elements of his or her identity, [the government] shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.” One of the frightening aspects of the Trump Administration's actions is that the Administration is now revealing that it has not properly documented and tracked these children. So not only might they strip children of their birth identity, but they clearly are failing to “re-establish[] speedily” the child's identity. Under children's rights law, the State has an obligation to support reunification.<sup>273</sup>

It bears noting that article 8 of the CRC was inspired by the Argentinian experience of the 1970s, in which children were abducted or taken from political dissidents by the government and given to military families, their original identities erased.<sup>274</sup> In other words, these violations occurring at the hands of the Trump Administration now put it in the company of some of the most notorious policies implemented by dictatorships.<sup>275</sup>

Finally, post-detention, there are broader obligations on the State under children's rights law. Article 39 of the CRC requires States to:

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271. *See id.*

272. CRC, *supra* note 14, art. 8.

273. CRC, *supra* note 14, art. 10. Failure to reunify also raises the prospects of long-term violations of children's rights to know and be cared for by their parents and their right to enjoy their culture. *See* CRC, *supra* note 14, arts. 7, 30.

274. John Tobin & Jonathan Todres, *Article 8: The Right to Preservation of a Child's Identity*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD 281, 282 (John Tobin ed., 2019).

275. *See, e.g.*, Juan Cole, *Top Six Dictators who also Divided Children from Parents like Trump/Sessions*, INFORMED COMMENT (June 18, 2018), <https://www.juancole.com/2018/06/dictators-children-sessions.html> [<https://perma.cc/7946-HWTU>] (discussing other historical examples of child separation policies, and noting in particular: Joseph Stalin's removal of children from their families; Saddam Hussein's expulsion of Iraqi adults of Iranian heritage, leaving the children abandoned; the Burmese military junta separated Muslim children from their families; and Adolf Hitler's practice of gifting kidnapped children to German families); *see also* Polly Dunbar, *300,000 Babies Stolen From Their Parents – and Sold for Adoption: Haunting BBC Documentary Exposes 50-year Scandal of Baby Trafficking by the Catholic Church in Spain*, DAILY MAIL (Oct. 16, 2011), <https://www.dailymail.co.uk/news/article-2049647/BBC-documentary-exposes-50-year-scandal-baby-trafficking-Catholic-church-Spain.html> [<https://perma.cc/L2WT-DMUZ>] (describing “a system for taking children away from families deemed politically dangerous to the regime of General Franco”).

[T]ake all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.<sup>276</sup>

In other words, for children who have suffered rights violations, the State is obligated to ensure a remedy and assistance to help them recover from the harm and reintegrate into society. As the Trump Administration has shown little to no interest in even reconnecting children with their parents, it almost certainly will reject the suggestion that it has any obligation to provide services to support the recovery of children in a manner which recognizes the dignity inherent in each child, unless pressure is brought to bear on the Trump Administration through both targeted legal action and broader advocacy by the general public.

#### *E. Children Seeking Asylum in Immigration Court*

Although the focus of this Article is not asylum law, it bears noting that, beyond the above-mentioned protections, there are numerous additional protections for asylum-seekers and refugees. These heightened protections for refugees—including “appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present [CRC] and in other international human rights or humanitarian instruments”<sup>277</sup>—are rooted in the foundational values of the international human rights movement, which was emerged out of the shadow of the Holocaust and the murder of six million Jews as well as many others. In short, presenting at a point of entry at the U.S. border and requesting asylum is consistent with both international human rights law and U.S. law.<sup>278</sup> Yet, the Trump Administration has made a mockery of these critical legal protections by imposing this separation policy and compelling children, including toddlers, to represent themselves before an

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276. CRC, *supra* note 14, art. 39.

277. CRC, *supra* note 14, art. 22(1).

278. See, e.g., Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (detailing a breadth of rights possessed by refugees); Universal Declaration of Human Rights, *supra* note 219, art. 14(1) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”); see also 8 U.S.C. § 1158 (2012); *supra* note 21. For a more in-depth look at asylum law in the United States and its roots in international policy, see Deborah Anker, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, 13 INT’L MIGRATION REV. 74 (1990).

Immigration Judge, and argue their defense against their removal from the United States.<sup>279</sup>

#### IV. NEXT STEPS

As the above discussion reflects, the Trump Administration's actions are inconsistent with a breadth of provisions of the Convention on the Rights of the Child. Of course, as the only country in the world yet to ratify the CRC, the United States is not legally bound by the treaty. We argue, however, that a children's rights assessment is still critical for two reasons: one historical and the other forward-looking. Below we discuss the CRC's utility in each of these contexts, and then close by outlining four steps that can move us closer to addressing the harms discussed in this Article and to preventing similar ones in the future.

##### A. *The CRC as Historical Lesson and Current Advocacy Tool*

First, although the U.S. government is the sole holdout with respect to the CRC, the United States did support the content of the CRC at one point. Indeed, a review of the CRC's drafting history finds that the United States' fingerprints are all over the CRC, and that the treaty reflected what the U.S. government believed was an appropriate vision for children.<sup>280</sup> “[T]he U.S. delegation was so influential that it not only added a number of new rights to the Convention, but it also wielded the power through the consensus process to prevent other rights from being included.”<sup>281</sup> In total, the United States made proposals or recommendations on thirty-eight of the forty substantive provisions of the CRC.<sup>282</sup> Several of the provisions that U.S.-based opponents of CRC ratification now identify as potentially problematic—for example, provisions on freedom of religion and freedom of speech—were included in the CRC at the insistence of the United States.<sup>283</sup> And despite the fact that nineteen provisions of the CRC speak to the importance of parents and family in the lives of children,<sup>284</sup>

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279. Misyrlena Egkolfopoulou, *The Thousands of Children Who Go to Immigration Court Alone*, THE ATLANTIC (Aug. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/08/children-immigration-court/567490/> [<https://perma.cc/WM6T-RTFT>]. Attorneys have reported that their clients are so young they cannot identify their country of origin.

280. Cynthia P. Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185, 191 (2006).

281. *Id.* at 191.

282. Cohen, *supra* note 17. Moreover, the drafting of the CRC occurred during the administrations of Ronald Reagan and George H.W. Bush.

283. T. Jeremy Gunn, *The Religious Right and the Opposition to U.S. Ratification of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 111, 123 (2006).

284. CRC, *supra* note 14, arts. 2–3, 5, 7–11, 14, 16, 18, 20–24, 27, 37, 40.

including the mandates that government “shall respect the responsibilities, rights and duties of parents” and that parents “have the primary responsibility for the upbringing and development of the child,”<sup>285</sup> U.S.-based opponents of the CRC today push highly-charged rhetoric claiming that the CRC is anti-parent. There is a cruel irony in the fact that the U.S. government opposes ratification of the CRC on purported concerns about parental rights,<sup>286</sup> while it tramples on parents’ rights by forcibly removing children from their parents’ custody. So, first and foremost, recalling the U.S. history vis-à-vis the CRC and viewing the Trump Administration’s actions through the lens of the CRC, taken together, show just how far the Trump Administration has strayed from basic principles of human rights and support for families that the U.S. government pressed for during the drafting of the CRC.

Indeed, the Trump Administration’s actions represent a dramatic and cruel rejection of some of the core ideals of the United States as a country. The Statue of Liberty, which proclaims “Give me your tired, your poor, Your huddled masses yearning to breathe free . . . I lift my lamp beside the golden door!”<sup>287</sup> portrays the United States as a land of opportunity and freedom for all. And, as the Congressional Research Service reports, “[f]amily reunification has historically been a key principle underlying U.S. immigration policy. It is embodied in the Immigration and Nationality Act.”<sup>288</sup> Although the United States has often stood for the ideals of liberty and family—and pushed to have those values reflected in the text of the CRC—it bears noting that in practice the government has had a history of targeting certain families and removing children.<sup>289</sup>

Arguably the most well-known example is the U.S. government’s treatment of American Indian children and their families. As a 1978 congressional report acknowledged, “The wholesale separation of Indian children from their families is perhaps the most tragic and destructive

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285. *Id.* arts. 5, 18.

286. *See, e.g.*, Kilbourne, *supra* note 222, at 57 (reviewing U.S. government opposition to the ratification of the CRC and identifying various conservative religious organizations as the driving force behind much of the opposition).

287. *The New Colossus, Statue of Liberty*, NAT’L PARK SERV. (Aug. 14, 2019), <https://www.nps.gov/stli/learn/historyculture/colossus.htm> [<https://perma.cc/BPK4-5Y2Q>].

288. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43145, U.S. FAMILY-BASED IMMIGRATION POLICY (2018), <https://fas.org/sgp/crs/homesecc/R43145.pdf> [<https://perma.cc/M2M2-788L>].

289. For a discussion of more recent history and harmful policies, see, for example, César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 200–13 (2018) (tracing the convergence of criminal law and immigration beginning in the 1980s and continuing through the Obama and Trump Administrations); *see also* Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 604–06 (2019) (discussing President Obama’s removal policies).

aspect of American Indian life today.”<sup>290</sup> In the years prior to the adoption of the Indian Child Welfare Act in 1978, approximately 25 to 35 percent of American Indian children had been removed from their Native homes.<sup>291</sup> “[The] attitude that Native American children were better off growing up in a non-Indian environment did not surface overnight. Rather it percolated from centuries of U.S. sanctioned policies—from boarding schools, to ‘placing out’ programs, to Indian adoption projects—aimed at the erasure of Native American cultures.”<sup>292</sup>

The Trump Administration’s family separations at the U.S. border are arguably less about erasing a culture entirely than they are about erasing, or at least reducing, the presence of certain ethnicities in the country. But though there may be differences, it is important to recognize the historical pattern of targeting certain family for separations in the United States, from slave children being removed as punishment of the parents, to the family separations that were inflicted on American Indian communities, to the forced deportation and family separations that occurred as part of the poorly named “Mexican Repatriation” (most Mexicans were in fact forcibly deported; they did not voluntarily repatriate), to the separation of families that occurred in the Japanese-American internment camps.<sup>293</sup>

Although the reality of U.S. history is a less pure picture, ideals are just that; values and goals to aspire to. If the United States is to stand for the ideal that government can and will respect the rights of individuals and support families—a vision enshrined in the CRC—then the Trump Administration’s policies and actions represent a betrayal of those ideals.

Second, if we are troubled or outraged by the Trump Administration’s departure from core ideals of the United States and, more broadly, from the universal norms of human rights law, then the CRC has relevance as an advocacy tool today. Although the CRC is not law in the United States, it provides a powerful framework that can be employed to advance the well-being of children.<sup>294</sup> And non-binding guidelines can make a difference, from the national policy level to day-to-day life in local

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290. H.R. REP. NO. 95-1386, at 9 (1978).

291. B.J. JONES, MARK TILDEN, & KELLY GAINES-STONER, *THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 2* (2d ed. 2008).

292. Lorie M. Graham, “*The Past Never Vanishes*”: *A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 2 (1998).

293. Catherine Galley, *A History of Family Separation and Human Rights Abuses in the United States*, CTR. ON HUM. RTS. EDUC. (2018), <https://www.centeronhumanrighteducation.org/a-history-of-family-separation-and-human-rights-abuses-in-the-united-states/> [<https://perma.cc/TB2R-HTVV>].

294. It bears noting that U.S. law and the CRC largely overlap and are consistent in many areas. See generally THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION (Jonathan Todres, Mark Wojcik & Cris R. Revaz eds., 2006).

communities. For example, a number of states and localities have adopted human rights resolutions that have spurred more rights-respecting processes and actions.<sup>295</sup> More generally, many of us are guided in our daily life by values. For example, many faith-based organizations and religious individuals are guided by moral precepts that are not enshrined in law. These ideas and values guide individuals to recognize the dignity in all individuals, welcome strangers, and treat others with respect.<sup>296</sup> Similarly, human rights law, including the CRC, can be a moral guide even in places where it is not yet enshrined in law. If you believe that children should not be torn away from families without their or their parents' consent, then your views are consistent with article 9 of the CRC. If you believe children should not be subjected to cruel and inhuman treatment, then your beliefs are consistent with the CRC. In short, we can use the CRC and other human rights law to guide our advocacy, as we press the U.S. government to treat all individuals with dignity, regardless of national origin.

### *B. Addressing Immediate Harms while Building a Better Future*

Despite the seemingly overwhelming task of “fixing” what the Trump Administration has set in motion and continues to inflict, there is a moral imperative. And the above child rights assessment helps to contextualize the extent of harm and the gravity of the Trump Administration's actions. Indeed, the last living prosecutor from the Nuremberg Trials, Ben Ferencz, stated that the Trump Administration's actions are a “crime against humanity”<sup>297</sup> noting the Statute of the International Criminal Court which includes in crimes against humanity “[o]ther inhumane acts . . . intentionally causing great suffering, or serious injury to body or to mental or physical health.”<sup>298</sup> The Trump Administration intended this trauma as a “tough deterrent.”<sup>299</sup>

As we look forward, we need to strategize about both short-term and long-term responses. This requires immediate action at the border and

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295. See, e.g., *State and Local Implementation of Human Rights*, COLUM. L. SCH. HUM. RTS. INST., (Dec. 17, 2019), <https://www.law.columbia.edu/human-rights-institute/human-rights-us/state-and-local-implementation> [<https://perma.cc/J2PH-SVTA>] (identifying a number of state and local initiatives).

296. See generally ARIGATOU INT'L, THE GNRC 5TH FORUM, ENDING VIOLENCE AGAINST CHILDREN: FAITH COMMUNITIES IN ACTION (2017), <https://gnrc.net/images/zdocs/GNRC-5th-Forum-Report-May-2017.pdf> [<https://perma.cc/5YZ8-ZHXB>].

297. Mythili Sampathkumar, *Last Surviving Prosecutor at Nuremberg Trials Says Trump's Family Separation Policy is 'Crime Against Humanity,'* INDEP. (Aug. 9, 2018), <https://www.independent.co.uk/news/world/americas/trump-border-crisis-nazis-nuremberg-trial-ben-ferencz-family-separation-migrants-un-a8485606.html> [<https://perma.cc/78P2-LUEL>].

298. Rome Statute of the International Criminal Court, art. 7(1)(k), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

299. See Cunnings, *supra* note 9.

with regard to the Trump Administration's policies. At the border, we must ensure sufficient legal and humanitarian support for children and families harmed by the Trump Administration's policies and actions. It is not just lawyers and social workers who are needed. For example, individuals fluent in Spanish, Mam, Q'eqchi', or K'iche' can volunteer remotely by translating for organizations working to support children and families at the border. Many more are needed on the ground, and a broader concerted lobbying effort—already underway—must continue until the Trump Administration ends these cruel policies and addresses the harm done. Ultimately, we need to pressure the Trump Administration until it ends detention of these children and their families.

The cruelty of the Trump Administration tearing toddlers away from their parents and subsequently dragging its feet in reunifying families highlights an uncomfortable truth: that grave human rights violations are possible, at any time, in any country. To confront that, we also need a longer-term strategy, a sustained commitment to creating a world in which all individuals can enjoy their rights. Below we outline four steps that can help advance efforts to realize that vision.

### *1. As Citizens*

U.S. politics has become increasingly polarized and contentious. The discourse has become increasingly offensive, accusations and insults are hurled, and apology and contrition are seemingly forgotten concepts. In voting, the "I'm a single-issue voter" line is often used to excuse demeaning or discriminating words or actions of a particular candidate. I care only about the economy, some say, choosing to ignore the rest. Many have critiqued the single-issue voter.<sup>300</sup> Perhaps, instead, we should embrace the single-issue focus. However, that single issue should be: human dignity. If a candidate or policy does not support or reaffirm human dignity, we should not support the candidate or the policy. More than 150 years ago, Giuseppe Mazzini wrote that "[y]our first duties, first, not as to time, but as to importance—because unless you understand these, you can only imperfectly fulfill the rest—your first duties are towards Humanity."<sup>301</sup> This call for a focus on the common experience of all

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300. See, e.g., Lauren Ashley Fitch, *Why It's Important to Not Be a Single Issue Voter*, ODYSSEY (Nov. 7, 2016), <https://www.theodysseyonline.com/losing-the-one-track-mind-why-its-important-not-single-issue-voter> [<https://perma.cc/5XF5-GWLS>] (proposing an intersectional approach to voting issues because many social issues are intertwined and affected by these connected issues).

301. GIUSEPPE MAZZINI, ON THE DUTIES OF MAN 44 (Funk & Wagnalls Co., 1892) (1862). While Mazzini's language and thought reflected, in many respects, the nineteenth century European intellectual mindset, he also moved beyond that in recognizing the exclusion of at least one marginalized group, by closing his famous book with a reminder to his fellow countrymen:

human beings has been overwhelmed by the vitriol of today's public discourse. But each of us, in our daily lives and as members of the polity, can demand that the human dignity of all individuals be a baseline for any policy or action.

## 2. *As Attorneys*

Attorneys have a critical role to play. It is a privileged position. Attorneys are guardians of justice and the rule of law. Upon joining the profession, each attorney takes an oath. In Georgia, for example, each attorney pledges:

I, \_\_\_\_\_, swear that I will truly and honestly, justly and uprightly conduct myself as a member of this learned profession and in accordance with the Georgia Rules of Professional Conduct, as an attorney and counselor, and that I will support and defend the Constitution of the United States and the Constitution of the State of Georgia. So help me God.<sup>302</sup>

This oath, including its broader obligation to uphold justice, is not limited to immigration lawyers and public interest lawyers who have committed to pursuing justice. Upholding justice is the duty of all lawyers. Government lawyers must, in appropriate situations, speak out and object to inhumane policies. Take the example of Alberto Mora. Mora, who served as General Counsel to the U.S. Navy under President George W. Bush, objected to the so-called "Torture Memos."<sup>303</sup> In 2006, Mora was awarded the John F. Kennedy Memorial Foundation's Profile in Courage Award in recognition of his opposition to the cruel and degrading interrogation techniques used with detainees following September 11, 2001.<sup>304</sup> Now imagine what could have been different if all government

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[I]n bidding you farewell, I will remind you of another duty not less solemn than that which binds you to achieve and preserve the freedom and unity of your Country. Your complete emancipation can only be founded and secured upon the triumph of a Principle, the principle of the Unity of the Human Family. At present day one half of the Human Family . . . is, by a singular contradiction, declared civilly, politically, and socially unequal, and excluded from the great Unity. To you, who are seeking your own enfranchisement and emancipation in the name of a Religious Truth, to you it belongs to protest on every occasion and by every means against this negation of Unity. The Emancipation of Woman, then must be regarded by you as necessarily linked with the emancipation of the Working-man. This will give to your endeavors the consecration of a Universal Truth.

*Id.* at 146.

302. *Attorney-Oath*, SUP. CT. GA. (Apr. 22, 2002), <https://www.gasupreme.us/rules/amendments-to-rules/attorney-oath/> [<https://perma.cc/9XKC-Y5JH>].

303. Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER (Feb. 20, 2006), <https://www.newyorker.com/magazine/2006/02/27/the-memo> [<https://perma.cc/86UD-TRY3>].

304. *Alberto Mora (2006), Events and Awards*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/events-and-awards/profile-in-courage-award/award-recipients/alberto-mora-2006> [<https://perma.cc/9KEK-8VT5>].

lawyers—and even all attorneys—opposed such torture. Mora’s example reminds us how important it is that all lawyers recognize their ongoing obligation to uphold the principles of justice and not blindly advocate for their client without regard to harm inflicted on individuals.

### 3. *As Law Professors*

As law professors, we are responsible for teaching the next generation of lawyers to not only effectively advocate for clients but also to counsel clients who might act in ways that do not comport with human rights law. And the window to teach that “next generation” is relatively small; students are actually only six months to roughly two-and-a-half years away from becoming the current generation of attorneys. There have been efforts that address aspects of this task. Many law schools have worked to build a culture of pro bono service among their students—including, in some cases, by implementing a mandatory service requirement for graduation.<sup>305</sup> However, these pro bono requirements are still seen by most as not part of the core curriculum, but rather as an additional graduation requirement. While fostering an interest in pro bono service among students is valuable, the prevention of human rights abuses cannot be achieved by creating a culture in which practicing attorneys will donate fifty to one hundred hours of their time per year. Nor can we achieve these goals by relying on only pro bono programs, human rights courses, and professional responsibility classes. We need to commit to teaching about the humanity of people affected by the law throughout the curriculum.<sup>306</sup> The law is ultimately about people. Ideas of humanity and the humanity of the law need to be incorporated across the curriculum, starting day one

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305. American Bar Ass’n Standing Comm. on Pro Bono & Pub. Serv., *Pro Bono Publico*, ABA (July 26, 2018), [https://www.americanbar.org/groups/legal\\_education/resources/pro\\_bono/](https://www.americanbar.org/groups/legal_education/resources/pro_bono/) [<https://perma.cc/D3CR-UPT5>] (reporting that “[a]t least 39 law schools require students to engage in pro bono or public service as a condition of graduation”).

306. In this regard, we build on work being done on humanizing legal education, therapeutic jurisprudence, and related initiatives that seek to humanize law and the profession. See, e.g., Barbara Glesner Fines, *Fundamental Principles and Challenges of Humanizing Legal Education*, 47 WASHBURN L.J. 313, 322 (2008) (“The call to humanize legal education is part of a much larger call to humanize the profession by recapturing the essence of professional values—peacemaking, problem solving, and justice work.”); David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 W. MICH. U. THOMAS M. COOLEY L. REV. 125, 125 (2000) (“Therapeutic jurisprudence focuses our attention on . . . humanizing the law and concerning itself with the human, emotional, psychological side of law and the legal process.”); see also Clark D. Cunningham, *Learning from Law Students: A Socratic Approach to Law and Literature*, 63 U. CIN. L. REV. 195, 215 (1994) (describing how often the law comes across to students as “barren, unemotional, hollow, repressive”). On professional identity formation, see, for example, Kendall Kerew, *Building Your Professional Identity*, in *LAWYERING FROM THE INSIDE OUT: LEARNING PROFESSIONAL DEVELOPMENT THROUGH MINDFULNESS AND EMOTIONAL INTELLIGENCE* 71, 71–82 (Natalie Martin ed., 2018) (explaining the importance and process of forming a well-rounded professional identity in order to become a fulfilled and ethical legal professional).

of the 1L year and continuing through all of legal education. Students need to develop an appreciation for the impact of the law on human beings. Cultivating a generation of lawyers who see people first and the law as a vehicle for improving the well-being of individuals and communities is essential.

#### 4. *As Members of a Community*

The last few years have witnessed an increase in acts of hate and discrimination, including among children.<sup>307</sup> Children are learning and adopting the hateful rhetoric and behavior of the adults they see—both those in their communities and our political leaders. In some cases, Trump’s name and campaign slogans have been shouted as epithets and threats during the beating of innocent victims, primarily targeting children of color and minority religious faiths.<sup>308</sup> We not only need to counter this negative trend, but more broadly we need to build rights-fulfilling communities. This need to create and sustain rights-respecting communities implicates human rights education—for both children and adults.<sup>309</sup> There is strong evidence of the positive impact of human rights education.<sup>310</sup> Children exposed to human rights education

demonstrate the fundamentals of good citizenship. They gain knowledge not only of their basic rights but also their corresponding social responsibilities. They develop the attitudes and values that are necessary for the promotion and protection of the rights of others, and they acquire the behavioural skills necessary for effective participation in a democratic society.<sup>311</sup>

And the CRC requires that governments ensure children’s rights are “widely known” among both adults and children.<sup>312</sup> In short, children’s rights education and human rights education more generally need to be integrated into both the school curriculum and other activities where young people are engaged.<sup>313</sup> Implementing human rights education is not

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307. Jonathan Todres, *The Trump Effect, Children, and the Value of Human Rights Education*, 56 FAM. CT. REV. 331, 332–34 (2018).

308. Kali Holloway, *10 Hate Crimes Inspired by Donald Trump’s Hateful Rhetoric*, ALTERNET (Aug. 24, 2016), <http://www.alternet.org/election-2016/10-hate-crimes-inspired-donald-trumps-hateful-rhetoric> [<https://perma.cc/4DHV-GLCE>].

309. Todres, *supra* note 307.

310. R. BRIAN HOWE & KATHERINE COVELL, EMPOWERING CHILDREN: CHILDREN’S RIGHTS EDUCATION AS A PATHWAY TO CITIZENSHIP 7 (2005).

311. *Id.*

312. CRC, *supra* note 14, art. 42. The CRC is the first and only human rights treaty that expresses requires governments to make the rights in the treaty widely known.

313. Todres, *supra* note 307, at 336–39.

only possible, but it can be done without sacrificing other educational goals or the core curriculum.<sup>314</sup> And human rights education should be part of all education, not just school-based learning. The UN Committee on the Rights of the Child explains that “[h]uman rights education should be a comprehensive, life-long process and start with the reflection of human rights values in the daily life and experiences of children.”<sup>315</sup> If we adopt this approach, we can begin to build more rights-respecting communities that benefit all individuals.

## CONCLUSION

The Trump Administration is inflicting grave harm on children and their families.<sup>316</sup> This harm violates a breadth of rights of these children, as well as the rights of their parents. And these rights violations echo and rise to the level of some of the harshest violations of human dignity in the age of human rights. Holding the Trump Administration accountable is challenging but critical. We also need to move beyond responding to single crises as they arise and be more proactive in developing a long-term vision that reprioritizes the ideals of human dignity, children’s rights, and human rights. Such a step requires not only action as citizens, but specific action as attorneys and law professors. Ultimately, by fostering the development of rights respecting communities, we can begin to create a country that will live up to its ideals and to the standards enshrined in children’s rights law.

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314. *Id.* at 336–37.

315. U.N. Comm. on the Rights of the Child, *General Comment No. 1: The Aims of Education*, ¶ 15, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001); see also Howe & Covell, *supra* note 310, at 6 (“[C]hildren’s rights education empowers children as citizens and enables them to take positive citizenship action. In this way children can learn the skills and achieve the competence necessary for effective citizenship and for participating in and promoting a democratic and human rights-based culture.”).

316. As Jack Shonkoff described, “[f]orcibly separating children from their parents is like setting a house on fire. Prolonging that separation is like preventing the first responders from doing their job.” *Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy* Before the H. Comm. on Energy and Commerce, Subcomm. on Oversight and Investigations, 116th Cong. (2019) (statement of Jack P. Shonkoff, M.D., Dir. of the Ctr. on the Developing Child at Harvard Univ.).