

**“COLLATERAL” DAMAGE: IMPLICATIONS OF
THE ZERO-TOLERANCE POLICY ON
IMMIGRATION**

KYLEE VERRILL*

*J.D. Candidate 2022, Quinnipiac University School of Law; B.A. Psychological Sciences, University of Connecticut. Thank you to my family for their unwavering support and special thanks to the editors and members of the Quinnipiac Health Law Journal for their support and excellent editorial work.

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Introduction

The “zero-tolerance” immigration enforcement policy implemented in 2018 countered the principles of immigration law and continues to negatively impact the families and workers involved. The policy, meant to discourage immigrants from crossing the border without proper inspection, resulted in families being separated for lengthy periods of time, regardless of whether they were seeking asylum. Images of refugee children locked in cages with nothing but mylar blankets quickly began to go viral, sparking an outcry for the government to resolve the humanitarian crisis occurring at the southern border. Though the Trump administration ended family separation in mid-2018, its effects are lasting and will continue long after, especially for families still separated. This note will aim to identify the lasting effects the zero-tolerance policy will have on immigration law and the people it affects, including the psychological trauma endured by children, parents, and government workers.

The implementation of the zero-tolerance policy has resulted in policy and public health consequences. This note will examine the long-term psychological and sociological turmoil migrant youth and families have experienced because of the zero-tolerance policy. Parents and children both experience adverse psychological effects due to the zero-tolerance policy and family separation – including toxic stress, PTSD, and increased risk of other mental and physical health issues. Migrant families experience sociological issues as well, including racism and xenophobia. ICE and other agents of the federal government also experience psychological effects due to feeling the need to support ICE’s “mission” and experience fear of expressing empathy or compassion.

Lastly, this note will suggest ways how the federal government can better protect families and children seeking asylum moving forward to better uphold the principles of immigration law.

I. The Fundamentals of U.S. Immigration Law

Lawmakers built United States immigration law on the values of family reunification, accepting immigrants who have skills that are valuable to the U.S. economy, protecting those seeking asylum, and

promoting diversity.¹ U.S. immigration law, which aims to uphold these values, is governed by the Immigration and Nationality Act (INA).²

There are multiple ways that a person can immigrate to the United States, which include: seeking a permanent immigrant visa, seeking a temporary visa, or seeking asylum.³ Immigrants seeking to permanently reside in the United States can do so by applying for and obtaining a green card, which allows lawful permanent residence as long as they are not convicted of a crime.⁴ After five years of lawful permanent residence with a green card, or three years if married to a U.S. citizen, a person can apply for U.S. citizenship.⁵ Temporary visas, which include work and student visas, often require sponsorship for the person to stay in the United States.⁶ Those who seek asylum bear the burden of proof to establish that they are a refugee, meaning they are unable or unwilling to return to their country due to persecution, or a well-founded fear of persecution, based on race, religion, nationality, membership in a particular social group, or political opinion.⁷

To become a permanent resident of the United States, an immigrant cannot have entered the country without proper inspection, which requires that the immigrant enters through a legal port of entry.⁸ The first time an immigrant enters or attempts to enter the United States without inspection, they can be charged with a federal misdemeanor which is punishable by fines or up to 6 months in prison.⁹ The second attempt, and any attempt after a person enters or attempts to enter without inspection, they face the possibility of being

¹ *How the United States Immigration System Works*, AM. IMMIGR. COUNCIL (Sept. 14, 2021), <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works>.

² *See generally* 8 U.S.C.

³ Julia Gelatt, *Explainer: How the U.S. Legal Immigration System Works*, MIGRATION POL'Y INST. (Apr. 2019), <https://www.migrationpolicy.org/content/explainer-how-us-legal-immigration-system-works>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ 8 U.S.C. § 1101(a)(42).

⁸ *See* CONG. RSCH. SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO-TOLERANCE" IMMIGRATION ENFORCEMENT POLICY 1 (Feb. 2, 2021) [hereinafter *CRS Report*].

⁹ *See* 6 INA § 275 (a)(3); *see also*, 8 U.S.C. § 1325 (a).

charged with a federal felony which is punishable by fines or up to two years in prison.¹⁰ The prior Bush and Obama administrations did not prosecute those entering illegally nearly as much as the Trump administration did. Rather, under the preceding administrations, there were often exceptions made for those seeking asylum and for those traveling with children.¹¹

In 2003, the Department of Homeland Security (DHS) announced the introduction of a new agency called the Bureau of Immigration and Customs Enforcement, now known as the U.S. Immigration and Customs Enforcement (ICE).¹² The primary objectives of ICE are to enforce immigration laws and combat transnational crime.¹³ Before the Trump Administration, ICE primarily focused on the removal of immigrants who had committed serious and dangerous crimes.¹⁴ Executive influence is one of the main factors in determining the focus of different government agencies such as ICE and the policies they follow.

II. Executive Influence and the Zero-Tolerance Policy

Throughout his presidency, Donald Trump made it a personal goal for his administration to crack down on illegal immigration and “restore law and order” in the United States.¹⁵ Some of the President’s most notable actions regarding immigration law have involved limitations on those seeking asylum, including calling for the abandonment of due process, family separation,¹⁶ building a wall along the southern border, and increasing the number of ICE agents

¹⁰ See 6 INA §276(a)(B); see also, 8 U.S.C. §1326 (a)(2).

¹¹ See *CRS Report*, *supra* note 8, at 2.

¹² *History of ICE*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/history> (last updated Jan. 29, 2021).

¹³ *ICE’s Mission*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/mission> (last updated May 13, 2021).

¹⁴ *Immigration Nation: Installing Fear* (Reel Peak Films, Aug. 3, 2020) [hereinafter *Immigration Nation*].

¹⁵ See *About*, DONALD J. TRUMP, <https://www.donaldjtrump.com/about> (last visited Mar. 24, 2021).

¹⁶ See Andre M. Perry, *Trump Reveals “Zero-tolerance” for Democracy*, BROOKINGS (June 25, 2018), <https://www.brookings.edu/blog/the-avenue/2018/06/25/trump-reveals-zero-tolerance-for-democracy/>.

and immigrant detention centers.¹⁷ The basis for these fell on the administration's "zero-tolerance" policy, which was announced in April 2018 as an effort to reduce illegal immigration to the United States.¹⁸

The zero-tolerance immigration enforcement policy quickly changed how the government enforced immigration law.¹⁹ One of the consequences of the policy was family separation, which involved separating parents from their children and holding them separately while waiting for court proceedings.²⁰ Due to the administration's 100% prosecution policy, every single alien apprehended while attempting to cross into the United States without proper inspection was to be prosecuted by the federal government, regardless of whether they were traveling with children or seeking asylum.²¹ This caused an influx of families separated at the southern border.²² At the start of the zero-tolerance policy, the Department of Homeland Security (DHS) had expected to separate at least 26,000 children from families.²³

As a politically run agency, ICE's objectives changed dramatically with the implementation of the zero-tolerance policy.²⁴ As part of the 100% prosecution policy, the agency's focus shifted from detaining those who had committed serious crimes to removing any and all immigration law violators.²⁵ This included capturing and removing people who had not committed any crimes but had violated immigration law by entering the country without inspection or remaining in the country after their visa had expired.²⁶ These are

¹⁷ See Exec. Order No. 13,767, 82 Fed. Reg. 8,793, 8,795 (Jan. 30, 2017).

¹⁸ See OFF. OF PUB. AFF., *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry*, U.S. DEP'T OF JUST. (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

¹⁹ See *CRS Report*, *supra* note 8, at 1.

²⁰ *Id.* at 2.

²¹ *Id.* at 1.

²² See Joanne M. Chiedi, *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody*, U.S. DEP'T OF HEALTH & HUM. SERVS. 2, 4 (Sept. 2019), <https://www.documentcloud.org/documents/6380666-Inspector-General-Report-from-HHSOIG.html>.

²³ *CRS Report*, *supra* note 8, at 8.

²⁴ *Immigration Nation*, *supra* note 14.

²⁵ *Id.*

²⁶ See *id.*

called “collateral arrests,” which many immigration lawyers criticize violate immigrants’ rights and are a result of racial profiling.²⁷ Many collateral arrests meant taking a providing parent away from their, often, young children, only adding to the traumatizing family separation issue which was occurring at the southern border.²⁸

In July of 2019, the U.S. House of Representatives released a report which detailed the child separations that had occurred during the Trump administration from April to July of that year.²⁹ Though family separation had occurred in the past on a more minimal scale, the study found that the Trump administration’s regular practice of family separation to be “more harmful, traumatic, and chaotic than previously known.”³⁰

Despite the *Flores Agreement*, which imposes a 20-day limit on the amount of time a minor child could be separated from their families in detention centers, many remained separated for far longer.³¹ At least 18 infants and toddlers separated from their parents remained separated for prolonged periods ranging from 20 days to half a year.³² Other children remained separated from their parents for extensive periods as well, as some spent more than a year and a half in the Office of Refugee Resettlement (ORR) custody.³³ Overall, the report obtained information concerning at least 2,648 children who had been separated from their parents, many of whom had traveled to seek asylum under U.S. law.³⁴ This report, however, was not an exhaustive record of the number of children who had been separated, but merely data the U.S. House of Representatives managed to obtain through subpoenas.³⁵ The total number of children

²⁷ Andrea Castillo, ‘Collateral arrests’ by ICE amount to racial profiling, violate immigrants’ rights, lawyers say, L.A. TIMES (Feb. 4, 2018), <https://www.latimes.com/local/lanow/la-me-ice-collateral-arrests-20180204-story.html>.

²⁸ See *Immigration Nation*, *supra* note 14.

²⁹ See *Child Separations by the Trump Administration*, U.S. HOUSE OF REPS. 1 (July 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf> [hereinafter *Child Separations Report*].

³⁰ *Id.* at 15.

³¹ See *id.* at 2.

³² *Id.* at 15.

³³ *Id.* at 17.

³⁴ *Id.* at 1.

³⁵ See *id.*

separated from their parents during this time is estimated to be much higher, at upwards of 5,400.³⁶

Though a federal judge ordered family reunification,³⁷ the Trump administration ultimately attempted to halt family separation by ending the zero-tolerance policy in June of 2018.³⁸ When the reunifications began, officials discovered that 400 parents had been deported without their children, leaving over 700 children behind.³⁹ For children whose parents had not yet been deported, many remained separated for months, even after the order for reunification.⁴⁰ Children and parents were held separated in ICE custody detention centers for an average of 58 days.⁴¹ Around 80% of the families detained ended up being released as opposed to deported, raising the question of whether their initial detention was appropriate in the first place.⁴² As of June 2021, 2,127 children remained separated from their parents.⁴³

Multiple Trump administration officials have defended family separation, stating that it was implemented as a deterrent to children and parents crossing the border illegally.⁴⁴ One federal agent explained his hope that once parents were deported, word that parents and children were being separated would then circulate around their home countries, thereby discouraging others from trying to gain illegal entry into the United States.⁴⁵

³⁶ Associated Press, *More than 5,400 children split at border, according to new count*, NBC NEWS (Oct. 25, 2019), <https://www.nbcnews.com/news/us-news/more-5-400-children-split-border-according-new-count-n1071791>.

³⁷ See *id.*; see also Josh Gerstein & Ted Hesson, *Federal judge orders Trump administration to reunite migrant families*, POLITICO (June 27, 2018), <https://www.politico.com/story/2018/06/26/judge-orders-trump-reunite-migrant-families-678809>.

³⁸ See *Child Separations Report*, *supra* note 29, at 12.

³⁹ *Immigration Nation*, *supra* note 14.

⁴⁰ See *Child Separations Report*, *supra* note 29, at 13.

⁴¹ *Id.* at 18.

⁴² *Id.*

⁴³ Jacob Soboroff, *More than 2,100 children separated at border 'have not yet been reunified,' Biden task force says*, NBC NEWS (June 8, 2021), <https://www.nbcnews.com/politics/immigration/more-2-100-children-separated-border-have-not-yet-been-n1269918>.

⁴⁴ Nicholas Wu, *What Is the Flores Agreement, and What Happens If the Trump Administration Withdraws from It?*, JUST SEC. (Oct. 18, 2018), <https://www.justsecurity.org/61144/flores-agreement-trump-administration-withdraws-it/>.

⁴⁵ *Immigration Nation*, *supra* note 14.

Though ICE and other federal agencies stopped the practice of separating families following an executive order in June 2018, the Trump administration never fully rescinded the zero-tolerance policy.⁴⁶ The Biden Administration fully rescinded the policy in January of 2021.⁴⁷

III. Discussion

a. The Zero-Tolerance Policy and the Principles of Immigration Law

The zero-tolerance policy undermined the values and principles that immigration law was built on and is meant to uphold. For example, while implementing the zero-tolerance policy, 100% of adult aliens apprehended crossing the border illegally faced prosecution regardless of whether they were seeking asylum.⁴⁸ During their time, the Bush and Obama administrations generally made exceptions for those crossing the border illegally and seeking asylum.⁴⁹ These exceptions upheld immigration law’s underlying principle of protecting asylum-seekers by not punishing those seeking lawful asylum.

Another issue presented by the zero-tolerance policy is family separation. Though the Trump administration claims it ended family separation in June 2018, many children remain separated from their parents and the numbers continue to grow (reportedly by over 2,000 since the “end” of family separation).⁵⁰ This actively works against the principle of family reunification, especially as the 100%

⁴⁶ Julia Ainsley & Jacob Soboroff, *Biden Justice Department officially rescinds Trump ‘zero-tolerance’ migrant family separation policy*, NBC NEWS (Jan. 26, 2021), <https://www.nbcnews.com/politics/immigration/biden-justice-department-officially-rescinds-trump-zero-tolerance-migrant-family-n1255762>.

⁴⁷ *Id.*

⁴⁸ *CRS Report*, *supra* note 8, at 1.

⁴⁹ *See id.* at 2.

⁵⁰ Kristina Davis, *U.S. Officials say they are highly confident to have reached tally on separated children: 4,368*, L.A. TIMES (Jan. 18, 2020), <https://www.latimes.com/world-nation/story/2020-01-18/u-s-officials-say-they-are-highly-confident-to-have-reached-tally-on-separated-children-4-368>.

prosecution policy fails to consider whether migrants are with their families or children.⁵¹

The Trump administration and its executives have repeatedly stated that the practice of family separation is useful as a deterrent to families who may cross the border illegally.⁵² DHS officials have argued that the 20-day limit on holding minors makes it easier for families to simply wait for the 20-day holding period to be over and then flee into the United States without attending immigration hearings.⁵³ However, there's not much evidence that this is true.⁵⁴ In most cases, this does not happen.⁵⁵ Nonetheless, there are other ways to help ensure that undocumented individuals show up to their court hearings, such as providing them with legal counsel and guidance.

b. The Zero-Tolerance Policy and Sociological Issues

The zero-tolerance policy, or at least the inflammatory anti-immigration ideology behind it, has attributed to increased instances of outward displays of racism and xenophobia. Encouraging Americans to cheer on and support the building of a wall at the southern border, among other things, has created a negative stigma around the topic of immigration. The zero-tolerance policy embodies anti-immigration rhetoric because it made it much more difficult for people to immigrate legally, as well as seek asylum, both of which are fundamental principles of immigration law.⁵⁶

Statistically, race-based hate crimes rose 17% from 2016 to 2017.⁵⁷ While this was before the implementation of the zero-tolerance policy in 2018, it can likely be, at least in part, attributed to the Trump administration's anti-immigration rhetoric. As the views

⁵¹ See generally Gelatt, *supra* note 3.

⁵² Wu, *supra* note 44.

⁵³ See Chris Jennewein, *Trump Administration Seeks to End 20-Day Limit on Holding Migrant Children*, SAN DIEGO TIMES (Aug. 21, 2019), <https://timesofsandiego.com/politics/2019/08/21/trump-administration-seeks-to-end-20-day-limit-on-holding-migrant-children>.

⁵⁴ Wu, *supra* note 44.

⁵⁵ *Id.*

⁵⁶ See *How the United States Immigration System Works*, *supra* note 1.

⁵⁷ *Midyear 2019: Why are hate crimes rising*, A.B.A. (Jan. 28, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/01/midyear-2019—why-are-hate-crimes-rising-/>.

of anti-immigration supporters became emboldened by the administration’s actions, even people merely perceived to be immigrants became the victims of disturbing hate crimes.⁵⁸ Though these hate crimes rose, undocumented victims were far less likely to file a report than the average victim due to fear of contacting the police, fear of questioning regarding their immigration status, and fear of family separation.⁵⁹ Fear of reporting dangerous crimes only creates a public safety issue, as those who commit these hate crimes go unpunished and can hurt more people.⁶⁰

Mexican and Iranian families were some of those most targeted and negatively affected following the implementation of the Trump administration’s anti-immigration policies.⁶¹ A study conducted in 2019 found that these families suffered discrimination in the United States while dominant government policies reflected racial biases, perpetuating discrimination.⁶²

Anti-immigration rhetoric and political actions threatened to increase health disparities among undocumented people, people of color, and immigrant groups.⁶³ One study found that restrictive immigration policies can be detrimental to the mental health of Latinos living in the United States, as Latinos are often characterized as immigrants regardless of whether they are U.S. citizens.⁶⁴

c. The Zero-Tolerance Policy and Psychological Trauma

The anti-immigration rhetoric of the zero-tolerance policy, as well as consequences of the policy—such as family separation—have attributed to psychological trauma experienced by migrant families

⁵⁸ Britney N. Morey, *Mechanisms by Which Anti-Immigrant Stigma Exacerbates Racial/Ethnic Health Disparities*, 108 AM. J. PUB. HEALTH 460, 461 (2018).

⁵⁹ Debra J. Robbin, *When Undocumented Immigrants Don’t Report Crimes, We All Suffer*, WBUR (Sept. 22, 2017), <https://www.wbur.org/cognoscenti/2017/09/22/undocumented-immigrants-report-crimes-debra-j-robbin>.

⁶⁰ *See id.*

⁶¹ Sandra L. Candel & Shahla Fayazpour, *Experiencing Anti-Immigrant Policies on Both Sides of the U.S./Mexico Borderland: A Comparative Study of Mexican and Iranian Families*, 9 EDUC. SCI. 1 (June 18, 2019).

⁶² *Id.* at 11.

⁶³ *See* Morey, *supra* note 58.

⁶⁴ *See* Mark L. Hatzenbuehler et al., *Immigration policies and mental health morbidity among Latinos: A state-level analysis*, 174 SOC. SCI. MED. 169 (Feb. 2017).

and children, as well as government agents who feel they have no option other than to enforce the policies of the administration.⁶⁵

d. Migrant Families

The zero-tolerance policy has undoubtedly contributed to the psychological trauma families and children experience when seeking asylum or fleeing their home countries. The likelihood that these families have already been pre-exposed to trauma is high, and the zero-tolerance policy and its repercussions only compound the existing trauma of those seeking asylum in the United States.⁶⁶ When family separation became a more regular practice in 2018, many parents who were separated from their children lost all control of what would happen to them and were often not able to communicate with them.⁶⁷ Children were often told by federal agents that they would never be able to see their parents again.⁶⁸

There is clear scientific evidence of the psychological turmoil caused by family separation.⁶⁹ Parent separation is a toxic stressor, which is an “experience that engages strong and prolonged activation of the body’s stress-management system.”⁷⁰ Even if experienced short-term, experiencing toxic stress at a young age affects the way a child’s body will respond to stress in the long-term and put children at a greater risk of adverse mental health effects such as anxiety, depression, post-traumatic stress disorder, and lower IQ.⁷¹ Children who experience toxic stress also experience a greater risk of adverse physical health effects, such as obesity, impaired immune system functioning, physical growth, cancer, heart and lung disease, stroke,

⁶⁵ See *Immigration Nation*, supra note 14.

⁶⁶ See *Key Health Implications of Separation of Families at the Border (as of June 27, 2018)*, KAISER FAM. FOUND. (June 27, 2018), <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-health-implications-of-separation-of-families-at-the-border/>.

⁶⁷ See *Immigration Nation*, supra note 14.

⁶⁸ See *id.*

⁶⁹ See Johayra Bouza et al., *The Science is Clear: Separating Families has Long-term Damaging Psychological and Health Consequences for Children, Families, and Communities*, SOC’Y FOR RES. IN CHILD DEV. (June 20, 2018), <https://www.srcd.org/briefs-fact-sheets/the-science-is-clear>.

⁷⁰ *Id.*

⁷¹ *Id.*

and morbidity.⁷² While younger children experience a higher chance of physical and mental consequences due to family separation, the stress of being separated from family members negatively affects children of all ages.⁷³

In filmmakers Christina Clusiau and Shaul Schwarz’s revealing documentary series, *Immigration Nation*, one child’s story provided a prime case example for children who had experienced overlapping trauma.⁷⁴ This specific child had witnessed her mother murdered in her home country, and when her father brought her to the United States in an attempt to seek asylum, they were separated.⁷⁵ ICE agents told the child that she would never see her father again, only compounding the trauma that she had already experienced in her home country.⁷⁶ Ultimately, this child was reunified with her father after a period of time, but this does not reverse the damage done by the initial separation.⁷⁷

The U.S. government itself has confirmed the speculation that family separation has caused adverse mental health effects in children and migrant families.⁷⁸ In September 2019, the U.S. Department of Health and Human Services released an assessment of the mental health of children in their custody.⁷⁹ When a migrant child is separated from their parents or crosses the border unaccompanied, the Department of Health and Human Services (HHS) is responsible for and has custody of that child, which includes providing care for that child’s mental health needs.⁸⁰ The government found that beginning with policy changes in 2018, HHS experienced an influx of minor children they were now responsible for, many of whom had been separated from their families or experienced other significant trauma.⁸¹ HHS recognized that many of these children are fleeing

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See *Immigration Nation*, *supra* note 14.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*; see also Bouza et al., *supra* note 69.

⁷⁸ See generally Chiedi, *supra* note 22 at 9.

⁷⁹ See *id.* at 19.

⁸⁰ See Chiedi, *supra* note 22.

⁸¹ See *id.*

their home countries due to fear of violence or persecution and have already experienced significant stressors.⁸²

Children aren't the only ones harmed by family separation – parents suffer psychological trauma and stressors as well.⁸³ Parents also experience extreme stress when no one is communicating with them about what's going on with their children – which is what happened to one Guatemalan migrant being held separate from her teenage daughter in 2018.⁸⁴ Parents in these traumatizing situations often suffer from depression, anxiety, problems sleeping, suicidal ideation, self-destructive behaviors, and concentration problems, among other symptoms.⁸⁵

Not only does family separation result in adverse mental health consequences, but the implementation of strict or harsh anti-immigration policies have negative effects on mental health as well. Migrant adults who fear deportation are more likely to experience negative psychosocial consequences, such as “employment challenges, physical health problems, psychological distress, acculturative stress, and decreased access to services.”⁸⁶ Both parents and children experience acculturative stress, a stress associated with immigration processes and adapting to new cultures or practices.⁸⁷

e. ICE Agents and Federal Workers

The Netflix docuseries *Immigration Nation*, released in 2020, captured raw, firsthand experiences of ICE agents acting in their professional capacities. Though ICE agents act to enforce

⁸² *Id.*

⁸³ See Heather Stringer, *Psychologists Respond to a Mental Health Crisis at the Border*, AM. PSYCH. ASS'N (July 2018), <https://www.apa.org/news/apa/2018/border-family-separation>.

⁸⁴ See Miriam Jordan, *U.S. Must Provide Mental Health Services to Families Separated at Border*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/us/migrants-mental-health-court.html>.

⁸⁵ *Disaster and Trauma Effects on Parents*, AM. COUNSELING ASS'N (Oct. 2011), https://www.counseling.org/docs/trauma-disaster/fact-sheet-4---disaster-and-trauma-effects-on-parents.pdf?sfvrsn=4470062a_2.

⁸⁶ Kalina M. Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. OF ORTHOPSYCHIATRY 496, 498 (2014).

⁸⁷ See Joaquín Borrego, Jr. & Tre D. Gissandaner, *Chapter 21 – Ethnic and Cultural Considerations, Acculturative Stress*, in PEDIATRIC ANXIETY DISORDERS 461 (2019), <https://www.sciencedirect.com/topics/psychology/acculturative-stress#:~:text=Acculturative%20stress%20refers%20to%20the,et%20al.%2C%202014>.

immigration law, behind the scenes many struggled with the idea of family separation.⁸⁸ One ICE employee explained how at first, compassion got to her, but as time moved on, she had to learn to separate her feelings from her work:

*[J]ust as a human, you have compassion towards other people. But you know the saying, right? It's a job. And somebody has to do it. So that somebody is you. And you just have to kind of learn how to separate your personal feelings or your personal emotions from doing your work.*⁸⁹

There are several negative consequences associated with feeling the need to withhold emotions, specifically empathy and compassion.⁹⁰ Many people who experience high levels of emotional stress in their day-to-day jobs emotionally detach from their work.⁹¹ Most who do this choose to do so to protect their mental well-being and allow themselves to think more objectively so they can better serve the individuals they are working with.⁹² However, there is a large difference between detaching by choice for your well-being and feeling the need to repress emotions, like empathy, due to fear of negative perception by your employer or coworkers.

Another factor that takes a toll on the mental health of ICE workers is the negative stigmatization of ICE and the pushback the agency has received from the public, especially in more recent years as immigration law has become harsher.⁹³ ICE employees reported being called “Nazis” and “racists,” with one employee stating that “we constantly look like the bad guys ... it gets to me sometimes, it does.”⁹⁴ Many critics have advocated for the abolishment of ICE,

⁸⁸ See *Immigration Nation*, *supra* note 14.

⁸⁹ See *id.* (Interview with Judy).

⁹⁰ See Steve Taylor, *Negative Empathy*, PSYCH. TODAY (May 12, 2016), <https://www.psychologytoday.com/us/blog/out-the-darkness/201605/negative-empathy>.

⁹¹ See Gina Lucia, *How to Emotionally Detach from Work to Preserve Your Wellbeing* (Dec. 18, 2019), <https://limitbreaker.co/how-to-emotionally-detach-from-work-to-preserve-your-wellbeing/#:~:text=One%20of%20the%20best%20ways,be%20as%20objective%20as%20possible.&text=Remember%2C%20you%20have%20the%20power,you%20react%20to%20certain%20situations>.

⁹² See *id.*

⁹³ *Immigration Nation*, *supra* note 14.

⁹⁴ *Id.*

especially as the family separation issue at the southern border became direr.⁹⁵

As ICE and other federal DHS employees internalize negative public stigma associated with their work, they face a higher risk of experiencing adverse mental health effects.⁹⁶ Additionally, ICE and other federal DHS employees experience institutional or job function stressors as well as other traumatic stressors that are unique within certain agencies.⁹⁷ Traumatic stressors are more likely to be experienced by tasks related to law enforcement work, such as work performed by ICE.⁹⁸ Some employees also experience secondary trauma, which results in psychological health issues resulting from either witnessing or being indirectly exposed to a traumatic event, or from communicating with those who have experienced a traumatic event.⁹⁹ It's easy to imagine that many ICE officers and other federal agents experience secondary trauma when involved with cases involving family separation, as this is an incredibly traumatic experience for both the children and the parents involved.¹⁰⁰

IV. Proposals: Protecting Migrants While Upholding Immigration Law Principles

There are multiple programs and practices that federal agencies and municipal governments could implement to enforce immigration law while also protecting migrants. These include providing legal counsel to families awaiting immigration hearings, providing community resources and outreach programs, requiring cross-cultural training and education opportunities, and mental health programs.

⁹⁵ See Ron Nixon & Linda Qiu, *What Is ICE and Why Do Critics Want to Abolish It?*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/politics/fact-check-ice-immigration-abolish.html>.

⁹⁶ See Carrie M. Farmer et al., *Programs Addressing Psychological Health and Resilience in the U.S. Department of Homeland Security*, RAND (2020), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1900/RR1952/RAND_RR1952.pdf.

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

a. Providing Legal Counsel and Guidance for those Awaiting Immigration Proceedings

Currently, immigrants facing deportation procedures or other civil matters are not afforded legal counsel by the government.¹⁰¹ According to a 2016 study by the American Immigration Council, only 37% of all immigrants facing removal proceedings were able to secure legal representation, and only 14% of those in detention were able to acquire legal counsel.¹⁰² Overall, immigrants who were able to secure legal representation had far better outcomes at every stage of the court process than those who were not able to secure legal counsel.¹⁰³ Though there are different pro-bono legal aid programs for those seeking deportation,¹⁰⁴ these resources can often be difficult to access for those in detention.

Providing counsel to families awaiting immigration hearings would address one of the Trump administration’s primary concerns regarding families fleeing once released from detention. Though this does not normally occur, being provided with legal counsel to help with their case will hold families more accountable and reduce the chance that they flee.¹⁰⁵ Additionally, providing legal counsel would help immigrants to understand the U.S. immigration system, which is constantly changing and generally confusing to those who don’t face linguistic or cultural barriers.

b. Community Resources and Outreach Programs

The implementation of outreach programs for migrant communities who have been affected by the zero-tolerance policy and family separation has been shown to help reduce the effects of toxic

¹⁰¹ Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016).

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *See generally Mission*, IMMIGRANT LEGAL RESOURCE CTR., <https://www.ilrc.org/mission> (last visited Feb. 5, 2021); *National Immigration Legal Services Directory*, IMMIGRATION ADVOC. NETWORK (2021), <https://www.immigrationadvocates.org/nonprofit/legaldirectory/index>.

¹⁰⁵ *See Wu, supra* note 44.

stress in children.¹⁰⁶ Examples of different programs that may be helpful are caretaker skill-building programs and interventional programs for children.¹⁰⁷ When outreach programs expose children to positive changes in their environment, they are more likely to overcome the negative effects associated with adverse childhood experiences.¹⁰⁸

Other potentially helpful services include assisting immigrants and families with employment, education, healthcare, and housing. Before the implementation of the zero-tolerance policy, immigrants often struggled to access services due to language barriers and cultural differences in family structure.¹⁰⁹ Though many impoverished immigrants are eligible for services, many remain unenrolled due to these barriers and out of fear of engaging directly with government agencies.¹¹⁰ Therefore, agencies and organizations that are not formally identified with the government can be particularly useful at providing information to low-income immigrant families and promoting enrollment in beneficial programs.¹¹¹ Involvement and enrollment in these programs would help create safer communities for immigrant families, pushing back against the harsh stigmatizing effects of the zero-tolerance policy.¹¹²

c. Cross-Cultural Competence Training and Critical Race Theory

Though President Trump signed an executive order in September 2020 excluding “divisive” diversity and inclusion training from federal contracts, these are arguably just what federal agencies need to become more sensitive to racial inequities.¹¹³

¹⁰⁶ Hillary A. Franke, *Toxic Stress: Effects, Prevention and Treatment*, 1 CHILD. 390, 397 (Nov. 2014).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Hirokazu Yoshikawa et al., *Improving Access of Low-Income Immigrant Families to Health and Human Services*, URBAN INST. at 2 (Oct. 2014).

¹¹⁰ *See id.* at 3, 4, 14.

¹¹¹ *Id.* at 7.

¹¹² *See id.*

¹¹³ See Janel George, *A Lesson on Critical Race Theory*, A.B.A. (Jan. 11, 2021).

In acknowledging how deeply rooted systemic racism is in the United States, it's important to consider the different educational resources that may help combat the racism amplified by the Trump administration's anti-immigration rhetoric. Providing educational resources that promote an understanding of diversity, such as cross-cultural competence training and critical race theory (CRT) courses, could benefit both communities and federal workers.

The benefits of cross-cultural diversity and sensitivity training include raising cultural awareness, improving communication skills, encouraging people to speak up when they see instances of discrimination or harassment, and increasing self-awareness of implicit biases.¹¹⁴ One of the practical consequences of cultural awareness training is a reduction in racist ideals because it helps people understand the traumatization, oppression, and systemic inequities marginalized people experience every day. These trainings could help federal agents understand cultural diversity on a deeper level, thereby allowing more cultural sensitivity and overall awareness of the cultural differences and struggles marginalized populations, such as immigrant communities, experience. People who work with these populations must understand cultural differences and how those differences may impact their interactions and trauma responses. Likewise, education in diversity for the general population could also result in a more widespread understanding of one another's experiences, promoting empathy, and enhancing cross-cultural interaction.¹¹⁵

d. Mental Health Programs

After being forced to endure the intense, traumatic experience of family separation, migrant families and children should be provided with adequate mental health programs to minimize the psychological effects.

¹¹⁴ Paul Glavin, *5 Reasons Cultural Diversity & Sensitivity Training Is Important*, TRALIAN (July 25, 2018), <https://www.traliant.com/blog/5-reasons-cultural-sensitivity-training-is-important/>.

¹¹⁵ See Stephane M. Shepherd, *Cultural awareness workshops: limitations and practical consequences*, 19 BMC MED. EDUC. 1, 7 (Jan. 8, 2019).

One of the first steps in treating trauma is promptly assessing the mental health needs of each child to stabilize children in crisis and “minimize the risk that the child may negatively influence or harm others.”¹¹⁶ Treatments that may be helpful for children who have experienced family separation are parent-child interaction therapy (PCIT), child-parent psychotherapy, cognitive behavioral therapy, and trauma-focused psychotherapy.¹¹⁷ One treatment that may be helpful for parents is cognitive behavioral therapy, which would aim to help them process circumstances surrounding the traumatic event of family separation.¹¹⁸

In November 2019, a federal judge in California ordered that the federal government must provide mental health services for those who experienced family separation as a result of the zero-tolerance policy.¹¹⁹ In his opinion, the judge referenced that the federal government can be held liable when it displays a “deliberate indifference” by placing people in certain situations – in this case, by separating families.¹²⁰ The judge’s injunction required the government to provide mental health screenings and other treatments to families traumatized by the government’s actions.¹²¹ Solutions like this in similar cases would help minimize trauma caused by the government, though government officials need to consider the possible trauma that may result from certain policies to minimize the possibility of trauma at all.

Though rarely discussed, ICE employees and other federal workers involved in the implementation of inhumane or psychologically damaging policies also suffer from adverse mental health effects stemming from the repression of compassion and empathy, as well as from exposure to secondary trauma.¹²² Federal agencies can combat adverse psychological effects in their employees

¹¹⁶ Cheidi, *supra* note 22, at 18.

¹¹⁷ *Id.* at 9-10.

¹¹⁸ See Aaron Brinen, *Trauma Treatment: Evidence-Based Approaches versus Intuitive Approaches*, BECK INST. (June 8, 2018) (explaining different approaches to treat victims of trauma).

¹¹⁹ Jordan, *supra* note 84.

¹²⁰ *Id.*

¹²¹ *Id.*; see also Order re Plaintiffs’ Motion for Class Certification, Plaintiffs’ Motion for Preliminary Injunction, Defendants’ Motion to Dismiss, No. 252, Ms. J.P. v. Sessions, 2:18-cv-06081 (C.D. Cal. 2018).

¹²² See Farmer et al., *supra* note 96, at 2.

by implementing mental health measures, including ensuring that all agents have access to mental health support services and offering peer-support programs.¹²³ Overall, agencies can help reduce instances of secondary trauma by refusing to implement, or pushing back against, inhumane policies which are likely to result in trauma.

Conclusion

The implementation of the zero-tolerance policy has resulted in policy issues and health consequences for those involved. The zero-tolerance policy worked against multiple principles of immigration law, including family reunification and protecting those seeking asylum. The government can minimize the sociological and psychological consequences migrant families and federal workers have experienced due to the zero-tolerance policy by providing legal counsel to migrant families and implementing community and mental health programs for those exposed to traumatic circumstances. In addition, community programs and outreach would help make immigrant communities safer and help lessen the negative stigma associated with immigration.

¹²³ *Id.* at 7.

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