

# The Ethical and Public Health Implications of Family Separation

*Mia Stange and Brett Stark*

## I. Background

Families fleeing violence and migrating to the United States are experiencing unprecedented threats to health, family unity, and well-being. In the past year alone, over 100,000 adults and children were apprehended between points of entry by Customs and Border Protection while attempting to enter the United States.<sup>1</sup> The number of individuals traveling as family units in Fiscal Year 2017 was five times that of Fiscal Year 2013.<sup>2</sup> Of those family units, 95 percent migrated from the Central American countries of Guatemala, El Salvador, and Honduras, all currently besieged by historic levels of gang-related violence and endemic political corruption.<sup>3</sup> A recent study conducted by the United Nations High Commissioner for Refugees found that more than 80 percent of a sample of Central American women apprehended at the border passed a “credible fear screening,” indicating *prima facie* eligibility for asylum protections, and that almost all of them had experienced sexual or physical abuse, threats of violence to themselves or their family, or extortion as a catalyst for their migration.<sup>4</sup>

---

**Mia Stange, M.P.H.**, oversees programmatic operations and partnerships for Terra Firma, a Medical-Legal Partnership for unaccompanied immigrant children. She holds a B.A. in Public Health from Brown University and a M.P.H. from Johns Hopkins University. **Brett Stark, Esq.**, is Legal Director and co-founder of Terra Firma at Catholic Charities New York, where he represents unaccompanied immigrant children in federal and state litigation, specializing in asylum and Special Immigrant Juvenile cases. A former Equal Justice Works fellow, Brett has worked in refugee resettlement in Kenya, on human rights in Israel, and was a 2008 Fulbright Scholar in Taiwan. Brett is a graduate of Harvard Law School and the University of Rochester, and is admitted to the New York Bar and the Eastern and Southern Districts of New York.

In April of 2018, the Trump Administration announced a Zero Tolerance policy, in which all adults who entered the U.S. unlawfully would be criminally prosecuted in an effort to deter migration.<sup>5</sup> Whether even more family units would have entered the U.S. if not for the Zero Tolerance policy is unknown. What is well-established, however, is that the enforcement of the policy resulted in the separation of more than 2,000 parents from their children in the first two months; many of the separated children were under the age of five.<sup>6</sup> In January 2019, the Inspector General (IG) of the U.S. Department of Health and Human Services found that even this number had been undercounted, resulting in a new total of 2,737 separated children.<sup>7</sup> As recently as December 2018, the IG also received new information that children were still being separated.<sup>8</sup>

Under the Zero Tolerance policy, an adult who is apprehended outside a designated port of entry is detained by Immigration and Customs Enforcement (ICE) and later charged with illegal entry.<sup>9</sup> If the adult traveled with a minor, the child is separated from his or her parent and re-classified as an Unaccompanied Minor, and placed into the care of the Office of Refugee Resettlement (ORR).<sup>10</sup> Both the child and the adult are placed in deportation proceedings, and if the adult is returned to his or her country of origin, the child may stay behind and pursue a separate asylum claim or seek other relief from deportation.<sup>11</sup> As a historic percentage of immigrant families seek refuge in America, a public health lens is needed to fully understand the public health implications of family separation and its potential legal consequences.

## II. Family Separation Represents a Substantial Harm to Public Health

The separation of families that has resulted from the enforcement of the Zero Tolerance policy is a significant public health problem. Multiple studies document the trauma of forcible family separation: research on Latina mothers who had been separated from their children found that they reported clinically-significant symptoms of depression, anxiety, and stress.<sup>12</sup> Similarly, children separated from their caregivers were noted to exhibit heightened rates of anxious behavior, distress, and symptoms of post-traumatic stress disorder.<sup>13</sup> Both the American Academy of Pediatrics and the American Medical Association have

The government's authority in the health arena arises primarily from its constitutionally sanctioned "police power" to protect health, welfare, and safety. Since family separation is demonstrably harmful to public health, and potentially unjustifiable to ensure health, welfare, and safety, Zero Tolerance is ultimately both misguided as a policy matter and constitutionally suspect.

adopted policies opposing family separation based on a body of scientific literature "replete with evidence of the irreparable harm and trauma to children caused by separation from their parents."<sup>14</sup>

Pediatricians and advocacy groups have documented sub-standard conditions in adult and children's immigration detention facilities operated by the United States.<sup>15</sup> Specifically, facilities have been found to have inadequate food and water provision, limited access to medical care, and minimal basic comfort levels.<sup>16</sup> Crowded conditions can escalate the risk of communicable diseases such as tuberculosis, varicella, and measles.<sup>17</sup> Delayed medical care, particularly for those with chronic health conditions, can be life-threatening: A 2018 report released by Human Rights Watch found that eight of the 15 deaths reported in immigration detention centers from December 2015 to April 2017 were attributed to substandard medical care.<sup>18</sup> The highly-publicized deaths of two children in federal immigration custody in December 2018, attributed to delayed medical care, indicate an ongoing problem.<sup>19</sup>

The combination of the mental health effects of family separation and the potential health effects of inferior detention conditions creates a critical issue

of relevance to the 20,000 families with children that were projected to cross in 2018 alone.<sup>20</sup> The risks of the traumatic experience of parent-child separation, particularly for children under five, can lead to life-long impacts to their health and well-being.<sup>21</sup> Exposure to Adverse Childhood Experiences early in life has been linked with a number of physical, developmental, and psychological consequences, including reduced longevity.<sup>22</sup> A nurturing parent or caregiver relationship has been found to buffer the toxic effects of exposure to adverse experiences and stress, while forcible separation from this relationship can exacerbate the risks of harmful sequelae.<sup>23</sup> Researchers have observed that children in detention facilities may demonstrate symptoms of trauma including non-age appropriate bedwetting, social withdrawal, and language delay.<sup>24</sup> Furthermore, the toxic stress of separation may influence mental health indicators and family functioning even after reunification or release from detention.

## III. Family Separation Compromises Parents' Fundamental Legal Rights to Provide Informed Consent

It is a well-established principle that before treating a patient, a physician or other healthcare provider must obtain the consent of the patient.<sup>25</sup> American

law presumptively assigns parents the right to consent on behalf of their children.<sup>26</sup> The right to consent includes the right to refuse or discontinue treatments, even those that may be life-sustaining.<sup>27</sup> Courts have specifically recognized the "natural rights" of parents to make medical decisions for their children.<sup>28</sup> Every U.S. state, however, provides for termination of parental rights by a court.<sup>29</sup> In these cases, a "best interest" standard has become the judicial and ethical touchstone for courts, physicians, and parents.<sup>30</sup>

Zero Tolerance is an affront to principles of consent, parental rights, and best interests. A parent detained by ICE cannot practically participate or consent to treatment for a son or daughter detained by ORR. Unlike termination of parental right cases, the child's best interests are not considered by any court (to the contrary, family separation is "decried by child-welfare experts"<sup>31</sup>). The loss of fundamental parental rights is thus effectuated without legal recourse or judicial review. The government's authority in the health arena arises primarily from its constitutionally sanctioned "police power" to protect health, welfare, and safety.<sup>32</sup> Since family separation is demonstrably harmful to public health, and potentially unjustifiable

to ensure health, welfare, and safety, Zero Tolerance is ultimately both misguided as a policy matter and constitutionally suspect. A federal judge in the Southern District of California said that family separation is “brutal, offensive, and fails to comport with traditional notions of fair play and decency...[it] ‘shocks the conscience’ and violates [the] constitutional right to family integrity.”<sup>33</sup>

#### IV. Conclusion

When immigrant parents are forcibly separated from their children pursuant to a policy of family separation, the manifold harms are not only medical and psychological, but legal and ethical. Family separation adversely affects the health of immigrant families in addition to posing potential ethical ramifications that remain to be fully ascertained. Studies conducted by the United Nations High Commissioner for Refugees, among others, overwhelmingly suggest that the unstable social, political, and economic factors in Guatemala, El Salvador, and Honduras causing families to flee show no signs of abating.<sup>34</sup> Given that the number of families fleeing violence continues to comprise an increasingly large portion of arriving immigrants, policymakers and systems that interact with newly-arrived immigrant families must be informed by and responsive to the public health and legal frameworks that govern both our ethical responsibilities and moral obligations.

#### Note

The authors have nothing to disclose.

#### References

1. US Customs & Border Protection, “Southwest Border Migration FY2018,” available at <<https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018>> (last visited April 5, 2019).
2. US Customs & Border Protection, “Total Monthly Family Units by Sector, FY13-17,” available at <<https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf>> (last visited May 23, 2019).
3. United Nations High Commissioner for Refugees, “Northern Triangle of Central America Situation Factsheet (February 2017),” available at <<http://www.refworld.org/docid/58aae2bb4.html>> (last visited April 5, 2019).
4. United Nations High Commissioner for Refugees, “Women on the Run: Firsthand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico” (2015), available at <<http://www.unhcr.org/5630f24c6.html>> (last visited April 5, 2019).
5. W. Kandel, Congressional Research Service, “The Trump Administration’s ‘Zero Tolerance’ Immigration Enforcement Policy” (2018), available at <<https://fas.org/sgp/crs/home-sec/R45266.pdf>> (last visited April 5, 2019).
6. United States District Court of California, *Ms. L vs. ICE, Case No. 18cv0428* (2018). Order Granting Plaintiffs’ Motion for Classwide Preliminary Injunction, available at <<https://www.aclu.org/legal-document/ms-l-v-ice-order-granting-plaintiffs-motion-classwide-preliminary-injunction>> (last visited April 5, 2019).
7. Office of Inspector General, U.S. Department of Health and Human Services, “Separated Children Placed in Office of Refugee Resettlement Care” (January 2019), available at <<https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>> (last visited April 5, 2019).
8. *Id.*
9. See Kandel, *supra* note 5.
10. *Id.*
11. *Id.*
12. B. E. McCabe, E. M. Mitchell, R. M. Gonzalez-Guarda, N. Peragallo, and V. B. Mitrani, “Transnational Motherhood: Health of Hispanic Mothers in the United States Who Are Separated from Children,” *Journal of Transcultural Nursing* 28, no. 3 (2017): 243-250; J. Miranda, J. Siddique, C. Der-Martirosian, and T. R. Belin, “Depression among Latina Immigrant Mothers Separated from Their Children,” *Psychiatric Services* 56, no. 6 (2005): 717-720; A. Miller, J. M. Hess, D. Bybee, and J. R. Goodkind, “Understanding the Mental Health Consequences of Family Separation for Refugees: Implications for Policy and Practice,” *American Journal of Orthopsychiatry* 88, no. 1 (2018): 26.
13. L. Rojas-Flores, M. L. Clements, J. Hwang Koo, and J. London, “Trauma and Psychological Distress in Latino Citizen Children Following Parental Detention and Deportation,” *Psychological Trauma: Theory, Research, Practice, and Policy* 9, no. 3 (2017): 352; M. J. MacKenzie, E. Bosk, and C. H. Zeannah, “Separating Families at the Border—Consequences for Children’s Health and Well-Being,” *New England Journal of Medicine* 376, no. 24 (2017): 2314-2315; J. Dreby, “US Immigration Policy and Family Separation: The Consequences for Children’s Well-Being,” *Social Science & Medicine* 132 (2015): 245-251.
14. United States District Court of California, *Ms. L vs. ICE, Case No. 18cv0428* (2018), “Declaration of A.J. Shapiro,” available at <[https://www.aclu.org/sites/default/files/field\\_document/memorandum\\_iso\\_motion\\_for\\_preliminary\\_injunction\\_and\\_updated\\_exhibits\\_3\\_3\\_2018.pdf](https://www.aclu.org/sites/default/files/field_document/memorandum_iso_motion_for_preliminary_injunction_and_updated_exhibits_3_3_2018.pdf)> (last visited April 5, 2019).
15. J. M. Linton, M. Griffin, and A. J. Shapiro, “Detention of Immigrant Children,” *Pediatrics* (2017): e20170483; American Civil Liberties Union, “Immigration Detention Conditions,” available at <<https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/immigration-detention-conditions>> (last visited April 5, 2019).
16. Detention Watch Network, “Expose and Close: Artesia Family Residential Center,” (2014): at 16, available at <<https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Artesia%20Report.pdf>> (last visited April 5, 2019).
17. K. Bortz, “Migrant Children’s Health Endangered by Family Separation at US Border,” *Infectious Diseases in Children* (2018), available at <<https://www.healio.com/pediatrics/practice-management/news/print/infectious-diseases-in-children/%7B049f2cc9-420e-4787-b3ff-97fe5af6dc6b%7D/migrant-childrens-health-endangered-by-family-separation-at-us-border>> (last visited April 5, 2019); M. Fazel, U. Karunakara, and E. A. Newnham, “Detention, Denial, and Death: Migration Hazards for Refugee Children,” *The Lancet Global Health* 2, no. 6 (2014): e313-e314.
18. C. Long, Human Rights Watch; American Civil Liberties Union; National Immigrant Justice Center; Detention Watch Network, “Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention,” *Human Rights Watch*, available at <[https://reliefweb.int/sites/reliefweb.int/files/resources/us0618\\_web2.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/us0618_web2.pdf)> (last visited April 5, 2019).
19. US Department of Homeland Security, “Secretary Kirstjen Nielsen Statement on Passing of Eight-Year-Old Guatemalan Child,” (2018), available at <<https://www.dhs.gov/news/2018/12/26/secretary-kirstjen-m-nielsen-statement>>

- passing-eight-year-old-guatemalan-child> (last visited April 5, 2019).
20. Projection based on internal Department of Homeland Security statistics obtained by the Associated Press. C. Long, "DHS Reports about 2,000 Minors Separated from Families," *Associated Press* (2018), available at <<https://apnews.com/3361a7d5fa714ea4b028f0a29db1cabc>> (last visited April 5, 2019). Statistics corroborated against US Customs & Border Protection, "Total Monthly Family Units by Sector, FY13-17," available at <<https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf>> (last visited May 24, 2019).
  21. See Linton, *supra* note 13.
  22. M. J. MacKenzie, E. Bosk, and C. H. Zeanah, "Separating Families at the Border—Consequences for Children's Health and Well-Being," *New England Journal of Medicine* 376, no. 24 (2017): 2314-2315; V. J. Felitti, R. F. Anda, D. Nordenberg, D.F. Williamson, A. M. Spitz, V. Edwards, and J. S. Marks, "Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study," *American Journal of Preventive Medicine* 14, no. 4 (1998): 245-258.
  23. J. P. Shonkoff et al. & Committee on Early Childhood, Adoption, and Dependent Care, "The Lifelong Effects of Early Childhood Adversity and Toxic Stress," *Pediatrics* 129, no. 1 (2012): e232-e246; MacKenzie et al., *id.*
  24. See Fazel et al., *supra* note 17.
  25. D. Diekema, "Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention," *Theoretical Medicine* 25 (2004): 243-264.
  26. The Guttmacher Institute, "An Overview of Minors' Consent Law," 2018, available at <<https://www.guttmacher.org/state-policy/explore/overview-minors-consent-law>> (last visited April 5, 2019).
  27. K. A. DeVille and L. M. Kopelman, "Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy," *Journal of Law, Medicine, & Ethics* 27 (1999): 335.
  28. M. Woods, "Overriding Parental Decision to Withhold Treatment," *Virtual Mentor* 5, no. 8 (2003): available at <<https://journalofethics.ama-assn.org/article/overriding-parental-decision-withhold-treatment/2003-08>> (last visited April 5, 2019).
  29. U.S. Department of Health and Human Services, Children's Bureau, "Grounds for Involuntary Termination of Parental Rights" (2017), available at <<https://www.childwelfare.gov/pubPDFs/groundtermin.pdf>> (last visited April 5, 2019).
  30. See Diekema, *supra* note 25.
  31. Young Center for Immigrant Children's Rights, "More Than 200 Experts in Child Welfare, Juvenile Justice Oppose Government Plans to Take Children from Parents at Border" (2018), available at <<https://www.theyoungcenter.org/stories/2018/1/16/experts-oppose-plans-to-take-children-from-parents-at-border>> (last visited April 5, 2019).
  32. See Diekema, *supra* note 25.
  33. United States District Court of California, *Ms. L vs. ICE, Case No. 18cv0428* (2018), Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, Page 23, available at <<https://www.aclu.org/legal-document/ms-l-v-ice-order-granting-part-and-denying-part-defendants-motion-dismiss>> (last visited April 5, 2019).
  35. UNHCR, "Northern Triangle of Central America Situation Factsheet (February 2017)," available at <<http://www.refworld.org/docid/58aae2bb4.html>> (last visited April 5, 2019).