FAMILY SEPARATION, CHILDREN’S RIGHTS, AND HARMFUL TREATMENT IN US IMMIGRATION LAW
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Abstract

Immigration law and immigration reform are some of the most debated and discussed topics in political dialogue. When it comes to deciding how to handle or manage the influx of immigrants, there is no one consensus agreed upon in the country. Specific issues currently exist in the US immigration policy at the state and federal levels that may be deemed inhuman or even unconstitutional. One prominent issue within immigration is the way in which immigration enforcement, including forced separation, affects children and creates conditions that make it difficult for immigrant families to reunite. These policies fundamentally affect the structure and composition of immigrant families, having potentially long-term effects. Furthermore, the treatment of children under these immigration policies poses a problematic issue of children's legal subjectivity and, at times, violates children's rights. This article will discuss family separation policies and relevant regulations that further this treatment. Then, this article will go over specific treatment and conditions of detained immigrant children that meet the criteria for torture. Furthermore, an analysis of the court case Bunikyte v. Chertoff

3 Charles Oberg et al., Treatment of migrant children on the US southern border is consistent with torture, 147 Pediatrics (2021).
(2007) will reveal children's legal subjectivity within immigration laws.\textsuperscript{4} Through these discussions and an overview of US immigration law and immigration practices, this article hopes to illuminate the profound struggles over executive power, human rights violations, and unconstitutional policies within immigration enforcement.

**Introduction**

In 2000, border crossings progressively included families and unaccompanied kids. In 2019, over 851,000 people were caught, including 473,682 relatives and 76,020 unaccompanied minors.\textsuperscript{5} The Department of Homeland Security (DHS) has had to grapple with how best to detain and handle these arrivals so abundant in families and children. The current immigration detainment administration has executed penal policies toward minors that have impacted their overall well-being, including the division from their families.

**Family Separation**

The family-based immigration system has foundational principles in the "nuclear family" value. Thus, most of the visas given in the US are to immigrants who are relatives or family members of US citizens. However, even the process of granting a visa to these relations has substantial obstacles in place to avoid reunification. When immigrant families are detained and separated, there is no substantial effort made on the part of the US to bring relatives back together. Family separation policies are meant to create uncertainty about whether or not family reunification will ever occur. These provisions often lead to limited


economic opportunities and social integration for immigrant families. Some of the policies contributing to separated families include the reentry bar and caps on family preference visas. These provisions determine what family members can enter the US and limit immigrants wanting to reunite with family, especially the visa cap.\(^6\) The reentry bar is found in "sections 212(a)(9)(i) and 212 (a)(9)(ii) of INA (Immigration Policy Center 2011)."\(^7\) Another provision is the affidavit of support, which was introduced in the IIRIRA of 1996.\(^8\) This policy states that US citizens requesting "visas for their relatives must submit an affidavit of support."\(^9\) In this affidavit, the sponsor must argue that the petitioned family member won't be a "public charge."\(^10\) The affidavit should show that the sponsor goes above a certain poverty threshold, reflected in their income and assets. The affidavit of support disproportionally impacts Latino immigrants specifically because of higher poverty rates that typically affect these groups. Thus, these immigrants usually do not meet the income threshold, ruining their chances of reuniting with their families.\(^11\) Tabulations from the ACS data show that "among adult Hispanic immigrants, 37 percent lived in households with incomes below 125 percent of the poverty level."\(^12\) The result of the policy is an economic barrier, a financial requirement many immigrant families in the US cannot overcome. The conundrum often lies in the fact that one of the ways the poverty of these families can be overcome is if they are reunited, adding more human resources to their household. These policies for


\(^{7}\) Id.

\(^{8}\) Id.

\(^{9}\) Id.

\(^{10}\) Id.

\(^{11}\) Id.

\(^{12}\) Id.
which family separation is exacerbated affect immigrants financially and can impact the stability of immigrant children.\textsuperscript{13}

**Child Treatment**

The treatment of children at the border may constitute torture as codified through the Geneva Conventions (1949), the Additional Protocols (1977), and the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT; 1984).\textsuperscript{14} According to the CAT and Rome Statute, treating children at the border fulfills the three criteria for torture. One of the criteria is severe pain and suffering, which consists of the intentional infliction of severe physical and psychological pain. Another criterion is that the trauma is intentional and purposeful. In immigration policies, the purpose is usually for coercion, intimidation, punishment, and deterrence. The last criterion is that the trauma happens with state consent. The immigration policies concerning children are done through the executive order of the US presidential administration and thus are state-sponsored.\textsuperscript{15}

Some treatments include children who arrive with families being placed in separate housing from their parents. These children can be as young as one years old. The care in which the minors are placed in, usually, does not consist of a trained child-care professional. Their living conditions are characterized by unsanitary holding cells, overcrowding, and concrete floors with no bedding. Sometimes, the cells they sleep in are called iceboxes, or hieleras.\textsuperscript{16} These are actual freezing units that may or

\textsuperscript{13} Id.


\textsuperscript{15} Id.

may not be functional. Most rooms do not have beds, and sleeping mats are not consistently given. The only "blanket" provided is usually aluminum covers. These harmful conditions usually lead to sleep deprivation and have proven to be linked to harmful mental health levels in the affected children. Furthermore, the health care available is severely limited, often withholding essential medication or vaccines required by the children.\textsuperscript{17} "Since 2018, at least seven children have died in US custody or immediately after release."\textsuperscript{18} The negative experiences of these children have been argued to be unconstitutional or at least in violation of children's protection under previous legal settlements. One prominent case example of these immigration policies specifically affecting children is \textit{Bunikyte v. Chertoff} (2007).\textsuperscript{19}

\textbf{Bunikyte v. Chertoff}

The US Department of Homeland Security (DHS) was sued in April 2007 for the detention of immigrant families at the T. Don Hutto Family Residential Facility in May 2006.\textsuperscript{20} These facilities were previously prisons run by the Corrections Corporation of America.\textsuperscript{21} The case's plaintiffs claimed that the detention conditions violated children's rights, which were delineated in \textit{Flores v. Meese} (1988).\textsuperscript{22} The \textit{Flores v. Meese} case secured that "minors in federal immigration custody have the right to release and unrestrictive custody environments."\textsuperscript{23} However, since both children and adults were being confined within the Hutto facility, the protection or treatment of children was left less supervised.

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\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{23} \textit{Id.}
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than usual. This court case consisted of debate regarding the relationship and extent of the US Immigration and Customs Enforcement's (ICE) authority and the Federal courts' authority. Over the years, the enforcement of US immigration policy has transitioned in power from Federal government agencies to state executive and legislative branches. Thus, the procedures can circumvent Constitutional principles. Immigration law also provides ICE a broad "discretion to detain' noncitizens, and federal courts have limited power to intervene in immigration enforcement practices (Coleman 2007; Varsanyi 2008)." For this reason, the situation at the Hutto facility easily occurred, given the lack of regulation on ICE procedures.

**Child's Legal Subjectivity**

Immigrant children in immigration law are treated as “child objects” rather than liberal people, whereas adults are treated as “criminalized migrant subjects.” This makes the adult ineligible for the due process of law of the US legal system's foundation. The claims of children's immigration are dependent on parents' claims; therefore, the "displacement of children's 'best interests' produces a 'citizenship deficit' through which children are rendered de facto stateless subjects." The entry of immigrants into the US is considered a sovereign issue by the Supreme court, dealing with territorial power. Since it is seen as a threat, the judicial authority of these policies is limited. This is what is called the 'plenary doctrine of immigration.'


25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*
States (1893), the plenary doctrine was used to rule "that the federal government held the sovereign right to deport noncitizens from the territorial US without judicial intervention." Under this doctrine, immigrants could be deported and treated as “aliens; rather than persons.” Therefore, the plenary doctrine of immigration authorized ignoring or overlooking immigrants' constitutional protections and rights, all in the name of national security.

**Plyler v. Doe**

In another prominent court case, *Plyler v. Doe* (1982), the Supreme Court considered whether “Texas may deny undocumented school-age children the free public education it provides to citizens of the United States or legally admitted aliens.” The Court decided that the right to deny the educational service was within Texas’s jurisdiction. The Court argued that “At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation.” However, this justification does not consider the variability of immigrant children's situations. The courts once again are transferring executive power from the federal agencies to states’ discretion or ICE’s individual discretion.

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33 *Id.*

34 *Id.*


36 *Id.*
Conclusion

Overall, the way in which these policies are conducted, how the courts rule, and regulations giving ICE a lot of freedom, all show how abuses of executive power and human rights violations can occur in immigration enforcement. Moving forward, possible solutions or calls to action on this issue include the involvement of the Interamerican Commission on Human Rights. They can head the investigation and resolution of alleged violations of human rights in immigration policies. They also have the power to publish comprehensive reports and prevent future violations. More work needs to be done to front the end of immigrant children’s suffering and the end of their treatment under immigration law as anything other than people. The US needs to rely on their Constitutional beliefs. Rather than ignore the natural rights of these groups of people, their protections should be honored while they are here in the US.