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## The Legal Ethics of Family Separation

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# THE LEGAL ETHICS OF FAMILY SEPARATION

*Milan Markovic* \*

## ABSTRACT

*On April 6, 2018, the Trump administration announced a “zero tolerance” policy for individuals who crossed the U.S. border illegally. As part of this policy, the administration prosecuted parents with minor children for unlawful entry; previous administrations generally placed families in civil removal proceedings. Since U.S. law does not allow children to be held in immigration detention facilities pending their parents’ prosecution, the new policy caused thousands of children to be separated from their parents. Hundreds of families have yet to be reunited.*

*Despite a consensus that the family separation policy was cruel and ineffective, there has been minimal focus on the attorneys who implemented it. One exception is Professor Bradley Wendel, who recently defended border prosecutors for following the zero-tolerance policy rather than pursuing their own conceptions of the public interest. Since immigration is not the only context in which prosecutors’ charging decisions may have the effect of separating families, the question of prosecutors’ ethical responsibilities in these situations continues to be of paramount importance.*

*This Article contends that prosecutors, as ministers of justice, should consider their charging decisions’ effects on children and families. Because of limited resources and opportunity costs, prosecutors cannot pursue every criminal misdemeanor and inevitably take the public interest into account in making charging decisions. The Trump administration’s “zero-tolerance” policy may have*

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*limited prosecutors' discretion but did not eliminate it. Prevailing prosecutorial standards recognize prosecutors' broad charging discretion but focus predominately on culpability in individual cases. Prosecutors should instead seek justice for the situation, which could include declining to prosecute nonviolent misdemeanors to keep families intact.*

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## INTRODUCTION

On April 6, 2018, the Trump administration instituted a “zero tolerance policy” for immigration offenses.<sup>1</sup> As part of this policy, the administration prosecuted parents who crossed illegally into the United States with their children for unlawful entry under 8 U.S.C. §1325. Previous administrations would usually place families in civil removal proceedings rather than pursue criminal cases that would necessitate family separation.<sup>2</sup> The Trump administration maintained that separating families would deter future border crossings<sup>3</sup> and viewed migrants who crossed the border with children as more culpable than those who crossed alone.<sup>4</sup> The zero-tolerance policy made no exception for asylum-seekers.<sup>5</sup>

Although estimates vary, the Trump administration separated at least 3,000 children from their families and perhaps as many as 5,000.<sup>6</sup> Hundreds of families have yet to be reunited because the

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1. OFF. OF THE INSPECTOR GEN., DEP'T OF JUST., REP. NO. 21-028, REVIEW OF THE DEPARTMENT OF JUSTICE'S PLANNING AND IMPLEMENTATION OF ITS ZERO TOLERANCE POLICY AND ITS COORDINATION WITH THE DEPARTMENTS OF HOMELAND SECURITY AND HEALTH AND HUMAN SERVICES 1 (2021) [hereinafter DOJ OIG Report], [https://oig.justice.gov/sites/default/files/reports/21-028\\_0.pdf](https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf) [<https://perma.cc/DE4G-DBLR>].

2. *See id.* at 6 (“The long-standing DHS practice of deferring to civil immigration proceedings and enforcement . . . was related to concerns about separating children from their family . . . detained children may not be held in restrictive settings such as detention facilities pending prosecution and sentencing of a family unit . . .”); *see also* WILLIAM A. KANDEL, CONG. RSCH. SERV., R45266, THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION ENFORCEMENT POLICY 1–2 (2018), [https://crsreports.congress.gov/product/pdf/R/R\\_45266/7](https://crsreports.congress.gov/product/pdf/R/R_45266/7) [<https://perma.cc/6W4K-UMYK>] (“[D]etaining adults who crossed illegally requires that any minor children under age 18 accompanying them be treated as unaccompanied alien children (UAC) and transferred to the care and custody of the Department of Health and Human Services’ (HHS’s) Office of Refugee Resettlement (ORR).”).

3. *See, e.g.*, Claudio J. Perez, *How U.S. Policy Has Failed Immigrant Children: Family Separation in the Obama and Trump Eras*, 54 FAM. L.Q. 37, 47, 57 (2020); Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 239 (2019).

4. DOJ OIG Report, *supra* note 1, at 24 (“[T]he AG’s perspective was that people smuggling children were actually more culpable than people who were coming alone because they’re not just themselves violating the law . . . [but also] endangering the child.”) (alteration in original).

5. *See, e.g.*, Jeffrey R. Baker & Allyson McKinney Timm, *Zero-Tolerance: The Trump Administration’s Human Rights Violations Against Migrants on the Southern Border*, 13 DREXEL L. REV. 581, 590 (2021); Jenny-Brooke Condon, *When Cruelty Is the Point: Family Separation as Unconstitutional Torture*, 56 HARV. C.R.-C.L. L. REV. 37, 46–47 (2021) (“The ‘zero tolerance’ memo made no exception for asylum-seekers, even though the 1951 Convention on the Status of Refugees, which binds the United States, prohibits signatories from punishing refugees for illegal entry . . .”) (citation omitted).

6. *See, e.g.*, DOJ OIG Report, *supra* note 1, at 80–81; Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot Be Found*, N.Y. TIMES,

Department of Homeland Security (“DHS”) could not track separated children once they were transferred to the custody of the United States Department of Health and Human Services (“HHS”) as required by U.S. law.<sup>7</sup> The Biden administration has condemned the Trump administration’s zero-tolerance policy while balking at the payment of compensation to separated families.<sup>8</sup>

The decision to prosecute parents, and thus separate families, under 8 U.S.C. § 1325 proved disastrous and was reversed by President Trump on June 20, 2018.<sup>9</sup> The policy was financially costly, and images of detainees in squalid and makeshift facilities inflamed public opinion domestically and internationally.<sup>10</sup> The zero-tolerance policy also required the U.S. Attorneys’ offices around the southern border to divert prosecutorial resources away from violent crimes to unlawful entry misdemeanors.<sup>11</sup> Even more problematic from the administration’s perspective was that family separations failed to deter illegal border crossings.<sup>12</sup> As one federal judge observed, the Trump administration’s zero-tolerance policy had knowingly sowed chaos.<sup>13</sup>

Scholars have criticized the family separation policy from a variety of perspectives, including whether it violated the rights of children under U.S. and international law.<sup>14</sup> Public criticism has

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<https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html> [<https://perma.cc/3VB8-ES4R>] (Mar. 15, 2021).

7. For a discussion of the DHS’s inability to track migrants’ children, see OFF. OF THE INSPECTOR GEN., DEPT’ OF HOMELAND SEC., *OIG-20-06, DHS LACKED TECHNOLOGY NEEDED TO SUCCESSFULLY ACCOUNT FOR SEPARATED MIGRANT FAMILIES 7–8* (2019) [hereinafter DHS OIG Report] <https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf> [<https://perma.cc/M4UZ-MZYV>].

8. See, e.g., Miriam Jordan, *Justice Department Halts Settlement Talks with Migrant Families*, N.Y. TIMES (Dec. 16, 2021), <https://www.nytimes.com/2021/12/16/us/biden-migrant-family-separation-settlement.html> [<https://perma.cc/8DK6-5P47>]; Jonathan Blitzer, *Why Biden Refused to Pay Restitution to Families Separated at the Border*, NEW YORKER (Dec. 22, 2021), <https://www.newyorker.com/news/news-desk/why-biden-refused-to-pay-restitution-to-families-separated-at-the-border> [<https://perma.cc/HR7W-8U2V>].

9. Exec. Order No. 13841, 83 Fed. Reg. 29, 435 (June 20, 2018).

10. See Baker & Timm, *supra* note 5, at 587 (describing the “global moral outcry over the Trump Administration’s treatment of migrants”); see also Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2378–79 (2019) (“The reports from border detention centers . . . spark what Judith Butler calls ethical outrage, an anger born of Americans taking stock of the harms that we have exacted on others.”) (citation omitted).

11. See DOJ OIG Report, *supra* note 1, at 66 (“[I]ncreased caseloads in some Southwest border districts impacted the prosecution of other important cases.”).

12. See Ryo, *supra* note 3, at 241–48.

13. See *L. v. U.S. Immigr. & Customs Enft*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018).

14. See e.g., Carrie F. Cordero, Heidi Li Feldman & Chimène I. Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430, 463–83 (2019); Juliet P.

centered predominately on high-ranking Trump administrative officials such as Attorney General Jeff Sessions, Deputy Attorney General Rod Rosenstein, and DHS Secretary Kirstjen Nielsen.<sup>15</sup> However, the actions of Department of Justice (“DOJ”) attorneys who charged parents with unlawful entry have received little scrutiny. Border prosecutors were reluctant initially to pursue cases that would separate families but facilitated thousands of family separations under political pressure.<sup>16</sup> What blame, if any, should fall on these prosecutors?

Professor Bradley Wendel has offered a thoughtful defense of border prosecutors in a recent article.<sup>17</sup> Wendel’s article does not at all endorse the Trump administration’s zero-tolerance policy or the separation of families but posits a sharp demarcation between public officials’ responsibilities and those of prosecutors, with the former responsible for determining the public interest and the latter for implementing policy.<sup>18</sup> Although prosecutors were entitled to disagree with the zero-tolerance policy, according to Wendel, they could not flout their superiors’ lawful orders to prosecute unlawful entry cases.<sup>19</sup> Since U.S. law not only permitted but, in the administration’s view, *required* the separation of families at the border,<sup>20</sup> prosecutors’ options were to bring unlawful entry cases or to resign.<sup>21</sup> Wendel concludes, “[A] lawyer’s ethical obligation is to advise clients to comply with the applicable law, not to act in the

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Stumpf, *Justifying Family Separation: Constructing the Criminal Alien and the Alien Mother*, 55 WAKE FOREST L. REV. 1037, 1042 (2020) (“Scholarship on the Trump administration’s family separation practice has traced the scope and impact of the policy of separating children from adult family members, explored the ethical and moral implications of separating children, and identified relevant legal frameworks, such as international law, children’s law, and family law, as well as political interests . . . .”) (citations omitted).

15. See, e.g., Michael D. Shear, Katie Benner & Michael S. Schmidt, ‘We Need to Take Away Children,’ *No Matter How Young*, *Justice Dept. Officials Said*, N.Y. TIMES, <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html> [<https://perma.cc/27EL-W48N>] (Oct. 28, 2021); Nicole Narea, *The Trump Administration Knew Exactly What It Was Doing with Family Separations*, VOX (Oct. 7, 2020, 4:20 PM), <https://www.vox.com/2020/10/7/21506059/trump-family-separation-s-sessions-rosenstein> [<https://perma.cc/E4HJ-GERN>].

16. See *infra* Part I.

17. W. Bradley Wendel, *Pluralism, Polarization, and the Common Good: The Possibility of Modus Vivendi Legal Ethics*, 131 YALE L.J. F. 89, 106–09 (2021).

18. See *id.* at 108.

19. See *id.* at 109.

20. See generally DOJ OIG Report, *supra* note 1, at 5–6 (explaining restrictions on the detention of child under the *Flores* settlement and Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1232 (b)(3)).

21. Wendel, *supra* note 17, at 109.

public interest.”<sup>22</sup> The alternative would be a system whereby federal prosecutors undermine democratic governance by substituting their judgments of the public interest for those of elected public officials.<sup>23</sup>

Of course, this narrow conception of the lawyer’s role is not universally accepted, and many scholars have argued that lawyers should limit the services that they provide to clients who undermine societal interests.<sup>24</sup> With respect to government lawyers specifically, there is a live debate as to whether they are employees of the agencies for which they work or should seek to represent the public more generally.<sup>25</sup>

Nevertheless, Wendel’s conception of the lawyer’s role as primarily concerned with “interpreting and applying positive law in good faith”<sup>26</sup> is the dominant one and is reflected in the prevailing ethical rules.<sup>27</sup> Under this dominant view, while lawyers may raise moral and policy considerations for their clients, the client has the “ultimate authority to determine the purposes to be served by legal representation.”<sup>28</sup> Even scholars who maintain that government lawyers serve the public concede that, as a practical matter, government lawyers must defer to publicly elected officials’ policy determinations.<sup>29</sup> The lawyer-client relationship is fundamentally

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22. *Id.*

23. *See id.*

24. *See id.* at 96.

25. *See, e.g.,* Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1412–14 (2008); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 792 (2000); *see also* Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991) (“[W]ho is the government lawyer’s client? . . . [T]he dispute has been primarily between a broader loyalty to the ‘public interest’ or the government as a whole, on the one hand, and a more restricted vision of the government lawyer as the employee of a particular agency, on the other.”).

26. Wendel, *supra* note 17, at 109. Professor Wendel has expounded on these themes in his excellent book, W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 194–97 (2010).

27. The “dominant view” is one of “zealous advocacy within the bounds of the law.” William H. Simon, *The Past, Present, and Future of Legal Ethics: Three Comments for David Luban*, 93 CORNELL L. REV. 1365, 1368–69 (2008); *see also* William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEX. L. REV. 709, 725 (2012) (reviewing W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010)) (suggesting that prevailing ethical rules provide lawyers with “great latitude to serve clients at the expense of third parties and the public”); Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 266 (2014) (criticizing the *Model Rules* for “hired gun bias”).

28. *See* MODEL RULES OF PRO. CONDUCT r. 2.1 cmt. 1 & r. 1.2(a) cmt. 1 (AM. BAR ASS’N 2020).

29. *See* Cramton, *supra* note 25, at 298; *see also* Berenson, *supra* note 25, at 824 (conceding that government attorneys are less suited to policy analysis than public officials).



rooted in agency law, and public officials are constitutionally empowered to make decisions on behalf of the government.<sup>30</sup>

Although Wendel makes a compelling case that lawyers should not generally strive to represent the amorphous public interest, his conceptualization is difficult to reconcile with prosecutors' special obligations to seek justice. As numerous courts and commentators have observed, prosecutors, as ministers of justice,<sup>31</sup> have a unique role in the criminal justice system and exercise nearly unbridled and boundless discretion in translating enforcement priorities into charges.<sup>32</sup> The Trump administration's "zero-tolerance" policy limited prosecutors' discretion without eliminating it entirely. The administration pushed border prosecutors to bring unlawful entry cases that would require the separation of families, but the policy itself provided that prosecutors should consider each case on its own terms. Prosecutors lacked the resources to charge every individual or family that crossed the border illegally and could have exercised independent judgment in charging; instead, by and large, they surrendered to political pressure and brought cases that were not in the interests of justice.<sup>33</sup>

This Article advances two chief propositions concerning the legal ethics of family separation. The first is that DOJ prosecutors acted unethically in pursuing misdemeanor unlawful entry cases that necessitated separating families. Prosecutorial standards, including the DOJ's own Principles of Federal Prosecution ("DOJ Principles"), recognize that the decision to prosecute is ultimately a policy judgment accorded to front-line prosecutors.<sup>34</sup> Prosecution is rife with tradeoffs and opportunity costs, and prosecutors must take the public interest into account in making charging decisions.

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30. See W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 305 (2017); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (AM. L. INST. 2000).

31. See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2020).

32. See, e.g., John A. Lundquist, Comment, *Prosecutorial Discretion—A Re-Evaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse*, 21 DEPAUL L. REV. 485, 485 (1972); Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS. L. REV. 1175, 1187 (2020); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 94 (5th ed. 1884) ("The office of the Attorney-General is a public trust, which involves in the discharge of it, the exertion of an almost boundless discretion, by an officer who stands as impartial as a judge.")

33. See discussion *infra* Section II.B.; see also *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (holding that prosecutors should "wield [their] formidable criminal enforcement powers in a rigorously disinterested fashion").

34. U.S. Dep't of Just., Just. Manual § 9-27.001 (2018).

Given the risk of family separations, the availability of alternatives to prosecution such as civil removal, and ambiguities in the policy itself, prosecutors erred in devoting substantial resources to misdemeanor unlawful entry cases involving parents with children at the expense of other cases.

The second proposition is that prosecutors should consider the prospect of family separation in criminal cases more generally as part of their core mandate to “seek justice.”<sup>35</sup> The Trump administration was the first to use the criminal justice system to separate families purposely, but family separation is endemic to the American criminal justice system characterized by mass incarceration.<sup>36</sup> Prosecutors are not passive actors in this system and should use their discretion to seek justice for the situation, which could include declining to prosecute nonviolent misdemeanors to keep families intact.<sup>37</sup>

Part I of this Article sets out the Trump administration’s zero-tolerance policy and its application to migrants who crossed into the United States illegally with children. Border prosecutors were aware that prosecuting misdemeanor unlawful entry cases would lead to the separation of families, and judges had expressed concerns about family separation prior to the zero-tolerance policy’s promulgation.<sup>38</sup> Nevertheless, border prosecutors acquiesced in bringing unlawful entry cases and even diverted resources from felony prosecutions to do so.

Part II examines border prosecutors’ duties under prevailing ethical rules and standards. Prosecutors are ministers of justice who exercise substantial discretion on behalf of the sovereign. This discretion is particularly pronounced with respect to charging. The

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35. Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 612 (1999); MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2020) (“A prosecutor has the responsibility of a minister of justice . . .”).

36. Leading critiques include Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004), and MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

37. This Article recognizes that the term “family” has no universal definition. *See, e.g.*, Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449, 451–52 (2009); Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 67–68 (2006). For purposes of this Article’s proposals, “family” refers to individuals, with or without children, who cohabit and depend on each other for economic and non-economic support. *See* Susan L. Brown & Wendy D. Manning, *Family Boundary Ambiguity and the Measurement of Family Structure: The Significance of Cohabitation*, 46 DEMOGRAPHY 85, 85 (2009).

38. *See* DOJ OIG Report, *supra* note 1, at 15–16.

charging decision is a policy judgment that is guided by the prosecutor's determination of the public interest in each case.<sup>39</sup> Consistent with this analysis, border prosecutors tasked with enforcing the zero-tolerance policy should have taken a case-by-case approach to unlawful entry cases. The zero-tolerance policy's text belies that prosecutors had no discretion and that prosecuting all unlawful entry cases would have been logistically impossible in any event.<sup>40</sup> Border prosecutors should have also consulted with their political superiors to ensure that they understood the limited capacities of DHS and HHS to track children. Charging decisions are not within political officials' purviews, and political interference with charging decisions violates longstanding standards and norms with respect to prosecutorial independence.

Part III contends that prevailing ethical standards should be amended to expressly recognize that the duty to seek justice requires prosecutors to consider criminal prosecution's effects on defendants' families. A robust empirical literature speaks to the economic and non-economic harms associated with family separation; even the mere filing of charges can have destructive consequences. Prosecutors are uniquely positioned to determine whether the benefits of criminal prosecution are outweighed by harm to families and communities. Rather than deflecting responsibility for their charging decisions, prosecutors should affirmatively seek justice "for the situation,"<sup>41</sup> which could include refusing to prosecute non-violent misdemeanors to keep families intact.

The Trump administration's ill-fated decision to separate families generated bipartisan outrage and condemnation.<sup>42</sup> Rather than succumbing to political pressure in unlawful entry cases, prosecutors should have exercised independent professional judgment. However, family separation is not unique to the Trump administration or immigration enforcement. To seek justice, prosecutors must accept that they hold tremendous power not only over potential defendants but their families as well.

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39. See U.S. Dep't of Just., Just. Manual § 9-27.001 (2018).

40. See DOJ OIG Report, *supra* note 1, at 56–57.

41. Justice Brandeis famously postulated that his role as a lawyer was to not merely represent individual clients but to act as a "lawyer for the situation." Geoffrey C. Hazard Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377 (2004); John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965).

42. See Baker & Timm, *supra* note 5, at 624–25.

## I. FROM ZERO-TOLERANCE TO FAMILY SEPARATION

One of the Trump presidency's defining features was its hostility toward immigrants. As a presidential candidate, President Trump repeatedly characterized undocumented immigrants as criminals and security threats.<sup>43</sup> To further the President's "America First" agenda and return America to its purported cultural roots, his administration, among other actions, banned immigration from Muslim-dominated countries and started preparations for a southern border wall.<sup>44</sup> Although illegal immigration was near historical lows,<sup>45</sup> the Trump administration, through its rhetoric, had turned the U.S.-Mexico border into a "concrete site for broader nativist expressions of the twin threats of crime and immigration."<sup>46</sup>

The zero-tolerance policy was the Trump administration's response to so-called "catch and release," whereby border enforcement officers would release undocumented individuals into the United States pending civil removal proceedings.<sup>47</sup> Critics inside and outside the administration alleged that "catch and release" endangered the public because undocumented individuals would fail to appear for immigration hearings, which would often not take place for months or years.<sup>48</sup>

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43. See Perez, *supra* note 3, at 44–45; see also Laura Finley & Luigi Esposito, *The Immigrant as Bogeyman: Examining Donald Trump and the Right's Anti-immigrant, Anti-PC Rhetoric*, 44 HUMAN. & SOC'Y 178, 192 (2020) (arguing that President Trump had succeeded in shifting the Overton window of acceptable discourse on immigrants by regularly associating them with rape and drug-dealing).

44. See Baker & Timm, *supra* note 5, at 624; see also Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 578 (2019) ("[W]hen situated within the history of immigration laws and policies in the United States, the current war against immigration diversity exhibits the administration's broader goal of returning to pre-1965 immigration policies designed to maintain a 'white nation.'").

45. See Perez, *supra* note 3, at 46; see also KANDEL, *supra* note 2, at 18 fig. A-1 ("Increasing numbers of apprehensions of Central American family units are occurring within the context of relatively low historical levels of total alien apprehensions . . .").

46. Hannah Gurman, *A Collapsing Division: Border and Interior Enforcement in the US Deportation System*, 69 AM. Q. 371, 389 (2017).

47. See Baker & Timm, *supra* note 5, at 589, 591.

48. See, e.g., KANDEL, *supra* note 2, at 6; Brett Samuels, *Homeland Security Touts End of 'Catch and Release' Next Week*, THE HILL (Sep. 23, 2019, 7:34 PM), <https://thehill.com/homenews/administration/462699-homeland-security-touts-end-of-catch-and-release-next-week> [<https://perma.cc/53ZL-5QXQ>]. But see Baker & Timm, *supra* note 5, at 589 (observing that the vast majority of families appear for immigration hearings).

The Trump administration bemoaned the “catch and release” of families in particular.<sup>49</sup> Administration officials asserted that families would rarely appear in Immigration Court despite considerable evidence to the contrary.<sup>50</sup> To cast “catch and release” as unworkable, the administration also ignored that it could electronically monitor families pending their immigration hearings or require them to post bonds prior to releasing them into the United States.<sup>51</sup>

The Trump administration’s first action against catch and release was to direct the DOJ to pursue more unlawful entry cases under 8 U.S.C. § 1325.<sup>52</sup> Previous administrations had prosecuted these unlawful entry cases only in special circumstances, such as when apprehended individuals were convicted felons or suspected of involvement in human trafficking.<sup>53</sup> Even with this limitation, most of the federal criminal docket consisted of immigration-related cases.<sup>54</sup>

When the number of unlawful entry prosecutions did not increase, the DOJ began to consider express changes in policy in coordination with DHS. One major policy shift was to begin to prosecute parents apprehended with their children.<sup>55</sup> The DOJ recognized that these prosecutions would be sensitive politically because they would require separating families.<sup>56</sup> Under the *Flores* settlement, the government cannot hold minor children in criminal detention facilities,<sup>57</sup> and the Trafficking Victim Protection Act requires that minors be transferred to HHS within seventy-two hours of custody if they have no available caregivers.<sup>58</sup> As a result

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49. See KANDEL, *supra* note 2, at 10–11 n.66; see also Stumpf, *supra* note 14, at 1073–74 (observing that unlawful entry prosecutions typically do not involve incarceration).

50. See Salvador Rizzo, *How Many Migrants Show Up for Immigration Court Hearings?*, WASH. POST (June 26, 2019, 3:00 AM), <https://www.washingtonpost.com/politics/2019/06/26/how-many-migrants-show-up-immigration-court-hearings> [https://perma.cc/K4WK-FMM2] (reporting that eighty-one percent of families attend hearings).

51. KANDEL, *supra* note 2, at 11.

52. See DOJ OIG Report, *supra* note 1, at 10–11.

53. See KANDEL, *supra* note 2, at 1, 6.

54. See generally Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281–82 (2010) (“Immigration . . . now constitutes over half of the federal criminal workload . . . Noncitizens have become the face of federal prisons.”).

55. See DOJ OIG Report, *supra* note 1, at 11–12.

56. KANDEL, *supra* note 2, at 2; DOJ OIG Report, *supra* note 1, at 6.

57. See DOJ OIG Report, *supra* note 1, at 77.

58. See generally DOJ OIG Report, *supra* note 1, at 6 (“[I]f a USAO accepts a referral from DHS of a family unit adult for criminal prosecution, the adult is transferred to USMS custody and separated from the child.”).

of these laws, prior administrations would usually place families in civil removal proceedings instead of pursuing criminal cases that would necessitate removing children from their parents.<sup>59</sup>

The Trump administration was convinced that prosecuting migrants apprehended with their children would deter future family border crossings. This belief was based partly on the purported success of a pilot initiative in El Paso, Texas, where the border patrol had begun referring families with children for prosecution to the local U.S. Attorney in 2017.<sup>60</sup> Local DOJ prosecutors were reluctant to accept such cases initially, with Richard L. Durbin, the acting U.S. Attorney for the Western District of Texas, observing, “History would not judge [charging parents] kindly.”<sup>61</sup> Nevertheless, he relented after concluding that a blanket exception from prosecution was unjustified and had his subordinates charge these cases.<sup>62</sup> The rate of prosecutions for parents apprehended with their children in the Western District rose from zero percent in June 2017 to fifteen percent in November 2017 and led to the separation of approximately 280 families.<sup>63</sup> The El Paso initiative reduced family apprehensions by sixty-four percent, indicating that substantially fewer families were attempting to cross the border illegally.<sup>64</sup>

The DOJ viewed the El Paso initiative as a model for the zero-tolerance policy but was unaware of its specifics beyond the purported effect on border crossings.<sup>65</sup> The local border patrol had in fact stopped referring unlawful entry cases after a federal magistrate judge expressed concern about the inability of parents to obtain information about their separated children’s whereabouts.<sup>66</sup> In devising the zero-tolerance policy, Attorney General Sessions’ working assumptions were that DHS and HHS could track separated children and that families would be reunited in short order.<sup>67</sup>

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59. KANDEL, *supra* note 2, at 6; DOJ, OIG Report, *supra* note 1, at 6.

60. KANDEL, *supra* note 2, at 13.

61. DOJ OIG Report, *supra* note 1, at 14.

62. *See id.*

63. *See id.* at 16.

64. *See id.* at 33; KANDEL, *supra* note 2, at 13.

65. *See* DOJ OIG Report, *supra* note 1, at 32. Indeed, no one thought to contact Mr. Durbin, who managed the El Paso initiative for his views on its successes and failures. *See id.* at 16 n.32.

66. *See id.* at 16–17.

67. *See id.* at 33–34; *see also* Stumpf, *supra* note 14, at 1053 (“[T]here was no plan in place to track separated children and their parents.”).

Sessions issued the zero-tolerance policy via an April 6, 2018, memorandum. The operative section reads as follows: “I direct each United States Attorney’s Office along the Southwest Border—to the extent practicable, and in consultation with DHS—to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 1325(a).”<sup>68</sup> While the memorandum does not mention families specifically, DHS Secretary Nielsen separately agreed that DHS would begin referring families to DOJ for prosecution.<sup>69</sup> Attorney General Sessions announced that the administration would begin prosecuting families in a May 7, 2018 speech.<sup>70</sup>

The Trump administration understood that applying the zero-tolerance policy to families with children meant that families would be separated.<sup>71</sup> According to then Deputy Attorney General Rosenstein, “the AG’s perspective was that people smuggling children were actually more culpable than people who were coming alone because they’re not just themselves violating the law . . . [but also] endangering the child.”<sup>72</sup>

Prior to Attorney General Sessions’ May speech, border prosecutors had assumed that the zero-tolerance policy would be inapplicable to migrants apprehended with minor children.<sup>73</sup> Border prosecutors also believed that they would have substantial discretion to decline cases because the policy’s “to the extent practical” language was standard in many DOJ policies.<sup>74</sup> However, after Sessions’ public comments, some prosecutors sought additional guidance on the handling of unlawful entry cases involving families.<sup>75</sup> They were especially reluctant to charge families with very young

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68. *Memorandum for Federal Prosecutors Along the Southwest Border*, OFF. OF ATT’Y GEN. (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download> [https://perma.cc/WX6J-W5C6].

69. See DOJ OIG Report, *supra* note 1, at 33; KANDEL, *supra* note 2, at 13.

70. DOJ OIG Report, *supra* note 1, at 36–37.

71. *Id.* at 24; see also Villazor & Johnson, *supra* note 44, at 612 (“Deterring future migrants from Central America was the motivation behind the Trump Administration’s original decision to separate migrant parents from their children.”).

72. DOJ OIG Report, *supra* note 1, at 24.

73. See *id.* at 35.

74. *Id.* at 22.

75. See *id.* at 37.

children because they feared that DHS would be unable to reunite these families.<sup>76</sup>

The administration's subsequent guidance—issued via emails and phone calls to prosecutors—was to bring as many cases as possible, and that there should be no categorical exceptions based on age.<sup>77</sup> Nevertheless, as Deputy Attorney General Rosenstein explained, prosecutors were still expected to exercise discretion:

'I would never construe zero tolerance to mean don't exercise judgment in individual cases. To me, as a U.S. Attorney, you're always going to exercise judgment in individual cases.'

....

... 'If somebody got the idea that they were supposed to be just like a soldier, prosecuting every case without regards to the facts, that didn't come from me ... [prosecutors could] consider case-based circumstances.'<sup>78</sup>

What the administration adamantly opposed was the declination of whole categories of unlawful entry cases.<sup>79</sup>

To comply with the zero-tolerance policy, border prosecutors were forced to shift resources to unlawful entry prosecutions.<sup>80</sup> Some U.S. Attorneys' offices even declined serious felony cases to pursue unlawful entry cases. For example, in one border state, prosecutors referred all drug-smuggling cases to state prosecutors because of their singular focus on immigration violations.<sup>81</sup> The increase in unlawful entry prosecutions also meant that some individuals with significant criminal histories were, in the words of one federal judge, "falling through the cracks."<sup>82</sup> From March to June 2018, the percentage of criminal prosecutions for non-immigration offenses along the border fell from fourteen to six percent.<sup>83</sup>

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76. See *id.* at 39; see also Lee, *supra* note 10, at 2367 (describing it as "doubtful" that all children will be reunited with their parents).

77. DOJ OIG Report, *supra* note 1, at 40–42.

78. *Id.* at 41–42.

79. As Rosenstein wrote to the border US attorneys, "we should not decline prosecution absent case-specific special circumstances." *Id.* at 42. However, Rosenstein and other DOJ officials did permit prosecutors to consider a child's inability to communicate with DHS or HHS as part of the charging decision. *Id.*

80. *Id.* at 66–67.

81. *Id.* at 68.

82. *Id.*

83. *Stepped Up Illegal-Entry Prosecutions Reduce Those for Other Crimes*, TRAC IMMIGR. (Aug. 6, 2018), <https://trac.syr.edu/immigration/reports/524/> [<https://perma.cc/A7VN-WCJE>].



By June 2018, family separation had become a liability for the Trump administration.<sup>84</sup> DHS and HHS were completely unprepared for the surge in numbers of children in their custody and lacked the technology to keep track of them.<sup>85</sup> Agents relied on *ad hoc* techniques, including inputting names in Microsoft Excel spreadsheets that introduced additional errors into the process and would slow subsequent efforts to reunite families.<sup>86</sup> The media reported on children ripped from their parents' arms and sent to makeshift prisons and cages.<sup>87</sup> The conditions in these facilities were spartan and even deadly:

[N]early all detention centers struggle with problems of overcrowding . . . which were documented in disturbing photographs . . . . One was of migrants of all ages sitting and lying down with no room to move . . . [and] using crinkly, reflective solar blankets . . . . [M]igrants, including children, have died under these conditions. Official DHS statistics tally the number of deaths at twelve since the beginning of April 2018, and other sources suggest at least twenty-four deaths since the start of the Trump Administration.<sup>88</sup>

The public spectacle of the government tearing apart families and herding migrants into squalid detention facilities provoked bipartisan opposition.<sup>89</sup> As Professor Stumpf has observed, the administration had inadvertently humanized the very people it had sought to vilify.<sup>90</sup> Most problematic of all, from the administration's perspective, was that the zero-tolerance policy had failed to deter border crossings. The rate of families apprehended for unlawfully crossing the border remained constant whereas other types of apprehensions had fallen.<sup>91</sup>

The Trump administration terminated the zero-tolerance policy on June 20, 2018.<sup>92</sup> A subsequent federal court order required the

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84. See Stumpf, *supra* note 14, at 1054.

85. DHS OIG Report, *supra* note 7, at 6–7. DHS policy required the itemizing and safeguarding of detainees' property, but there was no such policy with respect to the tracking of children. Stumpf, *supra* note 14, at 1053.

86. DHS OIG Report, *supra* note 7, at 12–13.

87. Condon, *supra* note 5, at 48; see also Baker & Timm, *supra* note 5, at 599.

88. Lee, *supra* note 10, at 2368 (citations omitted).

89. Stumpf, *supra* note 14, at 1053–54.

90. *Id.* at 1059.

91. *Id.* at 1059–60; see also Preface to DHS OIG Report, *supra* note 7 (“Although DHS spent thousands of hours and more than \$1 million in overtime costs, it did not achieve the original goal of deterring ‘Catch-and Release’ through the *Zero Tolerance Policy*.”).

92. Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018).

government to reunite all separated families within thirty days.<sup>93</sup> Despite the formal end of the zero-tolerance policy and the court's order, nearly 700 children remained separated from their families by the end of the Trump presidency.<sup>94</sup>

DOJ officials have sought to blame DHS and HHS for the family separation fallout, maintaining that they relied on these agencies' expertise in tracking and caring for separated children.<sup>95</sup> But the government's inability to track families and house them in humane conditions hardly absolves federal prosecutors for their own roles in enforcing the zero-tolerance policy.

First, U.S. attorneys located by the southern border received multiple warnings before and after the formal announcement of the zero-tolerance policy that DHS could not be counted on to track separated children. As noted, a federal judge raised the issue in connection with the 2017 El Paso initiative upon which the zero-tolerance policy was based,<sup>96</sup> and the *Houston Chronicle* had reported on the DHS's limitations in keeping track of family units.<sup>97</sup> Once Attorney General Sessions formally announced that families would be prosecuted under the zero-tolerance policy, several prosecutors inquired specifically about safeguards for separated children.<sup>98</sup> However, whatever misgivings border prosecutors may have had about family separation did not prevent them from carrying out the administration's orders. Indeed, prosecutions continued even after the administration had nominally terminated the zero-tolerance policy.<sup>99</sup>

Second, the zero-tolerance policy was bound to traumatize children even if DHS and HHS had been better equipped to track and reunite families.<sup>100</sup> Following reports that the Trump administra-

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93. *L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018); see also Perez, *supra* note 3, at 49–50.

94. See Baker & Timm, *supra* note 5, at 603; Jasmine Aguilera, *Here's What to Know About the Status of Family Separation at the U.S. Border, Which Isn't Nearly Over*, TIME, <https://time.com/5678313/trump-administration-family-separation-lawsuits/>[<https://perma.cc/R9MJ-QEXR>] (Oct. 25, 2019, 2:49 PM).

95. See, e.g., DOJ OIG Report, *supra* note 1, at 33–34.

96. *Id.* at 16–17.

97. See *id.* at 17.

98. See *id.* at 38–39.

99. See DHS OIG Report, *supra* note 7, at 29 (noting 649 separations after the zero-tolerance policy).

100. Clare Ryan, *Children as Bargaining Chips*, 68 UCLA L. REV. 410, 421–22 (2021) (summarizing research on separation).

tion was considering family separation in January 2018, more than 200 experts on childhood development wrote to DHS Secretary Nielsen, explaining that family separation would impose “significant and long-lasting consequences for the safety, health, development, and well-being of children.”<sup>101</sup> The American Academy of Pediatrics likewise warned that family separations would cause “toxic stress” and “irreparable harm” to children.<sup>102</sup> These groups highlighted that even short-term separations would be very harmful.<sup>103</sup> The Trump administration ignored all internal and external warnings because its overriding objective was to deter migration.<sup>104</sup>

Children separated from their families by the Trump administration have described their experiences as akin to “being kidnapped.”<sup>105</sup> While in detention, these children suffered from, *inter alia*, insomnia, crying spells, and incontinence.<sup>106</sup> As Professor Condon chronicles:

“[I]ntense trauma” was “common” among children who entered ORR facilities in 2018. Some separated children did not eat or participate in routine activities at the shelters. Others suffered from “acute grief that caused them to cry inconsolably,” not knowing what happened to their parents. In one instance . . . a 7 or 8-year-old boy required emergency psychiatric care, believing that his father was killed and fearing that he would be too.<sup>107</sup>

Parents of separated children have reported struggling with a sense of “overwhelming loss” and “agonizing helplessness” during the time they were unaware of their children’s whereabouts.<sup>108</sup>

Although some border prosecutors objected to family separation internally, many have rationalized their involvement, referencing

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101. Condon, *supra* note 5, at 47–48.

102. Perez, *supra* note 3, at 53.

103. Condon, *supra* note 5, at 47–48; *see also* Ryan, *supra* note 100, at 421–22 (“Even brief separations can cause the release of higher levels of cortisol—stress hormones—that begin to damage brain cells.”).

104. *See, e.g.*, Condon, *supra* note 5, at 48 (referencing objections of Commander Jonathan White of HHS’s U.S. Public Health Service).

105. Ryan, *supra* note 100, at 421–22.

106. Condon, *supra* note 5, at 52.

107. *Id.* at 53 (footnotes omitted) (quoting OFF. OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUM. SERVS., OEI-09-18-00431, CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY 9–10 (Sept. 2019), <https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf> [<https://perma.cc/XB7X-DKF7>]).

108. *Id.* at 50.

the urgent need to enforce the nation's immigration laws.<sup>109</sup> Others, consistent with Professor Wendel's account, have suggested that they were constrained by the chain of command.<sup>110</sup> But whatever prosecutors' actual views on separating families, they made these separations inevitable via their charging decisions; in this sense, they were willing participants in family separation.<sup>111</sup> Some prosecutors have even defended charging families with toddlers because the administration had not specifically approved age cut-offs.<sup>112</sup>

As set out in the next Part, such defenses of prosecutors' involvement in family separation are unconvincing. Prosecutors are ministers of justice and must consider the public interest in making charging decisions. The Trump administration could not and did not abrogate border prosecutors' charging discretion, and prosecutors should not have allowed political officials to direct their judgments in individual cases.

## II. PROSECUTORS AND THE ZERO-TOLERANCE POLICY

Although scholars have long debated whether government lawyers, including DOJ prosecutors, serve the public interest,<sup>113</sup> this debate is orthogonal to the question of whether border prosecutors acted in accordance with their ethical responsibilities in enforcing the zero-tolerance policy against families with children. The Trump administration was entitled to pursue the zero-tolerance policy and other elements of its "America First" agenda, but front-line prosecutors are responsible for their own charging decisions, which inevitably consider the public interest.

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109. See DOJ OIG Report, *supra* note 1, at 18–19.

110. See *id.* at 40.

111. See David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 GEO. J. LEGAL ETHICS 615, 621 (2021) (maintaining that obedience constitutes moral support); see also Condon, *supra* note 5, at 55 (“[Z]ero tolerance’ family separation was designed to inflict cruelty and implemented through the strategic use of the parent’s and children’s suffering to serve a policy end.”).

112. See DOJ OIG Report, *supra* note 1, at 38–42.

113. See, e.g., sources cited *supra* note 25. Other important works involving the DOJ lawyers specifically include Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1 (2018); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989).

### A. *Prosecutors and the Charging Function*

Under prevailing ethics rules, prosecutors are first and foremost “minister[s] of justice.”<sup>114</sup> Although commentators have varying perspectives on the prosecutor’s role, with some maintaining that prosecutors need to concern themselves only with procedural justice while other scholars maintain that prosecutors should seek substantive justice,<sup>115</sup> there is consensus that prosecutors differ from other attorneys, including other government attorneys.<sup>116</sup>

One reason relates to the vast powers that prosecutors wield.<sup>117</sup> As former Attorney General Robert Jackson expressed in a well-known address:

The prosecutor has more control over life, liberty, and reputation than any other person in America. . . . He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. . . . The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentations of the facts, can cause the citizen to be indicted and held for trial. . . . While the prosecutor at his best is one of the most beneficent forces in our society,

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114. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2020).

115. As Professor Green has captured:

Standing alone, the injunction [to seek justice] points in many directions. It might be taken to imply a posture of detachment characteristic of that assumed by judges, and quite apart from that ordinarily assumed by advocates . . . . It might imply an obligation of fairness in a procedural sense. Or, it might imply a substantive obligation of fairness . . . .

Green, *supra* note 35, at 622; *see also* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 60 (1991) (suggesting that prosecutors should correct flaws in the trial process).

116. *See, e.g.*, Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM L. 143, 149–50 (2016) (collecting authorities); Paula J. Casey, *Regulating Federal Prosecutors: Why McDade Should Be Repealed*, 19 GA. ST. U. L. REV. 395, 423 (2002) (“[F]ederal prosecutors have obligations and responsibilities that differ from those of private practitioners and even from other government attorneys.”); MODEL CODE OF PRO. RESP., EC 7-13 (AM. BAR ASS’N 1980) (“The responsibility of a public prosecutor differs from that of the usual advocate . . .”).

117. *See, e.g.*, Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1424 (2018); Green, *supra* note 35, at 627 (“[C]riminal prosecutors are the most powerful lawyers because, with rare exception, their offices have unchecked authority to exercise the sovereign’s power on behalf of the sovereign.”); Zacharias, *supra* note 115, at 58 (arguing that prosecutors’ higher duties can be explained by “fear of unfettered prosecutorial power”). *But see* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 179–80 (2019) (questioning the consensus on prosecutorial power because other actors can frustrate prosecutors’ abilities to achieve their objectives).

when he acts from malice or other base motives, he is one of the worst.<sup>118</sup>

Moreover, many decisions that would ordinarily be allocated to clients in typical representations, such as the decision to pursue a particular case, are entrusted to prosecutors.<sup>119</sup> In this respect, prosecutors function not as agents of the sovereign, but its “alter ego[s]”.<sup>120</sup> The unique relation between prosecutors and the sovereign affords prosecutors enormous discretion<sup>121</sup> that they are expected to use to ensure that the legal system is fair and just.<sup>122</sup>

Prosecutorial discretion is especially pronounced with respect to charging.<sup>123</sup> Prosecutors’ determinations whether to charge, whom to charge, and what to charge are largely unreviewable.<sup>124</sup> Commentators have described prosecutors’ charging discretion as “almost boundless,” “uncontrolled,” and “enormous.”<sup>125</sup> Since

118. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18, 18 (1940).

119. See Green, *supra* note 35, at 633–34 (“[T]he prosecutor fills both roles, as lawyer and as government representative.”); Russell M. Gold, “*Clientless*” Prosecutors, 51 GA. L. REV. 693, 702–03 (2017) (describing the “clientless’ nature” of prosecutors).

120. As the Tenth Circuit Court of Appeals has held:

[T]he government’s sovereign authority to prosecute and conduct a prosecution is vested solely in the United States Attorney and his or her properly appointed assistants. Of course, it cannot be otherwise because the government of the United States is not capable of exercising its powers on its own; the government functions only through its officers and agents. . . . [I]n criminal cases . . . an Assistant United States Attorney, acting within the scope of authority conferred upon that office, is the alter ego of the United States exercising its sovereign power of prosecution.

United States v. Singleton, 165 F.3d 1297, 1300 (10th Cir. 1999); see also Green, *supra* note 35, at 635, 641–42 (describing prosecutors as “surrogate[s]” and not “ministerial agents”).

121. See, e.g., Green, *supra* note 35, at 627–28; MODEL CODE OF PRO. RESP., EC 7-13 (AM. BAR ASS’N 1980) (“[T]he prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute . . .”).

122. See Green, *supra* note 35, at 635; *People v. Santorelli*, 741 N.E.2d 493, 497 (N.Y. 2000) (“As public officers [prosecutors] are charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process.”).

123. See Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 283–84 (2017) (“In the American system, the decision of whether or not to charge a certain crime is left to the prosecutor’s near-total discretion.”); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 272 (2013) (describing the “unlimited and unreviewable power to select the charges that will be brought against defendants”).

124. See Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 305 (2017) (collecting authorities).

125. SHARSWOOD, *supra* note 32, at 94 (describing prosecutorial discretion in charging as “almost boundless”); Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167, 168 (2004) (describing prosecutorial

charging decisions are rarely scrutinized publicly, charging is a “defining feature” of prosecutors’ work.<sup>126</sup>

Several authorities shed light on the charging function. In addition to describing prosecutors as “minister[s] of justice,” *Model Rules of Professional Conduct* Rule 3.8 establishes the procedural baseline that prosecutors should pursue charges only when they have probable cause.<sup>127</sup> The *ABA Criminal Justice Standards for the Prosecution Function* (“*ABA Prosecution Standards*”) characterize prosecutors as “administrator[s] of justice” and call upon them to “exercise sound discretion and independent judgment in the performance of the prosecution function.”<sup>128</sup> Further, the *ABA Prosecution Standards* require prosecutors to serve the public interest by “exercising discretion to not pursue criminal charges in appropriate circumstances.”<sup>129</sup> The *ABA Prosecution Standards* specifically exhort prosecutors to assess, *inter alia*, the efficient distribution of resources, the potential availability of civil remedies, harm to third parties, and the public welfare more generally.<sup>130</sup> Prosecutors cannot bring charges that are contrary to the interests of justice.<sup>131</sup>

The National District Attorneys Association (“NDAA”), a voluntary organization of prosecutors, has also promulgated its own standards that further delineate prosecutors’ charging duties. The NDAA standards call upon prosecutors to “screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest.”<sup>132</sup> NDAA members are advised to consider the availability of civil law alter-

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discretion in charging as “enormous”); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 301 (1980) (noting that prosecutors’ charging is “uncontrolled”).

126. Green & Roiphe, *supra* note 113, at 16, 70; accord Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001); Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 513 (1993) (describing the charging power as “virtually immune from legal attack”).

127. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2020).

128. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.2(a) (AM. BAR ASS’N 2017).

129. *Id.* at Standard 3-1.2(b).

130. *Id.* at Standard 3-4.4(a).

131. *See id.* at Standard 3-4.3(a).

132. NAT’L PROSECUTION STANDARDS § 4-1.3 (NAT’L DIST. ATT’YS ASS’N 2018).

natives to prosecution as well as “[u]ndue hardship that would be caused to the accused by the prosecution.”<sup>133</sup>

Most relevant for DOJ prosecutors are the DOJ Principles contained in the Justice Manual.<sup>134</sup> The DOJ Principles are intended to inform prosecutors’ exercises of discretion.<sup>135</sup> With respect to charging, the DOJ Principles recognize that the federal government lacks the resources to investigate and prosecute all crimes.<sup>136</sup> Charging decisions are described as discretionary and involving the weighing of a variety of factors such as the strength of the federal interest in prosecution.<sup>137</sup> That a case may fall under a federal enforcement priority is not dispositive of the federal interest because prosecutors must also take into account the personal circumstances of the alleged perpetrator such as “extreme youth, advanced age, or mental or physical impairment.”<sup>138</sup> The availability of non-criminal alternatives to prosecution such as civil or administrative removal support declinations of charges even where the federal interest in prosecution is strong.<sup>139</sup> Ultimately, the charging decision “represents a policy judgment that the fundamental interests of society require the application of federal criminal law to a particular set of circumstances.”<sup>140</sup>

Under Wendel’s account, the determination of the public interest is left to the President and other democratically accountable public officials whereas prosecutors simply implement administration policy.<sup>141</sup> Since charging decisions are usually shielded from public view, there are reasons to doubt that this allocation of authority safeguards democratic accountability.<sup>142</sup> More importantly, as a matter of professional ethics, prosecutors *must* take the public interest—“fundamental interests of society” in the language of the

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133. *Id.* at § 4.1.3(d), (k).

134. *See* U.S. Dep’t of Just., Just. Manual § 9-27.001 (2018).

135. *Id.* §§ 9-27.001, 9-27.110.

136. *See id.* §§ 9-27.230, 9-27.250.

137. *Id.* § 9-27.230 cmt. 1.

138. *See id.* § 9-27.230 cmt 7.

139. *See* Jennifer Chacón, *Prosecutors and the Immigration Enforcement System in the United States*, in *THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION* 431, 436 (Ronald F. Wright et al. eds., 2021) (describing linkage between civil removal and criminal prosecutions).

140. *See* U.S. Dep’t of Just., Just. Manual § 9-27.001 (2018).

141. Wendel, *supra* note 17, at 108–09. Professor Wendel has made a similar argument in the context of a New York prosecutor who was tasked with defending the prosecution of two men he had determined were innocent. *See* WENDEL, *supra* note 26, at 118–21.

142. *See* Green & Roiphe, *supra* note 113, at 69–70.



DOJ Principles—into account when making charging decisions.<sup>143</sup> The availability of civil remedies as an alternative to criminal prosecution and hardship to the accused are factors that would suggest that prosecution is antithetical to the public interest.<sup>144</sup>

While rare, prosecutors can also be disciplined for abusing their charging discretion.<sup>145</sup> Most common is when prosecutors bring charges that are not supported by probable cause as required by *Model Rules of Professional Conduct* Rule 3.8(a).<sup>146</sup> However, courts have also sanctioned prosecutors for abuses related to the targeting of political opponents, the non-prosecution of serious crimes, and even failures to plea bargain.<sup>147</sup> In recent years, there has been increasing alarm over the racial implications of prosecutors' exercises of charging discretion.<sup>148</sup> While border prosecutors did not necessarily endorse the Trump administration's various anti-immigrant policies,<sup>149</sup> they are still subject to ethical criticism for their decisions to charge migrant families with unlawful entry, even if professional discipline might be unwarranted.<sup>150</sup>

The next Section maintains that border prosecutors failed to exercise the requisite discretion and independent judgment expected of lawyers in their positions; nor did they consult with their superiors after the zero-tolerance policy's disastrous ramifications became evident.

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143. See U.S. Dep't of Just., Just. Manual § 9-27.001 (2018); see also K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 307 (2014) (“[T]he prosecutor’s duty is to undertake prosecutions in the public interest and to provide equal treatment before the law.”).

144. See U.S. Dep't of Just., Just. Manual §§ 9-27.230, 9-27.260 (2018).

145. See generally Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 153, 175 (2016) (“In late nineteenth century and early twentieth century disciplinary cases against prosecutors, state courts repeatedly emphasized judicial authority and responsibility to impose discipline as a response to prosecutorial misconduct, including in the context of charging decisions.”).

146. See *id.* at 173–74 (collecting authorities).

147. See *id.* at 174–76. The plea bargain case, *In re Rook*, 556 P.2d 1351, 1357 (Or. 1976), involved a prosecutor who declined to plea bargain in order to punish multiple defendants.

148. For a concise summary of the empirical research on this topic, see Matt Barno & Mona Lynch, *Selecting Charges*, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION, *supra* note 139, at 35, 42–51.

149. See MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 2020).

150. See also Griffin & Yaroshefsky, *supra* note 124 (criticizing prosecutors for deferring to law enforcement on charging).

## B. Discretion and the Zero-Tolerance Policy

In Professor Wendel's estimation, border prosecutors had two options after the issuance of the zero-tolerance policy: (1) pursue unlawful entry cases that would separate families or, (2) resign from their positions.<sup>151</sup> The zero-tolerance policy, however, did not and could not abrogate prosecutors' charging discretion in individual cases. Border prosecutors should have thus ensured that their superiors fully understood the consequences of the new policy before diverting resources to separating families.

Prosecutors, like all attorneys, have clients that they assist in meeting their lawful objectives.<sup>152</sup> Although the analysis is somewhat more complex when the client is an abstract entity such as the U.S. government,<sup>153</sup> Wendel is correct that border prosecutors could not disregard the Trump administration's lawful directives.<sup>154</sup> For lawyers to follow their policy preferences over those of public officials would blur the line between agent and principal.<sup>155</sup>

Yet, prosecutors have far more latitude in the selection and direction of their cases than other attorneys.<sup>156</sup> Although border prosecutors could not ignore the zero-tolerance policy, a close examination of the policy indicates that the choice before them was not whether to facilitate family separation or to resign.

The April 2018 zero-tolerance policy directive contains no mention of families or children.<sup>157</sup> The absence of any such references

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151. Wendel, *supra* note 17, at 109.

152. See MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020).

153. See Cramton, *supra* note 25, at 297 ("[T]he government lawyer must deal with a wide range of interests, constituencies, and competing values. . . . These interests are not inchoate but are expressed in constitutional structure and duties . . . ."); see also Wendel, *supra* note 30, at 301 (describing the relationship between attorney and government client as "muddled").

154. See MODEL RULES OF PRO. CONDUCT r. 1.2(a)–(b) (AM. BAR ASS'N 2020); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (AM. L. INST. 2000) ("[A] lawyer must, in matters within the scope of the representation, proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 27 cmt. b (AM. L. INST. 2000) ("Recognizing a lawyer as [an] agent creates a risk that a client will be bound by an act the client never intended to authorize.").

155. See Wendel, *supra* note 17, at 95, 112; see also Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 748 (2008) ("Conceptually, the attorney-client relationship is an agency relationship in which a lawyer-agent serves the interests of a client-principal.").

156. See discussion *supra* Section II.A.

157. See discussion *supra* Part I.

is significant because the administration had ostensibly sought to reverse pre-existing DOJ policy regarding family unit prosecutions. Because of this conspicuous omission, U.S. attorneys did not believe that the zero-tolerance policy applied to families with children and were stunned by the Attorney General's public comments to the contrary.<sup>158</sup>

The Trump administration would never go on to issue formal guidance to prosecutors to charge parents apprehended with their children under 8 U.S.C. § 1325. Rather, family separation was executed via a behind-the-scenes campaign to pressure U.S. attorneys to pursue cases that would require separating families.<sup>159</sup> The expectation, conveyed via private phone calls and emails, was that they would prosecute as many unlawful entry cases as possible until all available resources were exhausted.<sup>160</sup>

The administration went to great lengths to obscure its intentions. Depending on the audience, the administration would either admit or deny that its policy was to separate families.<sup>161</sup> President Trump sought to (erroneously) blame family separations on an Obama-era law.<sup>162</sup> One can broadly agree with Wendel that public officials have the prerogative of determining the public interest without expecting prosecutors and other attorneys to adhere to their superiors' ad hoc pronouncements and back-channel guidance on a matter as significant as separating families.

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158. See, e.g., DOJ OIG Report, *supra* note 1, at 34–35.

159. See, e.g., *id.* at 40–42. *But cf.* Stumpf, *supra* note 14, at 1052 (observing administration officials tied family separation to the normal course of criminal prosecution).

160. See, e.g., DOJ OIG Report, *supra* note 1, at 40–41.

161. See generally Philip Bump, *Here Are the Administration Officials Who Have Said That Family Separation Is Meant as a Deterrent*, WASH. POST (June 19, 2018, 12:14 PM), <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/> [https://perma.cc/VY9B-DHA5] (highlighting contradictory statements of Trump administration officials regarding family separations).

162. See generally Linda Qui, *Fact-Checking Trump's Family Separation Claim About Obama's Policy*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/us/politics/fact-check-family-separation-obama.html> [https://perma.cc/BK3U-CWN6] (“There is no law that mandates family separation, let alone a law enacted under Mr. Obama. The practice is the result of a policy enacted by the Trump administration, and ended by Mr. Trump last June.”); Villazor & Johnson, *supra* note 44, at 613 (citing Salvador Rizzo, *The Facts About Trump's Policy of Separating Families at the Border*, WASH. POST (June 19, 2018, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/> [https://perma.cc/J5VJ-S934]) (“President Donald Trump blamed the *Flores* settlement for his initial policy choice of separating families.”).

Expecting prosecutors to follow the administration's directives on prosecuting families also overlooks that the zero-tolerance policy, as written, anticipated that border prosecutors would independently assess DHS referrals for prosecution. Attorney General Session's April 6, 2018, memorandum required prosecutors "*to the extent practicable . . . adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 1325(a).*"<sup>163</sup>

Border prosecutors understood the foregoing language to permit them to decline cases to conserve resources in accordance with the DOJ Principles.<sup>164</sup> DOJ officials sought to subsequently limit this discretion by, for example, insisting that prosecutors not deny all referrals involving families with very young children.<sup>165</sup> But officials still expected front-line prosecutors to consider case-specific factors, including whether children apprehended with their parents could communicate effectively with DHS and HHS personnel.<sup>166</sup>

Of course, even though the zero-tolerance policy's express language allowed prosecutors to decline unlawful entry cases, border prosecutors understandably feared that the administration was "sapping" their discretion.<sup>167</sup> However, prior to prioritizing misdemeanor unlawful entry prosecutions over more serious federal crimes<sup>168</sup> U.S. attorneys could have raised their concerns about policy implementation with their political superiors. The lawyer-client relationship is predicated on effective communication,<sup>169</sup> and lawyers are obligated to engage in "consultation prior to taking action."<sup>170</sup> This includes presenting clients with information they are disinclined to confront, including moral considerations.<sup>171</sup> As vital

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163. *Memorandum for Federal Prosecutors Along the Southwest Border*, *supra* note 68 (emphasis added).

164. *See, e.g.*, DOJ OIG Report, *supra* note 1, at 22, 40–41; *see also* U.S. Dep't of Just., Just. Manual § 9-27.001 (2018) (noting interest in effective management of limited resources).

165. DOJ OIG Report, *supra* note 1, at 42.

166. *See id.* at 37, 41–42.

167. *See id.* at 41 ("Zero tolerance, per our instructions, it's basically sapping prosecutorial discretion.").

168. *See id.* at 66–67.

169. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2020); Wald, *supra* note 155 ("Communications are the mechanism by which the client controls the agency relationship . . . . Successful representation requires effective communications, without which the attorney-agent cannot know, understand, or represent the client's goals.").

170. MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. 3 (AM. BAR ASS'N 2020).

171. MODEL RULES OF PRO. CONDUCT r. 2.1 cmts. 1–2 (AM. BAR ASS'N 2020).

as the Trump administration believed immigration enforcement to be, it is not self-evident that it meant to deprioritize the prosecution of drug smuggling and other felonies.<sup>172</sup> As noted, the overall rate of prosecutions unrelated to immigration plummeted under the zero-tolerance policy.<sup>173</sup>

On the issue of charging families with infants, there was outright confusion.<sup>174</sup> Most front-line prosecutors felt compelled to disregard a child's age in considering charges against its parents even though the Trump administration had not communicated this message expressly.<sup>175</sup> As Deputy Attorney General Rosenstein explained: "I do not recall anybody asking me, 'Are we required to prosecute parents of infants and near infants?' I don't recall anybody asking me that question. My answer would have been no. We can consider those circumstances."<sup>176</sup> Communication was also lacking concerning the ability to track children once separated.<sup>177</sup> Unlike their political superiors, front-line prosecutors knew from interactions with defense counsel and judges that DHS and HHS would struggle to reunite families.<sup>178</sup>

Clients, even sophisticated ones such as governmental entities, are often overly optimistic about achieving their objectives while neglecting countervailing considerations.<sup>179</sup> Before devoting substantial resources to unlawful entry cases against families, U.S. attorneys should have satisfied themselves that the administration was prepared to accept the negative consequences of the zero-tolerance policy. Because of this lack of communication, the administration was unprepared for the public blowback toward the zero-tolerance policy.

The Trump administration may well have insisted on prioritizing the prosecution of families with children after having been apprised of countervailing considerations. However, even under these

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172. See DOJ OIG Report, *supra* note 1, at 67–68.

173. See *Stepped Up Illegal-Entry Prosecutions Reduce Those for Other Crimes*, *supra* note 83.

174. DOJ OIG Report, *supra* note 1, at 41.

175. See *id.* at 38–42.

176. *Id.* at 43.

177. See *id.* at 32–33.

178. See *id.* at 43–45.

179. See generally Milan Markovic, *Advising Clients After Critical Legal Studies and the Torture Memos*, 114 W. VA. L. REV. 109, 145 (2011) (arguing that a lawyer must identify relevant legal and non-legal considerations so that the client can make informed decisions for the representation).

circumstances, border prosecutors could not simply defer to the perceived wishes of political superiors—as Rosenstein acknowledged in differentiating prosecutors from soldiers.<sup>180</sup>

The actual decision border prosecutors faced was not whether to comply with the zero-tolerance policy or to resign but rather *how* to comply.<sup>181</sup> The issuance of a charging policy—zero-tolerance or otherwise—does not relieve front-line prosecutors of their obligations to consider charges case-by-case.<sup>182</sup> Independent prosecutorial assessments, case-by-case, protect against the politicization of the justice system.<sup>183</sup> The chief danger of politicization, as Attorney General Robert Jackson explained in his 1940 address, is that the prosecutor “will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”<sup>184</sup>

Throughout American history, prosecutorial independence was almost “taken for granted, a product of the scattered, local nature of federal prosecution.”<sup>185</sup> However, the norm of prosecutorial independence has endured because professional prosecutors are best situated to make difficult judgments in individual cases,<sup>186</sup> with the President’s role limited to setting criminal justice policy and removing the Attorney General and other high-ranking officials.<sup>187</sup>

In recent decades, some proponents of the unitary executive theory<sup>188</sup> have contested this seeming consensus against political

180. DOJ OIG Report, *supra* note 1, at 42.

181. See Wendel, *supra* note 17, at 109.

182. See generally U.S. Dep’t of Just., Just. Manual § 9–27.001 (2018) (“A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of federal criminal law to a particular set of circumstances.”); Green & Roiphe, *supra* note 113, at 72 (“Allocating responsibility for decisions in individual cases to career prosecutors who are lower down in the hierarchy helps achieve the fair and disinterested administration of criminal justice.”).

183. See, e.g., Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM U. L. REV. 805, 812 (2020); Andrew Kent, *Congress and the Independence of Federal Law Enforcement*, 52 U.C. DAVIS L. REV. 1927, 1930 (2019).

184. Jackson, *supra* note 118, at 19.

185. See Green & Roiphe, *supra* note 113, at 74.

186. *Id.* at 71–72.

187. Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction from the President?*, 87 FORDHAM L. REV. 1817, 1832 (2019).

188. In its most basic form, unitary executive theory posits that all executive power is vested exclusively in the President. As Professor Skowronek has explained:

There are different strands of the unitary theory . . . They do, however, move out from a common core. All proceed upon an elaboration of the principle of the separation of powers, most especially upon the Constitution’s grant of independent powers to the President. Of particular importance is the Constitution’s

involvement in federal prosecutions by noting instances from early American history where Presidents intervened in individual cases.<sup>189</sup> But it is notable that these isolated interventions were mostly unsuccessful.<sup>190</sup> Moreover, the DOJ was created to forestall such politicization:

The DOJ was . . . designed as an insular arena where lawyer professionals could thrive. Merit, standards of practice, and a common approach to legal problems would lend both quality and uniformity to federal law enforcement. Professionalism was designed to combat political pressure . . . [P]residential or other political control of prosecutors was inconsistent with the vision behind the law department.<sup>191</sup>

Thus, the relationship between the President and front-line prosecutors is not strictly hierarchical.<sup>192</sup>

The norm against political interference in prosecutorial decision-making has also reasserted itself across presidential administrations. President Nixon's decision to fire Watergate Special Prosecutor Archibald Cox would eventually contribute to the end of his presidency.<sup>193</sup> Attorney General Gonzales was forced to resign from the Bush administration after terminating several U.S. attorneys for their handling of alleged voter fraud cases.<sup>194</sup> Attorney General Barr's decision to overrule career prosecutors' senten-

vesting of "the executive power" in a single officer, the President, as that is read to imply expansive authority and exclusive responsibility.

Stephen Skowronek, *The Conservation Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2076 (2009).

189. For example, Professors Calabresi and Yoo note that President Washington intervened in the prosecution of two Pennsylvania residents and ordered the U.S. Attorney to enter a *nolle prosequi* on the indictment. See Stephen G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. L. REV. 1451, 1483–84 (1997); see also Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 553 (2005) ("Presidents Washington, Adams, and Jefferson believed that they had constitutional authority to direct federal district attorneys."). For a general introduction on the unitary executive theory and its relevance to prosecutorial independence, see David M. Driesen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 719–21 (2008).

190. See generally Green & Roiphe, *supra* note 113, at 70 ("Far from being consolidated under presidential control, most federal criminal prosecution in the early republic was local, and many cases were brought by state actors and private individuals.").

191. See *id.* at 55.

192. See Green & Roiphe, *supra* note 187, at 1823.

193. Todd David Peterson, *Federal Prosecutorial Independence*, 15 DUKE J. CONST. L. & PUB. POL'Y 217, 265–68 (2020).

194. See, e.g., Driesen, *supra* note 189, at 712–13; Green & Roiphe, *supra* note 113, at 68–69.

cing recommendations in the Roger Stone case was met by a “firestorm of protest.”<sup>195</sup>

Even if the President were to have the prerogative to intervene in individual cases, this would not relieve front-line prosecutors of their ethical obligations.<sup>196</sup> Prosecutors, like all lawyers, are required to exercise independent judgment in representing clients.<sup>197</sup> The DOJ, as an institution, supports this independence in several ways. For example, the DOJ Principles prohibit attorneys from considering their own professional or personal circumstances in making charging decisions.<sup>198</sup> Thus, fear of professional blowback should not have entered into border prosecutors’ charging calculus.<sup>199</sup> DOJ policy also restricts front-line prosecutors’ communications with political officials<sup>200</sup> and delegates the vast majority of decisions to front-line prosecutors, except for particularly sensitive ones such as whether to seek the death penalty.<sup>201</sup>

Of course, the Trump administration was entitled to prioritize the prosecution of parents with children under 8 U.S.C. § 1325 as a policy matter.<sup>202</sup> It could also remove U.S. attorneys who categorically refused to consider unlawful entry cases because all

195. Joyce White Vance, *Treat Every Defendant Equally and Fairly: Political Interference and the Challenges Facing the U.S. Attorneys’ Offices as the Justice Department Turns 150 Years Old*, 130 YALE L.J.F. 516, 516–17, 519 (2021); see Jeremy Herb & Katelyn Polantz, *Roger Stone Sentencing Recommendation Watered Down from ‘Highest Levels,’ Former Prosecutor Tells Congress*, CNN: POLS. (June 24, 2020, 6:53 PM), <https://www.cnn.com/2020/06/24/politics/house-judiciary-committee-hearing/index.html> [<https://perma.cc/J2GP-TE6T>].

196. See generally Green & Roiphe, *supra* note 187, at 1840 (“[F]rom a conventional ethics perspective, a lawyer serving as prosecutor may not accept the nonlawyer supervisor’s direction about how to achieve the government entity client’s lawful objectives but must exercise independent professional judgment.”).

197. See MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS’N 2020).

198. U.S. Dep’t of Just., Just. Manual § 9–27.260 (2018).

199. See also Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors’ Conflicts of Interest*, 58 B.C. L. REV. 463, 467 (2017) (warning of conflicts of interest related to personal ambition and institutional ties).

200. See generally Peterson, *supra* note 192, at 262 (“White House discussions with line prosecutors delegitimize the prosecutorial process by raising the risk of politically motivated decisions. For this reason, there have long been strict policies regulating White House contact with the Department of Justice for at least the last 80 years.”); see also Memorandum from the Off. of Att’y Gen. to the Head of Department Components & All U.S. Att’y’s 1 (May 11, 2009), [https://www.justice.gov/oip/foia-library/communications\\_with\\_the\\_white\\_house\\_and\\_congress\\_2009.pdf/download](https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/download) [<https://perma.cc/8RPV-S27V>] (“The Assistant Attorneys General, the United States Attorneys, and the heads of the investigative agencies . . . must be insulated from influences that should not affect decisions in particular criminal or civil cases.”).

201. See Green & Roiphe, *supra* note 187, at 1823; Fish, *supra* note 123, at 280.

202. See Wendel, *supra* note 17, at 108–09.



border prosecutors are ultimately agents and employees of the executive branch.<sup>203</sup> However, even under an expansive view of presidential power, the President cannot control prosecutors' charging discretion in individual cases.<sup>204</sup> As the United States Supreme Court has recognized, the right to remove a subordinate official does not entail the right to direct discretionary judgements.<sup>205</sup> For the President and other public officials to commandeer charging decisions would not only be inconsistent with ethical rules and standards but would also arguably violate the separation of powers because such conduct would intrude on courts' historical authority to regulate attorneys.<sup>206</sup>

What, then, should border prosecutors have done when political superiors pressed them to bring unlawful entry cases that would separate families? Professor Wendel is correct that border prosecutors could have resigned in moral protest.<sup>207</sup> Alternatives included warning their superiors that applying the policy to families would lead to prolonged family separations and undermine the enforcement of other laws.<sup>208</sup> Prosecutors could have also chosen to remain in their positions and to evaluate DHS referrals on a case-by-case basis with reference to the DOJ Principles and other prosecutorial standards.<sup>209</sup>

This meant, consistent with these authorities, balancing the purported federal interest in enforcing 8 U.S.C. § 1325 with the victimless nature of these crimes and perpetrators' "personal circumstances."<sup>210</sup> One potentially relevant circumstance would be if

203. See Green & Roiphe, *supra* note 187, at 1840.

204. See Green & Roiphe, *supra* note 113, at 25–26; see also Green & Roiphe, *supra* note 187, at 1823, 1840 (“[I]nsofar as the president gives direction to the Attorney General, who is plainly the president’s subordinate, the Attorney General may not simply direct the trial prosecutor to implement that direction.”).

205. See generally Green & Roiphe, *supra* note 113, at 25–26 (discussing *Myers v. United States*, 272 U.S. 52 (1926)); see also Ilan Wurman, *The Removal Power: A Critical Guide*, 2019–2020 CATO SUP. CT. REV. 157, 199–200 (discussing historical evidence that the President cannot direct the judgment of inferior officers).

206. See Green & Roiphe, *supra* note 187, at 1841–43.

207. See Wendel, *supra* note 17, at 109.

208. See discussion *supra* Section II.B.; see also Green & Roiphe, *supra* note 187, at 1830 (“[L]awyers for an entity, including a public entity, owe duties of competence and loyalty to the entity . . . . That means that the entity’s lawyers cannot simply accept imprudent direction from the entity’s authorized representatives as lawyers might from a flesh-and-blood client.”).

209. See Luban, *supra* note 111, at 664 (arguing that sometimes mitigating evil can be the more righteous path over disassociating oneself from it).

210. U.S. Dep’t of Just., Just. Manual § 9–27.230 (2018).

the individual was apprehended with young children who lacked the capacity to communicate effectively with DHS and HHS personnel.<sup>211</sup> The availability of civil removal as an alternative to criminal prosecution should have also factored into prosecutors' decision-making,<sup>212</sup> especially as civil removal would have kept families intact.

Although the administration would have likely terminated prosecutors who categorically refused to bring unlawful entry cases against parents apprehended with their children, it is hardly evident that they would have punished prosecutors who used their discretion to decline cases involving families with very young children and toddlers.<sup>213</sup> If called to account, prosecutors would have also been able to justify their decision-making by highlighting the need to prosecute serious non-immigration-related crimes such as drug-smuggling.

DOJ officials undoubtedly pressured prosecutors to bring unlawful entry cases, but it was incumbent on front-line prosecutors to resist this pressure and to use their own independent judgements to determine whether these prosecutions were in the public interest. Instead, border prosecutors by and large deferred to the administration's perceived wishes in individual cases.

Although the Trump administration was the first to separate families purposefully to deter border crossings, family separation is hardly unique to the immigration context. The next Part argues for prevailing prosecutorial standards and principles to be amended to specifically account for the societal interest in keeping families intact.

### III. PROSECUTORS AND FAMILY SEPARATION

Ethical rules and prosecutorial standards recognize the wide latitude afforded to prosecutors in making charging decisions. They also recognize that prosecutors inevitably consider the public interest in making such decisions. However, these rules and standards

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211. See DOJ OIG Report, *supra* note 1, at 42.

212. See U.S. Dep't of Just., Just. Manual § 9-27.250 (2018); NAT'L PROSECUTION STANDARDS § 4-1.3(d) (NAT'L DIST. ATT'YS ASS'N 2018).

213. Consider Rosenstein's comments regarding charging toddlers. See *supra* Section II.B.

do not expressly consider charging decisions' effects on potential defendants' families.

The *Model Rules of Professional Conduct*, and its predecessor *Model Code of Professional Responsibility*, require prosecutors to seek justice while treating individuals accused of crimes as atomistic.<sup>214</sup> *Model Rule* 3.8 refers to individuals charged with crimes simply as “the accused” or “defendant.”<sup>215</sup> Even individuals who are wrongly convicted are characterized as “defendant[s].”<sup>216</sup> The *Model Rules* include several references to lawyers and clients' families but are silent concerning defendants' and suspects' families.<sup>217</sup>

The DOJ Principles state that prosecutors should consider the “personal circumstances” of the accused, but “personal circumstances” are not defined expressly to include whether the accused has children or other dependents.<sup>218</sup> Similarly, the ABA's *Standards for Criminal Justice* allow prosecutors to consider “potential collateral impact on third parties, including witnesses or victims” as well as the defendant's “background and characteristics,” but defendants' families are unmentioned.<sup>219</sup> Lastly, the NDAA Standards call upon prosecutors to avoid undue hardship to the accused but do not reference separation from family specifically.<sup>220</sup>

Between the notion of prosecutors *qua* ministers of justice and the broad language of the aforementioned standards, prosecutors may have latitude to consider if charges would devastate a potential defendant's family.<sup>221</sup> However, the omission of any specific language to this effect reflects the criminal justice system's ten-

214. For a broader critique of the *Model Rules of Professional Conduct* as reflective of an overly individualistic conception of ethics, see Thomas L. Shaffer, *Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 963–64 (1987).

215. See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.8(b) (AM. BAR ASS'N 2020) (“[Prosecutors shall] make reasonable efforts to assure that the accused has been advised of the right to . . . counsel . . .”).

216. See *id.* r. 3.8(g).

217. For example, the *Model Rules* recognize that clients may wish to have their families present when consulting with a lawyer and that lawyers may have familial attachments that undermine their loyalty to their clients and independent judgment. MODEL RULES OF PRO. CONDUCT r. 1.14 cmt. 3, r. 1.7 cmt. 11 (AM. BAR ASS'N 2020).

218. U.S. Dep't of Just., Just. Manual § 9-27.230 cmt. 7(2018).

219. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-4.4 (v),(x) (AM. BAR ASS'N 2017). As Professor Davis notes, the *Standards* also exhort prosecutors to improve the administration of criminal justice. Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1078 (2016).

220. NATIONAL PROSECUTION STANDARDS § 4-1.3(k) (NAT'L DISTRICT ATT'YS' ASS'N 2018).

221. Cf. Griffin & Yaroshefsky, *supra* note 124, at 319 (calling for prosecutors to take a broader view of “public interest”).

dency to reduce accused individuals to “a fraction of their lives—their crime and criminal history.”<sup>222</sup> This reductivism has turned the criminal justice system into what Professors Griffin and Yaroshefsky have decried as a “fast track to mass incarceration.”<sup>223</sup> As set out in the following section, the Trump administration’s zero-tolerance policy was far from exceptional in disregarding prosecution’s harm to families.

### A. *Prosecutors, Immigration, and Mass Incarceration*

For the Trump administration, migrants were by and large synonymous with their alleged crimes; they were “illegals.”<sup>224</sup> High-ranking officials studiously ignored the reasons migrants were seeking to bring their children to the United States—such as their desires to raise them away from violence and gang activity—and focused instead on the risks posed to children during border crossings.<sup>225</sup> Adjudicating potentially bona fide asylum claims, as required by U.S. and international law, was subsumed to the goal of deterring families from crossing the southern border.<sup>226</sup> These twin themes of criminality and child endangerment made family separation seem unexceptional and even beneficent.<sup>227</sup>

Nevertheless, indifference to the circumstances of migrants long predated the Trump administration.<sup>228</sup> The following account during the Obama administration illustrates the degree to which

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222. Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y. L. SCH. L. REV. 69, 81 (2019).

223. Griffin & Yaroshefsky, *supra* note 124, at 305.

224. *See generally* Stumpf, *supra* note 14, at 1072 (“Administration officials took a stark position, declaring that [p]arents who entered illegally are, by definition, criminals.”).

225. *See id.* at 1074–75; *see also* DOJ OIG Report, *supra* note 1, at 24 (noting Attorney General Sessions’ belief that parents who crossed the border illegally were endangering their children).

226. *See* Villazor & Johnson, *supra* note 44, at 575, 578, 611 (describing an “all-out effort” to deter migration).

227. *See* Stumpf, *supra* note 14, at 1074.

228. While beyond the purview of this Article, for trenchant critiques of immigration law enforcement, *see generally* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1836 (2011) (“[R]elatively little discretion has been exercised when the decision is whether to force a noncitizen’s departure.”); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 469 (2007) (“[I]mmigration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication.”).

prosecutors have become almost passive bystanders in the fast-tracking of unlawful entry cases:

The defendants enter the courtroom in handcuffs and leg irons. Through headphones, they listen to a court interpreter translate into Spanish a plea agreement and the criminal charges against them. The judge asks the migrants, as a group, whether they understand those charges, whether they are satisfied with their legal representation, and whether their plea is voluntary. In unison, they respond, “*Si*.” Then, one by one, the judge asks each defendant how he pleads. Almost invariably, the answer is “*culpable*”—guilty. After each defendant enters his guilty plea, an attorney for the U.S. Border Patrol reads the factual basis for that plea. “On August 15, 2009, Mr. Javier Garcia Hernandez, who is a native and citizen of Mexico, did enter the United States illegally near Eagle Pass, Texas, by wading across the Rio Grande River.” The entire process usually takes just one to two hours. Five days a week, every week of the year, a version of this scene plays out in eight of the eleven federal district courthouses located along the U.S.-Mexico border.<sup>229</sup>

The notion of the federal prosecutor as a minister of justice is difficult to reconcile with the on-the-ground reality in immigration cases, but this dynamic is not unique to immigration.<sup>230</sup>

To defend its actions in separating families, the Trump administration analogized to criminal law enforcement generally. In Congressional testimony, former DHS Secretary Kirstjen Nielsen stated, “[I]f an American were to commit a crime anywhere in the United States, they would go to jail and they would be separated from their family. This is not a controversial idea.”<sup>231</sup> Border patrol officers offered similar justifications for referring families to DOJ for prosecution.<sup>232</sup> The public had become so acculturated to family separation as a normal collateral consequence of allegedly criminal conduct that the Trump administration may have assumed that it would not object to the wide-scale separation of migrant families.<sup>233</sup>

Indeed, a large interdisciplinary literature has documented American’s bipartisan acceptance of mass incarceration and resul-

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229. Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 481–82 (2010).

230. See also Eagly, *supra* note 54, at 1288 (“In practice, noncitizens are exposed to decidedly second-class criminal justice.”).

231. Stumpf, *supra* note 14, at 1052–53.

232. See *id.* at 1065 (quoting border agent Art Del Cueto).

233. As Professor Stumpf highlights, the Trump administration’s efforts to normalize family separation in the immigration context ignores that convictions for misdemeanors do not require a term of incarceration and therefore are unlikely to lead to family separations. See *id.* at 1074.

tant family separation.<sup>234</sup> The scale of the problem is daunting and disproportionately falls upon minority groups. Nearly eight million people in the United States have been incarcerated at some point in their lives.<sup>235</sup> Of this group, nearly sixty-five percent are racial minorities.<sup>236</sup> One study of men born in the late 1960s found that nearly three percent of White men spent time in prison by their thirties compared to twenty percent of Black men.<sup>237</sup> Overall, Black people are about eight times more likely to spend time in prison than White people.<sup>238</sup>

However, these stark statistics do not capture mass incarceration's full effects. According to the Bureau of Justice Statistics, fifty-two percent of state and sixty-three percent of federal inmates are parents to minor children; over 1.7 million children have a father or mother currently in prison.<sup>239</sup> At any given time, seven percent of Black children and one percent of White children have an incarcerated parent.<sup>240</sup> Incarceration disrupts families because incarcerated parents cannot take care of their children physically or financially,<sup>241</sup> and remaining family members often lack the resources to be able to preserve the family unit. Among children of

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234. See, e.g., Griffin & Yaroshefsky, *supra* note 124, at 302–03; Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 817 (2017) (“There is a growing consensus across the U.S. political spectrum that the extent of incarceration in the United States is not just unnecessary but also unsustainable. And it is not making our communities safer.”) (footnote omitted). Much of this literature understandably focuses on the disparate incarceration rates of racial minorities. See, e.g., Christopher Wildeman & Emily A. Wang, *Mass Incarceration, Public Health, and Widening Inequality in the USA*, 389 LANCET 1464, 1466 (2017) (“Disparities in incarceration by race or ethnicity and education in the USA are marked and have been since the earliest statistics were collected.”); ALEXANDER, *supra* note 36, at 9 (“The only country in the world that even comes close to the American rate of incarceration is Russia, and no other country in the world incarcerates such an astonishing percentage of its racial or ethnic minorities.”).

235. Terry-Ann Craigie, Ames Grawert, Cameron Kimble & Joseph E. Stiglitz, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. FOR JUST. (Sept. 15, 2020), <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal> [<https://perma.cc/4V2C-ZY4K>].

236. See *id.*

237. See Wildeman & Wang, *supra* note 233, at 1466.

238. Roberts, *supra* note 36, at 1274.

239. BUREAU OF JUST. STAT., U.S. DEP'T. JUST., NCJ222984, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2008).

240. Holly Ventura Miller & J.C. Barnes, *The Association Between Parental Incarceration and Health, Education, and Economic Outcomes in Young Adulthood*, 40 AM. J. CRIM. JUST. 765, 766 (2015).

241. Roberts, *supra* note 36, at 1283–84.

mothers who are incarcerated, one in ten will enter the foster care system.<sup>242</sup>

For families that remain intact, earnings losses extend beyond the period of incarceration.<sup>243</sup> Formerly incarcerated individuals suffer \$484,400 in lost lifetime earnings on average, with Latino and Black individuals suffering greater losses than their White counterparts.<sup>244</sup> Since most incarcerated individuals are poor to begin with, incarceration creates an intractable state of deep disadvantage that persists generation after generation.<sup>245</sup>

Children of incarcerated parents experience depression, anxiety, and feelings of rejection and shame.<sup>246</sup> Throughout their lives, these children are also more likely to exhibit anti-social behaviors and struggle in school than their peers.<sup>247</sup> Having an incarcerated parent during childhood is also associated with poor long-term health outcomes, such as higher risk of asthma, high cholesterol, and HIV/AIDS.<sup>248</sup> Notably, these adverse outcomes are far more common among children with incarcerated parents than children whose parents are absent for other reasons.<sup>249</sup>

In recent years, scholars have argued that prosecutors, as the criminal justice system's "most powerful party," should play a central role in ending mass incarceration.<sup>250</sup> For example, Professor Cassidy has urged prosecutors to advocate for the end of manda-

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242. *Id.* at 1284.

243. *See generally* Kristen Turney & Rebecca Goodsell, *Parental Incarceration and Children's Wellbeing*, 28 *FUTURE OF CHILD*. 147, 149 (2018) (discussing the stigma associated with former incarceration).

244. Craigie et al., *supra* note 234, at 16–17.

245. *Id.* at 18–19; *see also* Miller & Barnes, *supra* note 239, at 780 (finding that children of incarcerated parents are more likely to rely on public assistance in adulthood).

246. Roberts, *supra* note 36, at 1284; *see also* Miller & Barnes, *supra* note 239, at 780 (finding a significant relation between parental incarceration and depression).

247. *See, e.g.*, Turney & Goodsell, *supra* note 242, at 150–52 (summarizing educational research studies); Amanda Geller, Carey E. Cooper, Irwin Garfinkel, Ofira Schwartz-Soicher & Ronald B. Mincy, *Beyond Absenteeism: Father Incarceration and Child Development*, 49 *DEMOGRAPHY* 49, 71 (2012) (finding that paternal incarceration undermines children's well-being and increases the likelihood of aggressive behaviors).

248. Turney & Goodsell, *supra* note 242, at 152; *see also* Miller & Barnes, *supra* note 239, at 780 (finding a relationship between parental incarceration and poorer health outcomes).

249. Geller et al., *supra* note 246, at 65–66.

250. *See, e.g.*, Griffin & Yaroshefsky, *supra* note 124, at 304; JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 133–34 (2017).

tory minimum sentences.<sup>251</sup> Professor Davis has argued for the expansion of criminal diversion programs and the establishment of clemency units.<sup>252</sup> Lastly, Professor Joe has called for prosecutors who force excessive caseloads on public defenders to be disciplined.<sup>253</sup>

The foregoing proposals would certainly mitigate mass incarceration and thereby make family separation less commonplace. However, the problem's crux is that prosecutors have been far more aggressive in bringing charges that lead to incarceration even as U.S. crime rates have fallen since the 1990s.<sup>254</sup> These charges are consequential even if defendants are ultimately acquitted. As Professors Freedman and Smith have written:

The defendant's reputation is immediately damaged, frequently irreparably, regardless of an ultimate acquittal. Anguish and anxiety become a daily presence for the defendant and for the defendant's family and friends. The emotional strains of the criminal process have been known to destroy marriages and to cause alienation or emotional disturbance among the accused's children. Also, the financial burden can be enormous. A criminal charge may well result in loss of employment . . . . The trial itself . . . is a harrowing experience.<sup>255</sup>

Prosecutors should be cognizant of their charging decision's potentially wide-ranging harms.

The next Section contends that amending prosecutors' ethical standards would humanize suspects and increase awareness among prosecutors of their charging decisions' broader impacts.<sup>256</sup>

### B. *Prosecution and Keeping Families Intact*

Although office policies vary, under prevailing prosecutorial culture, prosecutors generally know little about the lives of individ-

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251. See R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 997–1010 (2014).

252. See Davis, *supra* note 218, at 1081, 1083–84.

253. See generally Joe, *supra* note 32, at 1211–12 (“Model Rule 8.4 makes it professional misconduct for a lawyer to ‘violate or attempt to violate the Rules of Professional Conduct, [or] knowingly assist or induce another to do so . . . .’ [A] prosecutor who initiates excessive caseloads potentially induces a public defender to violate duties of competence, loyalty, and integrity.”) (quoting MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2008)).

254. See Griffin & Yaroshefsky, *supra* note 124, at 307.

255. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 10.04 (LexisNexis 4th ed. 2010) (footnotes omitted).

256. See Griffin & Yaroshefsky, *supra* note 124, at 320 (arguing that prosecutors should seek social justice).



uals they charge with crimes.<sup>257</sup> Prosecutors also commonly report feelings of anger and disgust towards defendants.<sup>258</sup> Such emotions interfere with prosecutors' abilities to make informed and balanced charging decisions and lead them to prioritize the securing of convictions over other societal interests.<sup>259</sup>

Defendants are members of families and communities. Yet, the DOJ Principles and other ethical standards do not mention these "personal circumstances."<sup>260</sup> To combat mass incarceration and keep families intact, prosecutorial standards should be amended to exhort prosecutors to consider the accused's family as part of the charging decision.

There is precedent for ethical standards centered on children and families. The *Model Rules* do not allow attorneys to charge contingent fees in divorce cases because of the societal interest in family integrity.<sup>261</sup> In addition, much like prosecutors, matrimonial lawyers must balance their duties to their clients with the public interest.<sup>262</sup> Thus, in child custody cases, lawyers cannot pursue custody at all costs.<sup>263</sup> The American Academy of Matrimonial Lawyers' guidelines provide that attorneys representing parents consider "the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children."<sup>264</sup> Lawyers must even abandon potentially winnable custody cases under certain circumstances.<sup>265</sup>

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257. See generally Gajwani & Lesser, *supra* note 221, at 81 (noting that prosecutors are far more likely to have relationships with victims and investigators).

258. See Shira Leiterdorf Shkedy & Tali Gal, *The Sensitive Prosecutor: Emotional Experiences of Prosecutors in Managing Criminal Proceedings*, 63 INT'L J. L. & PSYCH. 8, 12–13 (2019).

259. *Id.* at 16. See also Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 46 (2009) (describing office incentives for prosecutors to focus on convictions).

260. U.S. Dep't of Just., Just. Manual § 9-27.230 cmt. 7 (2018).

261. See MODEL RULES OF PRO. CONDUCT r. 1.5 cmt. 6 (AM. BAR ASS'N 2020).

262. See William J. Howe & Hugh McIsaac, *Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents When the Interests of Children are at Stake*, 46 FAM. C. REV. 78, 83 (2008).

263. See *id.*

264. BOUNDS OF ADVOCACY § 6.1 (AM. ACAD. OF MATRIM. L. 2000) [<https://perma.cc/BT8D-3MNF>].

265. For example, if the parent is using the child as a bargaining chip to secure a more favorable settlement. See Howe & McIsaac, *supra* note 261, at 83; see also Ryan, *supra* note 100, at 435 (analogizing the Trump administration's family separation policy to the criminal justice system's leveraging of the fear of family separation to obtain confessions).

Of course, exhorting prosecutors to consider the welfare of children and families as part of their charging decision will not be a panacea for the criminal justice system's ills. In many cases, the interest in keeping families intact will be outweighed by other considerations, such as the seriousness of the suspect's crime and the federal interest in prosecution.<sup>266</sup> Victims may oppose declinations, and their views are entitled to some deference under prevailing prosecutorial standards.<sup>267</sup> More generally, because of the unreviewable nature of charging discretion,<sup>268</sup> it is hardly assured that prosecutors will actually consider the massive economic and non-economic costs of family separation even were prosecutorial standards to be amended. Lastly, there is no universal definition of "family", and front-line prosecutors could favor potential defendants with traditional nuclear families over those with nontraditional ones.<sup>269</sup>

Family separation and incarceration for nonviolent crimes are not indelible aspects of the criminal justice system and need not be confronted by prosecutors alone. The Trump administration abandoned the zero-tolerance policy because of widespread public condemnation.<sup>270</sup> Greater awareness of family separation and its impacts in other contexts may likewise engender opposition and openness to reform.

In addition, so-called "progressive prosecutors" in large cities such as Philadelphia, Seattle, and Chicago have won mandates to use their powers to attempt to reduce mass incarceration, eliminate racial disparities, and advance defendants' interests.<sup>271</sup> The track record of progressive prosecutors has been mixed and has drawn criticism from police departments, "tough on crime"

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266. See, e.g., U.S. Dept. of Just., Just. Manual § 9-27.230 cmt. 1 (2018).

267. See CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.4(a)(x) (AM. BAR ASS'N 2017).

268. See *supra* Part II.

269. See Brown & Manning, *supra* note 37, at 86 ("Family structure is usually treated as an objective social fact when in reality, family structure reports are based on subjective views of the family.").

270. Stumpf, *supra* note 14, at 1053–54.

271. Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUS. L. REV. 1, 2 (2019). For example, in Philadelphia, District Attorney Larry Kasner has prohibited his subordinates from charging minor crimes such as marijuana possession and prostitution and to estimate the financial costs of incarceration at sentencing hearings. See *id.* at 11–12.

politicians, and even some public defenders.<sup>272</sup> San Francisco's high profile progressive prosecutor was unseated recently via a recall election.<sup>273</sup> A qualitative study of one self-described progressive prosecutor's office in Massachusetts also raises the worrisome possibility that attorneys in such offices use their nominally progressive orientations as legitimation for unethical practices such as withholding evidence.<sup>274</sup> Nevertheless, the willingness of prosecutors to campaign on—and win—platforms centered on defendants' rights and ending mass incarceration would have been unimaginable decades ago.

This Article's proposal to amend prosecutorial standards to account for the societal interest in family integrity animates from the widespread opposition generated by the Trump administration's family separation police as well as some of the concerns that drive progressive prosecution. However, regardless of the presidential administration or a particular prosecutor office's political orientation or charging policies, front-line prosecutors maintain broad charging discretion, and such discretion has too often been exercised against the interests of individual suspects and their families.<sup>275</sup> Under this Article's proposal, prosecutors would be expected to consider the societal interest in keeping families intact as a matter of professional ethics.<sup>276</sup> Individuals suspected of crimes and their families should not have to depend on the vicissitudes of national and local elections to have their interests recognized.

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272. See *id.* at 15–16 (noting police departments' clashes with prosecutors); Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 *FORDHAM L. REV.* 2287, 2295–96 (2020) (noting criticisms of progressive prosecutors from former Attorney General William Barr, among others); see also Darcy Covert, *The False-Hope of the Progressive Prosecutor Movement*, *ATLANTIC* (June 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141/> [https://perma.cc/6SFA-3LFJ] (criticizing mismatch between progressive prosecutors' goals and the means that they use to achieve them).

273. Thomas Fuller, *Voters in San Francisco Topple the City's Progressive District Attorney, Chesa Boudin*, *N.Y. TIMES* (June 8, 2022), <https://www.nytimes.com/2022/06/07/us/politics/chesa-boudin-recall-san-francisco.html> [https://perma.cc/7RMP-MRJP].

274. Alexandra L. Cox & Camila Gripp, *The Legitimation Strategy of "Progressive Prosecutors"*, 31 *SOC. & LEGAL STUDS.* 657, 658 (2022).

275. See *id.* at 664; see also Belén Lowrey-Kinberg, Jon Gould & Rachel Bowman., "Heart & Soul of a Prosecutor": *The Impact of Prosecutor Role Orientation on Charging Decisions*, 49 *CRIM. JUST. & BEHAVIOR* 239, 253 (2021) (observing widely divergent approaches to charging within the same office).

276. As Professors Hessick and Morse have emphasized, the progressive prosecutor movement both presupposes that voters will elect progressive prosecutors, but also that there is a sufficient supply of such prosecutors, particularly in smaller counties. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 *IOWA L. REV.* 1537, 1547 (2020).

Considering suspects' familial ties as part of charging decisions is also likely to be less controversial than other high-profile actions taken by progressive prosecutors in recent years, such as refusals to enforce the death penalty.<sup>277</sup>

Mass incarceration and family separation are ingrained in the criminal justice system. The core of the problem rests with prosecutors' charging decisions, borne out of tendencies to regard individuals suspected of crimes as atomistic and disconnected from society. In extreme cases, prosecutors leverage family separation to secure plea bargains or to achieve nebulous policy outcomes, as the Trump administration sought to do.<sup>278</sup> To combat these destructive trends, prosecutors, as ministers of justice, must discern the public interest in individual cases rather than making charging decisions mechanistically.<sup>279</sup>

Victimless crimes such as those involving unlawful entry, prostitution, or drug use would rarely justify separating families. More serious crimes involving violence would justify separating families because children and spouses are unlikely to benefit from the presence of potentially dangerous and volatile family members.<sup>280</sup> Separating families would be beneficial where there is domestic abuse, especially if the victims are able to obtain counseling and other support.<sup>281</sup> The onus would be on prosecutors to develop an informed understanding of each situation's particulars rather than focusing solely on whether there is sufficient evidence to support a conviction.

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277. See generally Davis, *supra* note 270, at 18–19 (relating experience of a progressive Florida prosecutor in combatting the state's death penalty).

278. See generally Ryan, *supra* note 100, at 427 (observing that, under the Trump administration, parents who were willing to waive asylum claims were reunited more swiftly with their children than parents who were not).

279. As Professor Gershman has argued, even busy prosecutors' offices are also able to structure themselves away from mechanical decision-making. See Gershman, *supra* note 126, at 515.

280. A large empirical literature examines the effects of the presence of a volatile or violent family member on a child's development. See e.g., Gabriele Plickert & Heili Pals, *Parental Anger and Trajectories of Emotional Well-Being from Adolescence to Young Adulthood*, 30 J. RSCH ON ADOLESCENCE 440 (2019) (finding relationship between parental anger and anger in adolescent children); Carlos Valiente et al., *Prediction of Children's Empathy-Related Responding From Their Effortful Control and Parents' Expressivity*, 40 DEV. PSYCH. 911, 920–21 (2004) (finding relationship between negative parental emotions and lack of empathy in children).

281. See Geller et al., *supra* note 246, at 72.

Prosecutors may balk at this Article's proposal. They may protest that they are not social workers and simply do not have the time or resources to consider factors beyond whether there is probable cause to support a conviction against a particular defendant.<sup>282</sup> They may also fear that declining to charge potential defendants because of their familial ties will antagonize police departments, which are often skeptical of efforts to advance decarceration.<sup>283</sup>

As a descriptive matter, such protestations ignore that prevailing ethical standards and principles already presuppose that prosecutors will weigh the costs and benefits of charges and not merely secure convictions where potentially available.<sup>284</sup> Consideration of a particular defendant's familial situation is not qualitatively different than consideration of other personal characteristics such as his age.<sup>285</sup> All prosecutors, progressive or otherwise, are able to weigh the benefits of charges against their economic and non-economic costs, including the costs to families.

As a normative matter, failing to seek justice for the situation reduces the prosecutor's role to that of a mere clerk in a massive criminal justice bureaucracy.<sup>286</sup> No other actor beside the prosecutor is able to delve into a defendant's family situation or assess the likelihood of family separation prior to the filing of charges.<sup>287</sup> The costs incarceration imposes on families have been well-documented,<sup>288</sup> and prosecutorial standards should confront these costs. Prosecutorial discretion is inevitable and can be deployed to dismantle the apparatus of mass incarceration and family separation instead of building upon it.

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282. See MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 2020).

283. See Davis, *supra* note 270, at 24.

284. See *supra* Section II.A.

285. See e.g., U.S. Dep't of Just., Just. Manual § 9-27.230 cmt. 7 (2020).

286. See Shaffer, *supra* note 213, at 984; see also Griffin & Yaroshefsky, *supra* note 124, at 310 (describing the prosecution of misdemeanors as a "largely administrative processing mechanism, characterized, in large measure, by weak prosecutorial screening of police complaints") (footnote omitted).

287. See also Griffin & Yaroshefsky, *supra* note 124, at 320 ("[C]harging decisions have had a role in creating the current devastating social problem of mass incarceration, with its disproportionate racial impact, and [it should be acknowledged] that the prosecutor has a unique power to fix it.").

288. See *supra* research discussed in Section III.A.

## CONCLUSION

This Article has advanced two main propositions. First, prosecutors who pursued unlawful entry cases to separate families pursuant to the Trump administration's zero-tolerance policy acted unethically by failing to exercise independent judgment in charging and diverting resources to these cases without additional consultation. Second, the zero-tolerance policy was not anomalous because family separation is endemic to the U.S. criminal justice system. There has been substantial condemnation of family separation in the first context, but comparatively little in the second. The prosecutor's "seek justice" maxim is incompatible with the U.S. system of mass incarceration and wide-scale family separation.

Scholars have long debated whether government lawyers should serve the public interest. Yet, prosecutors differ from other government lawyers and inevitably consider the public interest in making charging decisions. Border prosecutors acted unethically because they deferred to the Trump administration's perceived wishes in individual cases rather than exercising independent judgment. The zero-tolerance policy did not abrogate prosecutorial discretion, and, under prevailing ethical rules and standards, prosecutors should not have allowed political superiors to direct their decision-making in individual cases.

Family separation is not unique to the Trump administration or the immigration enforcement context. Mass incarceration in the United States has separated and traumatized millions of families and exacerbated economic inequality and hardship. Scholars have begun to focus on the role of prosecutors in supporting mass incarceration but have largely neglected the ethics of charging decisions. As ministers of justice, prosecutors should carefully assess the public interest in individual cases rather than making charging decisions by rote. Amending prosecutorial standards to account specifically for the societal interest in keeping families intact would humanize individuals suspected of crimes and recalibrate the calculus of prosecutors' charging decisions. Neither prosecutors nor the public-at-large should conceive of family separation as an unavoidable and inevitable consequence of criminal conduct.