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Understanding U.S. Immigration Policy and Trump's Family-Separation Executive Order (with transcript)

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Interviewer: [Music Playing] Welcome to Case in Point produced by the University of Pennsylvania Law School, I'm your host Mirin Smith. In this episode we'll be talking about Family Separation and US Immigration Policy.

With us today is Sarah Paoletti a Practice Professor of Law, and the Director of the Transnational Legal Clinic whose research focuses on the intersection of human rights migration and labor law.

Also, joining us is Professor Law and History, Serena Mayeri who focus on the historical impact of progressive and conservative social movements on the legal and constitutional change. Thank you both for joining us.

Female: Thank you.

Female: Thanks for having us.

Interviewer: Of course. What's actually happening with regards to immigration policy? Can you give us the legal state of play about what's happening at the border?

Female: Many people have described what's happening at the border as a crisis. And I think different people view the crisis differently. But what is - what is happening is the administration has taken what it's calling, a zero-tolerance policy on people who are crossing into the United States without a visa.

Caught up in this are families, who are fleeing extreme violence and persistent humanitarian crisis often grounded in historic oppression and policies throughout Central America. They've been aggravated by natural disasters, and ironically a US foreign policy in the region and US immigration policy and the increased deportations of persons with US gang affiliations.

And so, we're seeing a larger number of people coming across the border. And historically if you look at migration you see ebbs and flows of migration coming across the border. And the zero-tolerance policy is the policy of prosecuting for criminal misdemeanors, individuals who have entered without a visa, or entered without permission to be in the United States.

Those individuals are typically held in customs and border protection custody while being subjected to summary prosecution again for the misdemeanor of criminal entry. Persons then typically

appear in court and plead guilty often are sentenced to time served before then being transferred into custody of immigration and customs enforcement for their removal of proceedings.

Where we have had families in this process, families had been being separated. And so, the argument that the administration put forth was that they could not keep children detained with the parents while the parents were being prosecuted. Even though, the child - the parents were never actually being transferred into the custody of the Bureau of Prisons. They remained within the custody of Department of Homeland Security in that process.

Thousands of children have been separated from their parents, and now there is a question about how, and if they can be, and when they will be reunited. Currently the - there are efforts underway to reunite family members. Although it appears that the circumstances under which that reunification is occurring is in the context of the parents accepting deportation.

Interviewer: So, ideally from a legal standpoint, what is the best way forward. What should the US government actually be doing to help these families?

Interviewee: There are a multitude of ways for addressing the current problem. I think the first thing is to question and look at very carefully what is the real purpose, and what is the effect of the zero-tolerance policy. I think the real purpose of the zero-tolerance policy is to look tough on immigration, and to serve as a deterrence policy.

It is not unusual, it is a not a historic for the US to engage in a detention and prosecution policy for the purposes of deterrence. We did see this under the Obama Administration as well, where the Obama Administration was detaining an increased number of individuals as a deterrence policy in 2014 and the courts weighted on it historic and long held settlement in a case called the Flores Settlement, where it was clear that the deterrence cannot be the basis for policy - cannot be the reason for deterring people. It violates international law as well to detain for the purpose of deterrence.

And so, that's the first question, right? Is whether detention is required and under what circumstances. The other reality is that people have a much greater likelihood of success in their immigration proceedings and if being successful in their immigration proceedings, if they are released because in those case, they have a greater likelihood of connecting with legal

services, and being able to represent themselves in immigration proceedings. So, that's one of the issues.

I think the other issue that we're seeing is, there are thousands of families who are at the border, who are seeking entry. Who are being held back. They are either been held back just because they are waiting in line, and waiting for the opportunity to present themselves at the border.

Or, they are being affirmatively turned away by customs and border patrol as they seek asylum. And so, there needs to be some method for addressing the right to seek asylum, on the part of all individuals who are coming into the United States and of keeping families together.

And I think, you know, detention is one way to do it, but it has proven to be unsuccessful and to violate international human rights on multiple occasions.

Interviewer: Last week an executive order was signed that will stop further separation. But what happens to the families that are already separated?

Female: So, the first thing I'll say is that, the executive order does not necessarily stop further separation. The executive order clearly says in the preamble, that keeping families together is a priority of the administration.

But if you read the executive order very carefully, it is an executive order that promotes increased family detention, but not necessarily keeping children together - keeping children with their parents.

So, it says that children should not be kept with their parents if there is a risk, or if there is a notation of a risk, or a thought of a risk. But that doesn't necessarily include in there any means or modalities for keeping families together. But rather, promotes family detention.

I think the question is, how are families going to be reunited, and under what circumstances? And so, if you look at the executive order and the content of the detention, it does not say that parents will be released to be reunited with their children. Instead, it says that children can be detained with their parents, if there is not a risk to the child.

In doing so, although we know from all of the research in the social sciences the harm that does befall children when they are detained. Whether they are detained independent of their parents, or even when they are detained with their parents.

So, I think the question is, what is the choice that parents are being asked to make? Are they being asked to be reunited with their children in the situation of either being detained - having their children be detained, or being deported? Or, is there actually an opportunity for meaningful family reunification outside of the detention context.

Interviewer: Serena, you just coauthored an _____ in the LA Times, and said, "The White House is taking us back to a shameful period in history." Can you expand on that?

Female: Sure. So, unfortunately there are many examples from American history, in which the government, or private citizens were acting with the government sanction. Had separated children from their parents.

And often like the Trump administrations current policies, these family separations have targeted families of color, immigrants and religious minorities.

So, for example, in slave families of course we're routinely and brutally separated. Native American children are removed from their families, and placed in boarding schools that were intended to obliterate their indigenous cultures, and instill work compared to the American values.

Immigrant Catholic children were relocated and placed in protestant homes. Immigrant of Chinese descent had family members excluded from the United States or, threaten with long term detention.

So, unfortunately there are a lot of examples in this _____ in which I coauthored with to imminent scholars of immigration - which I'm not. **Kristen Collins** of BU and **Hiroshima Nomura** at UCLA.

We described how over the past half century or so, the US has tried to overcome and move away from this very painful past. In 1965 Immigration and Nationality Act prohibited the government from denying people Visa's based on their national origin, or their race, or their gender. And it also established a pretty comprehensive scheme of projections and preferences for family relationship.

You know, as Sarah mentioned, it's absolutely true that the government's track record in the year since then has been far from perfect.

But I think it's fair to say that the past several administrations both Republican and Democratic have nevertheless made protecting families a priority even if they're - even if they've been intensifying immigration enforcement.

So, there are a number of examples of this that we discussed in our _____. One is that the Violence Against Woman Act protect - provided protections to survivors of intimate partner violence.

Another is that, most of the time when an undocumented parent of US citizen children have lived in the US without a criminal record, it was until the Trump administration relatively rare - not unheard of, but relatively rare that he or she would be deported.

Today in contrast you see stories about immigration enforcement agents arresting parents who are on the way to pick up their children from school. Or, even domestic violence survivors who are seeking protective orders at courthouses. We also make it a point that there are protections for families in US constitutional law, and in international law, that has long provided explicit protection.

So, for example normally a child can't be separated from a parent without due process. In the child's best interest, are supposed to be paramount in making determination of whether to separate a child from his or her parent.

And protection is also started our national human rights law in 1948 the Declaration of Human Rights includes the provision that was enacted in response to the practice of not dismantling Jewish and Polish families.

Now I want to say also as a scholar of family law, you know, I'm painfully aware that we have a deeply problematic history of separating children from their parents, even under some circumstances that might not warrant separation and that history extend to the present day.

And I think without minimizing the ongoing damage of mass incarceration and perhaps overzealous child welfare policies, we wanted to emphasize that what's happening here is a really

deliberate and calculated terrorization of immigrant families and communities.

And we also wanted to emphasize that family separation of the border is really only the most visible and ____ horrific at a whole range of policies that the administration has put in place.

There are really a departure from past administrations. One example that we talk a little bit about is the travel ban. Which is meant that, US citizens and legal residents whose relatives come from the six mostly majority countries that are targeted in the travel ban can bring their family members in, either for a visit to join as immigrants to the US.

It's almost impossible to obtain a waiver from this policy. And the result is, that many Americans have been indefinitely separated from their family members.

So, I think the point that we wanted to get across was that what's different here is there a measure of calculated cruelty in an effort to deter. And that the terror that a lot of immigrant families and communities are feeling is not just a bug in the system, but it's a feature. And we wanted to underscore how these policies are violating really long-standing principles of family integrity and equality and related that we should all be concerned about.

Interviewer: To follow up to your point, what legal resources do you detain migrants have?

Female: So, for detained migrants I think it's more challenging, right? There is pending litigation. The Department of Justice has filed with the court in the Flora settlement to get the Flora settlement amended, so that increase family detention. So, that they can increase the duration during which children can be detained and not be held in violation of that order.

So, I think there is still a push for ongoing and increased detention. Whether that be family detention. Or, detention of parents, we have to deal now with how our children who have been separated from their families being treated. So, they are now being referred to as unaccompanied minors. Although, they did not enter into the United States as unaccompanied minors.

So, we have a system I think where it is hard to think about how do we address the current situation of separation of families and detention of families outside of the context of detention and

increased immigration enforcement much in the way that Serena has been talking about.

There are resources out there. There is an active immigration bar, and organizations on the border in Texas and Arizona largely organizations that came up I think with the increase of detention in 2014 that have been reinvigorated.

Certainly, the stories of children being separated from their parents has generated a tremendous amount of interest and desire for engagement on the part - not just of lawyers, but of people across the country who want to get involved.

I think right now while there is a move towards the court, I think there is a general consensus that there is a need for congress to step in and act.

Congress needs to find a solution that will last longer to addressing entries of individuals without authorization. How to increase possibly the number of Visa's available to individuals. So, that people aren't forced through this border process, and really access in a comprehensive way what is happening with our immigration policy with a recognition of the short term, medium term, and long-term harm. The detention ultimate has on children and on the next generation.

Interviewer:

Well, thank you both so for joining us today and for your thoughts and perspectives on this important matter. I appreciate it. *[Music Playing]*.

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