

CRUELTY WAS THE POINT: THEORIES OF RECOVERY FOR FAMILY SEPARATION AND DETENTION ABUSES

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Reports of widespread, systemic, and pervasive abuses by immigration authorities have magnified the life and death consequences of anti-immigrant policies under the Trump Administration. From family separation and zero-tolerance border enforcement, to indefinite, large-scale detention in widely varying conditions, the maltreatment and subsequent deaths of immigrants in the custody of the federal government has skyrocketed. Public outcry mounts as journalists and human rights organizations document the injuries and complaints of the victims, including surviving family members. Congressional inquiries and government watchdog agency investigations seek to identify the extent of the problem and the damage caused. Meanwhile, lawsuits filed on behalf of victims build on this momentum, asserting both well-settled and experimental constitutional and statutory claims attempting to hold the federal government accountable and compensate victims. This Article provides an analysis of several instructive cases in this burgeoning field of litigation and the legal theories on which they are based and considers the potential of this jurisprudential moment to meaningfully expand the landscape of viable claims and remedies for immigrant victims and their families.

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INTRODUCTION

The Trump Administration severely restricted immigration at the United States-Mexico border through an unprecedented number of executive actions intended to deter migration to the United States, testing the limits of executive influence in immigration law and policy.¹ In the absence of meaningful Congressional action to curb the Administration's agenda, the legal community has taken to the judiciary. Because so many of the policies caused immediate and irreparable harm to large groups of immigrants who hold rights under the Constitution, many challenges have resulted in nationwide injunctions subsequently taken up for review by the Supreme Court of the United States, bypassing the typical appellate process.²

¹ A recent profile of Trump's top advisor on immigration, Stephen Miller, the chief architect and champion of these restrictive measures, reveals that deterrence and punishment of migrants are central goals of this administration's immigration policy. Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, NEW YORKER: PROFILES (Feb. 21, 2020), <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession> [https://perma.cc/6S4R-5XPX].

² See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2400 (2018) (upholding the Trump administration's travel ban); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (finding

However, one policy in particular has resulted in a large and varied number of claims against the federal government in multiple jurisdictions. It involves one of the most controversial and cruel policies to date: the Trump Administration's "zero-tolerance" border policy and the systematic physical separation of families resulting from its enforcement ("family separation" policy).³ These policies involved a dramatic departure from previous border enforcement approaches that allowed for more discretion, ordering the automatic detention of all unauthorized immigrants, even those seeking asylum lawfully at a port of entry.⁴

The intent of the policies was clear: to send a message to other migrants planning to cross through the southern border that they were not welcome and that if they tried to cross, they would be punished.⁵ Federal immigration officials were directed under zero-tolerance to detain children and parents separately, regardless of their legal claims or circumstances, in many cases resulting in long-term (and in some cases, permanent) separation of parent and child, including infants.⁶ In addition, overcrowded and substandard detention conditions

that the Trump administration's justification for adding a citizenship question to the national census insufficient); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (vacating the Trump administration's rescission of the Obama administration-era Deferred Action for Childhood Arrivals program as "arbitrary and capricious" under the Administrative Procedure Act). *But see, e.g.*, Dep't. of Homeland Sec. v. New York, No. 18-558, 589 U.S. ___, 2-3 (2020) (on app. for stay) (Gorsuch, J., concurring) (expressing frustration and concern regarding the proliferation of trial courts issuing nationwide injunctions challenging Trump's immigration policies). Much scholarship has yet to be written about what these cases might eventually reveal about claims of a unitary executive and other separation of powers questions.

³ See *infra* Parts II, III.

⁴ There are now several layers of restrictive policies that are being carried out at the border, including metering, the Migrant Protection Protocol (MPP), Remain in Mexico and more. For a detailed accounting, see *Policies Affecting Asylum Seekers at the Border: The Migrant Protection Protocols, Prompt Asylum Claim Review, Humanitarian Asylum Review Process, Metering, Asylum Transit Ban, and How They Interact*, AM. IMMIGR. COUNCIL (Jan. 29, 2020), <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border> [<https://perma.cc/U6DH-C7CZ>]. Because of these policies, fewer and fewer migrants make it through the Southern Border. See *id.* Those that do, are still routinely detained. See *id.*

⁵ The President himself made several public statements indicating that the purpose of the policy was deterrence and casting migrants as undesirable. For a detailed accounting of the creation and implementation of the family separation policy and its impact, see MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., REP. ON THE TRUMP ADMINISTRATION'S FAMILY SEPARATION POLICY: TRAUMA, DESTRUCTION, AND CHAOS 2 (2020) (documenting evidence indicating that family separation at the border began in February 2017, just a month into Trump's presidency, and concluding that the process used to separate families was "marked by reckless incompetence and intentional cruelty"); see also Carrie F. Cordero et al., *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430, 434 (2020).

⁶ See Cordero et al., *supra* note, 5 at 437-40 (offering a detailed accounting of what led to the crisis, the government's actions to implement the policy and an initial survey of some of the constitutional and statutory claims raised by the impacted families).

have caused severe illness and, in some cases, death.⁷ Immigration enforcement officials relied on family separation not only as a deterrent to future migrants, but also as a means to control immigrant families initially detained together.⁸ The cruelty was the point.

The first lawsuits challenging these policies alleged that the government's actions "shocked the conscience" and prioritized the physical reunification of families as the remedy for the immediate harm of family separation.⁹ Rooted in the Fifth Amendment Due Process right to family integrity, among other Constitutional and statutory claims, these cases seek not only injunctive relief to reunited families and other non-monetary remedies, but in some cases, monetary damages as well.¹⁰ An early estimate by legal scholars based on evidence of at least four thousand children and parents impacted by family separation suggests that "the aggregate liability for the harms suffered could reach up to \$24 billion."¹¹ This group of challenges to the specific practice of family separation have achieved some preliminary gains at the injunctive relief and class certification stages.¹²

Although the Trump Administration scaled back some aspects of these policies, the detained population skyrocketed and record numbers of children and adults are dying in immigration custody as a result of neglect and maltreatment by immigration officials in public and private detention facilities.¹³ Intense pub-

⁷ See OFF. OF THE INSPECTOR GEN., DEP'T. OF HOMELAND SEC., OIG-19-51, MANAGEMENT ALERT – DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY 2, 12 (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf [<https://perma.cc/K4RH-QFFF>].

⁸ For a discursive analysis of the shift at the border from more humanitarian policies regarding families to those centered on deterrence and racialized criminalization of family migration, see generally Juliet P. Stumpf, *Justifying Family Separation*, WAKE FOREST L. REV. (forthcoming 2021).

⁹ See *infra* Section II.A.

¹⁰ See Cordero et al., *supra* note 5, at 467–68; see also *infra* Parts I, II.

¹¹ See Cordero et al., *supra* note 5, at 467.

¹² *Id.* at 461.

¹³ See, e.g., Michael Brice-Saddler, *The 7-Year-Old Girl Who Died in Border Patrol Custody Was Healthy Before She Arrived, Father Says*, WASH. POST (Dec. 15, 2018, 3:35 PM), <https://www.washingtonpost.com/nation/2018/12/15/year-old-girl-who-died-border-patrol-custody-was-healthy-before-she-arrived-father-says/> [<https://perma.cc/P8J2-XFNY>]; Miriam Jordan, 'A Breaking Point': Second Child's Death Prompts New Procedures for Border Agency, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/us/felipe-alonzo-gomez-customs-border-patrol.html> [<https://perma.cc/VSZ3-M5Z5>]; Dara Lind, *The Death of 7-Year-Old Jakelin Caal Maquin in Border Patrol Custody Isn't an Isolated Outrage*, VOX (Dec. 18, 2018, 10:30 AM), <https://www.vox.com/2018/12/18/18144434> [<https://perma.cc/7CKA-LRQ8>]; Camilo Montoya-Galvez, *Timeline Shows Final Days of Felipe Alonzo Gomez, the Migrant Boy Who Died in U.S. Custody*, CBS NEWS (Dec. 26, 2018, 12:32 PM), <https://www.cbsnews.com/news/timeline-shows-finals-days-of-felipe-alonzo-gomez-the-migrant-boy-who-died-in-u-s-custody/> [<https://perma.cc/3UGZ-SFTT>]; Nick Valencia & Eric Levenson, *The Final Days of Felipe Alonzo-Gomez, the 8-Year-Old Migrant Who Died in US Custody*, CNN (Dec. 26, 2018, 10:28 PM), <https://www.cnn.com/2018/12/26/us/cbp-timeline-guatemala-boy-dies/index.html> [<https://perma.cc/7KU3-JSLP>]; Robert Moore et al.,

lic scrutiny has shone a light on what appears to be grossly negligent mismanagement by the Department of Homeland Security (DHS), including the lack of appropriate screening, training, and supervision of the individual immigration officers tasked with enforcement.¹⁴ The administration's cruel intentions in enacting the policies to begin with, combined with grossly negligent management and enforcement by government actors reveal a tragic landscape of harm and human cost to immigrant families scattered across the country in public and private immigration jails.

As a result, the cases involving family separation have evolved to include claims beyond injunctive relief related to detention conditions, including claims seeking compensatory and punitive monetary damages against the government.¹⁵ Some of these claims trigger questions regarding whether and to what extent the government is shielded by immunity. As the cases and theories of recovery evolve, Plaintiffs continue to experiment with claims that avoid relevant immunity defenses, particularly because the judiciary has so often deferred to the executive when immigration matters are at the core of the claim.¹⁶ Courts in multiple jurisdictions are expressing sympathy with the victims, yet vary in terms of the relief they see available, resulting in a patchwork of early victories and a bevy of unresolved questions.¹⁷ As claims move forward, the cases will reveal which pieces of zero-tolerance, family separation, and mandatory detention violated the Constitution and whether and to what extent immigration officials enforcing unconstitutional immigration policies can rely on immunity de-

Inside the Cell Where a Sick 16-Year-Old Boy Died in Border Patrol Care, PROPUBLICA (Dec. 5, 2019 1:30 PM), <https://www.propublica.org/article/inside-the-cell-where-a-sick-16-year-old-boy-died-in-border-patrol-care> [https://perma.cc/WP5K-KHFN].

¹⁴ The Office of the Inspector General ("OIG") released a report in early 2017 detailing the staffing, training and management problems within the Department of Homeland Security. That report is no longer publicly available, but news outlets reported on its contents. See Tal Kopan, *Report: ICE Deportations Hindered by Internal Disorganization*, CNN: POLITICS (Apr. 20, 2017, 5:08 PM), <https://www.cnn.com/2017/04/20/politics/ice-deportations-inspector-general/index.html> [https://perma.cc/8FMF-VRPA] (reporting that the OIG's report cited to deportation officers' "overwhelming" caseloads and lack of "well-defined policies and procedures"). In a subsequent memo, the OIG expressed concerns about relaxing background requirements for hiring the 15,000 new officers called for by Trump. See OFF. OF THE INSPECTOR GEN., DEP'T. OF HOMELAND SEC., OIG-17-98-SR, SPECIAL REPORT: CHALLENGES FACING DHS IN ITS ATTEMPT TO HIRE 15,000 BORDER PATROL AGENTS AND IMMIGRATION OFFICERS *passim* (July 27, 2017), <https://oig.dhs.gov/sites/default/files/assets/2017/OIG-17-98-SR-Jul17.pdf> [https://perma.cc/966Y-D8N3]; see also Todd J. Gillman & Caroline Kelly, *Call for 15,000 More Border Officers Raises Concerns with Homeland Security's Internal Watchdog*, DALL. MORNING NEWS (Aug. 1, 2017, 1:00 PM), <https://www.dallasnews.com/news/politics/2017/08/01/call-for-15000-more-border-officers-raises-concerns-with-homeland-security-s-internal-watchdog/> [https://perma.cc/4VKR-ZJHD] (reporting that members of Congress, immigrant advocacy groups and immigration policy experts expressed concern over the contents of the report and the relaxation of polygraph and drug screening hiring requirements in order to speed up the process).

¹⁵ See *infra* Section II.C.

¹⁶ See *infra* Section II.C.

¹⁷ See *infra* Parts II, III.

fenses. Where such defenses are unavailable, experimental new claims may chart a course toward new theories of accountability and expand the ability for private individuals to recover for individual harm inflicted by the federal government and its agents.

This Article contributes to a relatively new field of academic literature examining the family separation litigation¹⁸ and recent claims involving the abuse and death of migrants held in immigration detention facilities.¹⁹ It is the first of such articles to identify two key bridges between the family separation cases and detention treatment cases: the “state-created danger” doctrine and the Federal Tort Claims Act (FTCA), which have the potential to meaningfully expand the landscape of viable claims by immigrant victims against the government at a time when the Supreme Court has been increasingly hostile to traditional theories of recovery against immigration enforcement officers.²⁰

Part I will situate the rights, claims, and remedies involved in these cases in the immigration context. Because the claims are numerous and varied, and because immigration issues often complicate the claims in meaningful ways, this part will offer a general overview of the main theories brought to date through the lens of immigration enforcement. Part II will update existing literature concerning the family separation litigation, which has rapidly changed and developed since the initial cases were first filed, creating a moving target for scholars

¹⁸ This Article builds on the initial arguments set forth by a trio of scholars who identified the main legal arguments challenging the legality of family separation under domestic and international law. *See generally* Cordero et al., *supra* note 5 (examining various class actions, constitutional torts and claims brought under the Federal Tort Claims Act). Because this area of the law is developing so quickly, however, there is much to report from the field with regarding to the development of these claims and the advancement of others. Information contained in this Article is current as of June 2020. This article does not extensively discuss the litigation to release children and families on an emergency basis due to COVID-19 health and safety concerns. That subject warrants its own article as the cases unfold; relevant analysis will be incorporated herein, as appropriate.

¹⁹ It is important to note that the idea of family separation by virtue of immigration enforcement and detention is not a new concept. The Trump Administration’s policies were the first to explicitly and systematically implement a specific family separation policy as a deterrent, but the federal government has been separating families in immigration detention for a long time. *See* Nina Rabin, *Unseen Prisoners: Women in Immigration Detention Facilities in Arizona*, 23 *GEO. IMMIGR. L. J.* 695, 737–38 (2009).

²⁰ *See infra* Part I. The Supreme Court most recently ruled that individual recovery was not possible against a United States border patrol agent who, while on American soil, shot and killed a Mexican child who was playing on the Mexican side of the border. *See Hernandez v. Mesa*, 140 S. Ct. 735, 740, 744, 746–47 (2020). In that case, the Court ruled that sovereign immunity shielded the claim, which did not fall into any available exception. The extraterritorial reach of Constitutional rights is another area of increased litigation and interest as a result of American immigration policies at the southern border. Professor Fatma Marouf recently published an exceptional piece exploring this issue, including an in-depth examination of the Circuit Court split regarding the application of qualified immunity when immigration enforcement officers engage in cross-border shootings of migrants. *See generally* Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 *WASH. & LEE L. REV.* 751, 799–800 (2020).

and practitioners alike. Part III will identify the “state-created danger” doctrine and the Federal Tort Claims Act as theories common to family separation and detention abuses, exploring whether and how these theories may subvert traditional governmental immunity defenses. Part IV will identify other emerging theories of state liability specifically for harms suffered by detained immigrants, particularly children and other vulnerable groups, identifying fertile areas for future research and further expansion of theories of recovery for other classes of protected migrants.

I. RIGHTS, CLAIMS, & REMEDIES IN FAMILY SEPARATION AND DETENTION ABUSE MATTERS TO DATE

Anchoring the litigation surrounding family separation and detention abuses is the undisputed “bedrock principle[]” that the United States Constitution “protects everyone within the territory of the United States, regardless of citizenship.”²¹ However, the rights enshrined in the Constitution are not applied equally to unauthorized immigrants.²² As Hiroshi Motomura so aptly concludes, “unauthorized migrants remain at the law’s margins with rights that are indirect and oblique.”²³ As such, jurisprudence regarding the degree and extent to which a right may be extended to an unauthorized person or group is nuanced and complex. The government relocated immigrants impacted by zero-tolerance, family separation, and detention policies, holding them in various custodial settings located throughout the country.²⁴ As a result, the lawsuits that have followed are geographically diverse, resulting in many opinions from multiple federal jurisdictions. Looking at the body of jurisprudence developed to date, there are some common themes worth summarizing before delving into the specific cases in which they were developed.

A. *Rights*

Certain rights protect unauthorized immigrants under the Constitution. Among them are procedural and substantive due process rights (including the right to family integrity and habeas corpus protections), access to legal counsel, protections against prolonged detention, and the right to equal protection under the law.²⁵ These rights are limited as applied to unauthorized immigrants in im-

²¹ *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 302 F. Supp. 3d 1149, 1161 (S.D. Cal. 2018); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

²² “Congress may make rules as to [immigrants] that would be unacceptable if applied to citizens.” *Demore v. Kim*, 538 U.S. 510, 522 (2003).

²³ Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1729 (2010).

²⁴ *Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-statistics> [<https://perma.cc/W32A-5CVR>].

²⁵ This list is not exhaustive, but is representative of rights relevant to this Article. *See, e.g.*, *Jacinto-Castanon de Nolasco v. U.S. Immigr. & Customs Enf’t*, 319 F. Supp. 3d 491, 502 (D.D.C. 2018) (petitioners impacted by zero-tolerance and family separation will likely suc-

portant and complicated ways.²⁶ In general, however, these fundamental liberty interests are what give rise to the various claims asserted regarding family separation and other government abuses of unauthorized families and children in detention.

B. Claims

Claims asserted by separated families and immigrants mistreated in detention vary and include as follows: class actions, individual claims, consent decree violations, and constitutional torts.²⁷ Depending on the nature of the claim, sovereign immunity is available to the government in some cases, but not in others.²⁸ Due to recent, unfavorable precedent pertaining specifically to immigrants, claims subject to a defense of immunity are much more difficult to win.²⁹ However, scholars and practitioners are exploring several angles to over-

ceed on substantive due process claim based on the right to family integrity); *Reno v. Flores*, 507 U.S. 292, 306 (1993) (immigrants are entitled to Fifth Amendment due process rights); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[Immigrants] who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to . . . due process of law.”); *Kingsley v. Hendrickson*, 576 U.S. 389, 397–98 (2015) (conditions of civil confinement violate the Fifth and Fourteenth Amendments if the harm is not reasonably related to a legitimate governmental objective or is excessive); *Rios-Berrios v. Immigr. & Naturalization Serv.*, 776 F.2d 859, 862 (9th Cir. 1985) (immigrants have a due process right to obtain counsel of their own choosing at their own expense); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1509 (C.D. Cal. 1988), *aff’d sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (transfer of detained immigrants interferes with attorney-client relationship); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (indefinite detention is a violation of due process). *But see, e.g., Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (immigrants subject to mandatory detention do not have a statutory right to periodic bond hearings); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (Texas law denying a public education to the children of unauthorized immigrants lacked a rational basis and violated the Equal Protection Clause).

²⁶ Discussed at length *infra passim*.

²⁷ See Merrit Kennedy, *ACLU Sues ICE for Allegedly Separating ‘Hundreds’ of Migrant Families*, NPR: TWO-WAY (Mar. 9, 2018, 4:14 PM), <https://www.npr.org/sections/thetwo-way/2018/03/09/592374637> [<https://perma.cc/5VXB-XPC4>] (discussing ACLU’s request for a class-action status); see also Miriam Jordan, *Judge Blocks Trump Administration Plan to Detain Migrant Children*, N.Y. TIMES (Sept. 27, 2019), <https://www.nytimes.com/2019/09/27/us/migrant-children-flores-court.html> [<https://perma.cc/TGK2-FWYH>] (discussing the judge’s rejection of new regulation that would allow detention of parents and children for long period of times as this would be in violation of the *Flores* decree).

²⁸ For an overview of the doctrine of federal sovereign immunity, see generally Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439 (2005). As applied to immigration cases involving family separation and detention abuses, the doctrine is in flux as these cases present very new factual allegations not previously decided, as discussed *infra passim*.

²⁹ In 2017, the Supreme Court significantly restricted the viability of claims against individual government agents acting under color of federal law. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 1863 (2017) (ruling against an expansion of so-called *Bivens* actions for detained non-citizens accused of immigration violations); see also Michael L. Wells, *Qualified Immunity After Ziglar v. Abbasi: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 381–82 (2018).

come immunity in a number of family separation and detention abuse cases.³⁰ Before examining the experimental claims, a brief overview of traditional claims in the immigration context is helpful to understand the difficulties faced in raising them.

1. *Bivens and Section 1983 Claims*

Enforcement of immigration law involves both federal and state law enforcement actors. In family separation cases at the border, the vast majority of law enforcement officials involved are federal immigration enforcement officers, either with Customs and Border Patrol (CBP) or Immigration and Customs Enforcement (ICE), though other federal agents may be involved from time to time.³¹ However, the government actors involved beyond the border in the wider immigration detention network is much more complicated.

Detention facilities vary in terms of actual custody and control of the individual and the relationship of the custodian to the federal government. They may be federally owned and operated, privately operated but federally staffed, or locally operated (e.g., a state prison or a county jail with an inter-governmental service agreement or a contract with the federal marshal's service to house immigrant detainees).³² Several immigration detention facilities are run by for-profit private prison companies contracted by the federal government.³³ Considering the deep pockets held by private prisons, they are a natural target for these types of claims.³⁴ However, recovery from private prisons is

³⁰ See *infra* Parts II, III.

³¹ Family separation can occur outside of the border zone, involving a large number of state and local law enforcement agencies. However, it was federal agents in the Department of Homeland Security who were empowered to separate families at the southwest border in April 2018. Memorandum from Kevin K. McAleenan, Comm'r of U.S. Customs & Border Prot., to Kirstjen Nielsen, Sec. of the Dep't. of Homeland Sec. (Apr. 23, 2018), <https://www.documentcloud.org/documents/4936850> [<https://perma.cc/B6LE-9HCX>] (seeking the Secretary's decision on increasing prosecutions of immigration violations).

³² See generally EMILY RYO & IAN PEACOCK, AM. IMMIGR. COUNCIL, THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES (2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf [<https://perma.cc/VZK2-P3RZ>] (offering an empirical analysis of immigration detention across the United States, including privately operated facilities).

³³ *Id.* at 10–12.

³⁴ See HAUWA AHMED, CTR. FOR AM. PROGRESS, HOW PRIVATE PRISONS ARE PROFITING UNDER THE TRUMP ADMINISTRATION (2019), <https://cdn.americanprogress.org/content/uploads/2019/08/29100331/DrivingPrivatePrisons-Brief.pdf> [<https://perma.cc/X676-4XRC>]

(“Trump administration policies around enforcement priorities and detention practices have led to an increase in the demand for detention space, which has resulted in record-high profits for private detention facilities.”); see also George Zoley & Kamyar Samimi, *Profit and Unspeakable Loss*, in ACLU OF COLO., CASHING IN ON CRUELTY 3, 3 (2019), https://aclu-co.org/wp-content/uploads/2019/09/ACLU_CO_Cashing_In_On_Cruelty_09-17-19.pdf [<https://perma.cc/TEB6-UBW8>].

similarly complicated by immunity doctrines.³⁵ In addition, some detained immigrant children are housed in facilities run by the federal Department for Health and Human Services (HHS) or are held in other “child appropriate settings” run by local governments under contract with HHS.³⁶ Depending on the actors involved in the operation of the detention facility, claims can be made against both federal and state actors.

Both *Bivens* and Section 1983 actions have been asserted in family separation and detention abuse cases.³⁷ Created by caselaw, a *Bivens* claim allows an individual to pursue a cause of action against federal official(s) for a violation of their constitutional rights.³⁸ Created by the Ku Klux Klan Act of 1871, a Section 1983 claim allows for recovery for both constitutional violations and other federal statutory violations against state and local government officials and agencies.³⁹ Qualified immunity may be raised as a government defense to both causes of action⁴⁰ and specifically may be asserted in a Section 1983 action if the right violated was not “clearly established” under federal law at the time of the alleged violation.⁴¹ This is particularly troublesome for claims asserted by unauthorized migrants whose rights are already compromised as a result of their non-citizen status.

One of the first cases to assert a *Bivens* claim to challenge immigration enforcement practices is the case of Mexican national Laura S., a mother of three and a survivor of domestic abuse at the hands of her ex-husband (a suspected

³⁵ See Robin Miller, *Rights of Prisoners in Private Prisons*, 119 A.L.R. 5th 1 (2004) (detailing the patchwork of claims permitted or denied against private prisons operating under contract with the federal government); see also *Doe v. United States*, 831 F.3d 309, 317 (5th Cir. 2016) (disallowing a § 1983 action against a private detention facility housing detained immigrants under contract with the county because the defendants “were performing a federal function,” and the “[c]ounty had almost no involvement in the detention center’s day-to-day operations”).

³⁶ See Julie M. Linton et al., *Detention of Immigrant Children*, AM. ACAD. PEDIATRICS, Apr. 2017, at 1, 2 (describing the various custodial settings for immigrant children, both accompanied and unaccompanied and detailing the various psychological harms suffered by children in these settings).

³⁷ See *infra* Section II.B.

³⁸ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding that the Fourth Amendment allows claims against federal agents acting under color of federal authority).

³⁹ 42 U.S.C. § 1983. (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”). For the history of the statute and circuit split concerning state-created danger theories through 2001, see generally David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 REV. LITIG. 357 (2001).

⁴⁰ *Butz v. Economou*, 438 U.S. 478, 504 (1978) (“[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.”).

⁴¹ *Carroll v. Carman*, 574 U.S. 13, 16 (2014) (per curiam).

member of a drug cartel) who threatened to kill her if she returned to Mexico.⁴² A routine traffic infraction in 2009, led local police to bring Laura, who was unauthorized, to the attention of immigration authorities where she was detained and allegedly coerced into signing papers volunteering to leave the country.⁴³ She pled her asylum claim with immigration authorities who ignored her legally supportable articulation of a credible fear of persecution upon return and removed her from the country.⁴⁴ A few days later, Laura was murdered by her ex-husband, just as she had feared.⁴⁵

In 2013, Laura's sister, Maria S., filed suit on behalf of Laura's children against the government of the United States and the individual immigration officer who made the decision to deport her, allegedly coercing her into signing voluntary departure papers.⁴⁶ In denying the *Bivens* claims, the District Court nevertheless took the unusual step of taking particular note of the extremely distressing nature of the facts involved and the lack of a just remedy for the family.⁴⁷ The case was appealed to the Fifth Circuit, which affirmed the lower court's award of qualified immunity to the defendants with much less sympathy.⁴⁸

Undeterred, Plaintiffs in the *Maria S.* case filed a petition for certiorari before the United States Supreme Court.⁴⁹ The Government's brief in opposition to the petition expressed a concern that allowing the claim for a *Bivens* action could have far-reaching impact for immigration enforcement, precisely because it would bring the Constitution to bear on the role that immigration officers have in effectuating or infringing procedural due process in the immigration

⁴² Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence> [<https://perma.cc/8CW8-FTR4>].

⁴³ *Id.*

⁴⁴ *Id.* The claim was legally supportable for a number of reasons, including that Laura's ex-husband had made specific threats of mortal harm against her in the past, was likely to make them in the future, was believed to be a member of a drug cartel, and had committed prior acts of severe domestic violence against her. *Id.* With those facts, Laura was very likely to survive an initial credible fear determination (had the immigration officials permitted one) and also likely to assert a viable claim for asylum before an Immigration Court on the grounds of political opinion and a social group claim. *Id.*

⁴⁵ *Id.*

⁴⁶ *Maria S. ex rel. E.H.F. v. Doe*, 267 F. Supp. 3d 923, 927–29, 931 (S.D. Tex. 2017).

⁴⁷ *Id.* at 925–26, 954. The Court noted that the case, “presents one of the most lamentable set of circumstances that this Court has ever been called upon to address,” that Laura was, “by all accounts otherwise law abiding and was providing for her family to the best of her ability,” but that nevertheless, Laura was the only fact witness that could provide definitive evidence that her departure was not voluntary and that her selection of that option on the form the officers gave her was coerced—and she was dead. *Id.*

⁴⁸ *Maria S. ex rel. E.H.F. v. Garza*, 912 F.3d 778, 780 (5th Cir. 2019).

⁴⁹ Petition for Writ of Certiorari, *Maria S. ex rel. E.H.F. v. Garza*, 140 S. Ct. 81 (2019) (Mem.) (No. 18-1350), 2019 WL 1916150.

scheme.⁵⁰ Due to the wide discretion afforded to immigration officials by statute, they have the power, the incentive, and the mandate to incentivize immigrants to waive their rights; specifically, in *Maria S.*, the officers encouraged Laura to pursue immigration status and instead self-deport through the voluntary departure process, rather than pursue her asylum claim.⁵¹

Unfortunately, in October 2019, the Supreme Court denied certiorari in *Maria S.*⁵² Although the trajectory of the litigation has a disappointing ending, as one of the earliest cases to tackle the subject in a hostile jurisdiction to such claims, it gained more traction than one might have predicted. For reasons outlined herein, the theories developing in the family separation and detention conditions cases may result in much better outcomes.⁵³

2. *Federal Tort Claims Act (FTCA)*

The FTCA is a federal statute that was passed by Congress to articulate the circumstances in which private citizens may obtain compensation from the United States for the torts of federal officials.⁵⁴ It waives sovereign immunity, the doctrine preventing private citizens from recovering against the government in court absent the government's consent, when government agents commit tortious acts or engage in some deliberately malicious acts.⁵⁵ Individual government agents cannot be held personally liable for acts committed within the scope of their employment under the FTCA.⁵⁶ Notably, however, Immigration Customs and Border Patrol officers qualify as "law enforcement officers" for the provision of the FTCA that "renders the United States liable for certain intentional tort claims" committed by law enforcement officers.⁵⁷ Typically, these types of claims are brought in order to obtain compensatory monetary relief (punitive damages are not permitted).⁵⁸ Importantly, the harm must have oc-

⁵⁰ Brief for the Respondent in Opposition at 16, *Garza*, 140 S. Ct. 81 (2019) (Mem.) (No. 18-1350), 2019 WL 3425339, at *16.

⁵¹ *Id.* at 16–17; *see also* Immigr. Pol'y Ctr., *Authority of U.S. Customs and Border Protection Agents: An Overview*, AM. IMMIGR. COUNCIL (Feb. 2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/CBP_Overview_022112.pdf [<https://perma.cc/486Q-AWRZ>] (outlining the statutory authority for various search, interrogation and arrest powers of CBP).

⁵² *Maria S. ex rel. E.H.F. v. Garza*, 140 S. Ct. 81 (2019) (Mem.).

⁵³ *See infra* Section I.C.

⁵⁴ The Federal Tort Claims Act, ch. 753, § 401, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671 *et seq.*); 28 U.S.C. § 2674.

⁵⁵ *See* 28 U.S.C. §§ 1346(b), 2671 *et seq.*; 28 C.F.R. §§ 14.1–14.11.

⁵⁶ For a recent legal overview of the Federal Tort Claims Act, *see* KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, *THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW* 7 (2019).

⁵⁷ *Id.* at 26.

⁵⁸ *Id.* at 32.

curred on American soil in order for the FTCA to apply.⁵⁹ As will be discussed herein, these claims are some of the most promising, yielding early victories in attempts to make families whole.⁶⁰

3. *Other Claims*

A number of other claims fall outside of traditional immunity defenses and may chart additional pathways to recovery for victims and their families. As will be discussed in further detail *infra* Parts II–IV, additional legal theories are gaining traction in federal courts all over the country, including claims crafted under the 14th Amendment due process state-created harm doctrine, the Rehabilitation Act of 1973,⁶¹ the Americans with Disabilities Act,⁶² and the Administrative Procedure Act.⁶³ Each have been asserted as possible grounds for recovery with some success. Notably, some claimants are taking to state courts to challenge certain consequences of family separation under state constitutional law, particularly in the child welfare context.⁶⁴ As litigants continue to experiment with novel approaches, new avenues for recovery take shape.

C. *Remedies*

Remedies demanded by mistreated detainees and separated families to date include a variety of both monetary and non-monetary compensation for the damages alleged, as well as both declaratory and injunctive relief. Importantly, the Administrative Procedure Act, which protects against unlawful action by immigration authorities in certain contexts, provides a waiver to sovereign im-

⁵⁹ See 28 U.S.C. § 2680(k) (“The provisions of this chapter and section 1346(b) of this title shall not apply to . . . [a]ny claim arising in a foreign country.”).

⁶⁰ See *infra* Section II.C.

⁶¹ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 *et seq.*).

⁶² Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 *et. seq.*); see also Complaint at 2, Thiersaint v. Dep’t. of Homeland Sec., 18-CV-12406 (D. Mass. Nov. 16, 2018).

⁶³ Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237 (current version at 5 U.S.C. § 701 *et seq.*).

⁶⁴ Like family separation cases at the border, these cases are rooted in the Constitutional right to family integrity. Typically, the involvement of the federal government is different in these cases, where children are separated from their parents as a result of an order of deportation or through the family justice system in state courts, rather than by actual physical separation of a federal immigration official while in the custody of the federal immigration authorities at the border. See, e.g., Dep’t. of Child Safety v. Juan P., 427 P.3d 785, 786 (Ariz. Ct. App. 2018) (discussing the case of a Mexican father separated from his U.S. citizen son via deportation and again via the child welfare system). These cases are nonetheless instructive, particularly with regard to family separation cases under Trump’s policies that involve forced un-accompaniment and post-separation placement of children into foster care by the federal and state government. See *infra* Section II.D.

munity in cases where money damages are not pursued.⁶⁵ When all of the cases filed to date are viewed together, three general categories of remedies emerge: (1) those restoring the physical liberty or integrity of the person or family unit, typically through declaratory or injunctive relief; (2) procedural remedies, including the granting of immigration benefits, de novo review of the denial of benefits and/or the removal or waiver of certain barriers to immigrant status; and (3) government oversight and accountability measures.⁶⁶

1. *Physical Liberty and Integrity*

Declaratory or injunctive relief seeking the release of classes of immigrants from detention and family reunification are rooted mainly in Constitutional rights involving due process, habeas corpus, and equal protection.⁶⁷ Although often obtained relatively quickly, these remedies are incomplete in healing the universe of physical and psychological damage done by family separation. Beyond reunification, the most recent development in remedial action involves court-ordered psychological services for impacted children and families, whether detained or released.⁶⁸ Additionally, recent reports of forced labor and other abuses within private immigration detention facilities and the resulting deaths seek to lay a foundation for claims to compensate the surviving relatives.⁶⁹

Monetary damages in family separation and detention cases may be possible in addition to injunctive relief. The challenge, however, is that including a request for monetary damages will likely trigger a sovereign immunity de-

⁶⁵ Challenges pursuant to the APA cannot be brought in federal district court to second-guess a removal determination by an immigration judge. 8 U.S.C. § 1252(a)(5). However, many other successful immigration challenges have been grounded in the APA. *See, e.g.*, *Soltane v. U.S. Dep't. of Just.*, 381 F.3d 143, 145 (3d Cir. 2004) (reversing the denial of a visa petition based on the improper application of an immigration regulation); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1231, 1235 (9th Cir. 1999) (granting preliminary injunction where there was a reasonable question whether directives to immigration judges serving in the Executive Office for Immigration Review ("EOIR") violated the APA).

⁶⁶ A separate issue is the availability for attorney fees and costs under the Equal Access to Justice Act, which incentivizes attorneys to represent unauthorized immigrants in federal court pro bono to assert their rights. The remedy does not necessarily flow directly to the individual and is only awarded at the conclusion of the litigation in a separately contested matter, but its availability does increase the likelihood of representation for unauthorized immigrants with colorable claims for relief. Notably, EAJA does not allow recovery of attorneys' fees and costs in *Bivens* claims. 28 U.S.C. § 2412(d); 5 U.S.C. § 504 *et seq.*; *see* Trina Realmuto & Stacy Tolchin, *Practice Advisory: Requesting Attorneys' Fees Under the Equal Access to Justice Act*, AM. IMMIGR. COUNCIL (June 17, 2014), https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2014_17Jun_eaja.pdf [<https://perma.cc/MG7B-UZ43>].

⁶⁷ *See* Cordero et al., *supra* note 5, at 462 (discussing in detail the use of these reliefs based on violations of Constitutional rights).

⁶⁸ Miriam Jordan, *U.S. Must Provide Mental Health Services to Families Separated at Border*, N.Y. TIMES (Nov. 6, 2019), <http://nyti.ms/2Cn1luy> [<https://perma.cc/9TYE-TRMB>].

⁶⁹ *See infra* Part IV.

fense.⁷⁰ In a case where reunifying the family is the primary concern, it may be strategically wise to prioritize injunctive relief over monetary damages in the short term.

In June 2019, the first case to prevail in seeking monetary damages against CBP and ICE under the FTCA resulted in a payment of \$125,000 to a mother and son mistreated by government officials while imprisoned in a family detention center under the Obama administration.⁷¹ Their FTCA claim included allegations that the deportation officers threatened to separate them.⁷² Although the case was ultimately settled out of court, it survived a government challenge to transfer venue from New Jersey to Texas.⁷³ The government's choice to settle the case may signal at least some concern about the likelihood of the family's potential success on the merits and a desire to avoid the risk of unfavorable precedent. For reasons discussed *infra*, FTCA claims under Trump's zero-tolerance and family separation policies may be even stronger and may result in even larger recoveries.⁷⁴

2. Procedural Remedies

In some family separation cases and detention determinations, the government did not follow its own procedures. For example, asylum-seekers are entitled to an initial determination regarding whether the facts and circumstances giving rise to their migration have the potential to form the basis of a claim for asylum.⁷⁵ Known as "credible fear interviews," this procedural step was often

⁷⁰ For example, the Administrative Procedure Act waives sovereign immunity for claims against the government when the plaintiff is seeking relief other than monetary damages. 5 U.S.C. § 702. Therefore, it may make sense to bring a declaratory or injunctive action, rather than seeking monetary damages, to avoid triggering the sovereign immunity defense.

⁷¹ Consent Order Approving Settlement and Dismissal of Action, *Alvarado v. United States*, 16-CV-05028 (D.N.J. Feb. 22, 2019), ECF 97; see Sarah Stillman, *How Families Separated at the Border Could Make the Government Pay*, *NEW YORKER* (June 15, 2019), <https://www.newyorker.com/news/news-desk/how-families-separated-at-the-border-could-make-the-government-pay> [<https://perma.cc/BYU8-ZKWX>]; William Montgomery, *Victory for Asylum Seekers Suing ICE & CBP*, *ASYLUM SEEKER ADVOC. PROJECT* (June 17, 2019), <https://asylumadvocacy.org/wp-content/uploads/2019/07/Release-Victory-for-Asylum-Seekers-Suing-ICE-and-CBP.pdf> [<https://perma.cc/8YDH-CCCA>].

⁷² Montgomery, *supra* note 71.

⁷³ *Alvarado v. United States*, No. 16-5028, 2017 WL 2303758, at *8 (D.N.J. 2017). The government's push to transfer the case to Texas was likely an attempt at forum shopping prior to a decision on the merits of a motion to dismiss the substantive claims. In general, the Fifth Circuit is less sympathetic to the claims of immigrants than the Third Circuit. See *supra* notes 46–52 and accompanying text.

⁷⁴ See *infra* Section II.C.

⁷⁵ *Passing a Credible/Reasonable Fear Interview*, *IMMIGR. EQUAL.* (June 3, 2020), <https://immigrationequality.org/legal/legal-help/asylum/eligibility/passing-a-credible-reasonable-fear-interview/> [<https://perma.cc/EY6T-3XBZ>].

delayed or overlooked during the height of the crisis.⁷⁶ Requesting a court to instruct the government to afford the litigant the opportunity to be heard in a credible fear interview is a procedural remedy that may ultimately result in release from detention, since individuals who receive positive credible fear interviews are entitled to a bond or parole hearing.⁷⁷

Other humanitarian migration crises have resulted in the creation by litigation of an entirely new form of immigration relief as a form of procedural remedy.⁷⁸ In other cases involving sympathetic humanitarian elements (e.g., human trafficking or other cases where the immigrant is a material witness or victim of a crime), the government may agree to afford the litigant prosecutorial discretion (also known as “deferred action”), parole-in-place, or humanitarian parole in an effort to allow an individual to stay in the United States who would otherwise be ineligible for any other form of immigration relief.⁷⁹ In cases where humanitarian conditions have worsened or new facts give rise to new threats, the immigrant may request and/or the government may agree to a de novo review of the initial determination of the immigration judge who entered the final deportation order.⁸⁰

It is not unprecedented for the such procedural remedies to be included in the forms of non-monetary relief requested.⁸¹ However, many of the individuals impacted by family separation may not have a form of immigration relief immediately available to them. For those who were abused or who were victims of crimes committed by government agents in detention facilities, these types of remedies allow impacted individuals the right to stay in the United States

⁷⁶ See Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT’L L.J. 243, 304, 309 (2013).

⁷⁷ *Id.* at 317–18.

⁷⁸ See, e.g., *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (representing “ABC litigation” for Guatemalan and Salvadoran asylum seekers and the subsequent passage of the Nicaraguan Adjustment and Central American Relief Act); see also Barbara J. Van Arsdale, *Validity, Construction, and Application of Nicaraguan Adjustment and Central American Relief Act*, 191 A.L.R. Fed. 343 (2004).

⁷⁹ For a critique of these types of “immigration nonstatus” and their proliferation since 1990, see Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1119–20 (2015).

⁸⁰ *Immigr. Pol’y Ctr.*, *Understanding Prosecutorial Discretion in Immigration Law*, AM. IMMIGR. COUNCIL (Sept. 2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/IPC_Prosecutorial_Discretion_090911_FINAL.pdf [https://perma.cc/XLA5-UWW6].

⁸¹ See *infra* Part III (discussing mental health services as a remedy for the children separated from their family); see also *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018) (granting a classwide preliminary injunction in favor of the Plaintiffs, ordering ICE to not detain the class members without their children); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 42 n.11 (D.D.C. 2010) (“[T]he FTCA itself does not purport to forbid injunctive relief, as it merely states that it is [just] ‘exclusive of any other civil action or proceeding for money damages.’”).

temporarily, avoid deportation post-release, and (most importantly) may open up an avenue for permanent status.⁸²

3. Government Oversight and Accountability Measures

Minimum standards for the detention of children have been in place since 1997, through a judicially-created instrument known as the *Flores* consent decree.⁸³ It empowers the United States District Court for the Central District of California to hear complaints concerning the government's failure to maintain these standards.⁸⁴ As will be discussed *infra*, *Flores* has been invoked in family separation litigation and in case challenging detention conditions for minors in custody as a result of zero-tolerance.⁸⁵ This is an example of a strategy known as "public law litigation" where the claims involve matters of great public interest rooted in constitutional claims rather than those that provide specific remedies to private individuals to compensate them for harms suffered (such as the FTCA and *Bivens* actions).⁸⁶

Additionally, advocates and movement lawyers may choose to file cases that are likely to survive a motion to dismiss but are unlikely to succeed on the merits due to an unlucky bench draw or a lack of strong precedent simply to bring attention to the issue, engage in discovery, or force a settlement.⁸⁷ Although unlikely to result in specific relief to any individual or class, the case may serve an important function in forcing the government to reveal critical information through the discovery process that may later serve as the factual predicate for claims more likely to succeed in the future. Information and government accountability in and of itself can serve as a remedy, if not for the litigants, for future similarly situated victims. This type of remedy is common in

⁸² It is important to note that without a path to lawful permanent residency and naturalization, such forms of relief are subject to the whim of the executive because they primarily take the form of prosecutorial discretion, or, a promise from the executive to refrain from active deportation, which means that the individual is eligible for few, if any, actual benefits beyond work authorization.

⁸³ *Reno v. Flores*, 507 U.S. 292, 303 (1993); Stipulated Settlement Agreement at 7, *Flores v. Reno*, No. 85-4544 (C.D. Cal. Jan. 17, 1997); *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1062–63 (C.D. Cal. 2017).

⁸⁴ Stipulated Settlement Agreement, *supra* note 83, at 14–15, 20.

⁸⁵ See *infra* Part IV.

⁸⁶ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) ("Perhaps the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies. . . . Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation.").

⁸⁷ Recent Supreme Court cases have somewhat limited the effectiveness of this approach, particularly in employment discrimination cases, but it is still fairly regularly employed for civil rights cases in the public interest. See William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 696, 713, 735, 737 (2016).

cases that reach international tribunals, which family separation and detention abuse case very well may.⁸⁸

II. FAMILY SEPARATION

The Trump Administration's family separation policy was implemented quietly and remained largely unpublicized for months.⁸⁹ DHS was able to escape large-scale public scrutiny until the news outlet ProPublica released an audio tape revealing the cries of separated immigrant children calling out for their parents.⁹⁰ Following the groundbreaking reporting of several additional news outlets on the appalling conditions of the mass incarceration of children separated from their parents by DHS, public pressure and government obfuscation ensued.⁹¹ Separation of families at the border continued well beyond the

⁸⁸ One of the most successful cases to achieve such a remedy to date against the United States government is the case of Jessica Lenahan, a Latinx woman whose children were murdered due to the failure of the law enforcement officers in the state of Colorado to enforce an order of protection intended to protect her and her children from their violently abusive father. See Sarah Rogerson, *Domesticating Due Diligence: Municipal Tort Litigation's Potential to Address Failed Enforcement of Orders of Protection*, 21 AM. U. J. GENDER SOC. POL'Y & L. 289, 290–92 (2012) (detailing the original claim, the trajectory of the case, and the impact of the international litigation). Her prayer for relief was ultimately denied in an intellectually dishonest Supreme Court opinion authored by the late Justice Antonin Scalia. *Id.* at 300–01. Because her case was disposed of in the lower courts on a motion to dismiss, Jessica never received her “day in court.” *Id.* at 293. However, Professor Caroline Bettinger-Lopez, counsel at the Supreme Court, pressed the case further at Jessica's direction, filing a complaint with the Inter-American system, which ultimately invited Jessica to share her emotional and compelling testimony. *Id.* at 331–32. The result was a scathing report detailing the failures of the American justice system to protect domestic violence victims and their families, including systemic failures involving a lack of police protection. *Id.* at 292. The entire saga would ultimately result in a project to domesticate the international ruling declaring freedom from domestic violence to be a fundamental human right. *Id.* at 294. Dozens of local resolutions were passed by American municipal governments affirming the ruling and, in some cases, charging local police specifically with the duty to enforce orders of protection in accordance with international law. See *id.* at 309–10. Although Jessica never recovered a dime from the government, she became an international spokeswoman for domestic violence victims in the United States and inspired state and local governments to increase protections against domestic violence. See *id.* at 323–24.

⁸⁹ In June 2018, DHS Secretary Kirstjen Nielsen denied the existence of a family separation policy, but a memo sent to her office from the then Acting Director of Immigration and Customs Enforcement dated April 2018 proved that to be false. For a detailed accounting of the resulting revelations, see Cordero et al., *supra* note 5, at 440–43.

⁹⁰ See Ginger Thompson, *Listen to Children Who've Just Been Separated from Their Parents at the Border*, PROPUBLICA (June 18, 2018, 3:51 PM), <https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy> [<https://perma.cc/GR6M-RH38>] (releasing audio obtained by a DHS employee).

⁹¹ See, e.g., Aura Bogado et al., *Migrant Children Coming to the US Are Being Sent to Shelters with Histories of Child Abuse Allegations*, WORLD (June 20, 2018, 11:00 AM), <https://www.pri.org/stories/2018-06-20/migrant-children-coming-us-are-being-sent-shelters-histories-child-abuse> [<https://perma.cc/EZ93-FRN3>]; Molly Hennessy-Fiske, *'Prison-Like' Migrant Youth Shelter Is Understaffed, Unequipped for Trump's 'Zero Tolerance' Policy*,

alleged discontinuation of the policies that led to it.⁹² However, the resulting litigation has created a roadmap for future claimants and classes of impacted individuals by articulating the rights implicated, the actors responsible, and the Constitutional violations that federal immigration officials and agencies committed in designing, implementing, and enforcing it.

A. *The Right to Family Integrity*

From the beginning of the litigation, the right to family integrity has been central, with many judges granting injunctive relief on that basis to reunite families that had been separated.⁹³ The first case to establish a class of separated families entitled to relief, *Ms. L. v. United States Immigration and Customs Enforcement*, did so fairly quickly.⁹⁴ The ACLU and others filed the case in February 2018, long before public attention was focused on the issue.⁹⁵ The complaint alleged substantive and procedural due process violations under the Fifth Amendment right to family integrity and sought class action certification of the hundreds of parents separated from their children.⁹⁶ The Court defined the class as follows:

All adult parents who enter the United States at or between designated ports of entry . . . who (1) have been, are, or will be detained in immigration custody by the [Department of Homeland Security], and (2) have a minor child who *has been*, is or will be separated from them by DHS *and has been, is or will be* detained in [Office of Refugee Resettlement] custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child.⁹⁷

Insider Says, L.A. TIMES (June 14, 2018, 3:00 AM), <https://www.latimes.com/nation/la-na-border-migrant-shelter-20180614-story.html> [<https://perma.cc/V2G6-3RU6>].

⁹² See Stephen Collinson & Lauren Fox, *Outrage Grows as Families Are Separated, Will Trump Change His Policy?*, CNN (June 18, 2018, 8:59 AM), <https://www.cnn.com/2018/06/18/politics/immigration-trump-congress-family-separation/index.html> [<https://perma.cc/6TA6-V5YF>]; Annie Correal, *Why Big Law Is Taking on Trump over Immigration*, N.Y. TIMES (Nov. 21, 2018), <http://nyti.ms/2DBzPLn> [<https://perma.cc/SZ3K-N2JD>]; Maya Rhodan, *Lawyers on the Border Still Dealing with Fallout from Family Separations*, TIME (Aug. 20, 2018, 2:14 PM), <https://time.com/5371963> [<https://perma.cc/F444-VPNX>].

⁹³ See *infra* Sections II.A, II.B.

⁹⁴ Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 1–2, *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18-0428), ECF No. 1.

⁹⁵ *Id.* at 10.

⁹⁶ *Id.* at 3, 7–8; see also Notice of Motion and Motion for Class Certification, *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18-0428), ECF No. 35.

⁹⁷ *Ms. L.*, 310 F. Supp. 3d at n.5 (emphasis added). The italics signify class modification granted in a subsequent ruling. *Ms. L. v. U.S. Immigr. & Customs Enf't*, 330 F.R.D. 284, 292–93 (S.D. Cal. 2019).

The Petitioners did not pursue monetary damages under the FTCA, but focused on injunctive relief.⁹⁸

The injunctive ruling achieved in *Ms. L.* scored an early and important win for families seeking to hold the government accountable for family separations.⁹⁹ The Court found that the Petitioners were likely to succeed on the threshold legal question: whether the zero-tolerance policy and the separation of families pursuant to it violated the Petitioners Fifth Amendment constitutional right to family integrity.¹⁰⁰ The United States Supreme Court has recognized a liberty interest in family relationships and the care, custody and control of one's children, finding that family integrity is an "intrinsic" human right.¹⁰¹ Courts have judicially extended the right to immigrants, with mixed results.¹⁰² However, thus far the right has been universally recognized in the family separation cases filed to date.

The crux of the survival of the claims in *Ms. L.* had to do with the distinction that the Plaintiff was separated from her child as a result of an "unnecessary government action intended to separate family units who were arrested together," rather than a, "necessary incident of detention."¹⁰³ Additionally, *Ms. L.* was the first case to apply a "shocks the conscience" standard involving an appraisal of "the totality of the circumstances" to a claim of family integrity in the

⁹⁸ The Third Amended Complaint lists three counts: (1) Violation of Due Process: Right to Family Integrity; (2) Administrative Procedure Act: Arbitrary and Capricious Practice; and (3) Violation of Right to Seek Protection Under the Asylum and Withholding of Removal Statutes, and the Convention Against Torture. Third Amended Complaint for Declaratory and Injunctive Relief at 14–16, *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18-0428), ECF No. 250.

⁹⁹ Notably, other cases asserting additional claims for relief were not heard as courts referred cases that fit within the *Ms. L.* class certification. *See, e.g., M.M.M. ex rel. J.M.A. v. Sessions*, 347 F. Supp. 3d 526, 526, 529–30, 535–37 (S.D. Cal. 2018) (alleging due process and APA violations, a claim requesting judicial review of the expedited removal policy survived but is in settlement); *M.M.M. ex rel. J.M.A. v. Sessions*, 319 F. Supp. 3d 290, 296 (D.D.C. 2018); Complaint for Declaratory and Injunctive Relief at 55–58, *Dora v. Sessions*, No. 18-CV-01938 (D.D.C. Aug. 17, 2018) (including a Rehabilitation Act claim in addition to due process and APA challenges); *N.T.C. v. U.S. Immigr. & Customs Enf't*, No. 18-CV-6428, 2018 WL 3472544, at *1–2 (S.D.N.Y. July 19, 2018) (including an argument under *Flores* in addition to the due process and APA claims).

¹⁰⁰ *Ms. L.*, 310 F. Supp. 3d at 1149.

¹⁰¹ *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977); *see also Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." (citations omitted)).

¹⁰² Jason B. Binimow, *Application of Due Process Right to Family Integrity and Familial Association to Aliens and Immigrants*, 32 A.L.R. Fed. 3d Art. 8, at § 4 (2018).

¹⁰³ *Id.* at n.11.

immigration detention context to determine whether an individual's due process right was violated.¹⁰⁴ We see here that the cruelty of the family separation policy itself and the cruelty with which it was implemented is central to the holding. This would prove to be a critical foundation for claims that would follow *Ms. L.*, particularly those seeking individual relief through civil rights actions, because, as discussed later in this Article, the nature of the conduct of the government actors as “shocking” or “deliberate[ly] indifferen[t]” is central to those claims.¹⁰⁵

The *Ms. L.* lawsuit has led to the reunification of hundreds of families, and just as importantly, has uncovered multiple instances of official mismanagement by federal immigration officials in the tracking, monitoring, and documentation of families separated under the policy, resulting in further harms to an as-yet unknown number of families.¹⁰⁶ The Court in *Ms. L.* characterized the degree of mismanagement as a “startling reality” in a strong rebuke and recitation of the government's failures:

[T]he practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and childrenThe government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainees' release, at all levelsThe unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*.¹⁰⁷

The ongoing implementation of the injunction may reveal additional facts that shock the conscience and give rise to newly apparent Constitutional claims. In the meantime, the precedent set by the initial opinion is already sizeable, providing ample foundation for future claims.

B. Family Separation, Bivens, and § 1983 Civil Rights Claims

Six days prior to the ruling in *Ms. L.*, a lawsuit was filed in the Northern District of Illinois on behalf of two Brazilian children separated from their parents at the border, requesting injunctive relief to consolidate the immigration proceedings of each father/son pair, release the boys and their fathers from detention, and reunite the families.¹⁰⁸ Interestingly, in granting reunification (not release, which the Court found to be outside of the right to family integrity),¹⁰⁹

¹⁰⁴ *Id.* § 6.

¹⁰⁵ See *infra* Sections II.C, IV.C.

¹⁰⁶ *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018).

¹⁰⁷ *Id.*

¹⁰⁸ *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1119, 1122, 1128, 1133 (N.D. Ill. 2018).

¹⁰⁹ *Id.* at 1132.

the Judge himself suggested a complementary *Bivens* claim might be in order in its opinion granting the relief requested.¹¹⁰ In a footnote, the Court posits:

In light of the alleged policymaking at the highest levels of the federal agencies, another possible exception to sovereign immunity would have been to seek injunctive relief by naming the federal supervisory officials in their individual, rather than official, capacities. In that situation, a *Bivens* claim for injunctive relief might be appropriate.¹¹¹

This suggestion raises the possibility of pleading a *Bivens* claim to recover monetary damages in addition to injunctive relief. At least one federal judge seems open to the idea.¹¹² It seems that *Bivens* claims may be more successful in cases where the families separated allege psychological harm in addition to the physical act of family separation, or as discussed *infra*, additional physical and mental harm while in detention.¹¹³

In October 2019, the ACLU filed another family separation case asserting two nationwide classes, one of parents and the other of children separated at the border, claiming due process violations as well as statutory civil rights claims and seeking monetary damages.¹¹⁴ This case is a harbinger for the viability of *Bivens* and statutory civil rights claims moving forward. At this point, it is still too early to tell what, if anything, will come of these claims in the family separation litigation. Briefing is underway on the government's motion to dismiss.¹¹⁵ However, like *Ms. L*, the unreasonableness of the government's conduct is central to the claims. As the Complaint alleges, the conduct of the government actors named:

¹¹⁰ *Id.* at 1123.

¹¹¹ *Id.* at 1123 n.3 (citing *Bunn v. Conley*, 309 F.3d 1002, 1009 (7th Cir. 2002)) (“A *Bivens* claim can be brought as an allegation that a constitutional injury arose out of the actions of federal agents—regardless of the nature of the relief sought.” (quoting *Conley*, 309 F.3d at 1009)).

¹¹² *Id.*

¹¹³ Early attempts have not proven fruitful. In *K.O. v. U.S. Immigration and Customs Enforcement*, the Plaintiffs were a putative class of minor, non-citizens who were forcibly separated from their parents and classified as “unaccompanied.” See *K.O. v. U.S. Immigr. & Customs Enf’t*, No. 20-309, 2020 WL 3429697, at *2 (D.D.C. June 23, 2020). In addition to due process claims, they asserted *Bivens* and other statutory civil rights claims seeking monetary damages for mental health treatment of the class members. *Id.* at *6. All claims were dismissed. *Id.* at *8–9.

¹¹⁴ Class Action Complaint at 1, 63–69, 73–75, *A.I.I.L. v. Sessions*, No. 19-CV-00481 (D. Ariz. Oct. 3, 2019).

¹¹⁵ Motion to Dismiss for Lack of Personal Jurisdiction and Failure to State a Claim, *A.I.I.L. v. Sessions*, No. 19-CV-00481 (D. Ariz. Feb. 14, 2020), ECF No. 28; Stipulation for Extension of Time, *A.I.I.L. v. Sessions*, No. 19-CV-00481 (D. Ariz. Mar. 20, 2020), ECF No. 29; Order, *A.I.I.L. v. Sessions*, No. 19-CV-00481 (D. Ariz. Mar. 24, 2020), ECF No. 30 (granting the parties’ Stipulation for Extension of Time); Plaintiffs’ Opposition to Defendants’ Motion to Dismiss, *A.I.I.L. v. Sessions*, No. 19-CV-00481 (D. Ariz. Apr. 22, 2020), ECF No. 31; Reply in Support of Motion to Dismiss, *A.I.I.L. v. Sessions*, No. 19-CV-00481 (D. Ariz. June 2, 2020), ECF No. 32; Notice of Supplemental Authorities, *A.I.I.L. v. Sessions*, No. 19-CV-00481 (D. Ariz. June 24, 2020), ECF No. 33.

[S]hocks the conscience, interferes with rights implicit in the concept of ordered liberty, and demonstrates their deliberate indifference to the violation of Plaintiffs' and Class Members' constitutional right to due process.¹¹⁶

This is a direct challenge to immunity defenses, which will require the court to wrestle with the *Bivens* factors as they have been interpreted to apply in the immigration context.¹¹⁷ The court will need to determine whether the unique abuses and rights violations alleged in *Ms. L.* are meaningfully different from the types of claims courts have or have not recognized in the past.¹¹⁸ If the *Bivens* claims survive a motion to dismiss, this case has the potential to be precedent-setting.

C. Family Separation and FTCA

Subsequent to the initial cases regarding family separation, the American Immigration Council filed a complaint on behalf of multiple families for compensatory damages and attorney's fees and costs under the Federal Tort Claims Act alleging intentional infliction of emotional distress and negligence.¹¹⁹ Building on the right to family integrity established in *Ms. L.*, petitioners in *C.M. v. United States* argue that forced family separation by federal officials in immigration detention facilities, absent a showing of parental unfitness or other danger to their children, violates a family's substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution.¹²⁰ Similar to other family separation cases, the lawsuit asserts substantive and procedural due process claims, but rather than injunctive relief to reunite families, Plaintiffs seek monetary compensation for the damages caused by family separation under the FTCA.¹²¹

The factual allegations in the *C.M.* complaint makes explicit the government's intent to separate families through the policy as a deterrent to future migration and the deeply flawed and intentionally cruel manner with which government agents carried out the policy.¹²² The complaint proceeds with two counts of intentional infliction of emotional distress and negligence.¹²³

¹¹⁶ Class Action Complaint, *supra* note 114, at 67–71.

¹¹⁷ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858–64 (2017) (“[A] case can present a new context for *Bivens* purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases.”).

¹¹⁸ *Id.* at 1859, 1863.

¹¹⁹ Complaint at 73–74, *C.M. v. United States*, No. 19-CV-05217, 2020 WL 1698191 (D. Ariz. Sept. 19, 2019).

¹²⁰ *Id.* at 24–25 n.53; see *Parents Ripped Apart from Their Children by Family Separation Policy File Claims Against Trump Administration*, AM. IMMIGR. COUNCIL (Feb. 11, 2019), <http://americanimmigrationcouncil.org/news/parents-ripped-apart-their-children-family-separation-policy-file-claims-against-trump> [<https://perma.cc/L6YS-BQU3>].

¹²¹ Complaint, *supra* note 119, at 73–74.

¹²² Complaint, *supra* note 119, at 1, 3.

¹²³ Complaint, *supra* note 119, at 73–74.

The case is still pending in the District of Arizona, having survived the government's motion to dismiss asserting a lack of subject matter jurisdiction on two bases: (1) "Plaintiffs' claims are barred by the due care and discretionary function exceptions to the FTCA;" and (2) "Plaintiffs have failed to allege claims for which there is a private person analog or for which a private person could be held liable under applicable state law."¹²⁴ The main thrust of the government's arguments was that the family separation policy was a function of existing immigration laws, not a lapse of judgment by immigration enforcement agents and that immigration detention is a matter of federal discretion to which there is no private actor analog.¹²⁵ Plaintiffs responded that the exceptions do not apply because no immigration statute or regulation mandated family separation and further, that virtually any immigration case would fail under the government's broad interpretation of the private actor analog requirement.¹²⁶ The Court agreed with the Plaintiffs, holding that the Plaintiffs successfully "demonstrated that 'a private individual under like circumstances would be liable under state law' for the allegedly tortious conduct committed by the United States" and that the government failed to articulate an exception to the FTCA waiver of immunity.¹²⁷

Importantly, the Plaintiffs dug deeply into the justifications that the government employs to defend against the FTCA claim.¹²⁸ The government asserted that because zero-tolerance required parents to be detained for the pendency of their immigration proceedings and because the *Flores* agreement prohibits the detention of minors in adult facilities, they were forced to separate families.¹²⁹ Plaintiffs responded in four parts: (1) the *Flores* agreement was intended to protect the best interests of children and promote family unification rather than family separation; (2) the *Flores* agreement is not a statute or regulation; (3) officers did not separate families pursuant to the *Flores* agreement because the separations occurred within days of arrival, where as the agreement permits families to be detained together for twenty days; and (4) the exceptions argued by the government only apply when a statute or regulation mandates the actions

¹²⁴ Motion and Memorandum in Support of the United States of America's Motion to Dismiss at 2, *C.M. v. United States*, No. 19-CV-05217, 2020 WL 1698191 (D. Ariz. Dec. 23, 2019) (internal citations omitted); *C.M. v. United States*, No. 19-CV-05217, 2020 WL 1698191, at *5 (D. Ariz. Mar. 30, 2020) (denying the United States' Motion to Dismiss).

¹²⁵ Motion and Memorandum in Support of the United States of America's Motion to Dismiss, *supra* note 124, at 13, 19–20.

¹²⁶ Plaintiffs' Opposition to Defendant's Motion to Dismiss at 7–8, 10, 17, *C.M. v. United States*, No. 19-CV-05217, 2020 WL 1698191 (D. Ariz. Feb. 6, 2020).

¹²⁷ *C.M.*, 2020 WL 1698191, at *5.

¹²⁸ Plaintiffs' Opposition to Defendant's Motion to Dismiss at 5–6, *C.M. v. United States*, No. 19-CV-05217, 2020 WL 1698191 (D. Ariz. Feb. 6, 2020).

¹²⁹ Motion and Memorandum in Support of the United States of America's Motion to Dismiss, *supra* note 124, at 5–6, 8.

at issue.¹³⁰ Having survived the motion, this particular case is now in discovery until June 2021.¹³¹

In addition to *C.M.*, another family separation case that has potential to make FTCA precedent is the case of a father and son from Guatemala who sought asylum in the United States and were separated by immigration officials at the U.S.-Mexico border in June 2018.¹³² The father was detained and deported without full consideration of his asylum claim, while his son was placed in an ORR facility in the United States where he suffered physical, emotional, and sexual abuse at the hands of staff members in the facility.¹³³ They were separated for nine months before being reunited under the *Ms. L.* order.¹³⁴ The suit alleges intentional infliction of emotional distress under the FTCA for father and son, under a bevy of allegations of cruelty by immigration officials at every step of the process, as well as abuse of process, negligence/violation of family integrity, and negligence of the child in custody.¹³⁵ The prayer for relief includes \$6,000,000 in compensatory relief, split evenly between father and son.¹³⁶ The complaint focuses on the intent of the government behind the creation and implementation of the family separation program.¹³⁷ As more and more is revealed about the intentions of the federal government in implementing the policy, the stronger the likelihood of surviving a challenge to the FTCA claim in this case.

Because *Bivens* claims thus far have either been dismissed or are still in the motions phase,¹³⁸ these cases hold the most promise for the development of government accountability precedent in the family separation context. Because most other cases alleging abuse while in government custody in a detained setting on U.S. soil could be classified as either criminal or grossly negligent conduct, these cases may also create useful precedent for those cases. At the very least, the discovery process in *C.M.* will hopefully shed additional light on the intentions behind the government's decision to implement the zero-tolerance

¹³⁰ Plaintiffs' Opposition to Defendant's Motion to Dismiss, *supra* note 128, at 10–11.

¹³¹ Case Management Order at 2, *C.M. v. United States*, No. 19-CV-05217, 2020 WL 1698191 (D. Ariz. June 18, 2020).

¹³² Complaint at 1–2, *E.L.A. v. United States*, No. 20-CV-01524 (W.D. Wash. Oct. 15, 2020).

¹³³ *Id.* at 1–14.

¹³⁴ *Id.* at 10, ¶ 44.

¹³⁵ *Id.* at 18–20.

¹³⁶ *Id.* at 20.

¹³⁷ *See id. passim.*

¹³⁸ Havan Clark et al., *Bivens Basics: An Introductory Guide for Immigration Attorneys*, AM. IMMIGR. COUNCIL (Aug. 21, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/bivens_basics_an_introductory_guide_for_immigration_attorneys.pdf [<https://perma.cc/QXQ5-TQRR>] (discussing the limited scope in which a *Bivens* claim will survive after Supreme Court's holding in *Ziglar v. Abbasi* which limited the ability of a federal court to hear a *Bivens* claim to previously raised contexts).

and family separation policies to begin with, likely revealing that cruelty was, indeed, the point.

D. Forced Un-Accompaniment, Permanent Foster Placements, and Termination of the Parent-Child Relationship

In addition to the children separated from their families, those children who arrive unaccompanied by a parent, guardian, or other adult (for whom special legal protections exist) are suffering the same conditions in violation of established precedent.¹³⁹ Notably, many children who were separated from their parents at the border were later deemed to be “unaccompanied” by virtue of the fact that their parents were now being detained in another facility and/or deported without them.¹⁴⁰ To date, the United States government still does not have a thorough accounting of how many such children have been impacted.

Legally, this particular pattern of classification is problematic because the term “unaccompanied alien child” is defined in the Immigration and Nationality Act as,

[A] child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.¹⁴¹

The classification of children as unaccompanied is largely an administrative function, particularly for recent arrivals, therefore there is no adjudicative body making particular findings with respect to whether parents or legal guardians separated from their children at the border and detained separately are “unavailable” to provide care and physical custody.¹⁴²

As such, families impacted by the wrongful classification of children as “unaccompanied” may have additional due process claims available to them. Also, they may have suffered unique harms because the Unaccompanied Alien Child (UAC) classification may also result in an immigrant child being adopted by another family without the knowledge, consent, or even service on the right-

¹³⁹ See *infra* Section IV.A.

¹⁴⁰ See Amanda Holpuch & Lauren Gambino, *Why Are Families Being Separated at the US Border?*, GUARDIAN (June 18, 2018, 11:26 AM), <https://www.theguardian.com/us-news/2018/jun/18/why-are-families-being-separated-at-the-us-border-explainer> [<https://perma.cc/7HWR-CZ62>].

¹⁴¹ 6 U.S.C. § 279(g)(2).

¹⁴² William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, sec. 235, 122 Stat. 5044, 5077 (codified as amended at 8 U.S.C. § 1232) (“[T]he care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of [the Department of] Health and Human Services [and its sub-agency, ORR].”); see *Jacinto-Castanon de Nolasco v. U.S. Immigr. & Customs Enf’t*, 319 F. Supp. 3d 491, 495 n.2 (D.D.C. 2018); 8 U.S.C. § 1232(b)(1); see also 6 U.S.C. § 279(g)(2) (providing the statutory definition of unaccompanied child in the Immigration and Nationality Act).

ful parent.¹⁴³ The further and permanent separation of parent and child through the family justice system, which has occurred under different factual scenarios in the immigration context, could trigger additional parental rights, including those protected by the First Amendment right to familial association.¹⁴⁴

At least one court has held that a right to due process exists when children are unconstitutionally separated from their mother, even when the government asserts that she is “unavailable to provide care and physical custody” to her children while lawfully detained.¹⁴⁵ In a strongly worded footnote, the United States District Court for the District of Columbia specifically rejected the government’s disingenuous argument that the children were properly labeled as “unaccompanied” when it was the government that separated the children from their parents in the first place.¹⁴⁶ Because this is a common argument raised in the government’s pleadings in these cases, judges have a real opportunity to dismantle one of the pillars of legal distortion and fiction that the government relies on to justify its cruelty.

III. PSYCHOLOGICAL HARM AND THE STATE-CREATED DANGER DOCTRINE

Less than a week after the decision in *Ms. L.* in favor of parents separated from their children, the Yale Law Clinics and Connecticut Legal Services filed a similar lawsuit on behalf of the only two children separated from their parents at the border who were subsequently relocated to Connecticut.¹⁴⁷ In *J.S.R. v. Sessions*, the Petitioners’ primary injunctive claim sought immediate release of both children and parents from immigration detention to facilitate family reunification, or in the alternative, to release the children to a suitable sponsor until they could be reunited.¹⁴⁸ Like other family separation cases, the complaint asserted violations of procedural and substantive due process, equal protection,

¹⁴³ See Kathryn Joyce, *The Threat of International Adoption for Migrant Children Separated from Their Families*, INTERCEPT (July 1, 2018, 6:37 AM), <https://theintercept.com/2018/07/01/separated-children-adoption-immigration> [https://perma.cc/2YEG-KGQV].

¹⁴⁴ See generally Sarah Rogerson, *Lack of Detained Parents’ Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship*, 47 FAM. L.Q. 141 (2013); Benjamin R. Picker & Johnathan C. Dunsmoor, *Social Services and Constitutional Rights, a Balancing Act*, AM. BAR ASS’N (Feb. 11, 2013), <https://www.americanbar.org/groups/litigation/committees/civil-rights/articles/2013/social-services-and-constitutional-rights-a-balancing-act> [https://perma.cc/2QA9-SW9K] (“The First Amendment also provides a possible cause of action. Courts have recognized that the First Amendment protects the fundamental right to intimate association, which includes the familial association between parents and children.”).

¹⁴⁵ *Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 505 (granting plaintiffs’ motion for preliminary injunction to reunite Petitioner with her children on the basis of the right to family integrity).

¹⁴⁶ *Id.* at 495 n.2 (“[Petitioner’s] children, however, are not true unaccompanied minors within the meaning of the statute; they were rendered unaccompanied by the unilateral and likely unconstitutional actions of defendants.”).

¹⁴⁷ *J.S.R. v. Sessions*, 330 F. Supp. 3d 731, 733 (D. Conn. 2018).

¹⁴⁸ *Id.*

and other claims.¹⁴⁹ But importantly, it advanced a relatively new theory: violations of Section 504 of the Rehabilitation Act, which protects individuals who suffer from a disability.¹⁵⁰ Arguing that at least one petitioner child had suffered Post-Traumatic Stress Disorder (“PTSD”) as a result of being forcibly separated from his parents, the claim rested on the child’s protected status as disabled.¹⁵¹

In alleging irreparable harm, the Petitioners submitted the expert testimony regarding the specific psychological harm suffered by them as a result of the separation.¹⁵² In addition to the harm caused by the separation itself, the complaint revealed that one of the subject children was kept in a cage with other young children for four days at the Port Isabel Service Detention Center before being transferred.¹⁵³ Expert testimony submitted in the case concluded that, “there likely will be both short-term and long-term physical and mental health consequences for the children” including higher risk for “mental health consequences, including higher rates of depression, anxiety, symptoms of PTSD, substance abuse disorders” and “a higher risk of physical conditions, such as cardio-vascular disease, diabetes, and even cancer.”¹⁵⁴

In his ruling, the Judge reinforced the recognition of the right to family integrity as well as the legal conclusion in *Ms. L.* that the separation of parents and children at the border was “unconstitutional.”¹⁵⁵ However, due to the Petitioners eligibility as class members under the *Ms. L.* case, the Petitioner’s motion was denied with regard to the immediate reunification of the children with their parents.¹⁵⁶ Due to the evidence of harm submitted via expert testimony however, the court took the extra step of ordering that the parties confer regarding the appropriate relief to address the children’s PTSD during separation and post reunification.¹⁵⁷

¹⁴⁹ Complaint for Declaratory and Injunctive Relief & Petition for Writ of Habeas Corpus at 13–16, *J.S.R. v. Sessions*, 330 F. Supp. 3d 731 (D. Conn. 2018) (No. 18-CV-01106).

¹⁵⁰ See 29 U.S.C. § 701(a)(3) (stating that individuals with disabilities should have increased opportunities for employment, enjoyment of life, and inclusion).

¹⁵¹ Complaint for Declaratory and Injunctive Relief & Petition for Writ of Habeas Corpus, *supra* note 149, at 13–16.

¹⁵² *J.S.R.*, 330 F. Supp. 3d at 733–35.

¹⁵³ Complaint for Declaratory and Injunctive Relief & Petition for Writ of Habeas Corpus, *supra* note 149, at 11. The means of separation were abrupt and shocking. One of the subject children, who was fourteen years old, left her mother to take a shower at the Texas detention facility and when she returned, her mother was gone. The child was then taken to Connecticut while her mother remained detained in Texas. *J.S.R.*, 330 F. Supp. 3d at 735.

¹⁵⁴ *J.S.R.*, 330 F. Supp. 3d at 735.

¹⁵⁵ *Id.* at 741.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 745. The Court declined to order immediate reunification due to the fact that the Petitioners qualified as class members and the relief of reunification “should be obtained in and through that proceeding.” *Id.* at 733; see also *District Court Orders Parties to Confer Regarding Appropriate Relief to Address PTSD in Children Separated from Their Parents at the Border*, 95 INTERPRETER RELEASES, Art. 5 (July 23, 2018).

This is important for a number of reasons. First, the court found the expert testimony regarding the psychological harm of family separation to be persuasive enough to warrant specific relief.¹⁵⁸ Second, the court distinguished the specific claim of psychological harm from the issue of family reunification (precluded by *Ms. L.*), which allowed the court to then order the government to provide the immediate and specific relief of mental health services.¹⁵⁹ Finally, the court's ruling made an explicit connection between the unconstitutional federal policies and the harm suffered.¹⁶⁰

Notably, the government released the parents and children from custody *sua sponte* and reunited the families in less than one business day, well beyond the specific mental health-related relief ordered.¹⁶¹ Because the case was subsequently settled, the court did not reach the substance of the due process claims. However, another case filed on behalf of other families impacted by family separation in California just ten days after *J.S.R.* has led to a preliminary ruling that has the potential to dramatically alter the landscape of claims by immigrants harmed in the custody of immigration authorities.¹⁶²

A. *State-Created Danger and Families in Detention: J.P. v. Sessions*

In November 2019, Judge John A. Kronstadt of the United States District Court, Central District of California, denied the government's motion to dismiss a claim filed on behalf of a class of parents and children separated at the border seeking declaratory and injunctive relief "in the form of mental health screenings and trauma-informed mental health treatment . . ."¹⁶³ The government's motion was based on a defense of sovereign immunity.¹⁶⁴ The Petitioner's claims are rooted in equal protection and due process constitutional claims.¹⁶⁵ In denying the government sovereign immunity, Judge Kronstadt invoked the historically immunity-preserving doctrine of "state-created danger," opening a sliver of promise for a muted theory in light of the unique facts of family separation and detention abuses.¹⁶⁶

The state-created danger theory of recoverability is an exception to sovereign immunity that imposes on government, "a constitutional duty to protect a

¹⁵⁸ *J.S.R.*, 330 F. Supp. 3d at 743.

¹⁵⁹ *Id.* at 743–44.

¹⁶⁰ *Id.* at 744. The government's main response to the Constitutional claims raised by the families was that they were all moot on account of *Ms. L.* class membership. *Id.* at 739–40.

¹⁶¹ See Notice of Compliance at 2, *J.S.R.*, 330 F. Supp. 3d 731 (No. 18-CV-01106). The Court ordered on July 13, 2018, that the families be reunited by July 26, 2018, but the government asserted in a Notice of Compliance filed with the Court that the families had been reunited on July 16, 2018. *Id.* at 1–2.

¹⁶² *J.P. v. Sessions*, No. 18-CV-06081, 2019 WL 6723686 (C.D. Cal. Nov. 5, 2019), *sub nom.* *J.P. v. Barr*, No. 18-CV-06081, 2019 WL 6723686 (C.D. Cal. Nov. 5, 2019).

¹⁶³ *Id.* at *1–2.

¹⁶⁴ *Id.* at *27.

¹⁶⁵ *Id.* at *1.

¹⁶⁶ *Id.* at *36.

person against injuries inflicted by a third-party when [the government] affirmatively places the person in a position of danger the person would not otherwise have faced.”¹⁶⁷ Referred to colloquially as the “snake pit” theory, states have widely varied in its application, leading to much confusion.¹⁶⁸ The doctrine’s origins are rooted in several cases involving the deaths of children due to government inaction in which the Supreme Court “held that the government has no duty to protect people from privately inflicted harms.”¹⁶⁹ With few exceptions, the government almost always wins and the victims do not recover:

There is no series of cases that are more consistently depressing than the state-created danger decisions. The litigation typically arises because of a terrible tragedy. A suit is brought against the government and its officials on the grounds that if they had intervened they could have stopped or prevented the tragedy. Yet, the government almost always prevails.¹⁷⁰

But Judge Kronstadt’s ruling holds the potential to dramatically weaken the sovereign immunity defenses that the government is asserting in family separation cases nationwide, and might possibly have an even larger impact depending on whether the case proceeds to trial. Constitutional law expert Professor Erwin Chemerinsky, who has written definitive scholarship on the issue of state-created danger,¹⁷¹ marked the importance of Judge Kronstadt’s opinion denying the government’s motion to dismiss:

This is truly groundbreaking The court is recognizing that when a government creates a danger that inflicts trauma, the government is responsible for providing a solution. It is not something I have seen a court do before.¹⁷²

Perhaps not surprisingly, the government appealed this order to the Ninth Circuit Court of Appeals, which they denied.¹⁷³ By joint stipulation, the case is

¹⁶⁷ *Kamara v. Att’y Gen. of U.S.*, 420 F.3d 202, 216 (3d Cir. 2005); see *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996) (outlining the four elements of state-created danger:

“(1) [T]he harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party’s crime to occur.” (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995)).

¹⁶⁸ Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1211 (2005) (“Unless, and until, the Supreme Court makes its pronouncement or the other circuits shake down to a remarkable degree of uniformity, each new case will face the same barrier: We do not say whether the doctrine exists, and even if it does, our not saying makes it not clearly established law.”).

¹⁶⁹ Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 *TOURO L. R.* 1 (2007). Notably, one of the two cases establishing this doctrine is the *Lenahan* case discussed *supra* note 88. The other is *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 201 (1989) (finding that the failures of the government’s child welfare system to protect four-year-old Joshua DeShaney from his father’s lethal violence did not violate Joshua’s due process rights).

¹⁷⁰ Chemerinsky, *supra* note 169.

¹⁷¹ See generally *id.* (providing a thorough accounting of the origins and trajectory of the state-created danger doctrine).

¹⁷² Jordan, *supra* note 68 (quoting Erwin Chemerinsky).

currently stayed, including discovery, until January 2021.¹⁷⁴ Unfortunately, on June 15, 2020, the Supreme Court of the United States denied a request for a writ of certiorari in a case that could resolve a growing circuit split on the issue of whether qualified immunity applies to the state-created danger theory.¹⁷⁵ But the Ninth Circuit is in the minority of circuits that places the burden of persuasion in qualified immunity cases on the defendant, meaning that there is still hope that in this particular case the “state-created-danger” claim could proceed to discovery.¹⁷⁶

The government is right to have serious concerns about this case. Although the state-created danger doctrine has been limited in its application to cases where immigration is at the heart of the claim¹⁷⁷ this case is more likely to survive that precedential exclusion for several reasons. First, it is the government’s abuse of authority in implementing zero-tolerance and family separation, rather than a failure to act, that gives rise to the claim. Because the government’s stated goals of the policies were deterrence and punishment and because individuals were separated and detained by the government’s actions under the policy, the claims are factually well-suited to this particular claim.¹⁷⁸ Second, the cases involving family separation are distinguishable because the link between the government as actor and the harm suffered by the immigrant has nothing to do with immigration law, and everything to do with both (a) the government’s intentionally and unnecessarily cruel implementation of it; and (b) the conditions of detention, which are completely and absolutely within the control of the federal government.¹⁷⁹ Recently, Courts have specifically applied the state-created

¹⁷³ Notice of Appeal at 1, *J.P. v. Barr*, No. 18-CV-06081 (C.D. Cal. Nov. 27, 2019); Order from Ninth Circuit Court of Appeals, *J.P. v. Barr*, No. 18-CV-06081 (C.D. Cal. Feb. 21, 2020) (granting Defendants’ motion for voluntary dismissal of Defendants’ appeal).

¹⁷⁴ Stipulation to Stay Case at 3, *J.P. v. Barr*, No. 18-CV-6081 (C.D. Cal. Mar. 24, 2020).

¹⁷⁵ *Anderson v. City of Minneapolis*, 207 L. Ed. 2d 1051 (2020).

¹⁷⁶ *Anderson v. City of Minneapolis, Minnesota*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/anderson-v-city-of-minneapolis-minnesota/> [<https://perma.cc/MM7N-69SV>].

¹⁷⁷ *Rranci v. Att’y Gen. of U.S.*, 540 F.3d 165, 171 (3d Cir. 2008) (“We have stated unequivocally that ‘the state-created danger exception has no place in our immigration jurisprudence.’”).

¹⁷⁸ The government’s intent in creating, implementing and enforcing zero-tolerance and family separation are thoroughly detailed in Cordero et al., *supra* note 5, *passim*, and in, Stumpf, *supra* note 8, *passim*. Also consider Judge Kronstadt’s reasoning that, “‘the point of the state-created danger doctrine is that the affirmative actions of a state official created or exposed an individual to danger *which he or she would not have otherwise faced.*’” *J.P. v. Sessions*, No. 18-CV-06081, 2019 WL 6723686, at *35 (C.D. Cal. Nov. 5, 2019) (quoting *Henry A. v. Willden*, 678 F.3d 991, 1002–03 (9th Cir. 2012)), *sub nom.* *J.P. v. Barr*, No. 18-CV-06081, 2019 WL 6723686 (C.D. Cal. Nov. 5, 2019).

¹⁷⁹ See U.S. IMMIGR. & CUSTOMS ENF’T, DEP’T OF HOMELAND SEC., PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 (rev. 2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf> [<https://perma.cc/NT52-WXVE>].

danger doctrine to immigrant detainees at risk of contracting COVID-19.¹⁸⁰ It may very well be that the COVID-19 litigation outpaces the family separation cases, the former laying even more groundwork for a favorable recovery in the latter.

IV. CLAIMS REGARDING THE ABUSE AND DEATH OF IMMIGRANTS IN DETENTION, INCLUDING PARENTS AND CHILDREN POST-SEPARATION

Immigration violations are largely civil in nature and immigration detention has long been considered civil rather than penal.¹⁸¹ However, many legal scholars have argued that because immigration enforcement has taken on an increasingly penal approach and irregular migration has been criminalized, immigration detention serves as punishment, rather than process, and detained migrants should be entitled to increased constitutional protections, similar to those held by individuals in the criminal justice system.¹⁸² Recent attempts to use these arguments in litigation attempting to establish a right to counsel for detained immigrant children have been unsuccessful.¹⁸³ However, cases brought on behalf of child migrants have fared much better in terms of establishing certain rights concerning the conditions of their detention.

Speaking to the strength of these protections, some have recently argued that a child-centric view of family separation and detention may provide a stronger legal foundation to hold government accountable for harms inflicted in detention, including family separation.¹⁸⁴ Children comprise a large percentage of the potential plaintiffs in these cases. At the height of the 2018 wave of migration at the southern border, approximately 15,000 children were held in detention centers nationwide.¹⁸⁵ The detention population is ever-changing with

¹⁸⁰ See, e.g., *Castillo v. Barr*, 449 F. Supp. 3d 915, 920, 923 (C.D. Cal. 2020) (granting temporary restraining order because “the Government cannot put a civil detainee into a dangerous situation, especially where that dangerous situation was created by the Government.”).

¹⁸¹ See ALINA DAS, *NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS* 27–58 (2020). See generally KELLY LYTLE HERNÁNDEZ, *MIGRA! A HISTORY OF THE U.S. BORDER PATROL* (2010).

¹⁸² Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 613–14 (2012) (detailing how immigration enforcement has been criminalized over time); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014) (linking the overcriminalization of immigration to the increasingly penal nature of immigration detention); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 9–11 (2019) (detailing the history of immigration prison and its penal nature).

¹⁸³ See *J.E. F.M. v. Lynch*, 837 F.3d 1026, 1038 (9th Cir. 2016) (holding that the court lacked jurisdiction over the question of whether indigent immigrant children have a right to government-appointed counsel, not the substantive rights implicated).

¹⁸⁴ See Jonathan Todres & Daniela Villamizar Fink, *The Trauma of Trump’s Family Separation and Child Detention Actions: A Children’s Rights Perspective*, 95 WASH. L. REV. 377, 380 (2020) (arguing that the child’s rights framework carries the “force of law”); see also Cordero et al., *supra* note 5, at 485–91.

¹⁸⁵ See John Burnett, *Tent City Housing Migrant Children to Close as Kids Are Released to Sponsors*, NPR (Jan. 4, 2019, 8:12 PM), <https://www.npr.org/2019/01/04/682437566> [https://

some established facilities remaining, temporary shelters erected and then dismantled under pressure, and contentious debates holding up or pushing forward proposals between county officials and the federal government to house detainees.¹⁸⁶ With few outliers and to varying degrees, the maltreatment of detainees is the common thread.¹⁸⁷ While holding families and children in miserable and inhumane conditions in violation of existing detention standards, DHS continues to abuse and neglect children in their custody and several have died, allegedly as a result of the government's abuse and neglect.¹⁸⁸ In September 2019, the ACLU reported that thirty-one immigrants had "died in immigration custody during the Trump administration."¹⁸⁹

Videos and reports of abuses of detainees by the detention officers and staff at these facilities are emerging.¹⁹⁰ Documents released through initial public records requests reveal verbal, physical, and sexual abuse of children by immigration officials.¹⁹¹ Several children have died in DHS custody, including

/perma.cc/FL9H-PJ4Y].

¹⁸⁶ See *Immigration Detention in the United States by Agency*, AM. IMMIGR. COUNCIL (Jan. 2, 2020), <https://www.americanimmigrationcouncil.org/research/immigration-detention-unit-ed-states-agency> [https://perma.cc/899S-SNJ5].

¹⁸⁷ See *id.* An internal report in the Department of Homeland Security from March 2019, details seventeen complaints from detention facilities in Arizona, Texas, New Jersey, Georgia, Louisiana, and Washington, including allegations from lack of psychiatric monitoring leading to mental health deterioration to serious medication errors and forcible medication as a means of behavior control, to inadequate care leading to death. Memorandum from Cameron P. Quinn, Officer for C.R. & C.L., U.S. Dep't of Homeland Sec., to Ronald Vitiello, Deputy Dir. & Senior Off., U.S. Immigr. & Customs Enf't (Mar. 20, 2019), <https://www.documentcloud.org/documents/6575024> [https://perma.cc/A3ZP-WJF2].

¹⁸⁸ See Executive Summary, in CASHING IN ON CRUELTY, *supra* note 34, at 2.

¹⁸⁹ *Id.* at 1.

¹⁹⁰ See, e.g., Angelina Chapin, *Drinking Toilet Water, Widespread Abuse: Report Details 'Torture' for Child Detainees*, HUFFPOST (July 18, 2018), https://www.huffpost.com/entry/migrant-children-detail-experiences-border-patrol-stations-detention-centers_n_5b4d13ffe4b0de86f485ade8 [https://perma.cc/JB8H-Z23G]; Blake Ellis et al., *Handcuffs, Assaults, and Drugs Called 'Vitamins': Children Allege Grave Abuse at Migrant Detention Facilities*, CNN (June 21, 2018), <https://www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html> [https://perma.cc/2L3J-9ZBU]; Matthew Haag, *Two Workers at Arizona Migrant Children Centers Are Charged With Sexual Abuse*, N.Y. TIMES (Aug. 3, 2018), <https://www.nytimes.com/2018/08/03/us/sexual-abuse-arizona-migrant-children.html> [https://perma.cc/UQ7E-7NWJ]; Patricia Hurtado, *Migrant Children Describe Abuse, Hunger in U.S. Detention Facilities*, BLOOMBERG (July 24, 2018, 1:00 AM), <https://www.bloomberg.com/news/articles/2018-07-24/migrant-children-detail-rough-reality-as-judge-weighs-monitoring> [https://perma.cc/R9CZ-FFG6]; Mary Jo Pitzl, *Videos: Migrant Children Dragged, Pushed at Southwest Key Shelter*, AZCENTRAL (Dec. 28, 2018 10:43 PM), <https://www.azcentral.com/story/news/politics/immigration/2018/12/28/migrant-kids-dragged-shoved-video-footage-arizona-shelter/2436296002/> [https://perma.cc/J3HP-9CRT].

¹⁹¹ See sources cited *supra* note 190; see also Press Release, U.S. Att'y's Off., Dist. of Ariz., Youth Care Worker Convicted of Sexually Abusing Unaccompanied Minors in Southwest Key Facility (Sept. 10, 2018), <https://www.justice.gov/usao-az/pr/youth-care-worker-convict>

one child who died in 2018 on Christmas Day and another who died as a result of complications from the flu in December 2019.¹⁹² This led the Chairman of the House of Representatives Homeland Security Committee, Bennie Thompson, to call former DHS Secretary Kirstjen Nielsen before Congress to demand answers to critical questions around the family separation crisis and the treatment of children in DHS custody—in both publicly and privately run facilities.¹⁹³

Meanwhile, the Trump administration has denied any responsibility for the deaths of children in their custody, deflecting attention instead to the danger of unlawful migration and blaming the parents who migrated with their children.¹⁹⁴ Beyond deflection, the government appears to have deprioritized any reports of such deaths to DHS leadership.¹⁹⁵ During a Congressional hearing in early December 2018, nearly a year into the implementation of the family separation policy, Secretary Nielsen stated that she did not know the numbers of children who had died in DHS custody.¹⁹⁶ Although the Trump administration has claimed to scale back these policies, the government's position has not substantially changed: children and their parents assume the risk of death, even when lawfully presenting themselves at the border to claim asylum, and the government disclaims liability because the ends justify the means “to secure the border.”¹⁹⁷ This position has drawn support from an anti-immigrant political base,¹⁹⁸ but it is not legally defensible.¹⁹⁹

ed-sexually-abusing-unaccompanied-minors-southwest-key-facility [https://perma.cc/RZ9A-5LK2].

¹⁹² See *supra* note 6.

¹⁹³ See Letter from Rep. Bennie G. Thompson, Chairman, U.S. House of Representatives Comm. on Homeland Sec., to Kirstjen Nielsen, Sec’y, U.S. Dep’t of Homeland Sec. (Jan. 4, 2019), <https://homeland.house.gov/imo/media/doc/nielsen19.pdf> [https://perma.cc/FA86-39QU].

¹⁹⁴ See Caitlin Oprysko & Ted Hesson, *Trump Administration Rejects Responsibility for Death of 7-Year-Old Girl in Border Patrol Custody*, POLITICO (Dec. 14, 2018, 3:22 PM), <https://www.politico.com/story/2018/12/14/nielsen-migrant-girl-death-border-patrol-1063729> [https://perma.cc/7QY2-BCJ5].

¹⁹⁵ See Cheyenne Haslett, *Pressed by Democrats, Homeland Security Chief Can’t Give Number of Migrant Deaths in Government Custody*, ABC NEWS (Dec. 21, 2018, 4:42 PM), <https://abcnews.go.com/Politics/pressed-democrats-nielsen-give-number-migrant-deaths-government/story?id=59906664> [https://perma.cc/66XE-NACT] (“Homeland Security Secretary Kirstjen Nielsen said Thursday she could not provide a specific number of how many other people might have died in U.S. government custody.”).

¹⁹⁶ See *Homeland Security Department Oversight* (C-SPAN television broadcast Dec. 20, 2018), <https://www.c-span.org/video/?456086-1> [https://perma.cc/AT8X-WZTH].

¹⁹⁷ See *supra* note 195; see also 8 U.S.C. § 1158(a)(1); Donald J. Trump, President, U.S., Address to the Nation on the Crisis at the Border (Jan. 8, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-address-nation-crisis-border> [https://perma.cc/4LNP-QALE]; Press Release, Kirstjen M. Nielsen, Sec’y of Dep’t of Homeland Sec., Statement on Passing of Eight Year Old Guatemalan Child (Dec. 26, 2018), <https://www.dhs.gov/news/2018/12/26/secretary-kirstjen-m-nielsen-statement-passing-eight-year-old-guatemalan-child> [https://perma.cc/9SS8-B6CC]; Press Release, U.S. Customs &

A. *Flores Revisited: Forced Medication and Blocked Access to Counsel*

Several organizations have filed legal challenges to many aspects of the manner and conditions under which DHS is detaining children, in particular.²⁰⁰ As the government shut down over Trump's demand for a border wall dragged on, a D.C. federal court judge cited the "safety of human life" as the reason to continue a challenge to holding teenage migrants in adult facilities in spite of a "lapse in federal funding during the government shutdown."²⁰¹ This particular line of litigation rests on well-settled precedent that took decades to build and may well be litigated for decades to come: the *Flores* settlement and its progeny.²⁰² This line of cases set minimum standards for the detention of children,²⁰³ including conditions and length of detention.²⁰⁴

Border Prot., Statement on Death in Custody: 7-Year-Old Guatemalan in El Paso, TX (Dec. 14, 2018), <https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-death-custody-7-year-old-guatemalan-el-paso-tx> [<https://perma.cc/EKL8-4J4Q>]; Jeff Sessions, Att'y Gen., U.S. Dep't of Just., Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/6K5Q-M3CC>].

¹⁹⁸ See, e.g., Luis Sanchez, *Poll: Majority of Republicans Back Family Separation Policy*, HILL (June 18, 2018, 1:30 PM), <https://thehill.com/homenews/administration/392802-poll-majority-of-republicans-back-family-separation-policy> [<https://perma.cc/A5XR-6B8R>]; *Voters Blame Parents, Not Feds, For Border Children Crisis*, RASMUSSEN REPS. (June 21, 2018), http://www.rasmussenreports.com/public_content/politics/current_events/immigration/june_2018/voters_blame_parents_not_feds_for_border_children_crisis [<https://perma.cc/9HFQ-79ZG>].

¹⁹⁹ See *infra* Section IV.A; see also Cordero et al., *supra* note 5, at 450–51.

²⁰⁰ See *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1041 (C.D. Cal. 2017), *appeal dismissed sub nom.*, *Flores v. Barr*, 934 F.3d 910 (9th Cir. 2019); Memorandum in Support of Motion to Enforce Class Action Settlement at 1, *Flores*, 394 F. Supp.3d. 1041 (No. 85-CV-04544); see also *supra* Part III.

²⁰¹ Suzanne Monyak, *Feds Can't Pause Suit over Detained Teens During Shutdown*, LAW360 (Jan. 2, 2019, 2:45 PM), <https://www.law360.com/classaction/articles/1114321> [<https://perma.cc/PA58-4J38>].

²⁰² *Flores*, 394 F. Supp. 3d at 1072–73.

²⁰³ See *Flores v. Lynch*, 828 F.3d 898, 902–04 (9th Cir. 2016) (explaining what protections for minors in detention the *Flores* Settlement Agreement provided and the developments since then).

²⁰⁴ See *Flores v. Sessions*, 862 F.3d 863, 870–71 (9th Cir. 2017) (holding that the *Flores* Agreement is still in effect in conjunction with Trafficking Victims Protection Reauthorization Act, which sets standards on the duration children may be detained for before being transferred), *aff'g sub nom.*, *Flores v. Lynch*, 862 F.3d 863 (9th Cir. 2016); *Flores v. Barr*, 407 F. Supp. 3d 909, 918, 928–30 (C.D. Cal. 2019) (enforcing the *Flores* Agreement in favor of the Plaintiffs and rejecting the DHS's attempt to terminate the agreement and/or make changes that would allow them to hold minors in custody for indefinite periods of time); *Tex. Dep't of Fam. & Protective Serv. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433, at *7 (Tex. App. Nov. 28, 2018) (stating that *Flores* Agreement sets the requirements for facilities detaining minors, and a state rule allowing a longer duration of detention is superseded by ICE policy, i.e. *Flores* Agreement); *J.S.G. ex rel. Hernandez v. Stirrup*, No. SAG-20-1026, 2020 WL 1985041, at *5, *8 (D. Md. Apr. 26, 2020) (holding

The latest round of litigation to hold the government accountable for a lack of compliance under the agreement involves three main claims: (1) that the government administered psychotropic drugs to children separated from their parents without first obtaining their parents' consent; (2) that separated children were held in overly restrictive environments, their detention prolonged due to the government claiming that their detained parents were unfit without due process of law; and (3) that the government blocked access to the children's lawyers who were attempting to address the conditions of their confinement, all in violation of the *Flores* consent decree.²⁰⁵ These claims both complement and supplement other the other family separation cases because they are specifically grounded in precedent.

Because of this grounding, the government's attempt to undermine the claims and the consent decree itself have failed thus far. What remains to be seen is whether and how the protections of the *Flores* consent decree will be strengthened in the wake of the government's actions in implementing the family separation policy, particularly with regard to the types of relief that detained children can obtain. Further, some of the fact-finding and precedent set in this new round of cases may provide additional support for other cases involving the conditions of detention that fall outside of *Flores's* protection. Notably, the *Flores* litigation recently resulted in a victory for claims seeking injunctive relief citing the deterioration of conditions in detention due to the COVID-19 pandemic and the government's failure to adequately protect detainees.²⁰⁶ It bears repeating that the pandemic litigation may be quietly improving the chances of securing remedies for both family separation and non-COVID related detention abuses.

that the *Flores* Agreement applies in Maryland regardless of where it was executed and the Petitioner minor would most likely prevail on showing a violation of the *Flores* Agreement).²⁰⁵ See Notice of Motion and Motion to Enforce Settlement, *Flores v. Sessions*, 394 F. Supp. 3d 1041 (C.D. Cal. 2017) (No. 85-CV-04544), *appeal dismissed sub nom.*, *Flores v. Barr*, 934 F.3d 910 (9th Cir. 2019); see also Memorandum in Support of Motion to Enforce Class Action Settlement at 12–17, *Flores*, 394 F. Supp. 3d 1041 (No. 85-CV-04544) (memorandum in support of motion to enforce the *Flores* settlement, which details the administration of psychotropic drugs to migrant children in the Shiloh facility resulting in a Court order requiring ORR to obtain consent from the child's legal guardian or a court order before administering psychotropic drugs); Order Re Plaintiffs' Motion to Enforce Class Action Settlement at 1, 23–24, 29–30, *Flores*, 394 F. Supp. 3d 1041 (No. 85-CV-04544) (in chambers); First Amended Complaint for Injunctive Relief, Declaratory Relief, and Nominal Damages at 1–3, *Lucas R. v. Azar*, No. 18-CV-05741, 2018 WL 10483438 (C.D. Cal. Sep. 7, 2018), 2018 WL 8803996, at *2 (alleging that ORR violated the *Flores* agreement by confining children in overly restrictive environments, prolonging their detention on the grounds that their parents or other available custodians are unfit without an opportunity to be heard, administration by the government of psychotropic drugs without parental consent, and blocking lawyers from representing detained children with respect to the conditions of their confinement).

²⁰⁶ Miriam Jordan, *U.S. Must Release Children from Family Detention Centers, Judge Rules*, N.Y. TIMES (June 26, 2020), <https://nyti.ms/2VmGstf> [<https://perma.cc/WKM3-6LVE>].

B. *Victory in the Tucson Sector*

On February 19, 2020, a landmark ruling in Arizona enjoined the federal government from holding detainees for longer than 48 hours, unless

CBP can provide conditions of confinement that meet detainees' basic human needs for sleeping in a bed with a blanket, a shower, food that meets acceptable dietary standards, potable water, and medical assessment performed by a medical professional.²⁰⁷

The case, filed in June 2015, challenged the detention conditions at several facilities collectively located in what's known as the "Tucson Sector."²⁰⁸ The claims centered on the Administrative Procedure Act and the Declaratory Judgement Act.²⁰⁹ Widely celebrated as a major victory in advocating for more favorable detention conditions, the case explicitly characterizes immigration detention in the Tucson Sector as "punitive" even while maintaining that immigration detention is civil in nature.²¹⁰ Although this case may ultimately result in the functional equivalent of a *Flores*-like judicially monitored consent decree, as the litigation continues (an appeal of the decision to the Ninth Circuit is pending),²¹¹ it may articulate the specific conditions for basic needs to be met in immigration detention, to which the government may be held accountable in other facilities. Additionally, this opinion formally recognizes the punitive nature of immigration detention, which may result in future enhanced Constitutional protections for immigrants seeking to challenge their treatment in these facilities.

C. *Sexual Assault of Immigrant Detainees*

Cases involving the sexual assault of detainees in immigration custody, including children, have risen dramatically.²¹² "The Due Process Clause of the Fifth Amendment provides immigration detainees with the right to be free from physical attack, including sexual assault."²¹³ A recent case with precedent-

²⁰⁷ *Unknown Parties v. Nielsen*, No. 15-CV-00250, 2020 WL 813774, at *1 (D. Ariz. Feb. 19, 2020), *appeal filed*, *Doe v. Wolf*, No. 20-15850 (9th Cir. May 4, 2020).

²⁰⁸ *Id.*

²⁰⁹ Complaint for Declaratory and Injunctive Relief at 5, 43–45, 51–52, *Neilson*, 2020 WL 813774 (No. 15-CV-00250).

²¹⁰ *Id.* at 34–35, 40.

²¹¹ Order, *Doe v. Wolf*, No. 20-15850 (9th Cir. Nov. 5, 2020) (scheduling briefing dates as far out as February 2021).

²¹² Alice Speri, *Detained, Then Violated*, INTERCEPT (Apr. 11, 2018, 9:11 AM) <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs> [<https://perma.cc/H2FQ-8993>].

²¹³ *E.D. v. Sharkey*, No. 16-2750, 2017 WL 2126322, at *1 (E.D. Pa. May 16, 2017) (Plaintiff alleged sexual assault by a staff member in the Berks Immigration Detention Facility in Pennsylvania); *see Adekoya v. Chertoff*, 431 F. App'x. 85, 88 (3d Cir. 2011) (per curiam) (holding that immigration detainees are entitled to the same constitutional protections as pre-trial detainees).

setting potential involves a female detainee alleging that she was sexually assaulted in custody by a staff member in an immigration detention facility in Berks, Pennsylvania.²¹⁴ The Petitioner brought several claims against individual employees of the county government running the facility and various federal immigration officials who also worked at the facility.²¹⁵ Her claims included relief for the assault itself, failure of employees to protect her against the sexual assault, failure of supervisors to implement and establish adequate policies against sexual assault in the facility, and a retaliation claim against an employee who she claimed denied Plaintiff's parole as a result of her reporting the assault.²¹⁶

Unfortunately, the statutory civil rights claims of failure to protect, failure to implement policies, and retaliation claims against some of the defendants did not survive a defense of qualified immunity, largely because the Third Circuit determined that they were insufficiently plead.²¹⁷ However, a number of the *Bivens* claims against (ironically) six government officials, including the abusive agent and his supervisors, survived summary judgement.²¹⁸ In remanding the case for trial, the Circuit Court denied an interlocutory appeal by the defendants, agreeing with the District Court that:

[T]here is enough evidence to support an inference that the Defendants knew of the risk facing E.D., and that their failure to take additional steps to protect her – acting in their capacity as either a co-worker or supervisor – ‘could be viewed by a factfinder as the sort of deliberate indifference’ to a detainee’s safety that the Constitution forbids.²¹⁹

With this ruling, the Third Circuit and the District Court chip away at the effectiveness of the qualified immunity defense, particularly regarding both the perpetrators of sexual assault and their enablers in an immigration detention setting. In January 2020, the case was ultimately settled, however the precedent remains: detainees have a clearly established right “not to be sexually assaulted by a state employee while in confinement”²²⁰ Citing *Sharkey* precedent, at least one other court has allowed for claims to proceed against an officer who assaulted a United States citizen detained pre-trial, as well as failure to protect

²¹⁴ *E.D.*, 2017 WL 2126322, at *1.

²¹⁵ *Id.*

²¹⁶ *Id.* at *1, *4, *9.

²¹⁷ *See E.D. v. Sharkey*, 928 F.3d 299, 306 (3d Cir. 2019).

²¹⁸ The defendants filed an interlocutory appeal with the Third Circuit Court of Appeals, which affirmed the District Courts decision deny qualified immunity and the denial of defendant's summary judgement motion, remanding to the District Court for trial. *See id.* at 303.

²¹⁹ *Id.* at 309 (quoting *Hamilton v. Leavy*, 117 F.3d 742, 749 (3d Cir. 1997)).

²²⁰ *E.D.*, 928 F.3d at 307 (quoting *Beers-Capitol v. Whetzel*, 256 F.3d 120, 143 n.15 (3d Cir. 2001)). The case against Mr. Sharkey was dismissed by order of the court and the remaining individuals were released from the case through a stipulation of dismissal with all parties to pay their own costs. Order, *E.D. v. Sharkey*, No. 16-2750, 2017 WL 2126322 (E.D. Pa. Jan. 24, 2020) (dismissing action with prejudice pursuant to agreement and without costs). The terms of the settlement are not public.

claims to proceed against some of the other officers in question, stating definitively that, “Sexual assault constitutes impermissible punishment, as it cannot and does not serve a legitimate governmental objective.”²²¹ It follows then, that cases alleging sexual assault against children and adults in immigration detention have a much better chance at surviving government immunity defenses than other classes of claims.

D. Additional Claims to Consider

The theories developing in courts now may lay critical foundations to challenge other abuses suffered by immigrants in detention, some who have been impacted by the family separation policy and some who have not. For example, documented abuses against transgender women are on the rise.²²² Pregnant mothers are also experiencing severe abuses, maltreatment, and lack of medical care while in the custody of immigration authorities.²²³ An alarming number of immigrant detainees, including those who are disabled or who identify as LGBTQ are being held in solitary confinement, which is a form of punishment that has been established as particularly cruel.²²⁴ As these reports and others surface, the application of the theories being developed in these groundbreaking cases and the relief afforded by the court system, even if incremental, may ultimately lead to a cascade of recovery for unauthorized immigrants victimized by cruel immigration detention policies.

CONCLUSION

It is hard to imagine that the justice system will ever be able to fully and effectively compensate families and individuals suffering under federal immigration policies specifically designed to inflict pain and suffering, particularly at this early stage of the litigation. However, early indicators show that the uniquely cruel nature of the family separation policy and the increasingly punitive nature of immigration detention, paired with the government’s gross negligence in handling both may provide openings to pierce immunity or avoid it altogether by bringing claims under statutes specifically designed to afford some measure of relief to the victims. Each case builds on the other in an itera-

²²¹ Hailey v. Beard, No. 19-2171, 2019 WL 5592578, at *7 (E.D. Pa. Oct. 29, 2019) (alleging civil rights violations and due process violations under the Fourteenth Amendment).

²²² See N. Jamiyla Chisholm, *ICE Closes the Only Transgender Migrant Detention Unit in the U.S.*, COLORLINES (Jan. 31, 2020, 12:10 PM), <https://www.colorlines.com/articles/ice-closes-only-transgender-migrant-detention-unit-us> [<https://perma.cc/8X8N-3UQ4>].

²²³ See Nora Ellmann, *Immigration Detention Is Dangerous for Women’s Health and Rights*, CTR. FOR AM. PROGRESS (Oct. 21, 2019, 9:04 AM), <https://www.americanprogress.org/issues/women/reports/2019/10/21/475997> [<https://perma.cc/NQ5T-BBFW>].

²²⁴ See Spencer Woodman & Maryam Saleh, *40 Percent of ICE Detainees Held in Solitary Confinement Have a Mental Illness, New Report Finds*, INTERCEPT (Aug. 14, 2019, 5:30 AM), <https://theintercept.com/2019/08/14/ice-solitary-confinement-mental-illness> [<https://perma.cc/LNU7-HSP4>].

tive process with the hope of more permanently and meaningfully expanding the landscape of meaningful recovery for unauthorized immigrant victims against an abusive government.

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