

# THE LAW AGAINST FAMILY SEPARATION

Carrie F. Cordero, Heidi Li Feldman, Chimène I. Keitner\*

## ABSTRACT

This Article offers the first comprehensive assessment of how domestic and international law limits the U.S. government's ability to separate foreign children from the adults accompanying them when they seek to enter the United States. As early as March 6, 2017, then-Secretary of Homeland Security John Kelly told CNN's Wolf Blitzer that he was considering separating families at the border as a deterrent to illegal immigration as part of a "zero tolerance" policy whereby the Trump administration intended the strictest enforcement of immigration law against those migrants coming to the U.S. southern border. Kelly did not say upon what legal basis the administration could lawfully separate families at the border as a component of its immigration policies. Whatever the merits of maximal prosecution of adults unlawfully crossing the border, adopting this policy did not convert family separation into a lawful byproduct of the arrest of an adult. To the contrary, domestic and international law militates strongly against the lawfulness of family separation as a tool for immigration deterrence, yielding liability for the state and for individuals who implement family separation in this setting. Both litigation and Congressional action can and should play a role in addressing the Trump administration's use of family

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\* Carrie F. Cordero is the Robert M. Gates Senior Fellow, Center for a New American Security and Adjunct Professor of Law, Georgetown University Law Center; Heidi Li Feldman is Professor of Law and (by courtesy) Associate Professor of Philosophy, Georgetown University Law Center; Chimène I. Keitner is the Alfred & Hanna Fromm Professor of International & Comparative Law, UC Hastings Law. The authors thank Sam Cutler and Emilie Jones for research assistance and helpful comments, and additional subject matter experts for review and feedback on drafts of this article. The authors also thank Kathleen Ritter for her work on seeing the article through the publication process. This collaboration was made possible by support from the Center for a New American Security, Georgetown University Law Center, UC Hastings Law and The William and Flora Hewlett Foundation.

separation and ensuring that it is halted now and not used again, by Trump or any other U.S. President.

In the Article, we start with a factual chronology of the Trump Administration's family separation policy. We then argue for our positions regarding the illegality of the policy and its implementation. In Part II, we describe the federal government's recognized authority to enforce immigration laws and ensure border security, on the one hand, and the domestic constitutional framework for protecting the basic rights of migrant parents and children, on the other. In Part III we examine the reach of domestic law, including the common law of torts, for dealing with wrongful family separation in the immigration setting. Part IV reviews international law that protects against this harm. In the Conclusion we propose a range of steps that the U.S. Congress could take to repair at least some of the harm caused by the family separation policy, and to ensure that no future administration contemplates similar action.

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## INTRODUCTION

In an interview on March 6, 2017, then-Secretary of Homeland Security John Kelly told CNN's Wolf Blitzer that he was considering separating families at the border as a deterrent to illegal immigration.<sup>1</sup> Multiple administration officials have since stated publicly that the purpose of the separations was to serve as a deterrent.<sup>2</sup> This rationale was repeated even though evidence does not support the idea that such policies have a deterrent effect.<sup>3</sup>

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1. The Situation Room (@CNNSitRoom), TWITTER (Mar. 6, 2017, 2:24 PM), <https://twitter.com/CNNSitRoom/status/838877868453064704> [<https://perma.cc/55GL-8C6T>]. In the interview, Wolf Blitzer asked, "Are you considering a new initiative that would separate children from their parents if they try to enter the United States illegally?" Kelly responded, "I would do almost anything to deter the people from Central America [from] getting on this very, very dangerous network [that facilitates movement through Mexico to the United States]. . . . Yes, I am considering in order to deter . . . exactly that, they will be well cared for as we deal with their parents." (emphasis added).

2. See, e.g., David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, REUTERS (Oct. 13, 2018), <https://www.reuters.com/article/us-usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-idUSKCN1MO00C> [<https://perma.cc/5SHY-UMBB>] (reporting that Trump articulated the deterrence rationale); Beth Van Schaack, *New Proof Surfaces That Family Separation Was About Deterrence and Punishment*, JUST SECURITY (Nov. 27, 2018), <https://www.justsecurity.org/61621/proof-surfaces-family-separation-deterrence-punishment/> [<https://perma.cc/4AMR-9273>] (reporting on government documents that "reveal that the underlying intent" of the family separation policy was "to deter additional immigration and asylum petitions"); Philip Bump, *Here Are the Administration Officials Who Have Said that Family Separation Is Meant as a Deterrent*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/> (on file with the *Columbia Human Rights Law Review*) (noting that multiple officials, including former Attorney General Jeff Sessions and Steven Wagner, Acting Assistant Secretary for Children and Families, Department of Health and Human Services, stated that the policy served as a deterrent); see also Nick Miroff, *Acting Homeland Security Chief Frustrated and Isolated—Even as He Delivers What Trump Wants at the Border*, WASH. POST (Oct. 1, 2019), [https://www.washingtonpost.com/immigration/acting-homeland-security-chief-frustrated-and-isolated-even-as-he-delivers-what-trump-wants-at-the-border/2019/10/01/b62e740c-e3ad-11e9-b403-f738899982d2\\_story](https://www.washingtonpost.com/immigration/acting-homeland-security-chief-frustrated-and-isolated-even-as-he-delivers-what-trump-wants-at-the-border/2019/10/01/b62e740c-e3ad-11e9-b403-f738899982d2_story) (on file with the *Columbia Human Rights Law Review*) (reporting that Acting Secretary of Homeland Security Kevin McAleenan, one of the original architects of the zero tolerance prosecution policy, later determined that the family separations "went too far").

3. See, e.g., Tom K. Wong, *Do Family Separation and Detention Deter Immigration?*, CTR. FOR AM. PROGRESS (July 24, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/> [<https://perma.cc/75HB-KWJU>] (finding that both

Nevertheless, from the very early days of the Trump Administration, the senior official in charge of enforcing immigration laws acknowledged that what later became known as the family separation policy was intended to be a harsh mechanism of enforcement—so harsh, in fact, that the administration apparently believed and hoped it would deter future migration over the southern border. What was left unresolved at the time was upon what legal basis the administration could lawfully separate families at the border—without any assurance of limited duration or promise of reunification—as a component of its immigration and border security policies.

This Article offers the first comprehensive assessment of how domestic and international law limits the U.S. government's ability to separate families when they seek to enter the United States. To be sure, bona fide concerns about children's safety and increased awareness of the problem of human trafficking mean that some children were likely also separated from accompanying adults prior to 2017. To our knowledge, however, the U.S. government's policies and practices beginning in 2018 represent the first time the United States deliberately separated arriving migrant and asylum-seeking families as a tactic for deterring migration. Moreover, it quickly became clear that the government had no plans to reunify families, or even to track which children in the government's custody had originally arrived with their parents or relatives and had been forcibly separated from them. The conditions of confinement of these children—and their accompanying adults—have been well publicized.<sup>4</sup> In response to the

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family separation and family detention “have been shown to be ineffective deterrents”); Adam Cox & Ryan Goodman, *Detention of Migrant Families as “Deterrence”: Ethical Flaws and Empirical Doubts*, JUST SECURITY (June 22, 2018), <https://www.justsecurity.org/58354/detention-migrant-families-deterrence-ethical-flaws-empirical-doubts/> [<https://perma.cc/2LCS-W74L>] (arguing that available evidence not only fails to establish a causal link between U.S. detention policies and border crossings, but also that “there’s not even a correlational relationship”); Karen Musalo & Eunice Lee, *Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 “Surge” of Central American Women and Children at the US-Mexico Border*, 5 J. MIGRATION & HUM. SEC. 137, 139 (2017) (arguing that Obama-era policies aimed at deterrence, including family detention, expedited removal, accelerated proceedings, and raids, were unsuccessful in disincentivizing migration into the United States because the true causes were “push” factors in migrants’ home countries).

4. See, e.g., Grace Segers & Graham Kates, *Watchdog Details Psychological Trauma Among Migrant Children Separated from Families*, CBS NEWS (Sept. 4, 2019), <https://www.cbsnews.com/news/hhs-inspector-general-report-details-psychological-trauma-among-separated-migrant-children/> [<http://perma.cc/84ME->

public outcry over the separation of families, the government announced a policy of potentially indefinite family detention that is not consistent with the long-standing court-supervised agreement<sup>5</sup> specifying time limits on children's detention and basic standards of treatment for immigrant children and families.<sup>6</sup> In September 2019, a judge enjoined that new policy of indefinite family detention.<sup>7</sup> As this

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ZLQSI (providing information on reports issued by the Office of Inspector General and Department of Health and Human Services on the psychological effects of family separation on children); Camilo Montoya-Galvez, *New Pictures Show "Dangerous Overcrowding" at Border Patrol Facilities in Texas*, CBS NEWS (July 2, 2019), <https://www.cbsnews.com/news/dhs-inspector-general-report-reveals-squalid-conditions-at-migrant-detention-centers/> [<https://perma.cc/QQT7-7J3W>] (documenting conditions at detention centers); Lizzie O'Leary, "Children Were Dirty, They Were Scared, and They Were Hungry," *An Immigration Attorney Describes What She Witnessed at the Border*, ATLANTIC (June 25, 2019), <https://www.theatlantic.com/family/archive/2019/06/child-detention-centers-immigration-attorney-interview/592540/> (on file with the *Columbia Human Rights Law Review*) (same).

5. See *Flores v. Sessions*, 862 F.3d 863, 866–67 (9th Cir. 2017). The Flores Settlement Agreement was reached in 1997 (and subsequently modified) as a result of advocacy litigation challenging the duration and conditions of government detention of migrant minors. The settlement over time has provided that children may only be detained for twenty days; after that, the government must release them to family members or other suitable care, such as a licensed facility. The Trump Administration has encouraged Congress to act to relieve the government of the requirements placed on it by the *Flores* settlement. Simultaneously, it has sought court relief from the agreement's requirements. The government argues it should be able to detain families in immigration processing indefinitely pending the adjudication of their immigration proceedings. See SARAH HERMAN PECK & BEN HARRINGTON, CONG. RESEARCH SERV., R45297, THE "FLORES SETTLEMENT" AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER: FREQUENTLY ASKED QUESTIONS (2018), <https://fas.org/sgp/crs/homesecc/R45297.pdf> [<https://perma.cc/L3CD-5L3J>]. In August 2019, (former) Acting Secretary of Homeland Security Kevin McAleenan and Secretary of Health and Human Services Alex Azar announced new proposed regulations in response to the *Flores* settlement that would enable the government to hold children and families for longer than 20 days. See Press Release, U.S. Dep't of Homeland Security, DHS and HHS Announce New Rule to Implement the Flores Settlement Agreement; Final Rule Published to Fulfill Obligations Under Flores Settlement Agreement (Aug. 21, 2019), <https://www.dhs.gov/news/2019/08/21/dhs-and-hhs-announce-new-rule-implement-flores-settlement-agreement> [<https://perma.cc/Y3C7-TCVB>].

6. See Michael D. Shear & Zolan Kanno-Youngs, *Migrant Families Would Face Indefinite Detention Under New Trump Rule*, N.Y. TIMES (Aug. 21, 2019), <https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html> (on file with the *Columbia Human Rights Law Review*).

7. See Miriam Jordan, *Judge Blocks Trump Administration Plan to Detain Migrant Children*, N.Y. TIMES (Sept. 27, 2019), <https://www.nytimes.com/2019/09/>

article went to press, the case is pending before the U.S. Court of Appeals for the Ninth Circuit. A coalition of Attorneys General from nineteen states and the District of Columbia filed an amicus brief urging the Court to uphold the injunction.<sup>8</sup>

Comprehensively assessing the law against family separation is a complex undertaking. The underlying practice—deliberate, harsh, and large-scale family separation as a deterrent to migration or intended lawful immigration—is unparalleled in U.S. history, so it is not necessarily obvious which bodies of law apply, and how. As it turns out, many types of law prohibit this practice, though some could use bolstering by congressional action. The Article, therefore, is a broad survey of applicable areas of law with concrete discussion of how to use them. We look at an expansive range of currently applicable law, consider the viability of different specific legal approaches, and make an initial effort to identify the kind of federal legislation that could address the Trump Administration's family separation policies and practice beyond the important and consequential litigation that has already been brought.

We begin with what happened. Part I of this Article provides a summary of the Trump Administration's implementation of family separation, and early legal challenges to that activity. Our legal analysis begins with Part II, which describes the federal government's authority to enforce immigration laws and ensure border security, on the one hand, and the constitutional framework for protecting the basic rights of migrant parents and children, on the other.<sup>9</sup> Part III addresses the reach of domestic civil law for dealing

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27/us/migrant-children-flores-court.html (on file with the *Columbia Human Rights Law Review*).

8. For more information on the status of the *Flores* injunction, see *Vermont Joins Fight to Maintain Rights of Children in Detention*, VT. BUS. MAG. (Jan. 29, 2020), <https://vermontbiz.com/news/2020/january/29/vermont-joins-fight-maintain-rights-children-immigration-detention> [https://perma.cc/F4KK-Q3WN].

9. In this Article, we use the term “migrant” to describe individuals who enter the United States by crossing an international border. This category includes asylum-seekers who are entitled to additional protections under both domestic and international law, as described below. It does not include refugees whose applications are processed overseas, and who are subsequently admitted to, and resettled in, the United States. It is not possible to determine whether a given migrant who has crossed the border is an asylum-seeker without an individualized assessment, nor is it possible to determine without an individualized assessment whether an asylum-seeker is, in fact, legally entitled to receive asylum. The question of whether other categories of migrants, such as those fleeing natural disasters or the collapse of the rule of law, should also be accorded special legal protection lies outside the scope of this Article. Other

with wrongful family separation in the context of immigration enforcement. Part IV assesses the international legal framework governing the United States' treatment of migrant children and families. Our analysis shows that a policy or practice of separating families at the border as an immigration deterrent is an impermissible infringement on due process rights, is open to challenge under several theories of civil liability, and is inconsistent with principles of international law. While the federal government unquestionably is authorized to regulate immigration and enforce border security, that enforcement must be exercised consistent with fundamental constitutional principles of due process and family integrity, as well as an over-arching anti-dehumanization principle. This Article explains that the U.S. government may not indiscriminately remove children from their parents, or parents from their children, for a potentially indeterminate period of time as a deliberate deterrent to immigration. The Article concludes that violations of these basic constitutional rights can and should be afforded remedies in the form of civil relief, and that Congress should take legislative action to remedy past harm and to prevent future abuses.

#### I. THE CHRONOLOGY OF THE TRUMP ADMINISTRATION'S POLICY TO SEPARATE FAMILIES AT THE SOUTHERN BORDER TO DETER MIGRATION

The family separation policy was not an aberration; it was the culmination of processes set in motion during the 2016 campaign and soon after the new administration took office. A central feature of the 2016 Trump presidential campaign was its emphasis on limiting immigration and stopping the flow of Central American migrants into the United States via the southern border with Mexico.<sup>10</sup> Within days of assuming office, President Trump took executive action to limit immigration. On January 25, 2017, he signed Executive Order 13767, which, among other things, directed the immediate commencement of

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immigration-related measures, such as the "Remain in Mexico" program, the attempt to allow "expedited removal" nationwide, and the drastic reduction in refugee admissions also lie beyond this Article's scope.

10. See Nick Corasaniti, *A Look at Trump's Immigration Plan, Then and Now*, N.Y. TIMES (Aug. 31, 2016), <https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html> (on file with the *Columbia Human Rights Law Review*); Don Gonyea, *Trump's Plan to 'Make Mexico Pay' for the Wall*, NPR (April 5, 2016), <https://www.npr.org/2016/04/05/473109475/trumps-plan-to-make-mexico-pay-for-the-wall> [<https://perma.cc/7QFN-S2EU>].

(i) constructing a wall on the southern border, (ii) expediting immigration processing, and (iii) taking other steps to increase border security and immigration law enforcement.<sup>11</sup> That same day, the president issued Executive Order 13768, which, among other things, directed full enforcement of immigration laws and the withholding of federal funds from so-called sanctuary cities.<sup>12</sup> To implement the president's orders, on February 20, 2017, the Secretary of Homeland Security sent an implementation memorandum to senior Department of Homeland Security (DHS) officials, including the Acting General Counsel and the acting officials in charge of U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS). The memo provided that, among other things, the "Department would no longer exempt classes or categories of removable aliens from potential enforcement," would hire thousands more agents and officers, and would no longer afford privacy law protections to those who were not either U.S. citizens or lawful residents.<sup>13</sup>

Over the course of the next year, the Trump Administration struggled to implement its intended immigration and border security policies, in part due to the haste with which the policies were executed. The policies were not subject to typical interagency coordination among the various parts of the Executive Branch, including relevant stakeholders such as the Department of Health and Human Services (HHS) and the U.S. Department of State. In part because of this lack of internal process and interagency consultation, legal challenges to the original "travel ban" executive order succeeded in forcing the Administration to scale back some of its original intended activities.<sup>14</sup> By the spring of 2018, however, the

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11. Exec. Order No. 13767, 82 Fed. Reg. 8,793 (Jan. 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/> [<https://perma.cc/LH6U-NEZV>].

12. Exec. Order No. 13768, 82 Fed. Reg. 8,799 (Jan. 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/> [<https://perma.cc/D7LP-EGRX>].

13. Memorandum from Secretary John Kelly to Senior Department of Homeland Security (DHS) Officials (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) [<https://perma.cc/5UWR-H5DP>].

14. See Exec. Order No. 13769, 82 Fed. Reg. 8,977 (Feb. 1, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>; Carrie Cordero & Quinta Jurecic, *From the Travel Ban to Family Separations: Malevolence, Incompetence, Carelessness*, LAWFARE (July 3, 2018), <https://www.lawfareblog.com/travel-ban->

Administration had developed a new approach to effectuate its immigration policy objectives. On April 6, 2018, President Trump directed the end of a practice derogatively referred to as “catch and release,” which permitted border authorities to release apprehended aliens suspected of being unlawfully present in the United States and to allow them to remain within U.S. territory during the adjudication of their immigration status, which could take many months or even years.<sup>15</sup> That same day, Attorney General Jeff Sessions announced a policy of “zero tolerance” or “100 percent prosecution,” meaning that every instance of unauthorized entry or attempted unauthorized entry into the U.S. would be prosecuted by the DOJ.<sup>16</sup> This approach abandoned the longstanding U.S. Department of Justice (DOJ) policy and practice to focus prosecutorial resources on cases of defendants who were unlawfully present in the United States and had been convicted of a serious crime or posed a legitimate public safety concern.

This new prosecutorial guideline was a substantial departure from traditional DOJ practice.<sup>17</sup> The Attorney General directed

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family-separations-malevolence-incompetence-carelessness [https://perma.cc/X8ML-UQ4M].

15. *Presidential Memorandum for the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Health and Human Services and the Attorney General on ending “Catch and Release” at the Border*, WHITE HOUSE (Apr. 6, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-secretary-defense-attorney-general-secretary-health-human-services-secretary-homeland-security/> [https://perma.cc/X86Z-QRVU].

16. *Memorandum for Federal Prosecutors Along the Southwest Border*, U.S. DEPT OF JUSTICE (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download> [https://perma.cc/4BDZ-LXM2]; Press Release, U.S. Dep’t of Justice, Attorney General Announces Zero Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [https://perma.cc/PMY3-8M83]. The government’s position has been that those entering at ports of entry seeking lawful entry would not be prosecuted. But, at the same time, the government implemented a metering practice that limited the ability of migrants to seek lawful entry. See Stephanie Leutert, *What ‘Metering’ Really Looks Like in South Texas*, LAWFARE (July 17, 2019), <https://www.lawfareblog.com/what-metering-really-looks-south-texas> [https://perma.cc/7VPY-K75U].

17. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1042–43 (1984) (“[I]t must be acknowledged that only a small percentage of arrests of aliens are intended or expected to lead to criminal prosecutions.”); see also Press Release, U.S. Dep’t of Justice, Justice Department Smashes Records for Violent Crime, Gun Crime, Illegal Immigration Prosecutions, Increases Drug and White Collar Prosecutions (Oct. 17, 2018), <https://www.justice.gov/opa/pr/justice-department-smashes-records-violent-crime-gun-crime-illegal-immigration-prosecutions> [https://perma.cc/7VPY-K75U].

border region U.S. Attorneys' Offices to "adopt a policy to prosecute all Department of Homeland Security referrals" of attempted illegal entry and illegal entry, "to the extent practicable."<sup>18</sup> Once adult aliens were referred by DHS to DOJ for prosecution and placed into adult facilities, they could no longer be detained along with children.<sup>19</sup> Accordingly, government agents reclassified those children who had arrived with an adult now subject to prosecution as unaccompanied minors, even though they had not, in reality, entered the U.S. unaccompanied. Once classified as "unaccompanied," the children, in accordance with the Trafficking Victims Protection Reauthorization Act,<sup>20</sup> were taken into government custody, resulting in their potentially indefinite detention: first with CBP, and then, according to law and protocols, under the supervision of HHS. Meanwhile, DHS publicly denied that it had a family separation policy, stating in a press release that "DHS does not have a blanket policy of separating families at the border."<sup>21</sup> Yet, the same DHS press release, entitled

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cc/UW8E-2S2D] (citing a 38% increase in illegal entry prosecutions in 2018). For an example of earlier DOJ prosecution guidelines in one U.S. Attorney's Office, see *Data Source: United States Courts*, WALL STREET J., <http://wsj.com/public/resources/documents/DAG2106-2166.pdf> [<https://perma.cc/54NY-Q3VX>].

18. Press Release, Dep't of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/MC3B-3WPX>].

19. See *Family Separation and Detention*, AM. BAR ASS'N, [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/immigration/familyseparation/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/immigration/familyseparation/) [<https://perma.cc/SU25-RXVZ>] ("Since children cannot be held in criminal detention, the children are designated as 'unaccompanied alien children' and placed in the custody of the Department of Health and Human Services' Office of Refugee Resettlement (ORR). ORR places the children in shelters until they are released."); *Why Are Families Being Separated at the Border?*, BIPARTISAN POLICY CENTER (June 13, 2018), <https://bipartisanpolicy.org/blog/why-are-families-being-separated-at-the-border-an-explainer/> ("When adults are detained and prosecuted in the criminal justice system for immigration offenses, their children cannot, by law, be housed with them in criminal jails, so the family unit is separated.")

20. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

21. Press Release, U.S. Dep't of Homeland Security, Myth vs. Fact: DHS Zero Tolerance Policy (June 18, 2018), <https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy> [<https://perma.cc/VCL8-AKW5>]. In addition, Secretary Kirstjen Nielsen tweeted, "We do not have a policy of separating families at the border. Period." *DHS Sec. Kirstjen Nielsen Denies Family Separation Policy Exists, Blames Media*, CBS NEWS (June 18, 2018), <https://www.cbsnews.com/news/dhs-sec-kirstjen-nielsen-denies-family-separation-policy-exists-blames-media/> [<https://perma.cc/U7PH-DYFK>].

“Myths vs. Facts,” acknowledged the consequences of the zero tolerance policy: once charged, an alien adult will be transferred to the custody of the U.S. Marshals Service, and “children will be classified as an unaccompanied child and transferred to” HHS custody.<sup>22</sup> Thus, the new government policy intentionally created a bureaucratic fiction, as many children classified as unaccompanied had, in fact, entered the U.S. with a parent or family member.

Despite DHS’s effort to justify the practice, the President issued Executive Order 13841, which purported to end the family separation policy that DHS leadership said did not exist.<sup>23</sup> The order directed the Secretary of DHS to “maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings” unless joint detention presented a risk to the child.<sup>24</sup> The next day, the U.S. Department of Justice filed a motion requesting modification of the *Flores*<sup>25</sup> settlement which, as described further below, has been pivotal for protecting migrant families and children from prolonged detention.

As a result of the above chain of events, litigation and press reports indicate that the Trump Administration has likely separated over 2,500 children from their families at the border as part of the enhanced enforcement effort mandated by the zero tolerance policy.<sup>26</sup> The number of children separated from the beginning of the administration through August 2019 appears to be at least 4,000, and may be higher.<sup>27</sup> The American Civil Liberties Union (ACLU) sued

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22. U.S. Dep’t of Homeland Security, *supra* note 21.

23. Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 20, 2018).

24. *Id.*

25. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).

26. In addition, the Ms. L. litigation (discussed *infra* note 27) has revealed that family separations took place even before the zero tolerance policy announcement in April 2018 as a sort of pilot program. As a result, the numbers of children actually separated has continued to grow over time. See *Family Separation by the Numbers*, ACLU, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation> [https://perma.cc/2UDK-XRUM].

27. The Ms. L. agreement reveals that there were an original 2,737 separated children. See *infra* note 28. The *New York Times* reported an additional 700 children separated. See Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children than Reported*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html> (on file with the *Columbia Human Rights Law Review*). However, the government’s lack of accurate record keeping has resulted in reports of possible thousands of additional unknown separated children. See Miriam Jordan, *No More Family Separations, Except These 900*, N.Y. TIMES (July 30, 2019),

the government in the Southern District of California to end the practice of family separation and, on June 26, 2018, a federal district court judge ordered families reunited, a process that has been ongoing for over a year, despite continued court supervision.<sup>28</sup> As Judge Dana M. Sabraw stated in his order granting the preliminary injunction:

[T]here is no genuine dispute that the government was not prepared to accommodate the mass influx of separated children. Measures were not in place to provide for communication between governmental agencies responsible for detaining parents and those responsible for housing children, or to provide for ready communication between separated parents and children. There was no reunification plan in place and families have been separated for months.<sup>29</sup>

Throughout 2018, ongoing litigation highlighted the continued detention of migrant children, and the lack of processes in place to promptly reunite them with family members. Reports continued to indicate that family separation was taking place and reunification efforts were not keeping pace with judicial orders.<sup>30</sup> By the summer of 2019, public attention had shifted from concerns about the fact of detention to outrage at the conditions under which migrant children were being detained in some facilities. Reports that children were being detained in U.S. government custody without adequate access to humanitarian items such as food, blankets, and toothbrushes, resulted in renewed attention from some members of Congress, press reports, and congressional hearings.<sup>31</sup> In July 2019,

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<https://www.nytimes.com/2019/07/30/us/migrant-family-separations.html> (on file with the *Columbia Human Rights Law Review*) (reporting 900 further separations since Judge Sabraw's injunction). We expect these statistics may continue to shift as more information is revealed through continued litigation and press reporting.

28. See *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (order granting plaintiffs' motion for classwide preliminary injunction).

29. *Id.* at 1136–37.

30. CNN Newsroom (@CNNNewsroom), TWITTER (Aug. 22, 2019, 8:43 AM), <https://twitter.com/CNNnewsroom/status/1164563704781967360> [<https://perma.cc/P3M8-CNQB>] (“Family separations are ‘still going on,’ says ACLU lawyer Lee Gelernt, adding that he is going back to the San Diego court on September 13, with the hope that the judge ‘will put a halt to it.’”).

31. Caitlin Dickerson, *‘There Is a Stench’: Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html> (on file with the *Columbia Human Rights Law Review*).

after media reports exposed inadequate conditions, a federal facility in Clint, Texas was emptied of the resident children only to have dozens more relocated back to the facility within days.<sup>32</sup> Meanwhile, the government has never provided a sound legal rationale for creating and implementing a blanket policy of separating families seeking entry into the United States as a deterrent mechanism to discourage migration and enforce border security. The next section provides context for the government's exercise of its immigration and border functions, and identifies certain constitutional limitations on the conduct of those enforcement efforts.

## II. CONSTITUTIONAL AND STATUTORY FRAMEWORK

A discussion of limits on the federal government's ability to design and carry out immigration and border security measures first needs to take stock of its affirmative authority in these specific areas. As discussed below, the federal government is on solid footing when it claims significant powers, but this does not mean that it can exercise those powers free from legal boundaries.

### A. U.S. Government Authority to Regulate Immigration and Protect the Border

Intense policy debates over immigration and border enforcement are not new in U.S. history. Societal, political and legal questions surrounding the arrival of migrant laborers and immigrants of various ethnic backgrounds have been around nearly as long as the United States itself. The U.S. has a long history of periodically welcoming migrant laborers, followed by periods of increased deportations and attempts to limit both legal and illegal immigration.<sup>33</sup> The early to mid-19th century witnessed reactions

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32. See Simon Romero et al., *Hungry, Scared and Sick: Inside the Migrant Detention Center at Clint, TX*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html> (on file with the *Columbia Human Rights Law Review*); see also Arturo Rubio & Caitlin Dickerson, *We're in a Dark Place: Children Returned to Troubled Texas Border Facility*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/john-sanders-cbp.html> (on file with the *Columbia Human Rights Law Review*) (reporting on transfer of children from Clint, Texas).

33. For example, the Deportation Act of 1929 resulted in the repatriation of approximately 100,000 Mexicans back to Mexico. When farm labor was in greater need during WWII, a new agreement was reached between the United States and Mexico to permit increased migration for work purposes. Once the war was over

against immigrating Irish and German laborers.<sup>34</sup> In the mid- to late 19th century, immigration enforcement was focused on the influx of Chinese laborers, resulting in the extreme measures of the Chinese Exclusion Act in 1882 and the Geary Act of 1892, laws motivated by racial and ethnic prejudice.<sup>35</sup> Early 20th century border security efforts focused on unauthorized entry from both the Mexican and Canadian borders.<sup>36</sup>

The authority of the federal government to regulate immigration and enforce border security is rooted in the Constitution. Congress' authority to pass immigration laws comes from Article I, Section 8 of the Constitution, which confers on Congress the responsibility to establish a uniform rule of naturalization. Article II provides the executive with the authority to enforce the law and provide for the national security as commander in chief. Congress explicitly granted the executive branch specific authority to control immigration and border security in the Immigration and Nationality Act (INA), the comprehensive federal law governing immigration authorities, agencies, processes and procedures.<sup>37</sup> Immigration law provides a framework and process for detention and removal of aliens who are not lawfully present on U.S. territory.<sup>38</sup> Federal agents responsible for enforcing the immigration laws are authorized to stop, interrogate, arrest, and pursue proceedings against aliens who are known to be, or suspected of being, unlawfully present.<sup>39</sup> Absent certain exceptions, aliens who have entered the U.S. without legal permission can be removed after appropriate proceedings.<sup>40</sup> Unlawful

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and the need for Mexican labor decreased, a new wave of deportation enforcement took place in the early 1950s, resulting in the apprehension of a million Mexicans and the deportation of tens of thousands. See JAMES R. PHELPS ET AL., BORDER SECURITY 91–94 (2d ed. 2018).

34. Ron Elving, *With Latest Nativist Rhetoric, Trump Takes America Back to Where It Came From*, NPR (July 16, 2019), <https://www.npr.org/2019/07/16/742000247/with-latest-nativist-rhetoric-trump-takes-america-back-to-where-it-came-from> [<https://perma.cc/VX4K-FNDK>].

35. See PHELPS ET AL., *supra* note 33, at 72.

36. See *id.* at 68.

37. Immigration and Nationality Act, 8 U.S.C. §§ 1101–1107 (2018).

38. 8 U.S.C. § 1231 (2018) (detention and removal of aliens ordered removed).

39. 8 U.S.C. § 1357 (2018) (powers of immigration officers and employees), 8 C.F.R. § 287 (2002) (exercise of power by immigration officers).

40. 8 U.S.C. § 1227 (2018) (deportable aliens).

presence is a civil, not criminal offense,<sup>41</sup> while improper entry is treated as a crime that can result in a fine or up to six months' imprisonment for a first offense.<sup>42</sup> There are criminal penalties for re-entering illegally, or re-entering following conviction of a crime.<sup>43</sup>

The federal government has an extensive structure designed to administer and enforce its immigration and border security laws. Historically, agencies that were involved in immigration and border enforcement were spread across the executive branch. The Border Patrol was created in 1924 as part of the Labor Department, due to the close nexus between illegal immigration and migrant labor.<sup>44</sup> At the turn of the twentieth century, an early version of an immigration office was located in the Treasury Department; that later became the Immigration and Naturalization Service (INS), re-located to the Department of Justice in 1940. Since 2003, immigration and border enforcement has been the responsibility of DHS. The former INS—which used to report to the Attorney General—was dismantled. It was relocated by an act of Congress to DHS and split into three entities: U.S. Customs and Border Protection (CBP) (including the Border Patrol<sup>45</sup> and the Office of Field Operations focused on ports of entry), U.S. Customs and Immigration Services (USCIS) (handling civil immigration processing) and Immigration and Customs Enforcement (ICE) (responsible for investigations, detention, removal and enforcement).<sup>46</sup>

The Supreme Court has recognized that competing societal interests and individual rights must be taken into account when enforcing immigration laws as part of border security.<sup>47</sup> In addition to

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41. 8 U.S.C. § 1182 (2018) (inadmissible aliens); *see also* *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2018) (holding that it is not a crime for a removable alien to remain in the U.S.)

42. 8 U.S.C. § 1325 (2018).

43. 8 U.S.C. § 1326 (2018).

44. *See* PHELPS ET AL., *supra* note 33, at 68–69.

45. *See id.* at 68. Border Patrol has grown from over 4,000 agents in 1993 to over 23,000 agents in 2018. CBP, which includes Border Patrol, is currently the largest federal law enforcement agency in the country. AMERICAN IMMIGRATION COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 3 (2019) [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_cost\\_of\\_immigration\\_enforcement\\_and\\_border\\_security.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf) [https://perma.cc/8SC9-R98F].

46. *See* PHELPS ET AL., *supra* note 33, at 88–94. ICE currently has approximately 20,000 agents, of which 6,700 are assigned to Homeland Security Investigations (HSI). *Id.*

47. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (noting there are “limits on search and seizure powers in order to prevent arbitrary and

federal statutes providing agencies and officers with specific border enforcement authorities, current Fourth Amendment doctrine illuminates the wide discretion that has been granted to the federal government to enforce border security. For example, in certain circumstances, federal government agents may conduct warrantless searches in the context of border protection—they must only be a reasonable distance from the border for this border search exception to the warrant requirement to apply.<sup>48</sup> The Court also allows border patrol checkpoints in the interior of the United States, subject to certain limits.<sup>49</sup> Despite the extensive permissible enforcement regime, however, there *are* constitutional limits to what the government can do in the name of immigration enforcement. For example, ethnic appearance alone is insufficient grounds for border agents to stop a vehicle and question the occupants about their immigration status, even when the vehicle is near the physical border.<sup>50</sup> In a significant case, the Supreme Court evaluated whether the government's border security justification for stopping and questioning drivers of apparent Mexican ancestry or ethnicity outweighed those individuals' liberty rights, and the rights of lawful citizens to not be stopped without more substantial justification. The Court found that it did not.<sup>51</sup> Thus, even in an acknowledged area of substantial executive authority—border security—the executive's authority is not unbounded.

Courts have made it clear that federal authority significantly outweighs state authority in enforcing immigration law.<sup>52</sup> During the twentieth century, the federal government's primacy in immigration went relatively unchallenged.<sup>53</sup> In the first part of the twenty-first

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oppressive interference by enforcement officials with the privacy and personal security of individuals.”).

48. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 281 (1973).

49. *Id.* at 295.

50. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1968) (weighing the valid public interest in enforcing immigration laws against rights of individual liberty).

51. *Id.* (weighing concerns with liberty rights, including rights of citizens to transit without unreasonable traffic delays).

52. See, e.g., *Chy Lung v. Freedman*, 92 U.S. 275, 280 (1875) (indicating that “[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States”).

53. Although uncommon at the time, California passed an immigration-related law in 1971 providing for civil penalties for employing illegal aliens if the employment would adversely affect “lawful resident workers.” *Arizona v. United States*, 567 U.S. 387, 493 (2012) (California’s law withstood a preemption challenge, but that was prior to increased federal legislation on the issue).

century, however, states and localities have attempted to insert themselves into immigration enforcement.<sup>54</sup> On one end of the spectrum, certain cities have passed “sanctuary city” laws, intended to protect foreigners residing in the United States without legal status.<sup>55</sup> On the other end of the political spectrum, state governments have sought to assert a role for themselves in clamping down on illegal immigration. Arizona was the first state to pass federal-like immigration legislation during this time period.<sup>56</sup> Others have included Indiana, Georgia, Alabama, and South Carolina.<sup>57</sup> The Supreme Court considered whether Arizona’s attempts to enforce its own immigration laws were permissible, and found that three of four provisions were an improper encroachment on the federal government’s primacy in making and enforcing immigration law.<sup>58</sup> In 2011, South Carolina’s legislature passed, and then-Governor Nikki Haley signed into law several measures intended to address immigration issues.<sup>59</sup> These measures included criminal laws, employment laws, and mandates to law enforcement to report individuals suspected of being in the United States illegally.<sup>60</sup> In some states, the law mirrored or closely tracked federal immigration law.<sup>61</sup> State legislators recognized they were treading close to, if not

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54. United States v. South Carolina, 840 F. Supp. 2d 898, 906 (D.S.C. 2011).

55. See Darla Cameron, *How Sanctuary Cities Work, and How Trump’s Blocked Executive Order Could Have Affected Them*, WASH. POST (Nov. 21, 2017) <https://www.washingtonpost.com/graphics/national/sanctuary-cities/> (on file with the *Columbia Human Rights Law Review*).

56. *Id.* at 906.

57. *Id.* at 906–07.

58. See *Arizona*, 567 U.S. at 395, 402, 406, 409; see also *id.* at 394 (“[T]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”). The court assumed that the federal government would develop and execute its immigration law authority responsibly. See *id.* at 414 (“The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation’s meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse.”).

59. S. 20, 2011 Leg., 119th Sess. 2011 S.C. Acts 69 (preemption of local ordinances regarding immigration).

60. Robbie Brown, *Parts of Immigration Law Blocked in South Carolina*, N.Y. TIMES (Dec. 22, 2011), <https://www.nytimes.com/2011/12/23/us/judge-blocks-parts-of-south-carolinas-immigration-law.html> (on file with the *Columbia Human Rights Law Review*).

61. United States v. South Carolina, 840 F. Supp. 2d 898, 905 (D.S.C. 2011).

over, the line of the federal government's authority.<sup>62</sup> The federal government (in addition to advocacy groups) challenged these measures, and a district court held, with respect to the specific sections of the South Carolina law being challenged, that federal immigration law preempts state attempts to regulate immigration.<sup>63</sup> The Eleventh Circuit similarly disallowed much of the immigration enforcement provisions attempted by the state of Alabama.<sup>64</sup> In some cases, the courts gave states more time to determine how the state laws would be implemented before enjoining the enforcement efforts altogether. Given established precedent recognizing the federal government's primacy in developing and enforcing immigration laws, this Article does not challenge the federal government's authority to enforce immigration and border security laws. Rather, it identifies limits on what the government can do while enforcing those laws, particularly when it comes to infringing on the rights of migrant children and families, as discussed further below.

#### B. Potential Limits on the Use of Pretextual National Security Justifications for Family Separation and Detention

In carrying out what are legitimate immigration and border security enforcement authorities, the Administration has claimed that its recent, more severe, activities are justified on national security grounds. The Executive has a constitutional responsibility to protect national security, and certain inherent powers to implement that responsibility. Courts often defer to the executive branch when it asserts national security justifications for laws and policies. If the executive branch begins to abuse that deference, however, courts may begin to look behind the proffered justifications for executive branch activities. Such review may have long-term consequences for the executive's ability to act with flexibility in a true national security emergency.

In one recent immigration-related policy decision, the Supreme Court addressed whether the President could unilaterally

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62. *Id.*

63. *Id.* at 922–24 (“The simple principle that the Constitution vests the national government with certain fundamental indicia of national sovereignty, including the control of foreign policy and foreign affairs and the administration of immigration, has long been beyond dispute in our constitutional jurisprudence.”).

64. *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012).

limit immigration from certain (primarily Muslim) countries.<sup>65</sup> The Court considered the President's proclamation limiting entry from certain countries identified through an interagency process as posing threats to national security.<sup>66</sup> The Court found that issuing the proclamation was within the authority granted to the president by Section 212(f) of the INA.<sup>67</sup> Regulating immigration, the Court observed, resides in the "core of executive responsibility."<sup>68</sup> The Court acknowledged that the judiciary must be restrained when examining motivations behind executive national security actions, while opening the door to doing so. However, under the particular circumstances, it was persuaded that the proclamation was based on "legitimate national security interests."<sup>69</sup> In a 2019 case not involving national security but concerning an administrative determination by the executive branch involving the administration of the census, the Court looked behind the agency head's stated reason for implementing a new regulation. Historically, the Court would not have considered the agency head's motivation in such a core administrative function, but, in this case, the facts indicated that the Commerce Secretary had given pretextual reasons for adding a question to the census.<sup>70</sup> The Court's willingness to look behind the administrative decision may portend judicial review of the reasoning behind government policies in other contexts, such as national security.

More specifically, future judicial consideration of executive branch assertions of national security justifications for large-scale detentions or detentions with open-ended time frames should take into account historical reasons to proceed cautiously. In 2018, the Supreme Court took the opportunity in *Trump v. Hawaii* to make

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65. *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018) (reviewing whether the president had authority under the Immigration and Nationality Act to issue a proclamation limiting entry from certain countries, and whether the proclamation violated the Establishment Clause of the Constitution).

66. Proclamation No. 9645, Fed. Reg. 37,635 (Sept. 24, 2017) (the proclamation focused on countries the administration claimed "remain deficient at this time with respect to their identity-management and information-sharing capabilities, protocols, and practices.").

67. *Trump*, 138 S. Ct. at 2415.

68. *Id.* at 2418.

69. *Id.* at 2422.

70. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) ("Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision.").

clear that *Korematsu*<sup>71</sup>—the 1944 case upholding Japanese-American internment during WWII—has no place in the law.<sup>72</sup> Separately, in *Hamdi v. Rumsfeld*, a national security case involving the detention of an enemy combatant following the 9/11 terrorist attacks, the Court held that a U.S. citizen detained as an enemy combatant had a right to contest the basis of his detention.<sup>73</sup> The circumstances of current family separation and children's detention are obviously different from the facts in *Hamdi*,<sup>74</sup> but there are lessons to be drawn from that case as it relates to detention. In *Hamdi*, the Court warned of an “unchecked system of detention,”<sup>75</sup> cautioning that “[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested . . . .”<sup>76</sup> Nevertheless, the Court in *Hamdi* understood Congress's Authorization for the Use of Military Force (AUMF) to authorize detaining enemy combatants. In the family separation context, in contrast, there is no explicit legislative authorization to separate children from their families as a routine matter in order to deter others from crossing the border. And, even though AUMF affirmatively authorized the detention at issue in *Hamdi*, the Court nonetheless rejected circumstances that might become “indefinite” detention.<sup>77</sup>

Although there may be individualized circumstances pertaining to specific persons, as a group, migrants arriving from Central America are not a recognized severe national security threat

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71. *Korematsu v. United States*, 323 U.S. 214, 219 (1944).

72. *Trump*, 138 S. Ct. at 2423 (“Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.”).

73. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

74. It must be noted that *Hamdi*'s facts differ from our circumstances. In *Hamdi*, the petitioner was a U.S. citizen. However, in the circumstances we review in this Article, the detained individuals are non-U.S. citizens *without* lawful status in the United States. Further, in *Hamdi*, the petitioner had been designated through an administrative process as an enemy combatant. In our circumstances, although some detained children were actually unaccompanied, thousands have been separated from their families because the government initiated criminal prosecution proceedings as a result of its zero tolerance policy, without any individualized determination.

75. *Hamdi*, 542 U.S. at 530.

76. *Id.* at 532.

77. *Id.* at 519–20.

or otherwise urgent public safety threat.<sup>78</sup> The government cannot legitimately invoke these concerns as a legal basis for the family separation policy. This Administration risks undermining the executive's prerogatives in the national security context by using pretextual national security justifications for policies that are actually based on political, not national security, imperatives.

### C. Constitutional Rights of Families

Although family law issues might seem far removed from law governing detention, the family separation policy implicates both. Prior to recent litigation over family separation, family law's development over several decades has at times emphasized the rights of parents, and at other times focused more heavily on the rights of children. In Judge Sabraw's opinion preliminarily enjoining the family separation policy, he focused on the rights of families.<sup>79</sup> As described in Part III, *infra*, the case of *Ms. L.* focuses on family members' Fifth Amendment rights to family integrity as part of the guarantee of liberty.

In modern U.S. legal history, parental rights have been more strongly developed than children's rights; but in considering family separation as a punitive instrument of immigration policy and enforcement, the liberty rights of the child are also compelling. First,

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78. Neither the 2018 nor the 2019 Worldwide Threat Briefing presented by the Director of National Intelligence to Congress identified Central American migration as one of the country's most pressing national security threats. See Statement of Daniel R. Coats, *Worldwide Threat Assessment of the U.S. Intelligence Community* (Feb. 13, 2018), <https://www.dni.gov/files/documents/Newsroom/Testimonies/2018-ATA--Unclassified-SSCI.pdf> [<https://perma.cc/4SGC-ZCJJ>] (discussing Central American migration as a trend but not identifying it as a pressing national security threat to the U.S.); Statement of Daniel R. Coats, *Worldwide Threat Assessment of the U.S. Intelligence Community* (Jan. 29, 2019), <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf> [<https://perma.cc/2XL3-JTAJ>] (discussing Central American migration as a continued challenge to U.S. interests but not identifying it as a pressing national security threat to the U.S.). In addition, independent studies regarding public safety threats of immigrants question the existence of a correlation between undocumented immigrants and increased crime. Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/upshot/illegal-immigration-crime-rates-research.html> (on file with the *Columbia Human Rights Law Review*).

79. *Ms. L. v. U.S. Immigration & Customs Enft.*, 302 F. Supp. 3d 1149, 1162 (S.D. Cal. 2018) (citing the "liberty interest" of parents' rights to "care, custody and control" of their children); see also *Troxel v. Granville*, *infra* note 81 (same).

we consider the question of whether parents have a right not to have their children taken away by the government.<sup>80</sup> A government and society that values the role of parents in guiding the development of their children cannot adhere to that value while disrupting or even severing the caregiving relationship between migrant parent and child. As Justice O'Connor wrote for the majority in *Troxel v. Granville*, "the liberty 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."<sup>81</sup>

Parents have a fundamental liberty interest in the "care, custody, and management of their child."<sup>82</sup> It is generally at the state and local level that a child may be taken from a parent's custody—for example, as a result of a parent charged with a crime and detained as a result of the charge; as a result of criminal conviction; and, in the civil context, as a result of a custody determination in the instance of abuse or other family law proceeding resulting in the loss of custody of a child. The state has a responsibility to step in when parents are unfit or unable to care for a child.<sup>83</sup> The legal system distinguishes between the loss of custody of a child and loss of parental rights. Parental rights are not absolute, but the state must meet a high standard—such as evidence of abuse or neglect—to terminate parental rights and step in as *parens patriae*.<sup>84</sup>

Former Trump Administration Secretary of Homeland Security Kirstjen Nielsen argued that the practice of family

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80. But see Jeffrey Shulman, *Does the Constitution Protect a Fundamental Right to Parent?*, CONSTITUTION DAILY (July 8, 2014), <https://constitutioncenter.org/blog/does-the-constitution-protect-a-fundamental-right-to-parent> [https://perma.cc/39MT-8NBF] ("[N]o Supreme Court case has held that the right of parents to make . . . choices [for a child] is a fundamental one.").

81. *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (affirming the Washington Supreme Court's decision that the federal constitution "permits a state to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child."); see also Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2101 (2011) ("Since the early 1920s, parents have enjoyed broad constitutional rights to the care and custody of their children.").

82. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

83. See *Schall v. Martin*, 467 U.S. 253 (1984) (concerning the pretrial detention of a juvenile accused of serious crimes).

84. *Santosky*, 455 U.S. at 748 (1982) (setting a high standard of "clear and convincing evidence" before a state can sever parental rights). Moreover, the government does not have unlimited power to step in and make decisions for a child instead of a parent. See *In re Gault*, 387 U.S. 1, 44 (1967) ("[T]he admonition to function in a 'parental relationship' is not an invitation to procedural arbitrariness.") (quoting *Kent v. United States*, 383 U.S. 541, 554 (1966)).

separation was consistent with the situation when a parent or guardian is arrested or convicted and detained in the criminal justice system.<sup>85</sup> The situations are not, however, analogous. Individuals arrested or convicted have been provided due process, either through an arrest warrant based on probable cause issued by a judge, or a judgment by a judge or jury. Moreover, the children of detained or convicted adults who are subject to the criminal justice system are not denied their own liberty, whether present or anticipatory, as long as another caregiver is available.<sup>86</sup> In the circumstance of family separation, prosecution automatically resulted in government custody of children because migrant children were separated from accompanying adults in a foreign country, often without adequate identifying information, making placement with an alternative family caregiver difficult, if not impossible. Moreover, the government did not take adequate steps to facilitate reunification of separated children and families once the parent's improper entry violation was processed.

There are also strong arguments that the child's liberty rights are infringed by the practice of family separation.<sup>87</sup> For over eighty years, the Supreme Court has recognized that all persons, including those who are "young, ignorant, illiterate, [and/or] surrounded by a

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85. White House Daily Press Briefing, Remarks of Kirstjen Nielsen (June 18, 2018), <https://www.c-span.org/video/?447252-1/homeland-security-secretary-nielsen-calls-congress-fix-immigration-policy> [<https://perma.cc/CJ5G-585M>] ("If an American were to commit a crime anywhere in the United States, they would go to jail and they would be separated from their family. This is not a controversial idea.").

86. There are circumstances when children of an arrested adult may be taken into state custody pending placement with a relative or suitable guardian, or when children of a convicted adult may be placed into government custody or foster care following a best interests adjudication. But these processes are articulated in state law and policy and are conducted on a case-by-case basis. Children's custody as a result of criminal prosecution of an adult is not a blanket government policy to deter crime, nor is it a permissible additional punishment with respect to the prosecuted adult.

87. So far, assertions of children's rights to prevent the deportation of parents who have been convicted of crimes have not been successful at the circuit court level. *See Payne-Barahona v. Gonzalez*, 474 F.3d 1 (1st Cir. 2007). That situation is distinguishable from the border separation situation, however, because in that case, due process was provided to the adult, who had been convicted of a felony, and a deportation order was issued. In the circumstance of separation at the border, legitimate asylum claims have not yet been adjudicated. And, with respect to children's indefinite government detention, the children have done nothing wrong.

hostile sentiment,” are entitled to constitutional due process.<sup>88</sup> Children cannot be denied due process or “deprived arbitrarily of life or liberty.”<sup>89</sup> For younger children, the right to due process may be assessed in terms of their right to a caregiving relationship and caregiving interests.<sup>90</sup> For older children—an area in which there has been more judicial consideration—courts have considered the due process they are entitled to in the context of juvenile justice.<sup>91</sup> In 1967, the Supreme Court in *In re Gault* recognized the potentially harmful consequences of government detention on a child. No matter the “euphemism” used for the place of detention,

an institution of confinement in which the child is incarcerated for a greater or lesser time . . . [can result in] his world becom[ing] ‘a building with whitewashed walls, regimented routine and institutional hours . . . [i]nstead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees . . .’<sup>92</sup>

Thus, over fifty years ago, the Court understood the gravity of placing a child in government institutions, and the constitutional necessity of providing that child with due process before taking that life-altering, drastic step. Genuine due process must be afforded to children.<sup>93</sup> If minors accused of crimes are entitled to due process to ensure they are not unjustly detained, then minors who have committed no crime themselves, and were brought to the United

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88. Powell v. Alabama, 287 U.S. 45, 57–58 (1932) (the infamous *Scottsboro Boys* case wherein the Supreme Court held that the youths were entitled to counsel in the capital case against them).

89. Dailey, *supra* note 81, at 2100.

90. See *id.* at 2104 (articulating an argument that children have a fundamental constitutional right in the caregiving relationship). An adoption of Dailey’s argument would lead to the assessment that due process protects children from “state intervention into established caregiving relationships” which would be relevant to the practice of detaining children separately from parents for an indefinite amount of time following separation at the border. Further, Dailey articulates an argument that children may have “affirmative constitutional rights to a minimum level of caregiving services from the state”, which would be relevant to the allegations of inadequate safe and sanitary conditions that were revealed through media reports in 2019. *Id.*

91. *In re Gault*, 387 U.S. 1, 4 (1967) (noting that juveniles are entitled to due process).

92. *Id.* at 27.

93. *Id.* at 28 (“Under our Constitution, the condition of being a boy does not justify a kangaroo court.”).

States by an adult, are entitled to due process<sup>94</sup> before they are separated from their parent or caregiver and indefinitely detained by the government, both acts that infringe on their liberty.

In addition to a right to due process, children also arguably have anticipatory rights to future liberty. The idea of anticipatory rights pertains to protecting rights for children to exercise once they are fully developed and capable of exercising them; it is, in essence, protecting their future exercise of their rights, in trust.<sup>95</sup> Numerous pediatric experts have explained how the separation from the parent at the border and subsequent detention of children in government facilities may cause long-term damage, especially to young children. The American Academy of Pediatrics has warned that detained children face negative physical and emotional consequences.<sup>96</sup> Unexpected separation from a parent and indefinite detention may cause lasting damage to children's development. Using an anticipatory rights framework suggests that denial of liberty at young ages can cause long-term damage to children's development later.<sup>97</sup> Thus, the government policy of separation and detention not only infringes on the child's immediate liberty but also on that child's future development, which can affect the grown child's full exercise of his or her liberty.

Apart from limitations on separating parents from children, there are also limits on the practice of holding hearings regarding children without their parent or guardian present.<sup>98</sup> Due process for

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94. Consider what this would look like: what is an acceptable due process or adjudication process for children at the border? At least, the law could mandate reasonable efforts by government officials to promptly: identify if the person they arrived with is a parent, contact a parent or family member in the United States, and place the child with the parent for a period of time.

95. Dailey, *supra* note 81, at 2144.

96. Julie M. Linton et al., *Detention of Immigrant Children*, PEDIATRICS, Apr. 2017, 1, at 6, <https://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf> [<https://perma.cc/CB8K-SKZF>].

97. Laurence D. Houlgate, *Three Concepts of Children's Constitutional Rights: Reflections on the Enjoyment Theory*, U. PA. J. CONST. L. 77, 86–88 (1999) (articulating a theory of anticipatory rights as a right-in-trust, “younger children are persons in the sense that they have the right to be provided with opportunities and conditions assuring the full enjoyment of their constitutional rights when they acquire the characteristics of adult persons.”).

98. See Christina Jewett & Shefali Luthra, *Immigrant Toddlers Ordered to Appear in Court Alone*, TEX. TRIB. (June 27, 2018), <https://www.texastribune.org/2018/06/27/immigrant-toddlers-ordered-appear-court-alone/> [<https://perma.cc/5CGL-ELJG>].

children<sup>99</sup> must take into account that they are generally not recognized as capable of making important decisions for themselves.<sup>100</sup> This is particularly true of young children. Thus, the government's practice of holding hearings adjudicating the rights and status of children without their parent or guardian present should be impermissible, unless the government has taken meaningful steps to locate the parent or adult with a substantial relationship with the child.

Whether our analysis rests more on the children's rights framework which developed in the 1970s, or the parent's rights framework that evolved in the 1980s, the consequence of applying either framework is that children may not be detained apart from their parent absent an individualized assessment that this is in the child's best interest. No such assessment appears to have been implemented to precede the government's separation and detention of children affected by the family separation policy.

#### D. Constitutional Rights of Non-U.S. Persons Inside the United States

Separate from considering the rights of families, an analysis of the rights of migrant families must take into account that the Constitution protects non-citizens. In short, all persons present on U.S. territory have constitutional rights. The moment a non-U.S. citizen enters the United States, that person has certain basic constitutional rights by virtue of his or her territorial presence.<sup>101</sup>

The development of constitutional law involving non-U.S. persons has often involved the Fourth Amendment.<sup>102</sup> The Supreme

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99. Migrant children are particularly vulnerable: they are likely at a language disadvantage in the United States and may have been already subject to traumatic experiences in their home country or in transit to the U.S. border. For those reasons, the government should be under an enhanced obligation to ensure that the law and policies that apply to consideration of their cases and their physical and emotional care be highly regulated and implemented with care. The law should protect the most vulnerable.

100. See Dailey, *supra* note 81, at 2131, 2133–34.

101. This was, of course, an underlying reason for detaining 9/11-era terrorist detainees at Guantanamo Bay, Cuba, and not in the territorial United States. See Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55, 78 (2011).

102. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (recognizing respect for legal rights as a longstanding understanding in immigration enforcement). The Fourth Amendment does not apply to foreign

Court has articulated distinctions between the application of constitutional protections based on nationality (U.S. citizen or national, or not) and location (inside the United States or a territory subject to U.S. *de facto* sovereignty, or not). Although case law currently gives CBP broad search and seizure authority at the border and within a 100-mile border zone inside the territorial United States, that does not mean that constitutional rights do not apply to individuals within the territory. Rather, the balancing tests used to determine when invasions of privacy (for example) are consistent with the Fourth Amendment take into consideration the context of border enforcement, resulting in less robust protections.

While Fourth Amendment case law provides substantial examples of protecting rights of non-U.S. persons at and near the border, aliens also “have a wide range of rights under the Constitution,” including (but not limited to) First, Fourth, Fifth, Sixth, and Eighth Amendment rights.<sup>103</sup> The most relevant rights at issue for family separation are Fifth Amendment due process rights. Migrant children and families detained by the U.S. government are entitled to some base level of due process before they are separated. The U.S. government may not keep children in sustained government custody absent due process. This entitlement to due process constrains the government’s actions even before the underlying adjudication of the entrants’ immigration or asylum claim. In *Zadvydas v. Davis*, for example, the Supreme Court considered a non-U.S. citizen’s challenge to detention that stretched beyond ninety days.<sup>104</sup> Although the Supreme Court recently declined to read into

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persons in foreign lands, when that individual has no substantial connection to the United States. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990); cf. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (resident alien is a “person” within the meaning of the Fifth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (Fourteenth Amendment protects resident aliens).

103. Ilya Somin, *The Constitutional Rights of Noncitizens*, LEARN LIBERTY (Apr. 30, 2017), <https://www.learnliberty.org/blog/t-he-constitutional-rights-of-noncitizens/> [https://perma.cc/XZM5-PEGF] (arguing against the claim that noncitizens in the immigration context are not afforded constitutional rights); see also Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 15–17 (2003) (discussing the Chinese exclusion cases and the impact of the “plenary power” doctrine on immigration law).

104. *Zadvydas v. Davis*, 533 U.S. 678 (2001). The decision only concerned detention of aliens who had previously been admitted to the U.S. and later

the INA a six-month limit on immigration detention without bond,<sup>105</sup> the *Zadvydas* court recognized that *indefinite* detention merits severe constitutional inquiry:

[I]ndefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the government to "depriv[e] any person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.<sup>106</sup>

Once an alien is inside the United States, at the very least, due process applies.<sup>107</sup> This applies even once individuals are in facilities operated near the border by DHS.

The punitive nature of migrant family separation further suggests its unconstitutionality.<sup>108</sup> The Trump Administration's family separation policy was punitive.<sup>109</sup> For over 120 years it has been settled law that the government may not inflict a harsh punishment on an alien in conjunction with removal proceedings. In *Wong Wing v. United States*, the Court considered whether an alien ordered removed could be subject to a year of hard labor. The question before the Court was whether, in the course of implementing a government policy geared toward controlling illegal immigration, the punitive measure of hard physical labor could be applied. The Court rejected such punishment, whether of hard labor or of

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ordered removed; it did not consider detention circumstances for individuals who had not yet been granted lawful admission to the U.S.

105. *Rodriguez v. Jennings*, 138 S. Ct. 830, 845–46 (2018).

106. *Zadvydas*, 533 U.S. at 690.

107. *Id.* at 693 (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent.”).

108. *Id.* at 692 (holding that the government may not detain aliens ordered deported indefinitely: “the serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious.”).

109. The authors are not alone in characterizing the intent of the family separation policy as punitive. The American Bar Association's Commission on Immigration published an extensive memo characterizing it as such. See *Background on Separation of Families and Prosecution of Migrants at the Southwest Border*, AMER. B. ASSOC. (July 31, 2018), [https://www.americanbar.org/groups/public\\_interest/immigration/resources/memo-on-family-separation/](https://www.americanbar.org/groups/public_interest/immigration/resources/memo-on-family-separation/) [<https://perma.cc/HK4Y-CWPU>].

confiscation of property.<sup>110</sup> Thus, even if an alien is found guilty of the crime of illegal entry, a punitive act by the government is not permitted. Certainly, separating parent from child is more punitive than confiscation of property, both for the parent and the child. Separation of a child from a parent causes “irreparable harm”<sup>111</sup> and amounts to the punitive conduct prohibited by *Wong Wing*.

### III. THE REACH OF DOMESTIC U.S. LAW FOR DEALING WITH WRONGFUL FAMILY SEPARATION IN THE IMMIGRATION SETTING

As outlined in Part I, the Trump Administration separated thousands of children and parents, acting with extreme hostility and subjecting both children and parents to harsh, frightening, and sometimes unsafe conditions. Vigorous application of existing domestic law can and must be used to stop family separations, to deter their reoccurrence, to reunify separated families, and to compensate both children and adults for the serious harms suffered. This section discusses how U.S. domestic civil law can advance these goals, though we also posit that a legislatively-created program might achieve them more expeditiously than sole reliance on existing law. Congress could take action to enhance and build upon other pre-existing domestic legal avenues to end family separation, a matter we turn to in the conclusion of this Article.

Injunctive relief has been the most immediate tool for halting the government’s unlawful family separation practices. The American Civil Liberties Union (ACLU) and other groups have brought suits seeking a variety of judicial prohibitions and declarations meant to end family separation and reunify those wrongfully parted from one another. Resting on constitutional grounds, courts have declared the Trump family separations unlawful. Despite this, individual claims rooted in constitutional rights are unlikely to yield recovery for damages inflicted on parents and children. Common law tort claims afford the best chance at corrective justice for individual parents and children, with the government paying money damages to those injured by its policy and practice of family separation. We argue here that plaintiffs would be very likely to succeed on such claims and might realize large jury awards.

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110. *Wong Wing v. United States*, 163 U.S. 228, 237–38 (noting that due process provisions of the Constitution “are universal in their application to all persons . . . without regard to any differences of race, of color, or nationality”).

111. *See Leiva Perez v. Holder*, 640 F.3d 962, 969–70 (9th Cir. 2011); *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017).

A. Class Action Seeking Injunctive and Declaratory Relief Based on Constitutional and Statutory Law

Attention to the Trump Administration's combination of zero tolerance and family separation as a deterrent to lawful immigration spiked in June 2018.<sup>112</sup> As noted above, on June 6, 2018, in *Ms. L. v. U.S. Immigration and Customs Enforcement* (hereinafter *Ms. L. v. ICE*), Judge Dana Sabraw of the Southern District of California recognized the validity of a constitutional claim against the U.S. government brought by the ACLU on behalf of separated parents.<sup>113</sup> Later that month, Judge Sabraw certified a class action to litigate whether the Trump Administration had violated the substantive due process right of class members to family integrity. The court next granted plaintiffs' motions for class certification and for a preliminary injunction, and ordered reunification of the children in custody of the Office of Refugee Resettlement (ORR) with their parents within thirty days.<sup>114</sup> Rather than litigate these matters to a conclusion, the U.S. government entered into a negotiated working agreement under the court's supervision to implement the relief ordered by the court.<sup>115</sup>

Defendants in *Ms. L. v. ICE* include all the federal agencies involved in setting and implementing the policies that caused immigrant families to be separated as well as a range of specific people, who, acting in their official capacities, set and operationalized these policies.<sup>116</sup>

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112. See Aaron Hegarty, *Timeline: Immigrant Children Separated From Families at the Border*, USA TODAY (June 27, 2018), <https://www.usatoday.com/story/news/2018/06/27/immigrant-children-family-separation-border-timeline/734014002/> [<https://perma.cc/4V2K-TVU7>].

113. *Ms. L. v. U.S. Immigration & Customs Enft*, 302 F.Supp.3d 1149, 1168 (S.D. Cal. 2018) (dismissing claims premised on the Administrative Procedure Act and various immigration and asylum statutes while allowing the constitutional claim to proceed).

114. As explained in *Ms. L. v. U.S. Immigration & Customs Enft*, 330 F.R.D. 284, 286 (S.D. Cal. 2019).

115. Pending Agreement, Part 2, *Ms. L. v. U.S. Immigration & Customs Enft*, No. 3:18-cv-00428 (S.D. Cal. 2018), <https://www.aclu.org/legal-document/ms-l-v-ice-pending-agreement-part-2> [<https://perma.cc/LQ2V-TSJU>].

116. *Ms. L. v. U.S. Immigration & Customs Enft*, 330 F.R.D. 284 (S.D. Cal. 2019). Defendants included, in addition to ICE, the U.S. Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR), the then-Acting Director of ICE, a number of ICE Field Office Directors in San Diego and El Paso, the then-Secretary of DHS, the then-Attorney General of the United States, the Director of

The *Ms. L. v. ICE* plaintiffs originally sought a wider range of declaratory and injunctive relief than is currently being implemented. The complaint requested a pronouncement from the court that Trump-era family separation was illegal, and sought a prohibition of any further family separation. The court granted both these measures. But the court's current injunction does not extend to other steps originally requested in the complaint, such as that the U.S. government either release parents and their children from detention together or hold detained families together in the same facility; that the U.S. refrain from deporting otherwise removable parents from the U.S. until they are united with their children or the parents knowingly and voluntarily have decided they do not want their children removed with them; and that the U.S. discontinue further removals of parents until class members have had an opportunity to confer with legal counsel and a reasonable opportunity to pursue asylum.

The court also ultimately defined the class covered by its orders somewhat differently from the group specified in the ACLU's original request for class certification.<sup>117</sup> Originally, the only parents included were those who had entered the U.S. and were continuously present in the U.S. from June 26, 2018 onward.<sup>118</sup> Later, when it became apparent that the government had adopted its family separation tactics earlier than that date, the court amended the class to include parents who had arrived earlier and been separated from their children.<sup>119</sup>

To comply with the court's orders, the government agreed to make concrete reunification efforts and to spell out avenues to asylum hearings for parents. Efforts to implement all of these measures are ongoing, taking place under Judge Sabraw's supervision of the case.

Meanwhile, the ACLU continues to pursue relief for two classes related to the one certified in *Ms. L. v. ICE*. In *Padilla v. U.S. Immigration and Customs Enforcement* (hereinafter *Padilla v. ICE*),<sup>120</sup> the court certified a "credible fear interview class" and a

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USCIS, the then-Acting Commissioner of CBP, CBP Field Directors in San Diego and El Paso, the then-Secretary of HHS, and the then-Director of ORR.

117. *Ms. L. v. U.S. Immigration & Customs Enft*, No. 3:18-cv-00428, 2018 WL 3155677 (S.D. Cal. Feb. 26, 2018).

118. *Id.* at 287.

119. *Ms. L. v. U.S. Immigration & Customs Enft*, 330 F.R.D. 284, 287 (S.D. Cal. 2019).

120. Order Granting Class Certification, *Padilla v. U.S. Immigration & Customs Enft*, No. 2:18-cv-00928 (W.D. Wash. Mar. 6, 2019), <https://american>

“bond hearing class.” Both classes seek injunctive relief for adult asylum seekers, including parents who were separated from their children by ICE. The relief sought relates to the amount of time the government can hold asylum seekers in detention without, first, making a determination of whether the putative asylee has a credible fear of persecution or torture if she or he returns to her or his home country and, second, without holding a bond hearing for asylees recognized as having credible fear. With regard to the “bond hearing class,” the U.S. District Court for the Western District of Washington granted, in July 2019, a temporary injunction enjoining the government from refusing bond hearings for asylum seekers who have passed credible fear interviews and requiring a bond hearing to be held within seven days of a determination that an asylum seeker has credible fear of persecution if she or he returns home.<sup>121</sup> Thus, this injunction would prevent a parent in this class from remaining separated from his or her child by virtue of being denied a bond hearing. The government is resisting this result by litigating the preliminary injunction issued by the District Court as well as by pursuing the case on its merits.<sup>122</sup> In short, the government is seeking to extend some family separations by trying to make parole impossible for asylum-seeking parents who have established credible fear. Without parole, these parents cannot reunite with their children.

Whether various injunctions will successfully reunify separated families, result in lawful treatment of children and parents seeking asylum, and deter the government from committing

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immigrationcouncil.org/sites/default/files/litigation\_documents/challenging\_credible\_fear\_interview\_and\_bond\_hearing\_delays\_order\_for\_class\_certification.pdf [https://perma.cc/4SQG-738M]; see also *Federal Court Requires Immigration Courts to Continue to Provide Bond Hearings Despite Matter of M-S*, AM. IMMIGR. COUNCIL (Aug. 30, 2019), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/federal\\_court\\_requires\\_immigration\\_courts\\_to\\_continue\\_to\\_provide\\_bond\\_hearings\\_despite\\_matter\\_of\\_m-s.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/federal_court_requires_immigration_courts_to_continue_to_provide_bond_hearings_despite_matter_of_m-s.pdf) [https://perma.cc/9RAA-L5S8] (explaining the impact of the *Padilla* decision).

121. Order on the Motions re: Preliminary Injunction, *Padilla v. U.S. Immigration & Customs Enft.*, No. 2:18-cv-00928 (W.D. Wash. July 2, 2019), [https://www.americanimmigrationcouncil.org/sites/default/files/litigation\\_documents/challenging\\_credible\\_fear\\_interview\\_and\\_bond\\_hearing\\_delays\\_preliminary\\_injunction\\_order.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/challenging_credible_fear_interview_and_bond_hearing_delays_preliminary_injunction_order.pdf) [https://perma.cc/DFK3-4C6U].

122. *Challenging Credible Fear Interview and Bond Hearing Delays*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/challenging-credible-fear-interview-and-bond-hearing-delays> [https://perma.cc/S4NK-ZKZK].

additional unconstitutional acts of family separation in the immigration setting remains to be seen.<sup>123</sup>

#### B. Individual Constitutional Tort Claims: *Bivens* Actions

The central constitutional claim successfully asserted so far by migrants who have suffered family separation is that the Trump Administration's policy and practice violated their constitutionally guaranteed right to family integrity. As discussed in Part II, the right to family integrity derives from the Fifth Amendment's guarantee of liberty, with familial association long recognized as an integral component of natural persons' right to be free from governmental interference. Prospective immigrants enjoy a substantive due process right to family integrity.<sup>124</sup> When a federal government official invades this right and causes personal injury, a victim has, in principle, a cause of action to recover compensatory and punitive damages because of the availability of so-called *Bivens* actions.<sup>125</sup> *Bivens* actions are a judicially created remedy against federal officers acting under color of law who violate individuals' federally guaranteed rights and thereby harm them. *Bivens* is a federal counterpart to Section 1983 constitutional tort claims against state officers acting under color of state law. Named after the U.S. Code

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123. The ACLU has repeatedly had to return to court to ensure Trump Administration compliance with the working agreement. *See, e.g.*, Memo in Support of Motion to Enforce Preliminary Injunction, *Ms. L. v. U.S. Immigration & Customs Enft.*, No. 3:18-cv-00428, 330 F.R.D. 284 (S.D. Cal. 2019), <https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-motion-enforce-pi> [<https://perma.cc/B3XY-66AA>]. In addition, on October 3, 2019, the ACLU filed suit in the United States District Court for the District of Arizona to be a class representative in a damages action on behalf of separated families and seeking the creation of a victim compensation fund. *See* Zoe Tillman (@ZoeTillman), TWITTER (Oct. 3, 2019, 10:07 AM), <https://twitter.com/ZoeTillman/status/1179805180059176961> [<https://perma.cc/9AD3-GXCE>].

124. "A parent has a 'fundamental liberty interest' in companionship with his or her child." *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1079 (9th Cir. 2011) (citation omitted); *see also* *Ms. L. v. U.S. Immigration & Customs Enft.*, 330 F.R.D. 284, 286 (S.D. Cal. 2019) ("Plaintiffs challenged this family separation policy as a violation of their substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution. [T]his Court . . . ordered reunification of the children in ORR custody with their parents within 30 days.").

125. Named for *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that a violation of Fourth Amendment rights by federal officers can give rise to a federal cause of action for damages for unlawful searches and seizures).

provision that delineates the cause of action, 1983 claims permit recovery of monetary damages.<sup>126</sup> Both *Bivens* actions and Section 1983 actions have been structured and inflected by a large body of Supreme Court precedent. With regard to *Bivens* actions in particular, this precedent has sharply limited the effective reach of individual damage actions against federal officers who inflict harm by violation of a constitutional right.<sup>127</sup> So, even in the circumstances acknowledged in the *Ms. L. v. ICE* agreement, immigrant parents and children face an uphill battle to recover for their injuries arising from federal officials violating their constitutionally protected right to family integrity.<sup>128</sup>

The Supreme Court case creating *Bivens* actions was decided in 1971, with the Court holding that individuals may have a judicial remedy—including monetary damages—for harms arising from the conduct of federal agents when such agents are acting under color of federal authority.<sup>129</sup> *Bivens* itself involved a Fourth Amendment violation by drug enforcement agents. After *Bivens*, the Supreme Court permitted recovery against federal agents for conduct violating the Fifth Amendment's guarantee of equal protection under the

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126. See 42 U.S.C. § 1983 (2018). The statute reads, in its entirety: 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Id.* With the phrase "liable to the party injured in an action at law," Section 1983 creates a cause of action for money damages.

127. See *infra* notes 131–134 and accompanying text.

128. See *Alvarez v. U.S. Immigration & Customs Enft.*, 818 F.3d 1194, 1208 (11th Cir. 2016) (holding that the Immigration and Nationality Act was an "elaborate remedial system" precluding a *Bivens* claim but noting that *Bivens* actions might be available for claims regarding physical abuse or punitive conditions) (internal citations omitted).

129. *Bivens*, 403 U.S. at 388.

law.<sup>130</sup> The Court has also permitted *Bivens* recovery in a suit where federal prison officials failed to provide an inmate with proper medical care, thereby violating his Eighth Amendment right to be free from cruel and unusual punishment.<sup>131</sup> However, since these cases were decided, the Supreme Court has become resistant to *Bivens* actions.

In the aftermath of the 9/11 terrorist attacks on the World Trade Center and the Pentagon, the U.S. Supreme Court decided *Ziglar v. Abbasi*,<sup>132</sup> a case that raised serious questions about the viability of *Bivens* actions against high ranking officials in immigration settings.<sup>133</sup> In *Ziglar*, the Supreme Court announced that it would not recognize *Bivens* actions in “new contexts,” a term the Court defined very broadly.<sup>134</sup> The *Ziglar* court also emphasized a set

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130. See *Davis v. Passman*, 442 U.S. 228, 248–49 (1979) (recognizing a *Bivens* claim for violation of the Equal Protection Clause of the Fifth Amendment when a Congressman fired an administrative assistant based on her gender).

131. See *Carlson v. Green*, 446 U.S. 14, 16–18 (1980).

132. *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). The *Ziglar* plaintiffs were non-citizens of Arab descent (or perceived Arab descent) who had been picked up and detained without bail in the aftermath of 9/11. During their imprisonment at the Metropolitan Detention Center (MDC), MDC employees subjected the plaintiffs to harsh and oppressive conditions and physical abuse. *Ziglar*, 137 S. Ct. at 1853 (“According to the complaint, prison guards engaged in a pattern of ‘physical and verbal abuse.’ Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion.”).

133. Federal appellate courts have also displayed hostility to *Bivens* actions in the immigration context. See *De La Paz v. Coy*, 786 F.3d 367, 374 (5th Cir. 2015), *cert. denied*, 137 S. Ct. 2289 (2017) (refusing to recognize *Bivens* remedies in consolidated appeals for alleged Fourth Amendment violations, holding that “civil immigration proceedings” constitute a new context for *Bivens* claims); *Mirmehdi v. United States*, 689 F.3d 975, 981 (9th Cir. 2012) (declining to recognize a *Bivens* remedy against immigration officers for “unlawful detention [of noncitizens] during deportation proceedings.”).

134. In *Ziglar*, the Supreme Court held that the situation was too different from prior cases permitting *Bivens* recovery to allow the *Ziglar* plaintiffs to proceed against “executive officials” or even the prison warden himself. The Court explained:

The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at

of policy guidelines for lower courts to use to limit actions that meet the similarity criterion.<sup>135</sup> There are, however, a few post-9/11 cases that leave some potential room for allowing *Bivens* actions in the immigration setting.<sup>136</sup> A court might hold that the parent's and child's claims are sufficiently similar to cases in which *Bivens* actions have been allowed, and are sufficiently unrelated to the sort of policy concerns raised by the Supreme Court in *Ziglar*, to permit the action. *Ziglar*, however, provides numerous bases for courts to distinguish claims based on family separation from established *Bivens* actions. Whether *Bivens* actions brought by separated families would surmount today's judicial skepticism toward *Bivens* remedies cannot be known in advance of litigation.<sup>137</sup> In any event, given the availability of a tort remedy under the Federal Tort Claims Act (FTCA), the victims of the recent government family separation policy and practice may not need to rely on *Bivens*-type claims to recover damages for the injuries they have suffered.

### C. Individual Tort Actions

The ACLU sought only injunctive and declaratory relief on behalf of the class of immigrant parents separated from their children

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issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

*Ziglar*, 137 S. Ct. at 1859.

135. *Id.* at 1857–58.

136. *See, e.g.*, *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 627 (5th Cir. 2006) (denying qualified immunity defense to immigration officer where noncitizen alleged that immigration officer physically assaulted and arrested her without provocation); *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (reversing dismissal of *Bivens* claims against immigration agents on behalf of noncitizen killed in detention); *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1160 (10th Cir. 2006) (“No remedy for the alleged constitutional violations would affect the BIA’s final order of removal. Any remedy available to Mr. Ballesteros would lie in a *Bivens* action.”).

137. *See* Carrie Cordero, *Legal Considerations for Separating Families at the Border*, LAWFARE (June 19, 2018), <https://www.lawfareblog.com/legal-considerations-separating-families-border> [https://perma.cc/A85E-3WUK]

(arguing that individual federal officials who engage in federal civil rights violations in the course of carrying out family separation or overseeing children’s detention may also be implicated in federal color of law violations).

because of the Trump Administration's "zero tolerance" policies and the use of family separation to deter lawful immigration to the United States. This approach made sense as an early response to the combination of zero tolerance and family separation as an intentional damper on asylum-seeking and other lawful immigration to the U.S., but it cannot achieve corrective justice for the victims of these policies. Without requiring the government to compensate migrant parents and children injured by family separation, there may not be sufficient incentive for the government to fully disengage from such activity. Common law tort suits are the most likely avenue to achieve corrective justice for separated family members, thereby providing compensation and the government with a financial reason not to reintroduce the practice in any guise.

In February 2019, six asylum-seeking mothers and children filed administrative claims with DHS and HHS for intentional infliction of emotional distress under the FTCA.<sup>138</sup> As of late July 2019, five more families have given notice of similar claims.<sup>139</sup> The three most recent claimants are fathers separated from their children.<sup>140</sup> They are seeking "\$3 million in compensation per person, or a total of \$6 million per separated family," according to the Southern Poverty Law Center, which is representing the families.<sup>141</sup> If the government does not respond to the claims within six months, the fathers can sue the government in federal court.<sup>142</sup> With at least four thousand children and their parents subjected to family separation, the aggregate liability for the harms suffered could reach up to \$24 billion.<sup>143</sup>

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138. Press Release, Arnold & Porter Kaye Scholer LLP, Announcing Legal Claims Against Government on Behalf of Parents and Children Separated at the Border (Feb. 11, 2019), <https://www.arnoldporter.com/en/perspectives/news/2019/02/arnold-porter-brings-legal-claims-against> [https://perma.cc/7ENC-S9V8]. For specifics about individual claims, see *Separated Family Members Seek Monetary Damages from United States*, AM. IMMIGR. COUNCIL, <http://americanimmigrationcouncil.org/litigation/separated-family-members-seek-monetary-damages-united-states> [https://perma.cc/K4Y3-F6V3].

139. See *Family Separation*, S. POVERTY L. CTR., <https://www.splcenter.org/our-issues/immigrant-justice/family-separation> [https://perma.cc/M7ZZ-Z94Z].

140. Madeline Holcombe, *Their Children Cry at Night After Border Separation. These Fathers Are Seeking Damages for the Harm They Suffered*, CNN (July 25, 2019), <https://www.cnn.com/2019/07/25/us/fathers-damages-border-separation/index.html> [https://perma.cc/9V37-7AFB].

141. *Id.*

142. *Id.*

143. We calculated this very rough number using the amount claimed per family in the latest claims filed at the time of this writing and assuming a total of

Typically, sovereign immunity would insulate the federal government from tort liability. The FTCA, however, makes the federal government liable for torts it commits when it engages in conduct that would yield tort liability for a private person engaged in such conduct.<sup>144</sup> The FTCA specifically authorizes the award of monetary damages to those injured by tortious conduct of the U.S. government and its employees. While some intentional torts are excepted from the FTCA, actions for intentional infliction of emotional distress are permitted.<sup>145</sup>

The administrative-exhaustion requirement applicable to FTCA claims bars claimants from bringing suit in federal court until

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four thousand affected families potentially able to make similar claims. Of course, each family's experiences would create different amounts of damages, most likely some less and some more than three million dollars. We specify an aggregate number here to highlight the scale of the potential of the liability, not to prejudge the final amount that might be awarded after damage determinations at trial.

144. "In order for a suit to proceed against the United States, a waiver of sovereign immunity must exist." *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994). The FTCA constitutes a partial waiver of the federal government's sovereign immunity, which permits a claimant to sue the United States for the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2675(a) (2018); *United States v. Kubrick*, 444 U.S. 111, 115 n.4 (1979). "[T]he FTCA makes the United States liable to the same extent as a private individual under like circumstances, under the law of the place where the tort occurred, subject to enumerated exceptions to the immunity waiver." *Levin v. United States*, 568 U.S. 503, 507 (2013) (internal citations and quotation marks omitted). "If a tort claim against the United States falls into one of the FTCA's exceptions it is barred by sovereign immunity." *Hernandez v. United States*, 34 F. Supp. 3d 1168, 1176 (D. Colo. 2014).

145. The United States can be liable for the tort of intentional infliction of emotional distress. It is not one of the intentional torts explicitly exempted by 28 U.S.C. § 2680(h) from the general rule of liability, and the Court must assume in the absence of contrary legislative intent that the lists of exceptions in 28 U.S.C. 2680(h) is comprehensive. *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 539 & n.3 (D.C. Cir. 1977); *Avery v. United States*, 434 F. Supp. 937, 945–46 (D. Conn. 1977) (FTCA liability for invasion of privacy); *see also* Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 U.N.C. L. REV. 497, 519 (1976) (same); *Crain v. Krehbiel*, 443 F. Supp. 202, 211 (N.D. Cal. 1977) ("Inclusion of this intentional tort in the law enforcement proviso of § 2680(h) is therefore not necessary to create sovereign liability for this tort."); *Limone v. United States*, 579 F.3d 79, 91–93 (1st Cir. 2009) (U.S. government not entitled to tort immunity for intentional infliction of emotional distress on criminal defendants framed and imprisoned).

they have exhausted their administrative remedies.<sup>146</sup> But after that, an unsatisfied claimant can litigate, and, if successful, win monetary damages.

Federal courts apply relevant state tort law to tort claims against the U.S. government.<sup>147</sup> Choice of law depends on the geographical locus of the allegedly tortious events. State law on intentional infliction of emotional distress, the strongest tort claim separated families have, does not vary much. Whether families were separated in Texas, Arizona, New Mexico, California, or elsewhere in the United States, migrant families' intentional infliction of emotional distress claims will be treated similarly.<sup>148</sup>

The central idea behind this tort is distinctly moral. It is meant to provide a remedy to those "intentionally or recklessly" subjected to "extreme and outrageous conduct,"<sup>149</sup> especially from those who hold power over them.<sup>150</sup> The conduct must go beyond

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146. 28 U.S.C. § 2675(a) (2018); *see Barnes v. United States*, 776 F.3d 1134, 1139 (10th Cir. 2015).

147. *Pornomo v. United States*, 814 F.3d 681, 687 (4th Cir. 2016) ("The FTCA does not create a new cause of action; rather, it permits the United States to be held liable in tort by providing a limited waiver of sovereign immunity."); *Raplee v. United States*, 842 F.3d 328, 331 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 2274 (2017) (explaining that "the FTCA merely waives sovereign immunity to make the United States amenable to a state tort suit"); *Hornbeck Offshore Transp., LLC v. United States*, 569 F.3d 506, 508 (D.C. Cir. 2009) ("This statutory text does not create a cause of action against the United States; it allows the United States to be liable if a private party would be liable under similar circumstances in the relevant jurisdiction.").

148. The Restatement (Second) of Torts was extremely influential upon all U.S. jurisdictions' development of the law of intentional infliction of emotional distress. The drafters of the current Restatement (Third) of Torts found cases showing that forty-five jurisdictions, including D.C. and the Virgin Islands, expressly follow § 46; three states (Oregon, Pennsylvania, and Tennessee) follow a modified version; two states (Hawaii and Wisconsin) follow an earlier version; and two states (Mississippi and Montana) reject the Restatement approach altogether. RESTATEMENT (THIRD) OF TORTS § 46, at 22–23 (Council Draft No. 6, 2006).

149. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 46 (AM. LAW. INST. 2012). Note that recklessness suffices to meet the scienter requirement for a successful claim of intentional infliction of emotional distress. *See id.* cmt. h ("Courts uniformly hold that reckless conduct, not just intentional conduct, can support a claim for intentional infliction of emotional harm."). Note, too, that once conduct is found to be outrageous, that usually suffices to establish intent. *See id.* reporter's note h. ("Extraordinarily rare are cases in which extreme and outrageous conduct was satisfied but the intent requirement was not.").

150. *See, e.g., Lashley v. Bowman*, 561 So. 2d 406, 409–10 (Fla. Dist. Ct. App. 1990) ("[O]utrageousness is more likely to be found where some relationship

incivility or even ordinary malice. To prevail, a plaintiff must show that the conduct “has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>151</sup> “Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his [or her] resentment against the actor and lead him [or her] to exclaim, ‘Outrageous!’”<sup>152</sup> To make out and win an intentional infliction of emotional distress action, plaintiffs must give detailed and substantial factual evidence to prove these elements, as well as the usual evidence on causation and damages required in any personal injury litigation.

The facts alleged in the plaintiffs’ filings, and public reaction to news reporting on these facts, indicate that plaintiffs stand a good chance of recovering against the U.S. government and state and private actors involved in family separation. To make clear the strength of the potential intentional infliction of emotional distress claims, we go into fine detail about one such claim below. The range and force of the facts alleged drive home our view that, if these facts are proven at trial, factfinders will conclude that “an average member of the community” presented with such information would cry, “Outrageous!”

To illustrate, let us consider one administrative filing, presented on behalf of “A.P.F.” and his seven-year-old son, “O.P.D.”<sup>153</sup> The father and son fled Guatemala because of persecution of the father and the medical needs of the son, arriving in Arizona in mid-

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exists that gives the defendant actual or apparent authority over another or power to affect his interests.”).

151. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW. INST. 1965); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. d (AM. LAW. INST. 2012) (“Section 46 of the Second Restatement, on which this Section is based, employed the ‘extreme and outrageous conduct’ standard. That standard has been widely adopted, has been employed satisfactorily, and has become familiar. For these reasons, it is retained in this Section.”).

152. *Id.*

153. Notice of Claims from Matthew J. Schlesinger, Partner, Covington & Burling LLP to Attorney General, Dep’t of Justice (Apr. 4, 2019), [https://www.splcenter.org/sites/default/files/apf\\_opd\\_cover\\_letter\\_sf95\\_att.\\_a-\\_final\\_redacted.pdf](https://www.splcenter.org/sites/default/files/apf_opd_cover_letter_sf95_att._a-_final_redacted.pdf) [https://perma.cc/67KX-995T]. The account given in this Article is drawn wholly from this source.

May 2018. Both are members of the indigenous Q'anjob'al tribe.<sup>154</sup> The family home in a remote region of Guatemala had been burned

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154. The Q'anjob'al consider themselves descendants of the Mayans. Like all indigenous people in Guatemala they are among the country's least well off, by any metric, including likelihood of being subjected to racist persecution. See Maria Martin, *Killings Of Guatemala's Indigenous Activists Raise Specter of Human Rights Crisis*, NPR (Jan. 22, 2019), <https://www.npr.org/2019/01/22/685505116/killings-of-guatemalas-indigenous-activists-raise-specter-of-human-rights-crisis> [<https://perma.cc/4CVF-AN3B>]; Elizabeth Lowman, *UN Special Rapporteur Expresses Concern over Guatemala's Treatment of Indigenous Peoples*, JURIST (May 11, 2018), <https://www.jurist.org/news/2018/05/un-special-rapporteur-expresses-concern-over-guatemalas-treatment-of-indigenous-peoples/> [<https://perma.cc/Z9PQ-XEFB>]; Ellen Wulffhorst, *Indigenous and Female: Life at the Bottom in Guatemala*, REUTERS (May 3, 2017), <https://www.reuters.com/article/us-guatemala-women-indigenous/indigenous-and-female-life-at-the-bottom-in-guatemala-idUSKBN17Z07N> [<https://perma.cc/X8S8-ACCX>].

Today's subordination and persecution of Guatemalans of indigenous descent has deep roots. During the Guatemalan Civil War of the 1980s, the military targeted the indigenous civilian population, killing up to 200,000 people. COMMISSION FOR HISTORICAL CLARIFICATION, GUATEMALA: MEMORY OF SILENCE: REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION: CONCLUSION AND RECOMMENDATIONS 17 (1999), <https://hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf> [<https://perma.cc/6BHD-DL5T>]. Eighty-three percent of the fully-identified victims were Mayan. *Id*; see also Mireya Navarro, *Guatemalan Army Waged 'Genocide,' New Report Finds*, N.Y. TIMES (Feb. 26, 1999), <https://www.nytimes.com/1999/02/26/world/guatemalan-army-waged-genocide-new-report-finds.html> (on file with the *Columbia Human Rights Law Review*) (after investigating the Guatemalan civil war of the 1980s, the United Nations concluded that the U.S. had aided the Guatemalan military, which had committed genocidal acts against indigenous peoples). Guatemala's civil war devastated the country's indigenous Maya communities. See Patrick J. McDonnell, *Guatemala's Civil War Devastated the Country's Indigenous Maya Communities*, L.A. TIMES (Sept. 3, 2018), <https://www.latimes.com/world/mexico-americas/la-fg-guatemala-war-aftermath-20180903-story.html> (on file with the *Columbia Human Rights Law Review*).

Twentieth-century elites in Guatemala had clashed with those of Mayan origin since at least the 1960s. See *Genocide in Guatemala*, HOLOCAUST MUSEUM HOUSTON, <https://hnh.org/library/research/genocide-in-guatemala-guide/> [<https://perma.cc/P32W-8DF5>] ("Civil war existed in Guatemala since the early 1960s due to inequalities existing in the economic and political life. In the 1970s, the Maya began participating in protests against the repressive government, demanding greater equality and inclusion of the Mayan language and culture.").

While there is debate over the precise nature of the post-colonial legacy of the Spanish conquest of the indigenous peoples of Guatemala, the dynamic of repression of these groups by Spanish-speaking elites dates back to the country's colonial past. See, e.g., W. George Lovell, *Conquest and Survival, in COLONIAL GUATEMALA: A HISTORICAL GEOGRAPHY OF THE CUCHUMATN HIGHLANDS, 1500–1821*, at 200–201 (3d ed. 2005) (examining the impact of Spanish conquest

down in an effort to kill the residents, because of their indigenous background and A.P.F.'s environmental advocacy.

In Guatemala, A.P.F.'s son, O.P.D., had already undergone major heart surgery that was necessary to save his life, with funds for the operation provided by a philanthropic organization. O.P.D. required regular cardiology check-ups and possible occasional emergency care, neither of which could be accessed from the family home in Guatemala. Because of this and the ongoing persecution of the family, A.P.F. decided to flee with O.P.D. to the United States. It took the pair two weeks to journey from Guatemala to northern Mexico, with O.P.D.'s health deteriorating along the way. When A.P.F. and O.P.D. eventually crossed the border into the United States, it was after midnight. Around two a.m., A.P.F. stopped to build a campfire, to rest and to warm O.P.D. A.P.F. hoped that the campfire would attract U.S. border patrol agents from whom A.P.F. could request asylum. A Border Patrol agent did find the father and son. The agent (described in the administrative filing as "tall" and "light-skinned") started screaming obscenities in Spanish at O.P.D. and A.P.F., who is five foot three inches tall. With his hand on his gun, the agent called them "stupid fucking animals" and kept demanding that A.P.F. explain "why you came to my country." At first, out of fear, A.P.F. kept his head down and said nothing. When he eventually tried to tell the agent he and his son were seeking asylum and that O.P.D. had a serious medical condition, the agent did not acknowledge A.P.F.'s request or the information about O.P.D.'s health. Instead the agent put A.P.F. and O.P.D. in the back of a covered, air-conditioned pickup truck, where A.P.F. continued to try keeping O.P.D. warm. There was a three-hour wait before the pair arrived at a border patrol station.

The administrative filing recounts in detail the treatment A.P.F. and O.P.D. received at the station, where agents told A.P.F. they "did not care" about O.P.D.'s heart surgery or his current symptoms and difficulty breathing. The agent who questioned A.P.F. told him that he should not have come to "my country" because "you do not belong here." Eventually, A.P.F. cried and this made O.P.D. cry. Father and son were forced to wear thin clothing even though they were put into a cell known as a "hielera" or "icebox" because it was so cold. Crowded with about thirty occupants, there was no room in the cell to lie down. No matter how often A.P.F. informed agents

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and colonial rule on the Sierra de los Cuchumatanes, a region of Guatemala at the country's northwest border with Mexico).

that O.P.D. was in medical distress, the agents provided no medical attention and eventually threatened to deprive A.P.F. of the small ration of food being provided to detainees in the cell. This discouraged A.P.F. from continuing to ask for medical help.

After at least two days in this cell, O.P.D.'s condition worsened until he was severely choking. A.P.F. had to give his son the Heimlich maneuver, at which point agents took O.P.D. and his father to a hospital. There, O.P.D. was diagnosed with an acute respiratory infection. A.P.F. and O.P.D. were returned to the hielera after this hospital visit. Shortly thereafter, they witnessed an armed agent come to the cell, summon another father and son, and then shove the father into the cell and forcibly grab the son, while demanding the father give up the child. The boy, younger than O.P.D., was led away crying and screaming for his father not to let the agent take him. This caused other children in the cell to cry and scream in fear, and O.P.D. clung to his father, asking for reassurance that this would not happen to him. A.P.F. became fearful that, were O.P.D. taken, the boy would resist and endanger his precarious health, so he coached O.P.D. not to struggle if agents came for him. Later, three armed agents came to the cell and called A.P.F. and O.P.D. to come to them. They forcibly wrenched father and son apart. As agents carried him away, O.P.D. looked back at his father. O.P.D. was screaming and almost fainting. A.P.F. saw "incredible fear" on his son's face and he believes O.P.D. saw the same on his. O.P.D. screamed, "Daddy, why are you letting them take me?"

After this, A.P.F. and O.P.D. had no communication for the next fifty days at least. The administrative filing describes the unhygienic, crowded conditions of the cell to which A.P.F. was moved for the first ten days of this period. Food rations were extremely small. A.P.F. was in state of panic and anxiety about O.P.D.'s whereabouts and health. He was not given any information about these matters then or for the next three months from any government agent. A.P.F. had suicidal thoughts even before the agents came for him, manacled him, and transferred him by bus and plane to a different detention center. From other parents, A.P.F. learned of a possible phone number for O.P.D. and repeatedly attempted to contact his son. The calls did not go through. Despite his own pain, hunger, and discomfort, concern and fear for O.P.D.'s safety and health remained in the forefront of A.P.F.'s mind. Now under the control of ICE agents, A.P.F. was desperate. An officer told A.P.F. that ICE knew nothing about his case or O.P.D.'s whereabouts and that his son had been removed from him "for good." A.P.F. felt

“constant agony,” and lost hope of ever seeing O.P.D. again. After about a month, A.P.F. and other detainees were brought to another room and told to sign papers written in English. ICE agents refused to explain what the papers said and told detainees they would have “problems with ICE” if they did not sign. A.P.F. signed. Two weeks later, ICE agents gave him another form, this time in English with a Spanish translation. This form gave the option of A.P.F. being deported alone or being deported with his son. According to A.P.F.’s recollection, he signed that “he wanted to be with his son.”

After fifty days of separation, A.P.F. was briefly able to speak to O.P.D. by cell phone, after advocates visited the ICE facility where A.P.F. was held. This was the only time during a seventy-day separation that father and son spoke. Meanwhile, A.P.F. was told by his wife, who was still in Guatemala, that O.P.D. had been sexually abused in the foster home in New York where he had been placed by the U.S. government. This cast A.P.F. into a “spiral of negative thinking” including “self-destructive thoughts.”

Eventually, in July 2019, A.P.F. learned of the U.S. government’s “zero tolerance” policy from the news, which happened to be on television in the room he was then in with other detainees. The program reported that Judge Sabraw of the U.S. District Court in California had ordered that affected families be reunified.<sup>155</sup>

Several days later, without explanation, the U.S. government again put A.P.F. and other fathers in chains and transported them to a new location in Port Isabel, TX. Several more days passed. One day, officers returned A.P.F.’s clothes, took him and other fathers to a new room and unchained them. There, thirty children were released into the room, one by one. According to A.P.F., the children looked around frantically, disoriented and crying. Eventually he saw O.P.D., looking afraid and crying, at first unable to recognize his father. A.P.F. called O.P.D.’s name. O.P.D. walked toward him, still seeming not to recognize A.P.F. When he got closer, O.P.D. jumped into his father’s arms. Overcome with sorrow, they stayed still, holding each other. Eventually, O.P.D. started telling his father not to let “them” take him away again. O.P.D. repeated this concern throughout the next two days while he and his father were held together in Port Isabel. Then, without notice to them, their U.S. sponsor, or their counsel, the pair was released. They had no money on them and nowhere to go.

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155. *Ms. L. v. U.S. Immigration & Customs Enft*, 310 F. Supp 1133, 1146 (S.D. Cal. 2018).

They sought refuge in a Catholic Charities shelter until A.P.F.'s brother, their U.S. sponsor, arranged their travel to him in California.

The effects of the events recounted above continue to inflict manifest pain and suffering on A.P.F. and O.P.D. The boy is clingy, moody, fearful, subject to tantrums—in contrast to who he was before the separation. He is terrified of anybody in uniform and is reluctant to leave his home. His father suffers from acute headaches, something he did not experience prior to being separated from his son. To the extent the harms suffered by A.P.F. and O.P.D. can be traced to different and separate actions taken by CPB, ICE, and ORR, the government might try, at trial, to argue that not all of the damages claimed are proximately caused from the conduct that constitutes family separation and satisfies the outrageousness threshold. But A.P.F. and O.P.D. have colorable claims that all of their injuries flow directly from the distinctive policies and practices of family separation as applied to them.<sup>156</sup> Evidence shows that the government was aware of the medical consensus about the harms of removing children from parental care and separated parents and children, including A.P.F. and O.P.D., anyway. The government seemingly failed to provide O.P.D. the care recommended by the American Association of Pediatricians.<sup>157</sup> In a tort action for

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156. There is a consensus in the medical community that family separation can readily disrupt both the short- and long-term health of children, creating the need for specialized medical care. See, e.g., Hurley Riley, *The Impact of Parent-Child Separation at the Border*, U. MICH. SCH. PUB. HEALTH: PURSUIT (Sept. 7, 2018), <https://sph.umich.edu/pursuit/2018posts/family-separation-US-border.html> [<https://perma.cc/7AG4-WXL8>]; Martin H. Teicher, *Childhood Trauma and the Enduring Consequences of Forcibly Separating Children from Parents at the United States Border*, BMC MEDICINE (Aug. 22, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6103973/> [<https://perma.cc/M8HA-YMCS>]; Sue Coyle, *Children and Families Forum: The Impact of Immigrant Family Separation*, 18 SOC. WORK TODAY MAG. 8, <https://www.socialworktoday.com/archive/SO18p8.shtml> [<https://perma.cc/Q4BY-M3Q5>]; Patty Huang, *What Are the Long-Term Effects of Separating Immigrant Children from Their Parents?*, CHILDREN'S HOSP. PHILA. RES. INST. (Aug. 21, 2018), <https://injury.research.chop.edu/blog/posts/what-are-long-term-effects-separating-immigrant-children-their-parents> [<https://perma.cc/UT2D-KASP>]; *Key Health Implications of Separation of Families at the Border (as of June 27, 2018)*, HENRY J. KAISER FAM. FOUND. (June 27, 2018), <https://www.kff.org/disparities-policy/fact-sheet/key-health-implications-of-separation-of-families-at-the-border/> [<https://perma.cc/UQ3M-7DQ4>].

157. Linton et al., *supra* note 96, at 7–9. Among the many recommendations not followed, key ones include: the elimination of exposure to conditions and situations that will retraumatize already traumatized children; keeping children with a parent or primary caregiver; not holding children at CBP facilities because the conditions are not appropriate for their health; orienting

intentional infliction of emotional distress, knowing disregard for O.P.D.'s mental, as well as physical, health buttresses the evidence of extreme malice, a key element in the claim.

Facts like those asserted by O.P.D. and A.P.F. provide the sort of detailed basis necessary to assert a successful claim for intentional infliction of emotional distress. In fact, the facts we recount are abbreviated compared to the administrative complaint and to what would be pled at trial. A.P.F. himself relied on a paper trail to ascertain what happened to O.P.D. while they were separated. Presented with such corroborating evidence, expert medical testimony, and credible testimony from A.P.F. and O.P.D., a factfinder might well conclude that the forcible separation of the boy from his father, the bullying, the verbal abuse, the refusal to accept or provide important information, the inadequate food rations, the freezing cold cells, and the delayed and inadequate medical care were "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."<sup>158</sup>

The government's ability to address an influx of migrants and asylum-seekers is not governed solely by domestic constitutional, civil rights, or tort law. In the next section we turn to international law applicable to deliberate, harsh, and widescale family separation used deliberately to deter immigration to the U.S.

#### IV. PROTECTIONS UNDER INTERNATIONAL LAW

Litigation in U.S. federal court to protect the rights and welfare of migrant children at and within the U.S. border relies primarily on judicially enforceable domestic standards, including the terms of the 1997 *Flores* settlement<sup>159</sup> and certain provisions of the Trafficking Victims Protection Reauthorization Act of 2008, the U.S. Constitution, and American common law.<sup>160</sup> At the same time, the United States is also bound to comply with applicable provisions of

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children and providing them with information about what is happening and will happen to them.

158. RESTATEMENT (SECOND) OF TORTS, *supra* note 151.

159. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544 (RJK) (C.D. Cal. Jan. 17, 1997); *see supra* note 5 and accompanying text.

160. *See* 8 U.S.C. § 1232 (2018) (setting forth procedures for processing unaccompanied alien children at the U.S. border and ports of entry); *id.* § 1232(b)(3) (providing for transfer of unaccompanied alien children to HHS within 72 hours, "[e]xcept in the case of exceptional circumstances").

international law found in international treaties to which the United States is a party, as well as in customary international law formed by the near-uniform practice and views of states.

The enforceability of international legal obligations depends on the source of the obligation, the availability of binding dispute resolution mechanisms, and the willingness of states and other international actors to condemn and respond to violations. Although disputes regarding the interpretation and scope of international legal obligations can arise (as they do with respect to domestic law), the fact that the United States is legally obliged to comply with applicable provisions is beyond question.<sup>161</sup> Treaties to which the United States is party, and customary international law rules to which the United States has not persistently objected, are binding on the United States regardless of their enforceability in U.S. courts.<sup>162</sup> Although the prospect of judicial enforcement certainly enhances the likelihood of compliance with applicable legal norms, it is by no means the only factor that contributes to compliance. While debates persist about how, and how much, international law actually influences state behavior, states routinely invoke international law to justify their own behavior and to criticize—and attempt to shape—the conduct of other states.<sup>163</sup>

The Trump Administration has refused to continue participating in certain multilateral agreements, such as the Paris Climate Agreement and the Joint Comprehensive Plan of Action (JCPOA), and has been vocal in criticizing certain international organizations, such as the United Nations and NATO.<sup>164</sup> Yet, this

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161. A classic formulation remains Justice Gray's statement in *The Paquete Habana* that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

162. See, e.g., *Medellín v. Texas*, 552 U.S. 491, 504 (2008) (indicating that "[n]o one disputes" that the cited decision by the International Court of Justice "constitutes an *international* law obligation on the part of the United States," notwithstanding disagreement about its enforceability in U.S. courts).

163. Contributions to these debates include Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes et al. eds., 1st ed. 2002); and Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998).

164. See, e.g., Chimène Keitner, *Sovereignty on Steroids: International Institutions and the Trump Administration's "Ideology of Patriotism,"* LAWFARE

does not amount to a wholesale rejection of international law by the administration, nor to a decisive rejection of U.S. participation in the international community. The U.S. has long held a dual position as a key promoter of international law and institutions, on the one hand, and a powerful country that can withstand a certain amount of external economic and political pressure, on the other. As former State Department Legal Adviser John Bellinger stated in 2007:

[O]ur critics sometimes paint the United States as a country willing to duck or shrug off international obligations when they prove constraining or inconvenient. That picture is wrong. The United States *does* believe that international law matters. We help develop it, rely on it, abide by it, and—contrary to some impressions—it has an important role in our nation’s Constitution and domestic law.<sup>165</sup>

Bellinger went on to quote then-Secretary of State Condoleezza Rice’s convictions that “America’s moral authority in international politics also rests on our ability to defend international laws and treaties”<sup>166</sup> and that “when we respect our international legal obligations and support an international system based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America.”<sup>167</sup> President Trump’s first Senate-confirmed State Department Legal Adviser Jennifer Newstead echoed this sentiment in 2018 when she wrote that “the United States continues to play a leading role in promoting, protecting, and respecting international law around the world.”<sup>168</sup> While one might take issue with the tenor of this characterization, it is still fair to say that most civil servants, and some political appointees, take their responsibility for ensuring the United States’ compliance with international law seriously.

The relatively “lower profile” of binding international law in domestic legal and policy debates can be attributed both to a lack of

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(Sept. 28, 2018), <https://www.lawfareblog.com/sovereignty-steroids-international-institutions-and-trump-administrations-ideology-patriotism> [<https://perma.cc/U8SS-9JHH>] (discussing former National Security Adviser John Bolton’s long-standing hostility to the International Criminal Court).

165. John B. Bellinger, Legal Adviser, The United States and International Law, Remarks at The Hague, Netherlands (June 6, 2007), <https://2001-2009.state.gov/s/rls/86123.htm> [<https://perma.cc/V95W-U6PM>].

166. *Id.*

167. *Id.*

168. OFFICE OF THE LEGAL ADVISER, DEP’T OF STATE, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW iv (2017).

familiarity with international law and to limitations on its direct enforcement by U.S. courts. For example, the Office of Legal Counsel's (OLC) May 31, 2018 opinion on the President's authority to "direct airstrikes on facilities associated with Syria's chemical-weapons capability" did not address the legality of such strikes under international law.<sup>169</sup> Former OLC head Jack Goldsmith opined that "it is not surprising that OLC ducked that issue[]" given the difficulty of reconciling the strikes with the legal framework for using force under the United Nations Charter.<sup>170</sup> That does not mean, however, that international legal considerations do not, or should not, play a role in this Administration's decision-making process, whether or not such considerations ultimately prove decisive. Whether the current Supreme Court will take a more robust role in enforcing international law remains doubtful. As Jack Goldsmith has noted, international law arguments did not have a "discernible influence" in the travel ban litigation, and were not made by litigants and their *amici* with the vigor one might have expected.<sup>171</sup> In Goldsmith's view, "[t]hese silences might be explained by Trump's fervent nationalism and anti-internationalism, and the Supreme Court's general (though not inevitable) aversion to the incorporation of international law."<sup>172</sup> The appointment of Justice Brett Kavanaugh is also likely to compound the playing down of international law in Supreme Court arguments, since Justice Kavanaugh has taken the position that "international law has no judicially cognizable role in the U.S. legal system, except where the political branches explicitly incorporate it by statute, regulation[, or self-executing treaty]."<sup>173</sup>

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169. U.S. Dep't of Justice, Office of Legal Counsel, Memorandum Opinion for the Counsel to the President (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download> [<https://perma.cc/B3K7-63UH>].

170. Jack Goldsmith, *The New OLC Opinion on Syria Brings Obama Legal Rationales Out of the Shadows*, LAWFARE (June 1, 2018), <https://www.lawfareblog.com/new-olc-opinion-syria-brings-obama-legal-rationales-out-shadows> [<https://perma.cc/8WRM-VCKZ>]; see also Chimène I. Keitner, *Explaining International Acts*, 63 MCGILL L.J. 1, 13–14 (2018) (discussing American attempts to justify the 2018 Syrian airstrikes and experts rejecting their purported legality).

171. Jack Goldsmith, *The Trump Administration and International Law*, 113 AM. J. INT'L L. 408, 410 (2019) (reviewing HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2019)).

172. *Id.*

173. See Scott R. Anderson, Hayley Evans & Hilary Hurd, *Justice Brett Kavanaugh on National Security: A Reader's Guide*, LAWFARE (Aug. 30, 2018), <https://www.lawfareblog.com/judge-brett-kavanaugh-national-security-readers-guide> [<https://perma.cc/T5U8-WBFW>] (describing Justice Kavanaugh's concurrence in the denial of rehearing *en banc* in *Al-Bihani v. United States*).

Despite these doctrinal and political hurdles, lawyers representing migrant children and their families have long looked to international law as an additional source of protection for their clients, and government lawyers take account of international legal constraints in advising on policy options.<sup>174</sup> Any analysis of the United States' treatment of migrants and asylum-seekers would thus be incomplete without a consideration of the United States' international legal commitments. Although, as noted above, international law rarely gives rise directly to a cause of action in the U.S. legal system, the *Charming Betsy* canon of statutory interpretation instructs courts to presume that Congress does not intend to violate international law, including international human rights law, unless it does so explicitly.<sup>175</sup> Moreover, the United States bears international legal responsibility for violations of international law, regardless of whether such violations have been authorized by Congress or have survived challenge in U.S. courts. It is axiomatic that the inability to enforce an international standard through domestic channels, or even the existence of conflicting domestic law, does not absolve a state of the duty to comply with its international legal obligations.

Multiple international legal standards are engaged by the "zero tolerance" policy and by the routine separation of child migrants and asylum-seekers from accompanying adults when they cross the

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174. See, e.g., Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1121 (2011) (arguing that "[i]nterpreting the INA consistently with the [Refugee] Convention will invariably provide a more rights-protective framework than the domestic immigration statute alone"); Miriam Sapiro, *Advising the United States Government on International Law*, 27 N.Y.U. J. INT'L L. & POL. 619, 619 n.1 (1995) (indicating that "[t]here is little doubt that international law is considered in decisionmaking").

175. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). Lawyers have long raised arguments in the immigration context based on the international legal protection of "the right to family association and integrity." See, e.g., Brief of the Center for Constitutional Rights as Amicus Curiae Supporting Petitioner-Appellant Alfien P. Gordon, *Gordon v. Mulé*, 153 F. App'x 39 (2d Cir. 2005) (No. 02-2051), 2005 WL 6426403 (arguing against a father's deportation because international law protects "the right to family association and integrity" and, per *Charming Betsy*, "statutes must be construed in conformity with international law absent a clear statement from Congress to the contrary").

U.S. border between ports of entry.<sup>176</sup> As described above, the United States initiated—and has continued—a practice of forcibly separating minors from accompanying adults, while the adults are referred for criminal prosecution for illegal entry.<sup>177</sup> Compounding the harms created by this practice, adequate records of separations where minors were apprehended while in an adult’s care have not been maintained, thereby effectively “orphaning” children and dramatically reducing the prospect of family reunification.<sup>178</sup> The conditions of confinement of these children, as well as their prolonged detention, also violate relevant international legal obligations separate from the violations associated with the act of continued separation.<sup>179</sup> The acknowledgment by senior U.S. officials that these measures are intended to be punitive and to deter would-be immigrants from crossing the southern border also carries legal significance, although the practice would still be internationally unlawful even if it did not have a punitive intent.<sup>180</sup>

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176. According to one report, in some cases “immigrant families are . . . separated after . . . presenting themselves for asylum . . . [even though] Trump administration officials claim . . . they only separate families at ports of entry [for] the safety of the child, or if they don’t think . . . that the adult is really the child’s legal custodian.” Dara Lind, *The Trump Administration’s Separation of Families at the Border, Explained*, VOX (Aug. 14, 2018), <https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents> [https://perma.cc/46LJ-KMT8].

177. U.S. DEP’T OF HOMELAND SEC. OFFICE OF THE INSPECTOR GEN., OIG-18-84, SPECIAL REVIEW—INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 4 (Sept. 27, 2018). This practice has continued, with a reported 700 separations carried out between June 2018 and May 2019. See Lomi Kriel & Dug Begley, *Trump Administration Still Separating Hundreds of Migrant Children at the Border Through Often Questionable Claims of Danger*, HOUSTON CHRON. (June 22, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-administration-still-separating-hundreds-of-14029494.php> [https://perma.cc/5WCS-T7HK]; Michelle Goldberg, *The Terrible Things Trump is Doing in Our Name*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/opinion/family-separation-trump-migrants.html> (on file with the *Columbia Human Rights Law Review*).

178. Lind, *supra* note 176.

179. See *infra* Section II.A.

180. President Trump stated that his policy acts as a deterrent for people coming to the United States: “We want a great country . . . . But when people come up, they have to know they can’t get in. Otherwise it’s never going to stop.” Later he said: “When you prosecute the parents for coming in illegally, which should happen, you have to take the children away. Now, we don’t have to prosecute them, but then we’re not prosecuting them for coming in illegally. That’s not good.” President Donald Trump, Remarks at the National Federation of Independent Businesses 75th Anniversary Celebration (June 18, 2018); see also

The United States' treatment of migrant children and families is a legitimate matter of international concern, as the U.N. High Commissioner for Human Rights made clear in his June 2018 "global update" to the Human Rights Council.<sup>181</sup> It is worth cataloguing some of the criticism the United States has received for this practice from the international community. For example, later in June 2018, the Permanent Council of the Organization of American States issued a resolution reminding the United States of its international legal obligation to respect the human rights of migrants, and especially children.<sup>182</sup> In August 2018, the Inter-American Commission on Human Rights granted a request for precautionary measures received from six countries' National Institutions of Human Rights.<sup>183</sup> As a threshold matter, the Commission found that children who are separated from their parents as a result of the "zero tolerance" policy are at risk of "serious, urgent and irreparable harm" to the rights to a family life, personal integrity, and identity guaranteed by the American Declaration of the Rights and Duties of Man.<sup>184</sup> More recently, in July

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Van Schaack, *supra* note 2 (arguing that footage from a *60 Minutes* segment corroborates that the intent of the family separation policy was to deter immigration).

181. Zeid Ra'ad Al Hussein, Opening Statement by U.N. High Commissioner for Human Rights (June 18, 2018) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23206&LangID=E> [<https://perma.cc/3Q3J-XJDR>]; *see also* Press Briefing Note on Egypt, United States, and Ethiopia, UNHCR, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174&LangID=E> [<https://perma.cc/B7HZ-FUEB>] (indicating that "the practice of separating families amounts to arbitrary and unlawful interference in family life, and is a serious violation of the rights of the child").

182. Permanent Council Res. 1106 (2168/18) (July 6, 2018).

183. Inter-Am. Comm'n on Human Rights Res. 64/2018 (Aug. 16, 2018), <https://www.oas.org/en/iachr/decisions/pdf/2018/64-18MC731-18-US-en.pdf> [<https://perma.cc/ETE7-PG95>]. A complaint has also been filed against the United States with the U.N. Human Rights Council by fifteen U.S. civil society groups, although it is not clear that the Council will find the complaint admissible under its procedures. *See Human Rights Council Complaint Procedure Form*, HUMAN RIGHTS COUNCIL, [https://www.aft.org/sites/default/files/un-humrts-complaint\\_062018.pdf](https://www.aft.org/sites/default/files/un-humrts-complaint_062018.pdf) [<https://perma.cc/LCT8-QJB4>]. The same month the complaint was filed, the United States withdrew as a member of the 47-country Human Rights Council, although this does not in itself deprive the Council of the ability to consider complaints against the United States. *See* Colin Dwyer, *U.S. Announces Its Withdrawal from U.N. Human Rights Council*, NPR (June 19, 2018), <https://www.npr.org/2018/06/19/621435225/u-s-announces-its-withdrawal-from-u-n-s-human-rights-council> [<https://perma.cc/QQ8D-E8WH>].

184. Inter-Am. Comm'n on Human Rights Res. 64/2018 at 5 (Aug. 16, 2018), <https://www.oas.org/en/iachr/decisions/pdf/2018/64-18MC731-18-US-en.pdf>

2019, the new U.N. High Commissioner for Human Rights decried the conditions of confinement of refugee and migrant children and adults in the United States, and made clear that children should never be held in immigration detention or separated from their families.<sup>185</sup> Also in July 2019, the European Parliament adopted a resolution on the situation at the U.S.-Mexico border in which it invoked international human rights obligations and emphasized that, among other things, “depriving children of their liberty on the basis of their or their parents’ migration status is never in the best interests of the child . . . and may constitute cruel, inhuman or degrading treatment of migrant children.”<sup>186</sup> Moreover, as affirmed by the E.U. Parliament, “illegal family separations and the arbitrary and indefinite detention of asylum seekers without parole constitute cruel policies and flagrant violations of both U.S. asylum law and international law.”<sup>187</sup> Although not legally binding on the United States, these pronouncements reflect a consensus that recent U.S. practice does not comply with U.S. obligations. To date, other countries have not adopted stronger measures to try and compel U.S. compliance (likely because of an assessment that this does not represent a high enough foreign policy priority to risk incurring the

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[<https://perma.cc/ETE7-PG95>]; Inter-Am. Comm’n on Human Rights, *American Declaration of the Rights and Duties of Man*, art. 5, May 2, 1948, <https://www.refworld.org/docid/3ae6b3710.html> [<https://perma.cc/3SGH-HFL6>]. A coalition of holders of U.N. “special procedures” mandates has also officially communicated its concerns to the U.S. government about issues including “the automatic separation of children from their families in violation of the best interests of the child and their rights to liberty and family life.” Letter from Working Group on Arbitrary Detention et al. to the U.N. (June 19, 2018), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23913> [<https://perma.cc/S3GH-B87V>]. Among other possible international law violations, the communication specifically calls out “the use of immigration detention and family separation as a punitive deterrent of irregular entry, contrary to international human rights norms and standards” and emphasizes that “[t]he best interests of the child should be the paramount consideration, including in the context of migration management, and children should never be detained for reasons related to their own or their parents’ migration status, as detention of children in the context of migration constitutes a human rights violation.” *Id.* at 3.

185. *Bachelet Appalled by Conditions of Migrants and Refugees in Detention in the US*, U.N. OFFICE OF THE HIGH COMM’R (July 8, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24800> [<https://perma.cc/5D8L-A87N>].

186. Res. 2019/2733 of the Eur. Parl. on the Situation at the USA-Mexico border (July 18, 2019), [http://www.europarl.europa.eu/doceo/document/TA-9-2019-0005\\_EN.html?redirect](http://www.europarl.europa.eu/doceo/document/TA-9-2019-0005_EN.html?redirect) [<https://perma.cc/AZL5-EU8X>].

187. *Id.*

accompanying costs). However, there is no doubt that the United States' global standing—and its moral authority and ability to persuade other countries to comply with international legal standards—have been severely damaged.<sup>188</sup>

International human rights law governs how states treat individuals within their jurisdiction. These standards apply indisputably to all individuals who are on U.S. territory (regardless of how they entered), although the United States generally maintains that it does not also constrain the conduct of U.S. officials towards individuals who are not present on U.S. territory.<sup>189</sup> That said, the United States' exercise of its enforcement jurisdiction to prosecute adults for illegal border crossings, and to hold adults and children in detention facilities, clearly brings those individuals within the scope of the United States' international human rights obligations.<sup>190</sup> The rest of this section examines these obligations under four non-exhaustive categories: special protections afforded children; the requirement of humane and non-punitive treatment; the right to a family life; and the right to be free from cruel, inhumane, or degrading treatment.<sup>191</sup> It concludes with a brief discussion of the

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188. See, e.g., Tania Karas, *U.S. Leads Global "Race to the Bottom" in Shutting Door on Refugees and Asylum-Seekers*, PRI: WORLD (Sept. 17, 2019), <https://www.pri.org/stories/2019-09-17/us-leads-global-race-bottom-shutting-door-refugees-and-asylum-seekers> [<https://perma.cc/Y4KJ-UPXP>].

189. *U.S. Observations on Human Rights Committee General Comment 31*, U.S. STATE DEPT (Dec. 27, 2007), <https://2001-2009.state.gov/s/l/2007/112674.htm> [<https://perma.cc/968P-E6FX>]. Other countries and experts disagree with this interpretation and view this treaty language as encompassing *both* individuals within a country's territory *and* individuals within that country's jurisdiction.

190. International Covenant on Civil and Political Rights arts. 10, 13, 14, 17, 23, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Relating to the Status of Refugees art. 16, Jul. 28, 1951, 189 U.N.T.S. 137; Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment art. 16, Dec. 10, 1984, 1465 U.N.T.S. 85.

191. Other international legal prohibitions that commentators and international bodies have suggested might be implicated include: the prohibition on torture, the prohibition on forced disappearances, the prohibition on both intentional and unintentional discrimination on the basis of race, ethnicity, or national origin, and the right to personal integrity and to identity. This article's focus on the four categories of rights enumerated above does not diminish the importance of ensuring respect for other human rights. See Beth Van Schaack, *The Torture of Forcibly Separating Children from Their Parents*, JUST SECURITY (Oct. 18, 2018), <https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents/> [<https://perma.cc/PT7J-V4E9>] (torture); Van Schaack, *supra* note 2 (torture); Amnesty International Statement for March 26 Hearing on "The Department of Homeland Security's Family Separation Policy: Perspectives from

international right to a remedy, and highlights the inconsistency between recent U.S. advocacy on behalf of vulnerable children outside the United States, and its treatment of vulnerable children taken from their parents by U.S. officials after they have crossed the southern border.

#### A. Special Protections Afforded Children

Although the United States has gained notoriety for being the only country that has signed but not ratified the Convention on the Rights of the Child (CRC), this does not mean that children in the United States lack international legal protections.<sup>192</sup> First, the United States is bound by customary international law. While the content of customary international law may be contested at the margins, certain core prohibitions are acknowledged as legally binding on states regardless of whether or not the state has ratified a specific treaty. These standards include the categorical prohibitions on slavery and torture, as well as other types of norms such as—under some accounts—the “best interests of the child” principle.<sup>193</sup> Second,

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*the Border*,” AMNESTY INT’L (Mar. 25, 2019), <https://www.amnestyusa.org/our-work/government-relations/advocacy/amnesty-international-statement-for-march-26-hearing-on-the-department-of-homeland-securitys-family-separation-policy-perspectives-from-the-border/> [<https://perma.cc/BT9L-C7E9>] (torture); Alonso Gurmendi, *On Calling Things What They Are: Family Separation and Enforced Disappearance of Children*, OPINIOJURIS (June 24, 2019), <http://opiniojuris.org/2019/06/24/on-calling-things-what-they-are-family-separation-and-enforced-disappearance-of-children/> [<https://perma.cc/DQH3-J2BM>] (forced disappearance); Letter from Working Group on Arbitrary Detention et. al. to the U.N., *supra* note 184 (discrimination); Inter-American Commission on Human Rights, *Precautionary Measure No. 731-18: Migrant Children Affected by the “Zero Tolerance” Policy Regarding the United States of America*, ORG. OF AMERICAN STATES (Aug. 16, 2018), <https://www.oas.org/en/iachr/decisions/pdf/2018/64-18MC731-18-US-en.pdf> [<https://perma.cc/AFX3-LV89>] (personal integrity and identity).

192. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. South Sudan became the CRC’s 195th state party in 2015. There is a general understanding that signatories to a treaty are obliged not to take actions that would defeat the object and purpose of the treaty until they have indicated their intention not to ratify the treaty, but this prohibition has more rhetorical than legal force when it comes to multilateral human rights treaties. See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

193. Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213, 230 n.111 (2003). Brilmayer and Starr note that the “best interests” standard originally derived from U.S. family law. See *id.* at 225; see also *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002)

children in the United States benefit from human rights protections in treaties that are not child-specific, such as the International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified.<sup>194</sup> Thus, although more extensive and detailed provisions regarding the rights of child refugees and migrants are more often found in so-called “soft law” instruments that are not in themselves legally binding, the United States’ non-ratification of the CRC does not affect its obligations under customary international law and under other applicable treaties.<sup>195</sup>

The special protection accorded children under international law is reflected in the ICCPR, which provides that “[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor.”<sup>196</sup> As the Office of the U.N. High Commissioner for Human Rights emphasized in a 2010 report:

The principal normative standards of child protection are equally applicable to migrant children and children implicated in the process of migration. Accordingly, international law provides that all such children be seen and protected as children first and foremost, rather than letting their migratory or other status, or that of their parents, dictate their access to protection and assistance.<sup>197</sup>

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(reversed on other grounds) (applying the “best interests” principle as a matter of customary international law); *cf.* Starr & Brilmayer, *supra*, at 230 (noting in 2003 that, because family separation occurs in a variety of factual circumstances and state practice is not sufficiently uniform, it would be premature to declare that customary international law contains a blanket prohibition on family separation). On the failure of the United States to respect the “best interests” principle in immigration law more generally, see Bridgette A. Carr, *Incorporating a ‘Best Interests of the Child’ Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009).

194. ICCPR, *supra* note 190, art. 1.

195. *Human Rights Watch Submits Comments on Proposed Rule Regarding the Detention of Children and Families*, HUM. RTS. WATCH (Nov. 6, 2018), <https://www.hrw.org/news/2018/11/06/human-rights-watch-submits-comments-proposed-rule-regarding-detention-children-and> [<https://perma.cc/F5X3-5U77>].

196. ICCPR, *supra* note 190, art. 24.

197. U.N. High Commissioner for Human Rights, Study of the Office of the United Nations High Commissioner for Human Rights on Challenges and Best Practices in the Implementation of the International Framework for the Protection of the Rights of the Child in the Context of Migration, at 5, U.N. Doc. A/HRC/15/29 (July 5, 2010).

In carrying out deliberate and widespread family separations beginning in the spring of 2018, U.S. authorities rendered *accompanied* refugee and migrant children even more vulnerable by turning them into *unaccompanied* children, thereby incurring additional obligations for their protection and care.

Because children are among the most vulnerable members of society, refugee law has long considered the particular plight of children, including unaccompanied or separated children.<sup>198</sup> However, it is fair to say that the development of norms for protecting refugee children and reunifying families has, until now, taken place primarily, if not exclusively, in response to inadvertent family separations caused by armed conflicts, natural disasters, and other circumstances beyond the control of the destination state. The idea that a destination state would *intentionally* separate arriving children from their families for the purpose of deterring other would-

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198. Refugee guidelines have generally reserved the term “unaccompanied children” for “children who are separated from both parents and are not being cared for by an adult who, by law or custom, is responsible for doing so,” while “separated children” are “children under 18 years who are separated from both parents or from their previous legal or customary primary caregiver,” but who may currently be with an extended family member. See Daniel J. Steinbock, *Separated Children in Mass Migration: Causes and Cures*, 22 ST. LOUIS U. PUB. L. REV. 297, 298 n.5 (2003); see generally Kate Jastram & Kathleen Newland, *Family Unity and Refugee Protection in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* (E. Feller et al., eds., 2003) (emphasizing the role of family unity and the dangers resulting from its disruption); Guy S. Goodwin-Gill, *Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions*, 3 INT’L J. CHILD. RTS. 405 (1995) (outlining the international efforts to protect child refugees); HANNA GROS & YOLANDA SONG, UNIV. OF TORONTO FACULTY OF LAW, NO LIFE FOR A CHILD: A ROADMAP TO END IMMIGRATION DETENTION OF CHILDREN AND FAMILY SEPARATION (2016), <https://ihrp.law.utoronto.ca/sites/default/files/PUBLICATIONS/Report-NoLifeForAChild.pdf> [https://perma.cc/G2UJ-HCDQ] (arguing for changes to the Canadian immigration system due to its practical implications and insufficient legal justifications); KRISTINA TOUZENIS, INT’L ORG. FOR MIGRATION, HUMAN RIGHTS OF MIGRANT CHILDREN (2008), [https://publications.iom.int/system/files/pdf/iml\\_15\\_en.pdf](https://publications.iom.int/system/files/pdf/iml_15_en.pdf) [https://perma.cc/R2BQ-HKZB] (summarizing some of the most important protections provided to child refugees); Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21 (Aug. 19, 2014) (setting forth the obligations that Argentina, Brazil, Paraguay, and Uruguay must comply with in relation to the human rights of migrants).

be refugees and migrants has simply not been contemplated as a serious possibility.<sup>199</sup>

The long-term harms caused to children by potentially indefinite family separation, and by even short periods of immigration detention, have been well documented.<sup>200</sup> Consequently, a wide variety of international instruments seek to avoid and to remedy situations in which separation or detention occurs.<sup>201</sup> The

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199. This is not to say that family separation is unknown as a tool of state policy in other contexts. To the contrary, the historical experiences of indigenous peoples in Canada and Australia, and the current experience of Uighurs in China, make painfully clear that family separation has occurred outside this context. See, e.g., *Reconciliation*, GOV'T OF CANADA (Apr. 9, 2019), <https://www.rcaanc-cirnac.gc.ca/eng/1400782178444/1529183710887> [<https://perma.cc/694V-VK6C>] (showing the Canadian government's long-overdue attempts to apologize for and redress historical wrongs); AUSTRALIAN HUMAN RIGHTS COMMISSION, *BRINGING THEM HOME REPORT* (1997), [https://www.humanrights.gov.au/sites/default/files/content/pdf/social\\_justice/bringing\\_them\\_home\\_report.pdf](https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf) [<https://perma.cc/DJ58-KJKZ>] (reporting on Australia's "stolen generation"). International criticism of China's policy has been more muted, in part because of a systematic Chinese campaign to deflect scrutiny. See, e.g., Nick Cumming-Bruce, *China Rebuked by 22 Nations over Xinjiang Repression*, N.Y. TIMES (July 10, 2019), <https://www.nytimes.com/2019/07/10/world/asia/china-xinjiang-rights.html> (on file with the *Columbia Human Rights Law Review*) (noting that, since the United States withdrew from the U.N. Human Rights Council, "[d]iplomats said there was little prospect of another country leading a resolution in the council and exposing itself to the political and economic retaliation China often threatens against states that criticize it, especially in prominent forums").

200. See Linton et al., *supra* note 96; Chloe Reichel, *How Detention Centers Affect the Health of Immigrant Children: A Research Roundup*, JOURNALIST'S RESOURCE (July 22, 2019), <https://journalistsresource.org/studies/government/immigration/health-effects-immigration-detention-children/> [<https://perma.cc/Q7QM-55SR>]; see generally Zachary Steel et al., *Global Protection and the Health Impact of Migration Interception*, PLOS MED., June 2011, at 1 (describing the particular harms of immigration detention on children).

201. General rights that are potentially implicated by the U.S. policy include: American Convention on Human Rights art. 5 (right to humane treatment), art. 7 (right to personal liberty), art. 24 (right to equal protection); San Salvador Protocol to American Convention art. 3 (obligation of non-discrimination), art. 10 (right to health), art. 12 (right to food), art. 13 (right to education), art. 15 (right to the protection of families). See American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Child-specific protections include: American Convention on Human Rights art. 19 (rights of the child to "the measures of protection required by his condition as a minor"); San Salvador Protocol to the American Convention art. 6 (rights of children); Convention on the Rights of the Child art. 7.1 (right of the child to be cared for, as far as possible, by his or her parents), art. 8.1 (right of the child to preserve his or her identity), art. 9.1 (right not to be separated from his or her parents except when such separation is necessary for the best interests of the

CRC Committee has observed that “the detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child.”<sup>202</sup> The U.N. General Assembly, the U.N. Working Group on Arbitrary Detention, and the Inter-American Court of Human Rights have all indicated that the detention of a child cannot be justified solely on the basis of the migration status of that child or her parent.<sup>203</sup> Similarly, the United Nations Special Rapporteur on the Human Rights of Migrants has called on states to “preserve the family unit by applying alternatives to detention to the entire family,”

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child), art. 9.3 (right of a separated child to maintain personal relations and direct contact with both parents on a regular basis), art. 19 (right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, and sexual abuse), art. 20 (entitlement to special protection and assistance provided by the State for a child temporarily or permanently deprived of his or her family environment), art. 22 (appropriate protection and humanitarian assistance for children seeking refugee status), art. 23 (rights of disabled children), art. 24 (right to access health services), art. 28 (right to an education), art. 37 (treatment of all children deprived of liberty with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age). *Id.*; see San Salvador Protocol to the American Convention on Human Rights, Nov. 17, 1988, O.A.S.T.S. No. 69; Convention on the Rights of the Child, G.A. Res. 44/25, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/736 (1989). The United States is not a party to any of these instruments, meaning that they are binding on the United States only insofar as their provisions are reflected in other treaties to which the United States is a party or can be said to constitute customary international law. Provisions that arguably have attained customary international law status include, at a minimum, the imperative of considering the best interests of the child, the right to humane treatment, and the obligation of non-discrimination. With respect to detained children in particular, see General Assembly Resolution 45/113 of 14 Dec. 1990 on UN Rules for the Protection of Juveniles Deprived of Their Liberty. Although U.N. General Assembly resolutions are not legally binding, they frequently articulate international standards of conduct, including standards that the United States has encouraged other countries to follow in their treatment of vulnerable populations.

202. Rep. of the Comm. on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration (Sept. 28, 2012), <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf> [<https://perma.cc/4GAE-FYXM>]; see also INTER-AGENCY WORKING GROUP, ENDING CHILD IMMIGRATION DETENTION, [https://endchilddetention.org/wp-content/uploads/2016/09/IAWG\\_Advocacy-Brochure\\_Aug-2016\\_FINAL-web.pdf](https://endchilddetention.org/wp-content/uploads/2016/09/IAWG_Advocacy-Brochure_Aug-2016_FINAL-web.pdf) [<https://perma.cc/5XSG-CNJ8>]; Rights and Guarantees of Children in the Context of Migration and/or Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (Aug. 19, 2014).

203. See GROS & SONG, *supra* note 198.

and to only resort to detaining parents accompanied by their children “in very exceptional circumstances.”<sup>204</sup>

The Nelson Mandela Rules adopted by the U.N. General Assembly in 2015 also contain specific relevant provisions.<sup>205</sup> Of particular note, the rules provide that there shall always be a standardized prisoner file management system, and that upon admission of every prisoner, information shall be entered in the file management system indicating “[t]he names of his or her family members, including, where applicable, his or her children, the children’s ages, location and custody or guardianship status.”<sup>206</sup> The fact that family separations were carried out by U.S. officials without any plan or effort to keep track of family units or to identify which children arrived with accompanying adults directly contravenes the Mandela Rules endorsed by members of the General Assembly, including the United States. The United States continues to emphasize the importance of these rules, and even provides technical assistance to other countries to encourage their compliance.<sup>207</sup>

The most generous reading of the family separation policy is that children were rendered unaccompanied as a negligent and foreseeable by-product, rather than a deliberate goal, of the “zero tolerance” program. Although statements by officials instead support the view that separation was itself intended as a penalty for crossing the border illegally, even unintended consequences violate children’s rights. A joint general comment by two human rights treaty bodies makes clear that

authorities responsible for migration and other related policies that affect children’s rights should . . . systematically assess and address the

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204. Francois Crepeau, Special Rapporteur on the Human Rights of Migrants, Rep. on the Human Rights of Migrants, A/HRC/20/24 at 11 (Apr. 2, 2012).

205. G.A. Res. 70/175 (Jan. 8, 2016).

206. *Id.* at Rule 7(f).

207. Bureau of Int’l Narcotics & Law Enft Affairs, *INL Work in the Field of Corrections*, U.S. DEP’T OF STATE, <https://www.state.gov/inl-work-in-the-field-of-corrections/> [<https://perma.cc/3R2E-EY27>]; see also Bureau of Int’l Narcotics & Law Enft Affairs, *Strengthening Criminal Justice Institutions*, U.S. DEP’T OF STATE, <https://www.state.gov/supporting-rights-and-justice/> [<https://perma.cc/J8ZM-NCHJ>] (indicating that “INL also participates in establishing global standards on corrections policy, and is proud to have been an active supporter of the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (SMRs), known as The Nelson Mandela Rules, which were updated in 2015 after almost 50 years.”).

impacts on and needs of children in the context of international migration at every stage of policymaking and implementation.<sup>208</sup>

This imperative should flow self-evidently from due regard for the best interests of the child—not to mention basic decency and common sense.<sup>209</sup>

## B. The Requirement of Humane and Non-Punitive Treatment

The United States has often been reticent to join binding international human rights agreements for a variety of reasons, including the concern that international agreements require sacrificing “sovereignty,” and the conviction that domestic law fully and adequately protects individuals within the United States.<sup>210</sup> That said, the United States has participated in, and even spearheaded, “soft law” instruments, such as U.N. General Assembly Resolutions, that articulate guiding principles for decent and humane societies, as exemplified by Eleanor Roosevelt’s leading role in the adoption of the 1948 Universal Declaration of Human Rights.<sup>211</sup> In addition to

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208. U.N. Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, Joint General Comment No. 3, U.N. Doc. CMW/C/GC/3 (Nov. 16, 2017) (outlining state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return).

209. See *supra* note 192 and accompanying text; see also CRC Committee Gen. Cmt. 14 (2013), U.N. Doc. CRC/C/GC/14 (outlining the importance of prioritizing the best interests of the child when making policy decisions, including by avoiding family separation). In a 2017 statement, the United States dissociated itself from the “best interests of the child” principle in the context of international migration on the grounds that it is “derived from the Convention on the Rights of the Child.” This statement neglects the other sources of this principle, including U.S. family law. See Laurie Shestack Phipps, Adviser, Explanation of Position on Protection of Migrants, U.S. Mission to the U.N. (Nov. 20, 2017), <https://usun.usmission.gov/explanation-of-position-on-agenda-item-72b-a-c-3-72-l-43-rev-1-on-protection-of-migrants> [<https://perma.cc/9YBG-FDAA>].

210. See, e.g., Greg Staff, Adviser, U.S. Mission to the U.N., Explanation of Vote on A/C.3/72/L.21/Rev.1 on Rights of the Child (Nov. 21, 2017), [https://usun.usmission.gov/explanation-of-vote-on-a-c-3-72-l-21-rev-1-on-rights-of-the-child/?\\_ga=2.206287251.1275170924.1565159692-756070021.1562701866](https://usun.usmission.gov/explanation-of-vote-on-a-c-3-72-l-21-rev-1-on-rights-of-the-child/?_ga=2.206287251.1275170924.1565159692-756070021.1562701866) [<https://perma.cc/62D7-AC4A>] (stating that “we underscore that the United States fulfills its applicable international obligations to promote and protect the human rights of migrants by providing substantial protections under the U.S. Constitution and domestic laws to individuals within the territory of the United States, regardless of their immigration status”).

211. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

helping to draft and promulgate the Mandela Rules cited above, the United States also supported the New York Declaration for Refugees and Migrants adopted by the General Assembly in September 2016.<sup>212</sup> Although the Trump Administration subsequently disavowed the principles enshrined in the declaration, it continues to represent an articulation of widely shared goals and aspirations, as well as a reaffirmation of established legal principles relating to the treatment of migrants and refugees.<sup>213</sup>

The New York Declaration affirms countries' "profound solidarity with, and support for, the millions of people in different parts of the world who, for reasons beyond their control, are forced to uproot themselves and their families from their homes."<sup>214</sup> In adopting the resolution, all 193 U.N. member states explicitly "acknowledge[d] a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner."<sup>215</sup> They declared that "[d]iversity enriches every society and contributes to social cohesion," and that "[d]emonizing refugees or migrants offends profoundly against the values of dignity and equality for every human being, to which we have committed ourselves."<sup>216</sup> In adopting the declaration, all U.N. members pledged to "ensure a people-centred, sensitive, humane, dignified, gender-responsive and prompt reception for all persons arriving in our countries, and particularly those in large movements, whether refugees or migrants" and to "ensure full respect and protection for their human rights and fundamental freedoms."<sup>217</sup> They further pledged to "ensure that public officials and law enforcement officers who work in border areas are trained to uphold the human rights of all persons crossing, or seeking to cross, international borders" and to "intensify support in this area and help to build capacity as appropriate," while recognizing that "while upholding these obligations and principles, States are entitled to take measures

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212. G.A. Res. 71/1, New York Declaration for Refugees and Migrants (Sept. 19, 2016).

213. Patrick Wintour, *Donald Trump Pulls US out of UN Global Compact on Migration*, GUARDIAN (Dec. 3, 2017) <https://www.theguardian.com/world/2017/dec/03/donald-trump-pulls-us-out-of-un-global-compact-on-migration> (on file with the *Columbia Human Rights Law Review*).

214. G.A. Res. 71/1, *supra* note 212, ¶ 8.

215. *Id.* ¶ 11.

216. *Id.* ¶ 14; *see also id.* ¶ 39 (stating "[w]e commit to combating xenophobia, racism and discrimination in our societies against refugees and migrants").

217. *Id.* ¶ 22.

to prevent irregular border crossings.”<sup>218</sup> Of particular relevance, states committed to protecting “the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child,” and affirmed that this commitment applies “particularly to unaccompanied children and those separated from their families.”<sup>219</sup> Once again, it does not appear to have occurred to the declaration’s drafters that a country of arrival would itself *cause* children to be separated from their families, thereby becoming the most immediate threat to the safety and well-being of refugee and migrant children who managed to survive the journey from their country of origin.<sup>220</sup>

In addition to reciting the above political commitments, the New York Declaration restates the core international legal principles relating to immigration detention as follows:

Reaffirming that all individuals who have crossed or are seeking to cross international borders are entitled to due process in the assessment of their legal status, entry and stay, we will consider reviewing policies that criminalize cross-border movements. We will also pursue alternatives to detention while these assessments are under way. Furthermore, recognizing that detention for the purposes of determining migration status is seldom, if ever, in the best interest of the child, we will use it only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we will work towards the ending of this practice.<sup>221</sup>

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218. *Id.* ¶ 24; *see also id.* ¶ 41 (affirming that “[w]e are committed to protecting the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, at all times”).

219. *Id.* ¶ 32.

220. *Cf. id.* ¶ 29 (indicating that “[w]e recognize and will take steps to address the particular vulnerabilities of women and children *during the journey* from country of origin to country of arrival”) (emphasis added).

221. *Id.* ¶ 33; *see also id.* ¶ 56 (stating that “[w]e affirm that children should not be criminalized or subject to punitive measures because of their migration status or that of their parents”); *id.* ¶ 59 (declaring that “[w]e reaffirm our commitment to protect the human rights of migrant children, given their vulnerability, particularly unaccompanied migrant children, and to provide access to basic health, education and psychosocial services, ensuring that the best

Despite the international consensus supporting these goals, and the legal obligations underpinning many of them, the United States sharply reversed course a year after the Declaration's unanimous adoption. On December 2, 2017, the United States announced its "withdrawal" from the New York Declaration and associated process for increasing global cooperation on migration, on the grounds that "[t]he New York Declaration contains numerous provisions that are inconsistent with U.S. immigration policy and the Trump Administration's immigration principles."<sup>222</sup>

The U.S. government has taken other steps to make clear that it does not regard itself as bound by the commitments embodied in the New York Declaration, although it does acknowledge an obligation to comply with already-existing laws. For example, in a November 2018 explanation of a "no" vote in the U.N. on an omnibus resolution that referred to the New York Declaration, the U.S. representative objected to language in the resolution "regarding alternatives to detention and the 'need' to limit the detention of asylum seekers," and reiterated that the United States "will detain and prosecute those who enter U.S. territory illegally, consistent with our domestic immigration laws and our international interests."<sup>223</sup> As one of only two U.N. members (along with Hungary) to have voted against the 2018 Global Compact on Refugees, the United States also emphasized its "understanding that none of the Compact's provisions create or affect rights or obligations of states under international law, or otherwise change the current state of conventional or customary international law."<sup>224</sup> That said, the Declaration and Compact also

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interests of the child is a primary consideration in all relevant policies"); *id.* ¶ 70 (maintaining that "[w]e will also promote access for [refugee] children to child-appropriate procedures").

222. *United States Ends Participation in Global Compact on Migration*, U.S. MISSION TO THE U.N. (Dec. 2, 2017), <https://usun.usmission.gov/united-states-ends-participation-in-global-compact-on-migration/> [<https://perma.cc/PY9H-CQV5>].

223. *Explanation of Vote in a Meeting of the Third Committee on a UNHCR Omnibus Resolution*, U.S. MISSION TO THE U.N. (Nov. 13, 2018), <https://usun.usmission.gov/explanation-of-vote-in-a-meeting-of-the-third-committee-on-a-unhcr-omnibus-resolution/> [<https://perma.cc/3RV2-NKP3>].

224. *Id.*; see also *Remarks to the UN General Assembly on the Global Compact for Migration Resolution*, U.S. MISSION TO THE U.N. (Dec. 19, 2018), <https://usun.usmission.gov/remarks-to-the-un-general-assembly-on-the-global-compact-for-migration-resolution/> [<https://perma.cc/WZK6-AJCK>] (emphasizing the U.S. concern that "Compact supporters, recognizing the lack of widespread support for a legally-binding international migration convention, seek to use the

reference certain obligations that are *already* part of conventional and/or customary law. They could help catalyze other emerging norms by shaping future state practice, if not that of the United States.

Among other legally binding obligations, the 1967 Protocol to the Refugee Convention (to which the United States is a party) obliges the United States to comply with Article 31 of the 1951 Refugee Convention, which provides:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . , enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.<sup>225</sup>

Needless to say, countries routinely argue that their immigration detention regimes comply with the letter of this law, while advocates highlight the inconsistency between routine detention intended as a deterrent and the prohibition on imposing “penalties” on refugees on account of their illegal entry.<sup>226</sup> Guy Goodwin-Gill points out that, even apart from obligations under the Refugee Convention, “[t]o impose penalties without regard to the merits of an individual’s claim to be a refugee will likely also violate

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Compact and its outcomes and objectives as a long-term means of building customary international law or so-called ‘soft law’ in the area of migration.”).

225. Convention Relating to the Status of Refugees art. 31, July 28, 1951, 19 U.S.T. 6577; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577.

226. See generally GUY S. GOODWIN-GILL, ARTICLE 31 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES: NON-PENALIZATION, DETENTION AND PROTECTION (2001) (analyzing Article 31 and incorporation of its principles).

the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction.”<sup>227</sup>

Multiple studies detail viable alternatives to immigration detention.<sup>228</sup> In the context of updating its directive laying down standards for the reception of applicants for international protection, the European Parliament reaffirmed:

The detention of applicants [for asylum] should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention.<sup>229</sup>

Moreover, “[a]pplicants who are in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs in that situation.”<sup>230</sup>

With respect to children in particular, the EU Directive provides that “[t]he best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors,” and that “Member States shall ensure a standard of living adequate for the minor’s physical, mental, spiritual, moral and social development.”<sup>231</sup> Critically, “Member

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227. *Id.* at 2; see ICCPR, *supra* note 190, art. 2(1).

228. See, e.g., COUNCIL OF EUR., HUMAN RIGHTS AND MIGRATION: LEGAL AND PRACTICAL ASPECTS OF EFFECTIVE ALTERNATIVES TO DETENTION IN THE CONTEXT OF MIGRATION (2017), <https://rm.coe.int/legal-and-practical-aspects-of-effective-alternatives-to-detention-in-/16808f699f> [<https://perma.cc/5K74-EXD5>] (describing alternatives); G.A. Res. 64/142, Annex (Feb. 24, 2010) (emphasizing that, among other imperatives, “[c]hildren must be treated with dignity and respect at all times and must benefit from effective protection from abuse, neglect and all forms of exploitation, whether on the part of care providers, peers or third parties, in whatever care setting they may find themselves,” and that “[i]n accordance with the predominant opinion of experts, alternative care for young children, especially those under the age of 3 years, should be provided in family-based settings”).

229. Council Directive 2013/33/EU, ¶ 15, 2013 O.J. (L 180/96) (Eur. Parl. and Council).

230. *Id.*

231. *Id.*; see ICCPR, *supra* note 190, art. 23.

States shall ensure that minor children of applicants or applicants who are minors are lodged with their parents, their unmarried minor siblings or with the adult responsible for them whether by law or by the practice of the Member State concerned, provided it is in the best interests of the minors concerned.”<sup>232</sup> Although the EU Directive as such is clearly not legally binding on the United States, the imperatives that detention should not be imposed as a penalty and that it must be done in a manner consistent with human dignity and the best interests of the child mirror requirements in existing conventional and customary international law.

### C. The Right to a Family Life

Separating migrant children from their parents also contravenes the children’s and the parents’ right to a family life. Ironically, U.S. Senators who objected to ratifying the Convention on the Rights of the Child (CRC) emphasized their view that “the primary safeguard for the well-being and protection of children is the family.”<sup>233</sup> The Conference of Plenipotentiaries responsible for drafting the 1951 Refugee Convention, which included a delegate from the United States, unanimously adopted the following recommendation regarding the principle of unity of the family:

The Conference, considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and noting with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems (E/1618, p. 40), the rights granted to a refugee are extended to members of his family, recommends Governments to take the necessary measures for the protection of the refugee’s family especially with a view to

(1) Ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,

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232. *Id.*

233. S. Res. 99, 112th Cong. (2012).

(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.<sup>234</sup>

Multiple international treaties and declarations reaffirm the central importance of preserving family unity, as long as doing so is consistent with the best interests of the child.

The ICCPR, to which the United States is a party, provides that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>235</sup> It further provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his . . . family.”<sup>236</sup> The right to protection of the family unit, at a minimum, requires scrutiny of any routine separation of arriving minors from accompanying adults, and prohibits practices that result—either intentionally or unintentionally—in the prolonged and potentially indefinite separation of children from their parents.

Outside the immigration context, arrest and incarceration can undeniably result in the involuntary separation of parents from their children.<sup>237</sup> This, in itself, is a major societal problem. U.S. officials have cited this fact as a justification for treating the family separation policy just like any other law enforcement operation that results in the detention of adults who have custody of minor children.<sup>238</sup> Under current jurisprudence, family unity concerns also

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234. UNHCR, *Note on Family Reunification*, ¶ 2, U.N. Doc. EC/SCP/17 (Aug. 13, 1981).

235. ICCPR, *supra* note 190, art. 23; *see also* American Declaration of the Rights and Duties of Man, *supra* 183, at Art. VI; UDHR Art. 16(3) (providing the same rights protection in additional human rights documents that the United States has signed).

236. ICCPR Art. 17(1); *see also* American Declaration of the Rights and Duties of Man, *supra* 183, at Art. V; UDHR, Art. 12 (providing similar rights protections in additional human rights documents that the United States has signed).

237. *See, e.g.*, LAUREN E. GLAZE & LAURA M. MARUSCHAK, PARENTS IN PRISON AND THEIR MINOR CHILDREN (2008), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> [<https://perma.cc/C3D2-59R2>] (reporting data on the rapid increase of incarcerated parents, and their minor children, held in state or federal prisons in the United States); *see also* INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, SAFEGUARDING CHILDREN OF ARRESTED PARENTS (2014), [https://www.theiacp.org/sites/default/files/pdf/Safeguarding-Children-of-Arrested-Parents-Final\\_Web\\_v3.pdf](https://www.theiacp.org/sites/default/files/pdf/Safeguarding-Children-of-Arrested-Parents-Final_Web_v3.pdf) [<https://perma.cc/P6MP-KS2R>] (reporting on trauma experienced by children who have parents in prison or in jail).

238. Note that under U.S. law, individual officers can be held liable if children of arrested parents are subjected to a “state-created danger” on account

do not invariably prevent the removal of inadmissible aliens under applicable U.S. law, even if they have minor children who are U.S. citizens.

Whatever the doctrinal and policy justifications might be for other government actions that result in family separation based on an adult's alleged unlawful acts, they do not justify the policy of routinely separating migrant and refugee children from their parents at the border without any individualized assessment or proceeding.<sup>239</sup> The choices to close or dramatically restrict crossings at ports of entry, to treat all crossings between points of entry as crimes that warrant prosecution, to detain adults and children separately with no reliable means of regular contact or even identification, and to return adults to their countries of origin without any reliable information about their children's status or whereabouts, all show an utter disregard for the international legal principle that families deserve protection as such.

#### D. The Right to Be Free from Cruel, Inhuman or Degrading Treatment

In addition to the above violations, the photos and first-hand accounts of the treatment of children (and adults) in immigration detention centers depict treatment that is cruel, inhuman, and degrading under any reasonable interpretation of this concept, and thus prohibited under the ICCPR and the Convention Against Torture (CAT).<sup>240</sup> Whether caused by inadequate allocation of

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of the separation. See L. Cary Unkelbach, *No Duty to Protect: Two Exceptions*, POLICE CHIEF, July 2004, at 12–14.

239. Mass family separations have also been documented deep inside the border, as a result of so-called immigration “raids.” See Angela Fritz & Luis Velarde, *ICE Arrested Hundreds of People in Raids, Now “Devastated” Children Are Without Their Parents*, WASH. POST (Aug. 8, 2019), <https://www.washingtonpost.com/immigration/2019/08/08/ice-arrested-hundreds-people-raids-now-devastated-children-are-without-their-parents/> (on file with the *Columbia Human Rights Law Review*); Sarah Folwer, *Where Are Mom and Dad? School on Standby to Help Children in Aftermath of ICE Raids*, CLARION LEDGER (Aug. 7, 2019), <https://eu.clarionledger.com/story/news/2019/08/07/what-happens-children-people-detained-ms-ice-raids-immigration/1947642001/> [<https://perma.cc/ZD5Z-B9UC>].

240. Lizzie O’Leary, *‘Children Were Dirty, They Were Scared, and They Were Hungry,’* ATLANTIC (June 25, 2019), <https://www.theatlantic.com/family/archive/2019/06/child-detention-centers-immigration-attorney-interview/592540/> (on file with the *Columbia Human Rights Law Review*). Some of these issues are not new, but their scope and scale are. For previous reports on immigration detention conditions, see, e.g., Inter-American Comm’n on Human Rights,

resources, incompetent management, and—as appears likely—deliberate indifference, the prohibition on cruel, inhuman, or degrading treatment is absolute and non-derogable. As the ICCPR makes clear, “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,”<sup>241</sup> and “[n]o one shall be subjected to torture or to cruel, inhuman[,] or degrading treatment or punishment.”<sup>242</sup> The CAT, which the United States has also ratified, obligates states parties to “prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . . when such acts are committed by or at the instigation of or with the consent of a public official or other personal acting in an official capacity.”<sup>243</sup>

The Martens Clause, which first appeared in the 1899 Hague Convention on the laws and customs of war on land, famously invokes “the laws of humanity and the requirements of the public conscience” as the minimum standard of protection absent directly applicable treaty provisions.<sup>244</sup> Although the scope and nature of the clause have been debated ever since, the idea that—in peacetime as in wartime—there are certain fundamental obligations that we owe to other human beings as a *legal*, not just a moral, matter remains essential.<sup>245</sup> Although the Trump Administration continues to invoke state sovereignty as a shield against international standards (while

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*Refugees and Migrants in the United States: Families and Unaccompanied Children* (July 24, 2015), OAS/Ser.L/V/II, Doc. 16 (July 24, 2015), <https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf> [<https://perma.cc/2EQR-BTKF>] (discussing conditions). On the carve-out for “lawful sanctions,” see *Ilascu v. Moldova*, App. No. 48787/99, 40 Eur. H.R. Rep. 46,1121 (2004); David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 L. & INEQ. 343, 391–93 (2011).

241. ICCPR art. 10(1).

242. *Id.* art. 7.

243. CAT art. 16(1). The Convention defines “torture” as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for purposes such as “punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.” *Id.* art. 1(1).

244. Convention with Respect to the Laws and Customs of War on Land, Preamble, July 29, 1899, 32 Stat. 1803.

245. See, e.g., *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 22 (April 9) (“Such obligations are based . . . on certain general and well-recognized principles, namely elementary considerations of humanity, even more exacting in peace than in war . . .”).

at the same time selectively condemning other countries for violating such standards), the idea that states no longer have a free hand to mistreat their own citizens—let alone other countries' citizens—is too deeply enmeshed in the fabric of international law for such disavowals to absolve the United States of any responsibility to act with basic human decency. An *anti-dehumanization* principle, grounded in international legal instruments and born of the lessons of history, must guide official U.S. actions, whether or not it can be enforced as such in a court of law.

#### E. The Right to a Remedy

Historically, aliens injured by another country's government could seek redress by having their own government “espouse” their claim diplomatically. This avenue of recourse is more difficult, however, when the victims are refugees and migrants who are fleeing their countries of origin, although the right to consular notification continues to provide a crucial—if far from adequate—check on the abuse of foreign citizens.<sup>246</sup> In the end, the most important leverage other countries have in pressuring the United States to live up to its

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246. See generally Stefanie Grant, *Consular Protection, Legal Identity and Migrants' Rights: Time for Convergence?*, LONDON SCH. ECON. & POL. SCI. MIDDLE EAST CENTRE BLOG (May 17, 2019), <https://blogs.lse.ac.uk/mec/2019/05/17/consular-protection-legal-identity-and-migrants-rights-time-for-convergence/> [<https://perma.cc/CQD6-H8M7>] (discussing convergence of consular protection and human rights protection). Any foreign citizen arrested in the United States has the right to consular notification under the Vienna Convention on Consular Relations (VCCR). See Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 500 U.N.T.S. 95; see also Cindy G. Buys, Scott D. Pollock & Ioana N. Pellicer, *Do Unto Others: The Importance of Better Compliance with Consular Notification Rights*, 21 DUKE J. COMP. & INT. L. 461, 463 (2011) (explaining that VCCR Article 36(1)(b) states that “if requested by a foreign national, the authorities of the receiving state shall, without delay, inform the consular post of the sending state that a national of that state has been arrested, committed to prison or to custody pending trial, or detained in any other manner”). When ICE conducted a massive raid at agricultural processing plants in Mississippi, Mexico reportedly sent consular staff to the area to provide assistance to affected Mexican nationals. See *US Immigration: ICE Arrests Nearly 700 People in Mississippi Raids*, BBC (Aug. 8, 2019), <https://www.bbc.co.uk/news/world-us-canada-49275109> [<https://perma.cc/7U26-PBEA>]. But cf. Liz Robbins, *Hundreds of Separated Children Have Quietly Been Sent to New York*, N.Y. TIMES (Jun. 20, 2018), <https://www.nytimes.com/2018/06/20/nyregion/children-separated-border-new-york.html> (on file with the *Columbia Human Rights Law Review*) (reporting that “[t]he consulates in New York for Honduras and El Salvador said they, too, were unclear how many of their young citizens were in the city, and of how to reach their relatives back home”).

own erstwhile ideals may well be political rather than legal. Although the current administration seems somewhat impervious to “naming and shaming” as a technique for promoting compliance with international human rights standards, there will presumably come a point at which the U.S. electorate will put pressure on leaders to rectify the United States’ international moral standing.

It is also worth noting that, although most legal actions challenging detention conditions in U.S. courts allege violations of applicable statutes and provisions of the U.S. Constitution,<sup>247</sup> at least one civil suit has successfully challenged immigration detention conditions under the Alien Tort Statute (ATS)—a law which gives federal courts jurisdiction over a limited number of international law violations that “touch and concern” U.S. territory.<sup>248</sup> The ATS was originally enacted to allow foreigners in the United States to vindicate their international legal rights in U.S. courts.<sup>249</sup> More than a century and a half later, the drafters of the Universal Declaration of Human Rights emphasized that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”<sup>250</sup> However, as indicated above, the United States has been

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247. See, e.g., *Doe v. Kelly*, 878 F.3d 719 (9th Cir. 2017) (reviewing a lower court decision in which Plaintiffs alleged that DHS detention center conditions violated detainees’ constitutional rights); Complaint, *Teneng v. Trump*, No. 5:18-cv-01609 (C.D. Cal. Aug. 1, 2018) (alleging that detention facilities violate detainees’ constitutional rights under the 1st and 15th amendments, as well as statutory rights under the Religious Freedom Restoration Act).

248. *Esmor Correctional Services Lawsuit (Re Immigration Detention Facility)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (Feb. 18, 2014), <https://www.business-humanrights.org/en/esmor-correctional-services-lawsuit-re-immigration-detention-facility> [<https://perma.cc/CR44-J3H6>]; see *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386 (2018).

249. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700 (2004); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 464 (1989).

250. UDHR Art. 8; see also G.A. Res. 60/146, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005) (affirming the rights of victims of gross violations of international human rights law to access remedies and reparation); INTERNATIONAL COMMISSION OF JURISTS, THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS 287 (Oct. 2018), <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf> [<https://perma.cc/PP6Z->

reticent to make legally binding commitments commensurate with the aspirations it has endorsed in the Universal Declaration and other “soft law” instruments.<sup>251</sup> This is true of the right to a remedy, which remains limited for both domestic and international law violations.

The United States has not disavowed all concern for foreign children. In an August 2019 statement delivered at the United Nations, the U.S. representative declared as follows:

For our part, the United States continues to prioritize child protection programming that is life-saving and essential for survival as well as longer-term recovery, resilience and healing, and we will continue to invest in preventive and responsive programming to protect children from violence. We know that the resumption of familiar, safe, and nurturing routines, particularly within a family, helps children heal, build resilience, and better cope with stress.<sup>252</sup>

The standards of treatment the United States urges for children in armed conflict must also be reflected in our treatment of children seeking refuge in the United States. Indeed, the United States declared in November 2017 that it remained “committed to ensuring that migrant children, including those in the custody of the U.S. government, are treated in a safe, dignified, and secure manner and with special concern for their particular vulnerabilities.”<sup>253</sup> In the end, it might be less a question of imposing international standards on the United States, and more a matter of ensuring—through the mobilization of civil society groups, other governments, international organizations, and the U.S. electorate—that the United States lives up to the commitments it has already made.

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2YAM] (outlining the rights under international law for remedies and reparation via a practice guide).

251. Eleanor Roosevelt, U.S. Delegate to the U.N., *The Struggle for Human Rights* (Sept. 28, 1948), <https://erpapers.columbian.gwu.edu/struggle-human-rights-1948> [https://perma.cc/QG7M-XCD7].

252. Cherith Norman Chalet, U.S. Representative for U.N. Management and Reform, Remarks at a U.N. Security Council Annual Open Debate on Children and Armed Conflict (CAAC) (Aug. 2, 2019), <https://usun.usmission.gov/remarks-at-a-un-security-council-annual-open-debate-on-children-and-armed-conflict-caac/> [https://perma.cc/6TZ5-MPEC].

253. Laurie Shestack Phipps, Adviser for Economic and Social Affairs, Explanation of Position on Agenda Item 72(b), A/C.3/72/L.43/Rev. 1 on Protection of Migrants (Nov. 20, 2017), <https://usun.usmission.gov/explanation-of-position-on-agenda-item-72b-a-c-3-72-l-43-rev-1-on-protection-of-migrants> [https://perma.cc/EFT8-RK2U].

## CONCLUSION

Both domestic and international law prohibit the deliberate separation of children from their families as a means of attempting to deter unlawful immigration. In addition to putting a definitive end to the practice of family separation, and to ensuring that the conditions and duration of immigration detention comply with domestic and international standards, there are several additional legislative and oversight avenues for Congress to pursue.

An immediate step that Congress can take is to enact legislation mandating the reunification of any remaining children separated by the policies implemented in 2017 and 2018, and any additional children that have been separated since that time, consistent with federal court order. While court order should be sufficient, there have been substantial delays since the court first ordered reunification and the completion of that process. Accordingly, legislation is likely necessary.

Congress can also mandate mechanisms for children and parents (or relatives or guardians) who are separated at the border to be adequately tracked electronically through a system that is modern, accurate, and interoperable across relevant government agencies. Congress should also legislate requirements for a parent, guardian, or appropriate representative to appear on behalf of children in immigration proceedings. Specific legislation tied to appropriations is needed under these circumstances—given the executive branch’s unwillingness to put into place proper bureaucratic mechanisms to promptly reunify families following the 2018 court order—to provide appropriate parental accompaniment to children at administrative hearings.

Congress should conduct additional oversight and inquiry to determine if legislative action could expedite litigation, which is building toward individual compensation for victims of the family separation and zero tolerance policies and practices. Most simply, Congress could explicitly authorize a *Bivens* action to address the situation. In *Ziglar*, the Supreme Court made it clear that, with Congress’s authorization, there would be no issue with extending *Bivens* actions to so-called “new contexts.”<sup>254</sup> Clarifying the availability of *Bivens* actions for separated families would be a significant step in the right direction, both from the perspective of

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254. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017).

providing remedy for past actions, and as a deterrent for future implementation of a family separation policy.

With additional hearings and oversight by Congress, members of both chambers may come to the understanding that the Trump Administration's practice of intentional family separation circa 2018 constituted a mass tort perpetrated by the executive branch of the U.S. government. While there is controversy about substituting regulation and compensation funds for traditional tort recovery in the mass tort context, a well-designed scheme may be best for efficient and effective compensation for victims of family separation. Moreover, even if such legislation is not ultimately passed, legislative consideration of such a proposal may serve as a deterrent to the executive branch in considering similar policies in the future.<sup>255</sup>

It lies beyond the scope of this article to explore the specifics of a legislatively authorized alternative to traditional tort actions and constitutional damages claims. Nonetheless, with likely over four thousand children affected by the Trump Administration's family separation policy and practice, this may be a situation ripe for an umbrella remedy. When powerful entities inflict damage on a large number of individuals—and not all victims can be immediately identified nor can the emergence of the full extent of their injuries be readily determined—creating an ongoing mechanism to identify victims and to handle their needs for compensation and medical care may make sense.<sup>256</sup> As with other situations where Congress has created programs like this,<sup>257</sup> or powerful defendants have agreed to create and fund them,<sup>258</sup> the backdrop to such a program for victims

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255. Designing any such program raises a number of complex issues related to corrective justice and social policy. For an overview of the sort of concerns that would have to be taken into account, see Adam S. Zimmerman, *The Corrective Justice State*, 5 J. TORT L. 189 (2012).

256. Given that many victims of and witnesses to family separation may not be residing in the United States, the logistics of compensation for the harms suffered might make this situation particularly suitable for a legislative solution.

257. For a discussion of congressionally-enacted frameworks related to international aviation accidents, oil spills in navigable waters, nuclear power plant accidents, and mass vaccine injuries, see NICHOLAS M. PACE & LLOYD DIXON, *ASSIGNING RESPONSIBILITY FOLLOWING A CATASTROPHE: ALTERNATIVES TO RELYING SOLELY ON TRADITIONAL CIVIL LITIGATION* (2017), [https://www.rand.org/pubs/research\\_reports/RR1597.html](https://www.rand.org/pubs/research_reports/RR1597.html) [<https://perma.cc/3QQ5-2H5Q>].

258. For a review of such measures, see Jaime Dodge, *Privatizing Mass Settlement*, 90 NOTRE DAME L. REV. 335 (2014). For criticism of one high-profile one, see Linda Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as*

of the family separation policy will be the already rising tide of more traditional lawsuits.

Congress can also explore specific amendments to immigration law in order to affect future conduct by the executive branch. For example, Congress should consider establishing a presumption, set in law, that children remain with their parent, absent a magistrate's (or administrative judge's) determination that separation is in the best interests of the child. The government should have the burden of proving separation and placement in government facility is necessary for the best interests of the child. While the law should include exceptions for children who are legitimately unaccompanied or whose safety and well-being mandates government custody, the law should be clear that children cannot be detained in government custody for potentially indefinite periods, and that the executive branch cannot separate children from accompanying adults merely because the adults have been charged with improper entry—a violation that often results in a penalty of time served. Immigration law should also be amended to direct that immigration policies and enforcement may not be intentionally punitive, consistent with historical judicial precedent. Overall, Congress should exercise its budget and oversight authority to influence executive branch activities that focus on expediting immigration processing, including asylum claims, versus expanding a bureaucracy focused on detention.

Finally, notwithstanding the United States' non-ratification of the Convention on the Rights of the Child, Congress should ensure that U.S. policies live up to the representation that domestic laws are already sufficient to protect children's rights and interests. Legislators should take steps to ensure that the executive branch acts consistently at home with the principles it espouses abroad. Even without ratifying international instruments, Congress can build protections into domestic law, so that the U.S. government acts in accordance with established international standards and consistent with basic principles of humanity.

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*a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819 (2011).