When Cruelty Is the Point: Family Separation as Unconstitutional Torture

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The Trump Administration separated migrant children from their parents at the southern U.S. border in 2017 and 2018 knowing and intending that the families would suffer grievous harm. The President and other Administration officials candidly acknowledged that they intended the threat of separation under the "zero tolerance" policy to deter migration. In other words, the cruelty of separation was the very point of the plan. In June 2018, a district court concluded that the policy violated parents' due process right to family unity and association, enjoined the practice, and directed the reunification of families. That framing of the constitutional violation, however, failed to fully capture the scope of the government's abuse of power and the depth of the harm that family separation inflicted upon parents and children.

This Article draws upon Eighth Amendment and Due Process doctrine to articulate why the policy's intentional cruelty and infliction of grievous harm constituted unconstitutional torture. This understanding of family separation as torture recognizes the intentional violence and abuse of power at the core of the policy and sharpens the claim to broad and meaningful remedies and accountability. Emphasizing the defining cruelty of family separation resists its minimization within legal discourse and secures against similar abuses of migrants in the future.

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INTRODUCTION

In 2017 and 2018, the Trump Administration intentionally inflicted grievous harm upon thousands of migrant parents and children at the southern U.S. border through its "zero tolerance" separation policy.[2] Federal officers detained migrants, took their minor children from them, and shuttled the children into a refugee child welfare system as if they were "unaccompanied"[3] or orphaned.[4] They did so without consistently tracking parent-child relationships, making clear that the government had no intention to one day reunite parents and children.[5]

Permanent separation of more families likely would have occurred were it not for the families and advocates who challenged the practice in court[6] and the activists and so many others who protested in the streets.[7] But more than two years later, more than 545 children remain separated from their

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[2] U.S. HOUSE OF REPRESENTATIVES COMM. ON OVERSIGHT AND REFORM, CHILD SEPARATIONS BY THE TRUMP ADMINISTRATION, Prepared for Chairman Elijah E. Cummings, 1, 9 (2019), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf, *archived at* https://perma.cc/RH2B-89G9 [hereinafter HOUSE OVERSIGHT STAFF REPORT] (noting that "government watchdogs have indicated that the Administration may have separated thousands of additional children before the 'zero tolerance' policy was announced").

[3] 6 U.S.C. § 279(g)(2) defines an "unaccompanied alien child" ("UAC") as a child who "(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom— (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody."

[4] JACOB SOBOROFF, SEPARATED 13 (2020).

[5] Ms. L. v. U.S. Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018) (issuing nationwide injunction ordering reunification of families and describing the Department of Homeland Security's ("DHS") and the Office of Refugee Resettlement's ("ORR") failure to keep track of children and parents as "startling"); U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER 12, 16–17 (2018), https://www.gao.gov/reports/GAO-19-163, *archived at* https://perma.cc/96Z3-M3UT [hereinafter GAO 2018 FAMILY SEPARATION REPORT] (describing failures to accurately keep track of families).

[6] *See Ms. L*, 310 F. Supp. 3d at 1145, 1149 (finding that the plaintiff class established a likely violation of families' due process rights and ordering speedy reunification of parents and children).

[7] Marissa J. Lang, *Angered by Family Separations at the Border, Advocacy Groups Plan White House Protest June 30*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/local/wp/2018/06/19/angered-by-family-separations-at-the-border-advocacy-groups-plan-white-house-protest-june-30, *archived at* https://perma.cc/ZZT8-2HMC (noting that protests were "planned in 132 cities across the country . . . to demonstrate outrage at the Trump administration's policy of separating immigrant families at the border and detaining children apart from their parents").

parents,[8] some possibly "permanently orphaned" by the Trump Administration.[9]

The pain caused by this operation was not incidental; the cruelty of separation was the very point of the plan.[10] The top officials responsible for this scheme appreciated the importance of migrants' parent-child relationships only insofar as it provided the strategic motivation for the policy. Decision-makers understood that the attachment between parents and children meant that separating them would be devastating. They exploited that impact to deter migration from Mexico and Central America, including by asylum-seekers.[11]

Courts quickly declared this scheme illegal.[12] In a historic decision in June 2018, the United States District Court for the Southern District of California in *Ms. L. v. U.S. Immigration and Customs Enforcement*[13] enjoined the "zero tolerance" separations and directed the reunification of families. The court concluded that the government violated the families' Fifth Amendment substantive due process right to family unity and association.[14] This decision was monumental, particularly considering the judiciary's usual re-

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[8] Julia Ainsley & Jacob Soboroff, *Lawyers Say They Can't Find the Parents of 545 Migrant Children Separated by Trump administration*, NBC NEWS (Oct. 20, 2020), https://www.nbcnews.com/politics/immigration/lawyers-say-they-can-t-find-parents-545-migrant-children-n1244066, *archived at* https://perma.cc/6ZSH-A4SF (citing court filing recounting "that two-thirds of those parents were deported to Central America without their children" and have yet to be reconnected with their children).

[9] SOBOROFF, *supra* note 4, at 13 (describing some separated children as effectively "orphaned"). The Southern District of California similarly noted "the government is inundated by the influx of children essentially orphaned as a result of family separation." *Ms. L.*, 310 F. Supp. 3d at 1140.

[10] J.P. v. Sessions, No. LA CV18-06081, 2019 WL 6723686, at *36 (C.D. Cal. Nov. 5, 2019) (reasoning that the federal government implemented family separation "with awareness of the potential harm it would cause and intend[ed] to use that as a basis to deter future attempts by those similarly situated to enter the United States").

[11] 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, *archived at* https://perma.cc/3J3B-VE9Z. The Government Accountability Office concluded that approximately 82 percent of families apprehended by Customs and Border Protection ("CBP") at the southern border during fiscal year 2016 through the first half of fiscal year 2019 "were nationals of Guatemala, Honduras, or El Salvador." U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-245, SOUTHWEST BORDER: ACTIONS NEEDED TO IMPROVE DHS PROCESSING OF FAMILIES AND COORDINATION BETWEEN DHS AND HHS 20 (2020), https://www.gao.gov/products/GAO-20-245, *archived at* https://perma.cc/LEW5-97C3 [hereinafter GAO 2020 FAMILY PROCESSING REPORT].

[12] Every district court judge to address the legality of family separation found that it violated the Fifth Amendment. *See, e.g.*, *Ms. L.*, 310 F. Supp. 3d at 1133; W.S.R. v. Sessions, 318 F. Supp. 3d 1116, 1116 (N.D. Ill. 2018); De Nolasco v. U.S. Immigr. & Customs Enf't, 319 F. Supp. 3d 491, 491 (D.D.C. 2018); M.G.U. v. Nielsen, 325 F. Supp. 3d 111, 111 (D.D.C. 2018); Ms. Q. & J. v. U.S. Immigr. & Customs Enf't, No. 18-2409, 2018 WL 10050356, at *1 (D.D.C. Dec. 4, 2018).

[13] *Ms. L.*, 310 F. Supp. 3d at 1133.

[14] *Id.* at 1148.

luctance to impose constitutional limits on immigration enforcement.[15] Yet to understand family separation solely as a violation of a due process right to family unity and association fails to comprehend the magnitude of the government's wrongdoing, its intentional cruelty, and the searing damage inflicted upon parents and children.[16]

Indeed, the autonomy and privacy norms underlying the protection of family unity fail to give voice to other significant constitutional concerns posed by family separation.[17] Family separation also violates anti-brutality and human dignity norms embodied within the U.S. Constitution.[18]

There are normative and practical reasons for elevating these concerns within legal responses and public discourse addressed to family separation. First, doing so counteracts the Trump Administration's ongoing minimization of its abuses as the unfortunate byproduct of harsh immigration enforcement.[19] The Government's reframing of the harm and horrors of family separation "to a different, less pejorative class of events" denies the harm inflicted on the victim and "displac[es] blame on to those who are harmed."[20] Such efforts were not merely a Trump talking point but the Department of Justice's litigation position.[21] Centering the intentional cruelty of family separation in response to these claims acknowledges the grave human rights violations inflicted on families while resisting the normalization of broader harm directed at non-citizens throughout the immigration system, which such whitewashing inevitably invites as well.[22] Second, torture is an

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[15] *See, e.g.*, Kerry v. Din, 135 S. Ct. 2128, 2129 (2015) (holding that denial of visa to U.S. citizen's non-citizen spouse without providing a bona fide reason for the denial did not violate her substantive due process right to family unity); Reno v. Flores, 507 U.S. 292, 305–06 (1993) (holding that the former INS policy of detaining non-citizen juveniles who lacked close relatives or legal guardians able to take custody of them did not violate substantive due process); *see also* Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2348–49 (2019) (noting the unusualness of the district court's willingness in *Ms. L.* to restrain the Executive given that "broad delegations of power to the President and agencies at the border are routinely upheld by courts").

[16] J.P. v. Sessions, No. LA CV18-06081, 2019 WL 6723686, at *9–10 (C.D. Cal. Nov. 5, 2019) (citing expert testimony from leading trauma specialists who described the psychological impact of family separation on adults and children, including post-traumatic stress disorder, depression, and anxiety).

[17] *See infra* Part II.A.

[18] *See infra* Part III.

[19] Indeed, the Department of Justice defended the Trump Administration against damages actions brought by separated families by framing the actions as "challenge[s] to federal immigration policy"—thereby endeavoring to normalize family separation as legitimate action. *See* Motion to Dismiss, A.I.I.L. v. Sessions, No. CV-19-00481, at *1, ECF No. 28 (D. Ariz. Feb. 14, 2020). Specifically, the Government claimed that "[a]ny associated interference with the right to family integrity . . . was incidental to such enforcement and sprang from the federal government's legitimate interest in prosecuting illegal entrants and/or detaining them during the expedited removal and credible fear screening process." *Id.* at *43.

[20] STANLEY COHEN, STATES OF DENIAL 107, 110 (2001) (examining the forms of government denial for state atrocities).

[21] *See* Motion to Dismiss, *A.I.I.L.*, No. CV-19-00481, ECF No. 28, at *43.

[22] For example, even within *J.P. v. Sessions*, No. LA CV18-06081, 2019 WL 6723686, at *5, *36 (C.D. Cal. Nov. 5, 2019), a ground-breaking decision by the United States District Court for the Central District of California that ordered government officials to provide sepa-

intent-based violation;[23] whereas the norms that protect family unity and association do not similarly depend upon a deliberate and evil purpose.[24] Understanding family separation as torture emphasizes that the intentional infliction of severe pain and suffering was at the center of the government's deterrence strategy. Finally, accurately describing "zero tolerance" as intentional violence exposes and condemns the Trump Administration's actions as the grave human rights abuses that they were. As human rights advocates have long recognized, accurately naming abuses and those responsible for them not only helps victims heal, it guards against future human rights violations too.[25] Naming the brutality of family separation should not be limited to identifying the international law and domestic statutes that the practice violated.[26] The U.S. Constitution restrains executive officials from committing torture and was the primary means by which the impacted families' rights to reunification were vindicated. Recognition of torture restraints and remedies under the U.S. Constitution ensures that the intentional violence and abuse of power at the core of the policy is not diluted within our legal discourse, misremembered in our history, or repeated in the future.[27]

In conceptualizing the constitutional injury of the "zero tolerance" policy, human rights critiques of family separation offer important insights. Several human rights organizations, scholars, and others have persuasively contended that the "zero tolerance" family separations amounted to torture under international and U.S. statutory law.[28] They claim that government

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rated families with trauma-informed mental health care after their release and reunification, the family unity frame inhibited the Court's description of the government's intentional wrongdoing. Specifically, although the Court acknowledged that the defendant government officials were "aware" of the potential harm family separation would cause and "intend[ed] to use that as a basis to deter future attempts by those similarly situated to enter the United States," it simultaneously suggested that officials "did not take reasonable steps to avoid or address" the consequences of separation. *Id.* at *36. Describing the pain and injury of family separation as the "risks associated" with the policy minimizes the government's wrongdoing, categorizing it as incidental to some other purportedly legitimate government act rather than a specifically intended and deliberate human rights violation. *Id.* at *36–37.

[23] *See* David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823, 849 (2012) ("To commit torture, a defendant must specifically intend the act to cause severe pain or suffering.").

[24] *See infra* Part II.A & II.B.

[25] Suzanne Katzenstein, *Reverse-Rhetorical Entrapment: Naming and Shaming as a Two-Way Street*, 46 VAND. J. TRANSNAT'L L. 1079, 1079 (2013) ("In general, the mere act of naming and shaming can promote human rights norms by reinforcing the shared understanding that some types of government conduct are beyond the pale.").

[26] Carrie Cordero et al., *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 432 (2020) (examining the international law violated by family separation).

[27] *See, e.g.*, Kathryn Abrams, *Feminists in International Human Rights: The Changer and the Changed*, 21 BERKELEY J. INT'L L. 390, 393 (2003) (describing how scholarship addressing "contested episodes of family separation to which human-rights norms might be applied . . . challenges us to think of our own culture and polity not only as the source of corrective insight but as the site of potential human-rights violations").

[28] *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, *archived at* https://perma.cc/H6TB-KMXN. Physicians for Human Rights ("PHR") and Amnesty International contend that the "zero tolerance" family separa-

actors intentionally inflicted severe pain and mental suffering on parents and children such that family separation met the definitions of torture under the Convention Against Torture[29] and the federal torture statute.[30] These accounts emphasize the centrality of the intentionally inflicted suffering at the heart of torture and the magnitude of the government's wrongdoing. A similar account is warranted under the U.S. Constitution.

This Article draws upon Eighth Amendment and Due Process doctrines that reject torture and equivalent government brutality to articulate why the policy's intentional cruelty, inhumanity and grievous harm is state violence that amounts to unconstitutional torture. It explains why the strategically exploited cruelty at the core of family separation's design and implementation demands an expanded description of the policy's unconstitutionality and a broader vision of accountability.

Part I explains the family separation policy, centering cruelty both as the essential component of the government's deterrence strategy and as the driving force in the policy's implementation. Part II conceptualizes the harm and constitutional violations imposed by family separation through the frame of cruelty and brutality. It examines the norms undergirding the recognition of family unity and the limits of the constitutional injury emphasized in *Ms. L.* Part III then evaluates family separation's illegality as torture under international and federal statutory law and identifies the strands of Eighth Amendment and Due Process doctrine that reject torture and equivalent government cruelty.[31] Part IV surfaces insights from the literature criticizing the deficiency of constitutional doctrines and discourse in responding to gross violations of human rights and the dehumanization of communities of color.[32] It draws upon the anti-brutality norms recognized in Fifth Amend-

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tions meet the United Nations Convention Against Torture's ("CAT") definition of torture. PHYSICIANS FOR HUM. RTS., "YOU WILL NEVER SEE YOUR CHILD AGAIN": THE PERSISTENT PSYCHOLOGICAL EFFECTS OF FAMILY SEPARATION 27 (Feb. 2020), https://phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf, *archived at* https://perma.cc/8Q9G-RZ9N [hereinafter PHYSICIANS FOR HUM. RTS.]; *USA: Policy of Separating Children from Parents Is Nothing Short of Torture*, AMNESTY INT'L (June 18, 2018), https://www.amnesty.org/en/latest/news/2018/06/usa-family-separation-torture, *archived at* https://perma.cc/7WZ9-EQ9M [hereinafter *Amnesty Separation Report*] (quoting Erika Guevara-Rosas, Amnesty International's Americas Director); *see also* Jorge Ramos, *Yes, the Family Separation Policy Is Torture*, TIME (June 20, 2018), https://time.com/5317551/family-separation-policy-torture, *archived at* https://perma.cc/8SGG-4THL.

[29] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 24841.

[30] 18 U.S.C. § 2340A(a) (imposing criminal penalties for torture as defined by 18 U.S.C. § 2340(1), which defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control").

[31] *See* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1681 (2005) (describing the principle that the Constitution prohibits torture as "not just one rule among others, but a legal archetype—a provision which is emblematic of our larger commitment to nonbrutality in the legal system").

[32] *See* J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1706, 1727–28 (1997) (describing how constitutional discourse and language can

ment and Eighth Amendment doctrines to articulate a broader vision of why family separation—as inhumane, deliberately inflicted cruelty imposing lasting injuries—violates the Constitution's prohibition of torture.

I. The Motive and Harm of Family Separation

A. Cruelty as Deterrence

In May and June 2018, federal officers ripped children from their parents' arms at the southern U.S. border, and reports of distraught and despondent children caged in government warehouses soon followed.[33] But this violence began much earlier; the forced separation of thousands of parents and children under similar conditions began early in the Trump Administration.[34]

On April 11, 2017, then-U.S. Attorney General Jeff Sessions issued a memorandum directing federal prosecutors to prioritize the prosecution of

limit the presentation and recognition of claims of injustice); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 33–35 (1983) (offering his idea of "redemptive constitutionalism" as a process through which groups assert alternative visions of the Constitution in the search for justice). For recent examples of the limits within our constitutional discourse to respond to state violence and injustice, see Hernandez v. Mesa, 140 S. Ct. 735, 739 (2020) (citing national security concerns to reject a *Bivens* remedy sought by the family of a Mexican teenager killed by a Border Patrol officer who shot the adolescent as he played on the Mexican side of the border) and Ziglar v. Abbasi, 137 S. Ct. 1843, 1869 (2017) (declining to recognize a remedy under *Bivens* for the prolonged detention of undocumented persons under abusive conditions at a federal jail in New York City after September 11th).

[33] *See, e.g.*, Ginger Thompson, *Listen to Children Who've Just Been Separated From Their Parents at the Border*, ProPublica (June 18, 2018), https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy, *archived at* https://perma.cc/Y8HF-HCNS; *U.S. Family Separation Crisis – in Pictures*, The Guardian (June 22, 2018), https://www.theguardian.com/us-news/gallery/2018/jun/22/us-family-separation-crisis-in-pictures, *archived at* https://perma.cc/RX6G-3A3Q; Miriam Jordan, *How and Why "Zero Tolerance" Is Splitting Up Immigrant Families*, N.Y. Times (May 12, 2018), https://www.nytimes.com/2018/05/12/us/immigrants-family-separation.html, *archived at* https://perma.cc/MK6Q-277W; Amna Nawaz et al., *'Why Did You Leave Me?' In New Testimonies, Migrants Describe the 'Torment' of Child Separation*, PBS News Hour (Aug. 1, 2019), at https://www.pbs.org/newshour/nation/why-did-you-leave-me-in-new-testimonies-migrants-describe-the-torment-of-child-separation, *archived at* https://perma.cc/27GL-3ELU.

[34] Lomi Kriel's article in the Houston Chronicle on November 26, 2017 first reported the Trump Administration's family separation practices. *See* Lomi Kriel, *Migrant Families Left Broken at the Border; Questionable Federal Policy Separates Parents and Children*, Houston Chronicle (Nov. 26, 2017). Kriel confirmed 22 cases of family separation and projected there were dozens more based upon the statements of child advocates, public defenders, and immigration activists. *Id.* Later investigations reported "that the Administration may have separated thousands of additional children before the "zero tolerance" policy was announced." Off. of Inspector Gen., U.S. Dep't of Health & Hum. Servs., OEI-Bl-18-00511, Separated Children Placed in Office of Refugee Resettlement Care 1 (Jan. 17, 2019), www.oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf, *archived at* https://perma.cc/2MFL-CE2S; *see also* House Oversight Staff Report, *supra* note 2, at 9; Miriam Jordan, *Judge Gives U.S. 6 Months to Account for Thousands More Separated Migrant Families*, N.Y. Times (Apr. 25, 2019), www.nytimes.com/2019/04/25/us/migrant-family-separation-judge.html, *archived at* https://perma.cc/KSU6-VABW.

immigration violations, including illegal entry.[35] Although the memo did not specifically address family separation, it was the first step in the Administration's long-touted plan to crack down on unauthorized migration through harsh enforcement tactics.[36]

A few months later, a pilot program at the El Paso sector of Customs and Border Protection ("CBP") began the systematic separation of migrant families at the border.[37] Separated children were transferred to the Office of Refugee Resettlement ("ORR"), the division of the U.S. Department of Health and Human Services ("HHS") responsible for the custody and care of "unaccompanied" minors who do not have a parent or guardian available to care for them.[38] In late 2017, the Trump Administration made plans to separate families on an even more widespread basis.[39] A memo drafted in December 2017 and later leaked to the public showed that officials anticipated that publicity generated in response to the "zero tolerance" policy "would have substantial deterrent effect."[40]

On April 6, 2018, President Trump instructed federal agencies to stop releasing persons held for immigration violations pending their hearings.[41] On the same day, then-Attorney General Jeff Sessions issued a memo announcing DOJ's "zero-tolerance policy" for immigration offenses under 8 U.S.C. § 1325(a).[42] That memo mandated that U.S. Attorneys along the

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[35] Matt Zapotosky & Sari Horwitz, *Sessions Tells Prosecutors to Bring More Cases Against Those Entering U.S. Illegally*, WASH. POST (Apr. 11, 2017), https://www.washingtonpost.com/world/national-security/sessions-tells-prosecutors-to-bring-more-cases-against-those-entering-us-illegally/2017/04/11/9fc6e964-1eb7-11e7-ad74-3a742a6e93a7_story.html, *archived at* https://perma.cc/D3ML-BNRK (announcing department's end of so-called "catch and release" policy of releasing undocumented migrants taken into custody at the border while their immigration cases proceed and instructing prosecutors to pursue more immigration offenses and consider felony charges for offenses like repeated unlawful entry).

[36] *Id.*

[37] *See* OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., DHS LACKED TECHNOLOGY NEEDED TO SUCCESSFULLY ACCOUNT FOR SEPARATED MIGRANT FAMILIES, OIG-20-06, 14 (Nov. 25, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf, *archived at* https://perma.cc/V2MZ-8WQQ (describing pilot project and CBP's reports that the "prosecution initiative" aimed "to deter illegal border crossings"); *see also* Jonathan Blitzer, *A New Report on Family Separations Shows the Depths of Trump's Negligence*, NEW YORKER (Dec. 6, 2019), https://www.newyorker.com/news/news-desk/a-new-report-on-family-separations-shows-the-depths-of-trumps-negligence, *archived at* https://perma.cc/4MCH-DEC3 (describing El Paso pilot project).

[38] 6 U.S.C. § 279.

[39] Policy Options to Respond to Border Surge of Illegal Immigration (Dec. 16, 2017) https://www.documentcloud.org/documents/5688664-Merkleydocs2.html, *archived at* https://perma.cc/RP5N-E3VG.

[40] *Id.*

[41] Ending 'Catch and Release' at the Border of the United States and Directing Other Enhancements to Immigration Enforcement, 83 Fed. Reg. 16,179 (Apr. 6, 2018), https://www.federalregister.gov/documents/2018/04/13/2018-07962/ending-catch-and-release-at-the-border-of-the-united-states-and-directing-other-enhancements-to, *archived at* https://perma.cc/DD34-HPBY.

[42] *Memorandum for Prosecutors Along the Southwest Border: Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)*, OFF. OF THE ATT'Y GEN. (Apr. 6, 2018), https://

southern U.S. border prosecute non-citizens for the misdemeanor offense of unauthorized border crossing.[43] Sessions acknowledged that the policy sought to deter unauthorized migration by families.[44] When announcing the policy, he warned: "If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law."[45] However, no law required the separation of families, and U.S. asylum law protects the principle of family unity.[46]

Numerous other members of the Trump Administration also candidly acknowledged that the Government aimed to deter migration through these enforcement policies.[47] Although then-Secretary of Homeland Security Kirstjen Nielsen famously denied that the government adopted a policy to separate families,[48] she had previously acknowledged in a statement to Congress that the government sought to deter families from migrating.[49]

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www.justice.gov/opa/press-release/file/1049751/download, *archived at* https://perma.cc/WPU5-RXXT. 8 U.S.C. § 1325(a) establishes criminal penalties for improper entry into the United States by non-citizens. A first offense under section 1325(a) is a misdemeanor. 8 U.S.C. § 1325(a); *see also* OFF. OF THE ATT'Y GEN., *supra.*

[43] *Attorney General Announces "Zero Tolerance" Policy for Criminal Illegal Entry*, DEP'T OF JUST. (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-generalannounces-zero-tolerance-policy-criminal-illegal-entry, *archived at* https://perma.cc/5ENL-6D9T. The prosecution of asylum-seekers was already occurring. *See* HUM. RTS. FIRST, PUNISHING REFUGEES AND MIGRANTS: THE TRUMP ADMINISTRATION'S MISUSE OF CRIMINAL PROSECUTIONS 41 (Jan. 2018), https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf, *archived at* https://perma.cc/F8RL-785R (noting that 48 percent of defense attorneys practicing along the southern border who responded to a survey in 2017 reported that a majority of their clients were asylum-seekers and 66.7 percent reported that more than a quarter of their clients included asylum-seekers).

[44] Jeff Sessions, U.S. Att'y Gen., Dep't of Just., Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions, *archived at* https://perma.cc/V8DW-TQSG.

[45] *Id.*

[46] *See* Lori A. Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897, 904 (2005) (noting that "in enacting the asylum remedy, Congress went beyond the literal mandate of the international instrument and provided greater rights, including the right to family reunification").

[47] 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, *archived at* https://perma.cc/KVD2-N7Q7.

[48] *Kirstjen Nielsen Addresses Families Separation at Border: Full Transcript*, N.Y. TIMES (June 18, 2018), https://www.nytimes.com/2018/06/18/us/politics/dhs-kirstjen-nielsen-families-separated-border-transcript.html, *archived at* https://perma.cc/CU67-RQM7 ("[T]he administration did not create a policy of separating families at the border.").

[49] *Senate Hearing with DHS Secretary Nielsen*, CNN (Jan. 16, 2018), http://transcripts.cnn.com/TRANSCRIPTS/1801/16/cnr.04.html, *archived at* https://perma.cc/99RK-4PVG. A draft report by the Department of Justice's Inspector General in October 2020 later revealed that top Justice Department officials discussed the policy and its deterrence strategy with Nielsen and others in April 2018. *See* Michael D. Shear, et al., '*We Need to Take Away Children,' No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 21, 2020), https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html, *archived at* https://perma.cc/EL3S-VC7U. At that meeting, Sessions reportedly took a vote by show of hands regarding the decision to proceed with the policy and, although Nielsen voted against the measure, she assented the following day. *Id.*

Several officials explicitly tied the deterrence strategy to the family separation policy. For example, John Kelly, the former DHS Secretary who then became President Trump's chief of staff, acknowledged as early as March 2017 that the Administration was considering family separations "in order to deter" families from migrating to the United States.[50] Later, in a May 2018 radio interview, Kelly acknowledged that deterrence was the "name of the game."[51] Other officials within DHS also publicly confirmed that the Administration saw the "zero tolerance" separations as a means to discourage families from migrating.[52]

Most significantly, after he ended the program with an executive order in June 2018, President Trump conceded that the policy aimed to deter migration.[53] In an October 2018 television interview, he stated: "[F]rankly . . . when you allow the parents to stay together, okay, when you allow that, then what happens is people are gonna [sic] pour into our country. If they feel there will be separation, they won't come."[54]

The "zero tolerance" memo made no exception for asylum-seekers, even though the 1951 Convention on the Status of Refugees, which binds the United States,[55] prohibits signatories from punishing refugees for illegal en-

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[50] Madeline Conway, *Kelly Confirms He's Considering Program to Separate Migrant Children and Parents*, POLITICO (Mar. 6, 2017), https://www.politico.com/story/2017/03/kelly-migrant-chidren-travel-ban-235738, *archived at* https://perma.cc/GN3G-TS9K.

[51] *Transcript: White House Chief of Staff John Kelly's Interview with NPR*, NPR (May 11, 2018), https://www.npr.org/2018/05/11/610116389/transcript-white-house-chiefof-staff-john-kellys-interview-with-npr, *archived at* https://perma.cc/JJ9F-76CA (stating family separation "would be a tough deterrent" and children would be "put in foster care or whatever").

[52] *See* Bump, *supra* note 47 (quoting Assistant Secretary of HHS Steven Wagner's statement that "[w]e expect that the new policy will result in a deterrence effect").

[53] The Trump Administration ended the program through an Executive Order issued on June 20, 2018, in which it claimed the "policy of this Administration [is] to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources." Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018).

[54] Lesley Stahl, *Leslie Stahl Speaks with President Trump About a Wide Range of Topics in his First 60 Minutes Interview Since Taking Office*, CBS NEWS (Oct. 15, 2018), https://www.cbsnews.com/news/donald-trump-interview-60-minutes-full-transcript-lesley-stahl-jamal-khashoggi-james-mattis-brett-kavanaugh-vladimir-putin-2018-10-14, *archived at* https://perma.cc/EN8U-5TGR. That same month the President told reporters he was considering implementing a family separation policy again for this same reason, saying, "[i]f they feel there will be separation, they won't come." Philip Rucker, *Trump Says He is Considering a New Family Separation Policy at U.S.-Mexico Border*, WASH. POST (Oct. 13, 2018), https://www.washingtonpost.com/politics/trump-says-he-is-considering-a-new-family-separation-policy-at-us-mexico-border/2018/10/13/ea2f256e-cf25-11e8-920f-dd52e1ae4570_story.html, *archived at* https://perma.cc/MWB9-Y3L9. In December of 2018, he restated this motivation for the policy, tweeting, "if you don't separate, FAR more people will come." Brett Samuels, *Trump Goes on Offense Against Investigations after Tough Week*, THE HILL (Dec. 16, 2018), https://thehill.com/homenews/administration/421600-trump-seethes-at-fbi-snl-in-morning-burst-of-tweets, *archived at* https://perma.cc/B4ZM-CCBR.

[55] The United States ratified the 1967 Protocol Relating to the Status of Refugees, which incorporated the 1951 Convention. 1967 Protocol Relating to the Status of Refugees art. I (1), Jan. 31, 1967, 19 U.S.T. 6223. Prior administrations also thwarted the Refugees Convention by sweeping up asylum-seekers in efforts to target border crossers for prosecution. Eleanor Acer, *Criminal Prosecutions and Illegal Entry: A Deeper Dive*, JUST SECURITY (July 18, 2019), https://www.justsecurity.org/64963/criminal-prosecutions-and-illegal-entry-a-deeper-dive,

try or criminalizing their presence without lawful immigration status.[56] None of the Administration's statements explaining its motive of deterrence acknowledged the right of asylum-seekers to seek safety in the United States free of criminal penalty for their manner of entry.

B. Warnings Ignored

The government pursued its deterrence strategy with an awareness of the devastating harm that separation would impose. It acted not in spite of, but because of, that harm. As described below, numerous experts warned that separation would cause significant and lasting harm, particularly to children. Decision-makers pursued the policy anyway, exploiting such harm for the purpose of deterrence.

For example, in 2016, an advisory committee reported to DHS that separating families for immigration enforcement purposes "is never in the best interest of children."[57] In March 2017, the American Academy of Pediatrics also voiced its opposition to any DHS family separation policy.[58] It emphasized that separation would exacerbate the emotional and physical stress already experienced by children seeking refuge.[59]

Following reports that the Administration was considering family separation, more than 200 experts on childhood development, health, and trauma wrote to then-Secretary of DHS Nielsen in January 2018, urging the agency to halt any plans for family separation.[60] They warned that family separation

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archived at https://perma.cc/XBU7-TQUT [hereinafter *Deeper Dive*]. But neither the Bush nor Obama administrations employed a widespread family separation policy as a means to deter migration or thwart asylum-seekers from seeking refuge in the United States. PHYSICIANS FOR HUM. RTS., *supra* note 28, at 6.

[56] Convention Relating to the Status of Refugees art. 31, July 7, 1951,189 U.N.T.S. 137.

[57] U.S. IMMIGR. & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS (2016), https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf, *archived at* https://perma.cc/5A7B-B3EC. This report was issued during the final months of the Obama Administration. Although children were not systematically separated from parents as a matter of Obama Administration policy, members of family units were held apart for short periods during detention at CBP holding facilities or longer periods based upon custody decisions that sought to keep mothers and young children detained together. *See* LEIGH BARRICK, AM. IMMIGR. COUNCIL, DIVIDED BY DETENTION: ASYLUM-SEEKING FAMILIES' EXPERIENCE OF SEPARATION 7 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/divided_by_detention.pdf, *archived at* https://perma.cc/VM74-8F3G (describing how a mother and baby in a family unit were detained together at a family detention center while the father and older children were released).

[58] Fernando Stein & Karen Remley, *AAP Statement Opposing Separation of Mothers and Children at the Border*, AM. ACAD. PEDIATRICS (Mar. 6, 2017), http://aapalaska.org/separation-at-the-border, *archived at* https://perma.cc/LZ59-8K7Y.

[59] *Id.* The letter warned that "[p]roposals to separate children from their families as a tool of law enforcement to deter immigration are harsh and counterproductive." *Id.*

[60] *See* Letter from MaryLee Allen, Dir. of Pol'y, Child. Def. Fund, Urgent Appeal from Experts in Child Welfare, Juvenile Justice and Child Development to Halt Any Plans to Separate Children from Parents at the Border, to Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec. (Jan. 23, 2018), https://www.aclu.org/sites/default/files/field_document/

would impose "significant and long-lasting consequences for the safety, health, development, and well-being of children."[61]

Commander Jonathan White of the U.S. Public Health Service, who was the Deputy Director of ORR's Unaccompanied Alien Child Program in early 2018, also warned the Administration that the contemplated policy would severely harm children.[62]

Not only did the Trump Administration ignore these calls to reverse course to avoid harming children, it implemented the policy in a manner that exacerbated its anticipated and harmful effects. Officers ripped screaming children from their parents' arms,[63] and laughed at distraught parents.[64] DHS failed to provide children and parents with accurate and timely information about the location of their loved ones and how to contact them,[65] causing parents and children to fear that they would never see each other again.[66] Immediately after the trauma of their separations, many children were held in makeshift prisons and "cages."[67] A journalist's recording from a DHS detention facility in June 2018 captured young children wailing in psychological distress as an officer mocked their sobbing as an "orchestra."[68]

The government's cruelty was also evident in its failure to take basic steps to ensure that it would be able to reunite children with their parents. CBP and ORR implemented the family separation policy for months without

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2018_01_23_child_welfare_juvenile_justice_opposition_to_parent_child_sep.pdf, *archived at* https://perma.cc/K4PU-LDLE.

[61] *Id.*

[62] Jeremy Stahl, *The Trump Administration Was Warned Separation Would Be Horrific for Children, Did It Anyway*, SLATE (July 31, 2018), https://slate.com/news-and-politics/2018/07/the-trump-administration-was-warned-separation-would-be-horrific-for-children.html, *archived at* https://perma.cc/7BKM-H2TF (recounting Commander White's testimony to Congress).

[63] *See*, *e.g.*, J.P. v. Sessions, No. LA CV18-06081, 2019 WL 6723686 (C.D. Cal. Nov. 5, 2019); C.M. v. United States, No. CV-19-05217-SRB (D. Ariz., filed Sept. 19, 2019) (describing parents' harrowing accounts of separation and seeking relief under the Federal Tort Claims Act); Compl. at ¶¶ 72–80, 128–30, C.M. v. United States, No. 2:19-cv-05217-SRB (D. Ariz., filed Sept. 19, 2019), ECF No. 1; Compl. at ¶¶ 62–63, 81, A.I.I.L. v. Sessions, No. 4:19-cv-00481-JAS, ECF No. 1 (D. Ariz. Oct. 3, 2019).

[64] Compl. at ¶ 29, C.M. v. United States, No. 2:19-cv-05217-SRB (D. Ariz., Sept. 19, 2019), ECF No. 1; Compl. at ¶ 18, A.I.I.L v. Sessions, No. 4:19-cv-00481-JAS, (D. Ariz. Oct. 3, 2019), ECF No. 1.

[65] U.S. DEP'T OF HOMELAND SEC., OIG-18-84, INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 12–14 (2018); Ms. L. v. U.S. Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018) (noting that "parents have been left in a vacuum, without knowledge of the well-being and location of their children") (internal quotation and citation omitted).

[66] *See, e.g.*, *Ms. L.*, 310 F. Supp. 3d at 1138 (citing that Ms. L. was "terrified that she would never see her daughter again").

[67] SOBOROFF, *supra* note 4, at 10–11 (recounting his tour of detention facilities and his on-air reporting that described separated children's detention in "cages" and "kennels").

[68] Ginger Thompson, *Listen to Children Who've Just Been Separated from their Parents at the Border*, PROPUBLICA (June 18, 2018), https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy, *archived at* https://perma.cc/6DU5-X3M3 (featuring a recording in which an officer can be heard laughing and another can be heard joking, "Well, we have an orchestra here—what's missing is a conductor.").

any data systems or protocol in place that accurately tracked separated children and their parents.[69] CBP agents routinely designated separated children as "unaccompanied" without indicating that they had parents from whom they were taken.[70] And ORR received children who were separated from parents without recording this information either.[71] Indeed, it was not until July 2018 that ORR changed its data system to indicate that a so-called unaccompanied child had actually been separated from a parent.[72] This was after thousands of children were already separated from their parents.[73]

DHS haphazardly dispersed children to youth shelters and ORR facilities across the United States, treating children as if they were "orphaned" at the moment of separation.[74] In his later decision in *Ms. L.*, Judge Sabraw of the Southern District of California denounced the government for treating migrant children with less care and accuracy than it catalogues incarcerated persons' property.[75]

The Trump Administration's family separations were met with intense outrage and public backlash. Activists organized massive protests.[76] Leaders from across the political spectrum urged an immediate end to the practice.[77]

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[69] GAO 2018 Family Separation Report, *supra* note 5, at 12. The GAO also reported that prior to the government's Executive Order ending family separation in June 2018 and the district court's order directing immediate reunification, ORR did not know which children in their custody were separated from their parents and did not systemically track such information. *Id.* at 17.

[70] *Id.* at 16–17. Even once it implemented a system for recording this information, Border Patrol did not systemically indicate child separations on the referral form transmitted to ORR. *Id.* at 16.

[71] *Id.* at 18. ORR did not update its database for tracking unaccompanied children to allow officials to designate whether a child was separated from a parent until "July 6, 2018, after the June 20 executive order and June 2018 court order to reunify families." *Id.*

[72] *Id.*

[73] *Id.; see also* U.S. Dep't of Health & Hum. Servs. Off. of Inspector Gen., Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody, OEI-09-18-00431 4 (Sept. 2019), https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf, *archived at* https://perma.cc/9E36-3C4B [hereinafter HHS OIG Mental Health Report] (stating that by the time of the June 2018 Executive Order and the injunction in *Ms. L v. ICE*, "thousands of families had been separated").

[74] Ms. L. v. U.S. Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1140 (S.D. Cal. 2018) (describing "children [as] essentially orphaned as a result of family separation"); *see also* House Oversight Staff Report, *supra* note 2, at 9.

[75] *Ms. L.*, 310 F. Supp. 3d at 1144 (noting that the government readily tracks "[m]oney, important documents, and automobiles, to name a few" and that these items are efficiently "stored, tracked and produced" upon release at all levels of government detention).

[76] Andrea Castillo, et al., *From L.A. to N.Y., Hundreds of Thousands Join Nationwide Rallies to Protest Trump's Immigration Policies*, L.A. Times (June 20, 2018), https://www.latimes.com/local/lanow/la-me-rally-family-separation-20180629-story.html, *archived at* https://perma.cc/A2MP-7YK9.

[77] *See*, *e.g.*, Peter Baker, *Leading Republicans Join Democrats in Pushing Trump to Halt Family Separations*, N.Y. Times (June 17, 2018), https://www.politico.com/story/2018/06/19/trump-family-separations-outcry-reaction-653305, *archived at* https://perma.cc/SK73-JUHF; Louis Nelson, *75 Bipartisan Former U.S. Attorneys Call on Sessions to End Family Separations*, Politico (June 19, 2018), https://www.politico.com/story/2018/06/19/trump-family-separations-outcry-reaction-653305, *archived at* https://perma.cc/VYE3-ZBYN.

On June 20, 2018, President Trump purported to end the practice by issuing an executive order expressing a commitment to family unity, albeit with a qualification.[78] The executive order noted that family unity would be respected only "where appropriate and consistent with law and available resources."[79] The executive order did not prohibit further separations or immediately end the crisis.[80] In fact, the executive order did not address reunifications of separated families whatsoever.[81] The Administration conceded in court shortly thereafter that it had no plan or procedures ready to reunify separated families.[82]

C. The Grave Harm Inflicted

Family separation imposed severe harm and suffering on both parents and children.[83] Family members experienced feelings of overwhelming loss, abandonment, agonizing helplessness, fear, and uncertainty.[84] Their pain and trauma manifested as physical illness, depression, and severe anxiety.[85]

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[78] Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 25, 2018) [hereinafter Exec. Order No. 13,841]. In announcing the executive order, Trump stated in brief remarks: "We're going to have strong borders but we're going to keep the families together." David A. Graham, *Trump Says He Will End the Family Separations He Imposed*, THE ATLANTIC (June 20, 2018), https://www.theatlantic.com/politics/archive/2018/06/trump-executive-order-border-separations/563303, *archived at* https://perma.cc/FZ8H-UCT2. The Executive Order, however, which was announced on June 20, 2018 and published in the Federal Register on June 25, 2018, was more equivocal. It stated that families would be detained together "during the pendency of any criminal improper entry or immigration proceedings" to the extent permitted by law. Exec. Order No. 13,841.

[79] *Id.*

[80] *Ms. L.*, 310 F. Supp. 3d at 1140 (noting that the Executive Order purported "to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources," citing Exec. Order No. 13,841).

[81] *See* Exec. Order No. 13,841; *see also* Jacinto-Castanon de Nolasco v. U.S. Immigr. & Customs Enf't, 319 F. Supp. 3d 491, 495 (D.D.C. 2018) (noting failure of memo to address reunification of nearly 2,000 children already separated under the policy and ordering plaintiff's reunification with her sons); *Ms. L.*, 310 F. Supp. 3d at 1140 (noting the Executive Order was "silent on the issue of reuniting families that have already been separated or will be separated in the future").

[82] *See Ms. L.*, 310 F. Supp. 3d at 1140–41 (citing Transcript of Status Conference at 29–30, Ms. L., No. 18-cv-00428-DMS-MDD (S.D. Cal. Jun. 22, 2018), ECF No. 77.). HHS officials told the Government Accountability Office that before District Court Judge Sabraw issued a preliminary injunction and ordered a reunification process, there were simply "no specific procedures" in place to reunify children with parents. GAO 2018 FAMILY SEPARATION REPORT, *supra* note 5.

[83] J.P. v. Sessions, No. LA CV18-06081, 2019 WL 6723686, at *10 (C.D. Cal. Nov. 5, 2019) (citing expert declaration documenting trauma); *see also* HHS OIG MENTAL HEALTH REPORT, *supra* note 73.

[84] *J.P.*, 2019 WL 6723686 at *10.

[85] *Id.* (describing how for parents, "the sudden and forcible separation from their children could represent a traumatic event leading to acute and severe psychological distress . . . and may cause physical and mental health symptoms such as loss of sleep, loss of appetite, headaches, anxiety, depression, and suicidal ideation.").

Acute emotional distress typically triggers release of the stress hormone cortisol,[86] and the separated families' prolonged exposure to it increased their risk of post-traumatic stress disorder.[87] While both parents and children experienced profound emotional trauma and pain on account of family separation, the trauma inflicted on children was particularly grievous given its potentially life-altering consequences.

Evidence-based research has long documented the serious health consequences of early childhood emotional trauma, which can be imprinted on children's neuroregulatory systems for the rest of their lives.[88] Research over the last four decades has conclusively established the link between adverse traumatic experiences during the developmental years and "a range of individual and public health problems" including depression, substance abuse, suicidal behavior and medical illnesses.[89] Children who experience trauma early in life commonly suffer from a variety of psychological and behavioral disorders—often more than one—including "conduct disorder, attention-deficit hyperactivity disorder (ADHD), bipolar disorder, phobic anxiety, reactive attachment disorder and separation anxiety."[90]

When young children in need of care or emotional comfort do not receive it from their caregivers in response, their bodies react in the moment and they remain permanently scarred by the experience.[91] Some remain in "a continuous alarm or defeat response" in which "[n]o amount of care seems

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[86] Olga Khazan, *Separating Kids from Their Families Can Permanently Damage Their Brains: A Pediatrician Explains How the Trauma of Family Separation Can Change Biology*, The Atlantic (June 22, 2018), https://www.theatlantic.com/health/archive/2018/06/how-the-stress-of-separationaffects-immigrant-kids-brains/563468, *archived at* https://perma.cc/K75J-7JCD.

[87] *See* Allison Abrams, *Damage of Separating Families: The Psychological Effects on Children*, Psychol. Today (June 22, 2018), https://www.psychologytoday.com/us/blog/nurturing-self-compassion/201806/damage-separating-families, *archived at* https://perma.cc/L7PK-QVGW (describing psychological harm and trauma of family separation and its lasting impact upon children); Sarah Reinstein, *Family Separations and the Intergenerational Transmission of Trauma*, Clinical Psychiatry News (July 9, 2018), https://www.mdedge.com/psychiatry/article/169747/depression/family-separations-and-intergenerational-transmission-trauma, *archived at* https://perma.cc/WG6D-4X4K (same).

[88] *See, e.g.*, Vincent J. Felitti, *Foreword*, *in* The Impact of Early Life Trauma on Health and Disease xiii, xiii (Ruth A. Lanius et al. eds., 2010) ("Time does not heal the wounds that occur in those earliest years; time conceals them. They are not lost; they are embodied.").

[89] *See, e.g.*, Bessel A. van der Kolk & Wendy d'Andrea, *Towards a Developmental Trauma Disorder Diagnosis for Childhood Interpersonal Trauma*, *in* The Impact of Early Life Trauma on Health and Disease 57, 57 (Ruth A. Lanius et al. eds., 2010) (noting "increasing documentation of the effects of adverse early life experiences on brain development, neuroendocrinology and immunology"). We now know that childhood trauma is an influential determinant of "alcoholism, depression, suicidal behavior and drug abuse." Martin H. Teicher et al., *Neurobiology of Childhood Trauma and Adversity*, *in* The Impact of Early Life Trauma on Health and Disease 112, 120 (Ruth A. Lanius et al. eds., 2010).

[90] Van der Kolk & d'Andrea, *supra* note 89, at 58. Van der Kolk and d'Andrea note that "[t]he relationship of childhood trauma and multiple psychiatric diagnoses is a testament to the pervasive impact of childhood victimization on multiple core developmental competencies." *Id.* at 63.

[91] *Id.* at 59.

to be able to provide a sense of safety and comfort."[92] Others experience somatic manifestations of trauma such as digestive distress, migraines, chronic pain, and cardiopulmonary symptoms.[93] Some develop psychiatric symptoms that require care as adults.[94]

Many experts agree that childhood trauma powerfully and negatively impacts key regulatory biological systems, including the central nervous system and hormonal regulation.[95] In short, trauma at critical developmental stages, "particularly if it also involves disruption in fundamental attachment relationships[,]" generates "profound and lasting" harm.[96]

Only time will confirm the long-term impact of the trauma inflicted upon the separated families that research uniformly predicts is likely. But it is clear that the families have already endured severe pain and suffering.

For example, in ordering defendant officials to provide trauma-informed mental health care to the class of separated families, the United States District Court for the Central District of California in *J.P. v. Sessions* credited individual class members' allegations that they "and their respective children, experienced severe trauma due to their forced separations."[97] The court recounted parents' feelings "of anguish and fear" that they would never see their children again, as well as their difficulty sleeping and loss of appetite.[98] A licensed social worker who examined a class member during her immigration detention found that she suffered "from symptoms consistent with post-traumatic stress disorder, depression and anxiety."[99] At least one family member subjected to family separation committed suicide.[100]

The court also cited evidence of the severe trauma experienced by children, evidenced by "sleep and appetite loss, headaches and nosebleeds, crying spells, and incontinence."[101] These severe harms led the court to take the "groundbreaking" step of ordering injunctive remedies to the class members

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[92] *Id.*

[93] *Id.* at 62.

[94] *Id.* at 59.

[95] *See, e.g.*, Julian D. Ford, *Complex Adult Sequelae of Early Life Exposure to Psychological Trauma*, *in* THE IMPACT OF EARLY LIFE TRAUMA ON HEALTH AND DISEASE 69, 69 (Ruth A. Lanius et al. eds., 2010). Neuroscientists have begun to document molecular-level changes that occur with childhood emotional trauma. Vincent J. Felitti & Robert F. Anda, *The Relationship of Adverse Childhood Experiences to Adult Medical Disease, Psychiatric Disorders and Sexual Behavior: Implications for Healthcare*, *in* THE IMPACT OF EARLY LIFE TRAUMA ON HEALTH AND DISEASE 77, 77 (Ruth A. Lanius et al. eds., 2010).

[96] Ford, *supra* note 95.

[97] J.P. v. Sessions, No. LA CV18-06081, 2019 WL 6723686, at *10 (Nov. 5, 2019 C.D. Cal.).

[98] *Id.*

[99] *Id.* (citing Expert Declaration of Alejandra Acuña, ¶¶ 7–8, ECF No. 52).

[100] *Id.* (citing Compl. ¶ 130, ECF No. 1, alleging that "at least one parent forcibly separated from his child under the zero-tolerance policy committed suicide.") (citing Nick Miroff, *A Family Was Separated at the Border, and This Distraught Father Took His Own Life*, WASH. POST (June 9, 2018), https://www.washingtonpost.com/world/national-security/a-family-was-separated-at-the-border-and-this-distraught-father-took-his-own-life/2018/06/08/24e40b70-6b5d-11e8-9e38-24e693b38637_story.html, *archived at* https://perma.cc/HGG4-PKMC).

[101] *Id.*

in the form of trauma informed mental health care, even after they were reunited and released from custody.[102]

The Inspector General of HHS similarly found that "intense trauma" was "common" among children who entered ORR facilities in 2018.[103] Some separated children did not eat or participate in routine activities at the shelters.[104] Others suffered from "acute grief that caused them to cry inconsolably," not knowing what happened to their parents.[105] In one instance, as described in the HHS report, a 7 or 8-year-old boy required emergency psychiatric care, believing that his father was killed and fearing that he would be too.[106]

The government's failure to provide phone communication between parents and children increased the families' trauma. Even the government's stated justification for family separation—its discretion to prosecute parents for unlawful entry[107]—did not necessitate the cruelty of not informing children of the location of their parents or facilitating communication with them.[108]

ORR noted that children separated from their parents experienced even more emotional trauma than did the children in its care who crossed into the

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[102] Dean Erwin Chemerinsky used this language to describe the decision in the New York Times. Miriam Jordan, *U.S. Must Provide Mental Health Services to Families Separated at Border*, N.Y. TIMES (Nov. 6, 2019), https://www.nytimes.com/2019/11/06/us/migrants-mental-health-court.html, *archived at* https://perma.cc/3T6C-RAPN. In the same article, Professor Carl Tobias concurred that the decision was "pathbreaking." *Id.* The government initially appealed the decision and order. Notice of Appeal, J.P. v. Barr, No. 19-56400 (9th Cir. Nov. 29, 2019). But the government voluntarily dismissed its appeal prior to filing its opening brief on February 21, 2020. Order, J.P. v. Barr, No. 19-56400 (9th Cir. Feb. 21, 2020).

[103] HHS OIG MENTAL HEALTH REPORT, *supra* note 73, at 9–10.

[104] *Id.* at 11.

[105] *Id.* at 10 (noting some children experienced "feelings of fear or guilt," and were "concerned for their parents' welfare").

[106] *Id.* at 11.

[107] *See* A.I.I.L. v. Sessions, No. CV-19-00481, Motion to Dismiss, ECF No. 28, at *14–15, *42–47, *59. Even this claim is undermined by the evidence that prosecution did not always occur, and asylum-seekers also suffered separation. Indeed, a July 2019 report by the House Oversight Committee concluded that many separations were unnecessary under the government's purported justification because many "parents who were separated from their children were never sent to U.S. Marshals or other federal criminal custody, but instead went straight from CBP custody to ICE detention." HOUSE OVERSIGHT STAFF REPORT, *supra* note 2, at 21. Some parents who were separated from their children were never in federal criminal custody "at all—because prosecutors declined to prosecute the cases . . . Yet their children were nevertheless taken from them and kept apart for weeks or months." *Id.* Moreover, as the district court recognized in *Ms. L.*, "[m]igrant families that lawfully entered the United States at a port of entry seeking asylum were separated" too. Ms. L. v. U.S. Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1137 (S.D. Cal. 2018).

[108] Jeremy Raff, *"The Separation Was So Long. My Son Has Changed So Much.": U.S. Border Guards Took a 6-Year-Old Honduran Boy from His Mother, and Ultimately Returned a Deeply Traumatized Child*, THE ATLANTIC (Sept. 7, 2018), https://www.theatlantic.com/politics/archive/2018/09/trump-family-separationchildren-border/569584, *archived at* https://perma.cc/47NB-4XBU ("The trauma of separation 'can disrupt the architecture of a child's brain' . . . . Prolonged separation weaponizes a child's fight-or-flight response, elongating it into toxic stress that can damage health in both the short and long term").

United States without parents or guardians.[109] This observation is telling given that unaccompanied minors have typically survived high levels of stress and violence.[110]

II. Unpacking the Constitutional Basis for Enjoining Family Separation

The "zero tolerance" family separations transgressed important anti-brutality norms and constitutional values that the language and norms underlying family unity and association fail to express. In ordering an injunction prohibiting family separation and directing the reunification of families in *Ms. L.*, U.S. District Court Judge Dana Sabraw concluded that the class of migrant families established a likelihood of success on their claim that the "zero tolerance policy" violated families' Fifth Amendment substantive due process right to "family integrity and association."[111] The section that follows describes the limits of the *Ms. L.* court's reliance upon family unity as the primary basis for invalidating the policy and identifies a more promising strand of due process protection that only appeared superficially in the decision. Then it examines the normative underpinnings of the autonomy and family unity grounds of due process protection to show their inadequacy to give voice to the intentional brutality that defined the "zero tolerance" separations.

A. Ms. L.*'s Finding of Unconstitutionality*

The district court in *Ms. L.* concluded that the government likely violated the families' Fifth Amendment substantive due process right to family unity and association, relying upon both the autonomy/privacy norms and the family unity/integrity norms reflected in due process jurisprudence.[112] Specifically, the court held that the parents possessed a "constitutional liberty interest . . . in the care, custody, and control of their children" such that separating parents from their children without determining that parents were unfit or posed a danger to their children violated the parents' due process rights.[113] The court cited a string of circuit court precedent holding that the

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[109] HHS OIG Mental Health Report, *supra* note 73, at 10.

[110] Julia Heumer et al., *Mental Health Issues in Unaccompanied Refugee Minors*, 3 Child & Adolescent Psychiatry & Mental Health, no. 13, 3 (2009) (documenting higher levels of PTSD symptoms in unaccompanied refugee minors as compared to other migrant children and noting many "lack a familial system at a crucial developmental period and have experienced multiple stressful events").

[111] *Ms. L.*, 310 F. Supp. 3d at 1136–37.

[112] *Id.* at 1148.

[113] *Id.* The court noted that the two named class Plaintiffs suffered separation from their children without any determination that they were "unfit or presented a danger to the child." *Id.* at 1143.

removal of children from their parents without sufficient evidence that the children needed protection constituted due process violations.[114]

This mode of reasoning started from the wrong premise because it suggested that protecting children from unfit or abusive parents might have been a legitimate motive of the "zero tolerance" policy, and that the government simply failed to consider or establish evidence to support such a decision in the case of the individual class representatives and the thousands of others like them. But the policy was, of course, never rooted in child welfare; it was a strategy of immigration control that knowingly inflicted suffering upon children to serve the goal of deterrence.[115] The framing of the court's inquiry thus deemphasized that defining feature of the Trump Administration's actions.

The district court recognized that the context of the case was different from the child welfare cases it cited, but did so for the wrong reason.[116] It noted that the "zero tolerance" separations arose within the setting of the Executive Branch's authority to enforce immigration laws, ultimately concluding that this made no difference to the outcome.[117] But the most significant difference from other instances of family separation in foster care systems was that "zero tolerance" family separation was designed to inflict cruelty and implemented through the strategic use of the parent's and children's suffering to serve a policy end.[118]

The district court rightly acknowledged the brutality of the "zero tolerance" policy, but did so without naming the deliberate infliction of pain and suffering as unconstitutional torture. It concluded that family separation was

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[114] *Id.* ("Outside of the context of this case, namely an international border, Plaintiffs would have a high likelihood of success on a claim premised on such a practice.") (citing D.B. v. Cardall, 826 F.3d 721, 741 (4th Cir. 2016) (citing cases finding due process violation where state action interfered with rights of fit parents)); Heartland Acad. Cmty. Church v. Waddle, 595 F.3d 798, 808–11 (8th Cir. 2010) (finding removal of children from religious school absent evidence the students were "at immediate risk of child abuse or neglect" was violation of clearly established constitutional right); Brokaw v. Mercer Cnty., 235 F.3d 1000, 1019 (7th Cir. 2000) (citing Croft v. Westmoreland Cnty. Children and Youth Servs., 103 F.3d 1123, 1126 (3d Cir. 1997) ("[C]ourts have recognized that a state has no interest in protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.")).

[115] *See* Part I, *supra*.

[116] *Ms. L.*, 310 F. Supp. 3d at 1143.

[117] *Id.* (The court concluded that the parents' "right to family integrity" was not extinguished because it involved immigration policy at an international border.).

[118] This evil purpose distinguished the "zero tolerance" separations from the child welfare cases cited. Nevertheless, there is an undeniable and brutal history in the United States of exploiting child welfare rationales to destroy communities of color, including Native families. *See* THE DESTRUCTION OF AMERICAN INDIAN FAMILIES (Steven Unger ed., 1977) (a collection of essays addressing the separation of Native American families); Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 the United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 943–44 (2002) (describing the use of family separation to destroy Native way of life and promote assimilation with whites). Congress enacted the Indian Child Welfare Act of 1978 to end the federal government's "policy of forcibly transferring Native American children to boarding schools and white families." *Id.* at 943.

"so 'brutal' and 'offensive' that it [does] not comport with traditional ideas of fair play and decency" and may be said to shock the contemporary conscience.[119] The court cited *Rochin v. California*, a Supreme Court decision that invoked torture when declaring the defendant police officers' investigative techniques—the forced pumping of a suspect's stomach—a violation of substantive due process protections.[120] This strand of *Ms. L.*'s reasoning, however, was not developed; the court did not reckon with "zero tolerance" separations as violence akin to torture or contemplate whether this violence demanded remedies beyond reunification. This subtle recognition that "zero tolerance" separations violated other due process liberty interests, separate and apart from interference with family, had untapped potential. If expanded, the reasoning could have led to a broader conception of "zero tolerance" separations as state violence and a declaration that the policy violated the liberty interest in freedom from torture.

Properly understood, the constitutional limitation on family separation has roots both in the privacy/liberty norms prohibiting arbitrary state interference with families[121] as well as broader norms that place constitutional limits on torture and similar government brutality.[122] Before analyzing the anti-brutality norms that this Article argues are underdeveloped in constitutional discourse surrounding family separation, the next two sections examine the autonomy and privacy justifications that the Supreme Court has cited when protecting families. This analysis shows that reliance upon this narrower recognition of family separation's illegality insufficiently reckons with the government's strategic violence purposefully directed at vulnerable children and families.

B. Family Liberty Based upon Autonomy and Privacy Norms

The family liberty interest recognized in *Ms. L.*, is, as the court noted, one of the oldest of the substantive due process rights recognized by the Supreme Court.[123] As the primary or sole description of the wrong of family separation, family unity falls short. As explained below, the rationale for recognizing that right is rooted in autonomy and privacy connected to chil-

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[119] *Ms. L.*, 310 F. Supp. 3d at 1145–46 (reasoning that "[a] practice of this sort implemented in this way is likely to be 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience,' and interfere[ ] with rights 'implicit in the concept of ordered liberty' ").

[120] *Id.* (citing Rochin v. California, 342 U.S. 165, 172 (1952) (reasoning that the officers' conduct was "too close to the rack and the screw to permit of constitutional differentiation.")).

[121] *See* Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925).

[122] *See infra* Part III.B; *see also* Cordero et al., *supra* note 26, at 437, 503 (examining international and domestic law that prohibits family separation and arguing that immigration enforcement "must be exercised consistent with fundamental constitutional principles of due process and family integrity, as well as an overarching anti-dehumanization principle").

[123] Cordero et al., *supra* note 26, at 452.

drearing,[124] interests that do not speak to the more fundamental and corporal interest of parents and children to be free from the violence and pain inflicted through forced separation.[125]

For example, in the seminal cases leading to this strand of due process protection, the Court emphasized family unity rights through distinctly American conceptions of family rooted not only in biology, but individualism and ownership over children.[126] For example, in *Meyer v. Nebraska*, the Court struck down a law banning the teaching of foreign languages to children in part because it interfered with the parents' right to control their children's education.[127] In *Pierce v. Society of Sisters*, the Court struck down a state law requiring children to attend public schools, similarly reasoning that the law interfered with parents' right to "direct the upbringing and education of children under their control."[128] Subsequent decisions have repeated the

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[124] *See* Note, *Adjudicating What* Yoder *Left Unresolved: Religious Rights for Minor Children after* Danforth *and* Carey, 126 U. PA. L. REV. 1135, 1155 (1978) ("The privacy concept enunciated by the court in *Griswold v. Connecticut*, *Roe v. Wade*, and in *Meyer* and *Pierce* is based on a right of personal autonomy in the making of certain fundamental choices which guide one's destiny . . . ."); Lawrence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1934 (2004) (*Meyer* and *Pierce* "described what they were protecting from the standardizing hand of the state in language that spoke of the family as a center of value-formation and value-transmission that was not to be commandeered by state power. Their language bespoke the authority of parents to make basic choices directing the upbringing of their children.").

[125] *Meyer*, 262 U.S. at 399; *see also Pierce*, 268 U.S. at 534–35.

[126] *See* Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family That Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 516–18 (2010) (describing distinctly American value of individualism and ownership with respect to childrearing); Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1254 (1999) (noting that the overlapping spheres of family privacy and parental autonomy results in a "theoretical framework that . . . confer[s] unregulated authority on the dominant member within this closed community of persons").

[127] *Meyer*, 262 U.S. at 400.

[128] *Pierce*, 268 U.S. at 534–35. Unlike the rest of substantive due process jurisprudence, those nearly century-old decisions have never been seriously called into question. Tribe, *supra* note 124, at 1934 (describing the 1920s family unity and association cases as "survivors of the largely discredited *Lochner* era") (citing *Pierce*, 268 U.S. at 510; *Meyer*, 262 U.S. at 399–400). In 2015, however, in *Kerry v. Din*, Justice Scalia swept the family liberty theory of substantive due process rights within his broader criticism of the doctrine as malleable and unsupported by the Constitution's text. Kerry v. Din, 576 U.S. 86, 94–95 (2015); *see also* Lawrence v. Texas, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting) ("[T]here is no right to 'liberty' under the Due Process Clause, though today's opinion repeatedly makes that claim."). In *Din*, the Court rejected a U.S. citizen's claim that State Department officials violated her procedural due process rights by failing to provide her with a legitimate and bona fide reason for denying her Afghan husband a visa. *Din*, 576 U.S. at 88. Justice Scalia, writing for a plurality of the Court, rejected Din's claim that the family unity and association line of cases demonstrated that she possessed an important constitutional interest that could not be denied without due process of law. *Id.* at 94–95 (stating that "even if one accepts the textually unsupportable doctrine of implied fundamental rights . . . the capacious right" Din asserted was unsupported by the Court's decisions recognizing a right to family unity and association).

autonomy- and privacy-based rationales for protecting parents' rights with respect to their children.[129]

Indeed, more than 50 years later in *Moore v. City of East Cleveland*, the Court explained *Meyer* and *Pierce* as protecting "freedom of personal choice" about familial affairs and securing a "private realm of family life which the state cannot enter."[130] *Moore* involved a challenge to an East Cleveland zoning ordinance that excluded family members from living together unless they were members of a "nuclear" family.[131] Although *Moore* did not concern parental decision making, the Court harnessed the same theories relied upon in its early precedents when it recognized that extended family members also possess due process protections related to childrearing.[132]

The choice to do so illustrates that the Court protected family association under the Due Process Clause based upon specific normative values attached to the institution of family. Specifically, in striking down the law as a violation of Moore's due process rights, the Court emphasized the role of extended families in conferring to younger generations important cultural and moral traditions.[133] This reasoning connected the decision to the privacy and autonomy norms related to childrearing that were recognized in *Meyer* and *Pierce*,[134] but was a fairly narrow and incomplete description of families' liberty interests in freedom from state interference.[135] That is, the Court did

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[129] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Parham v. J.R., 442 U.S. 584, 602 (1979) (emphasizing historic "concepts of the family as a unit with broad parental authority over minor children"); Troxel v. Granville, 530 U.S. 56, 66 (2000) (recognizing that a fit parent warranted special deference in statutory scheme allowing grandparents and others to petition for visitation, noting "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children").

[130] Moore v. City of East Cleveland, 431 U.S. 494, 502–04 (1977). This same rationale was articulated in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing parents' primary "function and freedom" to include the preparation of their children); *see Troxel*, 530 U.S. at 65–66 (describing *Prince* as affirming "that there is a constitutional dimension to the right of parents to direct the upbringing of their children").

[131] *Moore*, 431 U.S. at 495–96. Inez Moore was prosecuted for violating that single-family ordinance because she lived with her son and two grandsons who were cousins and not brothers. *Id.*

[132] *Id.* at 534–35.

[133] *Meyer*, 262 U.S. at 400–01; *Pierce*, 268 U.S. at 533–34. Justice Powell viewed these decisions as recognizing the celebrated role of the family in the "Nation's history and tradition." *Moore*, 431 U.S. at 503–04. He reasoned that autonomy and privacy with respect to childrearing were protected in those decisions because of the essential role of the family in inculcating and passing down many of the country's most cherished moral and cultural values. *Id.*

[134] *Moore*, 431 U.S. at 503–04. Justice Powell reasoned that childrearing responsibilities are often shared with grandparents, whether out of tragedy or economic need. *Id.* at 504–05.

[135] *See* June Carbone & Naomi Cahn, Moore*'s Potential*, 5 Fordham L. Rev. 2589, 2590 (2017) ("[I]n granting Inez Moore a constitutional right to live with a family that included both of her grandchildren, the plurality based its decision on tradition, not autonomy."). To be sure, the decision did not sound in protection of Moore's autonomy to construct her family and

not recognize a broader due process interest in being with and living with ones' loved ones without state interference.

The Court's narrow focus was not inevitable. *Moore* involved facts that could have led to a broader articulation of family rights grounded in freedom from forced separation by the state. Specifically, in seeking to prevent extended family members from living with one another in the area impacted by the zoning ordinance, the law imposed a far more intrusive deprivation.[136] Unless Moore forfeited her home or suffered criminal penalties, one of the possible outcomes of the ordinance's enforcement was separation from family members. But the Court did not emphasize that more intrusive and corporal restriction of liberty imposed by the potential break up of a family. It opted instead to employ the same mode of "childrearing autonomy" reasoning used in the long-standing family liberty precedents.[137]

Professor Peggy Cooper Davis, in contrast, has argued that constitutional protection of family unity and association is rooted in protection against state violence.[138] Specifically, she argues that the framers of the Fourteenth Amendment knew that family separations and the denial of family rights were a "hallmark of slavery in the United States."[139] The drafters of the Fourteenth Amendment, she argues, thus "regarded the Fourteenth Amendment as the instrument with which to re-enshrine family liberty as an inalienable aspect of national citizenship and natural law."[140] Jill Elaine Hasday has similarly argued that Reconstruction advocates "were anxious to protect emancipated slaves' families and, more generally, to establish federal standards for certain basic family rights that no state would ever be allowed to fall below."[141]

This work suggests that the constitutional right to family unity recognized by the Court might have developed in a way that embraced norms rejecting government brutality and state disruption of families. But histori-

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living arrangements. The Court's focus on tradition was simply a means to connect a grandparent's interests to the kind of parental autonomy—decision making related to children's education and development—that the Court had protected in *Meyer* and *Pierce. Moore*, 431 U.S. at 503–04.

[136] *Moore*, 431 U.S. at 495–96.

[137] *Id.* at 504–05. Perhaps the Court looked to settled ground in overcoming the typical deference afforded to local zoning laws. *See* Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926); Ashira Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 729 (2008) (stating *Euclid* established a presumption of constitutionality applicable to zoning laws "and the related tradition of judicial deference in land use cases").

[138] Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV. C.R.-C.L. L. REV. 299, 309 (1993).

[139] *Id*. Other scholars have similarly situated the separation of families as a badge or incident of slavery and argued for constitutional restraints and remedies under the Thirteenth Amendment. *See* Ndjuoh MehChu, *Help Me to Find My Children: A Thirteenth Amendment Challenge to Family Separation*, 17 STAN. J. C.R. & C.L. (forthcoming 2021).

[140] Davis, *supra* note 138, at 309.

[141] Jill Elaine Hasday, *Federalism and Family Reconstructed*, 45 UCLA L. REV. 1297, 1318, 1337 (1998); *see also* Caitlin Mitchell, Note, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 YALE J.L. & FEMINISM 175, 181 (2012).

cally, the fuller picture of state violence directed at the institution of the family through slavery and the forced separation of Native children from their parents[142] played no role in the development of the Court's due process jurisprudence protecting family liberty.[143]

To that point, in *Moore*, the Court reasoned that liberty related to family was rooted in the important place of family in the nation's history and tradition without acknowledging state implemented destruction of enslaved people and Native people's families within that history.[144] In short, the Courts' justifications for family protection make clear that it did not develop those doctrines with widespread, intentional human rights violations in mind.

C. Family Unity as Freedom from Destruction of the Family

The norms underlying the due process protection of the family take on a slightly different cast in decisions addressing the arrangement or break up of families through the child welfare system.[145] In addressing state attempts to terminate parental rights or determine custody, the Supreme Court emphasizes the integrity of the physical family unit, and depends less upon respect for autonomy in childrearing.[146]

To be sure, in these cases too, the Court describes parents' fundamental interest "in the care, custody, and management of their child[,]" which also implicates the autonomy-based interest in parenting.[147] But the Court has

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[142] *See supra* note 118; DeNeen L. Brown, *'Barbaric': America's Cruel History of Separating Children from their Parents*, WASH. POST (May 31, 2008), https://www.washingtonpost.com/news/retropolis/wp/2018/05/31/barbaric-americas-cruel-history-of-separating-children-from-their-parents, *archived at* https://perma.cc/EHK7-6LE3 (describing U.S. history of forcibly separating children from their enslaved parents and from Native families); THE DESTRUCTION OF AMERICAN INDIAN FAMILIES (Steven Unger ed., 1977).

[143] *See* David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L. Q. 529, 569 (2008) (tracing the development of the Court's recognition of due process rights protecting family). As Martha Minow and Mary Lindon Shanley have noted, "disjunctions between the picture of family in political theory and law and the actual lives of families" is recurrent throughout U.S. history including with respect to the exclusion of enslaved people's families from U.S. domestic relations until the mid-Nineteenth Century. Martha Minow & Mary Lindon Shanley, *Revisioning the Family: Relational Rights and Responsibilities*, *in* RECONSTRUCTING POLITICAL THEORY: FEMINIST PERSPECTIVES 84, 86 (Mary Lyndon Shanley & Uma Narayan eds., 1997).

[144] Moore v. City of East Cleveland, 431 U.S. 494, 504–05 (1977).

[145] The protection of families in this context more readily implicates norms violated by the violence directed at enslaved and Native families through forced separation of family members. *See supra* note 118.

[146] Mitchell, *supra* note 141, at 180–81 (distinguishing between the cases protecting parents' interests in care and control of their children and "in not being forcibly separated from them, sometimes referred to as an interest in 'familial association' or 'family integrity' ").

[147] Santosky v. Kramer, 455 U.S. 745, 753 (1982); Minow & Lindon Shanley, *supra* note 143, at 95 ("One problem with 'rights talk' applied to family policy and law has been the tendency to see familial rights as protection for individual freedom, rather than rights that create, foster, and protect valued relationships.").

also recognized that termination decisions implicate parents' "vital interest in preventing the irretrievable destruction of their family life."[148]

For example, in *Santosky v. Kramer*, a case involving termination of parental rights, the Court framed the potential deprivation with language implicating state violence.[149] Termination was not simply a loss or forfeiture of decision-making authority but an action by the state "to destroy weakened familial bonds."[150] There, the Court held that due process requires the state to prove allegations of parental neglect or unfitness by clear and convincing evidence before parental rights may be permanently severed, noting that "[f]ew forms of state action are both so severe and so irreversible."[151] The Supreme Court later described the termination of parental rights as permanently "brand[ing]" a parent as unfit.[152] Lower courts have gone further, describing termination of parental rights as akin to a "civil death penalty."[153]

In these cases, rights in the family expand beyond the protection of parents' "freedom of personal choice" about the make-up of one's family as *Moore* described it,[154] to the preservation of the physical embodiment of the institution itself.[155] The integrity of the family unit is physically disrupted when the state terminates parental rights or makes decisions about the composition of families.[156]

State action in this area is thus much closer to physical restraints on liberty. Indeed, a critical literature has described termination and custody

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[148] *Santosky*, 455 U.S. at 753; Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' ") (quoting Smith v. Org. of Foster Fams., 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment)).

[149] *Santosky*, 455 U.S. at 754–55; *see also* Mitchell, *supra* note 141, at 181 (noting courts' powerful language in describing destruction of families through family separation).

[150] *Santosky*, 455 U.S. at 753–54.

[151] *Id.* at 759. The dissenting justices even described the severance of family bonds in relation to physical restraint, noting "[e]ven the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members." *Id.* at 787 (Rehnquist, J., dissenting).

[152] M.L.B. v. S.L.J., 519 U.S. 102, 119, 125 (1996).

[153] J.L.N. v. Nevada, 55 P.3d 955, 958 (Nev. 2002) ("We have previously characterized the severance of the parent-child relationship as 'tantamount to imposition of a civil death penalty.' "); *In re* Smith, 601 N.E.2d 45, 55 (Ohio Ct. App. 1991) (describing termination of parental rights as the "equivalent of the death penalty in a criminal case").

[154] Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).

[155] Minow & Lindon Shanley, *supra* note 143, at 95.

[156] *Id.* at 96. Citing the procreative liberty cases and cases involving the right to marry in addition to the family rights cases discussed here, Minow and Lindon Shanley contend that "[t]wo fundamental conceptions of rights undergird these decisions." *Id.* "The first views the family as a unitary entity, entitled to protection from state scrutiny or interference; the second locates rights in distinct individuals who should be guarded from state obstruction in intimate choices and behaviors." *Id.*

decisions within the child welfare systems as operating like punishment, particularly for poor Black and Brown parents.[157]

Notwithstanding the strength of such criticisms, due process liberty protection from the coercive and punitive nature of the child welfare systems does not provide a fully cogent basis for naming and reckoning with the wrongfulness of the "zero tolerance" separations. Those responsible for the "zero tolerance" family separations intentionally caused severe pain and suffering upon adults and children to deter migration.[158] Invoking constitutional protection typically applicable when the government claims to privilege the best interests of the child over the rights of parents is thus—without more—an ill-suited means for naming and responding to the government's strategic and purposeful destruction of families.[159]

III. Family Separation as Torture

A. Torture under International and Statutory Law

Human rights organizations and scholars have located the harm inflicted pursuant to the "zero tolerance" family separations within a broader human rights framework.[160] Several have demonstrated that the U.S. government's actions violated the Convention on the Rights of the Child ("CCR"), the International Covenant on Civil and Political Rights ("ICCPR"), and the

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[157] *See, e.g.*, Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 33 (2002); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. Rev. 1474, 1478 (2012) (describing the foster care system's role in the "brutal containment of the nation's most disenfranchised groups"); Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. Rev. 577, 580–81 (1997) (describing "coercive state intervention" in poor families' lives through the child welfare system largely based "on the gender, race, and class of parents").

[158] J.P. v. Sessions, No. LA CV18-06081, 2019 WL 6723686, at *36 (C.D. Cal. Nov. 5, 2019) (reasoning that the federal government implemented family separation "with awareness of the potential harm it would cause and intend[ed] to use that as a basis to deter future attempts by those similarly situated to enter the United States").

[159] *See supra* Part I.A.

[160] *See, e.g.*, Cordero et al., *supra* note 26 at 480–82; Jonathan Todres & Daniela Villamizar Fink, *The Trauma of Trump's Family Separation and Child Detention Actions: A Children's Rights Perspective*, 95 Wash. L. Rev. 377, 408 (2020); Van Schaack, *supra* note 28 (noting in October 2018 that "human rights organizations, journalists, the United Nations, academic psychologists, and doctors" are beginning to argue that family separation policy "as implemented implicates the international prohibitions against torture"); Physicians for Hum. Rts., *supra* note 28; *Amnesty Separation Report*, *supra* note 28; U.S. Hum. Rts. Network, Advancing Human Rights: A Status Report On Human Rights In The United States 30–33 (2018), https://ushrnetwork.org/uploads/Resources/USHRN%202018%20Status%20of%20Human%20Rights%20in%20the%20US.pdf, *archived at* https://perma.cc/2K5H-HK7L; Jillian Blake, *Trump Administration's Family Separation Policy Violates International Law*, INTLAWGRRLS (June 10, 2018), https://ilg2.org/2018/06/10/trump-administrations-family-separation-policy-violates-international-law, *archived at* https://perma.cc/GZZ5-WBQU.

Convention against Torture ("CAT"), each of which prohibits torture.[161] These arguments recognize that the intentional infliction of severe pain and suffering, and the concomitant abuse of power inherent in the strategic exploitation of migrant parents and children's suffering, constitute gross violations of human rights. Invoking due process protection rooted in family unity is not similarly or fully responsive to that intentionally inflicted harm or profound abuse of government power.

The U.S. torture statute,[162] which criminalizes torture, implemented the CAT[163] in 1994 after the United States ratified the Convention.[164] The argument that "zero tolerance" family separations constitute torture under both provisions rests on the conclusion that the government intentionally caused the families "severe physical or mental pain or suffering."[165] The federal torture statute defines the crime of torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control[.]"[166] While the CAT does not contain the same "specific intent" requirement, it includes added circumstances relevant to whether someone may be prosecuted for torture, including whether the acts were committed for "the purpose of coercion, punishment, intimidation, or for a discriminatory reason."[167] As David Luban and Henry Shue have summarized, "the 'severe physical or mental pain or suffering' formula is the definitional core of what it is that torturers inflict on their victims."[168]

Addressing whether specific U.S. officials could be prosecuted for the torture of migrant families who suffered family separation is beyond the scope of this Article. Rather, the focus is only on whether the United States' intentional separation of families for the purpose of deterring migration constituted the intentional infliction of "severe physical or mental pain or suffering" such that it transgressed the prohibition on torture.[169] That more

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[161] *See* Cordero et al., *supra* note 26, at 497–500; Todres & Villamizar Fink, *supra* note 160, at 408.

[162] 18 U.S.C. § 2340A(a) (imposing criminal penalties for torture as defined by 18 U.S.C. § 2340(1)).

[163] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 113 [hereinafter CAT].

[164] *See* 18 U.S.C. §§ 2340(1), 2340A(a).

[165] Luban & Shue, *supra* note 23, at 824–25. Specifically, the CAT defines torture that may be prosecuted with slightly greater specificity, prohibiting government actions (1) that cause severe physical or mental suffering, (2) that are committed intentionally, (3) for the purpose of coercion, punishment, intimidation, or for a discriminatory reason, (4) by a state official or with state consent or acquiescence. PHYSICIANS FOR HUM. RTS., *supra* note 28, at 27 (citing CAT, *supra* note 163).

[166] 18 U.S.C. § 2340(1).

[167] CAT, *supra* note 163, art. 1(1). The coercion, punishment, or intimidation can be directed to the torture victim or a third party. Van Schaack, *supra* note 28.

[168] Luban & Shue, *supra* note 23, at 824–25.

[169] Van Schaack, *supra* note 28. Under CAT, state parties violate Article 3 of the Convention when they return a person to a country where there are "substantial grounds" for believ-

limited inquiry is instructive in examining similar restraints under the U.S. Constitution. The argument is compelling that the "zero tolerance" separations violated the prohibition on torture embodied in CAT and the federal torture statute.

Specifically, as Professor Beth Van Schaack has argued, the medical literature and evidence of the actual impact on families confirms what any parent would know by intuition: forcibly separating a child from a parent, without telling families about the well-being of their loved one or whether they would ever see each other again, imposed severe mental pain or suffering.[170] Both Physicians for Human Rights and Amnesty International agree.[171]

For example, Physicians for Human Rights concluded that "U.S. officials intentionally carried out and condoned unlawful actions causing severe pain and suffering, in order to punish, coerce, and intimidate Central American asylum-seekers to give up their asylum claims, in a discriminatory manner."[172] Amnesty International concluded that there was "no question that . . . [the] Trump administration's policy of separating mothers and fathers from their children is designed to impose severe mental suffering on these families, in order to deter others from trying to seek safety in the USA."[173]

Even putting aside the horrific conditions of the children's confinement, which Van Schaack argues also caused severe pain and suffering and exacerbated the children's trauma, the forced separations alone imposed long-term emotional and psychological harm to parents and, most significantly, to children.[174]

As described *supra* in Part I.C., parents and children suffered agonizing pain on account of their separations and many exhibit symptoms of ongoing trauma and harm.[175] The brain science research summarized above also shows that such injuries inflict emotional harm to children in the moment, by rupturing parent-child attachments,[176] including between babies and parents.[177] But the trauma of separation also impedes the healthy development

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ing they will be tortured, which the Convention defines under Article 1 using the intentional infliction of severe pain or suffering standard. *See* CAT, *supra* note 163, art. 1; *id.* art. 3.

[170] *See* Van Schaack, *supra* note 28.

[171] PHYSICIANS FOR HUM. RTS., *supra* note 28, at 4 ("[T]he U.S. government's treatment of asylum-seekers through its policy of family separation constitutes cruel, inhuman, and degrading treatment and, in all cases evaluated by PHR experts, constitutes torture."); *Amnesty Separation Report*, *supra* note 28.

[172] PHYSICIANS FOR HUM. RTS., *supra* note 28, at 27.

[173] *Amnesty Separation Report*, *supra* note 28 (quoting Erika Guevara-Rosas, Amnesty International's Americas Director).

[174] *See* Felitti, *supra* note 88, at xiii (noting early childhood wounds "are embodied" and can be imprinted on children's neuroregulatory systems for the rest of their lives); Felitti & Anda, *supra* note 95, at 77 (noting molecular-level changes that occur with childhood emotional trauma).

[175] *See supra* Part I.C.

[176] *See* Abrams, *supra* note 87; *see also* Reinstein, *supra* note 87.

[177] HOUSE OVERSIGHT STAFF REPORT, *supra* note 2, at 2.

of children's brains[178] with psychological consequences for the rest of their lives.[179] When trauma disrupts fundamental attachment relationships, particularly at critical states of development, the harm can be "profound and lasting."[180]

Moreover, as the medical literature confirms, psychological torture often causes more long-term harm than techniques imposing physical pain.[181] These psychological injuries, like physical ones, live on in the body.[182]

The intentional infliction of severe pain and suffering upon migrant parents and children for strategic purposes constituted a gross violation of human rights that warrants condemnation under international law and the domestic statutes implementing it. The analysis of the prohibition on torture enshrined in international and domestic statutory law, though not dispositive of the separate constitutional questions, helps illuminate why family separation also violates the U.S. Constitution. That analysis follows.

B. Anti-Torture Norms under the U.S. Constitution

As Owen Fiss and other legal scholars have noted, the prohibition on torture "is rooted in the Constitution itself."[183] Thus, the prohibition on torture predates the anti-torture rules embodied in international treaties and statutes implementing those obligations—including CAT and the federal torture statute.[184] The Fifth, Eighth, and Fourteenth Amendments all prohibit torture.[185] The Constitution's anti-torture principle operates as an overriding

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[178] *See* Felitti, *supra* note 88, at xiii (noting early childhood wounds "are embodied" and can be imprinted on children's neuroregulatory systems for the rest of their lives); Felitti & Anda, *supra* note 95, at 77 (noting molecular-level changes that occur with childhood emotional trauma).

[179] *See* Ford, *supra* note 95, at 69 (describing disruption to central nervous system and hormonal regulation).

[180] *Id.*

[181] Van Schaack, *supra* note 28; *see also* ALFRED MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION FROM THE COLD WAR TO THE WAR ON TERROR 9–10 (2006) (noting that psychological pain often predominates even when torture is physical because of the terror and severity of mental suffering caused by denying victims all power "over their lives").

[182] ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 55 (1985) (describing how torture lives on in the body).

[183] Owen Fiss, *The Example of America*, 119 YALE L.J. ONLINE 1, 2 (2009); *see* Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003) (exhaustively examining the constitutional foundation for a prohibition on torture); Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 123 (2007) (stating that the Constitution "read correctly" prohibits torture through the Fifth and Eighth Amendments).

[184] Fiss, *supra* note 183, at 1–2; Mayerfeld, *supra* note 183, at 115 ("Many traditional due process protections are essential to the prevention of torture.").

[185] U.S. CONST. amends. V, VIII, XIV. As Justice Kennedy stated in *Chavez v. Martinez*, "[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear." 538 U.S. 760, 789 (2003) (Kennedy, J., concurring in part and dissenting in part).

norm that applies whether someone is in custody and being punished or is subjected to severe pain or suffering for some other governmental aim.[186]

The Eighth Amendment prohibition on "cruel and unusual punishments"[187] absolutely forbids torture and all other punishments imposing similar "unnecessary cruelty."[188] Indeed, outlawing torture and equivalent brutality was the central reason for the Amendment's adoption.[189] For that reason, when the Court assesses punishments under the Eighth Amendment, it often refers to torture as a baseline against which to compare such conduct.[190] The Court has stated that the Eighth Amendment is violated if punishments "involve the unnecessary and wanton infliction of pain."[191]

In assessing whether conditions of confinement amount to cruel and unusual punishment, the Court employs a variety of tests, often using torture as a referent. For example, in assessing whether conditions of confinement violate "contemporary standards of decency[,]" the Court looks to whether someone has suffered "extreme deprivations" sufficiently grave so as to deny "'the minimal civilized measure of life's necessities.'"[192]

The Court likewise considers whether denial of medical care in the custodial setting shows "deliberate indifference" to the "serious" medical needs of incarcerated persons, emphasizing that "the infliction of such unnecessary suffering" is incompatible with contemporary standards of decency.[193] Finally, the Court will find a violation of the Eighth Amendment where "prison officials maliciously and sadistically use force to cause harm" whether or not it produces a significant injury.[194] The Court adopted that approach to avoid sanctioning punishments that turn on the severity of injury no "matter how diabolic or inhuman" the officers' conduct.[195]

In the context of the death penalty—which many scholars and jurists consider to be cruel and unusual punishment[196]—the Court emphasizes that

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[186] Fiss, *supra* note 183, at 2 (rejecting the claim that torture outside of punishment "is beyond the scope of the Eight Amendment" because torture "is prohibited by an implicit premise of the Eighth Amendment"). Specifically, Fiss contends that the Eighth Amendment contains a dignity principle "that denies state officers the power to treat inhumanely anyone in their custody." *Id.*; *see also* Mayerfeld, *supra* note 183, at 115.

[187] U.S. CONST. amend. VIII.

[188] Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

[189] Gregg v. Georgia, 428 U.S. 153, 170 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *see also* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (proscribing torture and barbarous punishment as "the primary concern of the drafters" of the Eighth Amendment).

[190] *See, e.g.*, *Wilkerson*, 99 U.S. at 136 (finding it "safe to affirm that punishments of torture . . . are forbidden"); *In re* Kemmler, 136 U.S. 436, 447 (1890); Weems v. United States, 217 U.S. 349, 368 (1910).

[191] *Gregg*, 428 U.S. at 173 (joint opinion); *see also* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947).

[192] *See* Hudson v. McMillian, 503 U.S. 1, 8–9 (1992) (quoting *Estelle*, 429 U.S. at 103).

[193] *Estelle*, 429 U.S. at 103–04.

[194] *Hudson*, 503 U.S. at 9.

[195] *Id.*

[196] *See* Glossip v. Gross, 576 U.S. 863, 909, 915 (2015) (Breyer, J., dissenting) (citing evidence showing the death penalty's unreliability, arbitrariness, and "unconscionably long

execution methods transgress the Eighth Amendment where they "superadd" unnecessary cruelty or pain.[197]

Outside of the context of official punishment, the guarantee of substantive due process in the Fifth and Fourteenth Amendments prohibits torture and equivalent brutality as a violation of liberty and dignity of the person.[198] Indeed, the Court has repeatedly described the Due Process Clauses as intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression."[199]

In assessing whether abuses of power or government brutality transgress due process protections, the Court asks whether government conduct "shocks the conscience."[200] Significantly, in developing this standard in *Rochin v. California*, the Court analogized to torture, reasoning that the officers' conduct was "too close to the rack and the screw to permit of constitutional differentiation."[201] Finally, the Thirteenth Amendment's prohibition on slavery likewise rejects that specific form of torture, which included the forced separation of enslaved families.[202] The Thirteenth Amendment also thus clearly enshrines a constitutional commitment to non-brutality in the legal system.

These anti-brutality norms undergirding the Constitution, unlike the torture prohibition under international law and its domestic implementing statute, do not impose a requisite level of injury or pain to violate the Constitution. For purposes of due process, whether the government's conduct was "conscious shocking"—something the *Ms L.* court deemed the "zero tolerance" separations to be[203]—takes account of the extent and lasting nature of the harm. Moreover, the Court's rejection of wanton or "superadded" pain when assessing cruel and unusual punishments likewise suggests a

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delays" and suggesting he would request briefing on whether capital punishment violates the Eighth Amendment in and of itself).

[197] *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1124–25 (2019) (stating that the Eighth Amendment prohibits "punishment that intensified the sentence of death with a (cruel) "'superadd[ition]'" of "'terror, pain, or disgrace'"") (quoting Baze v. Rees, 553 U.S. 35, 48 (2008) (Thomas, J., concurring in judgment)).

[198] Fiss, *supra* note 183, at 10 (rooting the absolute prohibition on torture in "a just and proper regard for the dignity of each person held in state custody").

[199] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (citations, internal quotation marks, and internal alterations omitted) (substantive due process protects against government officials "abusing their power, or employing it as an instrument of oppression"); *see also* Davidson v. Cannon, 474 U.S. 344, 347–78 (1986) (concluding that the Due Process Clause does not protect against negligent actions by government officials but prohibits "abusive government conduct"); Daniels v. Williams, 474 U.S. 327, 330–31 (1986) (similarly recognizing that the guarantee of due process restrains "governmental power from being used for purposes of oppression") (internal quotation marks omitted); Rochin v. California, 342 U.S. 165, 172–74 (1952) (police officer's pumping of suspect's stomach to obtain evidence was "force so brutal and offensive to human dignity" that to allow it "would be to afford brutality the cloak of law" and thereby discredit the law).

[200] *Cnty. of Sacramento*, 523 U.S. at 846–47.

[201] 342 U.S. 165, 172 (1952).

[202] *See generally* MehChu, *supra* note 139.

[203] Ms. L. v. U.S. Immigr. & Customs Enf't., 310 F. Supp. 3d 1133, 1145–46 (S.D. Cal. 2018).

norm rejecting government-caused pain that is not merely incidental to some other purpose, but the intended result.

Taken together, the constitutional rejection of torture and equivalent governmental cruelty transcend a single constitutional provision. Each provision establishes through different doctrinal elements that the Constitution works as a shield against the government's intentional abuse of power to oppress, injure, and inflict unnecessary pain, all of which occurred as a result of the "zero tolerance" separations.

IV. Family Separation as Torture: The Value and Implications

A. An Expanded Vision of Illegality

The *Ms. L.* decision was instrumental in halting family separation, even though the exact number of victims, both before and after the district court's order, remains uncertain.[204] Indeed, in spite of the importance of the district court's order, in October of 2020, two years after the policy reportedly ended, lawyers for separated families reported that more than 545 children had still not been reunited with their parents.[205] One can recognize the decision's profound importance while still assessing whether the conception of the constitutional violation it relied upon was adequate and whether justice demands a broader vision of the Trump Administration's wrongdoing.

As Jack Balkin has noted, "ways of thinking about human rights . . . can be expressed only very awkwardly if at all in the language of our Constitution and its distinctive concepts and doctrinal glosses."[206] Balkin notes that the "language of the constitutional tradition and its characteristic concepts and categories" can limit how claims of injustice are presented and considered within our constitutional discourse.[207] Balkin correctly observes that the failure to give expression to injustice within constitutional language and discourse can "limit our imaginations" and "obscure our understanding rather

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[204] Achieving compliance with the court's order was not seamless or speedy. Soboroff, *supra* note 4, at 285–306. It required relentless pressure from the ACLU, supervision by the district court, and the imposition of clear command and control direction within the government's reunification efforts. *Id.* Because DHS and ORR had not accurately kept track of the identities and family relationships of parents and children, and had already deported some parents, they could not meet the deadlines set by Judge Sabraw for reunification. *Id.* During a court hearing four days before all children under five were set to be reunified, Trump Administration lawyers could not tell the court "for sure how many kids it had separated, nor where all their parents were." *Id.* (describing the reunification process as a "complete and total disaster" that resulted from "[s]hoddy record keeping, poor planning, and a scramble to fix everything"). More than a year and a half after the injunction issued in *Ms. L.*, the Government Accountability Office ("GAO") concluded that it was still unclear based upon data through March 2019 "the extent to which Border Patrol has accurate records" of family separations. GAO 2020 Family Processing Report, *supra* note 11, at 2.

[205] Ainsley & Soboroff, *supra* note 8.

[206] Balkin, *supra* note 32, at 1727–28.

[207] *Id.* at 1727.

than illuminate it."[208] Balkin's critique takes aim at injustice "or evil" that is not yet recognized as unconstitutional. But Balkin's assessment has purchase even with respect to human rights violations that are widely recognized as illegal, such as family separation.[209] Constitutional discourse may still be stunted in its capacity to accurately capture the degree or nature of the injustice.

Similarly, as Robert Cover posited in *Nomos and Narrative*, "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."[210] The narratives that the Court adopts as constitutional law are often those least likely to suggest radical disruption to, or departure from, the typical ways of thinking about the Constitution.[211]

These insights help to explain the power and limits of "family unity" as a basis for the "zero tolerance" policy's illegality. In rolling out the "zero tolerance" policy, officials dehumanized migrants, many of whom were seeking asylum,[212] as smugglers and criminals.[213] Officials denied the families' humanity by exploiting the families' pain and trauma for strategic purposes.[214]

For this reason, the *Ms. L.* court's reliance upon the family unity strand of due process protections had particular symbolic and educative significance.[215] It made clear that the families' attachments and bonds warranted respect, dignity and constitutional protection.

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[208] *Id.* at 1728. Michael Klarman's response to Balkin's critique is that "[o]ur constitutional history reveals that most challenges to widely-perceived injustices have been rendered plausible, and often successful, under the Constitution." Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739, 1745 (1997).

[209] Every district court judge to address the legality of family separation found that it violated the Fifth Amendment. *See* cases cited *supra* note 12.

[210] Cover, *supra* note 32, at 4.

[211] *Id.* at 34; Douglas Nejaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 895 (2013) (noting how efforts to achieve justice through constitutional litigation can "privilege more moderate movement factions, tactics, and goals over more radical ones").

[212] HOUSE OVERSIGHT STAFF REPORT, *supra* note 2, at 4.

[213] This, of course, was also factually wrong as many were asylum-seekers. But President Trump unfairly stereotyped Muslims and Latinos "as threats, whether as criminals, gang members, rapists, or terrorists poised to spill over the Southern Border." Catherine Powell, *Race, Gender, and Nation in an Age of Shifting Borders: The Unstable Prisms of Motherhood and Masculinity*, 24 UCLA J. INT'L L. & FOREIGN AFFS. 133, 136 (2020). Powell argues that "[b]y using race and gender tropes to dehumanize Latina mothers and their children, Trump laid the groundwork for the separation and detention of immigrant families who cross the Southern Border." *Id.* at 150.

[214] *See supra* Part I.A; Noa Ben-Asher & Margot J. Pollans, *The Right Family*, 39 COLUM. J. GENDER & L. 1, 27–28 (emphasizing the "zero tolerance" policy dehumanization of families).

[215] Numerous scholars have noted that decisions of the Supreme Court have educative importance. *See* MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 94–97 (1991); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 112–13 (1982); Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 103 (1990). This capacity to influence public perception and thinking about social issues arguably applies with equal force when lower courts issue high-profile and influential decisions like *Ms. L.*

Several privacy scholars have recognized that protecting one's privacy is a means of recognizing one's humanity.[216] For example, Jeffrey H. Reiman has described the right to privacy as protecting "the individual's interest in becoming, being, and remaining a person."[217] Philosopher Julie C. Inness has contended that privacy "acknowledges our respect for persons as autonomous beings with the capacity to love" and "freely develop close relationships."[218] These privacy theories suggest that though the family unity line of due process cases may sound in privacy and autonomy, they capture something far more fundamental and human.[219] Thus, the district court's holding, beyond its remedial significance, had powerful normative force in countering the Trump Administration's dehumanization of migrants.[220] Still, the rationale underlying *Ms. L.* was insufficient to reckon with the interests violated or to respond to the magnitude of the wrong committed.[221]

Indeed, in the context of cases involving state efforts to terminate parental rights, including the other federal court decisions cited by *Ms. L.*, the state's interest in children's education or welfare was not doubted.[222] The question was whether the state pursued that interest through means that went too far and undermined the primacy of parental interests.[223] In contrast, in the context of the "zero tolerance" separations, the purpose obviously was not to protect children or to accomplish what the government thought best for the children's growth or education. Rather, the purpose was to harm them for

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[216] *See* Daniel J. Solove, *Conceptualizing Privacy,* 90 CALIF. L. REV. 1087, 1117 (2002) (summarizing literature recognizing privacy as source of individuality, dignity, and autonomy and stating that under this lens privacy "is about respect for personhood, with personhood defined in terms of the individual's capacity to choose").

[217] Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 300, 314 (Ferdinand David Schoeman ed., 1984).

[218] JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 95 (1996).

[219] For example, as Pamela Karlan has argued in assessing the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), which invalided a state law prohibiting intimate sexual conduct by same sex couples, the Court's protection of people's private "choices within the intimacy of their homes serves essentially as a safeguard of their dignity in a more public sphere." Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1458 (2004); *see Lawrence*, 539 U.S. at 567 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

[220] For a deep analysis of how "rights-based legal contest[s]" can serve "as a form of resistance to dehumanization," see Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1687 (2009).

[221] GLENDON, *supra* note 215, at 12 (noting "subtle variations in the way rights ideas are presented can have broad and far-reaching implications that penetrate nearly every corner of the societies involved").

[222] Ms. L. v. U.S. Immigr. & Customs Enf't., 310 F. Supp. 3d 1133, 1143 (S.D. Cal. 2018) (citing D.B. v. Cardall, 826 F.3d 721, 741 (4th Cir. 2016); Heartland Acad. Cmty. Church v. Waddle, 595 F.3d 798, 808–11 (8th Cir. 2010); Brokaw v. Mercer Cnty., 235 F.3d 1000, 1019 (7th Cir. 2000)).

[223] *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (stating that forcing the break-up of a natural family "for the sole reason that to do so was thought to be in the children's best interest" would violate due process without evidence of parental unfitness).

the sake of deterrence.[224] A focus on the infringement of family unity and association thus does not adequately give expression to the violence and intentional brutality of the government's actions or the ongoing harm inflicted. In articulating how these features of family separation offend the Constitution, demands for justice should not be shaped by an inadequate constitutional vocabulary or a failure of imagination.

At the same time, while Balkin's description of the inadequacy of constitutional labels to meet the demands of gross injustice is certainly right, his account does not fully speak to the moments within our constitutional history when the Court rose to the occasion and adopted a new way of looking at the Constitution in response to flagrant injustice. Michael Klarman's work documents one extraordinary example.[225] Klarman explains that when the Court jettisoned 150 years of legal precedent grounded in federalism concerns and issued a string of decisions shaping modern criminal procedure, it was responding to the systemic brutality and blatant unfairness directed at black defendants in the South.[226] The Court could not ignore that torture and lynching were rampant and enmeshed with many southern states' criminal justice systems.[227] Similarly, when the Supreme Court held in *State Board of Education v. Barnette* that public school students could not be compelled to salute the American flag in class, it was responding to the rise of Nazi Germany.[228] Many observers contend that the Court's awareness of the threat to democracy posed by fascism led it to reverse course from a prior decision only three years earlier in *Minersville School District v. Gobitis*,[229] which deferred to school administrators.[230] Both examples reflect the capacity of our constitutional system and discourse to adapt and respond to unforeseen threats to human rights and, when appropriate, to rethink entrenched constitutional doctrines.[231]

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[224] *See supra* Part I.A.

[225] Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

[226] *Id.* at 52.

[227] *Id.*

[228] 319 U.S. 624 (1943). Justice Jackson was transparent about his views of the First Amendment as a shield against fascism. He noted, "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters." *Id.* at 641.

[229] 310 U.S. 586 (1940).

[230] *See* Stephen R. Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612, 613 n.7 (1970) (noting that "even when reading *Barnette* today, one is struck by how much this remarkable opinion was a reflection of the Court's strong antipathy to the then current supranationalism embodied in fascism"); Jamin B. Raskin, *No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the* Tinker *Decision*, 58 AM. U. L. REV. 1193, 1197 (2009) (noting that Justice Robert Jackson's opinion in *Barnette* defined "the anti-authoritarian premises of American democracy with more clarity than any Supreme Court justice had ever done").

[231] The Court in *Barnette* was not, to be sure, asserting itself to reign in brutality as the Court did when overseeing its criminal procedure revolution. Yet the Court's awareness of fascism's rise and impact abroad surely encouraged the Court's reassessment of a recent constitutional decision. *See* Goldstein, *supra* note 230; Robert L. Tsai, *Reconsidering* Gobitis*: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 382 (2008) (documenting

The patent and unrestrained cruelty of the family separation policy—its scale, its deliberate infliction of pain notwithstanding children's vulnerability, and the government's apparent belief that it was not obligated to take steps to ensure the children's eventual reunification—calls out, like those other moments, for a more expansive vision and description of why family separations violate the Constitution. The anti-brutality and dignity norms undergirding threads of substantive due process and Eighth Amendment jurisprudence provide a basis to recognize it as torture.

Moreover, framing the families' constitutional injury as separation and "infringement of family unity" suggests that the wrong could be remedied by simply reuniting the families. But the very notion of "separation" is inadequate as a description of the wrongfulness and enduring harm of the Trump Administration's violations. The United States District Court for the Central District of California's decision ordering post-reunification remedies to separated families arguably recognized the constraints of the family unity framework. The district court concluded that DHS and DOJ officials also violated migrants' rights to substantive due process under the state-created danger theory, recognizing that the families suffered "psychological trauma, and substantially increased risks of long-term mental health injuries" because of the separations.[232] This constitutional injury, the court recognized, did "not end upon release from custody and reunification."[233]

Even while the family unity framing affirmed the families' dignity and humanity, it offered a simultaneously incomplete account of the state violence inflicted. The family unity understanding does not give voice to the profound abuse of power inherent in a government policy that deliberately inflicted severe and lasting suffering on vulnerable people, many of whom sought the United States' protection. The infringements upon family unity and childrearing decisions recognized by the Supreme Court as due process violations do not speak to this level of government brutality.[234] To classify the "zero tolerance" family separations as a constitutional violation of the same degree as separations accomplished through the child welfare system based upon a purportedly legitimate governmental end diminishes—and even gives cover to—the government violence inflicted. Both with respect to the harm and the government's motive, the legal system should recognize family separation as torture.

President Roosevelt's influence on the Court's change of course as the nation countered Nazism and fascism abroad).

[232] J.P. v. Sessions, No. LA CV1806081, 2019 WL 6723686, at *21 (C.D. Cal. Nov. 5, 2019) (recounting this as the "gravamen" of the plaintiffs' complaint and holding that they showed a likelihood of success on the merits of their claims). The government initially appealed the decision and order. J.P. v. Barr, No. 19-56400 (9th Cir. Nov. 29, 2019). But the government voluntarily dismissed its appeal prior to filing its opening brief on February 21, 2020.

[233] *Id.*

[234] *See supra* Part II.A.B. *But see* Roberts, *supra* note 157; Appell, *supra* note 157. Both acknowledged the violence of family separations through incarceration and the child welfare system. Roberts, *supra* note 157; Appell, *supra* note 157.

Scholars who have urged accountability for acts of torture committed by the U.S. government in the wake of 9/11 have articulated the value of acknowledging the government's unconstitutional acts as torture.[235] Doing so centers the magnitude of the wrong and "enable[s] the public to confront and acknowledge the violations of the Constitution committed in their name."[236] In other words, recognition of the government's acts as torture has explanatory power. It draws attention to the intentional brutality of the government's plan and action, not waiting for future generations to look back and declare the full reality of its evil.[237]

The evil of family separation was clear before the policy was implemented.[238] Its evil was clear throughout its implementation.[239] And its evil should now be named and remedied as unconstitutional torture.

B. Implications for Broader Cruelty

Understanding family separation as torture that offends a constitutional commitment to non-brutality inevitably exposes the legal system's acceptance of cruelty in other forms of family separation, including those routinely imposed by harsh and restrictive immigration enforcement.[240] Understanding family separation as a violation of families' rights to unity and association makes plain that this theory of due process rarely provides protection to families separated because of other forms of immigration policy.[241]

Many scholars have criticized other forms of family separation that occur as a natural result of restrictive immigration opportunities or harsh immigration enforcement, which exist as legally sanctioned features of the immigration system. Stephen Lee, for example, has recounted the ways that immigration law is "pervasively organized around principles of family sepa-

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[235] *See* Fiss, *supra* note 183; Mayerfield, *supra* note 183.

[236] Fiss, *supra* note 183, at 19 (arguing that acknowledging the unconstitutionality of torture "allow[s] the judiciary to affirm the dignity principle and the constitutional norms to which it gives life, and to declare—in bold and clear terms—that these norms apply to American officials and their instrumentalities wherever they act and against whomever they act").

[237] In the context of debates about government antiterrorism responses, Martha Minow has noted the difficulty of identifying evil in the moment, which "is obvious only in retrospect." Martha Minow, *What Is The Greatest Evil*, 118 HARV. L. REV. 2134, 2139 (2005) (reviewing MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR (2004)). She observed that "[e]vil when we are in its power is not felt as evil but as a necessity, or even as a duty . . . [T]he truth will be distorted by felt necessity in the moment of perceived danger." *Id.* The evil of family separation was apparent in the moment as evidenced by the immediate and intense public backlash and the warnings pressed by experts even prior to "zero tolerance's" implementation that the policy would cause grievous harm. S*ee supra* Part I. Nevertheless, the legal response to it did not fully capture this recognized evil.

[238] *See supra* Part I.B.

[239] *See supra* Part I.C.

[240] David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law,* 14 VA. J. SOC. POL'Y & L. 58, 58–59 (2006) (describing the ways immigration law routinely transgresses family unity and association).

[241] *Id.*

ration."[242] Family separation is endemic to the immigration system, whether with respect to extended wait times for family-based immigration visas, interior immigration enforcement that separates families through detention and deportation, or the limited opportunities for non-citizens to establish admissibility for admission as permanent residents.[243] These forms of family separation are routinely sanctioned as lawful policy and immigration enforcement.[244]

Lori Nessel has similarly drawn attention to a related feature of family disruption caused by immigration enforcement: the "de facto" family separations that occur when noncitizen parents are deported and their U.S. citizen children make the agonizing choice to stay behind in the United States without their parent.[245] She urges a legislative response to end this less-recognized—but common—trauma.[246] Nina Rabin has similarly described the extreme "emotional toll" other forms of family separation impose upon children, which, like the "zero tolerance" separations, also inflict severe and detrimental mental health consequences.[247]

These accounts place the family separations at the southern U.S. border in 2017 and 2018 within a broader context of U.S. immigration law's separation of families. The ubiquity of the harm imposed by such policies raises the question why the more "spectacular" violence posed by the "zero tolerance" separations[248] should be categorized as torture, but not these forms of less visible violence and suffering. The same concerns exist with respect to the widespread separations of families of color through mass incarceration[249]

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[242] Lee, *supra* note 15, at 2322.

[243] *Id.* at 2322–23.

[244] *Id.* at 2322–24, 2327 (tracing the origin of the "slow death" literature to its starting point in Lauren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency)*, 33 CRITICAL INQUIRY 754, 754 (2007)). Lee invokes the concept of "slow death" developed by Lauren Berlant in the humanities and social science literature to offer an account of why such ubiquitous forms of family separation fail to provoke the same outrage and legal response generated by the "zero tolerance" separations at the border. *Id.*

[245] Lori A. Nessel, *Deporting America's Children: The Demise of Discretion and Family Values in Immigration Law*, 61 ARIZ. L. REV. 605, 614–21 (2019).

[246] *Id.* at 636–40.

[247] Nina Rabin, *Understanding Secondary Immigration Enforcement: Immigrant Youth and Family Separation in a Border County*, 47 J.L. & EDUC. 1, 18–20 (2018) (citing "family dysfunction, extreme poverty, and educational aspirations" as a few of many "intertwined" factors in addition to immigration enforcement that have resulted in family separations). Rabin notes based upon a study of youth in Pima County, Arizona, that "immigration enforcement was a key, disruptive event that led suddenly and directly to family separation." *Id.* at 6. Rabin cites research documenting "heightened levels of anxiety and depression for youth separated from their parents—particularly mothers—for extended periods of time." *Id.* at 18 (citing Carola Suarez-Orozco et al., *I Felt Like My Heart Was Staying Behind: Psychological Implications of Family Separations & Reunifications for Immigrant Youth*, 26 J. ADOLESCENT RES. 222, 236–37 (2011)).

[248] Lee, *supra* note 15, at 2322 ("Acts of slow violence stand apart from acts of 'spectacular' violence, the harms of which are immediately discernible").

[249] *See* Amy B. Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 MD. L. REV. 385, 390–94 (2018).

and punitive child welfare systems.[250] These implications are important, but do not undermine a broader vision of constitutional accountability for "zero tolerance" family separation, which was distinctively rooted in intentionally inflicted harm upon parents and children.

The vision for a more humane and just immigration system is much harder to accomplish if policies that announce their brutality as part of official government strategy are not renounced and condemned through norms that acknowledge and reject brutality and deliberate violence. Lee is correct that we should not countenance forms of injustice solely because the violence occurs slowly and over time.[251] But his argument does not point the other way and suggest that we should countenance the most visible forms of flagrant injustice.

A similar explanation exists for why focusing on the injustice of the death penalty does not diminish efforts to remedy other forms of injustice throughout the criminal justice system.[252] As Anthony Amsterdam has noted, the death penalty "extends the boundaries of permissible inhumanity so far that every lesser offense against humanity seems inoffensive by comparison, leading us to tolerate them relatively easily."[253] This insight underscores the importance of treating "zero tolerance" separations as torture. Doing so declares that a clear constitutional line was crossed through actions that reflected impermissible brutality and a disregard of migrants' humanity. Recognizing family separation as torture thus demands that Americans confront and acknowledge the families' enduring suffering and the violations of the Constitution committed in our name. Without this recognition, our legal system risks easily tolerating other forms of injustice and suffering routinely inflicted upon migrant parents and their children.

Conclusion

The federal government's cruelty in knowingly inflicting grievous harm upon migrant parents and children implicates norms of dignity and non-brutality that the Supreme Court's family liberty precedents fail fully to capture. Properly understood, the constitutional limitation on family separation has roots both in the privacy/liberty norms prohibiting arbitrary state interference with family unity and association, as well as broader norms that reject torture and equivalent government brutality. Expanding our constitutional discourse to give voice to family separation's monumental brutality would recognize it as the grave human rights violation that it was. The unrestrained cruelty of the "zero tolerance" family separation policy—its scale, its inten-

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[250] Roberts, *supra* note 157; Appell, *supra* note 157.

[251] Lee, *supra* note 15, at 2322.

[252] Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After* McCleskey, 39 Colum. Hum. Rts. L. Rev. 34, 47 (2007).

[253] *Id.*

tional infliction of suffering upon children notwithstanding their vulnerability, and the government's apparent belief that it was not obligated to take steps to ensure families' eventual reunification—demands condemnation of all dimensions of its unconstitutionality. Recognizing family separation as torture demands that the intentional violence and abuse of power at the core of the policy is never minimized or repeated.