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ARTICLES

BORDER ENFORCEMENT AS STATE-CREATED DANGER

JENNY-BROOKE CONDON[†] & LORI A. NESSEL[††]

INTRODUCTION

A woman seeks refuge at the U.S. border, but U.S. officials force her to wait for her asylum hearing in Mexico where a police officer later stalks and rapes her.[1] A father and child suffer unbearable trauma after U.S. officials separate them under a policy aimed at deterring migration.[2] A formerly healthy family loses a loved one to the coronavirus while forced to wait at an unsanitary, makeshift tent city in Mexico after fleeing for safety to the United States.[3] For the people impacted by U.S. border policies, the southern border is a dangerous place—it is the site of rampant U.S.-created harm.

Typically, legal and policy responses to refugee crises are framed by international and domestic legal obligations to provide safety and protect those fleeing persecution or humanitarian

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1 Uriel J. García, *"I Thought He Was Going to Kill Me": Migrants Say Return of Trump-Era Border Policy Will Put Asylum Seekers in Danger*, TEX. TRIB. (Dec. 14, 2021), https://www.texastribune.org/2021/12/14/texas-remain-in-mexico-biden-migrants/ [https://perma.cc/WAF5-U549] (citing the rape of a Cuban woman who was forced to go to Ciudad Juárez and wait for her court date after seeking asylum in Texas).

2 This prototypical experience of parents and children subjected to the Trump Administration's family separation policy is set forth in *J.P. v. Sessions*. No. 18-06081, 2019 U.S. Dist. LEXIS 217560, at *6, *45–46 (C.D. Cal. Nov. 9, 2019).

3 Alexandra Villarreal, *Rapes, Murders . . . And Coronavirus: The Dangers US Asylum Seekers in Mexico Must Face*, GUARDIAN (Mar. 23, 2020), https://www.theguardian.com/us-news/2020/mar/23/us-mexico-immigration-coronavirus-asylum [https://perma.cc/V8DX-DBL9] (describing threat of COVID spreading in migrant camps where asylum seekers were forced to wait in Mexico for U.S. asylum hearings).

disasters.[4] When states fail to meet migrants' needs or thwart humanitarian processes, critiques logically focus on the government's failure to meet its refugee, domestic law, and moral obligations.[5] But this focus, though an essential part of countering the government's illegal actions, insufficiently addresses the United States' role in creating and inflicting harm.

The harm of U.S. border policy is never far from the surface. For example, during the Trump Administration, policies such as the obversely-named Migrant Protection Protocols ("MPP") and many others purported to function as measured—and even humanitarian—responses to a "crisis" of refugees at the southern border.[6] Similarly, both the Trump and Biden Administrations invoked Title 42 health emergency powers during the pandemic to close off asylum processing for migrants.[7] Both administrations framed this policy as a critical public health measure.[8] In reality, however, these policies did little to achieve

[4] *See, e.g.*, *id.*

[5] *See*, *e.g.*, Innovations L. Lab v. Wolf, 951 F.3d 1073, 1081–82 (9th Cir. 2020) (addressing lower court's preliminary injunction ruling based upon the plaintiffs' "claim that the MPP does not comply with our treaty-based non-refoulement obligations codified at 8 U.S.C. § 1231(b)"), *vacated*, 141 S. Ct. 2842 (2021).

[6] Other policies included metering, the asylum transit ban, the Humanitarian Asylum Review Process, the Prompt Asylum Claim Review, and asylum cooperation agreements with Guatemala, Honduras, and El Salvador. *See infra* Section I.C.

[7] In the first four full months of the Biden administration, sixty-four percent of all people encountered by the Border Patrol at the border were expelled under Title 42. *See* AM. IMMIGR. COUNCIL, RISING BORDER ENCOUNTERS IN 2021: AN OVERVIEW AND ANALYSIS 6 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/rising_border_encounters_in_2021.pdf [https://perma.cc/EXY3-MRRT]; HUM. RTS. FIRST, FAILURE TO PROTECT: BIDEN ADMINISTRATION CONTINUES ILLEGAL TRUMP POLICY TO BLOCK AND EXPEL ASYLUM SEEKERS TO DANGER (2021), https://www.humanrightsfirst.org/sites/default/files/FailuretoProtect.4.20.21.pdf [https://perma.cc/PK4R-SF92].

[8] On March 20, 2020, the Department of Health and Human Services ("HHS") issued an emergency regulation which permits the Director of the Centers for Disease Control ("CDC") to "prohibit[ ] the introduction" of individuals when the Director believes that there is "serious danger of the introduction of [a communicable] disease into the United States." Dep't of Health & Hum. Servs., Notice of Order Under Section 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060, 17061 (Mar. 26, 2020). Citing the new CDC authority, the Border Patrol began expelling individuals who arrived at the U.S.-Mexico border, without giving them the opportunity to seek asylum. This practice, known as "Title 42 Expulsions," continued under the Biden Administration. AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER 2 (2022), https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border [https://perma.cc/S5FC-6VVR] (stating that more than 1.2 million such expulsions have been carried out since the pandemic began, "even though ports of

their purported policy aims. They instead sought to prevent migration and exposed migrants, including asylum seekers, to severe, and even deadly, harm.[9]

The harm imposed upon migrants in the name of immigration enforcement is not unique to a single era.[10] Harsh, dangerous, and deadly immigration policies aimed at deterring migration[11] have long been a staple of U.S. border policy and remain the frequent response to increases in asylum seekers at the southern border.[12]

Take, for example, the shocking images during the first year of the Biden Administration of uniformed Border Patrol officers on horseback chasing down Haitians seeking refuge at the border in Texas.[13] The spectacle of white men on horseback corralling desperate black migrants while threatening them with leather reins that looked like whips harkened to the nation's disturbing history of slave patrols. The brutality of this imagery—though condemned by the Administration—encapsulated more than a

entry remain open with nearly 11 million people crossing the southern border every month and thousands flying into the United States every day"). On April 10, 2023, President Biden signed into law a bill ending the Covid-based national emergency. Public Law No. 118-3 (Apr. 10, 2023). The Covid-based public health emergency will expire on May 11, 2023, and the President has stated that the Administration's use of Title 42 to expel migrants will end at that time. Off. of Mgmt. & Budget, Statement of Administration Policy (Jan. 30, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf [https://perma.cc/GB57-Q5JX].

[9] For example, the Trump Administration indefinitely suspended all MPP hearings during the pandemic, leaving more than 20,000 people stranded in extreme danger in Mexico or forced to abandon their cases and return home. *See infra* Sections I.B–C.

[10] Lori A. Nessel, *Enforced Invisibility: Toward New Theories of Accountability for the United States' Role in Endangering Asylum Seekers*, 55 U.C. DAVIS L. REV. 1513, 1581 (2022); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). For a discussion of how U.S. border enforcement has fueled the expansion of immigrant detention throughout the United States, see EUNICE HYUNHYE CHO ET AL., JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 5 (2020), https://www.aclu.org/sites/default/files/field_document/justice-free_zones_immigrant_detention_report_aclu_hrw_nijc_0.pdf [https://perma.cc/7LUD-S9PS] (finding that, under the Trump Administration, forty new immigrant detention facilities opened).

[11] *See infra* notes 46–53.

[12] *See* HUM. RTS. FIRST, UPDATE: GRAVE DANGERS CONTINUE FOR ASYLUM SEEKERS BLOCKED IN, EXPELLED TO MEXICO BY BIDEN ADMINISTRATION 1 (2021) [hereinafter GRAVE DANGERS], https://humanrightsfirst.org/wp-content/uploads/2022/10/FailuretoProtectUpdate.06. 21.pdf [https://perma.cc/ZZ2B-VM2L].

[13] Eileen Sullivan & Zolan Kanno-Youngs, *Images of Border Patrol's Treatment of Haitian Migrants Prompt Outrage*, N.Y. TIMES (Oct. 19, 2021), https://www.nytimes.com/2021/09/21/us/politics/haitians-border-patrol-photos.html?smid=url-share [https://perma.cc/HCB9-SPKV].

failure to protect. It revealed U.S.-imposed trauma in the course of a broader policy imposing obvious harm: the Administration's mass deportations of Haitians without access to asylum in the United States.[14]

Such episodes of spectacular, visible violence are only a fraction of the story of U.S.-inflicted border harm.[15] Republican and Democratic policies alike routinely harm and traumatize migrants in less visible but still profound ways[16] that are often not fully appreciated for years.

For example, the separation of parents and children pursuant to Trump's "Zero Tolerance" policy inflicted potentially life-altering consequences for children, given the reality that early childhood trauma can permanently impact developing brains.[17] Moreover, we know that many asylum seekers who fled their home countries in search of safety were forced to wait in Mexico or returned to Northern Triangle nations where they were kidnapped and even killed.[18] Thousands more suffered other serious harm, including physical abuse, rape, disease, and the lasting trauma of experiencing and witnessing this harm.[19]

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[14] *See* Catherine Porter, *Deported by U.S., Haitians Are in Shock: 'I Don't Know This Country'*, N.Y. TIMES (Oct. 17, 2021), https://www.nytimes.com/2021/09/20/world/americas/deported-haitians-shocked.html?smid=url-share (recounting the detention of Haitians in Del Rio, Texas followed by immediate deportation to Haiti even while their country suffered the aftermath of a hurricane and the greatest security crisis in a decade).

[15] *See* Stephen Lee, Essay, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2322 (2019) (noting that apart from "acts of 'spectacular' violence" much of immigration enforcement imposes severe and lasting harms which are less visible and immediately discernible).

[16] In fact, as one of us has written elsewhere, rendering these policies and their impact upon migrants invisible is part of such policy's strategic aims. *See* Nessel, *supra* note 10 at 1580–81.

[17] Jenny-Brooke Condon, *When Cruelty Is the Point: Family Separation as Unconstitutional Torture*, 56 HARV. C.R.-C.L. L. REV. 37, 50–53 (2021) (citing evidence-based research documenting the serious long-term "health consequences of early childhood emotional trauma, which can be imprinted on children's neuroregulatory systems for the rest of their lives").

[18] *See* GRAVE DANGERS, *supra* note 12, at 1 (noting that as of June 17, 2021, Human Rights First reported 3,250 kidnappings and other attacks, including rape, human trafficking, and violent armed assaults, against asylum seekers and migrants who were expelled at the southern border since President Biden assumed office in January 2021).

[19] *See id.*; *see also* PHYSICIANS FOR HUM. RTS., FORCED INTO DANGER: HUMAN RIGHTS VIOLATIONS RESULTING FROM THE U.S. MIGRANT PROTECTION PROTOCOLS 3 (2021), https://phr.org/wp-content/uploads/2021/01/PHR-Report-Forced-into-Danger_Human-Rights-Violations-and-MPP-January-2021.pdf [https://perma.cc/WDK5-4EWL] (documenting trauma experienced by asylum seekers subjected to MPP).

These risks persist as migrants continue to seek safety at the southern border[20] and America continues efforts to thwart this migration, harming countless people in the process.[21] The tragic fire at an overcrowded Mexican detention facility that killed 38 migrants on March 27, 2023, is a further illustration of U.S. policy's role in contributing to deadly harm for migrants seeking safety in the United States.[22]

Such actions are patently inconsistent with the United States' international and domestic refugee law obligations.[23] That law, however, does not adequately name or always respond to such harm. For example, the U.N. Protocol for the Protection of Refugees,[24] which the United States ratified and then implemented through the Refugee Act,[25] compels protection for persecution and atrocities committed by other State actors. This bedrock law protects people who face persecution at the hands of their own government and imposes obligations upon states bound by such instruments to protect refugees. But such instruments do not fully respond to the harm inflicted by countries who thwart those humanitarian obligations and instead contribute to and enable grievous harm on their own accord. This mismatch in

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[20] The number of migrants apprehended or turned back at the southern U.S. border in June of 2021 was reportedly the highest in at least a decade. *See* Geneva Sands, *US-Mexico Border Arrests in June Are the Highest in at Least a Decade*, CNN (July 14, 2021, 5:00 PM), https://www.cnn.com/2021/07/14/politics/us-mexico-border-arrests-june-decade/index.html [https://perma.cc/WEV3-MM94].

[21] *See* Porter, *supra* note 14. In September 2021, the Biden Administration returned thousands of Haitians without allowing them to seek asylum while the country was reeling from the aftermath of a devastating hurricane and worsened security threats after the assassination of its President. *Id.*

[22] *See* Solcyre Burga, *How Policies in the U.S. and Mexico Led to the Detention Center Fire That Killed 39 People*, TIME (Mar. 30, 2023), https://time.com/6267282/mexico-detention-center-fire-us-policy/ (describing how many people held at the prison where the fire took place were migrants seeking safety in the United States who were forced by Title 42 into Ciudad Juarez); Raquel Aldana, *Migrant Deaths in Mexico Put Spotlight on US Policy That Shifted Immigration Enforcement South*, CONVERSATION (Apr. 1, 2023), https://theconversation.com/migrant-deaths-in-mexico-put-spotlight-on-us-policy-that-shifted-immigration-enforcement-south-202896 (citing as a contributing factor in the tragedy U.S. border policies, which continue to "worsen the migrant processing bottleneck in Mexico, and add pressure on the country's already volatile detention facility system").

[23] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended at 8 U.S.C. § 1231(b)(3) (2018)).

[24] Refugee Protocol, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

[25] 8 U.S.C. § 1231(b)(3).

law demands a broader vision of U.S. legal responsibility to make visible and remedy this state-created harm.

Without much success, advocates have long advanced broader constitutional theories to account for the harm inflicted by U.S. border policies.[26] Recently, however, a court recognized that such theories may have a role to play in reckoning with the harm inflicted at the border—a development constitutional law scholars described as "groundbreaking."[27]

Specifically, following the termination of the Trump Administration's so-called "Zero Tolerance" family separation policy and the reunification of families, the United States District Court for the Central District of California in *J.P. v. Sessions*,[28] ordered federal immigration agencies to provide families with evidence-based and trauma-informed mental health services to remediate the government's violation of their substantive due process rights. The judge did so even though the vast majority of the roughly 4,000 class member parents whom the administration separated from their children were already released from custody and had been reunified with their children because of a nationwide injunction.[29] In ordering further remedies, the court relied upon the state-created danger theory of substantive due process protection.[30]

That doctrine is often understood solely as an exception to the longstanding principle that the Constitution does not impose affirmative duties on the government to assist people or protect

[26] See *infra* Section IV.A, for a discussion of the unsuccessful cases asserting state-created danger theories of constitutional protection for non-citizens seeking relief from removal. For a thoughtful discussion of the challenges faced by those seeking to enforce constitutional protections at the border, see also Philip Mayor, Note, *Borderline Constitutionalism: Reconstructing and Deconstructing Judicial Justifications for Constitutional Distortion in the Border Region*, 46 HARV. C.R.-C.L. L. REV. 647, 649 (2011).

[27] Legal scholar Erwin Chemerinsky used this language to describe a decision recognizing the state created danger theory of substantive due process as a basis for directing remedies for family separation. 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 [https://perma.cc/8L4W-3XF7]. Professor Carl Tobias concurred it was "pathbreaking." *Id.*

[28] J.P. v. Sessions, No. LA CV18-06081, 2019 WL 6723686, at *40–41 (C.D. Cal. Nov. 5, 2019).

[29] Ms. L. v. U.S. Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1149–50 (S.D. Cal. 2018).

[30] *J.P.*, 2019 WL 6723686, at *36.

them from third-party harm.[31] The state-created danger doctrine recognizes that the Fourteenth and Fifth Amendments' protection of individual liberty includes the right to be free from conscious-shocking government actions that place individuals at risk of a known or likely harm.[32] The injunction ordering mental health services to separated families and the original nationwide injunction ordering family reunification[33] reflect rare instances of courts enforcing constitutional restraints on executive immigration enforcement.[34] Courts have also been unwilling to hold federal officials accountable for the harm that occurs to people subject to removal or transfer, even in cases alleging that officials knew, should have known, or even intended, that serious

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[31] *See, e.g.*, Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 2–4 (2007) (describing the doctrine as one of two exceptions to DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 198–200 (1989)); Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1166–67 (2005) (describing the state-created danger doctrine as the second of two exceptions to the rule that the Constitution imposes no affirmative duty upon the government to protect members of the public); Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 740 (2006) (same).

[32] *See* Laura Oren, *Some Thoughts on the State-Created Danger Doctrine: DeShaney Is Still Wrong and Castle Rock Is More of the Same*, 16 TEMP. POL. & C.R. L. REV. 47, 48, 54 (2006) (noting that *DeShaney* implied that "its ruling might be different if the State had done more than fail to act, but also had played some part in creating the dangers that the victim faced or in making him more vulnerable to them"). As explained in more detail in Part II, *infra*, courts use various tests to assess the likelihood of harm under the state-created danger doctrine. *See* McClendon v. City of Columbia, 305 F.3d 314, 325 n.7 (5th Cir. 2002) (surveying the federal courts' various tests for addressing state-created danger claims).

[33] *J.P.*, 2019 WL 6723686, at *35; *Ms. L*, 310 F. Supp. 3d at 1145–46 (S.D. Cal. June 26, 2018) (concluding that the plaintiffs showed a likelihood of success on their claim that the separation of migrant families, many of whom were asylum seekers, was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience," that it "interferes with 'rights implicit in the concept of ordered liberty' " and does "not comport with traditional ideas of fair play and decency." (quoting Rochin v. California, 342 U.S. 165, 169 (1952)).

[34] Courts have been reluctant to impose substantive due process limitations on government actors including with respect to federal immigration enforcement. *See, e.g.*, 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); Kerry v. Din, 576 U.S. 86, 101 (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); *see also* Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 59 (2014) (noting that courts' willingness to immunize "the substantive immigration judgments of Congress" from "fundamental conceptions of constitutional review epitomizes what immigration law professors have characterized as 'immigration exceptionalism' ").

harm, including torture, would inevitably result once they were transferred or released.[35]

The recognition of state-created danger theories in the family separation context thus raises the possibility of unlocking substantive due process protection in response to other forms of immigration enforcement that cause grievous and lasting harm.[36] Where U.S.-created harm is a dominant feature of U.S. border policy, the implications are significant.

Still, commentators have long lamented the state-created danger doctrine as narrow and impossible to meet.[37] Nevertheless, over the last several decades, many state and federal courts have affirmed the doctrine, recognizing that the State has a duty not to expose people to conscious-shocking harm, even harm committed by third parties, if it is made possible or likely because of state action.[38] The courts have recognized the theory as a possible constitutional restraint even if they have been reluctant to recognize circumstances qualifying as constitutional violations.[39]

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[35] *See* discussion *infra* Section IV.B, in particular *Munaf v. Geren*, 553 U.S. 674 (2008), and *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008), *vacated*, 585 F.3d 559 (2d Cir. 2009).

[36] The United States Court of Appeals for the Third Circuit has previously stated that "the state-created danger exception has no place in our immigration jurisprudence" in a case in which a non-citizen invoked the doctrine in removal proceedings. Kamara v. Att'y Gen., 420 F.3d 202, 217 (3d Cir. 2005).

[37] Chemerinsky, *supra* note 31, at 1 (describing state-created danger cases as "consistently depressing" both because they often arise out of terrible tragedies and "the government almost always prevails"); *see also* Oren, *supra* note 32, at 57 ("All in all, the fate of state-created danger cases has been disheartening."); Oren, *supra* note 31, at 1200 (noting that the doctrine is used only for "for truly egregious" government abuse and arguing against further "narrow applications of an already stingy doctrine").

[38] *See infra* Section III.B and note 90. Still, courts have refused to impose constitutional relief for egregious harm. *See* Castle Rock v. Gonzalez, 545 U.S. 748, 768–69 (2005) (refusing to recognize a due process right to enforcement of a restraining order that led to father's murder of there children); *see also* Monica Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 717 (2019) (noting that although "*DeShaney* and *Castle Rock* left space for state liability for failing to keep an individual safe if the state created the danger . . . thus far, cases based on claims of state-created danger have fallen short" of protecting low-income people and communities of color living in places of concentrated poverty); Oren, *supra* note 32, at 48 ("[A]fter an initial period in which all the circuits but one apparently embraced the doctrine, the situation looks far bleaker today. The more recent cases in the courts of appeals rarely survive dismissal, much less summary judgment, and sometimes even overturn significant jury verdicts." (footnote omitted)).

[39] *See* Chesney, *supra* note 31, at 739 (noting there is a "substantial body" of state-created danger caselaw addressing "situations in which individuals have

This Article draws upon this underutilized strand of substantive constitutional protection to help draw attention to and conceptualize new ways of challenging, the United States' state-created border harm. We argue that this body of law provides a strong theoretical foundation for holding government actors accountable for what one commentator described as a doctrine reserved "for truly egregious" government abuse,[40] a fitting match for excessive and punitive immigration enforcement that costs people their lives, safety, health, and security. At the very least, it is a starting place for broader normative conversations about the unlawful harm inflicted by the United States in the name of border control.

Part I chronicles the southern U.S. border as a place not only of failed refugee and humanitarian protection but as the site of state-created harm. Part II charts the development of the state-created danger doctrine and its decades of recognition by the courts. Part III analyzes the application of this doctrine to the immigration, extradition, and executive transfer contexts, and shows that any conceptual difficulties posed by substantive due process restraints on removal and transfer are not insurmountable and do not justify the failure to recognize deadly, harmful, and shocking immigration enforcement as unconstitutional state-created harm.

I. U.S.-CREATED-DANGERS AT THE BORDER

For decades, through Democratic and Republican administrations alike, the primary goal and strategy of immigration enforcement at the southern border has been deterring migration and reducing the number of migrants admitted to the United States. That single-minded focus has trumped all else, including meeting international law obligations to provide surrogate State protection to those fleeing danger. An array of activities aimed at keeping asylum seekers outside of U.S. territory reveals that the priority is "border protection," not "refugee protection."[41]

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argued that the government is responsible, albeit indirectly, for harms inflicted by private actors").

[40] Oren, *supra* note 31, at 1200.

[41] Ascher Lazarus Hirsch & Nathan Bell, *The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime*, 18 HUM. RTS. REV. 417, 422 (2017) (quoting JENNIFER HYNDMAN & ALISON MOUNTZ,

To that end, decision-makers have long exploited fear. To defend its border protection strategies, the State invokes language and images connoting "waves" of refugees on the high seas,[42] migrant caravans descending upon the border,[43] or the prospect of private property being "overrun."[44] Narratives that play upon racialized fear are then coupled with aggressive language about securing the border and keeping the United States safe from harm.[45] Inevitably, the policies complementing such narratives do little to prioritize refugee or humanitarian protections, and instead impose direct and foreseeable harm, including upon asylum seekers, in the name of border protection at all costs.

Though these dynamics have long defined U.S. border policy, for many, the Trump Administration's treatment of refugees at the border cast into focus the reality of such state-created harm. But as explained below, the problem did not begin or end with the Trump Administration. The following sections provide a synopsis of U.S. border policy's pervasive state-created harm.

ANOTHER BRICK IN THE WALL? NEO-*REFOULMENT* AND THE EXTERNALIZATION OF ASYLUM BY AUSTRALIA AND EUROPE 253 (2008)).

[42] Ron Elving, *This Isn't the First Time Americans Have Shown Fear of Refugees*, NPR (Nov. 21, 2015), https://www.npr.org/2015/11/21/456857350/this-isnt-the-first-time-americans-have-shown-fear-of-refugees [https://perma.cc/N6D4-BLBC] (documenting U.S. fears of refugees coming to the U.S. from Syria and Iraq and noting this was "not, of course, the first time Americans have confronted a sudden influx of refugees. And it is not the first time the impulse has been to raise the drawbridge").

[43] Paul Waldman, *The Right Unleashes a New Wave of Fear-Mongering over Refugees*, WASH. POST (Aug. 17, 2021), https://www.washingtonpost.com/opinions/2021/08/17/right-unleashes-new-wave-fear-mongering-over-refugees/ (summarizing rhetoric of commentators fearing a so-called *invasion* of Afghan Refugees).

[44] John Burnett, *Controlling the Border Is a Challenge. Texas Gov. Abbott's Crackdown Is Proving That*, NPR (Aug. 6, 2021, 6:18 PM), https://www.npr.org/2021/08/06/1025253908/controlling-the-border-is-a-challenge-texas-gov-abbotts-crackdown-is-proving-that [https://perma.cc/V4QE-D7XB] (noting that Texas responded to complaints from border residents and ranchers who claimed they were being "overrun" by migrants by declaring a disaster emergency, authorizing police interdictions and detention, and building a border wall).

[45] *See, e.g.*, Jason Beaubien, *Migrant Caravan: Thousands Move into Guatemala, Hoping to Reach U.S.*, NPR (Jan. 18, 2021, 3:50 PM), https://www.npr.org/2021/01/18/958092745/migrant-caravan-thousands-move-into-guatemala-hoping-to-reach-u-s [https://perma.cc/QL9U-G56Z] (reporting that Guatemalan security forces attempted to block thousands of Honduran migrants from heading north towards Mexico and the U.S. border in the wake of President Biden's election, which spurred migrants' hope for a more humane approach to migration).

A. Insulating the Border from Asylum Seekers

One of the most harmful border policies employed by the United States in the name of border security is the long-utilized practice of intercepting migrants to prevent them from seeking asylum protection. For example, beginning in 1981, pursuant to an agreement with the brutal Duvalier dictatorship in Haiti, the United States directed the Coast Guard to interdict, on the high seas, Haitian boats fleeing with asylum seekers.[46] The United States detained the passengers and forced most of the Haitians back to the conditions they were fleeing.[47] Those intercepted before they could reach land were often returned "to violence and death in Haiti."[48] This system continued throughout the 1980s and 1990s, including during the Clinton presidency.[49] In 1993, in *Sale v. Haitian Centers Council*,[50] the Supreme Court of the United States authorized the U.S. interdiction of Haitian asylum seekers at sea and their forced repatriation without any opportunity to seek protection.

Such efforts were not unique to the seas. In fact, for more than three decades, U.S. border policy has sought to thwart asylum seekers from crossing the southern border. The U.S. has cooperated with Mexico and Central American nations since at least the 1980s to prevent asylum seekers from reaching the United States.[51] For example, in 1989, the then-Immigration and Naturalization Service ("INS") acknowledged its "cooperation with the Government of Mexico to stem the flow of Central Americans through that country, including the establishment of checkpoints along the transit corridors and the deportation of

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[46] Haiti. Migrants–Interdiction Agreement, Haiti-U.S., Sept. 23, 1981, 33 U.S.T. 3559, 3559–60.

[47] *Id.* at 3560.

[48] Fabiola Cineas, *Why America Keeps Turning Its Back on Haitian Migrants*, VOX (Sept. 24, 2021), https://www.vox.com/22689472/haitian-migrants-asylum-history-violence [https://perma.cc/W537-T74K] (quoting Professor Carl Lindskoog, author of Detain and Punish: Haitian Refugees and the Rise of the World's Largest Immigration Detention System).

[49] *Id.*

[50] Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 159 (1993) (upholding an Executive Order mandating that the U.S. Coast Guard turn back at sea Haitian asylum seekers on grounds that neither Article 33 of the Refugee Convention or section 243(h) of the Immigration and Nationality Act applied to asylum seekers intercepted on the high seas); Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 640–41 (2009).

[51] Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. ON MIGRATION & HUM. SEC. 190, 200–01 (2016).

intercepted Central Americans."[52] The United States pressured Mexico to control Central American migration across its border with Guatemala.[53]

Decades later, this foundation provided a ready model for exploitation by the Trump Administration. The so-called Migrant Protection Protocols ("MPP"), more accurately described as the Remain in Mexico program,[54] pushed more than 60,000 asylum seekers back into Mexico to await asylum hearings,[55] notwithstanding the grave dangers they faced there.[56]

As part of the MPP program, the United States detained asylum seekers at the border, processed them, scheduled their removal hearings, returned them to Mexico, and required them to come back to the port of entry to attend their court hearings.[57] The parts of Mexico where asylum seekers were forced to remain are some of the most dangerous in the world. Not surprisingly, people fleeing for safety faced extreme and deadly harm when redirected to Mexico.

Human Rights First reported that "[a]s of February 19, 2021, there [were] at least 1,544 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers and migrants forced to return to Mexico."[58] The

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[52] *Id.*

[53] *Id.* at 201.

[54] *See* Policy Guidance for Implementation of the Migrant Protection Protocols, Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Servs., Kevin K. McAleenan, Comm'r, U.S. Customs & Border Prot., Ronald D. Vitiello, Deputy Dir. & Sr. Off. Performing the Duties of the Dir., U.S. IMMIGR. & CUSTOMS ENF'T (Jan. 25, 2019) [hereinafter MPP Policy Guidance], https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/C5AC-6BE4] (describing the MPP as an arrangement between the United States and Mexico "to address the migration crisis along our southern border").

[55] *See* Innovation L. Lab v. Wolf, 951 F.3d 1073, 1088–89 (9th Cir. 2020).

[56] *Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants to Danger*, HUM. RTS. FIRST [hereinafter *Delivered to Danger*], https://www.humanrightsfirst.org/campaign/remain-mexico [https://perma.cc/S7GB-H6K8] (last visited Sept. 22, 2021).

[57] Complaint for Declaratory and Injunctive Relief ¶ 23, Tercios v. Wolf, No. 20-cv-00093 (S.D. Tex. June 4, 2020); Memorandum from Ronald D. Vitiello, Deputy Dir. & Sr. Off. Performing the Duties of the Dir., to Exec. Assoc. Dirs. & Principal Legal Advisor (Feb. 12, 2019) [hereinafter Memorandum from Ronald D. Vitiello], https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf [https://perma.cc/Q5S6-3HQR].

[58] *Delivered to Danger*, *supra* note 56.

harm extended to "341 cases of children returned to Mexico who were kidnapped or nearly kidnapped."[59]

While initially the United States instituted the MPP in only one or two ports of entry, the government quickly expanded it across the southern border to include the most dangerous parts of Mexico, effectively sealing off the entire southern border to asylum seekers. For example, the MPP applied in the dangerous Tamaulipas region, which the U.S. State Department ranked as a level four danger, which denote places with the greatest security risks,[60] such as Syria and Afghanistan.[61]

Indeed, the MPP applied in all six of Mexico's northern border states, where due to high levels of violent crime and gang activity, the U.S. State Department issued grim travel warnings.[62] For example, the United States warned anyone traveling to "high-risk" areas such as Tamaulipas to "make a will, designate a family member to negotiate with kidnappers, and establish secret questions and answers to verify that the traveler is still alive when kidnappers reach out to family."[63] In spite of these recognized dangers, the Trump Administration suspended asylum hearings for MPP cases during the Covid-19 pandemic, indefinitely abandoning asylum seekers to face these conditions unprotected and without status in Mexico.[64]

Moreover, even when asylum hearings took place on the U.S. side of the border, deliberate and senseless choices by the U.S. government exacerbated these dangers, placing asylum seekers

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[59] *Id.*

[60] Tijuana and Ciudad Juárez—where CBP has returned the majority of migrants as part of the MPP—had the highest homicide rates in Mexico for 2018. *Las 50 Ciudades Más Violentas del Mundo 2018*, SEGURIDAD, JUSTICIA Y PAZ (Mar. 12, 2019), http://seguridadjusticiaypaz.org.mx/files/estudio.pdf [https://perma.cc/Q5A3-RV4B].

[61] *Id.*; Steve Taylor, *State Department Travel Warning Ranks Tamaulipas as Dangerous as Afghanistan, Syria*, RIO GRANDE GUARDIAN (Jan. 18, 2018), https://riograndeguardian.com/travel-warning-ranking-tamaulipas-as-dangerous-as-afghanistan-syria-deemed-unhelpful/ [https://perma.cc/NU28-M5GJ].

[62] *See Mexico International Travel Information: Travel Advisory*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Mexico.html [https://perma.cc/66US-CHW4] (Jan. 5, 2023).

[63] *See High-Risk Area Travelers*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/international-travel/before-you-go/travelers-with-special-considerations/high-risk-travelers.html [https://perma.cc/64M3-7UL2] (Sept. 7, 2022); *see also* David Villani, *Public Citizen Defends Asylum Seekers in Mexico*, PUB. CITIZEN (Oct. 5, 2021), https://www.citizen.org/news/public-citizen-defends-asylum-seekers-in-mexico/ [https://perma.cc/BQ4P-EHQF].

[64] *See supra* note 8 and accompanying text.

at heightened risk of harm.[65] For example, asylum seekers waiting in Mexico were given early morning court appearances in Laredo, Texas. To make these hearings, asylum seekers in Mexico had to line up in the middle of the night in Nuevo Laredo, on the other side of the U.S.-Mexico border, to access the bridge to the U.S. border.[66] The few shelters for asylum seekers that operate in Mexico do not open their doors at night, given the danger from ubiquitous gangs.[67] To make their hearings, many asylum seekers had no choice but to bear the risks of sleeping unprotected on the street the night before their court appearances to timely cross the border.[68] Moreover, the United States physically returned asylum-seekers to Mexico to the same spot at the same time each day, resulting in frequent kidnappings and attacks.[69]

To place the dangers and harm wrought by the MPP program and its implementation in context, it is important to recognize that the policy, in spite of its phony humanitarian nomenclature, was an unambiguous and transparent joint venture to suppress migration to the United States.[70] Mexico agreed to take "unprecedented steps to increase enforcement to curb irregular migration, to include the deployment of its National Guard throughout Mexico, giving priority to its southern border."[71] Both nations agreed to share information and coordinate their actions toward this end.[72]

Although there should be little doubt that the United States, through these efforts, placed asylum seekers in Mexico at risk of obvious danger and harm, its role and responsibility has not been sufficiently visible in part because of the myth of "migrant protection" projected by the policy's name. The United States took the stance of humanitarianism with respect to the border, though the reality was much different. Just one example: notwithstanding the United States' purported commitment to

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[65] *See generally Publicly Reported Cases of Violent Attacks on Individuals Returned to Mexico Under the "Migrant Protection Protocols"*, HUM. RTS. FIRST (June 2020), https://humanrightsfirst.org/wp-content/uploads/2022/01/PubliclyReportedMPPAttacks2.19.2021.pdf [https://perma.cc/98FT-F8ZC].

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See generally* Nielsen, *supra* note 54.

[71] Joint Declaration and Supplementary Agreement on Migration, Mex.-U.S., June 7, 2019, T.I.A.S. No. 19-607.

[72] *Id.*

provide "tens of millions of dollars" to provide food and shelter for the impacted asylum seekers,[73] evidence suggests the United States never provided this funding, thereby increasing the risk of material danger and suffering for those forced back into Mexico by the United States.

B. Harm Wrought in the Name of Public Health

Anti-immigrant lawmakers have long seized upon the canard that immigration threatens public health in order to both exclude and dehumanize immigrants. For example, from medical exams at Ellis Island[74] to the alleged need to de-louse Mexican day laborers at the southern border during, and after, the typhoid fever epidemic,[75] public health concerns have long served as a proxy for immigrant exclusion and control. The Trump Administration continued to misuse public health concerns to suppress migration by relying on an obscure 1893 public health

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[73] According to the Washington Post, "[t]o shelter, feed and care for an increasing number of Central Americans who could wait months in Mexico for an asylum decision, the United States [was] willing to provide 'tens of millions' of State Department dollars that have gone unspent as a result of plunging refugee admissions, officials said." *See* Nick Miroff, Kevin Sieff & John Wagner, *How Mexico Talked Trump Out of Tariff Threat with Immigration Crackdown Pact*, WASH. POST (June 10, 2019), https://www.washingtonpost.com/immigration/trump-mexico-immigration-deal-has-additional-measures-not-yet-made-public/2019/06/10/967e4e56-8b8e-11e9-b08e-cfd89bd36d4e_story.html [https://perma.cc/EZ79-TQ9W].

[74] *See* Lori A. Nessel, *Instilling Fear and Regulating Behavior: Immigration Law as Social Control*, 31 GEO. IMMIGR. L.J. 525, 535 (2017) (noting that, "[e]ven as far back as the late 1800s, the immigrant medical exam at Ellis Island and other ports of entry was intended to control and shape behavior and create a docile workforce, rather than exclude immigrants"); *see also* AMY FAIRCHILD, SCIENCE AT THE BORDERS: IMMIGRANT MEDICAL INSPECTION AND THE SHAPING OF THE MODERN INDUSTRIAL LABOR FORCE 7 (2003). As Fairchild explained:

> These immigrants represented the nation's industrial workforce, and it was imperative that they work efficiently, obediently, unflaggingly. The assembly line of flesh and bone developed to defend the nation from diseased immigrants served as the inaugural event in the life of the new working class—one that would impress upon each immigrant the national hierarchy and his or her low place in it. Only when groups of immigrants failed to conform to societal expectations about the fit industrial worker did the immigrant medical exam serve to exclude those groups at the nation's borders.

Id.

[75] For decades, U.S. health authorities subjected Mexican migrants at the southern border to a humiliating "delous[ing]" procedure that included shaving their heads and spraying them with toxic chemicals. Although this degrading treatment was initially carried out in the name of protecting public health during the typhoid epidemic, the practice continued for decades after the typhoid epidemic had abated. *See* Nessel, *supra* note 10, 1540–41.

law known as Title 42 to expel asylum seekers at the border without providing an opportunity for them to seek protection.[76]

On March 20, 2020, the Department of Health and Human Services ("HHS") issued an emergency regulation to implement § 265 of U.S. Code Title 42.[77] Pursuant to this order, the Director of the Center for Disease Control ("CDC") was authorized to " 'prohibit . . . the introduction' into the United States of individuals when [he] believes that 'there is serious danger of the introduction of [a communicable] disease into the United States.' "[78] This order was enforceable by U.S. Customs and Border Protection and Border Patrol Agents.[79]

The same day, the Director of the CDC issued an order "suspending the 'introduction' into the United States of certain individuals who [had] been in 'Coronavirus Impacted Areas.' "[80] The order was aimed at individuals who entered the United States from Canada or Mexico and " 'who would be introduced into a congregate setting' at a port of entry or in a Border Patrol station."[81] Asylum seekers, unaccompanied children, and people attempting to enter the United States without inspection were all included within the reach of Title 42.[82] "Citing the new CDC order, that same day the Border Patrol began 'expelling' individuals who arrived at the U.S.-Mexico border [denying] them the opportunity to seek asylum."[83]

While the United States has long-used public health concerns as a pretext for immigrant exclusion, the invocation of this obscure health law to expel asylum seekers at the borders was unprecedented. Notwithstanding President Biden's criticism of the earlier administration's inhumane border policies,[84] he

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[76] Order Suspending Introduction of Persons From a Country Where a Communicable Disease Exists, 85 Fed. Reg. 16567, 16567 (Mar. 20, 2020).

[77] *Id.*

[78] *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL 1, 2 (May 2022) (second alteration in original), https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border_0.pdf [https://perma.cc/9HAH-PNNF].

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* The CDC ultimately terminated its use of Title 42 to expel unaccompanied children on March 12, 2022. For an overview of the litigation that led to this change, see *id.*

[83] *Id.*

[84] *See* Anita Kumar & Alice Miranda Ollstein, *Biden Pledged to Undo Trump's Immigration Policies. It Will Take Time*, POLITICO (Dec. 7, 2020),

continued to expel asylum seekers based upon Title 42 well into his presidency. By the time President Biden ordered an end to the policy, it had been in place for over two years.[85] And even when Title 42 expulsions were finally set to end on May 23, 2022, a federal judge in Louisiana appointed by President Trump issued a nationwide injunction enjoining repeal of the policy.[86] The Department of Justice ("DOJ") appealed the decision to the U.S. Court of Appeals for the Fifth Circuit, and the case, at the time of writing, remains pending.[87] But DOJ did not seek a stay of the injunction in either the district or circuit court.[88] Thus, until President Bident haulted the administration's use of Title 42 to expel migrants following the expiration of the Covid-based public health emergency on May 11, 2023,[89] Title 42 served as a basis to exclude vulnerable migrants and asylum seekers at the border for more than three years.

The harm wrought in the name of public health during the past three years has been staggering. The Border Patrol engaged in more than 1.87 million expulsions. Indeed, over sixty percent of encounters at the U.S.-Mexico border resulted in expulsion.[90] And those expulsions have led to more than 10,318 reports of murder, kidnapping, rape, torture, and other violent attacks since January 2021.[91]

In addition to the violent harm and death that were the foreseeable result of blocking access to protection, Title 42 has also led to an increase in family separations. Because

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https://www.politico.com/news/2020/12/07/biden-trump-immigration-policies-443468 [https://perma.cc/5UXP-GG2F].

[85] Public Health Determination and Order Regarding Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 87 Fed. Reg. 19941, 19941 (Apr. 6, 2022) (terminating the Order under 42 U.S.C. §§ 265, 268) (effective May 23, 2022).

[86] Louisiana v. CDC*,* No. 6:22-CV-00885, 2022 WL 1604901, at *1, *23 (W.D. La. May 20, 2022).

[87] My Khanh Ngo & Shaw Drake, *Title 42 Is a Failure Yet Still Dominates U.S. Border Policy*, JUST SEC. (June 24, 2022), https://www.justsecurity.org/82080/title-42-is-a-failure-yet-still-dominates-u-s-border-policy/ [https://perma.cc/Q4RQ-LU8Z].

[88] *Id.*

[89] *See supra* note 8.

[90] CONG. RSCH. SERV., U.S. BORDER PATROL APPREHENSIONS AND TITLE 42 EXPULSIONS AT THE SOUTHWEST BORDER: FACT SHEET (2022), https://crsreports.congress.gov/product/pdf/R/R47343.

[91] JULIA NEUSNER & KENNJI KIZUKA, THE NIGHTMARE CONTINUES: TITLE 42 COURT ORDER PROLONGS HUMAN RIGHTS ABUSES, EXTENDS DISORDER AT U.S. BORDERS 4 (2022), https://humanrightsfirst.org/wp-content/uploads/2022/09/NightmareContinues.pdf [https://perma.cc/2HLZ-H4YM].

unaccompanied children are no longer subject to Title 42 expulsions, parents face a Hobbesian dilemma: send their children across the border alone, even though this means family separation for already traumatized and vulnerable asylum seekers, or remain together and deprive their children of a chance at safety.[92] Title 42 has also forced vulnerable asylum seekers to pursue more perilous routes in an attempt to secure safety.[93]

From the beginning, it was clear that the federal government invoked Title 42 as an immigration enforcement tool rather than as a means to safeguard public health. In fact, the Department of Homeland Security, not the Center for Disease Control, devised the plan to use Title 42 to expel asylum seekers at the borders.[94] However, the complete disconnect between Title 42 and public health became increasingly apparent as advancements were made in screening and vaccinating against Covid-19. Indeed, even while covid-related entrance requirements were lifted for visitors to the United States, vulnerable asylum-seekers continued to be expelled at the border under the guise of public health.[95] Moreover, the fact that particular groups of asylum seekers, like Ukrainians, were excluded from Title 42,[96] while Black and brown asylum seekers continued to face expulsion, gave lie to the claim that Title 42 policy was a public health measure.

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[92] *Two Years of Separation and Violence: Why Title 42 Must End Immediately*, YOUNG CNTR. FOR IMMIGRANT CHILD.'S RTS. (Mar. 20, 2022), https://www.theyoungcenter.org/stories/2022/3/20/two-years-of-family-separation-and-violence-why-title-42-must-end-immediately [https://perma.cc/744X-4426].

[93] *See* NEUSNER & KIZUKA, *supra* note 91, at 2 ("With access to asylum blocked at ports of entry, some asylym seekers are pushed to take highly dangerous journeys to cross the border away from official border posts to attempt to seek safety, adding to the number of border encounters and the mounting death toll of people who have perished in the crossing.").

[94] *Id.*

[95] *CDC Rescinds Order Requiring Negative Pre-Departure COVID-19 Test Prior to Flight to the US*, CDC (June 10, 2022), https://www.cdc.gov/media/releases/2022/s0610-COVID-19-test.html#:~:text=Today%2C%20CDC%20is%20announcing%20that,2022%20at%2012%3A01AM%20ET [https://perma.cc/6M7B-SK8C].

[96] *The White House, Fact Sheet: The Biden Administration Announces New Humanitarian, Development, and Democracy Assistance to Ukraine and the Surrounding Region*, WHITE HOUSE (Mar. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/24/fact-sheet-the-biden-administration-announces-new-humanitarian-development-and-democracy-assistance-to-ukraine-and-the-surrounding-region/ [https://perma.cc/ZN6N-G4XD].

C. An Ecosystem of State-Created Harm

While the MPP stands out as perhaps the most far-reaching, recent example of U.S. border policy that thwarted U.S. refugee law obligations and exposed asylum seekers to danger, in reality, it is just one of many tools used by recent administrations to keep asylum seekers out of the United States all while inflicting grave harm. Other recent policies, including the Asylum Transit Ban,[97] the Humanitarian Asylum Review Program, the Prompt Asylum Case Review Program,[98] metering, and asylum cooperation agreements, all similarly worked to remove or delay the possibility of asylum protection for the vast majority of asylum seekers at the southern border.[99] In a variety of ways, interference with the normal processes and obligations for meeting the United States' refugee obligations inflicted lasting and even deadly harm.

For example, CBP officers could opt to apply the Asylum Transit Ban at the outset, which barred asylum to anyone who traveled through another country without first seeking and being denied protection, as an alternative to the MPP, ending the possibility of asylum protection.[100] While people subjected to the transit ban could still be provided with the less robust protections of withholding of removal or protection under the Convention Against Torture ("CAT"),[101] denying access to asylum protection

[97] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) (codified at 8 C.F.R. pts. 208, 1003, 1208). Unlike the MPP, which required a determination at the first encounter whether to subject an asylum seeker to return to Mexico, the Asylum Transit Ban could be applied at any point (even at the conclusion of proceedings). *Id.* This meant that even if an asylum seeker were allowed into the U.S. to seek protection, the Immigration Judge could still find that the ban on asylum applied at the end of the court proceedings. *Id.*

[98] *See* AM. IMMIGR. COUNCIL, POLICIES AFFECTING ASYLUM-SEEKERS AT THE BORDER: THE MIGRANT PROT. PROTOCOLS, PROMPT ASYLUM CLAIM REV., HUMANITARIAN ASYLUM REV. PROCESS, METERING, ASYLUM TRANSIT BAN, AND HOW THEY INTERACT 7 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf [https://perma.cc/G5CU-G648].

[99] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) (codified in 8 C.F.R. pts. 208, 1003, 1208).

[100] *Id.*

[101] 8 C.F.R. § 1208.31(e) (2021) ("If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I-863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of § 1208.16."). The Asylum Transit Ban was enjoined by the Ninth Circuit. *See* E. Bay Sanctuary Covenant v. Barr, 964 F.3d 832, 857–58 (9th Cir. 2020). Although DHS issued another rule aimed at blocking access to asylum at the

means severing the opportunities for family reunification, permanent safety and political membership that only attach to asylum.[102]

Moreover, under other programs, asylum seekers were held at CBP short-term detention facilities during the expedited removal process,[103] which dramatically curtailed their access to attorneys, evidence, family members, and meaningful judicial review.[104] Gutting meaningful access to asylum in this way imposed real and significant harm because people who needed protection were unable to demonstrate their entitlement to it, with the United States ultimately returning them to danger.[105]

Similarly, through a process known as "metering," border patrol agents turned back asylum-seekers at the southern border by asserting that U.S. ports of entry were full.[106] While the United States has subjected asylum seekers to waitlists at a few

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southern border for anyone who transited through another country without seeking and being denied asylum, a District Court enjoined it on February 16, 2021. *See* E. Bay Sanctuary Covenant v. Barr, Order Granting Preliminary Injunction 519 F. Supp. 3d 663, 668 (N.D. Cal. 2021).

[102] 8 U.S.C. § 1158(b)(3)(A) (allowing for derivative asylum status for spouse and unmarried children under 21 years of age); 8 C.F.R. § 209.2 (setting forth the procedure for an asylee to adjust status to lawful permanent residence after one year). *See generally* Lori A. Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897 (2005) (critiquing the U.S. decision to deny family reunification rights to those granted relief under Article 3 of the Convention against Torture).

[103] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-144, SOUTHWEST BORDER: DHS AND DOJ HAVE IMPLEMENTED EXPEDITED CREDIBLE FEAR SCREENING PILOT PROGRAMS, BUT SHOULD ENSURE TIMELY DATA ENTRY (2021); Muzaffar Chishti & Jessica Bolter, *Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All from Asylum*, MIGRATION POL'Y (Feb. 27, 2020) [hereinafter *Border Bars Virtually All*], https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum [https://perma.cc/3N53-LJKU]; Am. Immigr. Council, *Asylum Is in Danger After Court Upholds Rushed Screening Process at the Border*, IMMIGR. IMPACT (Dec. 14, 2020), https://immigrationimpact.com/2020/12/14/asylum-pacr-harp-court-decision/?emci=d575078a-6041-eb11-a607-00155d43c992&emdi=236f12ac-cb42-eb11-a607-00155d43c992&ceid=4507403#.X-DPu9hKhPZ [https://perma.cc/W2LF-2P56].

[104] AM. IMMIGR. COUNCIL, *supra* note 98, at 5, 8.

[105] Out of more than 4,700 asylum seekers placed into these programs just thirty-one of them were able to retain a lawyer. Am. Immigr. Council, *supra* note 98. And only nineteen to twenty percent of asylum seekers passed their initial asylum interviews, compared to a pass rate of seventy-four percent previously. *Id.*

[106] Weekend Edition Saturday, *Metering at the Border*, NPR, at 1:04 (June 29, 2019, 8:03 AM ET), https://www.npr.org/2019/06/29/737268856/metering-at-the-border [https://perma.cc/W8PX-9C2U] ("Asylum-seekers that show up there, they tell them they have to turn around and go put their name on a waitlist, basically, back in Mexico and wait for their turn to request asylum.").

ports of entry since 2015, the Trump Administration expanded this to apply to the entire southern border.[107] Moreover, the government failed to keep track of these people or accurately record the order of their requests for asylum.[108]

Asylum cooperation agreements also functioned to prevent asylum seekers from obtaining safety in the United States, inevitably imposing severe and deadly harm. These agreements tasked the primary regional asylum-producing nations to receive asylum-seekers from neighboring countries.[109] Congress has long authorized the federal government to enter into agreements to return asylum seekers to "[s]afe third countr[ies]."[110] However, in order for a country to qualify as such, it must be one that does not return asylum seekers to countries in which their "life or freedom would . . . be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion."[111] It must also be a country that offers "access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection."[112] The three Northern Triangle countries that entered into such Asylum Cooperation Agreements are some of the most dangerous places in the world, and none has a functioning and fair asylum adjudication system.[113]

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[107] STEPHANIE LEUTERT, ELLIE EZZELL, SAVITRI ARVEY, GABRIELLA SANCHEZ, CAITLYN YATES & PAUL KUHNE, ASYLUM PROCESSING AND WAITLISTS AT THE U.S.-MEXICO BORDER 18 (2018), https://usmex.ucsd.edu/_files/asylum-report_dec-2018.pdf [https://perma.cc/764M-UWDS].

[108] *See id.* at 18. A federal district court judge in the Southern District of California found that the metering practice violated the Administrative Procedures Act, 5 U.S.C. § 551 et seq. (1946), and the Due Process Clause of the Fifth Amendment because the INA requires the government to process asylum seekers at the border, without exception. *See* Al Otro Lado, Inc. v. Mayorkas, No. 17-cv-02366, 2021 WL 3931890, at *20 (S.D. Cal. Sept. 2, 2021).

[109] For example, on July 26, 2019, the United States and Guatemala entered into an Asylum Cooperative Agreement ("ACA"), allowing the U.S. to transfer non-Guatemalan asylum seekers from the southern U.S. border to Guatemala. Agreement on Cooperating Regarding the Examination of Protection Claims, Guat.-U.S., July 26, 2019, T.I.A.S. No. 191115 (entered into force Nov. 15, 2019); *DHS Announces Guatemala, El Salvador, and Honduras Have Signed Asylum Cooperation Agreement*, U.S. DEP'T OF HOMELAND SEC. (Dec. 29, 2020), https://www.dhs.gov/news/2020/12/29/dhs-announces-guatemala-el-salvador-and-honduras-have-signed-asylum-cooperation [https://perma.cc/HYD5-HB99].

[110] Immigration and Nationality Act 208, 8 U.S.C. § 1158(a)(2)(A) (2018).

[111] *Id.*

[112] *Id.*

[113] Maureen Meyer & Elyssa Pachico, *Fact Sheet: U.S. Immigration and Central American Asylum Seekers*, WOLA (Feb. 1, 2018), https://www.wola.org/analysis/fact-

While imposing Title 42 during the pandemic largely rendered metering policies obsolete and the Biden Administration later announced a suspension of the Asylum Cooperation Agreements,[114] these programs must be confronted as part of the ecosystem of state-created harm. While currently not utilized in the name of border security, these programs and ones similar to them remain dormant models ready to be invoked again by future anti-immigrant leaders or in response to untold emergencies the country may face ahead.

D. Cruelty as Deterrent

The Trump Administration's "zero-tolerance" family separation policy in 2017 and 2018 serves as a paradigmatic example of U.S. border policy as state-created harm.[115] This policy sought to deter migration and reduce the number of migrants admitted to the United States by deliberately and consciously imposing grievous harm.[116]

From its inception, Trump Administration officials sought to crack down on unauthorized migration through harsh enforcement tactics even as applied to people fleeing violence and in need of asylum.[117] Begun as a pilot program at the El Paso

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sheet-united-states-immigration-central-american-asylum-seekers/ [https://perma.cc/2UK9-F9MJ].

[114] Press Release, U.S. Department of State, Anthony J. Blinken, Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras (Feb. 6, 2021), https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/ [https://perma.cc/858L-9AQB].

[115] 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 [https://perma.cc/KVD2-N7Q7].

[116] *Id.*

[117] The policy started to take shape on April 11, 2017, when then-U.S. Attorney General Jeff Sessions issued a memorandum directing federal prosecutors to prioritize the prosecution of immigration violations, including illegal entry. 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 [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).

sector of CBP,[118] the Trump Administration made plans early in its tenure to separate families on an even more widespread basis.[119] 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."[120]

On April 6, 2018, President Trump instructed federal agencies to stop releasing persons held for immigration violations pending their hearings.[121] 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).[122] That memo mandated that U.S. Attorneys along the southern U.S. border prosecute non-citizens for the misdemeanor offense of unauthorized border crossing.[123]

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[118] *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, 5 (Nov. 25, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf [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 [https://perma.cc/4MCH-DEC3] (describing El Paso pilot project).

[119] Priscilla Alvarez, *What the 2017 Draft Memo Reveals About the Administration's Family Separation Policy*, CNN (Jan. 18, 2019), https://www.cnn.com/2019/01/18/politics/draft-memo-significance/index.html [https://perma.cc/3Z3K-QS5W].

[120] *Id.*

[121] 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, [https://perma.cc/DD34-HPBY].

[122] *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) [hereinafter *Memorandum for Prosecutors Along Border*], https://www.justice.gov/opa/press-release/file/1049751/download [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. *Id.*; 8 U.S.C. § 1325(a).

[123] Office of Public Affairs, *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 [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 4 (2018), https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf [https://perma.cc/F8RL-785R] (noting that 48% of defense attorneys practicing along the southern border who responded to a survey in 2017

Sessions acknowledged that the policy sought to deter unauthorized migration *by families.*[124] 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."[125] However, no law required the separation of families, and U.S. asylum law protects family unity.[126]

Numerous other members of the Trump Administration also candidly acknowledged that the government aimed to deter migration through the pain caused by these enforcement policies.[127] Although then-Secretary of Homeland Security Kirstjen Nielsen famously denied that the government adopted a policy to separate families,[128] she had previously acknowledged in a statement to Congress that the government sought to deter families from migrating.[129] 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.[130] Later, in a May 2018

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reported that a majority of their clients were asylum-seekers and 66.7% reported that more than a quarter of their clients included asylum-seekers).

[124] *Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, DEP'T OF JUST. (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions [https://perma.cc/V8DW-TQSG].

[125] *Id.*

[126] *See* Nessel, *supra* note 102, at 904 ("[I]n enacting the asylum remedy, Congress went beyond the literal mandate of the international instrument and provided greater rights, including the right to family reunification.").

[127] Bump, *supra* note 115.

[128] *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 [https://perma.cc/CU67-RQM7] ("[T]his administration did not create a policy of separating families at the border.").

[129] *Senate Hearing with DHS Secretary Nielsen*, CNN (Jan. 16, 2018), http://transcripts.cnn.com/TRANSCRIPTS/1801/16/cnr.04.html [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. 6, 2020), https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html [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.*

[130] Madeline Conway, *Kelly Confirms He's Considering Program to Separate Migrant Children and Parents*, POLITICO (Mar. 6, 2017, 5:46 PM),

radio interview, Kelly acknowledged that deterrence was the "name of the game."[131] Even after he ended the program with an executive order in June 2018, President Trump conceded that the policy aimed to deter migration.[132] 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 pour into our country."[133]

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,[134] prohibits signatories

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https://www.politico.com/story/2017/03/kelly-migrant-chidren-travel-ban-235738 [https://perma.cc/GN3G-TS9K].

[131] *Transcript: White House Chief of Staff John Kelly's Interview with NPR*, NPR (May 11, 2018, 11:36 AM), https://www.npr.org/2018/05/11/610116389/transcript-white-house-chiefof-staff-john-kellys-interview-with-npr [https://perma.cc/JJ9F-76CA] (stating family separation "would be a tough deterrent" and children would be "put into foster care or whatever"). Other officials within DHS also publicly confirmed that the Administration saw the "zero tolerance" separations as a means to discourage families from migrating. *See* Bump, *supra* note 115 (quoting Assistant Secretary of HHS Steven Wagner's statement that "[w]e expect that the new policy will result in a deterrence effect").

[132] 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. 13841, 83 Fed. Reg. 29435 (June 20, 2018).

[133] 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, 3:11 PM), 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 [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, 5:01 PM), 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 [https://perma.cc/DTB6-MJNB]. 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*, HILL (Dec. 16, 2018, 1:06 PM), https://thehill.com/homenews/administration/421600-trump-seethes-at-fbi-snl-in-morning-burst-of-tweets [https://perma.cc/B4ZM-CCBR].

[134] The United States ratified the 1967 Protocol Relating to the Status of Refugees, which incorporated the 1951 Convention. Protocol Relating to the Status of Refugees art. 31, 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 SEC. (July 18, 2019) [hereinafter *Deeper Dive*], https://www.justsecurity.org/64963/criminal-prosecutions-and-illegal-entry-a-deeper-

from punishing refugees for illegal entry or criminalizing their presence without lawful immigration status.[135] None of the administration's statements explaining its motive of deterrence acknowledged the right of asylum-seekers to seek safety in the United States without being penalized for their manner of entry.

Moreover, "[t]he government pursued its deterrence strategy with an awareness of the devastating harm that separation would impose."[136] A robust public record confirms that multiple experts—including an Advisory Committee to DHS, the American Academy of Pediatrics, 200 experts on childhood development, health, and trauma, and Commander Jonathan White of the U.S. Public Health Service—all warned the Administration of the severe trauma and potentially irreversible harm that family separation would impose.[137]

Not only did the Trump Administration ignore these calls to reverse course to avoid harming children, but it also implemented the policy in a manner that exacerbated its anticipated and harmful effects. Officers ripped screaming children from their parents' arms[138] and laughed at distraught

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dive [https://perma.cc/XBU7-TQUT]. 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 19, at 15.

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

[136] Condon, *supra* note 17, at 47 (recounting the pleas of numerous experts who warned before the broader Zero Tolerance policy went into effect that separation would cause significant and lasting harm, particularly to children).

[137] U.S. IMMIGR. & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS, 136 (2016), https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf [https://perma.cc/5A7B-B3EC]; 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 [https://perma.cc/LZ59-8K7Y]; *see* Letter from MaryLee Allen, Dir. of Pol'y, Child. Def. Fund, 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/2018_01_23_child_welfare_juvenile_justice_opposition_to_parent_child_sep.pdf [https://perma.cc/K4PU-LDLE] (warning that family separation would impose "significant and long-lasting consequences for the safety, health, development, and well-being of children"); Jeremy Stahl, *The Trump Administration Was Warned Separation Would Be Horrific for Children, Did It Anyway*, SLATE (July 31, 2018, 5:05 PM), https://slate.com/news-and-politics/2018/07/the-trump-administration-was-warned-separation-would-be-horrific-for-children.html [https://perma.cc/7BKM-H2TF] (recounting Commander White's testimony to Congress).

[138] *See, e.g.*, J.P. v. Sessions, No. LA CV18-06081, 2019 WL 6723686, at *2–3 (C.D. Cal. Nov. 5, 2019); C.M. v. United States, No. CV-19-05217, 2020 WL 1698191, at *1 (D. Ariz. Mar. 30, 2020) (describing parents' harrowing accounts of separation

parents.[139] DHS failed to provide children and parents with accurate and timely information about the location of their loved ones and how to contact them,[140] causing parents and children to fear that they would never see each other again.[141] Immediately after the trauma of their separations, many children were held in makeshift prisons and "cages."[142] 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."[143]

The government also imposed significant and unnecessary harm by failing to take basic steps to facilitate future reunions of children with their parents. Indeed, the government failed for months to employ any data systems or protocols to accurately track separated children and their parents.[144] CBP agents routinely designated separated children as "unaccompanied" without indicating that they had parents from whom they were

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and seeking relief under the Federal Tort Claims Act); Complaint ¶¶ 71–80, 128–30, C.M. v. United States, No. 2:19-cv-05217 (D. Ariz. Sept. 19, 2019); Complaint ¶¶ 62–63, 81, A.I.I.L. v. Sessions, No. 4:19-cv-00481 (D. Ariz. Oct. 3, 2019).

[139] Complaint ¶ 29, C.M. v. United States, No. 2:19-cv-05217 (D. Ariz. Sept. 19, 2019); Complaint ¶ 18, A.I.I.L v. Sessions, No. 4:19-cv-00481 (D. Ariz. Oct. 3, 2019).

[140] 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' " (quoting United States v. Dominguez-Portillo, 2018 WL 315759, at *14 (W.D. Tex. Jan. 5, 2018))).

[141] *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").

[142] JACOB SOBOROFF, SEPARATED 247 (2020) (recounting his tour of detention facilities and his on-air reporting that described separated children's detention in "cages" and "kennels").

[143] Ginger Thompson, *Listen to Children Who've Just Been Separated from Their Parents at the Border*, PROPUBLICA (June 18, 2018, 3:51 PM), https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy [https://perma.cc/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").

[144] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER 13 (2018). 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.

taken.[145] For months, the same was true for the Office of Refugee Resettlement ("ORR"), the agency charged with the care of children separated from their parents.[146]

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 their separation. This led a U.S. District judge for the Southern District of California to state that the government treated separated children with less regard than incarcerated people's property.[147]

There is abundant evidence that these border policies imposed severe pain and trauma on children and adults, inflicting profound feelings of overwhelming loss, abandonment, agonizing helplessness, fear, and lasting psychological harm.[148] This included physical illness, post-traumatic stress disorder, depression, and severe anxiety.[149] At least one family member subjected to family separation committed suicide.[150]

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[145] *Id.* at 17–18. 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 18.

[146] *Id.* at 19. Office of Refugee Resettlement ("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.* This was after thousands of families had already been separated. *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 4 (Sept. 2019) [hereinafter HHS OIG MENTAL HEALTH REPORT], https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf [https://perma.cc/YM75-M77Z].

[147] 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* U.S. H. OF REPS. COMM. ON OVERSIGHT & REFORM, CHILD SEPARATION BY THE TRUMP ADMINISTRATION 9 (2019) [hereinafter HOUSE OVERSIGHT STAFF REPORT], https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf [https://perma.cc/RH2B-89G9]; *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).

[148] *See*, *e.g.*, J.P. v. Sessions, No. LA CV18-06081, 2019 WL 6723686, at *10 (C.D. Cal. Nov. 5, 2019); *see also* HHS OIG MENTAL HEALTH REPORT, *supra* note 146, at 9.

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

[150] *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, 7:00 AM), https://www.washingtonpost.com/world/national-security/a-family-was-separated-at-

For children, the "intense trauma" they experienced impacted their physical well-being[151] as evidenced by documented "sleep and appetite loss, headaches and nosebleeds, crying spells, and incontinence."[152] In one instance, a seven or eight-year-old boy required emergency psychiatric care, believing that his father was killed and fearing that he would be too.[153]

Acute emotional distress typically triggers release of the stress hormone cortisol,[154] and the separated families' prolonged exposure to it increases their risk of post-traumatic stress disorder.[155] 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 during the developmental years and its connection to "a range of individual and public health problems," including medical and mental illness.[156] These problems include depression, substance abuse, suicidal behavior, "conduct disorder, attention-deficit

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the-border-and-this-distraught-father-took-his-own-life/2018/06/08/24e40b70-6b5d-11e8-9e38-24e693b38637_story.html.).

[151] HHS OIG MENTAL HEALTH REPORT, *supra* note 146, at 9.

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

[153] HHS OIG MENTAL HEALTH REPORT, *supra* note 146, at 11.

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

[155] *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 [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 [https://perma.cc/7BSH-EUY2].

[156] *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, 57–58 (Ruth A. Lanius et al. eds., 2010) ("Another significant development has been increasing documentation of the effects of adverse early life experiences on brain development, neuroendocrinology and immunology." (citations omitted)). 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).

hyperactivity disorder (ADHD), bipolar disorder, phobic anxiety, reactive attachment disorder and separation anxiety."[157] Researchers 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."[158] For children subjected to family separation, these lasting injuries are part of the state-created harm of U.S. border policies.

II. THE INADEQUACY OF "PROTECTION" OBLIGATIONS TO ACCOUNT FOR STATE-CREATED HARM

In evaluating the harm inflicted by the U.S. border policies outlined above, it is clear that the United States' actions are inconsistent with international and domestic refugee law obligations to treat asylum seekers humanely, allow them access to protection, and to refrain from penalizing them for their manner of entry.[159] The United States' actions have undermined both the Refugee Convention's goal of ensuring that there be surrogate state protection when a home country fails to protect its nationals from persecution on account of a protected ground[160] and congressional intent in enacting the Refugee Act to bring the United States into conformity with its protection obligations as a signatory to the U.N. Protocol on Refugees.[161]

While this understanding of U.S. failure is undoubtedly correct, it nevertheless misses a more fundamental point by failing to grapple with the United States' role in creating and inflicting harm. Although the legal regime protecting refugees is well established, recent experience shows how the United States

[157] Van der Kolk & d'Andrea, *supra* note 156, at 58.

[158] *Id.* at 63.

[159] For examples of scholarship making these important claims, see Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOY. L. REV. 121, 125 (2020); Ashley Binetti Armstrong, *Co-Opting Coronavirus, Assailing Asylum*, 35 GEO. IMMIGR. L.J. 361, 364 (2021); Thomas M. McDonnell & Vanessa H. Merton, *Enter at Your Own Risk: Criminalizing Asylum-Seekers*, 51 COLUM. HUM. RTS. L. REV. 1 (2019).

[160] Refugee Protocol, *supra* note 23 at 6276 (obligating signatory states not to return one to a country where their life or freedom would be threatened on account of race, religion, nationality, political opinion, or membership in a particular social group).

[161] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

has used border protection priorities to easily sublimate it.[162] Even where courts have restrained and held back aspects of the government's efforts, in the interim, asylum seekers have suffered, and their rights have been violated. Pushing asylum seekers back across the southern border endangered their lives and subjected them to grave human rights abuses while they waited for U.S. asylum hearings.[163] Separating parents and children imposed the potentially life-long consequences of trauma.[164] A broader theory of harm and accountability is necessary.

International human rights law is premised on the belief that the State serves as the guardian of rights.[165] Various international treaties and conventions set forth core human rights that the State is obligated to protect. Commonly referred to as the International Bill of Human Rights, the Universal Declaration of Human Rights ("UDHR"), together with the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights lay the foundation for the basic civil, political, economic, social, and cultural rights that all human beings should enjoy.[166]

"By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights."[167] Respecting human rights encompasses more than affirmative conduct, as States must also refrain from interfering with or curtailing the enjoyment of human rights. Protecting human rights requires States to take affirmative actions to safeguard individuals and groups against human rights abuses. Finally, these obligations

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[162] For a discussion of how immigration policymaking authority under the Trump Administration was weaponized to harm and terrorize non-citizens, see Stella Burch Elias, *Law as a Tool of Terror*, 107 IOWA L. REV. 1, 30 (2021).

[163] *Id.* at 6 ("Countless immigrants, whether seeking entry at the border, or already resident in the United States, experienced pervasive psychological and sometimes even physical harm as a direct consequence of the administration's proposed or existing law and policy initiatives."); Harris, *supra* note 159, at 127 (outlining concrete steps to "roll back the harm done by the Trump Administration" to the asylum system).

[164] *See supra* notes 147–58 and accompanying text.

[165] *International Human Rights Law,* UNITED NATIONS OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law [https://perma.cc/K6FZ-654A] (last visited May 25, 2023).

[166] *Id.*

[167] *Id.*

require that States take positive action to accelerate the enjoyment of basic human rights.[168] The obligation to fulfill and protect human rights, broadly conceived, thus clearly includes an obligation not to harm people fleeing their country and seeking protection. Nevertheless, because refugee law focuses on State obligation to protect refugees from the harm specifically inflicted by refugees' home countries, it does not easily illuminate—or provide a vocabulary necessary to assess—the harm imposed by the States obligated to provide surrogate protection.[169]

Refugee law derives from the 1951 United Nations Convention on the Status of Refugees, as amended by the 1968 United Nations Protocol Relating to the Status of Refugees.[170] Pursuant to this international human rights treaty and protocol, signatory States are prohibited from returning a person to a country where their life or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group.[171] While there is no right to be granted asylum, there is a right to seek asylum.[172] The U.S. has ratified the U.N. Protocol on the Protection of Refugees, and has codified its obligations in the Refugee Act.[173]

Notwithstanding that the United States is obligated by international and domestic law to offer access to asylum to those seeking safety, its approach to protection embodies a sense of charity rather than legal duty. Viewed through this lens, the obligation to protect refugees is susceptible to political and economic interests. Rather than a fixed duty, it is transformed into a pliable tool that can be utilized more generously when times are good and retracted during times of economic, national security, or health-based crisis.

But the U.S.'s border enforcement practices do more than undermine access to the type of humanitarian protection that the United States is obligated to provide under international and

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[168] *Id.*

[169] *Id.*

[170] Refugee Protocol, *supra* note 23, at 6276 (obligating signatory states not to return one to a country where their life or freedom would be threatened on account of race, religion, nationality, political opinion, or membership in a particular social group).

[171] *Id*.

[172] *See* G.A. Res 217 (III), Universal Declaration of Human Rights (Dec. 10, 1948) (guaranteeing "the right to seek and to enjoy" asylum in other countries).

[173] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 103 (codified as amended in scattered sections of 8 U.S.C.).

domestic law. Practices such as the MPP, Title 42 expulsions, and family separations also cause irreparable physical and psychological harm. As currently interpreted, Refugee Law and other legal mechanisms neither provide an adequate foundation for conceptualizing, nor provide appropriate remedies for, this U.S.-inflicted harm.

For example, the Supreme Court has held that a CBP officer's actions in shooting and killing a teenager from across the southern border failed to satisfy the requirements for liability in a Bivens constitutional law claim.[174] This ruling also foreclosed any damage award under tort law.[175] The Federal Torts Claims Act ("FTCA") has similarly been interpreted to shield U.S. agents from liability for harm inflicted outside of the United States.[176]

These egregious failures of accountability for wrongdoing and the suffering of non-citizens demonstrate just how unaccustomed our legal system is to identifying U.S.-created harm when it comes to the border. In recent years, scholars have offered a range of strategies to respond to the prospect of the border as a law-free zone.[177] This Article adds to those efforts by providing a lens for naming and grappling with U.S. border policy as U.S.-created harm.

III. THE LAW OF STATE-CREATED HARM

When a U.S. district court recently invoked the state-created danger doctrine in the context of family separation and ordered injunctive remedies, the move was hailed as novel and groundbreaking.[178] From one perspective, the court's ordering of broad constitutional remedies in response to an immigration enforcement policy was momentous given the paucity of constitutional restraints in the immigration context.[179] From another view, the ruling was not entirely exceptional given that

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[174] Hernandez v. Mesa, 140 S. Ct. 735, 745–46 (2020).

[175] *Id*. at 748–49.

[176] The FTCA contains a statutory exclusion for harm "arising in a foreign country." *See* 28 U.S.C. § 2680(k) (2018). While human rights attorneys have brought litigation seeking to hold the United States accountable for actions or omissions that are carried out in the U.S. and cause harm in a foreign country, these claims have been rejected by the Supreme Court. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004).

[177] *See, e.g.*, Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751, 759 (2020); Geoffrey Heeren, *Distancing Refugees*, 97 DENV. L. REV. 761, 761–62 (2020).

[178] *See* Jordan, *supra* note 27.

[179] *See* Johnson, *supra* note 34, at 59.

the state-created danger doctrine is not a novel theory of substantive due process protection.[180] State and federal courts alike have long recognized the doctrine as a potential response to arbitrary deprivations by the State of a similar or even lesser magnitude than many of the harms wrought by U.S. border policies.[181] Indeed, as the following sections demonstrate, judicial recognition of the state-created danger doctrine is rooted in elemental theories of constitutional restraints upon the government's arbitrary denial of liberty.[182]

A. *Action v. Inaction: An Elusive Line of Substantive Due Process Protection*

Courts have long held that the Due Process Clause of the Constitution provides no affirmative obligations upon the State to act because, as Judge Posner put it nearly forty years ago, "The Constitution is a charter of negative liberties."[183] The Constitution restrains the government from interfering with the exercise of rights and is often deemed "negative" in character; it does not impose affirmative obligations upon the State to do more.[184]

As scholars and courts have long noted, however, the neat distinction between positive and negative rights invites a blurry line between action and inaction.[185] Claimed omissions can often

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[180] David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 REV. LITIG. 357, 364 (2001) (analyzing state-created danger decisions predating *DeShaney*).

[181] *See infra* Part III; *see* Chesney, *supra* note 31, at 739 (acknowledging "substantial body" of state-created danger caselaw).

[182] Richard J. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 310 (1993) ("In its commonest form, substantive due process doctrine reflects the simple but far-reaching principle—also embodied in the Equal Protection Clause—that goverument [sic] cannot be arbitrary." (footnote omitted)).

[183] Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). Judge Posner explained that the Constitution mandates that the state "let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." *Id.*

[184] Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1315 (1984).

[185] For example, nearly eighty years ago, Justice Frankfurter observed that " '[n]egative' has really been an obfuscating adjective in that it implied a search for a distinction—non-action as against action—which does not involve the real considerations" that determine outcomes. Rochester Tel. Corp. v. United States, 307 U.S. 125, 141–42 (1939) (" 'Negative' and 'affirmative,' in the context of these problems, is as unilluminating and mischief-making a distinction as the out-moded line between 'nonfeasance' and 'misfeasance'.").

be recast in terms of action and misfeasance, rendering hotly divided opinions of the Supreme Court on such matters arguably exercises in oppositional framing.[186] This tension is evident in the Supreme Court's seminal decision recognizing the state-created danger doctrine discussed next. But as can be seen in the context of many border enforcement policies, the omission-action divide is more an illusion or defensive mechanism when the government is called to account for the damage inflicted by its actions.

1. *DeShaney* and the Meaning of State-Created Harm

DeShaney v. Winnebago County Department of Social Services[187] is often credited with creating an exception to the principle that the government is not responsible for failing to protect people from harm. *DeShaney* affirmed the principle that the Constitution imposes negative restraints on the government but does not impose affirmative obligations upon the government to act, such that the government is not constitutionally responsible for its omissions.[188] *DeShaney*, however, was equally based on a conceptually distinct—but often muddled—proposition: that the Constitution does not impose obligations upon the government to protect individuals from third-party harm.[189] Clarifying these two rationales is key to understanding whether the state-created danger exception is entirely an exception after all, or whether at least one thread of it is merely a statement of the Due Process Clause's substantive restraint upon arbitrary government action.[190]

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[186] Chemerinsky, *supra* note 31, at 25; Kreimer, *supra* note 184, at 1315 ("Distinguishing action from inaction is appealing, but misguided. The line between nonfeasance and misfeasance is theoretically problematic and difficult to maintain.").

[187] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

[188] *Id*. at 200.

[189] But as the district court in *J.P.* recognized, application of the doctrine to hold the government responsible for harm by third parties is not the exclusive—or arguably even most typical—use of the doctrine. J.P. v. Sessions, No. 18-cv-06081, 2019 WL 6723686, at *35 (C.D. Cal. Nov. 5, 2019) (noting that this is "not a required element"). Rather, the state-created danger doctrine applies when "a state official created or exposed an individual to danger *which he or she would not have otherwise faced*." *Id.* (citations omitted) (emphasizing that such affirmative conduct "must also be taken with 'deliberate indifference' to a 'known or obvious danger' ").

[190] Laura Oren, *DeShaney and "State-Created Danger": Does the Exception Make the "No-Duty" Rule?*, 35 ADMIN. & REG. L. NEWS 3, 3 (2010).

DeShaney found that a Wisconsin county child protective services agency bore no constitutional responsibility for the permanent brain damage suffered by four-year-old Joshua DeShaney, whose father severely beat him until he was in a coma.[191] Joshua's mother filed a civil rights action on her son's behalf, claiming that the local agency was aware of the threat from Joshua's father but violated his due process rights by failing to intervene in the face of known danger.[192]

In rejecting that claim, the Supreme Court emphasized that the Fourteenth Amendment restrains the State from depriving someone of life, liberty, or property without due process of law, but that Due Process is not implicated when the State fails to act.[193] Citing precedents declining to impose obligations on the government to engage in affirmative conduct, provide aid, or deliver benefits, the Court reaffirmed that the constitutional guarantee of substantive due process is a negative restraint.[194]

DeShaney showcased the malleability of the action/omission dichotomy. Indeed, what the majority considered to be a failure of the State to act, and thus beyond the reach of the Constitution, was just as easily viewed as affirmative misconduct.[195] For example, Justice Brennan, in dissent, cited the State's

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[191] *DeShaney*, 489 U.S. at 191.

[192] *Id.* at 193. The complaint alleged that the county's failure to protect Joshua "against a risk of violence at his father's hands of which they knew or should have known" deprived Joshua of liberty in violation of the Due Process Clause of the Fourteenth Amendment. *Id.*

[193] *Id.* at 203.

[194] John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 592 (2005) (noting that "*DeShaney* has been—and presumably *Castle Rock* now will be—treated as emblematic of a broader idea that the rights enjoyed under the Federal Constitution are negative, not affirmative"); Chemerinsky, *supra* note 31, at 2 (noting that Justice Rehnquist reasoned in his majority decision in *DeShaney* that "the Constitution typically provides negative liberties and does not impose affirmative duties on the government").

[195] *DeShaney*, 489 U.S. at 203 (Brennan, J., dissenting). After Joshua was admitted to a local hospital with injuries suggesting child abuse, child welfare services "obtained an order from a Wisconsin juvenile court placing Joshua in the temporary custody of the hospital." *Id.* at 192. But three days later, those officials determined "that there was insufficient evidence of child abuse to retain Joshua in the custody of the court" and returned him to his father's care pending the father's agreement to receive counseling and enroll Joshua in preschool. *Id.* Even though a month later Joshua was admitted to the hospital with suspicious injuries on two more occasions, and child protective services was again notified, the agency did nothing except to make regular visits to the DeShaney's home where a worker reported ongoing signs of abuse but still did nothing. *Id.*

affirmative misconduct in taking charge of the child and then releasing him into the custody of a known threat.[196]

In an apparent rejoinder to this view, the majority fused its reliance upon the action/omission dichotomy with another strand of reasoning: that the harm suffered by Joshua was at the hands of a private actor, his father, not the state, a deprivation which it noted the Constitution says nothing about.[197] The Court reasoned that the text and history of the Fourteenth Amendment's Due Process Clause does not require the State to shield "the life, liberty, and property of its citizens against invasion by private actors."[198] Noting that while the Clause limits "the State's power to act," it was not designed by the Framers as a "guarantee of certain minimal levels of safety and security."[199]

DeShaney's two strands of reasoning—first, that the Constitution does not restrain the government's omissions, and second, that the Constitution does not apply to private third-party actors—have been blurred following the decision.[200] Some critics focused squarely on the Court's treatment of the government's role as merely passive, challenging the Court's refusal to recognize a minor child's right to "care and treatment from the government" after he was taken into state custody through child protective services, even as the Court recognized the claims of others who are in no greater position of dependence.[201] Other critics questioned the historical basis for

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[196] *Id.* at 204 (criticizing the majority for beginning its analysis with the baseline proposition that there is an "absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights"). Justice Brennan said he would instead "focus first on the action that Wisconsin *has* taken with respect to Joshua and children like him, rather than on the actions that the State failed to take." *Id.* at 205; *see also* Chemerinsky, *supra* note 31, at 25.

[197] *DeShaney*, 489 U.S. at 203. The Court emphasized that the harm endured by Joshua "was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Id.*

[198] *Id.* at 195–96 (recounting Court's view of Fourteenth Amendment's historical purposes); *see also* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 509 (1992) (criticizing *DeShaney*'s historical reading of the Fourteenth Amendment).

[199] *DeShaney*, 489 U.S. at 195. ("It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.").

[200] *Id.* at 195–96.

[201] Fallon, *supra* note 182, at 319–20 (noting that the incongruity of *DeShaney* with the Supreme Court's recognition that persons committed to mental institutions

the second strand of reasoning given that the Fourteenth Amendment's framers understood how state action facilitated racialized terrorism during reconstruction in the South and meant to restrain the State from contributing to and facilitating privately-inflicted lynchings, torture, murder, and other atrocities.[202] Although section one of the Fourteenth Amendment is directed exclusively at the State, scholars have noted that many in Congress, in light of that history, were also concerned about restraining official action that facilitated private violence.[203]

What really concerned the majority in *DeShaney* was the confluence of its two strands of reasoning. That is, while it might be inclined to frame the state action as affirmative misconduct instead of a failure to act—as the dissent saw the case—it was unwilling to do so when the harm imposed came from an intervening private actor, a third-party not restrained by the Constitution.[204] The Court was primarily concerned about constitutionalizing negligent acts by the State that unwittingly lead to harm by others.[205]

Additionally, officials acting on behalf of child protective services who lack a malicious purpose and a desire to

have a fundamental interest under the Due Process Clause to care and treatment) (citing Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982)).

[202] *See, e.g.*, Alan R. Madry, *State Action and the Obligation of the States to Prevent Private Harms: The Rehnquist Transformation and the Betrayal of Fundamental Commitments*, 65 S. CAL. L. REV. 781 (1992); *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 509 (1991) (criticizing the Court's discussion of the history and "argu[ing that] the congressional debates on the Fourteenth Amendment show that establishing a federal constitutional right to protection was one of the central purposes of the Amendment," suggesting that the state must protect its citizens from private violence); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1355 (1964).

[203] HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 220–21 (1908) (citing CONG. GLOBE, 41st Cong., 2d Sess. 3611–13 (1870)) (noting that during the debates on ratification, Congressman Pool stated his view that section one of the Amendment reached acts of commission and omission in that a State could not deny the rights secured by the Amendment by failing "to prevent its own citizens from depriving any of their fellow citizens" of the rights secured by the Amendment).

[204] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202–03 (1989).

[205] The Court has repeatedly emphasized its unwillingness to treat the Constitution as a font for tort law. *See* Parratt v. Taylor, 451 U.S. 527, 544 (1981) (holding in a case by a prisoner seeking remedies for negligence by correctional officers after he was denied a purchased hobby kit that Section 1983 cannot be used to transform the Constitution into a "font of tort law").

intentionally harm, of course, stand apart from the public-private partnerships that wrought terror on Blacks in the South during Reconstruction.[206] Perhaps *DeShaney* would have come out differently if the "failure" or "omission" was more deliberate and concerted, even if the harm was still by a third party.

Though they work in tandem in *DeShaney* to explain the Court's thinking, the two strands of *DeShaney*'s reasoning have different implications, particularly as applied to U.S. border policies. If *DeShaney* stands for the principle that the State cannot be held responsible for its omissions, then there is no constitutional barrier under *DeShaney* to holding the government accountable for the foreseeable harm of its own actions, such as the harm wrought by family separation, which the government intentionally imposed to achieve its policy goal of deterrence. The so-called exception to *DeShaney* is not even implicated.

If, on the other hand, *DeShaney* stands for the proposition that the Constitution does not reach the negligent acts of State actors where other parties cause harm, there is still no barrier to holding the government accountable for the harm of family separation since the harm occurred at the hands of U.S. officials.

The doctrine impacts other U.S. border policies differently where a person's ultimate injury occurs at the hands of third parties oustide of the United States. But even in this instance, *DeShaney* offered the possibility of an outer reach of substantive restraint upon the government—the true exception in the decision.[207] The Court recognized that government actors might possess a duty to protect an individual from third-party danger where it plays a role in creating the danger or when through affirmative acts, it "render[s] him more vulnerable" to harm.[208] Lower courts and scholars both prior to *DeShaney* and after labeled this principle the "state-created danger" or "state endangerment" doctrine.[209] At the time of *DeShaney*, this concept was not a novel constitutional theory, but a component of due process long recognized by the courts.[210]

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[206] Frantz, *supra* note 202, at 1355.

[207] *DeShaney*, 489 U.S. at 203.

[208] *Id.* at 190.

[209] *See* Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001).

[210] *See* Kennedy v. City of Ridgefield, 439 F.3d 1055, 1083 n.1 (9th Cir. 2006) ("[T]he 'state-created danger' doctrine predates *DeShaney*" which is "more reasonably understood as an acknowledgment and preservation of the doctrine, rather than its source"); Pruessner, *supra* note 180, at 357 (tracing the modern doctrine to its roots in the statutory language and legislative history of the civil

Although framed as an "exception" to *DeShaney*'s rule that the Fourteenth Amendment does not impose an affirmative and generalized "right to government aid,"[211] in reality, the cases recognizing substantive due process protection in these circumstances were not constitutionalizing state actors' failures to protect. Rather, they addressed circumstances in which government actors used their authority to affirmatively cause foreseeable harm.[212]

For example, long before *DeShaney*, the Seventh Circuit recognized substantive due process restraints on the government releasing children into inclement weather where they suffered severe injuries from exposure.[213] Here, the emphasis was on the affirmative acts and use of state authority that placed the children in a location of obvious harm.[214] *DeShaney* expressed theoretical support for this theory of substantive due process protection but did not take seriously the claim that a state-created danger existed with respect to the Winnebago County Department of Social Services' actions, contending that Joshua would be in no worse position with respect to abuse from his father than had the state not intervened.[215]

The true "exception" in *DeShaney* is thus best understood as a rule allowing for constitutional restraints even when the ultimate harm occurs at the hands of a third-party private actor. *DeShaney*'s analysis of substantive due process and the Court's willingness to accept state-created dangers provides a theoretical basis for imposing constitutional restraints and remedies for

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rights legislation originally enacted as the Ku Klux Klan Act of 1871, now codified as 42 U.S.C. § 1983).

[211] Oren, *supra* note 32, at 62–63.

[212] *Id.* at 63; *see also* Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659, 696–700 (1990).

[213] White v. Rochford, 592 F.2d 381, 384 (7th Cir. 1979).

[214] *Id.*

[215] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989). The Court emphasized its "no worse position" reasoning in the context of rejecting a special relationship. *Id.* ("That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter."). But its analysis appeared to foreclose its recognition of a state-created danger on these facts as well. *Id.* ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.").

state-created danger at the border. But as explained next, the post-*DeShaney* landscape has not been favorable to such claims.

2. The Challenging Claim for Failure to Protect from Crime

Although there is no Supreme Court case expressly interpreting the state-created danger exception after *DeShaney*,[216] in the 2005 case *Town of Castle Rock v. Gonzalez*,[217] the Supreme Court recommitted to *DeShaney* in the context of a procedural due process claim. That case involved plaintiff Jessica Lenihan's claimed property interest in the enforcement of a restraining order that she secured against her estranged abusive husband.[218] Lenihan claimed that the local police department's refusal to enforce the order—notwithstanding the probable cause to know it had been violated—deprived her of her property interest without due process of law.[219]

The facts in *Castle* Rock, like *DeShaney*, show a tragic series of judgments and actions by state officials. Several weeks after Lenihan secured the restraining order, her estranged husband, from whom she was seeking a divorce, took their three daughters ages, ten, nine, and seven, without notice or permission in violation of the order.[220] When the children went missing, Lenihan called the police, noting that she suspected her husband had taken them in violation of the terms of the order. Officers reviewed the restraining order but told Lenihan to wait.[221] Throughout the night, she called the police station multiple times with increasing levels of urgency and desperation. During one call, she relayed that her husband had called and confirmed the children were with him at an amusement park. Lenihan eventually went to the police station, pleading with officers to intercede.[222] They failed to do so with devastating results: Gonzalez later shot and killed his three daughters and opened fire at the police station in the middle of the night with the

[216] Chemerinsky, *supra* note 31, at 15 ("Notably, there are no Supreme Court cases on the subject—as neither *DeShaney* nor *Castle Rock* articulates a test with regard to state-created dangers.").

[217] Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005).

[218] That order restricted her husband's contact with her children to specified periods and ordered him to "remain at least 100 yards from the family home at all times." *Id.* at 751.

[219] *Id.* at 750–51.

[220] *Id.* at 751–53.

[221] *Id.* at 753.

[222] *Id.* at 753–54.

bodies of his previously murdered children in the cab of his truck.[223]

The district court dismissed the complaint in *Castle Rock*, which was brought as both a substantive and procedural due process claim.[224] The U.S. Court of Appeals for the Tenth Circuit reversed as to procedural due process, which was the only claim before the Supreme Court.[225]

Justice Scalia, writing for the Court, rejected Lenihan's claim at the first step of the analysis, finding that she did not have a property interest protected by the Due Process Clause in police enforcement of the restraining order against her husband.[226] Central to the Court's conclusion was its recognition of the "deep-rooted nature of law-enforcement discretion," which it concluded was not erased by a Colorado statute making arrest mandatory for restraining order violations.[227] The Court thus did not reach whether the police department had a policy of not enforcing such orders that deprived Lenihan of a property interest without due process of law.[228]

Although *DeShaney* involved a claim under substantive due process, not procedural due process, it influenced the Court's resolution of the case just the same. The Court grouped the decisions together as standing for an overarching principle:[229] that "the framers of the Fourteenth Amendment . . . did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented."[230] The Court reasoned that both decisions indicate that "the benefit that a third party may receive from having

[223] *Id.* at 754.

[224] *Id.*

[225] *Id.* Leninhan brought suit under 42 U.S.C. § 1983 claiming "that she had a property interest in police enforcement of the restraining order against her husband; and that the town deprived her of this property without due process by having a policy that tolerated nonenforcement of restraining orders." *Id.* at 755.

[226] *Id.* at 768.

[227] *Id.* at 760–61.

[228] The Court thus did not address whether "the town's custom or policy prevented the police from giving her due process when they deprived her of that alleged interest." *Id.* at 768.

[229] *Id.* at 755. The Court noted that *DeShaney* found that the " 'substantive' component of the Due Process Clause" imposed no duty upon state officials "to protect the life, liberty, and property of its citizens against invasion by private actors" but did not resolve whether the petitioner had a procedural due process right in accordance with a state statute to receive protective services because that issue was not preserved. *Id.*

[230] *Id.* at 768–69.

someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."[231] The Court cited its "continuing reluctance to treat the Fourteenth Amendment as 'a font of tort law.' "[232]

Just as in *DeShaney*, the Court viewed the claim as a challenge to inadequate policing of private actors' behavior—here, the police department's failure to arrest Simon Gonzalez based upon his violation of a restraining order.[233] And as in *DeShaney*, the Court was unwilling to impose constitutional duties in this area. But *Castle Rock*, like *DeShaney*, did not foreclose constitutional accountability where state actors cause harm or render people vulnerable to harm ultimately inflicted by others. It just made clear that such claims will be especially hard to win.

B. Consensus and Divergence Among the Circuits

In spite of the Supreme Court's seemingly narrow view of due process protection in *DeShaney* and *Castle Rock*, all circuit courts of appeals have now recognized that the State may violate substantive due process when it affirmatively places a citizen in danger with harm to life or liberty, and that this includes danger posed by third parties.[234] The courts have not spoken uniformly, however, on what state of mind is required for such action to

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[231] *Id.* at 768.

[232] *Id.* (quoting Parratt v. Taylor, 451 U.S. 527, 544 (1981)). It emphasized the power of the states to provide remedies in the absent of due process rights. *Id.* at 768–69.

[233] But Justice Scalia's framing of the harm sought to be remedied as a want for "better policing" and a complaint about the failure to "arrest" could just as easily be recast as affirmative acts and decisions. Under this view, the police officers' decision "to deny enforcement" of the protective order was the unconstitutional affirmative act, which as the dissent pointed out, the Tenth Circuit reasonably concluded it had no discretion under Colorado's mandatory arrest law to do. *Id.* at 784 (Stevens, J., dissenting).

[234] *See, e.g.*, Lockhart-Bembery v. Sauro, 498 F.3d 69 (1st Cir. 2007); Pena v. DePrisco, 432 F.3d 98 (2d Cir. 2004); Kneipp v. Tedder, 95 F.3d 1199, 1210–11 (3d Cir. 1996); Pinder v. Johnson, 54 F.3d 1169, 1175–77 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 994 (1995); Scanlan v. Tex. A&M Univ., 343 F.3d 533, 538 (5th Cir. 2003); Kallstrom v. City of Columbus, 136 F.3d 1055, 1069–70 (6th Cir. 1998); Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990); Wood v. Ostrander, 879 F.2d 583, 589–90 (9th Cir. 1989); Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995); Waddell v. Hendry Cnty. Sheriff's Off., 329 F.3d 1300, 1305 (11th Cir. 2003); Butera v. District of Columbia, 235 F.3d 637, 647–48 (D.C. Cir. 2001).

amount to a violation of due process or where in the continuum between state action and inaction substantive due process is implicated.[235]

Moreover, the consensus that substantive due process protections exist does not mean that litigants can easily establish liability based upon state-created danger theories. In a 2006 survey of cases, one scholar found that in only two of twenty-one then-recent cases did state-created danger claims survive on appeal.[236] In addition, federal courts have shown a hesitancy to expand the scope of due process protection into areas typically addressed by state tort law or statutory protections. For example, several courts declined to recognize substantive due process protections in the context of environmental hazards, even when the government has created or contributed to conditions that impose grave consequences and injury.[237]

Given these limitations, the power of the state-created danger doctrine as a constitutional restraint upon arbitrary governmental harm should not be exaggerated. Nevertheless, the well-established body of state-created danger claims is instructive in understanding harm at the border. It shows that courts can and do recognize substantive due process protections

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[235] *See generally* Oren, *supra* note 31, at 1167 (noting that the courts before and after *DeShaney* have consistently noted that "the line between action and inaction, between inflicting and failing to prevent the infliction of harm" is not always clear) (quoting Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)).

[236] Oren, *supra* note 32, at 49 ("[C]laims foundered on various elements of the tests previously elucidated by the courts, most often because the requisite 'affirmative act' was missing.").

[237] As Monica Bell has noted, for example,

> [P]ublic housing residents in New York City, Philadelphia, and Upstate New York have argued that dangerous housing conditions such as lead paint and bed bugs ran rampant despite officials' knowledge that they endangered the lives and health of tenants; they claimed that these safety hazards were state-created dangers that the state had an affirmative duty to alleviate. In each case, the district court ruled for the defendant public housing authorities on motions to dismiss, on various grounds.

Bell, *supra* note 38, at 717 (citing Hurt v. Phila. Hous. Auth., 806 F. Supp. 515, 529 (E.D. Pa. 1992) (dismissing lead paint case on grounds that there is no state constitutional right to "decent, safe and sanitary housing")); Paige v. N.Y.C. Hous. Auth., No. 17cv7481, 2018 U.S. Dist. LEXIS 137238, at *7 (S.D.N.Y. Mar. 9, 2018) (dismissing lead paint case for lack of subject matter jurisdiction); Barber v. Rome Hous. Auth., No. 6:16-cv-1529, 2018 U.S. Dist. LEXIS 54211, at *11–13 (N.D.N.Y. Mar. 30, 2018) (dismissing substantive due process claim challenging housing authorities' responsibility for bed bugs because compliant failed to claim officials' deliberate indifference to danger).

when state actors take affirmative steps that render people more vulnerable to harm.

For example, courts have upheld claims where inebriated pedestrians, drivers, or their passengers were seriously injured after police officers intercepted them and left them stranded and alone on roadsides.[238] One circuit court recognized a state-created danger claim based on an allegation that public school officials acted recklessly and in conscious disregard of a special education student's risk of self-injury by suspending him without parental notification and leaving him home alone where he then committed suicide.[239] In a number of cases, courts have also found that police misconduct in handling domestic violence complaints rendered victims more vulnerable to harm by their abusers than had the police not intervened.[240]

While the jurisdictions vary on what amounts to a state-created danger, they all contain "the essential constitutional requirement of affirmative causation that is at the heart of the state-created danger doctrine."[241] Following the Supreme Court's holding in *County of Sacramento v. Lewis*,[242] substantive due process violations must reflect conscious-shocking government conduct, albeit what courts consider conscious-shocking may vary based on the exigencies at issue. An actor's state of mind is paramount because it establishes the line "between torts and

[238] *See Kneipp*, 95 F.3d at 1209 (finding state-created danger claim alleged where inebriated pedestrian fell down embankment and suffered hypothermia and permanent brain damage after the police stopped her and her husband while they were walking home from a bar and officers informed husband he could go home because officers would take care of his wife, but instead left her to walk home alone in the freezing cold); *Wood*, 879 F.2d at 588 (finding state-created danger claim alleged where officer stopped drunk driver on the side of the road, impounded the car, and left vehicle passenger by the side of road at night in high-crime area, resulting in passenger's accepting ride with stranger and being raped); *see also* Reed v. Gardner, 986 F.2d 1122, 1124–25 (7th Cir. 1993) (due-process violation when police left an intoxicated passenger in the car with the ignition keys).

[239] Armijo v. Wagon Mound Pub. Sch., 159 F.3d 1253, 1264 (10th Cir. 1998).

[240] *See, e.g.*, Freeman v. Ferguson, 911 F.2d 52, 54–55 (8th Cir. 1990) (concluding that police chief who had close personal relationship with the victim's estranged husband and interfered with other officers' attempts to stop him stated a state-created danger claim arising out of death of woman and her daughter at the hands of the husband); Caldwell v. City of Louisville, 120 F. App'x 566, 573 (6th Cir. 2004) (finding viable state-created danger claim based on allegation that officer was deliberately indifferent to the risks of injury to domestic violence victim by failing or refusing to process warrant for arrest of domestic violence victim's boyfriend in timely manner due to animus toward victim).

[241] Oren, *supra* note 31, at 1184 (emphasis omitted).

[242] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 836 (1998).

constitutional violations."[243] Indeed, it is beyond dispute that negligence is insufficient to establish a constitutionally cognizable state-created danger.[244]

For example, the First, Second, Ninth, Eleventh, and D.C. Circuits have all specifically required that actionable state-created dangers show conscience-shocking government action.[245] These courts have also suggested that in some circumstances, when a State actor has the opportunity to think and make rational, non-spontaneous decisions, "deliberately indifferent behavior may suffice to 'shock the conscience.' "[246] Courts have frequently cabined this lesser showing of deliberate indifference to circumstances of a custodial relationship or analogous special relationship.[247]

Several courts have delineated multi-factor tests for analyzing state-created dangers. While each requires some degree of reckless disregard of known dangers or harm, they articulate the state of mind requirement with subtle differences.

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[243] Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 GEO. WASH. L. REV. 417, 424 (1992).

[244] Chemerinsky, *supra* note 31, at 11 (citing Daniels v. Williams, 474 U.S. 327 (1986), and Davidson v. Cannon, 474 U.S. 344 (1986)).

[245] Rivera v. Rhode Island, 402 F.3d 27, 35 (1st Cir. 2005); *see also* Pena v. DePrisco, 432 F.3d 98, 114 (2d. Cir. 2005); Kennedy v. City of Ridgefield, 440 F.3d 1091, 1094 (9th Cir. 2006); Wadell v. Hendry Cnty. Sheriff's Off., 329 F.3d 1300, 1305 (11th Cir. 2003). *But see* Doe v. Braddy, 673 F.3d 1313, 1319 (11th Cir. 2012) (noting that *Waddell*'s standard does not apply in "non-custodial substantive due process cases even of the kind presented in *Waddell*"); Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001) .

[246] *Rivera,* 402 F.3d at 36; *see also Pena,* 432 F.3d at 114 (concluding that even if defendants do not act "with specific intent or desire to cause physical injury," allegations that they "created a serious danger by acting with deliberate indifference to it" is actionable whether deemed "deliberate indifference" or "recklessness"); *Kennedy*, 440 F.3d at 1093 (noting government conduct may be conscience-shocking when an "official acted with deliberate indifference to known or obvious dangers"); *Waddell*, 329 F.3d at 1306 ("In some cases, a state official's deliberate indifference will establish a substantive due process violation."); *Butera*, 235 F.3d at 652 ("Like prison officials who are charged with overseeing an inmate's welfare, State officials who create or enhance danger to citizens may also be in a position where 'actual deliberation is practical.' ").

[247] *See*, *e.g.*, *Doe*, 673 F.3d at 1319 (noting that deliberate indifference would only apply in certain noncustodial cases); Estate of Phillips v. District of Columbia, 455 F.3d 397, 405 & n.10 (D.C. Cir. 2006) ("Because deliberate indifference requires a 'lower threshold' showing than does an affirmative act, we insist that only if the 'special circumstances' of a special relationship exist can a 'State official's deliberate indifference . . . be truly shocking.' " (quoting Fraternal Order of Police v. Williams, 375 F.3d 1141, 1146 (D.C. Cir. 2004)).

The Third Circuit, for example, has required in some cases that:

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.[248]

But the Third Circuit has also suggested that this same state of mind would not apply to exigent circumstances where a State actor must act quickly without the luxury of deliberation.[249] In those circumstances, the court has held that a shock the conscious standard would apply and "only an 'intent to harm' standard of culpability would shock the conscience."[250]

The Eighth and Tenth Circuits engage in a similar inquiry, but both require that the State actors "acted recklessly in conscious disregard of" a "known or obvious" risk and that their conduct put the individual at risk of "immediate and proximate harm."[251] The Seventh and Ninth Circuits also require that the State's enhancement of danger "must be the proximate cause of the injury."[252]

Similar to prong three of the Third Circuit's test, the Sixth Circuit requires a plaintiff to show a " 'special danger' in the absence of a special relationship between the state and either the

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[248] *Kneipp*, 95 F.3d at 1208. In *Kneipp*, the harm was a third-party's commission of a crime. *See id.* at 1208–09.

[249] Rivas v. City of Passaic, 365 F.3d 181, 195 (3d Cir. 2004).

[250] *Id.*

[251] Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995). The Tenth Circuit requires a plaintiff to establish that

> (1) [the victim] was a member of a limited and specifically definable group; (2) Defendants' conduct put [the victim] and the other members of that group at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking.

Id. The Tenth Circuit later clarified that this test necessarily included the requirement from *De Shaney* that "the charged state entity and the charged individual defendant actors created the danger or increased . . . the danger in some way." Castaldo v Stone, 192 F. Supp. 2d 1124, 1153 (D. Colo. 2001) (discussing Tenth Circuit precedents). The Eighth Circuit adopted the *Uhlrig* test in *Avalos v. City of Glenwood*, 382 F.3d 792, 799 (8th Cir. 2004).

[252] Buchanan-Moore v. Cnty. of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009); Lawrence v. United States, 340 F.3d 952, 957 (9th Cir. 2003) (affirming lower court's determination that Plaintiff had failed to show under a state-created danger theory that "the Defendants' conduct was the proximate cause of her injuries").

victim or the private tortfeasor' " which renders "the victim specifically at risk, as distinguished from a risk that affects the public at large."[253] In addition, the plaintiff must demonstrate that "[t]he state must have known or clearly should have known that its actions specifically endangered an individual."[254]

Finally, while the Fourth Circuit has recognized that "[a]t some point on the spectrum between action and inaction, the state's conduct may implicate it in the harm caused," it has never delineated the state of mind required to find that substantive due process is implicated in such circumstances and has expressed considerable doubt regarding such claims given the amorphous line between action and inaction.[255]

Taking stock of the Circuits' various articulations of state-created dangers, it is clear that the touchstone of this form of substantive due process violation is whether a state official acts recklessly in exposing a person to a known or obvious danger.[256] The degrees of difference between "deliberate indifference," "willful disregard of known dangers," or "conscious disregard of" a known or obvious risk may be minimal, particularly given that the bottom line for all state-created danger claims is that the government's abuse of power must shock the conscience of the court.[257] Indeed, in spite of the variation, common to each

[253] Kallstrom, 136 F.3d at 1066.

[254] *Id.*

[255] Pinder v. Johnson, 54 F.3d 1169, 1175–77 ("It cannot be that the state 'commits an affirmative act' or 'creates a danger' every time it does anything that makes injury at the hands of a third party more likely. If so, the state would be liable for every crime committed by the prisoners it released."). The court further noted that state inaction can always be couched as affirmative acts as a means of avoiding *DeShaney's* proscription of state liability for a failure to act. *Id.*

[256] One scholar has criticized circuits' "foreseeable and direct risk of harm criteria" as an extra-constitutional requirement, which redundantly states a baseline of legal causation necessary for any constitutional liability, but which "does not explain how to identify the affirmative duty that is central to state-created danger doctrine." *See* Oren, *supra* note 31, at 1186–87. Another has noted that by "emphasizing the importance of foreseeability under the theory," the Third Circuit has "seemingly eliminated the need to characterize the state's conduct as an act as opposed to an omission"—a criticism that presumably would apply to other circuits that have enacted similar requirements. Christina M. Madden, *Signs of Danger—The Third Circuit Emphasizes Foreseeability as the Crucial Element in the "State-Created Danger" Theory:* Morse v. Lower Merion School District, 43 VILL. L. REV. 947, 967 (1998).

[257] *See* Kritchevsky, *supra* note 243, at 429, 470 n.279. Kritchevsky notes that in the substantive due process context, the U.S. Supreme Court, "[r]ecognizing that lines between negligence, recklessness, and intent are difficult to draw," has "not yet determined where on the spectrum between negligence and intent a deprivation occurs." *Id.* at 429. But its "focus on abuse of governmental power as the touchstone

circuit's analytical framework are three basic requirements: (1) affirmative government conduct that creates or enhances a danger to the particular individual; (2) state of mind above mere negligence, but at a minimum that which exhibits deliberate indifference to the danger and is conscious-shocking in light of the circumstances; and (3) causation.

This framework developed from cases involving policing and social welfare.[258] The state-created dangers doctrine has not traditionally addressed the application of these substantive due process limitations in the context of border enforcement. While that circumstance undoubtedly poses additional complexity, including the intersection of immigration law and extraterritorial threats and conditions outside of the United States, there are strong normative bases for extending constitutional protections to harmful and reckless border enforcement. The next section examines those complications.

IV. SUBSTANTIVE DUE PROCESS RESTRAINTS ON REMOVAL AND TRANSFER

A. *State-Created Danger and Removal*

As the Supreme Court has noted, it has long been settled that the Due Process Clause of the Fifth and Fourteenth Amendments applies to all " 'persons' within the United States, including [non-citizens], whether their presence here is lawful, unlawful, temporary, or permanent."[259] That principle has remained intact for more than a century after the Supreme Court declared in *Wong Wing v. United States* that "all persons within the territory of the United States are entitled to the protection guarantied by [the Fifth and Sixth A]mendments, and that even [non-citizens] shall not be . . . deprived of life, liberty, or property without due process of law."[260]

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of a due process violation suggests that it will join the lower courts in recognizing that reckless and deliberately indifferent conduct can inflict a deprivation" where "[s]uch conduct involves the deliberate decision to ignore a great likelihood of injury, evidencing a blameworthy decision that amounts to an abuse of power." *Id.* (footnote omitted).

[258] *See* Oren, *supra* note 31, at 1173.

[259] Zadvydas v. Davis, 533 U.S. 678, 693 (2001); Plyler v. Doe, 457 U.S. 202, 210 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976).

[260] 163 U.S. 228, 238 (1896); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886) (holding that non-citizens are "persons" entitled to equal protection of the law).

In spite of those foundational principles, the federal courts have largely declined to recognize substantive due process limits on Executive authority to deport non-citizens to countries where they claim they will be persecuted or tortured abroad.[261] Separate from any constitutional restraints on the Executive, other federal laws, including the Refugee Act,[262] which implemented the 1951 Convention on Refugees,[263] and the Foreign Affairs Reform and Restructuring Act of 1998,[264] which implemented the United Nations Convention Against Torture,[265] separately limit the power of the federal government to return non-citizens to places where they would be persecuted and tortured. When non-citizens cannot avail themselves of those treaty-based statutory protections, most often because they have missed a procedural filing deadline, they have invoked the Constitution—unsuccessfully—as an additional source of protection from removal.[266]

The First, Third, Fifth, and Tenth Circuits have all declined to assess whether the Constitution applies to the actions of the federal government in removing non-citizens to countries where they claim they would be in danger.[267] These courts have cited the federal government's plenary authority over immigration policy, which courts have deemed the broadest and most deserving of deference in matters concerning who may enter and remain within the United States.[268]

Nevertheless, some courts have at least contemplated an outer constitutional limit on removal, rejecting the prospect that the federal removal power is wholly immune from constitutional restraint. The Ninth Circuit and several district courts have concluded that in circumstances where the federal government's affirmative acts enhance the risk faced by a non-citizen abroad—for example, where the government shares confidential

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[261] *See supra* Part II.

[262] Pub. L. No. 96-212, 94 Stat. 102 (1980).

[263] Refugee Convention, *supra* note 23, at 29.

[264] Foreign Affairs Reform and Restructuring Act of 1998, H.R. 1757, 105th Cong. § 1242.

[265] Convention against torture and other cruel, inhuman or degrading treatment or punishment art. 3, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85.

[266] 8 U.S.C. § 1158(a)(2)(B).

[267] *See, e.g.*, Enwonwu v. Gonzales, 438 F.3d 22, 35 (1st Cir. 2006); Kamara v. Att'y Gen., 420 F.3d 202, 219 (3d Cir. 2005); Lakhavani v. Mukasey, 255 F. App'x 819, 823 (5th Cir. 2007); Vicente-Elias v. Mukasey, 532 F.3d 1086, 1095 (10th Cir. 2008).

[268] *See, e.g.*, *Kamara*, 420 F.3d at 218.

information with a foreign persecutor or uses non-citizens as criminal informants then removes them to foreign countries defenseless to any retaliation—substantive due process may limit the Executive removal power.[269] Thus, the viability of substantive due process restraints on removal have largely been determined by whether courts view removal as an exclusively political judgment entrusted to the executive and legislative branches or whether the court views itself as retaining some role at the outer limits in protecting individual liberty even in the immigration setting where deference to the Executive is great.

This section divides the various removal cases addressing substantive due process into two categories. First, we describe what this Article refers to as *primary removals*—meaning removing someone to danger in their home countries that exists separate and apart from actions by U.S. actors. Next, we address *aggravated removals*—removals following conduct by U.S. state actors that enhance or create a danger abroad. No court has recognized substantive due process restraints in the first category; a limited number have been open to such restraints in the context of aggravated removals.

In *Kamara v. Attorney General of U.S.*,[270] the Third Circuit refused to recognize a state-created danger claim in a primary removal case involving a native from Sierra Leone. There, a habeas petitioner asserted a claim under the Convention Against Torture, contending that if the United States removed him, he would be tortured in his home country because of his prior political activity.[271] He also claimed a substantive due process right to be free from removal to torture but did not point to actions by the United States government that enhanced the danger he faced in Sierra Leone or rendered him more vulnerable to harm.[272]

The Third Circuit rejected the claim.[273] It refused to consider the role of constitutional restraints upon the removal power, proclaiming that the doctrine "has no place in our immigration

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[269] *See* Barahona-Gomez v. Reno, 167 F.3d 1228, 1235 (9th Cir. 1999) (suggesting adherence to the Executive Office for Immigration Review's directives "may have violated due process").

[270] *Kamara*, 420 F.3d at 202.

[271] Kamara, who was ineligible for asylum, filed a petition for a writ of habeas corpus, after the Board of Immigration Appeals denied him relief from removal under the CAT. *Id.* at 208.

[272] *Id.* at 208–09.

[273] *Id.* at 219.

jurisprudence."[274] The court reasoned that to extend the state-created danger exception to the removal context "would impermissibly tread upon Congress' virtually exclusive domain over immigration, and would unduly expand the contours of our immigration statutes and regulations, including the regulations implementing the CAT."[275] The court concluded that questions regarding whether non-citizens should be removed from the United States are "policy questions entrusted exclusively to the political branches of our Government," such that the courts have no authority to interfere with the will of the Executive or the judgment of Congress.[276]

Cases like *Kamara*, though clothed in plenary power-type constitutional avoidance, really reflect straightforward *DeShaney* concerns. Holding the federal government constitutionally accountable for the harm that occurs post-removal, where the U.S. government has not contributed to or created the harm abroad, implicates *DeShaney*'s rejection of constitutional liability for third-party harms. Indeed, just as the Supreme Court was unwilling to hold the State responsible for protecting Joshua from the pre-existing threat of his father, courts resist holding the government constitutionally responsible for failing to protect Kamara and other immigrants from the pre-existing threats posed by their own governments.[277] To the extent deportation is viewed as the return of a non-citizen "to the status quo ante,"[278] under *DeShaney*, the United States would arguably not be liable as a constitutional matter under a state-created danger theory for the danger faced by Kamara in Sierra Leone—torture by a rebel group and the government.

On the other hand, it is hard to see why the government's act of sending an individual into harm's way to suffer persecution in their country of origin would not amount to throwing them into a proverbial snake pit. That is, without the act of deportation, the status quo for a non-citizen would be safety—even if temporary and not based on legal status—obtained outside their country of origin. By directing and delivering someone back to the danger

[274] *Id.* at 217.

[275] *Id.* at 217–18.

[276] *Id.* at 218 (quoting Fiallo v. Bell, 430 U.S. 787, 798 (1977)).

[277] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

[278] *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 27 (1984).

they fled, the government is at least theoretically interfering with their efforts at self-help and protection in ways lower courts, in the context of reckless police action, have found constitutionally problematic.[279] The Third Circuit's summary conclusion that the judiciary had no obligation to even evaluate substantive due process limitations on the Executive's removal authority, however, meant that the court never reached this analysis or contemplated whether the act of removing a person who faced a threat of torture violated an elemental liberty interest in being free form torture and death.[280]

Following *Kamara,* the Third Circuit addressed an aggravated removal case but reached the same result. In *Rranci v. Attorney General of U.S.*,[281] a native of Albania, who was detained after he paid a smuggler to bring him to the United States, served as a material witness for the U.S. government in the investigation and prosecution of his smuggler, a leader of an Albanian organized crime syndicate.[282] In challenging his removal to Albania, Rranci claimed that by procuring his service as a cooperating witness, and then removing him to the place where he could be harmed by the target of the government's investigation, the government created or enhanced the danger he faced in Albania.[283] Citing *Kamara*, the court rejected Rranci's constitutional claim, noting that the Third Circuit has "stated unequivocally that 'the state-created danger exception has no place in our immigration jurisprudence.' "[284] The court declined to consider whether Rranci's case was factually distinguishable from *Kamara* and whether the use of Rranci's statement constituted affirmative state action that enhanced the danger Rranci faced, thereby imposing a substantive due process

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[279] *See e.g.*, Kneipp v. Tedder*,* 95 F.3d 1199, 1209–11 (3d Cir. 1996). *Kneipp* involved an inebriated pedestrian who fell down an embankment and suffered hypothermia and permanent brain damage after the police stopped her and her husband while they were walking home from a bar. *Id.* Officers informed Kneipp's husband that he could go home because officers would take care of his wife but instead left her to walk home alone in the freezing cold. *Id.*

[280] *Kamara*, 420 F.3d at 217 (first citing Builes v. Nye, 239 F. Supp. 2d 518, 525–26 (M.D. Pa. 2003); then quoting *Fiallo*, 430 U.S. at 792; and then quoting Galvan v. Press, 347 U.S. 522, 531–32 (1954)).

[281] Rranci v. Att'y Gen., 540 F.3d 165, 171–72 (3d Cir. 2008).

[282] *Id.* at 169.

[283] *Id.* at 171.

[284] *Id.* (citing *Kamara*, 420 F.3d at 217).

obligation on the government not to return him to a place where he faced likely retaliation.[285]

Even where the risk to a witness was extreme, the Third Circuit again refused to limit *Kamara*. In an unpublished decision, *Nunez v. Attorney General of U.S.*,[286] the court held that substantive due process provided no recourse for a cooperating witness from the Dominican Republic who faced threats to his life and "at least one documented attempt to kidnap him" because of his cooperation with the government.[287] In light of the seriousness of the threats to Nunez's life in the Dominican Republic, the district judge who presided over his sentencing "express[ed] profound concern that Nunez would be harmed if removed" and offered to recommend to the government on the record that he "not be deported because of his cooperation."[288] Nevertheless, the Third Circuit mechanically applied *Kamara*, declining to analyze whether the government's conduct in using Nunez as a witness provided a constitutional basis for stopping his removal.[289]

The First Circuit has similarly concluded that substantive due process does not limit the Executive's authority over removal in any way. In *Enwonwu v. Gonzales*,[290] the petitioner appeared to appreciate the distinction drawn by *DeShaney* between the lack of constitutional duties on the government to protect persons from the status quo, and substantive due process as a negative restraint on government conduct that renders an individual more

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[285] *Id.* The court did note, however, that the record contained "no direct evidence" that the government informed the target that Rranci had made a statement against him, suggesting perhaps, that if the government had engaged in such conduct that enhanced the risk Rranci faced abroad, the court's conclusion may have been different. *Id.* at 170 n.2. Arguably looking for some form of protection, the court remanded Rranci's case for consideration of whether his counsel engaged in ineffective assistance of counsel in failing to raise the possibility that Rranci may be protected by the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209, art. 24(1) which requires state parties to "take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention." *Id.* at 177–79 (emphasis omitted).

[286] 226 F. App'x 177, 179 (3d Cir. 2007).

[287] *Id.* at 178–79.

[288] *Id.* at 178.

[289] *Id.* at 179. Nevertheless, the Court found that the Board of Immigration Appeals had applied the wrong legal standard under CAT and granted the petition for review. *Id.* at 180.

[290] 438 F.3d 22, 25 (1st Cir. 2006).

vulnerable to harm.[291] He argued that the government's affirmative actions in using him as an informant and then seeking to send him to Nigeria "would be placing him in a position more dangerous tha[n] it found him and the Constitution prohibits this."[292]

Nevertheless, the First Circuit rejected this argument in favor of a blanket rule against substantive due process restraints upon removal. It concluded that "regardless of the facts" of a given case, "a non-citizen trying to avoid removal from the country states no substantive due process claim on a state-created danger theory."[293] The court reversed the district court's holding that the federal government had subjected "Enwonwu to the risk of deadly retribution by inducing his cooperation though promises of protection and then forc[ing] him to face that retribution" in Nigeria, which the district court described as "utterly egregious and intolerable."[294]

Drawing a distinction that the Third Circuit elided in *Kamara*, the district court reasoned that the critical fact was not whether the petitioner had a substantive due process right to stay in the United States, but whether he had a substantive due process "right to live and the right to be free from state sanctioned torture, the danger of which, he alleges, the executive created."[295]

The First Circuit, however, dismissed this reasoning as untenable, citing separation of power principles.[296] The court concluded that "[t]he remedial effect of such a ruling would, of course . . . preclude the BIA from ordering removal to Nigeria."[297] According to the court, such a ruling would interfere with Congress's constitutional authority to determine "how aliens are admitted to the United States, whether and under what conditions they may stay, and under what conditions such an alien will be removed or may avoid removal."[298] Thus, according to the First Circuit, under no "set of facts" does a non-citizen have a "constitutional substantive due process right not to be

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[291] *Id.* at 29.

[292] *Id.* at 29 (alteration in original).

[293] *Id.* at 25.

[294] *Id.* at 27 (citing Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 74 (D. Mass. 2005)).

[295] *Id.* at 27–28 (citing *Enwonwu*, 376 F. Supp. 2d at 70).

[296] Enwonwu v. Gonzales, 438 F.3d 22, 30 (1st Cir. 2006).

[297] *Id.* at 28 n.4.

[298] *Id.* at 28.

removed from the United States, nor a right not to be removed from the United States to a particular place."[299] According to the court, the "theory itself simply is not viable";[300] courts are only required to ensure that a non-citizen's removal comports with procedural due process.[301]

The Tenth and Fifth Circuits have cited this reasoning to similarly reject wholesale state-created danger claims in the removal context. In *Vicente-Elias v. Mukasey*,[302] the Tenth Circuit stated that it declined to "engraft a new form of relief from removal onto the statutory scheme established by Congress."[303] Additionally, the Fifth Circuit, in an unpublished decision, *Lakhavani v. Mukasey*,[304] refused to reach the question of whether a Pakistani citizen facing removal asserted a violation of substantive due process under a state-created danger theory.[305] The court noted that Lakhavani's argument was actually "a challenge to his final order of removal that [was] merely 'cloaked

[299] *Id.* at 29–30 n.8.

[300] *Id.* at 30.

[301] *Id.* at 29–30. Viewing such challenges as "shift[ing] to the judiciary the power to expel or retain aliens" the court concluded that "whether sitting in habeas or in judicial review" to entertain such challenges would exceed courts' defined constitutional role, interfering with the authority of the Executive and the Legislative branches. *Id.* at 30. The court also expressly rejected the notion that the United States might have an obligation not to send a person to a particular country but the Executive could still exercise its plenary authority over immigration by removing him to a third-country where he did not face a risk of torture. Citing 8 U.S.C. § 1231(b)(2), the court noted that although the Attorney General may, under certain circumstances, be compelled to agree to send an alien's to a third country, practically speaking the "Attorney General has little choice but to remove him to the country of which he is a subject, national, or citizen." *Id.* (citing § 1231(b)(2)(D)). The court reasoned that in Enwonwu's case this dilema was likely given that he was a convicted drug smuggler, such that there was little reason to believe another country would accept the person. *Id.* at 29 n.7. The court failed to explain why the difficulty of avoiding harm should matter in the analysis of constitutional restraints on government action.

[302] 532 F.3d 1086 (10th Cir. 2008).

[303] *Id.* at 1095.

[304] 255 F. App'x 819, 823 (5th Cir. 2007). This decision was in contrast with an earlier district court decision arising in the Fifth Circuit, *Momennia v. Estrada*, in which the court at least acknowledged the possibility of a viable state-created danger claim in the removal context if a petitioner could prove that: (1) the U.S. actors created or increased the danger the non-citizen faces upon removal, and (2) that those actors acted with deliberate indifference to that risk. 268 F. Supp. 2d 679, 686–87 (N.D. Tex. 2003).

[305] 255 F. App'x 819, 823 (5th Cir. 2007).

in constitutional garb' " for the purpose of establishing jurisdiction.[306]

As noted, however, some courts have at least recognized that substantive due process might restrain executive action in the context of aggravated removals. For example, the Ninth Circuit has held that the state-created danger theory might apply in the removal context when a non-citizen demonstrates that state actors increased the risk of serious harm upon removal.[307] In *Morgan v. Gonzales*,[308] the Ninth Circuit emphasized that affirmative misconduct by government officials must be shown to establish a substantive due process claim in this context.

In that case, an English citizen who faced deportation because of drug and racketeering convictions agreed to cooperate in a major drug case in Montana.[309] He alleged that the government promised him relief from deportation for his cooperation and failed to fulfill the agreement.[310] But even these alleged facts were not enough. The court concluded that he failed to allege any "affirmative government misconduct," such as U.S. officials either deceiving him or coercing his testimony, so he failed to state a claim under the state-created danger doctrine.[311]

In contrast, in *Wang v. Reno*,[312] the Ninth Circuit identified a set of facts arising in the removal context that shocked the conscience of the court. There, the court held that the affirmative actions of the government placed Wang, a Chinese citizen, in a position of danger such that his removal would violate fundamental liberty interests protected by the substantive component of the Due Process Clause.[313] In that case, U.S. officials had arranged for Wang, who had been arrested by Chinese authorities for his participation in heroin

[306] *Id.* (quoting Hadwani v. Gonzalez, 445 F.3d 798, 801 (5th Cir. 2006)). The increase in the number of immigrants facing removal who claim relief under the state-created danger doctrine during the early 2000s may have been a response to § 1252(a)(2)(C), which removed habeas jurisdiction in immigration cases, unless the cases raises questions of law or constitutional issues, which are reviewable under 8 U.S.C. § 1252(a)(2)(D).

[307] 495 F.3d 1084, 1093 (9th Cir. 2007).

[308] *Id.* at 1092.

[309] *Id.* at 1088.

[310] *Id.* at 1090–91.

[311] *Id.* at 1093. The Court also found unconvincing that a danger even existed, doubting that if "he returned to England, former associates from his drug-running days twenty-five years past would be likely to take their revenge on him for his cooperation with U.S. authorities." *Id.*

[312] 81 F.3d 808, 811–13 (9th Cir. 1996).

[313] *Id.* at 813.

trafficking, to be paroled into the United States so that he could testify against one of the other alleged participants in the scheme.[314] Wang falsely implicated an individual, whose name was suggested to him by the Chinese, after they subjected him to electrical shocks and other torture and promised him leniency if he cooperated.[315] Once U.S. prosecutors learned Wang had provided a confession that implicated the target of the Chinese investigation, they sought to bring him to the United States to testify. Evidence suggested, however, that the prosecutors were both aware of China's record of torture and had specific reasons to believe that Wang had been tortured into falsely confessing.[316] Nevertheless, the prosecutors ignored this evidence and proceeded to arrange for Wang's parole into the United States, failing to disclose any evidence related to the reliability of his confession to defense counsel.[317] After Wang recanted his confession during the trial and a mistrial resulted, the United States proceeded to deport him.

The court concluded that Wang was put in an impossible dilemma by the United States: he could perjure himself in the court proceedings in the United States by falsely continuing to implicate a co-conspirator, or he could recant his confession and face the prospect of further torture, possible execution, and a withdrawal of the Chinese's promise of leniency.[318] The court concluded that unlike in *DeShaney*, where the victim was "in no worse a position than that in which he would have been had [the government] not acted at all," the government's reckless conduct put Wang "in a far worse position" than had the government not intervened.[319]

The Court rejected the government's arguments that the Fifth Amendment did not provide Wang with any protection from conduct that would occur in China, and concluded that by creating this situation, U.S. actors "violated Wang's due process rights on American soil, where he was forced in an American courtroom, to choose between committing the crime of perjury or telling the truth and facing torture and possible execution."[320]

[314] *Id.* at 811–12.

[315] *Id.* As the Court noted, the Chinese were apparently intent on attributing the drug trafficking ring to a subject of Hong Kong, and not China. *Id.*

[316] *Id.* at 811.

[317] *Id.*

[318] *Id.* at 818–19.

[319] *Id.* at 819 (alteration in original).

[320] *Id.* at 817.

The court summed up that the government recklessly disregarded the very real possibility that Wang's testimony was false and that telling the truth would subject him to torture and possible execution upon his removal to China.[321]

The Ninth Circuit's approach demonstrates the flimsiness of plenary power justifications for judicial refusal to recognize state-created harm.[322] The fear is that constitutionalizing removal decisions based upon the level of harm a non-citizen faces abroad could conceivably place the courts in the position of deciding who may remain or who must be removed—or so the argument would go. But that rationale does not alone justify judicial forbearance in enforcing constitutional backstops when the Executive knowingly sends a person into situations of likely and significant harm. Just as courts can interpret and enforce the requirements of statutory restraints on removal and assess the magnitude of harm likely faced upon removal without usurping the political branches' roles over immigration policy, so too can they interpret and enforce the Constitution as the most fundamental protection against arbitrary denial of life and liberty.

As Michael Wishnie has argued in suggesting that removal orders should be subject to Fifth Amendment Due Process and Eighth Amendment proportionality review because the act of removal is sufficiently punitive, the notion of removal as simply a return to the status quo ante does not hold upon closer

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[321] *Id.* at 820–21. The Court rejected the Government's claim that it had "no constitutional duty to protect a witness from harm stemming from his or her testimony that may occur after the witness is released from the government's custody." *Id.* at 818. Here, the Court noted that the government "created a special relationship with Wang by paroling him into the United States and placing him in custody" and therefore "had an obligation to protect him from liberty deprivations he faced by virtue of his testimony in court." *Id.* at 818. Significantly, the court rejected a claim by the Attorney General that she would not return Wang to China "unless the United States Government is confident that he will not be executed because of his conduct in judicial proceedings in the United States." *Id.* at 819. The Court reasoned that the U.S. Government "cannot guarantee that China, a sovereign nation, will not execute Wang for his decision to testify truthfully" and that Wang faced the prospect of further mistreatment short of execution upon his return to China. *Id.* at 819–20. But Wang is not typical of a run-of-the-mill removal case given his status as a witness; the Court emphasized the inherent obligation of the courts to exercise their "supervisory power to protect government witnesses." *Id.* at 820.

[322] *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 84 (1976) ("[I]t is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens.").

scrutiny.[323] The act of removal is never a mere reset button that returns a person to the position they were in prior to their entry; most often, deportation severs family connections, removes people from their community, and causes undeniable suffering.[324] It likely delivers them back into the seat of danger they fled or escaped, poorer and more traumatized than when they left. At worst, deportation draws attention to a person's absence, increasing their visibility and risk of persecution upon their return. It is hard to see why this form of state action is anything other than affirmative government action that delivers a person into the seat of danger or throws them into the proverbial snake pit.

Indeed, if the state-created danger doctrine holds government actors accountable for acts that cut off a person's "private source of rescue" or "self-help" and thus renders them more vulnerable to harm,[325] there is little justification for not treating a sufficient threat posed by removal, coupled with U.S. actors' deliberate indifference to it, as a state-created danger subject to the constraints of substantive due process.

More fundamentally, however, the state-created danger removal cases have little bearing upon the scope of constitutional restraints and remedies for harm inflicted upon non-citizens through immigration enforcement that occurs separately from the act of removal. Even if it is true that the Constitution, for separation of powers reasons, imposes limited substantive restraints upon the government's deportation of non-citizens, that principle would of course not mean that the Constitution would permit the same government to torture the non-citizen as a means of discouraging his return to the United States before placing them on a plane back to their country. That hypothetical, and not immigration enforcement in the form of removal, is the closer analogy to family separation and other recent border policies.

For example, it more closely resembles the harm wrought by the MPP, which forced non-citizens to experience a known risk of sexual assault, disease, kidnapping, or murder, while they awaited the chance to even apply for asylum in the United

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[323] Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 427-30 (2012) (explaining punitive nature of removal for both permanent residents and other non-LPR non-citizens).

[324] *Id.* at 430.

[325] *See generally* Chemerinsky, *supra* note 31.

States.[326] Imposing constitutional limits on this infliction of wanton physical or psychological trauma even prior to asylum seekers having their asylum claims heard in court, need not constitutionalize removal proceedings. This tracks the *J.P.* court's recognition of state created danger theories in the context of family separation.[327] But if the person loses their case and is removed, this harm would also arguably contribute to an aggravated removal—returning someone to their home country after visiting further trauma and suffering upon them.[328]

Several principles can be distilled from the decisions addressing whether removal itself may pose a state-created danger that violates due process. The decisions contemplating due process protections for aggravated removals indicate that courts see a meaningful difference between holding the U.S. government accountable under the Constitution for preexisting threats and harm in a non-citizen's native country—which no court has been willing to do—and recognizing that due process restrains U.S. actors from recklessly engaging in action—beyond deportation itself—that inflicts injury or renders someone more vulnerable to harm.

A stark example of recent U.S. actions that create danger, which cannot be characterized simply as a failure to protect, was the United States' erroneous posting of the names and other identifying details of 6,252 asylum seekers on an Immigration and Custom Enforcement's website in December 2022.[329] By revealing the names of people who claimed persecution by their home countries, the government's action enhanced the threat of harm those individuals faced if forced to return—a quintessential state-created danger, the viability of which would turn on the level of recklessness that led to the error.

Unlike arguments rooted in refugee protection, the state-created danger doctrine names the government's reckless or

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[326] *How MPP Works: One of Trump's Cruelest Immigration Policies, a Year On*, REFUGEE & IMMIGRANT CTR. FOR EDUC. & LEG. SERVS. (Jan. 1, 2020), https://www.raicestexas.org/2020/01/30/one-of-trumps-cruelest-immigration-policies-a-year-on/ [https://perma.cc/G2BC-4RPF].

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

[328] Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that the commissioner erred in sentencing the appellants to imprisonment at hard labor according to the law for deportation).

[329] Livia Albeck-Ripka & Miriam Jordan, *Identities of Thousands of Migrants Seeking Asylum in U.S. Posted in Error*, N.Y. TIMES (Dec. 1, 2022), https://www.nytimes.com/2022/12/01/us/ice-migrants-privacy.html [https://perma.cc/CM7G-K34X].

intentional infliction of harm through policies aimed at preventing people from seeking asylum in the first place or deterring them from migrating altogether. Recognzing the harm inflicted upon migrants as more than a mere failure to protect is a step toward accountability.

B. Constitutional Restraints on Extralegal Renditions and Foreign Transfers

Courts have likewise shown an unwillingness to impose constitutional restraints upon federal officials when they transfer people to the custody of foreign governments outside the context of removal—even when the transfer involves U.S. citizens. The justifications for court acceptance of a constricted role in evaluating substantive limits on Executive transfer authority vary depending upon the contexts in which such transfers occur.

As noted, in the deportation context, courts cite deference to the Executive's plenary authority over immigration policy.[330] In the extra-judicial rendition context, however, which gained visibility during the Post 9-11 period because of a number of illegal renditions conducted by the United States to countries with well-known records of torture,[331] courts typically cite national security concerns and the need to preserve state secrets as the justification for declining to recognize or even address potential constitutional claims.[332] And in the extradition context, courts invoke the common law rule of non-inquiry, which is rooted in diplomatic comity and courts' unwillingness to insert themselves in matters of foreign affairs when deferring to

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[330] *See* Khouzam v. Att'y Gen. of U.S., 549 F.3d 235, 250–51 (3d Cir. 2008); Kamara v. Att'y Gen. of U.S., 420 F.3d 202, 211–12 (3d Cir. 2005).

[331] These illegal renditions actually resulted in torture to the person rendered. *See* DENNIS O'CONNOR, COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR: REPORT OF THE EVENTS RELATING TO MAHER ARAR, FACTUAL BACKGROUND, VOL. 1, 149–73 (2006) (Can.), https://www.loc.gov/item/2006497706/ [https://perma.cc/25AN-8SA2]; Nicholas Kulish, *Court Finds Rights Violation in C.I.A. Rendition Case*, N.Y. TIMES (Dec. 13, 2012), https://www.nytimes.com/2012/12/14/world/europe/european-court-backs-cia-rendition-victim-khaled-el-masri.html [https://perma.cc/9XAW-H5LL] (describing decision of European Court of Human Rights addressing illegal capture, detention, and rendition of a German man, Khaled el-Masri, to Afghanistan where he was brutally tortured, after the CIA mistakenly confused him with a suspected terrorist with a similar name).

[332] *See* Arar v. Ashcroft, 532 F.3d 157, 181 (2d Cir. 2008). The majority in *Arar* erroneously viewed this extra-legal transfer case as an immigration case, so it invoked plenary immigration authority as a justification as well. *Id.*

Executive transfer determinations.[333] Despite the various justifications, put together, courts have shown a consistent unwillingness to recognize constitutional restraints in the context of foreign transfers, even when such acts may cause grievous harm.

For example, in 2008, in *Munaf v. Geren*,[334] the United States Supreme Court unanimously held that habeas relief was unavailable to two United States citizens who sought to prevent their transfer to Iraqi custody, claiming they would be tortured. The citizens, Omar and Munaf, were detained by the U.S. military in Iraq and faced prosecution for violations of Iraqi law. In seeking to enjoin their transfer, they claimed that they faced a "grave risk of torture or death," citing the "systemic and widespread torture of prisoners in Iraqi custody, particularly Sunni Muslims."[335] They asserted a substantive due process right under the Fifth Amendment to be free from a transfer to torture.[336]

Though the Court found that it had jurisdiction to hear Omar's and Munaf's habeas petitions, it concluded that in these circumstances, habeas was an empty vessel.[337] Because the Executive had determined that the risk of torture did not prevent the transfer, the Court refused to look behind that determination

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[333] *See* Hoxha v. Levi, 465 F.3d 554, 563 (3d Cir. 2006); Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1010 (9th Cir. 2000), *aff'd on other grounds sub nom.* Cornejo-Barreto v. Siefert, 379 F.3d 1075, 1089 (9th Cir. 2004), *reh'g en banc granted*, 386 F.3d 938, 938 (9th Cir. 2004), *vacated as moot*, 389 F.3d 1307, 1307 (9th Cir. 2004) (concluding appeal was moot after government withdrew its extradition claim).

[334] 553 U.S. 674, 705 (2008).

[335] *See* Petition for Writ of Habeas Corpus ¶ 24, Mohammed v. Harvey, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-cv-01455); *see also* Petition for Writ of Habeas Corpus ¶¶ 36–38, Omar v. Harvey, 416 F. Supp. 2d 19 (D.D.C. 2006) (No. 05-cv-02374); Memorandum of Points and Authorities in Support of Petitioners' Ex Parte and Emergency Motion for a Temporary Restraining Order at 9–10, *Omar*, 416 F. Supp. 2d 19 (No. 05-cv-02374).

[336] The Court noted, however, that a substantive due process claim to be free from a transfer to torture was only raised in Munaf's habeas petition, not in Omar's. *Munaf,* 553 U.S. at 698–99. Both Petitioners asserted a due process claim, however, in their motions for preliminary injunctions. *See* Memorandum of Points and Authorities in Support of Petitioners' Ex Parte and Emergency Motion for a Temporary Restraining Order, *supra* note 335, at 8. Omar and Munaf also asserted claims not to be transferred to torture under Article 3 of the Convention Against Torture, as implemented by the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), 8 U.S.C. § 1231 note (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture).

[337] *Munaf*, 128 S. Ct. at 2213.

and declined to remand the case for further proceedings. Thus, irrespective of what evidence Omar and Munaf could put forth showing a likelihood of torture upon transfer, the Court unanimously disclaimed responsibility for assessing such threats to individual liberty, averring that deference to the Executive in matters of foreign relations required it to "forgo the exercise of its habeas corpus power."[338] According to the Court, Omar's and Munaf's claims presented "questions of policy than of law, that . . . are for diplomatic, rather than legal discussion."[339]

Munaf appeared to recognize at least some constitutional limit on Executive transfer authority to third parties likely to torture the transferee, but noted without further explanation, that the petitioners' circumstances did not present "a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway."[340] In contrast to *Munaf*'s limited caveat, under traditional state-created danger doctrine, where there is time for reflection, it is deliberate indifference or recklessness that defines a substantive due process violation, and not a specific intent by the State actor that particular harm will result.[341] But the Court refused to interrogate whether the government possessed such an intent, deferring instead to the government's blanket and contestable disclaimer that "it is the policy of the United States *not* to transfer an individual in circumstances

[338] *Id.* at 2220 (citing Fay v. Noia, 372 U.S. 391, 425–26 (1963)); Withrow v. Williams, 507 U.S. 680, 699 (1993); Francis v. Henderson, 425 U.S. 536, 539 (1976).

[339] *Munaf*, 128 S. Ct. at 2225. Justice Souter, joined by Justices Ginsburg and Breyer, suggested in his concurrence that the Court's opinion was the result of, and limited to, eight factors uniquely presented by Omar and Munaf's circumstances, with one factor arguably dispositive for the majority: that Omar and Munaf were being held by United States forces in Iraq pending prosecution by the Iraqi government for crimes they allegedly committed within that country. In light of that fact, the Court concluded that irrespective of whether an extradition treaty applied and irrespective of whether Omar and Munaf could demonstrate a substantial risk of torture upon transfer, the Court would not interfere with the Executive's decision to transfer persons in its custody to a foreign sovereign for crimes committed within their border. *Id.* at 2226, 2228.

[340] *Id.* at 2226.

[341] *See supra* Section III.C; *see, e.g.*, Pena v. DePrisco, 432 F.3d 98, 114 (2d Cir. 2004) (noting "specific intent or desire to cause physical injury," not required where there is time to reflect); *see also* Kennedy v. City of Ridgefield, 439 F.3d 1055, 1039 (9th Cir. 2006) (same); Waddell v. Hendry Cnty. Sheriff's Off., 329 F.3d 1300, 1306 (11th Cir. 2003) (same); Butera v. District of Columbia, 235 F.3d 637, 652 (D.C. Cir. 2001) (same).

where torture is likely to result."[342] The Court reasoned that the Executive has the "ability to obtain foreign assurances it considers reliable" and courts are not well-suited to second-guess such determinations.[343]

The Court also cited the importance of the federal courts not passing judgment on foreign justice systems so that the government may "speak with one voice in this area"[344] even though other non-constitutional sources of law—specifically the Refugee Convention and the Convention Against Torture—already require courts to pass judgment on the likelihood of harm a person would face in a foreign justice systems.[345] Indeed, courts often evaluate State Department reports as evidence regarding the likelihood of torture, and sometimes reach conclusions about the threat of torture abroad that is inconsistent with the information presented by the State Department.[346] Thus, in these contexts, courts routinely speak with a different voice than the Executive with respect to threats individuals face abroad.

In arguable recognition of the problem with the Court disclaiming any role in checking torture, Justice Souter's concurrence emphasized that the decision was more about the unsuitability of habeas to remedy the petitioners' unique circumstances than the scope of the constitutional prohibitions on the facilitation of torture.[347] He pointed to eight

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[342] Munaf v. Geren, 128 S. Ct. 2207, 2226 (2008) (citing Brief for Federal Parties 47; Reply Brief for Federal Parties 23). Certainly, a petitioner could demonstrate that the Executive's transfer policy is not evenly enforced, or even if it is, the Executive recklessly assessed a foreign countries' likelihood to torture or exhibited deliberate indifference to a threat. *See generally* Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition,"* 20 GEO. IMMIGR. L.J. 213, 217 (2006) (arguing that that diplomatic assurances from countries that routinely torture should be considered "legally worthless").

[343] *Munaf*, 128 S. Ct. at 2226.

[344] *Id.* The Court deferred almost entirely to the political branches with respect to an individual's risk of torture noting that it was "well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Id.*

[345] Specifically, in the deportation context, non-citizens may seek relief from removal to conditions of torture under Article 3 of the Convention Against Torture, as implemented by FARRA, div. G, 112 Stat. 2681-761, 8 U.S.C. § 1231 and courts "routinely evaluate the justice systems of other nations in adjudicating" petitioners' claims that they would face torture upon removal from the United States. Khouzam v. Att'y Gen. of U.S., 549 F.3d 235, 253 (3d Cir. 2008).

[346] Melchor-Reyes v. Lynch, 645 F. App'x 381, 386 (6th Cir. 2016).

[347] In the post-911 period, many legal scholars explicated the Constitution's prohibition on torture. *See, e.g.*, Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1681 (2005) (arguing

circumstances that converged in Omar and Munaf's case and precluded relief, including that the detainees were captured in Iraq and facing prosecution after they voluntarily traveled abroad and allegedly committed crimes there.[348] But subsequent decisions suggest that the Supreme Court's holding may not be so easily cabined.

Less than a year after *Munaf*, in *Kiyemba v. Obama*,[349] the United States Court of Appeals for the District of Columbia Circuit addressed the ability of Guantánamo detainees to challenge their transfers to countries where they feared torture. The court reversed a district court's order barring a transfer, citing *Munaf* as "control[ling]."[350] The court reasoned that "*Munaf* precludes a court from issuing a writ of habeas corpus to prevent a transfer" based on the risk of torture abroad because such matters are for "the political branches, not the judiciary."[351] Thus, far from reading *Munaf* as a fact-specific result with narrow precedential value, *Kiyemba* instead viewed the decision as a sweeping disavowal of the judiciary's role in protecting individuals from transfers to torture whether under federal anti-torture statutes or the Constitution's substantive due process protections.

The Second Circuit was also unwilling to recognize substantive due process restraints even on an extralegal transfer of someone wrongly suspected of terrorism.[352] Canadian Maher

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that torture "is 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"); *see also* EDWARD PETERS, TORTURE 74–75 (1985); 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, 294–95 (2003) ("Torture is alien to our Constitution both because it impinges on bodily integrity, and because it assaults the autonomy and dignity of the victim.").

[348] 128 S. Ct. at 2228 (Souter, J., concurring). Justice Souter noted that

> Although the Court rightly points out that any likelihood of extreme mistreatment at the receiving government's hands is a proper matter for the political branches to consider, if the political branches did favor transfer it would be in order to ask whether substantive due process bars the Government from consigning its own people to torture.

Id. (citation omitted).

[349] 561 F.3d 509, 511 (D.C. Cir. 2009).

[350] *Id.* at 514.

[351] *Id.*

[352] For a thorough discussion of Arar's allegations regarding his transfer to Syria see the district court opinion denying him relief, Arar v. Ashcroft, 414 F. Supp. 2d 250, 283 (E.D.N.Y. 2006), and for the Canadian government's report clearing Arar of any wrongdoing, see *Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: Report of the Events Relating to Maher Arar*, Vol. 1, 149

Arar's suit against the United States claimed that in 2005, federal officials used their authority to intercept him while he was transiting flights at JFK airport and sent him to Syria, intending or knowing that he would be tortured.[353] In concluding that Arar failed to state a claim for damages pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*,[354] the Second Circuit relied on reasoning similar to *Munaf*'s.[355] The majority concluded that it was obliged to exercise restraint in recognizing a *Bivens* remedy in Arar's circumstances "where the adjudication of the claim at issue would necessarily intrude on the implementation of national security policies and interfere with our country's relations with foreign powers."[356]

These decisions make plain that consideration of state-created danger theories in the context of border enforcement are likely to similarly implicate courts' considerable concerns about their limited competence in issues of national security and foreign affairs. Because U.S. border policies are now largely conceived of and framed as "border protection," rather than as "refugee protection," courts may be unwilling to second-guess policies that inevitably inflict serious harm.

The decisions also provide a point of comparison in that they involved requests for constitutional restraints on removal/transfer and, in some cases, concerned people suspected of terrorism, some wrongly, as opposed to kids seeking safety within the United States. Still, even with these differences, the failure to recognize constitutional restraints when grievous harm like torture was at stake helps illuminate why the the Central District of California's holding in *J.P.* slightly more than a decade later was so pathbreaking.[357] Finally, a court was willing to enforce constitutional restrains upon the federal government in an area normally receving judicial deference. It was willing to compel remedies for such harm too.

(2006), https://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/06-12-13/www.ararcommission.ca/eng/Vol_I_English.pdf [https://perma.cc/FR4G-6RX8].

[353] *Arar*, 414 F. Supp. 2d at 257.

[354] Arar v. Ashcroft, 532 F.3d 157, 172 (2d Cir. 2008) (citing Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 389–90 (1971)).

[355] *Id.* at 180–81.

[356] *Id.* at 181. An en banc panel of the Second Circuit agreed. Arar v. Ashcroft, 585 F.3d 559, 624 (2d Cir. 2009) (en banc).

[357] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989).

V. BORDER ENFORCEMENT AS STATE-CREATED HARM

As the above doctrinal analysis demonstrates, the lower courts all recognize that the Constitution imposes substantive due process restraints on government conduct that is conscious-shocking and either calculated to, or recklessly, harms. As the district court in *J.P.* and one circuit court of appeals has recognized, this principle applies in the context of immigration enforcement when the government's conduct reaches an outer limit of conscious-shocking action that cannot be treated as part and parcel of a standard removal decision.[358]

Notwithstanding the government's significant policy discretion over matters of immigration, the State simply cannot inflict reckless or knowing harm on non-citizens in the name of deterring migration or punishing asylum seekers for unlawful entries.[359] Just as the State could not torture a non-citizen before removing them in order to deter their return to the United States, it cannot expose them to rape, disease, kidnapping, murder, or take their children from them as a means of border protection.[360]

Though *DeShaney*, in our view, wrongly appreciated the affirmative misconduct at issue, on its own terms, it stands for the principle that the Constitution was not intended to correct bureaucratic failures that render someone more vulnerable to preexisting harm. It contends that the Constitution is not implicated where the victim was "in no worse a position than that in which he would have been had [the government] not acted at all."[361] A long record of harmful border practices does not fit this mold.

When the government takes custody of and separates non-citizen parents and children or prevents asylum seekers from applying for asylum, it undeniably puts them "in a far worse

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[358] Wang v. Reno, 81 F.3d 808, 819 (9th Cir. 1996).

[359] This is separately illegal because the Refugee Act (and 1951 Convention) protects the rights of asylum seekers to claim a need for safety notwithstanding the manner of entry. *See* Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102, 101 (1980).

[360] *See Family Separation 2.0*, AMNESTY INT'L, at 4, https://www.amnestyusa.org/wp-content/uploads/2020/04/Amnesty-International-USA-Family-Separation-2.0_May-21-2020-.pdf [https://perma.cc/C847-3F6H] (contending that family separation meets the definition of torture under U.S. and international law).

[361] *Wang*, 81 F.3d at 819 (emphasis omitted) (citation omitted).

position" than had it not taken those acts. These policies lead to brutality, trauma, and death.

Some might argue that the government is not required to stand idly by and can enforce its immigration laws or control access to its border without being hauled into court to answer for a constitutional claim. But what that objection misses is that by interfering with access to asylum and exposing people to severe harm and even death, the United States is not simply imposing law; it is imposing harm and suffering as a barrier to a person seeking legal redress and safety. This puts asylum seekers and families in a far worse position than had the government not intervened at all by cutting them off from their own private sources of rescue and making kidnapping, rape, death, and other harm more likely.[362]

Moreover, invoking substantive due process restraints in the family separation context provides an opportunity to clarify the state-created danger doctrine, which is often erroneously characterized as an exception that emerged in *DeShaney* to the principle that the Constitution does not constitutionalize what would otherwise amount to violations of state tort law. As the above analysis of decades of state-created decisions by the lower courts predating and following *DeShaney* demonstrates, the state-created danger cases *also* address affirmative abuses of government power that deprive persons of life or liberty.[363]

Moreover, giving meaning to the Constitution's negative restraints on such arbitrary abuses of government power compels meaningful constitutional remedies. Although, as Richard Fallon has stated, the Constitution does not dictate "individually effective remediation for every constitutional violation . . . . Sometimes the Constitution does require individually effective remedies . . . . Remedies directed to confine or stop ongoing wrongdoing are the most basic in the constitutional scheme."[364] Border abuses are one of those instances. Without full and meaningful remedies that respond to the U.S.-inflicted harm, cruelty directed at migrants is

[362] *See* HUM. RTS. FIRST, *supra* note 12, at 1.

[363] Oren, *supra* note 32, at 60 (stating it is "clear that a number of these cases are touched with the 'abuse of power' that should be the hallmark of constitutional tort litigation"); Fallon, *supra* note 182, at 310 ("In its commonest form, substantive due process doctrine reflects the simple but far-reaching principle—also embodied in the Equal Protection Clause—that government cannot be arbitrary." (footnote omitted)).

[364] Fallon, *supra* note 182, at 370.

normalized. This degrades non-citizens' broader claims to humane treatment, leaving them vulnerable to even further deprivation and injury in the future.

Even if it would be impractical to correct, through substantive due process restraints, "every individual injustice" that occurs on account of the government's aggressive immigration enforcement, due process must intervene to restrain intolerable systemic wrongs by correcting "the most flagrant errors."[365] Measured in terms of its high likelihood to result in suffering, its actual costs, and the importance of the interests violated, the recent state-created dangers occuring at the border surely constitute such flagrant errors.

CONCLUSION

Typical responses to criticisms of U.S. border policy have failed to conceptualize and challenge a defining feature of U.S. border enforcement: U.S.-created harm. Emphasizing the United States' legal and moral obligations to provide safety and protect those fleeing persecution or humanitarian disasters does not adequately address the government's role in creating and inflicting harm. To better name and diagnose the scope of U.S.-driven harm and suffering inflicted upon non-citizens at the border, expanded conceptions of U.S. responsibility are needed. The state-created danger theory is a strand of constitutional protection that can serve as an important starting place for helping to articulate and respond to the United States' role in perpetrating harm. Though the doctrine is not an easy path for securing relief for non-citizens who are harmed, it provides a strong theoretical and doctrinal basis for seeking to hold the government accountable for harm perpetrated in the name of border enforcement. More advocates and courts should start to recognize it as such.

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[365] *Id.* at 365.