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COMMENTS

PREGNANT AND DETAINED: CONSTITUTIONAL RIGHTS AND REMEDIES FOR PREGNANT IMMIGRANT DETAINEES

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Over the last thirty years, the United States has increasingly expanded what is already the largest immigration detention system in the world. On a daily basis, the U.S. government holds more than 50,000 people in detention as they wait for their immigration hearings or their removal back to their home country. During the past two decades, presidential administrations have enacted regulations to deter immigrants from entering the United States and narrow their ability to stay in the country, leading to an overall increase in detentions.

There is wide documentation of poor detention conditions, inadequate medical care, and overcrowding in immigration detention facilities. This is particularly troubling for pregnant immigrant women who find themselves in immigration detention. Indeed, the U.S. Immigration and Customs Enforcement's own medical records show that from 2017 to 2018, eighteen women miscarried while in that agency's custody, a nearly 100% increase from the prior year. Other reports detail how pregnant women are shackled around their stomachs while in transit and describe serious delays when experiencing health emergencies and denial of routine medical care.

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Holding pregnant women in detention comes at a high cost. Not only do pregnant women experience emotional and mental stress while in detention, but the risk of miscarrying or other harm to their fetuses increases. Because pregnant detainees have no alternatives for care, detention facilities are constitutionally required to provide them with adequate healthcare. However, for many immigrants this constitutional guarantee bestows a right with no mechanism for enforcement.

In order to address claims of inadequate medical care while in immigration detention, courts have incorporated the deliberate indifference standard from Eighth Amendment jurisprudence into the immigration detention context through the Fifth and Fourteenth Amendments, legally treating immigrants in detention the same as pretrial detainees. This opens the door for pregnant and detained women to bring a cognizable constitutional claim; but to be successful under this standard, pregnant detainees must meet the high bar of proving that they were harmed by an officer's deliberate indifference to their health. This Comment explores the standard that pregnant immigrant women must meet to show they have suffered a constitutional injury, the remedies that are available, and the significant challenges that arise in pursuing their claims.

INTRODUCTION

Two weeks after arriving in the United States seeking asylum, a twenty-three-year-old woman, E, found herself bleeding profusely in her detention cell.[1] She was four months pregnant.[2] Though E begged for help from staff at the facility, they told her they were not doctors and did not help her.[3] She spent about eight days bleeding in her detention cell and ultimately lost her baby.[4] Speaking to reporters after returning to her home country, E said she would never have come to the United States seeking a better and safer life if she had known that she would lose her baby in detention.[5] "My soul aches that there are many pregnant women coming who could lose their babies like I did and that [officials] will do nothing to help them," she said.[6]

Over the last thirty years, the United States has increasingly expanded what is already the largest immigrant detention system in the world.[7] On a daily basis, the U.S. government holds more than 50,000 people awaiting

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[1] Ema O'Connor & Nidhi Prakash, *Pregnant Women Say They Miscarried in Immigration Detention and Didn't Get the Care They Needed*, BUZZFEED NEWS (July 9, 2018), https://www.buzzfeednews.com/article/emaoconnor/pregnant-migrant-women-miscarriage-cpb-ice-detention-trump [https://perma.cc/HY7F-J2VJ].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *United States Immigration Detention Profile*, GLOBAL DETENTION PROJECT, https://www.globaldetentionproject.org/countries/americas/united-states#country-report [https://perma.cc/9YBR-VRMA]; *see also* WALTER A. EWING, DANIEL MARTÍNEZ & RUBÉN G. RUMBAUT, AM. IMMIGR. COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES 10–11 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf [https://perma.cc/6E2D-ZH4D] (describing how the growing criminalization of immigration led to a significant expansion of the United States' detention infrastructure). Additionally, the increase in the number of immigrants held in the immigration system under the Obama administration was fueled in part by a congressionally mandated detention bed quota. *Detention Quotas*, DETENTION WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-quotas [https://perma.cc/64TX-U4YS] (last visited Dec. 15, 2019). The quota created an artificial floor of 34,000 for the number of people required to be held in detention at any given time. *Id.* Though the quota has since been removed from congressional funding, the Trump administration exceeded the original quota. *Id.*

immigration hearings or deportation back to their home country,[8] and the Trump administration sought to increase that number.[9] In recent years, immigration has dominated American political discourse: as the number of immigrants coming to the United States has increased, so too have nativist sympathies.[10] During the past two decades, presidential administrations have enacted policies and regulations that aim to deter immigrants from entering the United States and narrow their ability to remain in the country.[11] The Trump administration in particular mounted significant efforts to change the

[8] U.S. Immigration and Customs Enforcement (ICE) has shared numbers showing that the combination of U.S. Customs and Border Protection (CBP) and ICE's criminal population surpassed 50,000 average daily persons (30,050 in CBP custody and 20,115 in ICE custody). U.S. IMMIGR. & CUSTOMS ENF'T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS 5 (2019), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf [https://perma.cc/TU93-BN2B]; *see also* Hannah Rappleye & Lisa Riordan Seville, *Twenty Four Immigrants Have Died in ICE Custody During the Trump Administration*, NBC NEWS (June 9, 2019), https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291 [https://perma.cc/5WW9-35Y8]. A more recent report has stated that as many as 55,000 people were held in detention on a daily basis under the Trump administration. S. POVERTY L. CTR., PRISON BY ANY OTHER NAME 2 (2019), https://www.splcenter.org/sites/default/files/cjr_fla_detention_report-final_1.pdf [https://perma.cc/A5NW-7ED7].

[9] Exec. Order No. 13767, 82 Fed. Reg. 8793, 8794 (Jan. 30, 2017) ("The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate or control facilities to detain aliens at or near the land border with Mexico.").

[10] *See* Julia G. Young, *Making America 1920 Again? Nativism and U.S. Immigration, Past and Present*, 5 J. ON MIGRATION & HUM. SEC. 217, 227 (2017). The U.S. is experiencing a "Second Great Wave" of immigration, and as a result, the country is also experiencing "another great wave of nativism." *Id.* "Immigrants' current share of the overall U.S. population—13.7 percent of the country's 327.2 million people—remains below the record-high 14.8 percent hit in 1890 but is a very significant increase over the record low 4.7 percent marked in 1970." Jeanne Batalova, Brittany Blizzard & Jessica Bolter, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Feb. 14, 2020), https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states [https://perma.cc/D76Z-SR4Z].

[11] President George W. Bush increased work raids, deployed more Border Patrol agents, and intensified enforcement measures. David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 529–530 (2006). The Obama administration deported more people than any other president in U.S. history, rushed Central American asylees through deportation proceedings rather than ensuring a fair process, and increased family detention as a deterrent measure. Am. Immigr. Council, *President Obama's Legacy on Immigration*, IMMIGR. IMPACT (Jan. 20, 2017), http://immigrationimpact.com/2017/01/20/president-obamas-legacy-immigration/#.Xfb0gOhKg2x [https://perma.cc/3EX5-MMTU].

U.S. immigration system, making it more difficult for immigrants, asylum-seekers, and refugees to enter the country.[12]

As the number of immigrants in detention rise, so do claims of abuses and mistreatment within the system. There is wide documentation of poor detention conditions, inadequate medical care, and overcrowding in government detention facilities.[13] Poor medical care remains the top complaint for immigrants in detention,[14] and U.S. Immigration and Customs Enforcement (ICE) has reported a steady number of immigrant deaths linked to inadequate medical care.[15]

Inadequate medical care and poor detention conditions are particularly troubling for pregnant immigrant women like E, and government reports show that the number of pregnant women in immigration detention increased under the Trump administration.[16] This was largely due to that

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[12] The Trump administration implemented a variety of harsh immigration policies including criminally prosecuting all individuals illegally crossing the border through a "zero-tolerance" policy that resulted in forced family separations, signing executive orders providing funding for the border wall, banning immigrants from particular countries from entering the U.S., forcing asylum-seekers to remain in Mexico while their asylum cases were pending, and ending the Temporary Protected Status for multiple countries and the Deferred Action for Childhood Arrivals (DACA) program. SARAH PIERCE, MIGRATION POL'Y INST., IMMIGRATION-RELATED POLICY CHANGES IN THE FIRST TWO YEARS OF THE TRUMP ADMINISTRATION 2–4 (2018), https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationChanges TrumpAdministration-Final.pdf [https://perma.cc/GB8D-L33R].

[13] *See, e.g.*, S. POVERTY L. CTR., *supra* note 8, at 9–16; HUM. RTS. WATCH, SYSTEMIC INDIFFERENCE: DANGEROUS & SUBSTANDARD MEDICAL CARE IN US IMMIGRATION DETENTION 2–4 (2017), https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention [https://perma.cc/L7ME-BJ5S]; AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 7 (2009), https://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf [https://perma.cc/R4Y3-24P5].

[14] *Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/detention-statistics/ [https://perma.cc/M2HV-SWP5] (last visited Dec. 16, 2019).

[15] *See Deaths at Adult Detention Centers*, AM. IMMIGR. LAWS. ASS'N, https://www.aila.org/infonet/deaths-at-adult-detention-centers [https://perma.cc/67T6-9GSE] (last updated Dec. 21, 2020). ICE has reported at least thirty-two deaths since the beginning of fiscal year 2018. *Death Detainee Reporting*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detainee-death-reporting [https://perma.cc/B3K3-JQBD] (last updated Jan. 7, 2021).

[16] U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-36, IMMIGRATION ENFORCEMENT: ARRESTS, DETENTIONS, AND REMOVALS, AND ISSUES RELATED TO SELECTED POPULATIONS 38 (2019), https://www.gao.gov/assets/710/703032.pdf [https://perma.cc/2NRP-PUK7]. The number of detained women in ICE detention increased from 2016 (1,380 total detentions of pregnant women) to 2018 (2,098 total detentions). *Id.* These numbers do not include the number of pregnant women held in CBP detention. That number also increased from year 2016 (1,322 detained in CBP custody) to 2018 (2,004 detained). *Id.* While the GAO report found that most pregnant women were detained for less than fifteen days, over 600 individual women were detained for longer than two weeks, and several were detained for more than

administration's reversal of an Obama-era policy that gave a presumption of release to pregnant women.[17] The Trump administration justified this reversal by claiming that it was holding people who should rightfully be detained, asserting that it would not create a "special class" of persons exempt from detention.[18]

Holding pregnant women in detention comes at a high cost. Not only do pregnant women experience emotional and mental stress themselves while in detention, but detention increases the risk of miscarriage and other harm to the fetus.[19] Because pregnant detainees have no alternative, detention facilities are constitutionally required to provide them with adequate medical care.[20] In order to address claims of inadequate medical care while in immigration detention, courts have incorporated the deliberate indifference standard from Eighth Amendment jurisprudence into the immigration detention context through the Fifth Amendment, legally treating immigrants in detention the same as pretrial detainees.[21] Though their constitutional claims are brought under a different amendment, immigrant detainees have to meet the same standard as prison inmates to allege inadequate medical care while incarcerated.

However, for many immigrants, this constitutional guarantee bestows a right with almost no remedy.[22] Immigrants must navigate a complex

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three months in 2018. *Id.* at 123. This is an increase from the ninety-two women who were detained for more than two weeks in 2016. *Id.*

[17] Maria Sacchetti, *Pregnant Immigration Detainees Spiked Fifty-two Percent under Trump Administration*, WASH. POST (Dec. 5, 2019), https://www.washingtonpost.com/immigration/pregnant-immigration-detainees-spiked-52-percent-under-trump-administration/2019/12/05/610ed714-16bb-11ea-8406-df3c54b3253e_story.html [https://perma.cc/SV5V-LZXM].

[18] Alan Gomez, *ICE to Hold More Pregnant Women in Immigration Detention*, USA TODAY (Mar. 29, 2018, 3:10 PM), https://www.usatoday.com/story/news/nation/2018/03/29/ice-hold-more-pregnant-women-immigration-detention/469907002/ [https://perma.cc/CL4Q-5WFV]. Deputy Executive Associate Director of ICE's enforcement and removal operations Phillip Miller explicitly stated that this policy was to ensure that there would be no special classes of persons not subject to the Trump administration's policies. *Id.*

[19] *See* NORA ELLMAN, CTR. FOR AM. PROGRESS, IMMIGRATION DETENTION IS DANGEROUS FOR WOMEN'S HEALTH AND RIGHTS 12–13 (2019), https://www.americanprogress.org/issues/women/reports/2019/10/21/475997/immigration-detention-dangerous-womens-health-rights/ [https://perma.cc/8TZP-33RW].

[20] *Cf.* Estelle v. Gamble, 429 U.S. 97, 100 (1976). The Supreme Court has held that incarcerated individuals are entitled to medical care since they must rely on prison authorities to meet their medical needs. The Court has extended these constitutional protections to pretrial detainees, which include immigrant detainees. *See* City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982).

[21] *See infra* Part II, pp. 19–26.

[22] *See infra* Part III, pp. 27–39.

constitutional tort landscape where the type of claim available primarily depends on which entity runs the facility.[23] This means that for pregnant women at certain facilities, even if they can prove constitutional harm, any remedy is still foreclosed.[24] As a result, immigrants face considerable, if not insurmountable challenges when seeking redress for the deprivation of their constitutionally assured medical care.

Pregnant immigrant detainees are entitled to due process constitutional rights; lack of access to appropriate medical care while in detention violates those rights and gives rise to a claim for relief. This Comment explores the legal standard that pregnant women must meet in order to make a constitutional claim, what remedies are available, and the significant challenges that arise in pursuing their claims. Part I gives an overview of the immigration system and its statutory framework as well as executive policies and current detention conditions for pregnant women. Part II reviews the deliberate indifference standard incorporated from prisoner litigation into the immigration context and describes how courts define the constitutional rights of pregnant immigrant detainees through the lens of pretrial detainees and pregnant prisoners. Relying on the case law discussed in Part II, Part III examines the claims available to pregnant women, including an injunction, a Section 1983 claim, a claim under the Federal Torts and Claims Act (FTCA), and a *Bivens* claim, as well as the substantial challenges pregnant women face in pursuing those remedies.

I. PREGNANT WOMEN IN THE IMMIGRATION DETENTION SYSTEM

To identify potential constitutional violations of pregnant immigrant women's rights, it is important to understand the immigration landscape more broadly, including its laws, policies, and the stories of immigrants' experiences while in detention. This Part will explore the basic framework of the immigration detention system, the similarities between detention and punitive imprisonment, current executive agency policies, detention conditions, and stories from pregnant women who have been in immigration detention.

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[23] *Id.*

[24] *See infra* Part III, pp. 27–39.

A. THE IMMIGRATION SYSTEM: A BROAD OVERVIEW

The immigration system in the United States is a civil rather than criminal system.[25] The Supreme Court has repeatedly held that control over immigration is a power solely executed by the political branches.[26] The political branches of government control immigration law through a wide array of statutes, regulations, and executive policies.[27] As a result, detainees interact with a variety of executive agencies that control different components of the immigration process.[28] While in detention, detainees have the most contact with the Department of Homeland Security (DHS).[29] DHS has two enforcement arms: Immigration and Customs Enforcement (ICE), which enforces laws within the interior of the United States, and Customs and Border Protection (CBP), which patrols the United States' international border, regulating and inspecting goods and persons at ports of entry.[30]

The main law that governs the immigration process is the Immigration and Nationality Act (INA), which gives officials broad authority to detain immigrants and lays out the requirements for mandatory detention.[31] Those subject to mandatory detention include immigrants who present themselves at a port of entry and immigrants who have entered the United States without inspection from government officials.[32] The INA provides for the expedited removal of individuals who present themselves at a port of entry without valid entry documents or are apprehended near the border but have not been

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[25] AM. BAR ASS'N, ABA CIVIL IMMIGRATION DETENTION STANDARDS 1 (2012) https://www.americanbar.org/content/dam/aba/administrative/immigration/detention_standards/aba_civil_immigration_detention_standards_11_13_12.pdf [https://perma.cc/2NXT-TYBM]; Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 119 (2018). This is why immigrants in detention are deemed as "detained" rather than "imprisoned" or "incarcerated." *Id.*

[26] *See* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (stating that the federal government's power to exclude foreigners was inherent in the sovereignty bestowed on it by the Constitution); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (explaining that the Constitution gives the political departments control over "international relations" including the "entrance of foreigners within its dominion").

[27] *See* HILLEL R. SMITH, CONGR. RSCH. SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW (2019), https://fas.org/sgp/crs/homesec/R45915.pdf [https://perma.cc/STA3-XLVP] (discussing the statutory, regulatory and executive agency framework that control immigration detention).

[28] *See generally id.* (detailing the statutory and regulatory framework governing detained immigrants including the various agencies involved).

[29] *See id.* at 1. Federal immigration law charges DHS with the responsibility to detain non-U.S. nationals. *Id.*

[30] *Id.* at 9 n.63, 23 n.153.

[31] *See id.* at 8.

[32] *See id.* at 22.

admitted by immigration authorities.[33] These individuals are temporarily detained by CBP; afterwards, they are transferred to ICE custody if they request asylum and pass a credible fear interview.[34] ICE also detains individuals who have been apprehended while in the country and placed into removal proceedings.[35] Immigrants are also detained by the United States Marshal Services (USMS), which is the enforcement arm of the Department of Justice (DOJ), when they are prosecuted for federal crimes.[36]

Though distinct from criminal punishment as a matter of law, the immigration detention system closely resembles criminal imprisonment in its physical representation and treatment of detainees.[37] Many of the ICE detention facilities that hold detainees are county and local jails or privately contracted detention facilities,[38] thus blurring the lines between the criminal and administrative state systems.[39] Though these facilities house "civil

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[33] *Id.* at 23.

[34] *Id.* at 24. According to U.S. law, immigrants should not be detained for more than 72 hours in CBP custody. 6 U.S.C. § 211(m)(3) ("Short-term detention means detention in a U.S. Customs and Border Protection processing center for 72 hours or less."); *see also* U.S. CUSTOMS & BORDER PROT., NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH 14 (2015) [hereinafter CBP NATIONAL STANDARDS], https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf [https://perma.cc/T8K6-JF89] ("Detainees should generally not be held for longer than 72 hours in CBP hold rooms or holding facilities. Every effort must be made to hold detainees for the least amount of time required for their processing, transfer, release, or repatriation as appropriate and as operationally feasible."). However, recent reports demonstrate that individuals have been held in CBP detention for a week in some facilities and up to a month in others. *See, e.g.*, Zolan Kanno-Youngs, *Squalid Conditions at Border Detention Centers, Government Report Finds*, N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/us/politics/border-center-migrant-detention.html [https://perma.cc/U644-VLF4].

[35] SMITH, *supra* note 27, at 9. This typically involves the issuance of an administrative warrant to arrest the individual. *Id.* at 9 n.64.

[36] *Defendants in Custody and Prisoner Management*, U.S. MARSHALS SERV., https://www.usmarshals.gov/prisoner/index.html [https://perma.cc/75G6-7E56] (last visited Dec. 14, 2019).

[37] Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 42 AM. CRIM. L. REV. 1441, 1442 (2010).

[38] ICE uses a variety of facilities for detention including facilities owned and operated by ICE, private detention facilities, local and county jails, and facilities used by the U.S. Marshals Service that also contract with ICE. DEPT. OF HOMELAND SEC. OFF. OF INSPECTOR GEN., OIG-19-18, ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS 3 (2019) [hereinafter OFF. OF INSPECTOR GEN., OIG-19-18], https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf [https://perma.cc/6GAB-BA9Q]. Of the two hundred facilities that ICE uses, one hundred are U.S. Marshal facilities, eighty-seven are local and county jails, and eight are operated by private companies. *Id.*

[39] Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL'Y REV. 429, 433 (2011). The

immigration detainees" rather than people who have been charged with or convicted of crimes, they essentially function as jails and prisons.[40] Like their criminal counterparts, immigration detainees are held in secure facilities in remote locations, usually far from their families, communities, and counsel.[41] Indeed, many of ICE's facilities were originally built as jails and prisons to house people accused or convicted of crimes.[42] Moreover, like correctional facilities, detention facilities operate with layouts, staffing plans, and population-management strategies that are designed to control their detained population.[43] Detainees cannot move freely, and many facilities lack windows.[44] Further, immigrants held in county and state jails are often housed with pretrial and sentenced inmates.[45]

Nevertheless, the criminal and immigration detention systems differ in important ways, some of which do not favor detained immigrants. Immigration proceedings are conducted exclusively in civil courts, and legally, at least, immigration detention does not constitute a form of punishment.[46] Unlike criminal cases, traditional rules of evidence do not govern immigration cases,[47] nor do criminal discovery rules.[48] If an immigrant or their attorney wants access to information the government has, they have to file a FOIA request with whichever agency possesses that

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immigration detention population converges with the overall boom in the prison population in the U.S. *Id.* at 434.

[40] Schriro, *supra* note 37.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 21 (2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf [https://perma.cc/2DBP-C2A6].

[45] *Id.*

[46] Schriro, *supra* note 37, at 1442*; see also* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for a crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend."); Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("[Detention] is not imprisonment in the legal sense.").

[47] Matter of Lam, 14 I. & N. Dec. 168, 172 (B.I.A. 1972) ("A deportation hearing is an administrative proceeding, civil in nature. Due process in such a proceeding ordinarily does not require adherence to judicial rules of evidence unless deviation would make the proceeding manifestly unfair.").

[48] Geoffrey Heeren, *Shatter the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569, 1571 (2014).

information.[49] Further, whereas prosecutors must turn over favorable evidence to the accused in criminal discovery, DHS attorneys can introduce evidence against immigrants in court without the immigrant ever having seen the evidence or having time to prepare their arguments against it.[50]

Additionally, immigrants do not receive the constitutional guarantees that form the basis of the criminal process, such as the right to counsel.[51] Rather, immigrants themselves bear the burden of proof to show why they should qualify for asylum or otherwise be allowed to stay in the country.[52] And unlike criminal defendants, who are released unless the prosecutor can show that they are a danger to the community or a flight risk, immigrant detainees bear the burden of proving that they warrant release.[53] If immigrants are fortunate enough to be released from detention on bond, they have to pay the full amount, which is statutorily set at a minimum of $1,500,[54] though many immigration judges demand sums far higher.[55] This differs

[49] What would have been "routine" FOIA requests in the past were increasingly denied under the Trump administration. *US: Suit Filed over Immigration FOIA Request*, HUM. RTS. WATCH (Jan. 10, 2019, 1:00PM), https://www.hrw.org/news/2019/01/10/us-suit-filed-over-immigration-foia-request [https://perma.cc/N9UV-E6HU].

[50] Heeren, *supra* note 48, at 1570, 1576.

[51] Only 37% of all immigrants have representation during their removal cases, and the numbers are even lower for immigrants in detention. INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016). Immigrants who secure counsel have better success "at every stage of the court process." *Id.*

[52] The constitutional right to the assistance of counsel stems from the Sixth Amendment. However, because immigration proceedings are civil rather than criminal, immigrants are not provided the same protections as those accused of crimes under the Sixth Amendment. Rather, constitutional guarantees in immigration proceedings flow from the Due Process Clause of the Fifth Amendment. *See infra* pp. 19–21 and note 119.

[53] 8 USC § 1226(c)(2) (providing that the Attorney General may release an immigrant on bond if the immigrant shows that he or she will "not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding"). The Attorney General enjoys wide discretion in this decision: there is no right to be released on bond. In re D- J-, 23 I. & N. Dec. 572, 575–76 (B.I.A. 2003). In the case of *In re D- J-*, the Attorney General determined that an immigrant's release was unwarranted due to concerns of mass migration and national security, in addition to concerns of flight risk. *Id.* at 578–79; *see also* César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1468–69 (2015).

[54] 8 U.S.C. 1226(a).

[55] *See* Daniel Bush, *Under Trump, Higher Immigration Bonds Mean Longer Family Separations*, PBS (June 28, 2018, 2:38 PM), https://www.pbs.org/newshour/politics/under-trump-higher-immigration-bonds-mean-longer-family-separations [https://perma.cc/U982-DT78].

from the criminal system, where defendants are generally only required to pay a percentage of their bond in order to secure release.[56]

These differences highlight how pregnant women, who are already a vulnerable population, are even more disadvantaged due to their immigration status in the U.S. detention system. Because of their vulnerability, government policies should ensure that pregnant immigrant detainees are properly protected. Instead, pregnant immigrants are often hardest hit by draconian detention policies and practices.

B. EXECUTIVE AGENCY POLICIES

The medical crisis immigrant detainees face is not a recent phenomenon; poor medical care has been a hallmark of detention facilities since DHS's creation following the September 11 attacks.[57] However, challenges arising from insufficient medical care have been further exacerbated by the growing numbers of immigrants in detention, which started under the Obama administration.[58] Indeed, more than 2.5 million people were deported during Obama's presidency.[59] Additionally, the number of asylum-seekers who passed their credible fear interviews yet were still kept in detention increased,[60] and the practice of family detention

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[56] *See* Shaila Dewan, *When Bail Is Out of Defendant's Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), https://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html [https://perma.cc/MBF9-LKKG].

[57] *See* Lisa Riordan Seville, Hannah Rappleye & Andrew W. Lehren, *Twenty-two Immigrants Died in ICE Detention Centers During the Past Two Years*, NBC NEWS (Jan. 6, 2019, 6:10 AM), https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781 [https://perma.cc/Y3N3-H6M8]. While immigrant deaths in ICE detention increased over the first two years of the Trump administration, "trouble with medical care in ICE detention began long before Trump's election." *Id.* The Obama administration sought to improve practices after a series of exposés in the early 2000s through heightened standards and oversight, but the Trump administration sought to roll back those policies in favor of expanding detention. *Id.*

[58] *See* HUM. RTS. WATCH, *supra* note 133.

[59] Serena Marshall, *Obama Has Deported More than Any Other President*, ABC NEWS (Aug. 29, 2016, 1:05 PM), https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661 [https://perma.cc/E46N-NEM5].

[60] The Obama Administration at first made it easier for immigrants who passed their credible fear interview to get paroled. *See Revised Parole for Arriving Aliens with Credible Fear Claims*, U.S. IMMIGR. & CUSTOMS ENF'T., https://www.ice.gov/factsheets/credible-fear [https://perma.cc/7JWQ-WRQG] (last updated Aug. 1, 2014). However, by 2014, ICE was detaining more than 84% of people with positive credible fear determinations. HUM. RTS. FIRST, LIFELINE ON LOCKDOWN: INCREASED U.S. DETENTION OF ASYLUM SEEKERS 12 (2016), https://www.humanrightsfirst.org/resource/lifeline-lockdown-increased-us-detention-asylum-seekers [https://perma.cc/QMT8-TZP5].

expanded under the Obama administration.[61] With these policy changes, a greater number of asylum-seekers and families were detained for longer periods of time, putting stress on the medical care system in detention facilities.[62]

The Trump administration took an even more hardline approach to immigration enforcement than prior administrations. Through executive order, President Trump declared undocumented immigrants a threat to national security and public safety[63] and prioritized increased detention.[64] He also explicitly sought to limit immigrants' ability to seek parole and bond after their apprehension due to perceived abuses of asylum applications and allegations of ineffective catch-and-release policies.[65] In accordance with these priorities, in 2018 the DOJ implemented a zero-tolerance policy under which the DOJ prosecuted *all* adults crossing the U.S. border without

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[61] *See Mother's Day in Jail: The Obama Administration's Detention of Women and Children Fleeing Violence*, HUM. RTS. FIRST (Apr. 24, 2015), https://www.humanrightsfirst.org/resource/mother-s-day-jail-obama-administration-s-detention-women-children-fleeing-violence [https://perma.cc/9TJL-Y84D]; Dora Schriro, *Weeping in the Playtime of Other: The Obama Administration's Failed Reform of ICE Family Detention*, 5 J. MIGRATION & HUM. SEC. 452, 455, 460 (2017). The family detention expansion coincided with the influx in immigrant families from El Salvador, Honduras, and Guatemala in 2014. *Id.* at 460.

[62] *See* ACLU, SHUTTING DOWN THE PROFITEERS: WHY AND HOW THE DEPARTMENT OF HOMELAND SECURITY SHOULD STOP USING PRIVATE PRISONS, 9–15 (2016), https://www.aclu.org/report/shutting-down-profiteers-why-and-how-department-homeland-security-should-stop-using-private [https://perma.cc/6DG5-DAUV].

[63] Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017). This executive order also ordered the construction of a wall on the U.S.'s southern border. A subsequent implementation memo stated that "the Department will no longer exempt classes or categories" of removable immigrants from potential enforcement. Memorandum from John Kelly, U.S. Dept. of Homeland Sec. Sec'y to Senior U.S. Dept. of Homeland Sec. Staff (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/48A4-4XQG].

[64] Exec. Order No. 13767, 82 Fed. Reg. 8793, 8794 (Jan. 25, 2017). This executive order also ordered the increase in detention facility construction and expansion.

[65] *Id.* Parole is awarded on a case-by-case basis for "urgent humanitarian reasons or significant public benefit" to individuals seeking admission to the United States. 8 U.S.C. § 1182(d)(5)(A).

authorization,[66] regardless of an individual's status as an asylum seeker.[67] This zero-tolerance policy was met with intense public backlash when the family separations that resulted from the prosecutions became widely publicized.[68] As a result of these policy changes under President Trump, ICE detained significantly more immigrants than in previous years.[69] Indeed, there was a dramatic surge in both immigration arrests and prosecutions due to the Trump administration's policies.[70]

Another policy that has had a devastating impact on pregnant immigrants took effect in December 2017. That year, in an effort to align its policies with President Trump's executive orders, ICE reversed an Obama-era policy of presumptive release for pregnant women facing detention and deportation.[71] Instead, pregnant detainees now have their cases judged on a

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[66] Jeff Sessions, U.S. Att'y Gen., Remarks Discussing the Immigration Enforcement Actions of the Trump Administration, (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions [https://perma.cc/C5T7-7KE9]; Press Release, Dept. of Just., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (April 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/F5XZ-ELVM]. This policy is what ultimately lead to the widely publicized family separations.

[67] WILLIAM A. KANDEL, CONG. RSCH. SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY 8 (Feb. 26, 2019), https://fas.org/sgp/crs/homesec/R45266.pdf [https://perma.cc/6WS3-DUXK].

[68] *See id.* at 2.

[69] *See* U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS 10 (2017), https://www.ice.gov/removal-statistics/2017 [https://perma.cc/EK3F-NAQT]. This report shows that in 2017, detentions increased by 42% compared with the same time period in 2016 as a result of ICE operations in the interior of the U.S. *Id.* The report attributes that increase to the implementation of policies as a result of President Trump's executive orders. *Id.* at 1.

[70] John Gramlich, *Far More Immigration Cases Are Prosecuted Criminally under Trump Administration*, PEW RSCH. CTR. (Sept. 27, 2019), https://www.pewresearch.org/fact-tank/2019/09/27/far-more-immigration-cases-are-being-prosecuted-criminally-under-trump-administration/ [https://perma.cc/H35Z-MEFX]. Federal criminal arrests increased by 87% in fiscal year 2018, which was higher than any other year in two decades. *Id.* Similarly, the number of individuals who the DOJ criminally prosecuted in 2018 for immigration offenses rose 66%, a two-decade high. *Id.* This surge was not due to an increase of border apprehensions but rather the administration's policy changes. *Id.*

[71] Memorandum from Thomas Homan, Exec. Dir., U.S. Immigr. and Customs Enf't to Field Offs. and ICE Health Serv. Corps, on Identification and Monitoring of Pregnant Detainees (Aug. 15, 2016), https://www.ice.gov/sites/default/files/documents/Document/2016/11032.2_IdentificationMonitoringPregnantDetainees.pdf [https://perma.cc/WKZ8-4N59]. This policy memo stated that pregnant women generally would not be detained by ICE. From the time of the policy change (Dec. 2017) to the public announcement of the change (Mar. 2018), more than 506 pregnant women had been detained by ICE. Leif Reigstad, *ICE to Stop Releasing Pregnant Women From Detention to Comply with Trump's Order*, TEX. MONTHLY

case-by-case basis "with their pregnancy as a 'special factor' to be considered as part of their entire case,"[72] despite a statement from prominent doctors' associations that detention is harmful both to mothers and their fetuses.[73]

C. STORIES ON THE GROUND

All of these policies combined have led to record high numbers of individuals held in detention—an average of 45,980 people a day in FY18.[74] Regardless of how many persons they house, detention facilities must adhere to relevant agency standards in providing appropriate healthcare to detainees.[75] For example, ICE's *Performance-Based National Detention Standards 2011* require that pregnant detainees be given close medical supervision, including appropriate prenatal care, testing, counseling, and postpartum care.[76] They also prohibit the use of restraints absent extraordinary circumstances.[77] However, ICE's understaffing of medical

(Mar. 30, 2018), https://www.texasmonthly.com/news/ice-stop-releasing-pregnant-women-detention-comply-trumps-order/ [https://perma.cc/6UFM-AE3K].

[72] Gomez, *supra* note 188. According to ICE, detainees in their third trimester of pregnancy will be released absent "extraordinary circumstances." *FAQ's: Identification and Monitoring of Pregnant Detainees,* U.S. IMMIGR. AND CUSTOMS ENF'T (Apr. 29, 2018), https://www.ice.gov/faqs-identification-and-monitoring-pregnant-detainees [https://perma.cc/HB7W-DR68]. All other pregnant detainees are subject to a case-by-case analysis which considers whether the detainee is a flight risk or a danger to the community among other factors. *Id.*

[73] The American Academy of Pediatrics, the American College of Obstetricians and Gynecologists and the American Academy of Family Physicians all sent a joint letter to DHS urging ICE to reverse the decision to presumptively detain pregnant women. Joint Letter to Deputy Director Homan Regarding ICE Procedures for Pregnant Women (Mar. 30, 2018), https://www.aafp.org/dam/AAFP/documents/advocacy/prevention/women/LT-DeputyDirectorHoman-033018.PDF [https://perma.cc/9WER-YX43]. They expressed concern about the lack of adherence to medical standards across multiple detention sites and the documented poor access to quality medical care in detention. *Id.*

[74] Emily Kassie, *How Trump Inherited His Expanding Detention System*, MARSHALL PROJECT (Feb. 12, 2019), https://www.themarshallproject.org/2019/02/12/how-trump-inherited-his-expanding-detention-system [https://perma.cc/8J3G-9BGQ].

[75] Detention facilities with ICE contracts must comply with one of three sets of national detention standards, depending on the specifics of the contracts: National Detention Standards, 2008 Performance-Based National Detention Standards (PBNDS) or 2011 PBNDS. OFF. OF INSPECTOR GEN., OIG-19-18, *supra* note 38, at 5. For CBP standards, see CBP NATIONAL STANDARDS, *supra* note 34. Detention facility standards are generally derived from prison standards. *See* Schriro, *supra* note 37, at 1442, 1445.

[76] U.S. IMMIGR. & CUSTOMS ENF'T, PERFORMANCE-BASED DETENTION STANDARDS 2011 322, 324 (revised 2016).

[77] *Id.* at 322. CBP standards similarly prohibit restraints barring exigent circumstances. CBP NATIONAL STANDARDS, *supra* note 34, at 23. CBP standards categorize pregnant detainees as an "at-risk population" that may require additional care and oversight. The

personnel[78] and lack of contract enforcement mechanisms have led to insufficient implementation of these standards.[79]

Despite agency standards and DHS's assertions that pregnant women are given "better care" than they would receive outside of detention,[80] multiple reports have documented poor medical care resulting in mistreatment and miscarriages.[81] Reports not only detail a lack of medical care for pregnant women, but also show overcrowding and cold temperatures in CBP facilities for women and children,[82] deficient lactation services for nursing mothers, refusal of routine gynecological care and mammograms, and lack of sanitary pads in ICE detention.[83] ICE's medical records show that

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standards dictate that pregnant detainees be treated with "dignity, respect and special concern for their particular vulnerability." *Id.* at 19.

[78] OFF. OF INSPECTOR GEN., OIG-18-32, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES 3–4, 8 (2017).

[79] OFF. OF INSPECTOR GEN., OIG-19-18, *supra* note 38, at 7.

[80] *Hearing on the FY2019 Budget Request for the U.S. Dept. of Homeland Security Before the Subcomm. on Homeland Sec. of the S. Comm. on Appropriations*, 115th Cong. (May 8, 2018) [hereinafter *Hearing on the FY2019 Budget*] (ProQuest Congressional), https://www.appropriations.senate.gov/hearings/review-of-the-fy2019-budget-request-for-the-us-dept-of-homeland-security at 54:15 to 58:04 [https://perma.cc/4HWY-V5SG]. Former Secretary Nielsen stated, "We do not exempt classes . . . [pregnant detainees] are given adequate care in the facilities but it is much better care than living in the shadows." *Id.*

[81] *E.g.,* HUM. RTS. WATCH, DETAINED AND DISMISSED: WOMEN'S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION 24–42 (Mar. 17, 2009) [hereinafter HUMAN RIGHTS WATCH, DETAINED AND DISMISSED], https://www.hrw.org/report/2009/03/17/detained-and-dismissed/womens-struggles-obtain-health-care-united-states [https://perma.cc/88WM-92ZM].

[82] HUM. RTS. WATCH, IN THE FREEZER: ABUSIVE CONDITIONS FOR WOMEN AND CHILDREN IN U.S. IMMIGRATION HOLDING CELLS 2, 5, 7, 19 (Feb. 28, 2018), https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells [https://perma.cc/PRQ7-TE86].

[83] HUM. RTS. WATCH, DETAINED AND DISMISSED, *supra* note 811, at 3. Although not the primary focus of this Comment, the Trump administration also implemented new policies known as the Migrant Protection Protocols (MPP or the "Remain in Mexico" policy) that detrimentally affected pregnant women and other vulnerable populations by forcing them to stay in Mexico, where they often lack adequate food, shelter, and access to healthcare, while their asylum case is pending in immigration court. Quinn Owen, *New Details of Dire Conditions for Pregnant Women under Trump's Remain in Mexico Policy*, ABC NEWS (Sept. 30, 2019, 12:15 PM), https://abcnews.go.com/Politics/details-dire-conditions-pregnant-women-trumps-remain-mexico/story?id=65910150 [https://perma.cc/9TK6-ZVGD]. As a result of the Trump administration's policies, the ACLU lodged a complaint with DHS on behalf of pregnant women who were returned to Mexico under the MPP. Letter from ACLU Border Rts. Ctr. & ACLU of Tex., to Dept. of Homeland Sec. and Customs and Border Protection (Sept. 26, 2019), https://www.aclutx.org/sites/default/files/aclu_oig_complaint_preg_mpp.pdf [https://perma.cc/WZF4-NDME]. The ACLU also filed a lawsuit regarding the legality of the MPP, and the Supreme Court granted certiorari for the case in October 2020. Complaint, Innovation Law

from 2016 to 2018, twenty-eight women miscarried while in ICE custody.[84] Other reports tell of women being shackled around their stomachs while being transported, denied medical care when in need,[85] and experiencing serious delays during health emergencies.[86]

As a result, the ACLU and other advocacy groups filed a complaint with DHS on behalf of women detained by ICE.[87] The women in the complaint claim they were ignored or denied medical care while they were clearly miscarrying and allege that they suffered psychological and emotional damage while in detention which harmed the health of their pregnancies.[88] The experiences of four of these women are summarized below.

Teresa[89] was thirty-one years old when she was detained after arriving at the San Ysidro Port of Entry.[90] She spent twenty-four hours in a holding cell under CBP custody and then was transferred to Otay Mesa Detention Center (OMDC).[91] She was four months pregnant when she arrived.[92] Teresa notified officials at her holding cell that she was pregnant and bleeding and requested medical assistance but was ignored.[93] After her transfer to OMDC, she talked with medical personnel, but her attorney's requests that she be

Lab v. Nielsen, No. 3:19-cv-00807 (N.D. Cal. Feb. 14, 2019), *cert. granted sub nom.* Wolf v. Innovation Law Lab, 141 S. Ct. 617 (2020).

[84] Daniel Gonzalez, *Twenty-eight Women Have Miscarried in ICE Custody Over the Past Two Years*, ARIZ. REPUBLIC (Feb. 27, 2019), https://www.azcentral.com/story/news/politics/immigration/2019/02/27/28-women-may-have-miscarried-ice-custody-over-past-2-years/2996486002/ [https://perma.cc/C9HX-SA4G]. Ten of the deaths occurred in fiscal year 2017 and eighteen in fiscal year 2018. *Id.; see also* Scott Bixby, *Immigrant Miscarriages in ICE Detention Doubled under Trump*, DAILY BEAST (Mar. 2, 2019), https://www.thedailybeast.com/immigrant-miscarriages-in-ice-detention-have-nearly-doubled-under-trump [https://perma.cc/Q4FB-DX2P]. This article attributes the rise in number of miscarriages at least partially to Trump policy of default detention for pregnant women. Bixby, *supra.* The increase does not include data from CBP. *Id.*

[85] O'Connor & Prakash, *supra* note 1.

[86] Joint Letter to Dept. of Homeland Sec., 5 (last updated Nov. 13, 2017) [hereinafter ACLU Letter], https://www.aclu.org/sites/default/files/field_document/revisedcomplaintcrcl_oigpregnantwomenicecustody11.13.17.pdf [https://perma.cc/Z9ES-N2XX].

[87] *Id.* at 1. This letter dates from September 2017, three months prior to ICE's official policy change made in December 2017 (and announced in March 2018). However, advocates noticed a rise in the detention of pregnant women before the policy change, starting in the summer of 2017. O'Connor & Prakash, *supra* note 1.

[88] ACLU Letter, *supra* note 86, at 5.

[89] All of the names in the ACLU letter are pseudonyms. *Id.* at 5.

[90] *Id.* at 8.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 8–9.

taken to the hospital were denied.[94] OMDC medical staff confirmed her miscarriage several days later.[95] After her miscarriage, Teresa continued to experience medical issues including heavy bleeding, but her attorney's requests that she be released on humanitarian parole were denied.[96]

Monica was a thirty-one-year-old Mexican woman who was four weeks pregnant when she was detained by ICE in the United States.[97] After arriving at the detention center, she had a doctor's appointment where she was given prenatal pills and a prescription for her hyperthyroidism.[98] Monica began bleeding after three weeks in detention and had to wait over an hour for a physician to see her.[99] Despite her bleeding, detention personnel did not immediately respond to her requests for medical detention.[100] She was eventually taken to a hospital where it was confirmed that she had miscarried.[101] Monica also experienced anxiety and depression during her stay in detention, which lasted for over two months.[102]

Rosa was a twenty-three-year-old El Salvadoran woman who was detained after she sought asylum at a port of entry when she was twelve weeks pregnant.[103] Over the course of her detention, Rosa was transferred between facilities at least six times.[104] One trip lasted twenty-three hours[105] and resulted in her hospitalization due to exhaustion and dehydration.[106] Rosa also experienced nausea, vomiting, weakness, headaches, and abdominal pain and vomited blood during her twelve weeks in detention.[107] She did not receive sufficient prenatal vitamins or adequate medical attention.[108]

Esther was sixteen and two months pregnant when she sought asylum at the San Ysidro Port of Entry.[109] She was only given two meals a day almost

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[94] *Id.* at 9.
[95] *Id.*
[96] *Id*.
[97] *Id.* at 10.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 11.
[104] *Id*. at 12.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] Cady Voge, *"I Was Scared I'd Get Sick": The Pregnant Women Detained by the U.S.*, GUARDIAN (July 31, 2019), https://www.theguardian.com/us-news/2019/jul/31/us-immigration-detention-centers-pregnant-migrant-women [https://perma.cc/U6MT-NACC].

ten hours apart.[110] As a result of not receiving adequate nutrition or rest, she lost almost twenty pounds.[111] Esther remained in detention for two months before she was released.[112]

These are only a few of many stories documenting inadequate prenatal and post-partum care, delay or denial of urgent medical services, and immense psychological and emotional pain. Inadequate medical treatment in detention exacerbates what is already a risky position for many pregnant women.[113] Pregnant women who journey to the U.S. border often arrive with high-risk pregnancies and may have experienced emotional trauma or sexual assault on their journeys, further putting their pregnancies at risk.[114] Substandard medical care in detention puts this already vulnerable population in even more danger.[115]

Immigration agencies have not acknowledged—let alone addressed—the risks that their facilities pose to pregnant women. Instead, DHS has responded to allegations of mistreatment and abuse with claims that pregnant women receive more than adequate medical attention while in detention, even better than they receive while "living in the shadows."[116] Similarly, when reporters asked ICE officials about problems for pregnant women in their facilities, their response was that they were "unaware of concerns regarding medical care of pregnant detainees."[117] Regardless of the agency's refusal to acknowledge it, this type of mistreatment could give rise to a constitutional due process violation since immigration detention facilities are constitutionally required to provide adequate medical care to detainees.

II. CONSTITUTIONAL FRAMEWORK: DELIBERATE INDIFFERENCE AS APPLIED TO PRETRIAL AND IMMIGRANT DETAINEES AND PREGNANT INMATES

The constitutional right to adequate medical care for pregnant immigrant detainees is based in two lines of cases. The first are cases where immigrant or pretrial criminal detainees have successfully alleged due process violations as a result of deliberate indifference. The second are cases holding that pregnant inmates' Eighth Amendment rights were violated due to deliberate indifference. Though brought under different constitutional

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110 *Id.*
111 *Id.*
112 *Id.*
113 *See* ELLMAN, *supra* note 1919, at 12–13.
114 O'Connor & Prakash, *supra* note 1.
115 *See* ELLMAN, *supra* note 19, at 12–13.
116 *Hearing on the FY2019 Budget*, *supra* note 800.
117 Bixby, *supra* note 84.

amendments, both lines of cases use the same deliberate indifference standard. This Part will examine the legal framework under which pregnant women can allege a constitutional violation due to the lack of medical care in immigration detention. It will examine the deliberate indifference standard from Eighth Amendment jurisprudence as it applies to the medical care of criminal inmates, and it will consider how courts apply this standard to pretrial and immigrant detainees through substantive due process. It will also discuss specific examples where courts found that care provided to pregnant pretrial detainees and inmates constituted deliberate indifference.

A. THE DELIBERATE INDIFFERENCE STANDARD

Immigration is a civil matter;[118] immigrant detainees cannot be subjected to punishment without due process.[119] The Supreme Court has extended some constitutional protections to noncitizens, starting with *Yick Wo v. Hopkins*,[120] where the Court stated that "the Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . [its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality . . . ."[121] The Court again addressed the issue about ten years later in *Wong Wing v. United States*, stating, "it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments, and that even [non-citizens] shall not . . . be deprived of life, liberty or property without due process of law."[122] Therefore, due process protections are afforded to anyone on U.S. soil, whether their presence is "lawful, unlawful, temporary, or permanent."[123]

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[118] *See supra* p. 7 and note 25.

[119] *See* Wong Wing v. United States, 163 U.S. 228, 235 (1896). The Court concluded that non-citizens could be detained as part of the removal process, but that detention was "not imprisonment in a legal sense." *Id.* The case was brought on behalf of a Chinese immigrant who the U.S. government sought to subject to hard labor and later expulsion from the country pursuant to the 1892 Chinese Exclusion Act. The court ultimately held punishing Wong Wing in this way was a violation of the Fifth and Sixth Amendments in that it deprived him of liberty without due process or presentment and indictment by a grand jury and trial. *Id.* at 238.

[120] 118 U.S. 356 (1886).

[121] *Id.* at 369.

[122] *Wong Wing*, 163 U.S. at 238. Ironically, this case extended the protections of the Fifth Amendment to non-citizens on the same day that the *Plessy v. Ferguson* decision denied Fourteenth Amendment protections to Black Americans. *See* Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

[123] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

While noncitizens enjoy a level of constitutional protections, the Supreme Court's more recent jurisprudence has primarily addressed challenges regarding the length of immigration detention rather than its conditions.[124] Consequently, challenges to detention conditions have been primarily decided by circuit and trial courts.[125] Courts that have addressed immigration detention conditions have applied the standard for pretrial detention as laid out in *Bell v. Wolfish*.[126] *Bell* held that pretrial detention conditions violate due process rights if the conditions amount to punishment.[127] In order to meet *Bell's* threshold, a detainee must show that officials intended to punish the detainee or that the conditions of detention are arbitrary or purposeless and thus not reasonably related to a legitimate government objective.[128] Courts have employed the "punishment" standard when looking at environmental conditions of detention facilities.[129]

However, when claims of inadequate medical care surface, courts analyze such claims according to the "deliberate indifference" standard arising from Eighth Amendment jurisprudence. In *Estelle v. Gamble*,[130] the Supreme Court extended the Eighth Amendment's prohibition against the infliction of "cruel and unusual punishments"[131] to the provision of medical care to those "whom [the government] is punishing by incarceration."[132] The Court reasoned that lack of medical care for incarcerated inmates would amount to "physical torture or lingering death" or "pain and suffering which no one suggests would serve any penological purpose."[133] Therefore, the Court held that "deliberate indifference to serious medical needs" resulted in

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[124] *See* Anshu Budhrani, Comment, *Regardless of My Status, I Am a Human Being: Immigrant Detainees and Recourse to the Alien Tort Statute*, 14 U. PA. J. CONST. L. 781, 793 (2012).

[125] *Id.*

[126] 441 U.S. 520 (1979).

[127] *Id.* at 535. Conditions that rose to the level of punishment infringed on due process rights since pretrial detainees are not to be punished prior to adjudication. *Id.*

[128] *Id.* at 538–39.

[129] *See, e.g.*, Doe v. Kelly, 878 F.3d 710, 720 (9th Cir. 2017) (stating the "punishment" standard from *Bell v. Wolfish* was the proper standard to apply when considering conditions of immigration detention); Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000) ("We consider a person detained for deportation to be the equivalent of a pretrial detainee; a pretrial detainee's constitutional claims are considered under the due process clause instead of the Eighth Amendment.").

[130] Estelle v. Gamble, 429 U.S. 97 (1976).

[131] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII.

[132] *Estelle*, 429 U.S. at 103.

[133] *Id.* at 103 (quoting *In re* Kemmler, 136 U.S. 436, 447 (1890)) (internal quotations omitted).

the cruel and unusual punishment forbidden by the Eighth Amendment.[134] Deliberate indifference can be manifested by the prison doctor's response to the inmate's needs or by prison guards who intentionally deny or delay access to medical care or interfere with prescribed treatment.[135] However, "inadvertent failure to provide adequate medical care" does not result in a cognizable Eighth Amendment claim.[136] The Court thus barred claims that medical staffs' negligence or medical malpractice are sources of punishment.[137]

The standard for deliberate indifference was further fleshed out in *Farmer v. Brennan*,[138] where the Court laid out the requisite mental state for what would constitute "deliberate" conduct on the part of prison officials.[139] The Court concluded that deliberate indifference was a reckless disregard for a substantial risk of serious harm to a prisoner.[140] The official must both "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[141] Thus, deliberate indifference constitutes a two-part test: 1) there must be a substantial risk of serious harm[142] or a serious medical need;[143] and 2) there must be a "sufficiently culpable state of mind."[144] Generally, deliberate indifference is "a very high standard" for plaintiffs to meet since they must allege that officials possessed a consciously reckless state of mind.[145]

The Supreme Court has determined that pretrial detainees are at least entitled to the same due process protections as prisoners.[146] These protections

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[134] *Id.* at 104.

[135] *Id.*

[136] *Id.* at 105.

[137] *Id.* at 105–06.

[138] 511 U.S. 825 (1994).

[139] *Id.* at 834–837.

[140] *Id.* at 836.

[141] *Id.* at 837.

[142] *Id.* at 834.

[143] *See* Estelle v. Gamble, 429 U.S. 97, 105 (1976).

[144] *Farmer*, 511 U.S. at 834.

[145] Newbrough v. Piedmont Reg'l Jail Auth., 822 F. Supp. 2d 558, 576 (E.D. Va. 2011) (quoting Young v. City of Mount Ranier, 238 F.3d 567, 575 (4th Cir. 2001)) (quotations omitted) ("Deliberate indifference is a 'very high standard—a showing of mere negligence will not meet it.'"). See *infra* Part III for discussion of the kinds of officials subject to suit and the different standards that immigrants have to meet in order to hold officials liable for their torts.

[146] City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) ("[T]he due process rights of a person in [defendant's] situation are at least as great as the Eighth Amendment protections available to a convicted prisoner."); Bell v. Wolfish, 441 U.S. 520, 545 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those

include a right to be free from the deliberate indifference of detention officials to their medical needs.[147] Instead of analyzing alleged violations under the Eighth Amendment, however, courts examine claims of deliberate indifference in detention under substantive due process through either the Fifth or Fourteenth Amendments.[148] Most courts apply the standard for pretrial detainees to immigrant detainees.[149] Courts accomplish this by either analogizing the circumstances of prison inmates to those of immigration detainees[150] or explaining how immigrant detainees are like pretrial detainees and are therefore entitled to the same protections extended by the Supreme Court.[151]

B. APPLICATION OF THE DELIBERATE INDIFFERENCE STANDARD

This section gives an overview of cases where courts have applied the deliberate indifference standard to different populations held in detention or in prison, starting with immigrant detainees. These cases demonstrate how courts apply the deliberate indifference standard and establish a baseline of care while in detention that would also apply to pregnant immigrant detainees.

1. Deliberate Indifference and Immigrant Detainees

In a case involving HIV positive Haitian detainees held in Guantanamo, the District Court for the Eastern District of New York found detention

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constitutional rights that we have held are enjoyed by convicted prisoners."); *see* Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.").

147 *See City of Revere*, 463 U.S. at 244.

148 The Second Circuit has stated the deliberate indifference analyses under the Fifth Amendment and the Fourteenth Amendments are the same. Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000). Depending on the parties and factual allegations, claimants bring their suits under one amendment or the other. For the Fifth Amendment as the source of the due process claim, see Adekoya v. Holder, 751 F. Supp. 2d 688, 695 (S.D.N.Y. 2010). For the Fourteenth Amendment, see Charles v. Orange Cnty., 925 F.3d 73, 82 (2d Cir. 2019); Boswell v. Cnty. of Sherburne, 849 F.2d 1117, 1121 (8th Cir. 1988); *Newbrough*, 822 F. Supp. 2d at 574. The Seventh Circuit cited both amendments in Belbachir v. Cnty. of McHenry, 726 F.3d 975, 979 (7th Cir. 2013).

149 *See, e.g.*, *Charles,* 925 F.3d at 82.

150 *See Adekoya*, 751 F. Supp. 2d at 694, n.4 (stating that because Adekoya was in civil immigration detention rather than criminal detention, his deliberate indifference claims should be analyzed under the Fifth Amendment's Due Process Clause rather than the Eighth Amendment's "cruel and unusual punishment" clause) (citing *Cuoco*, 222 F.3d at 106).

151 *See Belbachir*, 726 F.3d at 980. The Seventh Circuit posited that an immigrant detainee's situation might resemble that of an individual who was involuntarily committed, a pretrial detainee who fails to make bail, or a prison inmate. *Id.* at 979–80.

officials acted with deliberate indifference because officials were aware of the medical needs of the immigrant detainees but chose not to address those needs.[152] The court determined that the government knew about the detainees' low T-cell count as a result of their AIDS diagnoses by U.S. military doctors at Guantanamo.[153] The military doctors requested the detainees' prompt evacuation from Guantanamo because Guantanamo lacked facilities and specialists to adequately treat the detainees.[154] Despite its knowledge, the Immigration and Naturalization Service[155] consistently failed to act on the military doctors' recommendations that the detainees be evacuated and repeatedly ignored the advice given by military doctors.[156] This constituted deliberate indifference to the Haitian immigrants' medical needs in violation of their due process rights, and the court ordered the detainees' immediate release from detention.[157]

Courts also have found deliberate indifference where medical staff were willfully ignorant of the serious nature of a detained immigrant's illness. In the Fourth Circuit, the Eastern District Court of Virginia held that the estate of a deceased immigrant could bring a wrongful death suit against certain officials for deliberate indifference to the deceased's medical care while in detention.[158] The detainee died of a heart infection following several weeks of intense pain and requests for medical attention.[159] Detention officials ignored his complaints and requests, refused to administer prescribed pain medication, and failed to follow up on prescribed courses of treatment.[160] Moreover, officials could not escape liability by claiming ignorance of the

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[152] Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1038, 1044 (E.D.N.Y. 1993). The Haitian detainees were refugees fleeing political upheaval in Haiti and had been transported to Guantanamo after trying to land a boat in the U.S. *Id.* at 1034–35.

[153] *Id.* at 1044.

[154] *Id.*

[155] The INS was an agency under the supervision of the DOJ that ceased to exist in 2003. USCIS HIST. OFF. & LIBR., OVERVIEW OF INS HISTORY 8, 11 (2012), https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf [perma.cc/4YAB-8LRB]. Its duties were split up between U.S. Citizenship and Immigration Services (USCIS), ICE and CBP following a major government reorganization after the September 11, 2001 terrorist attacks. *Id*. at 11.

[156] *Haitian Ctrs*., 823 F. Supp. at 1044.

[157] *Id.* at 1050.

[158] Newbrough v. Piedmont Reg'l Jail Auth., 822 F. Supp. 2d 558, 577–80 (E.D. Va. 2011). The court dismissed the claims against certain defendants who either acted reasonably or only negligently. *Id.* The court also allowed for claims of municipal liability to go forward. *Id.* at 582–83.

[159] *Id.* at 565–68.

[160] *Id.* at 565–68, 577–578, 580.

underlying medical concern.[161] The court found that refusing to verify "'underlying facts . . . strongly suspected to be true,' which if verified would have compelled [the] realiz[ation] that the claimant needed immediate medical attention" signified willful ignorance on the part of officials.[162] As a result, the plaintiff had sufficiently demonstrated the deliberate indifference of various officials required to survive a motion to dismiss.[163]

At least one court has found that an unjustified delay in a recommended and authorized surgery can constitute deliberate indifference. In 2009, the District Court for the Middle District of Florida granted a Haitian immigrant a preliminary injunction against detention officials due to their deliberate indifference.[164] The plaintiff had a known serious medical condition that caused persistent vaginal bleeding.[165] Though doctors recommended and authorized surgery for her condition, she never received the recommended procedures.[166] The court found this delay to be unjustified and harmful to the plaintiff's health.[167] That delay constituted deliberate indifference, and the court issued a preliminary injunction requiring the defendants to provide the plaintiff with the appropriate treatment.[168]

2. Deliberate Indifference and Pregnant Pretrial Detainees and Prisoners

In addition to the examples of deliberate indifference in medical care provided to immigrant detainees, there are several reported cases that establish a baseline of appropriate care for pregnant women both in pretrial detention and in prison. One particularly distressing example is that of *Boswell v. Sherburne* from the Eighth Circuit.[169] Boswell was arrested for driving under the influence of alcohol and was six months pregnant when she was detained, where she informed jail staff that she had a high-risk pregnancy.[170] When she started bleeding and passing blood clots later in the evening after her arrest, however, jail staff ignored Boswell's repeated pleas for help and the signs of the growing emergency.[171] Boswell was not taken

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[161] *Id.* at 580.

[162] *Id.*

[163] *Id.* at 577–580. The court also found sufficient the allegations of a policy of indifference by the superintendent of the county jail.

[164] Rosemarie M. v. Morton, 671 F. Supp. 2d 1311, 1313–14 (M.D. Fla. 2009).

[165] *Id.* at 1313.

[166] *Id.*

[167] *Id.* at 1313–14.

[168] *Id.*

[169] Boswell v. Cnty. of Sherburne, 849 F.2d 1117 (8th Cir. 1988).

[170] *Id.* at 1119.

[171] *Id.* at 1190–1120.

to the hospital until the following morning.[172] There, she gave birth to a baby boy who died thirty-four minutes after he was born.[173] The court found that Boswell had sufficiently alleged that the jail officials acted with deliberate indifference to her pressing medical need, defeating the jail officials' motion for summary judgment.[174]

The case of *Coleman v. Rahija* involved a pregnant inmate, Gloria Coleman, who had a history of troubled pregnancies. [175] On the day Coleman went into labor, the nurse on duty largely dismissed her complaints of pain and bleeding, resulting in Coleman's delayed transport to a hospital.[176] The court found that the nurse had exhibited deliberate indifference towards the inmate because the nurse had knowledge of the inmate's medical history and had noted that the inmate might be experiencing early labor.[177] This, combined with Coleman's clear manifestations of premature labor, showed that "a trier of fact could have found that [the nurse] had actual knowledge of the risk of pre-term labor."[178] The court subsequently found that Coleman's delayed transportation demonstrated deliberate indifference on behalf of the nurse.[179]

Another case involving a pregnant inmate where the court found deliberate indifference is *Doe v. Gustavus*.[180] Jane Doe refused to have her labor induced and was placed in "segregated confinement."[181] When Doe complained of labor symptoms, the nurse on duty determined that they were false contractions.[182] A little less than twenty-four hours later, Doe gave birth to her baby on her own in her cell.[183] She was accused of "push[ing] that baby out on purpose, just to get out of segregation."[184] The judge determined that there was evidence from which a jury could reasonably infer that several

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[172] *Id.* at 1120.

[173] *Id.*

[174] *Id.* at 1123.

[175] 114 F.3d 778, 781 (8th Cir. 1997).

[176] *Id.* at 782–83.

[177] *Id.* at 786.

[178] *Id.*

[179] *Id.*

[180] 294 F. Supp. 2d 1003 (E.D. Wis. 2003).

[181] *Id.* at 1006. Doe was apparently placed in segregated confinement not as a punishment for refusing induction, but over concerns that her knowledge of the day and time of a later off-site appointment could pose a security threat to the prison. *Id.*

[182] *Id.*

[183] *Id.* at 1007.

[184] *Id.*

defendants had ignored the inmate's condition and make a finding of deliberate indifference.[185]

These cases involving immigrant detainees and pregnant women demonstrate two things. First, courts are willing to enforce the rights of immigrants in detention where their constitutional rights have been violated. This includes applying the deliberate indifference standard drawn from prisoner and pretrial detainee cases to immigrant detainees in the context of their medical care. Second, these cases show a path forward for pregnant detainees in particular. Using the deliberate indifference standard, pregnant immigrant detainees whose medical needs have been ignored and left untreated can seek a remedy for their constitutional injuries. But, as explained further below, there are numerous challenges to pursuing this type of claim.

III. CONSTRUCTING RELIEF FOR PREGNANT IMMIGRANT DETAINEES: POSSIBILITIES AND CHALLENGES PRESENTED BY CONSTITUTIONAL TORT CLAIMS

Pregnant detainees who have experienced constitutional violations while detained may choose to pursue a remedy for their constitutional deprivation. As detainees, pregnant immigrants have a constitutional right to be free from the deliberate indifference of detention officials, and when pregnant immigrants miscarry in detention or suffer as a result of other medically deficient circumstances, there are several remedies available for them to redress their injuries. However, the judicial branch has increasingly restricted the availability of constitutional remedies, and obtaining relief will, for most immigrant women, be an almost insurmountable challenge.

Though all of the cases cited in Part II alleged constitutional violations based on the deliberate indifference of detention and prison officials, the plaintiffs sought a variety of remedies. Many requested injunctive and declaratory relief, but this is appropriate only if the plaintiff is still in detention and likely to experience a future violation to their constitutional rights.[186] Other plaintiffs sought compensatory relief under 42 U.S.C.

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[185] *Id.* at 1010.

[186] *See, e.g.*, Rosemarie M. v. Morton, 671 F. Supp. 2d 1311, 1312 (M.D. Fla. 2009); Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1044 (E.D.N.Y. 1993). As a recent example, in 2019, the Southern Poverty Law Center and Al Otro Lado filed a lawsuit on behalf of a class of detainees in ICE custody. The class action asked for declaratory and injunctive relief for inadequate medical care, segregation in detention, and denial of disability accommodations. Complaint, Fraihat v. U.S. Immigr. & Customs Enf't, No. 19-cv-01546 (C.D. Cal. Aug. 19, 2019). The district court granted an emergency preliminary injunction on April 20, 2020 due to Covid-19. Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709 (C.D. Cal. 2020) (order granting preliminary injunction). The case is currently in discovery pending an appeal of the preliminary injunction to the Ninth Circuit. *See* Plaintiff's

§ 1983,[187] which imposes tort liability on local and state employees for the violation of federal rights.[188] Where there has been a tortious violation by federal officers rather than state or local officials, claims are appropriately brought under the *Bivens*[189] doctrine rather than Section 1983. Finally, plaintiffs could also seek relief from the federal government under the Federal Torts and Claims Act (FTCA).[190]

A. STOPPING THE HARM: INJUNCTIONS

The first plausible remedy is a suit for injunctive and declaratory relief. An injunction forces the enjoined party to start or stop doing a particular action.[191] A declaratory judgment declares the rights of the parties and can have injunction-like effects following the declaration.[192] Injunctions are granted as a matter of course for immigrants in many circumstances, including cases where immigrants have sought to improve the conditions of

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Opposition to Defendant's Motion to Stay Discovery, Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709 (C.D. Cal. Sept 28, 2020) (No. 19-cv-01546-JGB(SHKx)), 2020 WL 7333606.

[187] All of the following cases, discussed above, brought § 1983 claims: Charles v. Orange City, 925 F.3d 73 (2d Cir. 2019); Coleman v. Rahija, 114 F.3d 778, 781 (8th Cir. 1997); Boswell v. Cnty. of Sherburne, 849 F.2d 1117, 1120 (8th Cir. 1988); Newbrough v. Piedmont Reg'l Jail Auth., 822 F. Supp. 2d 558, 589 (E.D. Va. 2011); *Doe v. Gustavus*, 294 F. Supp. 2d at 1005.

[188] Belbachir v. Cnty. of McHenry, 726 F.3d 975, 978 (7th Cir. 2013). The statute itself reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

[189] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[190] 28 U.S.C. § 1346.

[191] *Injunction*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/injunction [https://perma.cc/EAM3-DRWN] (last edited June 2017).

[192] 28 U.S.C. § 2201. "[A]ny court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." *Id.*

their confinement,[193] access to legal counsel,[194] or to compel the government to enforce its own policies.[195] Other courts have granted injunctive relief where immigrant claimants alleged deliberate indifference by detention officials because they were denied needed surgery[196] or appropriate medical treatment.[197] Pregnant detainees themselves have also successfully obtained injunctive relief in certain situations, such as when they were denied access to abortion services[198] or received poor medical care during the Covid-19 pandemic.[199]

However, one particular obstacle for pregnant immigrant detainees seeking an injunction is that of standing. The Supreme Court has made clear that "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[200] Thus, in pursuing injunctive relief, a plaintiff must show a "likelihood of substantial and immediate irreparable injury."[201] This is particularly challenging for pregnant immigrants suffering from a miscarriage who need immediate care. Once they lose the pregnancy, immigrants are no longer in danger of future harm or an ongoing violation because they are unlikely to get pregnant in detention again.[202] While the

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[193] Unknown Parties v. Johnson, No. CV-15-00250, 2016 WL 8188563, at *15–16 (D. Ariz. Nov. 18, 2016) (granting injunctive relief to immigrants in CBP custody who did not have access to basic necessities while detained). The court later granted a permanent injunction in the case. Unknown Parties v. Nielsen, No. CV-15-00250-TUC-DCB, 2020 WL 813774 (D. Ariz. Oct. 19, 2020).

[194] Innovation L. Lab v. Nielsen, 342 F. Supp. 3d 1067, 1082–83 (D. Or. 2018) (ordering government to provide counsel with notice of immigrant client's credible fear interview and access to telephone lines and conference rooms for attorney-client communication, as well as prohibiting the transfer of clients to other detention centers without consent from counsel).

[195] Mons v. McAleenan, No. 19-1593, 2019 WL 4225322, at *1–2 (D.D.C. Sept. 5, 2019) (enjoining DHS's practice of denying parole to asylum seekers, in contradiction of policy).

[196] Rosemarie M. v. Morton, 671 F. Supp. 2d 1311, 1313 (M.D. Fla. 2009) (issuing a preliminary injunction requiring the defendants provide plaintiffs with the appropriate treatment).

[197] Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1044 (E.D.N.Y. 1993).

[198] J.D. v. Azar, 925 F.3d 1291, 1338 (D.C. Cir. 2019) (enjoining the government from "interfering with unaccompanied minors' access to a pre-viability abortion").

[199] Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709 (C.D. Cal. 2020) (finding that pregnant women faced medical risks while in detention due to the Covid-19 pandemic and should be screened for release).

[200] City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1665 (1983) (quoting O'Shea v. Littleton, 414 U.S. 488, 495–96 (1974)) (internal quotations removed).

[201] *Id.* at 1670 (quoting *O'Shea*, 414 U.S. at 502) (internal quotations removed).

[202] This is similar to the situation that respondent Adolph Lyons faced in *Lyons*. 103 S. Ct. at 1660. Lyons was inexplicably held in a chokehold during a routine traffic stop, and he sought an injunction to prevent the repetition of the chokehold. *Id.* at 1663. However, the court determined that he was not in danger of being put in a chokehold again and the injunction was

pregnant detainee can pursue monetary damages against detention officials for a violation of her constitutional rights, the past wrong "does nothing to establish a real and immediate threat" that she would again experience a miscarriage due to the deliberate indifference of detention officials.[203]

Additionally, standing presents an issue once the immigrant has been released from detention. While pregnant women who remain in immigration detention for a longer period of time may find injunctive relief readily available,[204] the majority of pregnant women are released from detention within fifteen days of their arrival, and most others get out of detention within three to six months.[205] The detainee cannot bring an injunction for the enforcement of their constitutional rights against detention facilities if they are no longer in custody.[206]

The urgency to get an injunction presents another challenge for immigrants—that of access to counsel. In filing for injunctive relief, counsel can provide much-needed support. In all of the cases cited in this section, immigrants were represented by counsel, and some even had several attorneys.[207] However, as little as 14% of detained immigrants have counsel, even though having an attorney has been connected to more successful outcomes in immigration cases.[208] Without the help of an attorney, it is

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therefore speculative. *Id.* at 1668. "Absent a sufficient likelihood that he will again be wronged in a similar way Lyons is no more entitled to an injunction than any other citizen of Los Angeles[.]" *Id.* at 1670.

[203] *See id.* at 1667.

[204] *See* Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1042 (E.D.N.Y. 1993). Many of the plaintiffs in *Haitian Ctrs.* had been in detention for over two years and included pregnant women. *Id.; see also* Complaint, *supra* note 186, at 147–48 (arguing that pregnant women should not be held in solitary confinement).

[205] U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-36, IMMIGRATION ENFORCEMENT: ARRESTS, DETENTIONS, AND REMOVALS, AND ISSUES RELATED TO SELECTED POPULATIONS 123 (2019), https://www.gao.gov/assets/gao-20-36.pdf [perma.cc/53e8-WZRR]. Of the 2,098 pregnant women detained in ICE facilities in 2018, 1,483 were released within fifteen days of their detention, and 612 were released between fifteen and 180 days. *Id.* Only three women remained in detention longer than 180 days. *Id.*

[206] *See Lyons*, 103 S. Ct. at 1669–70 (stating that plaintiff lacked standing to pursue an injunction without a "real and immediate threat" of future wrongdoing). Pregnant immigrants may be able to avoid this issue if they bring a suit for an injunction via class action. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975) (stating that the recent conviction of named class representatives in a suit regarding pretrial rights did not moot the unnamed class members' claim for injunctive relief); Sosna v. Iowa, 419 U.S. 393, 399 (1975) (holding that the fact that the named plaintiff now met the challenged residency requirement did not moot the claims of other class members).

[207] J.D. v. Azar, 925 F.3d 1291, 1298 (D.C. Cir. 2019). The pregnant minors were represented by seven attorneys. *Id.* at 1298.

[208] EAGLY & SHAFER, *supra* note 51, at 2.

unlikely that a pregnant detainee will succeed in her pursuit of an injunction.[209]

As a result, while bringing a suit for injunctive and declaratory relief is not impossible, obtaining relief remains difficult given the particular circumstances of pregnant women. While injunctions may be a viable option for pregnant women who remain in detention and experience an ongoing lack of adequate care, obtaining an injunction is nearly impossible for women who experience medical emergencies, such as miscarriages. Indeed, for many pregnant women, an injunction is not an available remedy because their alleged injuries have already occurred or they have already been released from detention, rendering their claims for an injunction or declaration of rights moot.[210]

Where seeking an injunction or declaratory judgment is not a viable option, immigrant detainees may bring suits for damages, either through a *Bivens*, Section 1983, or FTCA claim. However, each claim presents its own set of complex requirements that immigrant women must navigate. The following three sections will examine the elements of claims brought under *Bivens*, Section 1983, and the FTCA that a pregnant detainee would have to allege in order to bring a successful suit, as well as the challenges that exist in bringing these claims.

B. A FORECLOSED FEDERAL RIGHT: *BIVENS* ACTIONS

A *Bivens* claim provides a private right of action for individuals whose constitutional rights have been violated by federal officials.[211] In *Bivens*, the plaintiff (Bivens) brought suit for damages against several FBI agents for an unreasonable search and seizure that violated his Fourth Amendment rights.[212] In allowing Bivens's case to proceed, the Supreme Court found that damages should be available for the constitutional violations committed by individual federal officials and established an implied right of action to bring such suits.[213] Since the decision in 1971, the Supreme Court has expanded the *Bivens* action to two other claims of constitutional violations: an Eighth

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[209] *See id.* at 3. ("Among detained immigrants, those with representation were twice as likely as unrepresented immigrants to obtain immigration relief if they sought it (49 percent with counsel versus 23 percent without.)").

[210] For the women described earlier in this Comment, *supra* pp. 17–18, injunctive relief would not be a possible remedy precisely for this reason. Their miscarriages and inadequate medical mistreatment already occurred, and they have already been released from detention.

[211] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

[212] *Id.* at 389–90.

[213] *Id.* at 392, 395–96.

Amendment prison conditions claim[214] and an equal protection claim under the Fifth Amendment.[215]

However, the Court has since whittled away at the *Bivens* doctrine and has time and again refused to expand its application to new claims outside of these three established contexts.[216] The Court's growing antipathy towards *Bivens* claims reached a new apex in *Ziglar v. Abbasi*, where the Court held that if the constitutional violation arose outside the three narrowly defined established contexts, a *Bivens* claim could only proceed in rare instances where there were no special factors counseling hesitation "in the absence of affirmative action by Congress."[217]

For pregnant women whose constitutional rights have been violated while in federal custody, a *Bivens* claims would require the court to expand the doctrine since the claim would be "different in a meaningful way from previous *Bivens* cases."[218] Indeed, a case brought by pregnant immigrant detainees would implicate a different constitutional right, new facts, and a different rank in federal officer than the three recognized contexts,[219] thus presenting an extension of prior *Bivens* decisions. [220]

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[214] Carlson v. Green*,* 446 U.S. 14, 19–20 (1980).

[215] Davis v. Passman, 442 U.S. 228, 234–35 (1979).

[216] *See* Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (holding that *Bivens* would not expand to a Fifth Amendment due process violation by government officials poorly administrating Social Security benefits because money damages were not included by Congress in the statutory remedial scheme); Wilkie v. Robbins, 551 U.S. 537 (2007) (refusing to extend the *Bivens* claim to an alleged Fifth Amendment violation of property rights because there were alternate remedies through state law); Ziglar v. Abbasi, 137 S. Ct. 1843, 1861–62 (2017) (denying an extension of *Bivens* due to national security concerns constituting "special factors" that counseled "hesitation"). Expanding *Bivens* remedies is now a "disfavored judicial activity." *Id.* at 1857.

[217] *Ziglar,* 137 S. Ct. at 1857. "[S]eparation-of-powers principles are or should be central to the analysis. The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?" *Id.* (citing Bush v. Lucas, 462 U.S. 367, 380 (1983)).

[218] *Id.* at 1859.

[219] *Id.* at 1860. "A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider." *Id.*

[220] *Id.* at 1864. "Yet even a modest extension is still an extension . . . . a case can present a new context for *Bivens* purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases." *Id.*

Since it would be a new context, courts would have to determine whether there were special factors counseling hesitation. In *Ziglar*, the Court was concerned with special factors like national security, which is the "prerogative of Congress," not the courts.[221] While not all lower courts have considered issues arising in the immigration context to implicate national security,[222] a pregnant immigrant would likely face trouble if her claim could be characterized as challenging an official policy rather than a single bad act.[223] Should the court decide that a pregnant immigrant is really challenging a detention policy, her claim would fail.

In addition to facing challenges with the *Bivens* doctrine itself, courts have further narrowed access to *Bivens* remedies based on the availability of other remedies, such as state tort law.[224] For example, in *Minneci v. Pollard*, the Court held that *Bivens* claims were not available to prisoners who were held in a private-prison company that contracted with the federal government.[225] The Court determined that the plaintiff in *Minneci*, who alleged an Eighth Amendment violation, had remedies available through state tort law, and thus a *Bivens* claim was foreclosed.[226] As a result, it is no surprise that the federal government is expanding its use of private-prison companies for immigration detention because the contractors will be shielded from liability.[227] Thus, it is unlikely that immigrants who are held in privately

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[221] *Id.* at 1860. Moreover, the existence of other remedies may be sufficient to foreclose *Bivens* as an avenue for relief. *Id.* at 1858.

[222] Lanuza v. Love, 899 F.3d 1019, 1028–29 (9th Cir. 2018) (concluding that there were no special factors suggesting the unavailability of a *Bivens* remedy where an immigration official forged an order of voluntary departure for a lawful permanent resident).

[223] *Ziglar*, 137 S. Ct. at 1860 ("[A] *Bivens* action is not 'a proper vehicle for altering an entity's policy.'") (citing Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001)); *see also* Creedle v. Miami-Dade Cnty., 349 F. Supp. 3d 1279, 1315 (S.D. Fla. 2018) (finding that plaintiff's challenge to ICE's general policy of issuing immigration detainers was an inappropriate use of *Bivens*).

[224] *See, e.g.*, Malesko, 534 U.S. at 73–74; Minneci v. Pollard, 565 U.S. 118, 127–30 (2012).

[225] 565 U.S. at 131.

[226] *Id.*

[227] Maunica Sthanki, *Deconstructing Detention: Structural Impunity and the Need for an Intervention*, 65 RUTGERS L. REV. 447, 471 (2013).

run detention facilities, like some of the women cited in this Comment,[228] would be able to bring a viable claim for relief against those officials.[229]

As a result of the Court's decisions in *Ziglar* and *Minneci*, the plausibility of a successful *Bivens* claim is virtually nonexistent for pregnant immigrants. As a result, pregnant immigrants who are held in federal facilities or private facilities that contract with the federal government have essentially no avenue to receive damages for constitutional violations.

C. WHERE STATE TORT LAW GOVERNS: FEDERAL TORTS AND CLAIMS ACT

The FTCA permits individuals to pursue monetary damages against the federal government for acts that were "caused by the negligent or wrongful act or omission" of federal employees.[230] Unlike Section 1983 and *Bivens* actions, the FTCA only imposes liability on the United States, not on individual officials.[231] Thus, under the FTCA, the federal government is liable "under circumstances where the United States, if a private person, would be liable to the claimant."[232]

An action can only be brought pursuant to the FTCA if the state where the action took place would permit a cause of action for that misconduct to go forward.[233] As a result, state tort law governs the application of the

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[228] Two of the women discussed earlier in this Comment, *supra* pp. 17–18, were held in Otay Mesa Detention Center, which is a contract detention facility (CDF). The OIG describes CDFs as "facilities owned and operated by private companies and contracted directly by ICE." OFF. OF INSPECTOR GEN., OIG-19-18, *supra* note 38, at 3. Thus, if these women were to bring a *Bivens* suit, they would be dismissed.

[229] *Bivens* remedies are even barred in situations where privately contracted detention facilities employ federal doctors and health workers to provide patient care through the Public Health Service (PHS). Hui v. Castaneda, 130 S. Ct. 1845, 1848 (2010). The PHS, a division of the Department of Health and Human Services, administers healthcare through ICE's Health Service Corps, which provides direct patient care to immigrant detainees. Lena H. Sun, *White House Wants to Cut this Public Health Service Corps by Nearly 40 Percent*, WASH. POST (June 27, 2018, 6:00 AM), https://www.washingtonpost.com/news/to-your-health/wp/2018/06/27/white-house-wants-to-cut-this-public-health-service-corps-by-nearly-40-percent/ [https://perma.cc/TJP5-WJV5]. However, in *Hui*, the Court determined that PHS officers had absolute immunity under 42 U.S.C. § 233(a), which requires that any suit brought against a PHS employee be brought as a suit against the United States under the FTCA. *Hui*, 130 S. Ct. at 1850–51, 1854.

[230] 28 U.S.C. § 2672.

[231] *See* 28 U.S.C. § 2674.

[232] § 2672. The FTCA serves as a limited waiver of sovereign immunity on the part of the federal government. *See* Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 707 (1997).

[233] 28 U.S.C. § 2672.

FTCA.[234] Because constitutional violations stem from federal rather than state law, the Supreme Court has held that constitutional torts cannot be brought under the FTCA.[235] This effectively bars immigrant detainees from bringing claims of deliberate indifference under the FTCA.

Even if a detainee were to reframe the cause of action as a common law tort, the claim's viability would depend on specific state laws. If a state would not allow for a detainee to sue a detention or prison official for negligence or an intentional tort, then the detainee could not bring an FTCA claim. For example, three states that hold significant immigrant populations in detention (Texas, Louisiana, and Arizona) have enacted strict tort reform policies, making it more difficult for detainees in those states to recover under the FTCA.[236] Moreover, to sue under the FTCA, plaintiffs have to comply with a statute of limitations and must also exhaust administrative remedies.[237] An additional challenge with the FTCA is that the claim can only be brought against federal officials, not nongovernment contractors.[238] Therefore, like immigrants suing under Bivens, immigrants suing under the FTCA cannot recover if they are being held in private detention facilities. And, even if they are being held in a federal facility, they have to jump through the hoops of state law to have a chance of moving forward with their claim.

D. ACTING UNDER "COLOR OF STATE LAW": SECTION 1983 CLAIMS

If a pregnant detainee is held in one of the many state and county jails that the federal government contracts with to house immigrant detainees, she

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[234] Carlson v. Green, 446 U.S. 14, 23 (1980). The Court has reasoned that the FTCA is not as effective of a deterrent as a *Bivens* action because the government steps in for the individual in an FTCA suit, whereas in a *Bivens* claim, the federal official is held liable. *Id.* at 21.

[235] FDIC v. Meyer, 510 U.S. 471, 477–78 (1994) (holding that constitutional tort claims are not cognizable under the FTCA because state law provides the source of liability under the FTCA).

[236] Sthanki, *supra* note 227, at 472–73.

[237] Spencer Bruck, Note, *The Impact of Constitutional Liability and Private Contracting on Health Care Services for Immigrants in Civil Detention*, 25 GEO. IMMIGR. L.J. 487, 494 (2011). The FTCA also has thirteen exceptions, the largest of which is the discretionary function exception. *See* 28 U.S.C. § 2680. The discretionary function exception seeks to protect certain discretionary government actions from suit. United States v. Varig Airlines, 467 U.S. 797, 808 (1994). However, what constitutes a discretionary function is not defined in the FTCA; while the Supreme Court has interpreted the standard many times, there is little consistency, which risks that the exception might "swallow[] the rule entirely and shield[] the government from all forms of liability." Daniel Cohen, *Not Fully Discretionary: Incorporating a Factor-based Standard into the FTCA's Discretionary Function Exception*, 112 Nw. U. L. Rev. 879, 881 (2018).

[238] Bruck, *supra* note 237, at 494.

could pursue a Section 1983 remedy for any constitutional injuries suffered.[239] To establish a violation of 42 U.S.C. § 1983, a plaintiff must allege a violation of a federally protected right caused by the conduct of a "person" acting under color of state law.[240] Under Section 1983, plaintiffs can bring suits against officers in their official or personal capacities or against municipalities.[241] Section 1983 does not give the plaintiff any substantive rights; rather, it only provides a method for remedying the violation of federal rights.[242] Though Section 1983 claims may provide a viable path forward for pregnant immigrants, there are several obstacles, particularly in bringing municipal suits and overcoming affirmative defenses like qualified immunity.

Though they sound similar, personal capacity and official capacity suits differ widely.[243] While state and local officials "literally are persons," a suit brought against an official in their official capacity is not a suit against the individual official; rather, it is a suit against the official's office or the government entity itself. [244] As a result, officials cannot be held personally liable for damages in official capacity suits. Instead, plaintiffs can only recover damages from the government entity.[245] On the other hand, personal

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[239] Many immigrant detainees are held in facilities owned by state and local governments pursuant to ICE contracts with the facilities. OFF. OF INSPECTOR GEN., OIG-18-53, IMMIGRATION AND CUSTOMS ENFORCEMENT DID NOT FOLLOW FEDERAL PROCUREMENT GUIDELINES WHEN CONTRACTING FOR DETENTION SERVICES 2 (2019), https://www.oig.dhs.gov/sites/default/files/assets/2018-02/OIG-18-53-Feb18.pdf [perma.cc/2GHD-MMEK]. Intergovernmental Service Agreement facilities (IGSAs) and Dedicated Inter-governmental Service Agreement facilities (DIGSAs) housed the majority of ICE detainees over the course of FY 2017. OFF. OF INSPECTOR GEN., OIG-19-18, *supra* note 38, at 3. IGSAs housed 8,778 persons and DIGSAs housed 9,820 persons, which amounts to more than 50% of the total detainees held by the U.S. government. *Id.*

[240] Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49–50 (1999) ("To state a claim for relief in an action brought under § 1983, respondents must establish that they were deprived of a right secured by the constitution or laws of the United States, and the alleged deprivation was committed under color of state law."); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978) (holding that Congress intended for municipalities and local governments to be included among the "persons" to whom § 1983 applies).

[241] Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 17 TOURO L. REV. 525, 531–32 (2016).

[242] Albright v. Oliver, 510 U.S. 266, 271 (1994).

[243] The distinction between the suits "continues to confuse lawyers and confound lower courts." Kentucky v. Graham, 473 U.S. 159, 166 (1985).

[244] *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).

[245] *Graham*, 473 U.S. at 166. When combined with claims against a municipality, courts view claims against municipal officials in their official capacity as redundant. Schwartz, *supra* note 241, at 532; *see also* Newbrough v. Piedmont Reg'l Jail Auth., 822 F. Supp. 2d 558, 574 (E.D. Va. 2011) (dismissing claims against a defendant in their official capacity because the municipality was also a defendant). However, plaintiffs can seek prospective injunctive relief

capacity suits impose personal liability on the individual defendant, and any damages awarded come out of the official's personal assets.[246]

This is further complicated where state-run facilities are involved. The Supreme Court has held that while local governments and municipalities are "persons" under Section 1983,[247] state governments are not and cannot be sued.[248] Thus, if the officer sued in his official capacity is employed by the state, the suit will be dismissed;[249] if the officer sued in his official capacity is employed by a local government, it will be treated as a municipal suit and allowed to proceed.[250] In addition to not being "persons" for the purpose of Section 1983, state officers sued in their official capacity and state offices are also protected by sovereign immunity, and so cannot be sued for damages.[251]

State and municipal officers sued in their personal capacities are protected by a different type of immunity—qualified immunity, which is recognized as "the most critical issue in Section 1983 litigation."[252] Officials sued in their personal capacity under Section 1983 can claim qualified immunity if they acted reasonably, which means their actions did not violate clearly established federal law.[253] The Supreme Court views qualified immunity as a sort of "fair warning" standard, where an individual will not be held responsible "for conduct which he could not reasonably understand

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from state officials in their official capacity under *Ex parte Young* for threatened or ongoing violations of federal law. 209 U.S. 123, 159–60 (1907) ("If the act which the state [official] seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.") A successful *Ex parte Young* action allows plaintiffs to effectively bind the state under this authority-stripping rationale. JAMES PFANDER, PRINCIPLES OF FEDERAL JURISDICTION 241 (3d ed. 2016). *See supra* pp. 28–31 of this Comment for a discussion of injunctive relief for pregnant immigrant detainees.

[246] *Graham*, 473 U.S. at 165–66.

[247] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 658 (1978).

[248] *Will*, 491 U.S. at 71.

[249] *See id.*

[250] Schwartz, *supra* note 241, at 532; *Graham*, 473 U.S. at 165–66.

[251] Quern v. Jordan, 440 U.S. 332, 342–43 (1979) (holding that Section 1983 did not abrogate the Eleventh Amendment immunity of the states).

[252] Schwartz, *supra* note 241, at 539. In addition to qualified immunity, there are several other forms of immunity that defendants can raise in a Section 1983 suit, including absolute immunity, sovereign immunity, and sovereign immunity through the Eleventh Amendment. *See* OFF. OF STAFF ATT'YS OF THE NINTH CIR., SECTION 1983 OUTLINE 19–47 (2011), http://cdn.ca9.uscourts.gov/datastore/uploads/guides/Section_1983_Outline_2012.pdf [https://perma.cc/3MHB-AV3B].

[253] Schwartz, *supra* note 241, at 540.

to be proscribed."[254] In order for federal law to be "clearly established," the right alleged to have been violated must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right."[255] Additionally, the facts in the case at hand and the facts of precedent on which the plaintiff relies must be similar, though not necessarily identical.[256] Therefore, in the face of a qualified immunity defense, the success of a pregnant detainee's Section 1983 suit depends on whether she can find a prior case in her circuit that is similar enough to her own to argue that officials should have known their conduct was illegal.[257] However, overcoming qualified immunity on the whole can be very difficult for plaintiffs because the outcome depends on the district court's interpretation of the facts of both the plaintiff's case and prior similar cases.

On the other hand, municipalities do not enjoy any form of immunity.[258] As a result, plaintiffs typically include municipalities in their Section 1983 claims because municipalities cannot assert the immunity defenses that individuals or the state can; municipalities are also more lucrative targets for compensatory relief, given that they have deeper pockets than individual tortfeasors.[259] Though plaintiffs commonly assert Section 1983 claims against municipal entities, plaintiffs often encounter significant difficulties establishing municipal liability, mostly due to challenges of evidence.[260] In order to establish municipal liability, plaintiffs must establish that the violation of their rights was attributable to a municipal policy or custom,[261] as opposed to personal capacity suits, where plaintiffs need only show that

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[254] United States v. Lanier, 520 U.S. 259, 265–66 (1997) (quoting Bouie v. City of Columbia, 378 U.S. 347, 351 (1964)).

[255] Wilson v. Layne, 526 U.S. 603, 615 (1999) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)) (holding that officers enjoyed qualified immunity for bringing members of the media into a private home during the execution of an arrest warrant because the illegality of such conduct was not clearly established).

[256] Schwartz, *supra* note 241, at 544.

[257] For example, where officials delayed in responding to pregnant immigrants' medical needs, pregnant immigrants could potentially overcome a qualified immunity defense in circuits where courts have recognized that detainees and inmates have a right to prompt medical care in similar situations. *See, e.g.*, Boswell v. Cnty. of Sherburne, 849 F.2d 1117, 1123 (8th Cir. 1988); Newbrough v. Piedmont Reg'l Jail Auth., 822 F. Supp. 2d 558, 577 (E.D. Va. 2011).

[258] Kentucky v. Graham, 473 U.S. 159, 166–67 (1985).

[259] Schwartz, *supra* note 241, at 547.

[260] *See id.* at 547–48.

[261] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978) (stating that a municipality can only be held liable for actions taken pursuant to official municipal policy, not because the municipality employs a tortfeasor).

the individual official themselves caused the alleged constitutional injury.[262] The Supreme Court has emphasized that "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee."[263] Officially circulated policies encouraging deliberate indifference are uncommon, and mounting sufficient evidence to show an unofficial custom or practice can be time-consuming and difficult to prove.[264] Because of this, proving the existence of a municipal policy or custom that unconstitutionally harms pregnant detainees for the purposes of Section 1983 will present a significant hurdle for plaintiffs.

In sum, if a pregnant immigrant is held in a facility run by state employees, she will be limited to bringing a Section 1983 damages claim against an officer in his personal capacity and that officer will have the protection of qualified immunity. If she is held in a municipally run facility, she could sue the individual official in their personal capacity, but again, qualified immunity would likely shield the officer from liability. The pregnant immigrant could also sue the municipality, but she will face the difficult challenge of proving that the constitutional harm was pursuant to an official policy or custom. Thus, like injunctive relief and damages under the FTCA and *Bivens* doctrine, it will be difficult, and often impossible, for a pregnant detainee to prevail on a Section 1983 claim.

CONCLUSION

The numbers of immigrants in detention continues to increase, straining an already overtaxed system and negatively affecting the medical care and health of detainees, particularly that of pregnant detainees. Nevertheless, detention facilities are constitutionally required to provide women with adequate medical care, and when those rights are violated, pregnant women have a pathway to obtaining relief under the deliberate indifference standard. The remedies available to pregnant immigrants are both complicated and narrow, however, making recovery for constitutional violations uncertain, if not altogether unavailable.

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[262] *Graham*, 473 U.S. at 166.

[263] Bd. of the Cnty. Cmm'rs v. Brown, 520 U.S. 397, 405 (1997).

[264] *See* Schwartz, *supra* note 241, at 548.