Note

Forgotten Victims: Exploring the Right to Family Integrity as a Form of Redress for Children of Wrongfully Convicted Parents

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Almost five million children in the United States have had a parent incarcerated at some point in their lives. Children who grow up with an incarcerated parent face immense challenges, including mental health issues, problems at school, economic hardship, and the propensity to participate in criminal activity themselves. When it turns out that the child's parent was wrongfully convicted and incarcerated for a crime they did not commit, the challenges faced by the child are even more devastating.

One way that a child may be able to obtain a remedy in these instances is through their due process right to family integrity. The Supreme Court has extended the Fourteenth Amendment Due Process Clause to protect parents and children from state interference with their familial relationships. However, circuit courts are split on whether unintentional state interferences with the family relationship violate the right to family integrity, or if this right is only violated by intentional interferences. This specific-intent element, required by a vast majority of circuit courts, unfortunately makes it difficult for a child who is deprived of a relationship with their parent due to wrongful conviction to state a successful claim, because it is unlikely they will be able to prove that the state actor who wrongfully convicted their parent did so with the intentional aim of violating their relationship with their parent.

This Note begins by exploring the prevalence of wrongful convictions, the impacts of parental incarceration on children, and

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the constitutional right to family integrity. It then analyzes the circuit split and proposes that, because both the minority and majority circuit reasonings fall short, the shocks-the-conscience test should instead be used by courts to determine whether a child has stated a claim of interference with their right to family integrity.

This proposed test would allow courts to take into consideration the specific circumstances of a wrongful conviction to determine whether the child's rights have been violated, instead of relying on a rigid rule that is nearly impossible to satisfy in the wrongful incarceration context. Although the minority view does come to the correct conclusion, this Note argues that the shocks-the-conscience test is a better and clearer way for courts to assess this issue going forward.

INTRODUCTION

When brothers Danny and Dontell were only toddlers, they faced the unimaginable. Their father, Danny Burton, a nineteen-year-old Black male, was convicted and sentenced to life in prison without the possibility of parole for a crime he did not commit.[1] These innocent children grew up fatherless after Mr. Burton was torn away from them for over thirty-two years, and throughout their childhood they were "forced to endure the pain and humiliation of having their father labeled a murderer."[2] However, their father was innocent.[3] Mr. Burton was convicted because a detective chose to engage in threats, intimidation, and physical violence to pressure Mr. Burton and various witnesses into false confessions and testimony.[4]

The reality of mass incarceration in the United States makes what Danny and Dontell experienced far too common.[5] The United States Bureau of Justice Statistics estimated in 2016 that 684,500 state and federal prisoners were parents of at least one minor child, and nearly 1,500,000 children aged seventeen or younger had a parent who was in state or federal prison.[6] Notably, among those children with an incarcerated parent, more than seventy percent are children of color, according to a 2009 study.[7] Although it is unavoidably difficult to determine an exact

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1. Sophie Mishara, *Danny Burton: A 32-Year Wait for the Truth to Set Him Free*, UNIV. OF MICH. CARCERAL ST. PROJECT (May 2021), https://storymaps.arcgis.com/stories/ce677066d4c0462da67ce8e47df1c7a7 [https://perma.cc/23SG-AXB6]; Chambers v. Sanders, 63 F.4th 1092, 1095 (6th Cir. 2023).

2. Complaint and Jury Demand at 7, Chambers v. Sanders, 63 F.4th 1092, 1095 (6th Cir. 2023) (No. 22-1446) [hereinafter Chambers Complaint].

3. Mishara, *supra* note 1.

4. *Chambers*, 63 F.4th at 1095, 1112.

5. *See* Patricia Allard & Judith Greene, *Children on the Outside: Voicing the Pain and Human Costs of Parental Incarceration*, JUST. STRATEGIES 3 (Jan. 12, 2011), https://femlaw.queensu.ca/sites/flswww/files/uploaded_files/ChildrenontheOutside.pdf [https://perma.cc/UXH3-DXB2] ("This report examines the tragic consequences of mass incarceration and the war on drugs on the lives of countless children across the nation—especially black and Latino children—due to the incarceration of their parents.").

6. LAURA M. MARUSCHAK ET AL., BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 252645, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2021).

7. Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 81 (2011) (citing Sarah Schirmer et al., *Incarcerated Parents and Their Children: Trends 1991-2007*, THE SENT'G PROJECT 1 (2009), https://www.issuelab.org/resources/7372/7372.pdf [https://perma.cc/6TXD-D6DJ].

rate, studies estimate that the overall wrongful conviction rate in the United States is between four and six percent,[8] meaning that anywhere between 80,000 to 120,000 of the approximately 2,000,000 people currently incarcerated are likely innocent.[9] Inevitably, some of those wrongfully incarcerated people include parents.[10]

When it comes to the factors that contribute to wrongful convictions, official misconduct is a leading cause.[11] According to the National Registry of Exonerations, which has maintained a database since 1989 of innocent people who have been exonerated, official misconduct has been present in sixty percent of recorded exonerations.[12] Official misconduct is defined as police, prosecutors, or other government officials significantly abusing their authority or the judicial process in a manner that contributed to the exoneree's conviction.[13] Examples of police misconduct include "coercive interrogation techniques, lying on the stand, failing to turn over exculpatory evidence, working with unreliable informants, [and] displaying outright prejudice."[14] Prosecutorial misconduct often involves prosecutors "making improper

8. *Compare* Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCIS. U.S. 7230, 7230 (2014) (estimating that 4.1% of death-sentenced defendants would be exonerated), *with* Charles E. Loeffler et al., *Measuring Self-Reported Wrongful Convictions Among Prisoners*, 35 J. QUANTITATIVE CRIMINOLOGY 259, 259 (2019) (estimating that six percent of state prisoners are wrongfully convicted).

9. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html [https://perma.cc/FU9J-WH6L] (stating that almost two million people are incarcerated in the United States as of 2024).

10. *See* Boudin, *supra* note 7, at 81.

11. *Official Misconduct*, INNOCENCE PROJECT, https://innocenceproject.org/official-misconduct [https://perma.cc/XQQ5-KB84]. This Note will focus only on wrongful convictions involving official misconduct, but there are numerous other factors that can lead to wrongful convictions. *See The Issues*, INNOCENCE PROJECT, https://innocenceproject.org/the-issues [https://perma.cc/HAP2-F5ZK] (citing, among other factors, race, eyewitness misidentification, and inadequate defense).

12. *% Exonerations by Contributing Factor*, NAT'L REGISTRY OF EXONERATIONS (Oct. 24, 2023), https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [https://perma.cc/EP5V-NYLV].

13. *Glossary*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx [https://perma.cc/WN42-N2BZ].

14. *Official Misconduct*, *supra* note 11.

arguments at trial [or] purposely withholding evidence of innocence or other favorable evidence."[15]

Children of incarcerated parents, despite being unquestionably innocent, are likely to face tragic consequences, including severe emotional, mental, physical, social, and economic harm as a result of losing a parent to a prison sentence.[16] The parent-child bond is fundamental to a child's overall development and basic needs, and can be destroyed when a parent is incarcerated.[17] Arguably, the pain of losing a parent to prison is tantamount to losing a parent to death or divorce, with the additional trauma of the social stigma associated with having an incarcerated parent.[18] Some of the many harms these children face include increased odds of engaging in anti-social or delinquent behavior, experiencing school failure and unemployment, and developing serious mental health problems.[19] More generally, children experience a sense of abandonment and lack of stability when their parent is present one day and gone the next.[20] When a child's parent is found to have been convicted and incarcerated, but is innocent of the charges against them, the challenges faced by the child are arguably even more devastating.

Based on the foregoing, undoubtedly a significant number of innocent children have lost a parent and faced insurmountable pain and struggles because of preventable, intentional official misconduct. This Note will analyze the constitutional due process right to family integrity as a potential form of redress that these children so greatly deserve. The right to family integrity is a substantive due process right that protects the fundamental right of parents to make decisions concerning the care, custody,

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15. *Id.*

16. Reece M. McGovern, *In Their Absence We Remain: Embracing the Victims of Parental Incarceration*, 13 DREXEL L. REV. 533, 535–36 (2021).

17. *Id.* at 541–42.

18. Allard & Greene, *supra* note 5, at 5.

19. *Id.* at 6 (citing Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133 (2008)).

20. *Id.* at 8 ("[Children] experience a sense of abandonment when parents go to prison—one day the parent is there and the next the parent is gone. Depending on the age, they'll take it personally. They think they did something wrong; one day they were mad at their mother and wish she was dead and now she's far away." (quoting a family service provider)).

and control of their children.[21] Currently, circuit courts are divided on whether children can claim violations of their right to family integrity when official conduct *incidentally* impacts their relationship with their parents, or only when official conduct is *directly* aimed at, or specifically intended to impact, this relationship.[22] This specific-intent element, required by a vast majority of circuit courts,[23] unfortunately means that it is rare for a child who is deprived of a relationship with their parent due to wrongful conviction to state a successful claim.[24] This is because it is likely difficult for a child to prove that the state actor who wrongfully convicted their parent did so with the intentional aim of violating their relationship with their parent.[25]

Because of the importance of allowing children of wrongfully incarcerated parents to obtain a remedy, and because both the minority and majority circuits' reasoning fall short,[26] this Note proposes a new test be used by courts to determine whether a child has stated a claim of interference with their right to family integrity. Instead of the majority rule requiring conduct specifically targeted at the family relationship in order for an interference with the right to family integrity to be actionable, the shocks-the-conscience test should be used to analyze whether a state actor who caused a wrongful conviction has violated a child's right to family integrity.[27] This proposed test would allow courts to take into account the specific circumstances of a wrongful conviction to determine whether the child's rights have been violated, instead of relying on a rigid rule that is nearly impossible to satisfy in the wrongful incarceration context. Although the minority view does come to the correct conclusion, the shocks-the-conscience test is a better and clearer way for courts to assess this issue going forward.

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21. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

22. See *infra* Part II, for a discussion of the circuit split.

23. See *infra* Part II.A, for a discussion of the majority view.

24. *See infra* Part III.A.

25. *See infra* Part III.A.

26. See *infra* Part II, for a discussion of the circuit split.

27. See *infra* Parts I.A, II, for explanations of the majority rule and the shocks-the-conscience test.

This Note will be split in three major Parts. Part I explains the history and evolution of the substantive due process right to family integrity, how it has been asserted by children as well as by adults, and the importance of this right as shown by summarizing the impacts of parental separation on children. Part II then lays out the circuit court split involving cases that incidentally, as opposed to directly and intentionally, impact a child's right to family integrity. Finally, Part III argues that the majority and minority views are incorrect and proposes that intentional wrongful convictions[28] of a parent violate a child's right to family integrity so long as the state conduct "shocks the conscience."[29] This proposition is more favorable to the often-underrepresented victims of wrongful convictions: the children of incarcerated parents.

I. THE CONSTITUTIONAL RIGHT TO FAMILY INTEGRITY

The constitutional right to family integrity has been recognized by the United States Supreme Court as a substantive due process right arising out of the Fifth and Fourteenth Amendments' Due Process Clauses.[30] This Part will explain what substantive due process rights are, how they come to exist, and how the Court determines whether these rights have been violated. It will then explore the right to family integrity, including its history and common applications. Lastly, it will touch on the real-world consequences caused by separation of children from their parents to illustrate the importance of this discussion.

A. EXPLORING THE CONCEPT OF SUBSTANTIVE DUE PROCESS

The Due Process Clause found in the Fifth and Fourteenth Amendments prohibits the deprivation "of life, liberty, or property, without due process of law."[31] While the Due Process Clause explicitly entitles people to certain procedural safeguards, it has also been read to include a substantive component that "bar[s] certain [arbitrary wrongful] government actions

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28. In this Note, the term "intentional wrongful conviction" refers to a conviction that results from intentional acts by state officials such as lying, making accusations known to be false, or hiding exculpatory evidence.

29. *See* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (defining the shocks-the-conscience test).

30. *See infra* Part I.A.

31. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

regardless of the fairness of the procedures used to implement them."[32] Essentially, the Supreme Court has recognized that certain rights "are so fundamental that no amount of process will justify their denial."[33] Examples of substantive due process rights that have been recognized by the Supreme Court include the right to contraceptives[34] and the right of interracial[35] and same-sex couples to marry.[36] The substantive due process doctrine allows the Court to protect fundamental personal rights that are not enumerated in the Constitution.[37]

The Supreme Court has indicated that the inquiry to be used to determine whether substantive due process rights have been violated differs depending on the type of violation alleged.[38] Substantive due process violations resulting from a government official's action, for instance, are frequently considered constitutionally cognizable only if the action can be said to "shock the judicial conscience."[39] For example, the Court held in *Rochin v. California* that the forced pumping of a suspect's stomach by a police officer is a violation of substantive due process because it "shocks the conscience" and violates the "decencies of civilized conduct."[40]

When it comes to whether a law violates substantive due process, the Court has observed that only those fundamental rights that are "deeply rooted in this Nation's history and

32. Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 521 (2008) (alteration in original) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

33. Lee Farnsworth, *Conscience Shocking in the Age of Trump*, 2020 WIS. L. REV. 805, 808 (2020); *see* Boudin, *supra* note 7, at 109 ("Since the New Deal Era, courts have referred to 'substantive due process' as the basis for extending unenumerated fundamental rights through the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment." (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 502 (1935))).

34. Griswold v. Connecticut, 381 U.S. 479, 507 (1965).

35. Loving v. Virginia, 388 U.S. 1, 12 (1967).

36. Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015).

37. *See, e.g.*, *id.* at 675 ("[T]he right to marry is a fundamental right *inherent in the liberty of the person* . . . ." (emphasis added)).

38. *E.g.*, Farnsworth, *supra* note 33, at 805 (outlining the two-step analysis of determining (1) whether an "executive" action is at issue and, if so, (2) whether it shocks the conscience).

39. *Id.* at 809–10 (citing County of Sacramento v. Lewis, 523 U.S. 833, 846–47 (1998)).

40. 342 U.S. 165, 172–73 (1952).

tradition,"[41] and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," are protected.[42] Using that test, the Court in *Washington v. Glucksberg* determined that the right to die by suicide is not a fundamental right and thus upheld a state law prohibiting physician-assisted suicide.[43] After determining whether something is a fundamental right, courts applying this test determine whether there is a legitimate state interest justifying an intrusion upon the right.[44]

Despite these seemingly clear tests, in practice, they are not always applied with clarity, nor are they applied exclusively, making the doctrine of substantive due process quite confusing.[45] In certain instances, the Supreme Court has strayed from any clearcut rule and instead used "reasoned judgment" to determine the boundaries of substantive due process.[46] Under this theory, substantive due process rights are not limited by historical tradition and instead, "the Supreme Court is free to identify rights independently" through what is essentially "philosophical analysis or political-moral reasoning."[47] When applying this theory, "the Court itself evaluates the liberty interest . . . and weighs it against competing governmental concerns" to

41. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

42. *Id.* at 721 (quoting Palko v. Connecticut, 302 U.S. 319, 324–25, 326 (1937), *overruled in part on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969)).

43. *Id.* at 728.

44. *See id.* (explaining that the statute at issue is rationally related to legitimate government interests).

45. *See* Farnsworth, *supra* note 33, at 806 ("It is, even now, seemingly obligatory to begin any discussion related to the substantive Due Process Clause by noting the controversy and confusion that still attends the doctrine."); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66 (2006) ("The Supreme Court's welter of decisions and its confusing doctrinal standards have emboldened the Court's critics, who view . . . substantive due process as little more than a judicial charade . . . .").

46. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule."), *overruled in part on other grounds by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

47. Conkle, *supra* note 45, at 66.

determine whether a right deserves constitutional protection.[48] For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court used "reasoned judgment" to weigh the competing interests and conclude that the liberty interest of a woman seeking an abortion warrants constitutional protection.[49]

Lastly, and importantly, many federal courts of appeal seem to have abandoned any of the above inquiries when it comes to indirect violations of the right to family integrity, and instead "require that the state official act with a culpable state of mind directed at the family relationship."[50] To justify this approach, courts such as the Sixth Circuit in *Chambers v. Sanders* have relied on the Supreme Court's indication that a certain level of culpability is required to state a due process violation.[51] Specifically, the Supreme Court has said that negligent conduct does not constitute a deprivation under the Due Process Clause.[52] Instead, "due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property."[53] The *Chambers* court argued that conduct must not only be deliberately injurious, but it must also be deliberately aimed at the family relationship in order for an indirect violation of the right to family integrity to be actionable.[54] Instead of analyzing specific circumstances to determine whether official conduct

48. *Id.* at 66–67.

49. 505 U.S. at 852–54.

50. Chambers v. Sanders, 63 F.4th 1092, 1100 (6th Cir. 2023). This Note uses "indirect violations" of the right to family integrity to refer to instances where a family member is indirectly harmed by a constitutional violation against their family member. For example, when a child's parent is wrongfully convicted, their right to family integrity is impacted by the state's violation of their parent's rights. *See* Chambers Complaint, *supra* note 2, at 6–7, 11; *infra* Part II. This is contrary to instances where a child themself is directly impacted, for example, if they are illegally taken into state custody. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 646 (1972) (narrating how a father's children were taken into state custody following their mother's death because the father was unmarried).

51. 63 F.4th at 1097 (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)).

52. *Daniels*, 474 U.S. at 331.

53. *Id.*

54. 63 F.4th at 1100–01 ("A government official can make a wrongful, intentional decision, as the alleged facts here demonstrate, without that intent or the decision itself being aimed at the family relationship. Instead, as with any due process violation, stating a claim in this context requires that the state actor act with a culpable state of mind with respect to the plaintiffs themselves and their own alleged constitutional rights.").

rises to the level of conscience shocking in a particular case, these courts adopt an absolute rule that indirect violations of the right to family integrity are never actionable absent culpability directed at the family relationship.[55] In fact, these cases do not reference the concept of conscience shocking at all.[56]

With this understanding of what substantive due process rights are and the different inquiries courts rely on to determine when they have been violated, the next Section will shift to an explanation of the right to family integrity more specifically.

B. THE SUBSTANTIVE DUE PROCESS RIGHT TO FAMILY INTEGRITY

The right to family integrity is a well-recognized substantive due process right,[57] "protect[ing] the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[58] The right was first recognized in 1923 in *Meyer v. Nebraska*, in which the Supreme Court held that a statute prohibiting the instruction of foreign languages to children was unconstitutional because it interfered with a parent's freedom to direct the upbringing and education of their children.[59] The Court recognized that the right to "establish a home and bring up children" was "[w]ithout doubt" a liberty guaranteed under the Fourteenth Amendment.[60]

Throughout the years, the Supreme Court has affirmed this right in numerous decisions.[61] For example, in *Pierce v. Society*

55. *Id.*; *cf. Daniels*, 474 U.S. at 335–36 (declining to impose liability in a case involving alleged negligence by an official).

56. *See Chambers*, 63 F.4th 1092; *Daniels*, 474 U.S. 326.

57. Boudin, *supra* note 7, at 109 ("According to the Court, the primary relationship between parent and child 'is now established beyond debate as an enduring American tradition.'" (quoting Wisconsin v. Yoder, 406 U.S. 205, 232 (1972))).

58. Troxel v. Granville, 530 U.S. 57, 66 (2000).

59. 262 U.S. 390, 401 (1923) ("Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.").

60. *Id.* at 399.

61. *See, e.g.*, Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Stanley v. Illinois, 405 U.S. 645, 651, 658 (1972) (holding that denying a parent a hearing

of Sisters of the Holy Names of Jesus and Mary, the Court invalidated a statute requiring public schooling on the ground that it interfered with a parent's liberty to direct the upbringing of their children.[62] In *Prince v. Massachusetts*, the Court again confirmed that parents have a constitutional right to direct the upbringing of their children in the context of religion.[63] In *Troxel v. Granville*, the Court made clear that based on extensive precedent, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[64]

While a parent's right to family integrity is firmly established in Supreme Court jurisprudence, a child's constitutional right to family integrity has received less attention.[65] Although in the early 1900s children were considered to be the property of their parents and had little to no independent rights, there has been a growing shift toward recognition of children's rights.[66] The children's rights movement has successfully championed laws preventing child labor, compulsory education laws, and overall greater autonomy and safety for children.[67]

Throughout the children's rights movement, there has also been a shift toward the recognition of a child's right to family integrity—in other words, the power children hold to advocate for the protection of their family units.[68] Although the Supreme Court has not directly addressed the question of a child's right to family integrity, it arguably has implied over time that the Fourteenth Amendment applies to children, and to a child's right to family integrity, in particular.[69] In the 1972 case of *Stanley v.*

to maintain custody of his children was contrary to the Equal Protection Clause); Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (extending due process protections to less common family units).

62. 268 U.S. at 536.

63. 321 U.S. 158, 165–66, 176 (1944).

64. 530 U.S. 57, 66 (2000).

65. Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 272–73 (2021).

66. *Id.*

67. *Id.*

68. *Id.* at 273–74.

69. Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 434–35 (1999) (arguing that, pursuant to the Court's increasing recognition of

Illinois, a father whose children were taken from him by the State based on the sole fact that he and the children's mother, now deceased, had not been married, brought suit against the State on Fourteenth Amendment grounds.[70] The Court ruled that denying him a hearing on his fitness as a parent before his children were taken away violated his due process rights under the Fourteenth Amendment.[71] The Court further noted that when the State separates a child from her fit parents, it fails to protect the welfare and safety of the minor.[72] This shows that the Supreme Court at least recognized the legitimate interest children have in the protection of their family units.

Six years later, in *Quilloin v. Walcott*, the Court stated that state interference with a family unit, "over the objections of the parents *and their children*," would offend the Due Process Clause.[73] The Court's rationale here clearly illustrates that the child's perspective is to be considered. This case involved a biological father who unsuccessfully attempted to block the adoption of his son by his son's stepfather.[74] Courts below had found that adoption by a familiar family unit was in the "best interests of the child."[75] Because the biological father had never before sought custody of the child nor attended to his basic needs, the Supreme Court found that the "best interests" determination did not violate the biological father's due process rights.[76] This holding implicitly emphasizes the importance of the child's interest in protecting their familial relationships.

In 1982, the Court again recognized a child's right to family integrity in an even clearer way in *Santosky v. Kramer*.[77] In this

a child's individual constitutional rights, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." (quoting *In re* Gault, 387 U.S. 1, 13 (1967))); Rachel Kennedy, *A Child's Constitutional Right to Family Integrity and Counsel in Dependency Proceedings*, 72 EMORY L.J. 911, 921 (2023) ("Supreme Court jurisprudence clearly supports a child's right to family integrity.").

70. 405 U.S. 645, 646 (1972).

71. *Id.* at 649.

72. *Id.* at 652–53.

73. 434 U.S. 246, 255 (1978) (emphasis added) (citing Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)).

74. *Id.* at 247.

75. *Id.* at 254.

76. *Id.* at 256.

77. 455 U.S. 745, 760 (1982) (requiring the State prove parental unfitness before terminating parental rights).

case, parents appealed a trial court's decision to permanently terminate their parental rights.[78] The Supreme Court vacated the decision, concluding that the standard of "preponderance of the evidence," which was used in the custody proceeding, is too low a burden of proof to protect a parent's vital interest in the care and upbringing of their child.[79] Importantly, the court went on to state that "*the child and his parents* share a vital interest in preventing erroneous termination of their natural relationship," essentially explicitly extending the due process right to family integrity to children.[80] The reciprocal language the *Santosky* Court used to describe the right to family integrity suggests that both children and parents can invoke the right.[81] The preceding line of cases indicates the Court recognizes a child's right to family integrity.

Most lower federal courts agree that children have a right to family integrity.[82] Seven federal courts of appeal have recognized this right and none have explicitly held that the right does not exist.[83] Notably, each of these federal appellate cases, as well as the Supreme Court cases that recognize a child's right to

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78. *Id.* at 751–52.

79. *Id.* at 747–48, 768–70.

80. *Id.* at 760 (emphasis added).

81. Kevin B. Frankel, Note, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COLUM. J.L. & SOC. PROBS. 301, 319 (2007).

82. Kennedy, *supra* note 69, at 926; *see also* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children."); Jordan *ex rel.* Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994) ("[D]elay implicates the child's interests in his family's integrity and in the nurture and companionship of his parents."); J.B. v. Washington County, 127 F.3d 919, 925 (10th Cir. 1997) (recognizing that the forced separation of parent from child infringes upon both the parents' and child's rights (citing *Jackson*, 15 F.3d at 346)); Wooley v. City of Baton Rouge, 211 F.3d 913, 923–24 (5th Cir. 2000) ("[The child] undeniably is entitled to stay with his mother without governmental interference."); Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 2000) (recognizing "the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency"); Suboh v. Dist. Att'y's Off., 298 F.3d 81, 91 (1st Cir. 2002) ("[A child's] liberty interest is protected . . . by the procedural component of the Due Process Clause, which guarantees 'fair process.'" (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997))); Berman v. Young, 291 F.3d 976, 983 (7th Cir. 2002) ("Parents have a fundamental due process right to care for and raise their children, and children enjoy the corresponding familial right to be raised and nurtured by their parents.").

83. Trivedi, *supra* note 65, at 282.

family integrity, involve child custody disputes.[84] For example, disputes commonly arise when a child and her parents allege that state officials wrongfully terminated the parent's custodial rights.[85] Although these are the most common and straightforward violations of family integrity, because a child is literally taken from her parents by the state, wrongful incarceration of a parent can also violate a child's right to family integrity.[86] Even though the child is not being directly taken from their family, parental incarceration prevents them from being raised and nurtured by their parent.[87] Part II will address the circuit split involving indirect violations of family integrity, including through wrongful convictions of parents.

The foregoing decisions indicate that American courts recognize the fundamentality of the right to family integrity. Further, there is a strong argument that children have an exercisable right to family integrity just as their adult counterparts do. With that background in mind, the next Section will examine more thoroughly the impacts of family separation on children to illustrate why this right is so important.

C. The Consequences of Forced Family Separation on Children

Examining the devastating trauma caused by forcibly separating a child from their parent makes the Supreme Court's emphasis on the importance of the right to family integrity understandable. Scientific research has demonstrated the vast number of ways children are impacted, sometimes irreparably, by separation from their parents.[88]

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84. *See supra* notes 70–81 and accompanying text (explaining Supreme Court decisions that indicate the Court recognizes a child's right to family integrity); *supra* note 82 (citing federal appellate cases that recognize a child's right to family integrity).

85. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 646 (1972) (addressing a dispute over removal of children after parent was presumed unfit due to being unmarried); *Santosky v. Kramer*, 455 U.S. 745, 751 (1982) (discussing a dispute over termination of parental rights).

86. See *infra* Part II, for discussions on how the right to family integrity applies in the wrongful incarceration context.

87. *Infra* Part II.

88. *See generally, e.g.*, Sarah Beresford et al., *The Health Impact on Children Affected by Parental Imprisonment*, 4 BMJ PAEDIATRICS OPEN, no. 1, 2020, at 1 (discussing the adverse impact of parental imprisonment on children's

Research on the impacts of child-parent separation in general, as opposed to in the specific context of parental incarceration, indicates that the stress hormones released by children when they are forcibly separated from their parents can cause long-term damage, both psychologically and to the structure of the brain.[89] A Harvard Medical School professor used a powerful analogy to explain the impact on the brain of children separated from their parents: if the brain is thought of as a lightbulb, "it's as though there was a dimmer that had reduced them from a 100-watt bulb to 30 watts."[90] Child-parent separation is so devastating on brain development because this separation involves "one of the most fundamental and critical bonds in human biology."[91]

Studies have also focused more specifically on the impacts on children who are separated from their parent due to incarceration. These findings include that children of incarcerated parents are more likely to experience behavioral problems, mental health issues, and delinquency.[92] These children have an increased likelihood of being diagnosed with psychiatric disorders, including attention deficit hyperactivity disorder and depression.[93] Additionally, children with incarcerated parents are at an

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physical and mental health); Juan Del Toro et al., *The Intergenerational Effects of Paternal Incarceration on Children's Social and Psychological Well-Being from Early Childhood to Adolescence*, 35 DEV. & PSYCHOPATHOLOGY 558 (2023) (analyzing the effect of paternal incarceration on child well-being); Child.'s Rts. Litig. Comm., *Trauma Caused by Separation of Children from Parents: A Tool to Help Lawyers*, AM. BAR ASS'N (Jan. 2020), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf [https://perma.cc/SS7Y-43HV] (citing multiple studies that focus on the impacts of separating children from their parents).

89. William Wan, *What Separation from Parents Does to Children: 'The Effect is Catastrophic': Trump's Border Policy Could Cause Long-term Damage to Children's Brains, Experts Warn*, WASH. POST (June 18, 2018), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html [https://perma.cc/JL2B-8JLB].

90. *Id.*

91. *Id.*

92. Julie Poehlmann-Tynan & Kristin Turney, *A Developmental Perspective on Children with Incarcerated Parents*, CHILD DEV. PERSPS., Mar. 2021, at 3, 4–5.

93. *Id.* at 6.

increased risk of physical health problems.[94] Children with incarcerated parents are also more likely than their peers to suffer from poor educational outcomes and problems in school, including decreased odds of completing high school and college,[95] as well as higher odds of being disciplined in school.[96] Other circumstances children of incarcerated parents face include economic disadvantage, housing instability, inconsistent family environments, and chronic stress.[97]

Undoubtedly, parental incarceration has detrimental impacts on children. The child-parent bond is vital, as implied by the Supreme Court in its numerous decisions touching on the fundamentality of the right to family integrity.[98] Despite its clear importance, the majority of circuit courts rarely recognize this right when it comes to children seeking redress after their parent has been wrongfully incarcerated.[99] The next Part will address this view and the circuit split.

II. THE CIRCUIT SPLIT THAT NEEDS RESOLVING

The right to family integrity is traditionally applied to government actions aimed directly at interfering with the family unit, such as in child custody or visitation contexts, or government regulation of parental decision-making, such as educational choices.[100] However, the right is also impacted, though indirectly, in the wrongful conviction and wrongful death contexts. When the government deprives a child of a relationship with their parent by intentionally wrongfully convicting or wrongfully killing their parent, the government has deprived the child of their right to family integrity. Though the child of a wrongfully

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94. *See* Rosalyn D. Lee et al., *The Impact of Parental Incarceration on the Physical and Mental Health of Young Adults*, 131 PEDIATRICS e1188, e1188 (2013) (reporting significant associations between parental incarceration and physical health problems, such as asthma, migraines, and HIV/AIDS).

95. Poehlmann-Tynan & Turney, *supra* note 92, at 7.

96. Rebecca J. Shlafer et al., *School-Based Outcomes Among Youth with Incarcerated Parents: Differences by School Setting*, 87 J. SCH. HEALTH 687, 690–91 (2017).

97. *Id.* at 688.

98. *See supra* notes 57, 61 and accompanying text.

99. *See infra* Part II (explaining the circuit majority and minority views regarding claims by children for incidental violations of their right to family integrity).

100. Chambers v. Sanders, 63 F.4th 1092, 1096 (6th Cir. 2023).

convicted parent is not themself the subject of the government misconduct, it may have the same, if not a more serious, impact on their right to family support and integrity than if they had been directly impacted, for example, through an improper custody decision.[101]

When it comes to these indirect violations, however, seven of the eight federal appellate courts that have addressed the issue have held that an actionable claim requires conduct intentionally directed at the parent-child relationship.[102] Even if the actor acts intentionally with respect to the wrongful conviction of the parent, these courts require an additional showing that the action was directed *at the familial relationship*.[103] Despite being incidentally deprived of their right to family integrity, if the child cannot prove that the government action was directly aimed at depriving them of that right, as opposed to simply being an intentional deprivation of their parent's rights, the child has no claim under this framework. The Ninth Circuit, on the other hand, has allowed children to assert this right absent a showing

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101. Parental incarceration can have lifelong impacts on a child, whether or not the parent is facing a life sentence. *See supra* notes 92–97 and accompanying text. A custody conflict, on the other hand, theoretically can sometimes be resolved quickly, for example, by returning the child to their parent after the wrongful decision is discovered.

102. *See, e.g.*, *Chambers*, 63 F.4th at 1100 ("[S]ubstantive due process claims based on the right to family integrity require that the state official act with a culpable state of mind directed at the family relationship."); Partridge v. City of Benton, 929 F.3d 562, 568 (8th Cir. 2019) (stating that a familial-relationship claim requires state action "intentionally directed at the familial relationship" (citing Harpole v. Ark. Dep't of Hum. Servs., 820 F.2d 923, 927–28 (8th Cir. 1987))); Gorman v. Rensselaer County, 910 F.3d 40, 48 (2d Cir. 2018) ("[A] claim under the Due Process Clause for infringement of the right to familial associations requires the allegation that state action was specifically intended to interfere with the family relationship."); Russ v. Watts, 414 F.3d 783, 790 (7th Cir. 2005) (refusing to recognize parental liberty interest claims absent "intentional action by the state to interfere with a familial relationship"); McCurdy v. Dodd, 352 F.3d 820, 827–28 (3d Cir. 2003) ("[T]he Due Process Clause only protects against deliberate violations of a parent's fundamental rights—that is, where the state action at issue was specifically aimed at interfering with protected aspects of the parent-child relationship."); Shaw v. Stroud, 13 F.3d 791, 805 (4th Cir. 1994) (declining to extend a substantive due process claim to government actions that affect families incidentally); Ortiz v. Burgos, 807 F.2d 6, 9 (1st Cir. 1986) ("We decline, on this record, to make the leap ourselves from the realm of governmental action directly aimed at the relationship between a parent and a young child to an incidental deprivation of the relationship between appellants and their adult relative.").

103. *E.g.*, *Chambers*, 63 F.4th at 1100.

of intentional interference with the family relationship.[104] This Part will explain the majority and minority views by walking through various circuit court decisions on the topic.

A. THE MAJORITY VIEW

The Sixth Circuit addressed this issue most recently in the 2023 case of *Chambers v. Sanders*.[105] There, two brothers, Danny and Dontell, alleged that a detective, Ronald Sanders, violated their right to family integrity by causing the wrongful conviction and incarceration of their father, Danny Burton.[106] Burton's wrongful murder conviction rested primarily on testimony by Burton and other witnesses that resulted from manipulation, intimidation, and infliction of physical violence by Sanders.[107] Other allegations contained in the Complaint included bribery, threats, suppression of exculpatory evidence, and fabricated evidence.[108] The Complaint also indicated that, on the plaintiffs' information and belief, Sanders "*knew*" that their father had not killed the murder victim and knew who actually committed the killing.[109] This wrongful conviction resulted in Danny and Dontell being separated from their father for thirty-two years and deprived them of their right to a family unit throughout their entire childhood.[110]

Despite evidence of deliberate conduct by Sanders to wrongfully convict Burton, the Sixth Circuit held that the brothers failed to state a 42 U.S.C. § 1983 claim.[111] The court explained

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104. *See* Smith v. City of Fontana, 818 F.2d 1411, 1417–20 (9th Cir. 1987) (finding that a deceased father's children had a substantive due process claim due to the excessive police force giving rise to the father's claim), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999).

105. 63 F.4th at 1092.

106. *Id.* at 1095.

107. *Id.*

108. Chambers Complaint, *supra* note 2, at 4, 7, 13.

109. *Id.* at 6; *Chambers*, 63 F.4th at 1103 (Moore, J., dissenting).

110. *See* Chambers Complaint, *supra* note 2, at 11 ("Danny Burton was sent to prison, and plaintiffs were forced to grow up fatherless, instead watching Mr. Burton spend over 32 years in prison.").

111. Section 1983 provides in pertinent part: "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,

that the brothers did not allege their rights were deliberately targeted by the detective, instead alleging their rights were violated as a byproduct of the violation of their father's constitutional rights.[112] The court relied on the Supreme Court's holding in *Daniels v. Williams*, that negligent acts causing unintended injury to a plaintiff's life, liberty, or property do not implicate the Due Process Clause.[113] The *Chambers* court held that due process is similarly not implicated "when a government official unintentionally harms those interests with no culpable state of mind directed toward them at all."[114] Essentially, because mere negligent conduct does not give rise to a due process claim, incidental harm which is not directed toward the specific plaintiffs must similarly be inadequate. To prevail in such cases under this approach, a plaintiff must show that the government official "acted with a culpable state of mind directed at the *plaintiff's* family relationship or a decision traditionally within the ambit of the family."[115] It is not enough that violations of a plaintiff's rights were an inevitable byproduct of a government official's deliberate violation of the parent's rights.[116]

The Tenth Circuit came to a similar conclusion in the 2008 decision, *Lowery v. County of Riley*.[117] There, a father was wrongfully convicted of rape, aggravated battery, and aggravated burglary and incarcerated for ten years before DNA testing proved he was innocent of these crimes.[118] His conviction rested on a confession he made that was coerced by suggestive and leading questions after he was denied a lawyer.[119] His daughter's § 1983 claim for deprivation of family integrity was denied because, according to the court, not every act that results in interference with the rights of familial association is actionable.[120] Instead,

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.

112. *Chambers*, 63 F.4th at 1101 (majority opinion).

113. *Id.* at 1098 (citing Daniels v. Williams, 474 U.S. 327, 328 (1986)).

114. *Id.* at 1098.

115. *Id.* at 1100 (emphasis added).

116. *Id.* at 1101.

117. 522 F.3d 1086, 1092 (10th Cir. 2008).

118. *Id.* at 1088.

119. *See id.* at 1089–90 (listing examples of the suggestive questions posed by the interrogating officers).

120. *Id.* at 1092 (quoting J.B. v. Washington County, 127 F.3d 919, 927 (10th Cir. 1997)).

the conduct must be directed at the familial relationship with knowledge that it will adversely affect that relationship.[121] The *Lowery* court relied on a previous Tenth Circuit decision,[122] *Trujillo v. Board of County Commissioners*, which held that "an allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under section 1983."[123] Because there was no allegation that the officers directed their conduct at the familial relationship, relief was not granted.[124]

The First, Second, Third, Fourth, Seventh, and Eighth Circuits have come to similar conclusions when faced with the issue of indirect violations of family integrity in the context of wrongful death.[125] They have concluded that a claim of infringement of the right to family integrity requires that the state conduct was specifically intended to interfere with the family relationship.[126] The First Circuit, for example, addressed this issue in the context of a stepparent alleging a deprivation of their right to family integrity due to the wrongful death of their child, who was beaten and killed by prison guards.[127] The court declined to recognize that the stepparent had a constitutionally protected interest in the companionship of their child because the government did not "directly act" to sever the family relationship, and because the relationship was between a stepparent and his adult—as opposed to minor—child.[128] In *Russ v. Watts*, the Seventh Circuit concluded that finding a constitutional violation of a parental liberty interest based on actions not directed at the parent-child relationship would "stretch the concept of due process far beyond the guiding principles set forth by the Supreme Court," resulting in "the risk of constitutionalizing all torts

121. *Id.*

122. *See id.* (noting the intent requirement from Trujillo v. Bd. of Cnty. Comm'rs, 768 F.2d 1186, 1190 (10th Cir. 1985)).

123. 768 F.2d at 1190.

124. *Id.*

125. *See supra* note 102.

126. *See, e.g.*, Gorman v. Rensselaer County, 910 F.3d 40, 48 (2d Cir. 2018) ("[A] claim under the Due Process Clause for infringement of the right to familial associations requires the allegation that state action was specifically intended to interfere with the family relationship."); *see also supra* note 102.

127. Ortiz v. Burgos, 807 F.2d 6, 7 (1st Cir. 1986).

128. *See id.* at 8–9 (highlighting the adult child and incidental deprivation components of the case).

against individuals who happen to have families."[129] In other words, the court seemed concerned that this application of due process would result in individuals having actionable claims anytime their family member is impacted by state action.

In sum, the majority of circuits have decided that if a child cannot prove that government action was directly aimed at depriving them of their right to be raised by their parent, as opposed to simply being an intentional deprivation of their parent's rights, the child has no due process claim.

B. THE MINORITY VIEW

In 1987, the Ninth Circuit announced the opposing view in *Smith v. City of Fontana*, allowing children to claim violations of their right to family integrity arising from conduct that incidentally impacts their relationship with their parents.[130] There, Rufus A. Smith, an unarmed Black man, was killed by excessive police force during his arrest.[131] While attempting to comply with police orders, he was placed in a chokehold, dragged, kneed in the groin, struck in the face, and finally, fatally shot.[132]

Mr. Smith's children subsequently brought § 1983 claims against the officers for violating their personal substantive due process rights.[133] Specifically, they alleged violations of their "rights not to be deprived of the life of their father and not to be deprived of his love, comfort, and support."[134] The court found these claims valid and concluded that the same allegation of excessive force giving rise to their father's substantive due process claim based on his loss of life also gave the children a substantive due process claim based on their loss of his companionship.[135] The court did not require any showing of culpability or intent to harm the family relationship.[136]

To justify its holding, the Ninth Circuit acknowledged the fundamentality of the right to family integrity, and more

129. 414 F.3d 783, 790 (7th Cir. 2005).

130. 818 F.2d 1411, 1420 (9th Cir. 1987), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999).

131. *See id.* at 1414 (detailing the excessive force used by the officers).

132. *Id.*

133. *Id.* at 1417.

134. *Id.*

135. *Id.* at 1420.

136. *See id.* (omitting such an intent or culpability requirement).

specifically, the need to "protect children from unwarranted state interference with their relationships with their parents."[137] Not only does the right to family integrity protect parents' interest in directing the upbringing of their children, the court held, but it also protects the weighty interest of a child in the companionship and support of their parent.[138] Therefore, when a parent is wrongfully killed or incarcerated by the State, their child may be able to state a valid claim for violation of their personal substantive due process rights.[139]

The Ninth Circuit also relied on the legislative history of the Ku Klux Klan Act of 1871, the precursor to § 1983, to explain its ruling.[140] The Act was described by a congressman as a remedy offered specifically "to the children whose father has been killed."[141] Therefore, the court reasoned, the Act makes an even clearer case for a child's recovery due to loss of companionship of a parent, than for the parent's recovery due to the loss of a child.[142]

Importantly, the Ninth Circuit in *Smith* came to its conclusion without applying a concrete rule, such as the shocks-the-conscience test or a specific-intent requirement.[143] Instead, it simply asserted the reciprocal nature of the constitutional interest in familial companionship to hold that children have a cognizable interest in their relationship with their parents.[144]

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137. *Id.* at 1418 (explaining that a long line of Supreme Court cases has stressed the importance of protecting the liberty interest of parents, and that this interest logically extends to protect children as well).

138. *See id.* at 1419 ("We hold that a child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest.").

139. *See id.* at 1420 ("[T]he same allegation of excessive force giving rise to Mr. Smith's substantive due process claim based on his loss of life also gives the children a substantive due process claim based on their loss of his companionship.").

140. *Id.* at 1419; *see also* Ku Klux Klan Act of 1871, Pub. L. No. 42-22, 17 Stat. 13 (current version at 42 U.S.C. § 1983).

141. *Smith*, 818 F.2d at 1419 (emphasis omitted) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 807 (1871)), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999).

142. *Id.* (citing Bell v. City of Milwaukee, 746 F.2d 1205, 1244 (7th Cir. 1984)).

143. *See id.* at 1417–20 (omitting a concrete rule to be applied).

144. *Id.* at 1418 ("We now hold that this constitutional interest in familial companionship and society logically extends to protect children from

Essentially, the court held that, in general, children can claim violations of their own right to family integrity based on conduct directed toward their parent.[145] The decision does not give courts any concrete guidelines or boundaries to adhere to in future cases.[146] It could theoretically apply to all children of parents wrongfully killed or incarcerated without any limiting scope.

To date, no other circuit has adopted the Ninth Circuit's view. Instead, the seven other Circuits that have addressed this issue have concluded that a violation of the right to family integrity requires that the state conduct was specifically intended to interfere with the family relationship.[147] The result of this circuit split is that a child in most jurisdictions whose parent is wrongfully convicted or killed by state actors very likely cannot state an actionable claim for violation of their right to family integrity, despite the Supreme Court's indication that children do possess this right.[148] On the other hand, a child in the Ninth Circuit can freely claim a violation of their right to family integrity when their parent's right has been violated.[149] Part III will explain why neither of these views is satisfactory and propose a better solution.

III. THE SHOCKS-THE-CONSCIENCE TEST SHOULD REPLACE BOTH THE MAJORITY AND MINORITY RULES

Part III begins by explaining that the Ninth Circuit came to the proper conclusion in *Smith* and that the majority view's specific-intent requirement is misguided. It notes, however, that the Ninth Circuit failed to lay out a concrete test in coming to its conclusion. It then proposes that the shocks-the-conscience test is the appropriate test to be applied in the context of incidental

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unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.").

145. *Id.*

146. *See id.* at 1420 (neglecting to include guidelines for courts while characterizing the children's loss of companionship claim).

147. See *supra* Part II.A, for examples of the majority holdings.

148. *See supra* Part I.B (citing Supreme Court decisions indicating that the right to family integrity applies to children as well as parents).

149. *See supra* notes 135–39, 143–46 and accompanying text.

violations of family integrity due to parental wrongful conviction, both from a precedential and policy perspective.

A. THE MINORITY AND MAJORITY VIEWS ANALYZED

The Ninth Circuit in *Smith* came to the correct conclusion when it recognized that children have an actionable substantive due process claim even absent direct, intentional interference with the family relationship. Unfortunately, under the majority view, the children in *Smith* who lost their father to brutal police violence, as well as children like Danny and Dontell who lost theirs to thirty-two years of wrongful incarceration, are unable to claim violations of their right to companionship with their parent.[150] Despite the right to family integrity being recognized as vital by the Supreme Court,[151] children in most jurisdictions are rarely able to assert it, simply because they are unable to prove that the state conduct was directed at their relationship with their parent. No matter how substantial the interference is with their ability to have a relationship with their parent, this bright-line majority rule prevents a remedy.

Not only is the Ninth Circuit's holding admirable from a public policy standpoint, as it recognizes the significance of the parental bond to a child's life, but it also should be applauded for declining to apply an arbitrary specific-intent requirement. The majority circuits, on the other hand, take the Supreme Court's instruction that due process is only violated by "conduct intended to injure,"[152] and use this to conclude that the intent must be directed at the family relationship.[153] They fail to acknowledge the possibility that a state actor may intentionally injure someone by wrongfully incarcerating them and leaving their child without a parent, without specifically intending to interfere with the family relationship.

The majority circuits are incorrect in reasoning that the specific-intent requirement is necessary to comport with Supreme Court precedent. The Supreme Court has indicated that

150. *See* Chambers v. Sanders, 63 F.4th 1092, 1101 (6th Cir. 2023) (dismissing Danny and Dontell's family integrity claims for failing to allege the defendant's conduct was "directed at interfering with their parent-child relationship").

151. *See supra* note 64 and accompanying text.

152. *Chambers*, 63 F.4th at 1097 (citing County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998)).

153. *Id.* at 1100.

"[h]istorically, [the] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property."[154] When making clear that deliberate decisions are a necessary component of a due process claim, the Supreme Court was acknowledging that *negligent* conduct by a state official causing *unintended* loss or injury, such as leaving a pillow on prison stairs causing a prisoner to trip or misplacing an inmate's property, does not constitute a deprivation of substantive due process.[155] Instead, as the Court has emphasized repeatedly, the role of due process is to protect individuals against the *arbitrary* exercise of governmental power.[156] Importantly, negligent conduct, also known as failure to exercise the degree of care that a normal person would,[157] is not at issue in the pertinent wrongful conviction context. Intentionally procuring a wrongful conviction is not a negligent, accidental, arbitrary, or trivial act. It is a completely deliberate act that results in deprivation not only of the convicted person's liberty, but their child's as well.

The Supreme Court reiterated the negligence-intent distinction in *County of Sacramento v. Lewis* when it stated that negligent conduct is "categorically beneath the threshold of constitutional due process," while behavior on the other end of the spectrum—"conduct intended to injure in some way unjustifiable by any government interest"—is most likely to support a substantive due process claim.[158] These Supreme Court instructions make it clear that negligent conduct is not egregious enough to

154. Daniels v. Williams, 474 U.S. 327, 331 (1986).

155. *Id.* at 332 ("We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate's property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.").

156. *Id.* at 331 ("This history reflects the traditional and common-sense notion that the Due Process Clause . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government' . . . ." (quoting Hurtado v. California, 110 U.S. 516, 527 (1884))).

157. *See* Blyth v. Birmingham Waterworks Co. (1856) 156 Eng. Rep. 1047, 1049; 11 Exch. Rep. 781, 784 ("Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.").

158. 523 U.S. 833, 849 (1998) (citing *Daniels*, 474 U.S. at 328, 331).

constitute a substantive due process deprivation. They do *not* purport to announce that there is a specificity requirement when it comes to intent. There is no requirement under these precedents that official conduct must intend to injure the family relationship for a due process family integrity claim to be successful.[159] The Ninth Circuit's conclusion that children's due process could be violated based on intentional, as opposed to negligent, excessive police force comports with this precedent.[160] In sum, the Ninth Circuit was correct in holding that children have an actionable substantive due process claim when their parent was intentionally brutalized by police, even absent intentional interference *with the family relationship*.

Putting aside the strengths of the Ninth Circuit's decision to recognize that children have a family integrity claim even absent intentional interference with the family relationship, it cannot be ignored that it is the only circuit with this view. The majority of circuits have interpreted substantive due process precedent to hold that the right to family integrity does not protect against all forms of state action that impact parent-child relationships.[161] Instead, they argue, a culpable mental state directed toward the child is a necessary component of a due process claim.[162] In a broad sense, this argument is not without merit. It is true that children should not be protected against *all* forms of state action that impact their relationships with their parents. For example, when a government official acts negligently or

159. *See id.* The court explains that "conduct intended to injure in some way" may support a substantive due process claim but does not specify that the conduct must be directed at a particular individual or relationship. *Id.*

160. *See* Smith v. City of Fontana, 818 F.2d 1411, 1420 (9th Cir. 1987) (noting that excessive police force "constitutes the very sort of affirmative abuse of government power which the substantive protections of the due process clause are designed to prevent"), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999).

161. *See supra* note 102 and accompanying text.

162. *See, e.g.*, Chambers v. Sanders, 63 F.4th 1092, 1098 (6th Cir. 2023) ("[H]olding a government actor automatically responsible for incidental harms flowing from his actions imposes strict liability—a result directly contrary to *Daniels*, which clarifies that the Due Process Clause 'serves to prevent governmental power from being used for purposes of oppression.'" (quoting *Daniels*, 474 U.S. at 331)).

unintentionally but ultimately causes a wrongful conviction or death, the Due Process Clause is not implicated.[163]

However, it also is not right that the fundamental right to family integrity should *never* protect children unless they can somehow prove not only culpability, but culpability directed toward their relationship with their parent. Courts have even admitted that it would be rare for a plaintiff in the wrongful incarceration context to establish the requisite specific intent to constitute an infringement on the right to family integrity.[164] Though not impossible, it is difficult to imagine many situations where a child would be able to prove that an actor wrongfully convicted their parent with specific intent to harm their family relationship.[165]

Instead of either of the existing views, the well-known shocks-the-conscience test should step in to strike a balance between the Ninth Circuit's holding allowing limitless claims of indirect violations of family integrity, and the majority holding foreclosing essentially all of these claims. The next Section will explore the shocks-the-conscience test and how it could be applied in the context of indirect violations of a child's right to family integrity.

B. JUSTIFYING THE SHOCKS-THE-CONSCIENCE TEST

Courts should apply the shocks-the-conscience test to analyze whether a state actor who caused a wrongful conviction has violated a child's right to family integrity. Application of this

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163. *See Daniels*, 474 U.S. at 328 ("We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.").

164. *E.g.*, *Chambers*, 63 F.4th at 1101; Note, *Tied Together, Torn Apart: Exploring "Incidental" Interferences with the Right to Family Integrity*, 137 HARV. L. REV. 2364, 2376 (2024) [hereinafter *Tied Together, Torn Apart*].

165. There has been at least one instance where a child has successfully met the specific-intent requirement in the wrongful conviction context. *See* McIntyre v. Unified Gov't of Wyandotte County & Kansas City, No. 18-2545-KHV, 2022 WL 2072721 (D. Kan. June 9, 2022). A child and his mother alleged that a state actor pursued the wrongful conviction of their father/husband in order to punish the mother for repeatedly denying his unwanted sexual and romantic advances. *Id.* at *6. A federal district court held that a jury could reasonably infer that the actor specifically intended to interfere with the child and mother's familial unit. *Id.*; *see also Tied Together, Torn Apart*, *supra* note 164, at 2376–77 (summarizing the McIntyres' family integrity claim).

test, which is supported by ample Supreme Court precedent,[166] is a more robust inquiry than that of the Ninth Circuit and allows children the ability to state an actionable claim more frequently than under the majority view. While the Ninth Circuit did come to the correct conclusion, it did so without applying a concrete test or even referring to the shocks-the-conscience test.[167] A more practical inquiry would involve application of the shocks-the-conscience test to create uniformity and clarity among courts.[168]

The Supreme Court first announced the shocks-the-conscience test in its 1952 decision, *Rochin v. California*.[169] The Court held that conscience-shocking conduct "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples."[170] Ever since, the Court has made it abundantly clear that when determining whether executive action violates substantive due process, the Court looks at whether the conduct shocks the conscience.[171] In *County of Sacramento v. Lewis*, the Court, in a unanimous decision, reiterated

166. *See supra* notes 39–40 and accompanying text.

167. *See* Smith v. City of Fontana, 818 F.2d 1411, 1417–20 (9th Cir. 1987) (holding that children have a cognizable claim against state actors who wrongfully convict their parent without introducing a standard for assessing such claims), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999) (overruling the holding in *Smith* that standing to seek damages serves as a basis for standing to seek equitable relief).

168. *See* Christina Conkling, Shockingly Confusing: Why a Shocks the Conscience Test Should Be Adopted as a Uniform Test for State-Created Danger Claims 1, 7 (2024) (unpublished comment) (on file with the Seton Hall University eRepository) (advocating for the shocks-the-conscience test to be universally applied in cases where a state actor's misconduct leads to a plaintiff being injured by a third party).

169. *See* 342 U.S. 165, 172–73 (1952) ("Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience . . . [there is a] general requirement that States, in their prosecutions, respect certain decencies of civilized conduct.").

170. *Id.* at 169 (quoting Malinski v. People of the State of New York, 324 U.S. 401, 416–17 (1945)).

171. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) ("To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."). For an example of an appellate court applying *Rochin*'s shocks-the-conscience test, see Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

the *Rochin* shocks-the-conscience test, stating that an official's conduct must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[172] This opinion also acknowledged that the Court has repeatedly adhered to the shocks-the-conscience test when asked to state the cognizable level of executive abuse of power.[173]

The shocks-the-conscience test should be applied to parental wrongful conviction cases. This test is explicitly supported by Supreme Court precedent and fits squarely within the context of the procurement of wrongful convictions by government officials. The test was designed to apply to rogue, arbitrary actions of individual government officials directed at individual defendants.[174] In other words, the exercise of power without any reasonable, legitimate governmental objective.[175] The underlying reasoning is that individuals are due a process governed by law rather than by the whims of a government actor.[176] The shocks-the-conscience test serves as a check on the power of government officials to arbitrarily deprive individuals of rights without legal process.[177] Wrongful convictions necessarily involve one or more government officials, acting arbitrarily and independently, in violation of a family's due process rights. Therefore, it would be entirely consistent with Supreme Court jurisprudence to apply the shocks-the-conscience test to these cases. Families deserve to have their due process rights protected against state actors who make the horrific decision to wrongfully convict an innocent person.

Applying the shocks-the-conscience test, in some instances a state actor who intentionally and deliberately secures a wrongful conviction resulting in a child growing up parentless would be liable to the child for violating their due process right to family integrity. Considering the grossly unjust and abhorrent

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172. 523 U.S. at 847 n.8.

173. *Id.* at 846–47 ("In the intervening years we have repeatedly adhered to *Rochin*'s benchmark.").

174. Farnsworth, *supra* note 33, at 820.

175. *See Lewis*, 523 U.S. at 846 (explaining that the cornerstone of substantive due process violations is "the exercise of power without any reasonable justification in the service of a legitimate government objective").

176. Farnsworth, *supra* note 33, at 822.

177. *See id.* ("Broadly, scholars trace due process to the Magna Carta, where the concept operated as a check on the power of the King to unilaterally deprive individuals of rights without legal process.").

nature of intentionally ripping an innocent parent from their child through wrongful incarceration and depriving the child of their parent, it is wrong to require an additional showing of intent to harm the family relationship in order for a claim to be actionable. The intentional procuring of a wrongful conviction should constitute sufficient intent to shock the conscience. Arguably, it is much more conscience shocking to imprison an innocent person for years than to force a doctor to pump the stomach of a criminal defendant who swallowed drugs to hide evidence, which the Supreme Court first considered conscience shocking in *Rochin v. California*.[178] In that case, the defendant put drugs in his mouth after officers found them on his nightstand, refused to spit them out, and was then taken to a hospital where a doctor pumped his stomach.[179] Although undoubtedly violating and shocking, one would likely choose to endure this incident over being stripped of all freedom and imprisoned for years for no reason. If pumping the stomach of a criminal defendant is enough to shock the conscience, deliberately procuring the conviction of an innocent person also very well may meet the conscience-shocking threshold.

Application of this test would allow courts to analyze the official's conduct under the circumstances to determine whether it is significant enough to shock the conscience. Therefore, this proposal would not give *all* children of wrongfully incarcerated parents an absolute right to sue, thus mitigating a potential concern of a vast increase in successful litigation.[180] Factors such as the length of the separation, the motivation and flagrancy of the official misconduct, whether the official had knowledge of the family relationship, and the amount of time the official had to deliberate might be considered to determine whether the conduct shocks the conscience. There is a clear and drastic difference between deliberate conduct aimed at taking away the freedom of an innocent parent, and less atrocious conduct that simply has the effect of interfering with a child's relationship with their

178. *See* 342 U.S. 165, 172–73 (1952) (characterizing the forceful pumping of a defendant's stomach as an act that shocks the conscience).

179. *Id.* at 166.

180. *See* Chambers v. Sanders, 63 F.4th 1092, 1106 (6th Cir. 2023) (Moore, J., dissenting) (explaining the Tenth Circuit's view that a requirement of intent to interfere with a particular relationship is necessary to avoid flooding the courts with cases).

parent. An accidental wrongful conviction,[181] a wrongful conviction that was remedied in a very short time, or even some wrongful convictions involving questionable, but not sufficiently flagrant, intentional conduct would be unlikely to shock the conscience. For example, lying to suspects during an interrogation may seem problematic, especially when it leads to a wrongful conviction, but it is a legal practice that would not be enough to shock the conscience.[182] Government officials would face liability only when their conduct caused the plaintiff's injury and sufficiently shocks the conscience—"a tough test [t]o say the least."[183] The shocks-the-conscience test seeks to ensure that not every improper executive act is a constitutional violation, thus requiring the high standard of conscience-shocking conduct.[184]

To illustrate how application of the shocks-the-conscience test would work in the family integrity and wrongful conviction context, consider the misconduct alleged in *Chambers v. Sanders*.[185] There, a detective deliberately and intentionally procured a wrongful conviction against the innocent father of young children, despite knowing he was innocent, resulting in the children being without their father for thirty-two years.[186] Detective Sanders threatened, intimidated, and inflicted physical violence on Burton, an innocent suspect and father, to pressure him into confessing to a crime he did not commit.[187] He coerced witnesses into making false statements through threats, including that they would be charged with murder or have their children taken

181. An "accidental wrongful conviction" refers to a wrongful conviction that was not the result of intentional or deliberate conduct by a state actor.

182. *See* Nigel Quiroz, *Five Facts About Police Deception and Youth You Should Know*, INNOCENCE PROJECT (May 13, 2022), https://innocenceproject.org/police-deception-lying-interrogations-youth-teenagers [https://perma.cc/34JK-B42T] (explaining that police can lie to suspects during interrogation).

183. *Chambers*, 63 F.4th at 1107 (Moore, J., dissenting) (alteration in original) (internal quotation marks omitted) (quoting *id.* at 1096 (majority opinion)).

184. *See* Farnsworth, *supra* note 33, at 820 (explaining that the shocks-the-conscience test applies to the "rogue" actions of government officials but has been overused to "challenge government polic[ies] writ large").

185. See *supra* Part II.A for a discussion of *Chambers* and the misconduct alleged therein.

186. *See Chambers*, 63 F.4th at 1102 (Moore, J., dissenting) ("[W]e are faced with children who lost their association with their father for thirty-two years because a police officer deliberately and intentionally procured a false conviction against their father that condemned him to a life sentence of imprisonment.").

187. *Id.* at 1103.

away, as well as through physical, mental, and emotional abuse.[188] He fabricated evidence, suppressed exculpatory evidence, and prevented certain witnesses from testifying at Burton's trial.[189]

Likely, most would agree that this conduct is brutal and offensive enough to shock the conscience.[190] Detective Sanders intentionally and deliberately procured a wrongful conviction against the children's father and deprived them of this vital relationship for thirty-two years.[191] He did so in a way that violates the "decencies of civilized conduct."[192] This was not an instance of negligence or recklessness.[193] Instead, it was "conduct deliberately intended to injure . . . unjustifiable by any government interest," which is "the sort of official action most likely to rise to the conscience-shocking level."[194]

A crucial factor that points toward the conscience-shocking nature of this conduct is the amount of time Detective Sanders had for deliberation.[195] Courts have highlighted that when government officials are required to make instant judgments, for example, during a high-speed chase, their conduct does not shock the conscience.[196] If, on the other hand, they have ample time to

188. *Id.*

189. *Id.* at 1103–04.

190. The Supreme Court has indicated that certain interrogation techniques, including physical and psychological torture, are so offensive that they violate the Due Process Clause. *See* Miller v. Fenton, 474 U.S. 104, 109 (1985).

191. *See Chambers*, 63 F.4th at 1113 (Moore, J., dissenting) ("Sanders engaged in conscience-shocking conduct when he intentionally and deliberately procured a wrongful conviction that incarcerated Appellants' father for thirty-two years.").

192. Rochin v. California, 342 U.S. 165, 173 (1952).

193. *See Chambers*, 63 F.4th at 1113 (Moore, J., dissenting) ("[K]nowing that deliberately and wrongfully incarcerating Burton would deprive his children of their father for the remainder of his life, Detective Sanders nonetheless took actions to carry out that consequence. As the Restatement of Torts instructs, a person acts with intent when they desire to or have the purpose of bringing about certain consequences or when they 'act[] knowing that the consequence is substantially certain to result.'" (alteration in original) (quoting RESTATEMENT (THIRD) OF TORTS § 1 & cmts. a–c (AM. L. INST. 2010))).

194. County of Sacramento v. Lewis, 523 U.S. 833, 834 (1998).

195. *See Chambers*, 63 F.4th at 1101 (asserting that it shocks the conscience when a government actor has time to deliberate and still chooses to act with deliberate indifference to the federally protected rights of another).

196. *See Chambers*, 63 F.4th at 1111 (Moore, J., dissenting) ("We have highlighted that though 'a police officer who exhibits a reckless disregard for life

deliberate and still choose to act in way that is deliberately indifferent or harmful, this conduct may rise to a conscience-shocking level.[197] Detective Sanders was not in a high-pressure, time-sensitive environment when he procured Burton's wrongful conviction.[198] He consciously chose on each day of Burton's investigation to conduct it in a way that would result in separating him from his children for no apparent reason.[199] He had time to understand the risks and consequences of wrongfully convicting an innocent father.

To be clear, if the facts were different, this may not be a conscience-shocking case, even if it still resulted in a wrongful conviction. Few interrogation techniques rise to a conscience-shocking level.[200] The Supreme Court has upheld confessions resulting from deceptive interrogation techniques by police, including misrepresenting the strength of their case against a suspect, lying to a suspect's attorney, and employing "good cop, bad cap" routines.[201] Other courts have held that absent certain circumstances, such as evidence that the state actor attempted to coerce the defendant, evidence that investigators purposefully ignored

during a high-speed chase does not shock the conscience because the circumstances require instant judgment,' on the other hand 'an officer who has five hours to decide whether to use tear gas and forced entry during a standoff might shock the conscience if the officer is deliberately indifferent to the risks posed to hostages.'" (quoting Ewolski v. City of Brunswick, 287 F.3d 492, 510 (6th Cir. 2002))).

197. *Id.*

198. *Id.* at 1112 ("Sanders had months between Ruffin's death and Burton's trial 'to deliberate' and 'fully consider the potential consequences of [his] conduct,' but Sanders stayed the course." (alteration in original) (quoting Range v. Douglas, 763 F.3d 573, 590 (6th Cir. 2019))).

199. *Id.* The *Chambers* opinion does not explain why Sanders wanted to convict Burton, but the dissent does indicate the possibility that Sanders knew Burton was innocent, knew he had children, and knew that incarcerating him would destroy his family unit. *Id.* at 1103 ("On Appellants' information and belief, Sanders '*knew*' that their father had not killed Ruffin and knew who committed the killing."); *id.* at 1104 ("[A]s an experienced officer and detective, Sanders would certainly know, better than most, that incarceration separates families.").

200. *See* Laurie Magid, *Deceptive Police Interrogation Practices: How Far is too Far?*, 99 MICH. L. REV. 1168, 1208–09 (2001) (explaining that the shocks-the-conscience test bars a small number of interrogation techniques).

201. *Id.* at 1175–77 (describing cases where the Supreme Court has not struck down deceptive interrogation techniques, misrepresentation of the strength of cases, or "good cop, bad cap" routines on shocks-the-conscience grounds).

evidence suggesting the defendant's innocence, or evidence of systemic pressure to implicate the defendant in the face of contrary evidence, the official's conduct does not shock the conscience.[202] If Detective Sanders had conducted Burton's investigation in a lazy manner, by negligently failing to interview exculpatory witnesses or using borderline threatening, but legal, interrogation tactics to speed up witness interviews, this very well may not be considered conscience-shocking conduct.[203] Even if it resulted in the same outcome, a wrongful conviction, this conduct would lack the level of offensiveness required to really shock the conscience.[204] It is not easy for conduct to rise to the level of conscience shocking,[205] and therefore, application of this test would not lead to a vast increase in successful litigation.

Despite this comprehensible example of an application of the shocks-the-conscience test, it should not be ignored that the test does not always result in such a clear answer. It is undoubtedly a subjective test that may come out differently depending on who is doing the analysis.[206] This results in the risk of judicial activism.[207] Judges may, based on their personal preferences, overturn the decisions of other government actors by subjectively determining that their conduct was conscience-

202. Akins v. Epperly, 588 F.3d 1178, 1184 (8th Cir. 2009).

203. *See* Magid, *supra* note 200, at 1175–77 (noting that the Court has not forbidden the use of deception, misrepresentation, or "good cop, bad cop" interrogation techniques).

204. *E.g.*, *Akins*, 588 F.3d at 1184 ("[M]ere negligence . . . is insufficient to establish a claim of conscience-shocking conduct.").

205. Chambers v. Sanders, 63 F.4th 1092, 1096 (6th Cir. 2023) (explaining that the shocks-the-conscience test is a "tough test" and must be applied with "the utmost care." (first quoting Golf Vill. N., LLC v. City of Powell, 42 F.4th 593, 601 (6th Cir. 2022); and then quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997))).

206. Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 334–35 (2010) ("Justice Souter . . . conceded that 'the measure of what is conscience-shocking is no calibrated yardstick,' and the concurring opinion of Justice Scalia, joined by Justice Thomas, as well as Justice Kennedy's concurrence, joined by Justice O'Connor, attacked [the shocks-the-conscience test's] subjectivity." (quoting County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998))).

207. *See id.* at 346–47 (explaining that a reason to constrain substantive due process claims is that the absence of "objective guideposts" opens the door for judicial activism).

shocking.[208] At the same time, though, this subjectivity allows judges to hold actors liable when they clearly acted in egregious ways.[209] It allows them to take a holistic view of complex factual situations in order to come to the correct decision,[210] instead of being required to rule a certain way no matter the circumstances simply because of the majority's specific-intent rule.[211] In the context of *Chambers*, the court should have had the discretion to make an informed judgment based on the nature of the detective's conduct.[212] The brothers who lost their father to wrongful incarceration should not have been barred from recovery solely because of the strict majority rule.

In addition to being subjective, the shocks-the-conscience test has been criticized for imposing too high a standard for litigants to meet, resulting in successful claims being limited to only the most egregious misconduct.[213] For example, although the Supreme Court has recognized that students have a right to be free from "appreciable physical pain" inflicted by school authorities,[214] most appellate courts in school discipline cases require a showing of intentional malice or sadism in order for conduct to

208. *See id.* at 347 ("Opponents complain that allowing substantive due process challenges means that judges, based only on their own subjective preferences, will second-guess executive or administrative decisions. Arguably, the largely undefined labels 'arbitrary' and 'capricious' can be attached to all sorts of government misconduct, potentially creating an undue strain on federal judicial resources as well as on state-federal relations.").

209. Conkling, *supra* note 168, at 31 ("While a shocks the conscience test is clearly still a very subjective test, it allows for a decisionmaker to take a step back and hold some defendants liable who clearly acted affirmatively in such a way that it contributed to the plaintiff's injury.").

210. *Id.* ("This holistic review allows judges to make decisions that more accurately reflect the situation rather than break it down piece by piece.").

211. *See supra* Part III.A (explaining that it is nearly impossible for a child's family integrity claim to be actionable under the majority rule because of the difficulty of proving specific intent).

212. *See supra* notes 185–99 and accompanying text (describing the detective's conduct in Chambers v. Sanders, 63 F.4th 1092 (6th Cir. 2023)).

213. *See, e.g.*, Levinson, *supra* note 206, at 348 ("[R]ejection of the shocks the conscience standard should include elimination of a rigid intent to harm, wantonness, malice, or sadism test. Arbitrary abuse of power should not be insulated by imposing draconian burdens of proof on the victims.").

214. Ingraham v. Wright, 430 U.S. 651, 674 (1977) ("[A]t least where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated.").

be considered conscience shocking.[215] The Tenth Circuit, for example, held in 2001 that a teacher forcing a student to clean a toilet with his bare hands was not sufficiently inspired by malice or sadism so as to demonstrate the degree of outrageousness that is truly conscience shocking.[216] Similarly, the Sixth Circuit has held that a teacher's beating of a student was not severe enough or sufficiently inspired by malice or sadism so as to shock the conscience.[217]

Despite being a stringent standard, the shocks-the-conscience test would still be successful in cases like *Chambers*, where the official conduct is so blatantly malicious and the injuries so significant.[218] Unlike a teacher who can argue that their conduct was the result of a lapse of judgment that was only intended to be disciplinary, an officer who is proven to have intentionally wrongfully convicted someone has no such excuse. Even with a requirement of intentional malice or sadism, litigants could be successful under the shocks-the-conscience test in the wrongful conviction context if the facts are egregious enough. Additionally, the concern that the shocks-the-conscience test imposes too high a standard for litigants to meet is immaterial here considering that under the current majority rule, litigants face an even higher, nearly impossible standard.[219] The shocks-the-

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215. Levinson, *supra* note 206, at 327.

216. *Id.* at 327 n.121 (listing examples of conduct by teachers that did, or did not, rise to the level of conscience shocking, including *Harris* as an example where the teacher's conduct did not); Harris *ex rel.* Harris v. Robinson, 273 F.3d 927, 930–31 (10th Cir. 2001) (holding that a teacher requiring a student to clean a toilet with bare hands was negligent, but not so "inspired by malice or sadism" to rise to the level of conscience shocking).

217. Levinson, *supra* note 206, at 327 n.121 (including *Saylor* as an example where the teacher's conduct did not rise to the level of conscience shocking); Saylor v. Bd. of Educ., 118 F.3d 507, 514–15 (6th Cir. 1997) (holding that bruises caused by five "licks of the paddle on Randy Saylor's fully clothed buttocks" were not so disproportionately severe, or inspired by malice or sadism, as to rise to a conscience-shocking violation of substantive due process).

218. *See* Chambers v. Sanders, 63 F.4th 1092, 1112 (6th Cir. 2023) (Moore, J., dissenting) ("The risks and consequences of physically, mentally, and emotionally abusing witnesses to obtain false statements and testimony, fabricating evidence, and refusing to turn over exculpatory evidence in order wrongfully to convict an innocent person and deprive them of their family—and necessarily deprive their family of them—are self-apparent and extreme.").

219. *See supra* Part III.A (explaining that it is nearly impossible for a child's family integrity claim to be actionable under the majority rule because of the difficulty of proving specific intent).

conscience test gives children like those in *Chambers*[220] a realistic shot at seeking justice while simultaneously being a stringent enough standard to prevent excessive litigation.

Not only does the shocks-the-conscience test impose a challenging standard for litigants to meet, the Supreme Court's indication that negligent conduct is not sufficient to give rise to a due process violation further alleviates the concern of a potential drastic increase in litigation.[221] All cases involving mere negligence would be categorically barred, and those falling within the "middle range" between negligence and intent would be looked at critically.[222] Therefore, the specific-intent requirement imposed in the majority circuits is unnecessary as a tool to prevent opening the judicial floodgates to claims based on merely negligent acts.[223] The concern is alleviated instead by the Supreme Court's instruction that the act causing the violation must have been more than simply negligent.[224]

Nevertheless, it cannot be denied that application of the shocks-the-conscience test would likely lead to some increase in litigation.[225] Inevitably, more children whose parents have been exonerated and who have a colorable claim that their wrongful conviction was procured by official misconduct would file lawsuits. Most likely a portion of these lawsuits would involve conscience-shocking conduct resulting in a finding in favor of the

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220. *See supra* Part III.A.

221. *See Chambers*, 63 F.4th at 1106 (explaining that more than negligence is required to meet a shocks-the-conscience standard (citing Daniels v. Williams, 474 U.S. 334 (1986))); *see also* County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998) ("[C]onscience-shocking is reached . . . from something more than negligence.").

222. *See Lewis*, 523 U.S. at 849 ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.").

223. Smith v. City of Fontana, 818 F.2d 1411, 1420 n.12 (9th Cir. 1987) (explaining that the Tenth Circuit first imposed the specific-intent requirement to avoid opening the judicial floodgates, but that this concern has been alleviated by *Daniels*' requirement that the act causing the deprivation must be more than simply negligent), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999).

224. *Id.*

225. *See Tied Together, Torn Apart*, *supra* note 164, at 2384 ("Because most individuals are members of one or more family units, recognizing an overly expansive right to family integrity would grant 'every close family member of a wrongfully incarcerated individual . . . a constitutional claim based on the incidental, even unknowing, impact of that individual's incarceration on the family relationship.'" (quoting *Chambers*, 63 F.4th at 1101)).

child.[226] This increase in litigation would arguably be beneficial, not only because deserving children would be entitled to a remedy, but also because an increase in successful lawsuits against officials who procured wrongful convictions could lead to a decrease in future wrongful convictions, or, at the very least, a decrease in official misconduct. A 2004 study found that deterrence considerations play a prominent role in police misconduct decisions.[227] More specifically, it found that an increase in the certainty of potential punishment is correlated with a decrease in intent to commit misconduct.[228] Accordingly, by making clear to police that they will face lawsuits brought by the children they harm, there may be a deterrent effect.

Additionally, a decrease in wrongful convictions could also lead to a decrease in prison crowding and saving of tax dollars.[229] Deterring police misconduct before a wrongful conviction occurs not only saves taxpayer money by keeping innocent people out of tax-funded prisons, but also minimizes the need for lawsuits that result in large settlements that come from taxpayers' pockets.[230] This proposal is not going to eliminate wrongful convictions. But if it were to prevent one parent from being wrongfully convicted, and therefore protect their child from the associated suffering, it is worth consideration.

It is important to note that in many cases, when a child sues an official in this context, the wrongfully convicted person will

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226. For example, had *Chambers* been decided on conscience-shocking grounds, the plaintiffs arguably may have been successful due to the egregiousness of the conduct. *See supra* notes 185–99 and accompanying text.

227. Greg Pogarsky & Alex R. Piquero, *Studying the Reach of Deterrence: Can Deterrence Theory Help Explain Police Misconduct?*, 32 J. CRIM. JUST. 371, 381 (2004) ("[D]eterrence considerations appear to figure prominently in police misconduct decisions . . . perceived sanction certainty and celerity were negatively associated with police misconduct.").

228. *Id.*

229. Kari Lydersen, *Costs Are High for Conviction of Wrong People*, N.Y. TIMES (June 18, 2011), https://www.nytimes.com/2011/06/19/us/19cncwrongful.html [https://perma.cc/LBZ7-Z23X] ("About $18.5 million has been spent incarcerating people later cleared of crimes.").

230. Christine Carrega, *Millions in Lawsuit Settlements Are Another Hidden Cost of Police Misconduct, Legal Experts Say*, ABC NEWS (June 14, 2020), https://abcnews.go.com/US/millions-lawsuit-settlements-hidden-cost-police-misconduct-legal/story?id=70999540 [https://perma.cc/5S8G-UVBC] (presenting data that claims against police cost taxpayers over $300 million in fiscal year 2019).

also likely be suing separately.[231] Although this would likely result in an increase in the amount recovered in wrongful conviction lawsuits, to the detriment of the defendant cities (and taxpayers),[232] the importance of a child's recovery should outweigh this concern. Regardless of how much the wrongfully convicted person recovers, their child still deserves a voice and to make an independent recovery that could potentially be used to mitigate some of the harms they endured in the years without their parent. Arguably, there is no amount of money that could sufficiently compensate a wrongfully incarcerated person or their children for the lost years and other traumas they faced.[233] Compensation can, however, ease the inevitable financial struggles that come with reentering society, and can provide a child with assistance to seek counseling, obtain higher education, or mitigate any other financial struggle they may have faced during their parent's incarceration.[234] As long as wrongful convictions are a reality, compensation through litigation should be provided to victims, including children.

CONCLUSION

The current majority rule requiring conduct intentionally directed at the parent-child relationship in order for a violation of family integrity to be actionable essentially forecloses most claims by children in the wrongful conviction context because of how unlikely it is that a child is able to prove this intent. The

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231. For example, not only did Danny Burton's children sue the state actors that procured his wrongful conviction, but Burton also sued separately. *See* Chambers v. Sanders, 63 F.4th 1092 (6th Cir. 2023) (concerning the Burton children's allegation of their father's wrongful conviction); Burton v. Sanders, No. 20-11948, 2021 WL 168543, at *1 (E.D. Mich. Jan. 19, 2021) (concerning Danny Burton's allegation of his own wrongful conviction).

232. *See* Carrega, *supra* note 230 (explaining the costs of police misconduct settlements).

233. *See Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, THE INNOCENCE PROJECT 1, 5 (Oct. 2009), https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf [https://perma.cc/6XMA-B56Y] ("No amount of money can make up for the lost years, the trauma of prison life, or the horrible experience of being falsely branded a murderer, rapist or thief. But compassionate state assistance can at least help bring the exoneree's struggle to an end by providing him with the finances to find a home, see a doctor, get job training and counseling, and attempt to make a new life for himself.").

234. *Id.*

Supreme Court has reiterated time and time again just how important the right to family integrity is,[235] and thus it is wrong to bar a child's opportunity to vindicate this right, especially considering how detrimental and common parental incarceration is.[236] Children facing parental incarceration across the country are left without a vital parental bond, are forced to endure economic and behavioral issues, and often fall susceptible to negative external pressures, including involvement in criminal activity.[237] Some children face these insurmountable harms for no reason: their parent is completely innocent. As a society, we should do everything we can to prevent innocent children from experiencing these life-altering obstacles.

One step toward the goal of mitigating the harm to children caused by parental convictions is allowing children of wrongfully convicted parents to vindicate violations of their vital right to be parented by applying the shocks-the-conscience test. This test is regularly applied in due process litigation, making it the logical approach for parental wrongful conviction due process cases as well.[238] It is a more robust and clearer inquiry than that of the Ninth Circuit, while also allowing children the ability to state actionable claims more frequently than under the current majority view.[239] In sum, the shocks-the-conscience test is the appropriate test to be applied in the context of incidental violations of family integrity due to parental wrongful conviction, both from a precedential and policy perspective.

235. *See supra* notes 73, 77, and accompanying text.

236. *See supra* Part I.C (discussing the impacts of forced family separation on children).

237. *See* McGovern, *supra* note 16, at 539–40 (enumerating the negative consequences of parental incarceration on children).

238. *See supra* Part III.B (arguing that the shocks-the-conscience test should be applied for due process claims of parental wrongful conviction).

239. *See supra* Part III.B.

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