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LETHAL IMMIGRATION ENFORCEMENT

Abel Rodríguez†

*Increasingly, U.S. immigration law and policy perpetuate death. As more people become displaced globally, death provides a measurable indicator of the level of racialized violence inflicted on migrants of color. Because of Clinton-era policies continued today, deaths at the border have reached unprecedented rates, with more than two migrant deaths per day. A record 853 border crossers died last year, and the deadliest known transporting incident took place in June 2022, with fifty-one lives lost. In addition, widespread neglect continues to cause loss of life in immigration detention, immigration enforcement agents kill migrants with virtual impunity, and immigration law ensures courts routinely order people deported to their deaths. As these preventable deaths persist, particularly among migrants of color, the Supreme Court has all but foreclosed causes of action against individual federal agents for wrongful death. It has done so most notably in its recent 2022 decision *Egbert v. Boule*, further limiting judicial remedies for constitutional violations and sanctioning use of force as a routine function of immigration enforcement.*

This Article provides a novel perspective on law enforcement and race. It is the first to provide a comprehensive examination of lethal immigration enforcement, arguing that racialized policy rationales, impunity instituted by courts, and prevailing political paradigms have coalesced to render migrants of color expendable. Therefore, the enforcement system must be reimagined. While scholars have begun to analyze the immigration system in terms of “slow death,” or harms that occur over time, a holistic view of “spectacular deaths,” those readily perceived, is lacking. After mapping how the immigration enforcement system takes migrant lives, this Article interrogates the

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policy rationales for lethal enforcement in light of largely unexamined data, finding that anti-Blackness drives punitive immigration detention and the perceived dangerousness of Latinx migrants fuels lethal border policies. It then turns to an analysis of wrongful death actions and recent Supreme Court doctrine, poised to impede remedies for excessive force in courts further and escalate racialized violence against noncitizens. Ultimately, given the urgency of addressing rising migrant mortality, it calls for a paradigm shift beyond liberal reforms to end lethal enforcement and its racial subordination.

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INTRODUCTION

Increasingly, migration control policies produce and perpetuate death. As the number of displaced people increases globally, receiving countries use more violent and lethal means

to secure borders and deter migration.¹ In the United States, Customs and Border Protection (“CBP”) and Immigration and Customs Enforcement (“ICE”) use violence to prohibit noncitizens from entering, remaining in, or returning to the United States. In many instances, that violence results in the death of migrants forced to flee their home countries because of poverty, persecution, or political instability. Border policies push migrants into lethal terrain, which has led to record deaths, and CBP and ICE agents routinely use military-style weapons and force against unarmed noncitizens.² Immigration detention centers maintain harsh conditions, leading to migrant death through medical neglect and suicide, and inadequate immigration laws continue to ensure the removal of migrants to countries where they face fatal persecution. Many of these deaths are avoidable. Many disproportionately impact communities of color.

The number of people forced into migration shows no signs of abating. According to the United Nations, the number of forcibly displaced people has increased steadily since 2011, reaching a record 89.3 million people in 2021.³ It stands to reason that migration may continue to increase as a result of economic deprivation, political instability, and natural disasters. Climate change may become a more significant driver of migration. The World Bank estimates that climate migration may displace 216 million people within their own countries by

¹ See Itamar Mann, *Border Violence as Crime*, 42 U. PA. J. INT’L L. 675, 675, 697 (2021). See also Euan Ward & Aida Alami, *More Than 20 Migrants Die in Effort to Enter Spanish Enclave in Africa*, N.Y. TIMES (June 6, 2022), <https://www.nytimes.com/2022/06/25/world/europe/melilla-spain-africa-migrants.html> [<https://perma.cc/XW9Q-DAGS>]; see Benjamin Bathke, *3 Migrants Killed in Libya After Being Intercepted in the Mediterranean and Returned*, INFOMIGRANTS (July 28, 2020), <https://www.infomigrants.net/en/post/26286/3-migrants-killed-in-libya-after-being-intercepted-in-the-mediterranean-and-returned> [<https://perma.cc/ZE9V-YATA>]; “*Lethal Disregard*” Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf> (last accessed Jan. 28, 2022) [<https://perma.cc/BL4Q-S2MA>].

² *CBP Use of Force Case Summaries*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/cbp-use-force/case-summaries> (last accessed Sept. 19, 2022) [<https://perma.cc/T94L-T6TD>] (summarizing many recent CBP use of force cases); TIMOTHY J. DUNN, *THE MILITARIZATION OF THE US-MEXICO BORDER IN THE TWENTY-FIRST CENTURY AND IMPLICATIONS FOR HUMAN RIGHTS* 40 (2021).

³ *Figures at a Glance*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.unhcr.org/en-us/figures-at-a-glance.html> [<https://perma.cc/9TWQ-4KXM>] (last accessed Oct. 16, 2022).

2050.⁴ Inevitably, many of those internally displaced people will migrate beyond their countries' borders.⁵ Further escalation of violent enforcement and increased preventable migrant deaths are likely concomitants of heightened migration. As a major receiving country, the United States—particularly its lawmakers, jurists, scholars, and people of conscience—must grapple with the legal, political, and moral questions this gratuitous loss of life raises as well as its racial implications.

This Article challenges its readers to engage with these timely questions. It contributes a novel perspective to scholarship examining racialized violence in policing and enforcement, providing the first comprehensive analysis of lethal immigration enforcement. It argues that racialized policy rationales, impunity instituted by courts, and prevailing political paradigms have coalesced to render migrants of color expendable. Among its contributions to the existing literature, the Article examines largely unexamined data related to loss of life, establishes that the immigration enforcement system increasingly produces preventable death, and explores the racialized nature of such prevalent violence and migrant mortality. Ultimately, this analysis interrogates the normative rationales perpetuating death in immigration enforcement, underscoring the need to denaturalize violence as a response to migration. Absent meaningful action deterring violence against migrants and a reimagining of the immigration enforcement system, racialized immigration enforcement will perpetuate the needless death of migrants of color, reinforcing their racial subordination and structural racism.⁶

⁴ Viviane Clement et. al, *Groundswell Part 2: Acting on Internal Climate Migration*, WORLD BANK GRP. (2021), <https://openknowledge.worldbank.org/handle/10986/36248> [<https://perma.cc/953S-YRRY>].

⁵ See Abrahm Lustgarten, *The Great Climate Migration*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html> (last accessed Jan. 28, 2023) [<https://perma.cc/B5Z2-M7NJ>]; see Jackie Swift, *Migration Forced by Climate Change*, CORNELL UNIV. (last accessed Jan. 28, 2023), <https://research.cornell.edu/news-features/migration-forced-climate-change> [<https://perma.cc/KNT9-5TYU>] (noting predictions that as high as 200 million migrants will be displaced by mid-century); see also K. Warner, M. Hamza, A. Oliver-Smith, F. Renaud & A. Julca, *Climate Change, Environmental Degradation and Migration*, 55 NAT HAZARDS 689, 697–98 (2010), <https://doi.org/10.1007/s11069-009-9419-7> [<https://perma.cc/BB5L-XXL3>] (detailing different estimates of the number of those that will be forced to migrate due to climate change and highlighting the difficulty in determining an exact number).

⁶ This argument builds primarily on the following legal scholarship: Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040 (2021); Karla McKanders, *Immigration and Racial Justice: Enforcing the Borders of Blackness*, 37 GA. ST. U. L. REV. 1139 (2021); Yolanda Vázquez, RACE AND IDENTITY IN LEGAL INSTITUTIONS:

Part I maps how the immigration enforcement system kills. Death is the most extreme consequence migrants face. It provides a measurable indicator of the level of violence the immigration enforcement system inflicts on particular people in migration at a given moment. This Part provides a comprehensive cataloguing of death caused by immigration enforcement previously unexamined in legal literature. After defining lethal enforcement, it explains how law and policy empower each facet of immigration enforcement to take migrant lives, including border policies pushing migrants to hostile terrain, violent encounters with CBP and ICE, deplorable detention conditions, and deportations to lethal danger. It provides quantitative measure of migrant mortality and identifies areas requiring further research to understand more fully the violence produced by immigration enforcement. This mapping highlights the punitive nature of enforcement and the rising levels of documented premature death for people largely fleeing circumstances well beyond their control.⁷

Ostensibly vital motivations undergird this lethal immigration enforcement, such as crime control, national security, and sovereignty.⁸ A racial analysis of these rationales, as Part II explains, hollows these rationales. Lethal enforcement points more readily to preserving racial hierarchies than securing the homeland. This discussion provides novel findings related to race and enforcement. Rather than control crime, for instance, detention causes premature death among migrants of color. Reflecting the anti-Blackness found in other facets of the immi-

ENFORCING THE POLITICS OF RACE IN IMMIGRATION CRIME CONTROL, IN ENFORCING THE BOUNDARIES OF BELONGING: RACE CRIMINAL JUSTICE AND MIGRATION CONTROL (M. Bosworth, A. Parmar, and Y. Vázquez eds., Oxford University Press, 2018).

⁷ An examination of migrant mortality contributes to arguments that immigration enforcement is punitive. See, e.g., César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1358 (2014) (“Detention that occurs as part of the removal process does not satisfy the narrow exception for special ‘non-punitive’ circumstances precisely because it is inherently punitive.”).

⁸ These rationales represent the primary justifications for immigration enforcement as expressed by the Supreme Court’s reasoning in seminal immigration cases as well as the increased focus on crime-based deportation. See Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–77 (2006); see also *New York v. Miln*, 36 U.S. 102, 103 (1837); *Passenger Cases*, 48 U.S. 283, 283 (1849); *Henderson v. City of New York*, 92 U.S. 259, 259 (1875); *Hernandez v. Mesa*, 140 S. Ct. 735, 739 (2020); *Egbert v. Boule*, 142 S. Ct. 1793, 1798 (2020); *Chae Chan Ping v. United States*, 130 U.S. 130 U.S. 581, 592–93 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

gration and criminal systems, immigrants racialized as Black die in detention well beyond their proportion of the immigrant community overall, and the average age of those who die in detention is lower than the life expectancy of any country in the world.⁹ Border Patrol has used force approximately every nine hours for the past decade, and those killed in these encounters are largely migrants of color who posed no threat to national security. Arguably, most posed no threat even to the immigration agents involved. Furthermore, many migrants killed hail from countries whose sovereignty has been undermined by profound and protracted U.S. intervention rooted in claims to racial superiority and national exceptionalism.

As migrant deaths persist, particularly among migrants of color, the Supreme Court has weakened protections for non-citizens. Part III examines wrongful death actions and recently established Supreme Court doctrine that may lead to increased migrant mortality. It considers the erosion of *Bivens v. Six Unknown Named Agents*,¹⁰ which established causes of action against federal agents infringing constitutional rights, culminating in *Egbert v. Boule's* virtual abrogation of legal remedies for use of force.¹¹ In *Egbert*, Justice Sotomayor, concurring and dissenting in part, names a “restless and newly constituted Court” for effectively foreclosing the already limited protections for excessive use of force by federal officials.¹² In addition, in *Johnson v. Arteaga-Martinez*,¹³ the Court recently ruled noncitizens can be held indefinitely in immigration detention without bond hearings, overruling Third and Ninth Circuit Courts of Appeals decisions.¹⁴ As stated in a press release from leading advocates, this decision has “life-threatening consequences, especially given ICE’s record of abuse, neglect, and death in its detention centers.”¹⁵ Wrongful death suits under *Bivens* prior to these Supreme Court decisions demonstrate these rulings

⁹ Molly Grassini et. al, *Characteristics of Deaths Among Individuals in US Immigration and Customs Enforcement Detention Facilities, 2011-2018*, JAMA NETWORK OPEN, July 7, 2021, at 5 (2021).

¹⁰ 403 U.S. 388, 397–98 (1971).

¹¹ 142 S. Ct. 1793 (2022).

¹² *Id.* at 1818 (Sotomayor, J., concurring in part).

¹³ 142 S. Ct. 1827, 1830 (2022).

¹⁴ See *Guerrero-Sanchez v. Warden York County Prison*, 905 F.3d 208, 211 (3d Cir. 2018); *Diouf v. Napolitano*, 634 F.3d 1081, 1082 (9th Cir. 2011).

¹⁵ Press Release, Matt Adams & Inga Sarda-Sorensen, Supreme Court Denies Bond Hearings to Detained Immigrants (June 13, 2022). Matt Adams of Northwest Immigrant Rights Project represented Esteban Alemán González, one of the parties in *Arteaga-Martinez*.

have likely opened the door to increased racialized violence against migrants.

Especially in light of these evolving precedents, preventing migrant deaths will require a paradigm shift. Through the lens of Howard Lesnick's trichotomy of conservative, liberal, and radical perspectives, Part IV proposes potential responses to migrant mortality.¹⁶ With influence from liberal perspectives, conservative thought has largely shaped immigration law and policy. Conservative perspectives have imagined and implemented restrictionist immigration policies while liberal perspectives have sought to limit abuses within this framework. If the past is any predictor, this dynamic will lead to further increased federal spending, intensified immigration enforcement, and escalating migrant mortality. Notably, liberal perspectives have called for increased legal rights for migrants and proportional immigration enforcement, which may decrease but not end migrant deaths. To curb preventable migrant deaths and the racialized nature of immigration enforcement, however, the path forward lies in emerging abolitionist scholarship and activism calling for an end to detention and deportation. This shift will require scholars, lawmakers, and advocates to reimagine immigration policy and espouse more radical approaches to altering enforcement practices.

While scholars have considered the violence within the immigration system,¹⁷ a comprehensive examination of the ways the Department of Homeland Security ("DHS"), and its predecessor the Immigration and Naturalization Service ("INS"), has

¹⁶ Howard Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 1991 DUKE L.J. 413 (1991).

¹⁷ Eddie Bruce Jones, *Refugee Law in Crisis: Decolonizing the Architecture of Violence*, in RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING 176–193 (Oxford University Press, 2018); Cházaro *supra* note 6; Dr. Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 UCLA L. REV. 267, 273 (2003) (examining the violence that takes place at the U.S.-Mexican Border); Peter L. Markowitz, *Rethinking Immigration Enforcement*, 73 FLA. L. REV. 1033, 1052–55 (2021) (noting that the brutality within the immigration system leads scholars to suggest an end to mass detention); Maya Pagni Barak, *THE SLOW VIOLENCE OF IMMIGRATION COURT: PROCEDURAL JUSTICE ON TRIAL* (2023) (documenting the mundane, routine violence the immigration court backlog and fear of deportation inflict on Central American immigrants); Kari Hong, *10 Reasons Why Congress Should Defund ICE's Deportation Force*, 43 HARBINGER 40, 52 (2019) (listing overzealous enforcement and the causing of many preventable deaths as reasons for why Congress should defund deportation force); Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1, 37 (2001) (discussing the violence, brutality, and widespread human rights violations against Mexican Migratory workers).

produced death as a result of that violence is absent from legal scholarship. There exists no comprehensive examination of the ways immigration law and policy routinely take life, overlooking a crucial reality of the consequences of migration control.¹⁸ Moreover, scholars have given scant attention to the racial implications of lethal policies and wrongful death suits in the context of immigration enforcement. An analysis of lethal immigration enforcement contributes to understanding the confluence of increased human displacement, heightened migration control enforcement, and diminished accountability for immigration enforcement agents who violate noncitizens' constitutional rights. Ideally, this analysis also contributes to a more complete picture of law enforcement's racialized state violence across the country as well as the value of life in the nation's embedded racial hierarchies.

I

MAPPING MORTALITY: THE HOMELAND SECURITY STATE AND DEATH AS DETERRENCE

Among its various functions, the Homeland Security State engages in state violence to exclude, police, detain, and deport migrants.¹⁹ By examining the myriad ways immigration enforcement kills, it becomes evident that death, rather than

¹⁸ Legal scholarship that addresses the death of migrants has largely focused on human rights at the U.S.-Mexico border. This Article builds on this scholarship to engage in a more holistic view of death within the immigration system. While this Article addresses loss of life in the U.S. immigration enforcement system, a deeper understanding of its broader harms beyond death within the United States as well as globally is also needed.

¹⁹ See Nicholas De Genova, *The Production of Culprits: From Deportability to Detainability in the Aftermath of "Homeland Security,"* 11 *CITIZENSHIP STUDIES*, 2007, at 421 (framing the implementation of domestic police powers and the reconfiguring of "illegality" in the aftermath of the purported War on Terrorism as the "Homeland Security State"); Alfonso Gonzales, *REFORM WITHOUT JUSTICE: LATINO POLITICS AND THE HOMELAND SECURITY STATE* 2, 11-15, 99-120 (2013) (viewing the Homeland Security State as including civil society in addition to traditional institutions of governance and examining its role in effectuating mass removals, racializing Latinos, and contributing to transnational policing that targets Salvadoran deportees). While this Article focuses on the more traditional institutional aspects of the Homeland Security State, it is important to note, as Gonzales argues, that it may extend beyond its institutional features, constituting sets of social and economic relationships implicating state and civil society. Gonzales at 2, 13. See also Mizue Aizeki, *Mass Deportation under the Homeland Security State: Anti-Violence Advocates Join the Fight Against Criminalization of Immigrants*, S&F ONLINE: UNRAVELING CRIMINALIZING WEBS: BUILDING POLICE FREE FUTURES (2019) <https://sfonline.barnard.edu/mass-deportation-under-the-homeland-security-state-anti-violence-advocates-join-the-fight-against-criminalization-of-immigrants/> [<https://perma.cc/K75J-S7MH>]; Roberto Lovato, *Building the Homeland Security State*, N. Am. Cong.

incidental or accidental, has become an intentional and integral component of the Homeland Security State's enforcement tactics.²⁰ Taking life forms part of the bureaucracy's role in all spheres of immigration enforcement, particularly as a result of border security but also in interior enforcement, detention, and deportation. Despite commanding enforcement systems much like local and state police as well as a detention system comparable to and embedded within the prison system, immigration control implicates civil, rather than criminal, systems.²¹ As a civil system, immigration enforcement actions do not constitute punishment.²² Yet, by taking migrant life, the Homeland Security State exacts the ultimate punishment to impede and deter migration.

A. Defining Lethal Immigration Enforcement

Ruth Wilson Gilmore defines racism as “the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death.”²³ Racism and structural inequality inflict harms on vulnerable communities in myriad ways. In recognition of the various manifestations of harms leading to premature death, scholars across disciplines have theorized these harms in terms of “slow violence” and “slow death,” or harms occurring over time “offering no signs of impending ruination,” as well as “fast violence” and “spectacular violence,” those harms that are immediately perceivable.²⁴ The notion of slow death has informed discussions concerning health, climate change, and policing.²⁵ In the immigration

on Latin Am. (Nov. 17, 2008), <https://nacla.org/news/building-homeland-security-state>. [<https://perma.cc/AS6Y-8DRC>].

²⁰ See Cházaro, *supra* note 6, at 1049 (2021) (“The cataloguing of violence supports the conclusion that violence is not incidental to deportation, but rather that deportation is violence.”).

²¹ *Fong Yue Ting v. United States*, 149 U.S. 698, 708 (1893). Continuing to classify the punitive detention and deportation systems as civil remains one of immigration law's many legal fictions.

²² *Id.*

²³ Ruth Wilson Gilmore, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (1st ed. 2017) (quoted in Cházaro, *supra* note 6).

²⁴ See Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2322 (2019) (examining family separation as slow death resulting from laws governing admissions, enforcement, adjustment of status, and remittances).

²⁵ *Id.* See also Laren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency)*, 33 CRITICAL INQUIRY 754, 766–67 (2007) (describing obesity as a slow death in the context of health); Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273, 325–26 (2015) (noting that regular acts of violence committed by police and other government actors cause the slow death of underserved communities); Rob

sphere, scholars have examined slow violence in the context of family separation²⁶ and deportation proceedings.²⁷ Slow death may also inform discussions concerning public charge rules deterring noncitizens from seeking public benefits, lack of access to healthcare for many immigrants, and the many employment challenges for migrant workers.

Given the lack of comprehensive analysis addressing migrant mortality, this Article seeks to correct that oversight by examining “spectacular death,” that is quantifiable, readily perceivable termination of life. It centers state-sanctioned violence and exploitation perpetuated by the Homeland Security State that have led to discernible premature deaths, providing a deeper understanding of the level of violence in the immigration system. Although anyone, regardless of immigration status, may encounter Border Patrol or ICE, this discussion focuses on noncitizens, those most likely to be targeted by and experience violence within the immigration enforcement system.²⁸ This approach proceeds from the premise that the racism pervasive throughout society informs and undergirds the policies that produce vulnerability and premature migrant deaths. It also acknowledges that while violence in the civil immigration legal system is egregious, it is not exceptional.²⁹ Instead, this violence is one facet of prevalent racialized legal and extralegal harms impacting noncitizens and citizens of color, in civil and criminal legal systems.³⁰ To map this particular

NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 211 (2011) (explaining that the gradual nature of environmental harms is an example of slow violence, as it effects vulnerable communities, yet garners little attention).

²⁶ *Id.*

²⁷ Barak, *supra* note 17.

²⁸ While the term “migrant” is used here somewhat broadly, the analysis of deaths caused by immigration enforcement includes all noncitizens, including people in migration, immigrants, refugees, visa holders, among others. Depending on the context, I use various terms throughout the Article. Use of the term “migrant” as the default reflects the most significant loss of life occurring at the U.S.-Mexico border, avoids extensive use of the more sterile and status-oriented term “noncitizen,” and prevents cumbersome constructions to encapsulate various categories of people impacted by the immigration enforcement system. To an extent, this Article also includes U.S. citizens, since they also face violence and death at the hands of immigration enforcement agents. Where U.S. citizens are involved, I indicate that the discussion has diverted from its focus on noncitizens by specifying the person’s citizenship.

²⁹ See, e.g., Jennifer Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 711 (2015) (arguing that banishment, or the expulsion of “undestable individuals,” is also occurring in the criminal justice system through “spatial exclusion” and “susceptibility to incarceration”).

³⁰ *Id.*

aspect of state-sanctioned violence, the remainder of this section examines the loss of life produced by each facet of the U.S. immigration enforcement system.

B. The Weaponized Border

While migrant deaths at the U.S.-Mexico border did not begin in the 1990s, they surged at that time. In 1994, the U.S. government executed a new national strategy for border enforcement under the Clinton administration.³¹ The objective of the national strategy was “prevention through deterrence.”³² Across border cities, the new approach gave rise to initiatives such as Operation Gatekeeper (San Diego, CA), Operation Safeguard (Tucson, AZ), Operation Blockade (El Paso, TX), and Operation Rio Grande (Brownsville, TX).³³ It increased the number of Border Patrol agents and provided them with increased technology, focusing those resources on popular crossings at the U.S.-Mexico border. The strategy also placed more barriers, such as fences and walls, along populated border zones, sending migrants into more remote areas to enter the United States.³⁴ In the borderlands, pushing migrants to remote areas largely means forcing them to contend with more dangerous terrain, such as traversing deserts, rivers, and mountains.³⁵ In effect, lawmakers made the strategic decision to weaponize the landscape.³⁶ The government intended for the dangers of crossing through such hostile terrain to deter migrants from attempting to enter the United States altogether.³⁷

³¹ *Border Patrol Strategic Plan: 1994 and Beyond — National Strategy*, U.S. BORDER PATROL (July 1994), <https://www.hsdl.org/?view&did=721845> [<https://perma.cc/F7Y7-6URY>].

³² *Id.*

³³ Joseph Nevins, *OPERATION GATEKEEPER: THE RISE OF THE “ILLEGAL ALIEN” AND THE MAKING OF THE U.S.-MEXICO BOUNDARY 2* (2003).

³⁴ An analogy to property law may be instructive here. The approach taken in this Article rejects the notion of migrants as unwelcomed trespassers. For those who may view unauthorized entry as a form for trespass, however, U.S. law presents challenges to current border policy. For instance, even a trespasser would have recourse against a property owner who creates perilous or lethal conditions. On a theory of nation as property, the nation may be liable for creating such dangerous conditions at the border.

³⁵ Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 *TEX. A&M L. REV.* 253, 280 (2018).

³⁶ Maura Fitzgerald, *Borderline*, *HARVARD DIVINITY BULLETIN*, 18–30 (2015) (“The government has officially enlisted death and suffering as tools of deterrence; they have weaponized the desert.”).

³⁷ Grace Chang, *Precious Cargo*, 52 *U.C. DAVIS L. REV.* 81, 84 (2018) (“Taken together, the evidence suggests that the policy and practice instituted under

The new enforcement strategy required increased resources to secure the U.S.-Mexico border. Even as deaths began to mount, the federal government went to work expanding its border enforcement efforts. Between 1993 and 2000, Congress tripled the Border Patrol budget from \$363 million to over \$1 billion,³⁸ and it more than doubled Border Patrol staff from 4,028 to 9,212 agents.³⁹ In addition to hiring more CBP agents, the increased federal funds allowed for miles of fencing, infrared scopes, underground sensors, surveillance aircraft, and even horse patrol teams.⁴⁰ In 1996, passage of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) bolstered these efforts, providing for steady increases of CBP agents as well as additional barriers, vehicles, sensor units, and surveillance equipment.⁴¹ With significant congressional support and financial backing, these enforcement resources rapidly militarized the border and achieved its objective of diverting migrants to more dangerous crossings.

While the effort to divert migrants succeeded, the objective of deterring migration largely failed. Though pushed to more dangerous terrain, migrants inevitably kept attempting to cross the border undeterred. In fact, migration increased. In 1993, before the government implemented the new policy, the number of border apprehensions totaled 1.2 million.⁴² From 1994 to 2000, the number of apprehensions increased to an average of 1.6 million per year.⁴³ During the same period, from 1994 to 2000, the unauthorized population in the United States also increased. In 1993, there were an estimated 4.5 million un-

Operation Gatekeeper explicitly relied on the assumption that migrants would either be discouraged from entering the country or die trying.”)

³⁸ U.S. BORDER PATROL BUDGET BY FISCAL YEAR (1990-2017), <https://immigrationforum.org/wp-content/uploads/2019/02/BP-Budget-History-1990-2017.pdf>; see also *The Cost of Immigration Enforcement and Border Security*, AMERICAN IMMIGRATION COUNCIL (Jan. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf.

³⁹ U.S. CUSTOMS AND BORDER PROT., CHARTS DEPICTING BORDER PATROL AGENT STAFFING STATISTICS, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/Staffing%20FY1992-FY2018.pdf>.

⁴⁰ *Operation Gatekeeper to Expand*, 42 INTERPRETER RELEASES 1547, (Nov. 4, 1996); DHS BUDGET OVERVIEW (2023), https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Customs%20and%20Border%20Protection_Remediated.pdf.

⁴¹ *Id.*

⁴² U.S. CUSTOMS AND BORDER PROT., CHART DEPICTING TOTAL ENCOUNTERS AT THE SOUTHWEST BORDER SECTORS (2020), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/US59B8-1.PDF>.

⁴³ *Id.*

authorized immigrants in the United States.⁴⁴ By 2000, that number had risen to 7 million.⁴⁵ The undocumented population grew even as removals increased sharply during the same period—from under 43,000 removals in 1993 to over 188,000 in 2000.⁴⁶ Counterintuitively, increased border militarization contributed to the increase in the undocumented population.⁴⁷ More perilous border crossings likely caused decreased cyclical migration, increasing the length of time migrants remained in the country.⁴⁸ What soon became clear was that the new border strategy redirected but failed to deter crossings.⁴⁹

As the number of apprehensions at the border and undocumented immigrants living in the United States increased significantly during the 1990s, so, too, did the number of border deaths. At the time, border crossings showed no signs of decreasing. “Instead, the smuggling industry has expanded, and most seriously,” as legal scholar Bill Ong Hing recounted in 2001, “human lives have been lost.”⁵⁰ The increase in needless deaths resulting from the 1994 change in border policy is significant. According to Mexico’s Secretaria de Relaciones Exteriores (“SRE”), or Secretary of Foreign Relations, twenty-three people died on the border in 1994.⁵¹ After the new border policies took root, that number steadily increased to an average of 247 each year from 1995 through 2000, with 499 deaths

⁴⁴ *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, U.S. IMMIGR. AND NATURALIZATION SERV., 1–19, https://www.dhs.gov/xlibrary/assets/statistics/publications/III_Report_1211.pdf; *Estimates of the Unauthorized Immigrant Population Residing in the United States*, DHS (June 8, 2022), <https://www.dhs.gov/immigration-statistics/population-estimates/unauthorized-resident>. [<https://perma.cc/VAX8-SWPE>].

⁴⁵ *Id.* This number cannot be attributed solely to border crossings. Many represent visa overstays, people who entered with authorization and remained in the country beyond their authorized stay. However, at least half of the unauthorized migrants were likely border crossers. See Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 *FORDHAM L. REV.* 1545, 1578 (2011).

⁴⁶ *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2019*, DHS (Dec. 8, 2021), <https://www.dhs.gov/immigration-statistics/yearbook/2019/table39> [<https://perma.cc/4V2G-X2E5>].

⁴⁷ Douglas S. Massey, Karen A. Pren, & Jorge Durand, *Why Border Enforcement Backfired*, 121 *AM. J. SOCIOLOGY* 1557, 1557–600 (2016).

⁴⁸ *Id.*

⁴⁹ Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 *U.C. DAVIS J. INT'L L. & POL'Y.* 121, 124 (2001).

⁵⁰ *Id.*

⁵¹ Maria Jimenez, *Humanitarian Crisis: Migrant Deaths at the U.S.-Mexico Border*, ACLU (2009), <https://www.aclu.org/legal-document/humanitarian-crisis-migrant-deaths-us-mexico-border?redirect=cpredirect/41186>.

estimated for the year 2000.⁵² The SRE estimates that border deaths totaled 5,607 between 1994 and 2008. On average, that figure represents 374 deaths per year, more than one death every day, in the fifteen years following the policy shift.⁵³ Many of those deaths were related to exposure, exertion, hypothermia, heatstroke, and drowning.⁵⁴

Despite the sharp rise in deaths, the Homeland Security State has persisted with its deadly deterrence policies. By Border Patrol's own estimates, border deaths totaled 4,924 from 2009 through 2021,⁵⁵ an average of 379 deaths per year. In 2021, at least 577 people lost their lives on the border.⁵⁶ In 2022, at least 853 border crossers lost their lives, more than two people per day, a record among border statistics.⁵⁷ The commitment to closing borders and pathways to authorized migration has led to increased deaths in the ocean as well. For 2014 through 2021, the average number of annual deaths and disappearances in the Caribbean was 121.⁵⁸ In 2022, by con-

⁵² *Id.*

⁵³ Prior to the policy shift, border deaths were significantly lower and decreasing in the years leading up to the change. For instance, border deaths totaled 147 in 1985 and dropped to 67 in 1993. See Priscilla Solano & Douglas S. Massey, *Migrating through the Corridor of Death: The Making of a Complex Humanitarian Crisis*, 10 *JMHS* 147, 151 (2022).

⁵⁴ Mica Rosenberg et al., *The Border's Toll: Migrants Increasingly Die Crossing into U.S.*, *REUTERS* (July 25, 2022), <https://www.reuters.com/investigates/special-report/usa-immigration-border-deaths/> [<https://perma.cc/PJ2A-LVGM>] (citing lack of food and water, drowning, vehicle and transport, violence, and sickness as causes of migrant deaths); *Responding to Migrant Deaths Along the Southwest Border: Lessons from the Field*, *POLICE EXECUTIVE RESEARCH FORUM* (Aug. 2016), <https://www.policeforum.org/assets/respondingmigrantdeaths.pdf> [<https://perma.cc/6J8Z-9M6S>] (noting many migrant deaths are gruesome, involving heatstroke that causes hallucinations and later organ failure).

⁵⁵ U.S. CUSTOMS AND BORDER PROT., *CHART DETAILING NUMBER OF DEATHS AT THE SOUTHWEST BORDER* (2020), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Fiscal%20Year%20Southwest%20Border%20Sector%20Deaths%20%28FY%201998%20-%20FY%202020%29%20%28508%29.pdf> [<https://perma.cc/KSG9-TEK6>].

⁵⁶ Stephen Dinan, *Border Deaths Soar as 2021 Sets Record for Most Migrant Fatalities*, *WASH. POST* (Nov. 1, 2021), <https://www.washingtonpost.com/news/2021/nov/1/border-deaths-soar-2021-sets-record-most-migrant-f/> [<https://perma.cc/9JTP-UTTE>].

⁵⁷ Camilo Montoya-Galvez, *At Least 853 Migrants Died Crossing the U.S. -Mexico Border in the Past 12 Months - a Record High*, *CBS* (Oct. 28, 2022), <https://www.cbsnews.com/news/migrant-deaths-crossing-us-mexico-border-2022-record-high/> [<https://perma.cc/SF9V-3UXX>] (reporting FY 2022 as the deadliest year for migrants recorded by the U.S. government).

⁵⁸ See Missing Migrants Project (2014–2021), https://missingmigrants.iom.int/region/americas?region_incident=4026&route=All&year%5B%5D=2511&year%5B%5D=2516&year%5B%5D=2521&year%5B%5D=2504&year%5B%5D=

non-profit organization founded in 2004 committed to stopping deaths in the Arizona desert.⁶⁴ By 2005, the organization's aid workers faced felony transporting charges for taking three ailing migrants found in the desert to a nearby hospital.⁶⁵ A few years later, in 2008, fifteen volunteers from No More Deaths and other organizations faced criminal charges for leaving water jugs in the desert meant to prevent dehydration.⁶⁶ In 2017, several volunteers again faced multiple criminal charges for entering a protected refuge and leaving food and water.⁶⁷ Among them, Scott Warren faced felony charges and up to 20 years in federal prison for his work with No More Deaths, allegedly as retaliation for videos the organization posted online of Border Patrol agents destroying water jugs in the desert meant to save migrant lives.⁶⁸

For three decades, Border Patrol has continued to pursue policies that have increased deaths at the border. To date, the agency has given no indication of changing course.⁶⁹ Rather than revisit its lethal policies, the federal government has opted for warnings to potential migrants, rescue operations, and body identification efforts.⁷⁰ Lawmakers and immigration

⁶⁴ NO MORE DEATHS, (Sept. 15, 2022), <https://nomoredeaths.org/en/> [<https://perma.cc/Z6A5-TR7J>].

⁶⁵ Ted Robbins, *Immigrant Aid Workers Face Prison for Smuggling*, NPR (Aug. 26, 2005), <https://www.npr.org/templates/story/story.php?storyId=4817559> [<https://perma.cc/KZ3B-27BJ>].

⁶⁶ Marc Lacey, *Water Drops for Migrants: Kindness, or Offense?*, N.Y. TIMES (Sept. 26, 2010), <https://www.nytimes.com/2010/09/27/us/27water.html> [<https://perma.cc/HX74-M7QZ>]; *United States v. Millis*, 621 F.3d 914, 915–15 (9th Cir. 2010).

⁶⁷ Kristine Phillips, *They Left Food and Water for Migrants in the Desert. Now They Might Go to Prison*, WASH. POST (Jan. 20, 2019), <https://www.washingtonpost.com/nation/2019/01/20/they-left-food-water-migrants-desert-now-they-might-go-prison/> [<https://perma.cc/7HLJ-RKV9>]; *United States v. Hoffman*, 436 F.Supp.3d 1272, 1276–77 (D. Ariz. 2020).

⁶⁸ Ryan Deveraux, *Bodies in the Borderlands: Scott Warren Worked to Prevent Migrant Deaths in the Arizona Desert. The Government Wants Him in Prison.*, THE INTERCEPT (May 4, 2019), <https://theintercept.com/2019/05/04/no-more-deaths-scott-warren-migrants-border-arizona/> [<https://perma.cc/RQW6-YFVV>]; *United States v. Warren*, No. CR-18-00223-001-TUC-RCC (BPV), 2018 WL 4403753, at 1 (D. Ariz. 2018).

⁶⁹ See Vargas, *supra* note 17; Rosenberg et al., *supra* note 54.

⁷⁰ Daniel A. Scharf, *For Humane Borders: Two Decades of Death and Illegal Activity in the Sonoran Desert*, 38 CASE W. RES. J. INT'L L. 141 (2006); *CBP Launches Digital Ad Campaign "Say No to the Coyote: to Warn Migrants About Smuggler Lies*, U.S. CUSTOMS AND BORDER PROT. (May 16, 2022), <https://www.cbp.gov/newsroom/national-media-release/cbp-launches-digital-ad-campaign-say-no-coyote-warn-migrants-about> [<https://perma.cc/S2N2-KDK7>] (detailing the various warnings the government has issued to potential migrants to dissuade them from

officials have condemned “smugglers” instead of border policy for the rise in deaths.⁷¹ In the summer of 2022, for instance, fifty-one migrants died while trapped in a tractor-trailer in San Antonio, Texas, the deadliest border tragedy in U.S. history.⁷² While conservatives blamed the Biden administration’s “open border policies,”⁷³ the administration deflected the blame to smugglers,⁷⁴ a strategy that took hold in the 1990s.⁷⁵ Although the prevention through deterrence strategy has failed to curb migration, CBP persists in employing this strategy.⁷⁶ The implementation of Title 42 during the COVID-19 pandemic, for instance, only made circumstances more difficult and more dangerous for migrants.⁷⁷ Congress continues, nonetheless,

attempting to enter the United States in an attempt to “prevent tragedies and curtail irregular migration”).

⁷¹ Chang, *supra* note 37 (discussing the blame placed on smugglers and arguing that border policy, government officials, and the public must take responsibility for border deaths); Gabriella Sanchez, *Portrait of a Human Smuggler: Race, Class, and Gender among Facilitators of Irregular Migration on the US-Mexico Border*, in RACE, CRIMINAL JUSTICE AND MIGRATION CONTROL (Mary Bosworth et al. eds., 2018).

⁷² Paul J. Weber, Juan Lozano & Elliot Spagat, *51 Migrants Die after Trailer Abandoned in San Antonio Heat*, AP NEWS (June 29, 2022), <https://apnews.com/article/politics-mexico-san-antonio-12d7431c008ea0123dfa9c271a27a3ca> [<https://perma.cc/8MZC-C4M4>].

⁷³ Sarakshi Rai & Morgan Chalfant, *Texas Governor Blames Biden for Deaths of Migrants Found in Truck*, THE HILL (June 29, 2022, 10:53 AM), <https://thehill.com/homenews/administration/3539444-texas-governor-blames-biden-for-deaths-of-migrants-found-in-truck/> [<https://perma.cc/HW67-DLDE>].

⁷⁴ Morgan Chalfant, *Biden Rebukes ‘Political Grandstanding’ after Republicans Blame him for Migrant Deaths*, THE HILL (June 28, 2022, 12:40 PM), <https://thehill.com/homenews/administration/3539752-biden-rebukes-political-grandstanding-after-republicans-blame-him-for-migrant-deaths/> [<https://perma.cc/LTS6-M2KU>].

⁷⁵ Joe Biden Blames ‘Criminal’ Smugglers as Two Charged over 51 Migrant Deaths in Texas Trailer, SBS NEWS (June 29, 2022, 11:10 AM), <https://www.sbs.com.au/news/article/joe-biden-blames-criminal-smugglers-for-deaths-probe-after-51-migrants-die-in-sweltering-trailer-in-texas/64634n799> [<https://perma.cc/L7P3-A9JN>] (reporting that Biden blamed human smugglers for the deaths of 51 migrants left inside a sweltering tractor-trailer in Texas).

⁷⁶ See Mary D. Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-fillers in Border Regulation*, 42 LAW & SOC’Y. REV. 701, 701, 728–29 (2008) (providing psychoanalytic analysis how fantasy and fetishes contribute to the persistence of prevention through deterrence strategies that fail to curb border crossings).

⁷⁷ Cleve R. Wootson Jr., Nick Mirroff, Maria Sacchetti & Kevin Steff, *Biden immigration plan would restrict illegal border crossings*, WASH. POST (last updated Jan. 5, 2023), <https://www.washingtonpost.com/politics/2023/01/05/biden-border-security-immigration/> [<https://perma.cc/JG2C-UART>] (“The American Civil Liberties Union, which has led the legal battle to stop the expulsions since the Trump administration, criticized Biden for continuing to rely on Title 42,

to fund deterrence approaches. CBP now manages a budget of \$17.5 billion and a staff of nearly 20,000 Border Patrol agents.⁷⁸ Meanwhile, the number of people dying at the country's doorstep continues to rise.

C. Fatal Encounters with CBP and ICE

While border deterrence policy is the Homeland Security State's most lethal policy, migrants also face deadly violence when they encounter CBP and ICE officials.⁷⁹ In existence since 1924, CBP is the largest law enforcement agency in the country.⁸⁰ Border enforcement heightened progressively with increased funding, particularly through the 1986 Immigration Reform and Control Act ("IRCA"), the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), and the 2001 USA PATRIOT Act.⁸¹ With increased resources, CBP agents have increasingly used military style weapons and adopted tactics similar to other law enforcement agencies, such as local police, state police, and the FBI.⁸² For instance, CBP weaponry includes hollow point bullets, which expand on impact, increasing the likelihood of death.⁸³

saying expelling migrants will send them into dangerous border cities where some have been kidnapped or killed.”).

⁷⁸ DHS BUDGET OVERVIEW (2023), https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Customs%20and%20Border%20Protection_Remediated.pdf [<https://perma.cc/PLD6-NAQQ>].

⁷⁹ It is important to note that local police often serve as a proxy for CBP and ICE, acting as part of the Homeland Security State and taking the lives of noncitizens. For instance, police killed Patrick Lyoya in 2022, Botham Jean in 2018, Ismael López in 2017, Alfred Olango in 2016, and Amadou Diallo and Patrick Dorismond in 1999, among others. While immigrants have been among the targets of police violence, more research is needed to determine the scope of these deaths and the lack of legal recourse for the victims' families. See L. Darnell Weeden, *“We the People” Should Extend Constitutional Protections to Undocumented Resident Immigrants Killed Unreasonably by the Police*, 44 T. Marshall L. Rev. 187, 187–89, 192 (2020) (arguing that undocumented migrants face deadly violence from law enforcement officials without adequate constitutional protections).

⁸⁰ Meg Green, *Standing on the Wrong Side: Hernandez v. Mesa and Bivens Remedies in the Context of Cross-Border Shootings by Federal Law Enforcement*, 61 B.C. L. REV. E-SUPPLEMENT II. -20, n.11 (Feb. 2020).

⁸¹ Massey, Pren & Durand, *supra* note 47, at 1569.

⁸² CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* (2d ed. 2021) 13–14; Sophia Porotsky, *Rotten to the Core: Racism, Xenophobia, and the Border and Immigration Agencies*, 36 GEO. IMMIGR. L.J. 349, 371–72 (2021) (discussing the militarization of CBP and ICE).

⁸³ BTS Law Enforcement Units Will Continue Use of Hollow Point Bullets, 80 No. 44 Interpreter Releases 1570 (Nov. 17, 2003); Pete Norman, *Border Patrol Buys 33 Million Bullets for new Glock Handgun*, THE BOSTON GLOBE (Oct. 27, 2019)

Pursuant to the Code of Federal Regulations pertaining to immigration enforcement, deadly force is authorized when an immigration officer “has reasonable grounds to believe such force is necessary to protect the designated immigration officer or other persons from the imminent danger of death or serious physical injury.”⁸⁴ A 2013 report commissioned by Border Patrol, however, casts doubt this standard is upheld. According to the Police Executive Research Forum, agents deliberately stepped in front of cars to justify shooting their drivers and shot at individuals throwing rocks when they could have moved out of range instead of using deadly force.⁸⁵ Border Patrol attempted to conceal the report and ignored recommendations that, if adopted, would make its policies more consistent with other law enforcement agencies and reduce the number of preventable deaths.⁸⁶ Despite the apparent gratuitous use of force, criminal penalties against Border Patrol for deadly use of force while on duty are exceedingly rare.⁸⁷

From 2012 to 2021, according to its own estimates, CBP used force on 9,334 occasions.⁸⁸ This figure represents one

(“Customs and Border Protection agreed to pay \$9.89 million for Winchester Ammunition Inc.’s special 9mm hollow point Luger rounds . . .”). Due to their increased lethality, the Hague Convention prohibits the use of “bullets which expand or flatten easily in the human body” in international warfare. Declaration (IV.3) concerning Expanding Bullets. The Hague, 29 July 1899.

⁸⁴ 8 C.F.R. § 287.8(a)(2)(ii); Chapter I, Part 287 of the Code of Federal Regulations (C.F.R.), C.F.R. § 287.8(a)(2), and “[N]on-deadly force,” C.F.R. § 287.8(a)(1).

⁸⁵ Brian Bennett, *Border Patrol’s use of Deadly Force Criticized in Report*, L.A. TIMES (Feb. 27, 2014, 12:00 AM PT), <https://www.latimes.com/nation/la-xpm-2014-feb-27-la-na-border-killings-20140227-story.html> [<https://perma.cc/MHE8-EWVG>]; See THE POLICE EXECUTIVE RESEARCH FORUM, U.S. CUSTOMS AND BORDER PROTECTION USE OF FORCE REVIEW: CASES AND POLICIES at 4 (2013), <https://www.cbpf.gov/sites/default/files/documents/PERFReport.pdf> [<https://perma.cc/T6XH-Z5CV>] (asserting CBP’s “lack of diligence” in investigating incidents where officers used deadly force).

⁸⁶ See Bennett, *supra* note 85 (noting that U.S. Customs and Border Protection attempted to prevent the Police Executive Research Forum report from coming to light and the agency’s internal response rejecting its two major recommendations).

⁸⁷ Roxanna Altholz, *Elusive Justice: Legal Redress for Killings by U.S. Border Agents*, 27 BERKELEY LA RAZA L.J. 1, 16 (2017); *Fatal Encounters with CBP Since 2010*, SBCC (last updated Dec. 20, 2022), https://www.southernborder.org/deaths_by_border_patrol.

⁸⁸ *CBP Use of Force Statistics Fiscal Year 2018*, U.S. CUSTOMS AND BORDER PROT. (March 5, 2019) (reporting 6,788 instances of use of force for 2012-2018); *Assaults and Use of Force Statistics Fiscal Year 2020*, U.S. CUSTOMS AND BORDER PROT., <https://web.archive.org/web/20201116041832/https://www.cbpf.gov/newsroom/stats/assaults-use-force> [<https://perma.cc/325H-HT2S>] (reporting 1,781 instances of use of force for 2019-2020); *Assaults and Use of Force Statistics*, U.S. CUSTOMS AND BORDER PROT. (last accessed Aug. 6, 2023), <https://www.cbpf.gov/>

act of violence approximately every nine hours over the course of a decade. A number of these encounters have resulted in death. The ACLU of Texas, where the largest number of deaths occur, reports at least 272 fatal encounters with Customs and Border Protection since 2010.⁸⁹ The figures include 101 cases involving vehicle pursuits, 60 firearm deaths, 55 deaths in CBP custody, 18 deaths of minors, and 12 cases of off-duty homicide.⁹⁰ In total, approximately 20 people lose their lives each year in encounters with CBP. The ACLU notes the lack of oversight and accountability measures as Border Patrol has expanded dramatically, including with regard to use of excessive, deadly force.⁹¹

According to the Southern Border Communities Coalition (“SBCC”), an organization that tracks fatal encounters with Border Patrol, 265 people have lost their lives in encounters with CBP since 2010, slightly fewer than the deaths reported by the ACLU.⁹² Notably, the number of deaths is increasing. While 113 people died in encounters with CBP between 2010 and 2019, 144 died in less than a third of the time from 2020 to 2022.⁹³ While the organization attempts to track specific information about those who died, that information is limited. According to SBCC, the country of origin was unknown for 91 of the 265 killed.⁹⁴ Of the known deaths, most were from Latin American countries, particularly Mexico (73), Guatemala (20), and Honduras (14).⁹⁵ Three were African, specifically two Angolans and one Congolese woman.⁹⁶ Border Patrol continues to search for the brother of one of the missing Angolan children.⁹⁷

newsroom/stats/assaults-use-force [https://perma.cc/8VCR-TNM4] (reporting 765 instances of use of force for 2021).

⁸⁹ *CBP Fatal Encounters Tracker*, ACLU Tex., <https://www.aclutx.org/en/cbp-fatal-encounters-tracker> [https://perma.cc/N2Z4-R76S] (last accessed Sept. 20, 2022).

⁹⁰ *Id.* See also Eileen Sullivan, *A Rise in Deadly Border Patrol Chases Renews Concerns About Accountability*, N.Y. TIMES (Jan. 9, 2022), <https://www.nytimes.com/2022/01/09/us/politics/border-patrol-migrant-deaths.html> [https://perma.cc/AH7E-BZ2P].

⁹¹ *Id.*

⁹² *Fatal Encounters with CBP Since 2010*, SBCC (Aug. 11, 2022), https://www.southernborder.org/deaths_by_border_patrol [https://perma.cc/8FRD-H3EF].

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Body of Missing Child Found in Rio Grande*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/local-media-release/body-missing-child-found-rio-grande> (last updated May 6, 2022) [https://perma.cc/D537-XQP4].

Of the known deaths, 32 were either lawful permanent residents or citizens of the United States.⁹⁸ In addition, the ages of 142 of the victims were unknown. Of the victims whose ages are known, 13 dead were under the age of 10 and 35 dead were under the age of 20.⁹⁹ SBCC attributes the deaths to “CBP’s lack of accountability and oversight paired with its culture of violence.”¹⁰⁰

Typically, this violence occurs on U.S. soil, but there are also instances of cross-border shootings. Since 2010, CBP agents have shot six people across the U.S.-Mexico border, half of whom were minors.¹⁰¹ Among those CBP killed in Mexico were Sergio Adrián Hernández Güereca (age 15), José Antonio Elena Rodríguez (age 16), and Ramses Barrón Torres (age 17). In each of these fatal shootings, CBP agents claimed they reacted to rocks thrown at them. In many cases involving rock throwing, there is scant evidence or video evidence refutes CBP’s claims.¹⁰² In 2013, the Police Executive Research Forum advised that CPB’s rock throwing policy is unlawful and that rock throwing should not be treated as warranting per se deadly force.¹⁰³ In 2019, however, the Supreme Court found in *Hernandez v. Mesa* that federal courts should not recognize causes of action for cross-border shootings, opening the door to more shootings of migrants in Mexico.¹⁰⁴

There are less data related to use of force, shootings, or fatal encounters by ICE since the agency does not make statistics available and there is no organization currently tracking this information. In 2017, ICE requested approval from the National Archives and Record Administration for the routine destruction of records related to deaths as well as sexual assaults in custody.¹⁰⁵ Despite the barriers to obtaining information, the Howard Center for Investigative Journalism found

⁹⁸ *Fatal Encounters with CBP Since 2010*, *supra* note 92.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *CBP Fatal Encounters Tracker*, ACLU Tex., <https://www.aclutx.org/en/cbp-fatal-encounters-tracker> (last accessed Sept. 20, 2022) [<https://perma.cc/HE8L-MSQD>].

¹⁰² *Fatal Encounters with CBP Since 2010*, SBCC (Aug. 11, 2022), https://www.southernborder.org/deaths_by_border_patrol [<https://perma.cc/7BJQ-PWZM>].

¹⁰³ THE POLICE EXECUTIVE RESEARCH FORUM, *USE OF FORCE REVIEW: CASES AND POLICIES* at 2 (Feb. 2013).

¹⁰⁴ 140 S. Ct. 735 (2020) (explaining that cross-border shootings involve foreign policy and national security, and that Congress always ensures that statutes that allow damages against federal agents do not apply abroad).

¹⁰⁵ Victoria López, *ICE Plans to Start Destroying Records of Immigrant Abuse, Including Sexual Assault and Deaths in Custody*, ACLU (May 29, 2018), <https://>

that Homeland Security Investigations, an agency within Immigration and Customs Enforcement, shot at least 16 people between 2011 and 2020.¹⁰⁶ Of the 16 identified victims, 13 were Black, Latinx, or Native American, and 5 died as a result of the shootings.¹⁰⁷ No ICE agents were charged in these deaths. In 2020, ICE agents in New York shot unarmed Erick Díaz Cruz, who was not the target of their arrest, in the face, nearly ending his life.¹⁰⁸ At the time, ICE officials stated their agents fire their weapons approximately ten times per year.¹⁰⁹

D. Death in Detention

In *Wong Wing v. United States*, the Supreme Court allowed for detention “as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens,” but found that it is “not imprisonment in a legal sense.”¹¹⁰ After that 1896 ruling, detention numbers remained relatively low for the next century.¹¹¹ In the past few decades, however, the immigration detention system has expanded exponentially, quickly becoming one of the Homeland Security State’s primary forms of violence against migrants. In 1973, the INS detained 2,370 noncitizens daily.¹¹² In 1994, the number of people detained daily was 6,785 and rising.¹¹³ In 2019, more than half a million

www.aclu.org/news/immigrants-rights/ice-plans-start-destroying-records-immigrant [https://perma.cc/V9QD-639A].

¹⁰⁶ Derek Hall, Mackenzie Shuman, Devan Sauer, Nicole Ludden & José-Ignacio Castañeda Perez, *War Zone*, CRONKITE NEWS, <https://cronkitenews.azpbs.org/homeland-secrets/arizona-stories/war-zone.html> [https://perma.cc/73L7-NSVM] (last accessed Sept. 20, 2022).

¹⁰⁷ *Id.*

¹⁰⁸ Annie Correal & Ed Shanahan, *Shooting of Man in the Face by ICE Turns into a Trump-New York Fight*, N.Y. Times (Feb. 12, 2020), <https://www.nytimes.com/2020/02/11/nyregion/ice-officer-shooting.html> [https://perma.cc/F96W-LG6W].

¹⁰⁹ *Id.*

¹¹⁰ *Wong Wing v. United States*, 163 U.S. 228, 235 (1896); *See also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *INS v. Lopez Mendoza*, 468 U.S. 1032, 1038 (1984).

¹¹¹ CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019).

¹¹² Altaf Saadi, Maria-Elena De Trinidad Young, Caitlin Patler, Jeremias Leonel Estrada & Homer Venters, *Understanding US Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health*, 22 HEALTH & HUMAN RIGHTS J. 187, 188 (2020).

¹¹³ Katharina Buchholz, *Number of Immigrant Detainees Rises Quickly*, STATISTICA (Jan. 3, 2020), <https://www.statista.com/chart/17977/number-of-detainees-in-facilities-of-dhs-immigration/> [https://perma.cc/83AA-5E5Z].

people faced detention, with more than 50,165 people detained each day.¹¹⁴ The United States now has the largest detention system in the world.¹¹⁵ That system is increasingly driven by profits, with approximately 80% of immigrants detained in for-profit detention centers.¹¹⁶ As the detention system expands, it continues to subject migrants to neglect, sexual assault, and prolonged detention.¹¹⁷ Like its border policies, the government intends immigration detention to serve as a deterrent to potential migrants.¹¹⁸

Despite the purported non-punitive nature of immigration detention, the risk of premature death is a reality for detained migrants. From 2004 to 2021, it is estimated that at least 219 people died in ICE detention.¹¹⁹ That figure represents more than one death every month inside an ICE detention center. As a result of a Freedom of Information Act request, ICE published information for its 172 reported deaths from October 2003 through June 2017.¹²⁰ Among the reported deaths, some detainees perished for reasons that may have been preventable if the individuals were not detained, such as electrocution, drowning, and suicide.¹²¹ Several died as a result of

¹¹⁴ ICE Details how Border Crisis Impacted Immigration Enforcement in FY 2019, ICE (Oct. 29, 2021), <https://www.ice.gov/features/ERO-2019#:~:text=ERO's%20Average%20Daily%20Population%20in,43.7%20days%20in%20FY%202017> [<https://perma.cc/2DQ7-PS4Z>].

¹¹⁵ Carl Lindskoog, The Historical Origins of the World's Largest Immigration Detention System, 97 *DENV. L. REV.* 655 (2020).

¹¹⁶ Eileen Sullivan, *A.C.L.U. Says Immigration Detention Facility Should be Shut Down*, N.Y. TIMES (Sept. 22, 2022), <https://www.nytimes.com/2022/09/22/us/politics/aclu-ice-immigration-detention.html>.

¹¹⁷ Valerie Gisel Zarate, *Disposable Immigrants: The Reality of Sexual Assault in Immigration Detention Centers*, 53 ST. MARY'S L. J. 619 (2022); 132 *HARV. L. REV.* 417 (Nov 2018).

¹¹⁸ See *R.I.L.-R v. Johnson*, 80 F.Supp.3d 164, 188–189 (D.D.C. 2015) (showing the government's argument that "one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration").

¹¹⁹ Alex Nowrasteh, *21 People Died in Immigration Detention in 2020*, CATO INST. (Oct. 22, 2020, 5:16 PM), <https://www.cato.org/blog/21-people-died-immigration-detention-2020#:~:text=The%20FY2020%20death%20rate%20in,highest%20ever%20recorded%20in%202004> [<https://perma.cc/2CPC-XJN4>] (reporting 214 total deaths in ICE detention from FY 2004 through 2020); Immigration and Customs Enforcement, *Detainee Death Reporting*, <https://www.ice.gov/detain/detainee-death-reporting> [<https://perma.cc/6RPX-XZKZ>] (reporting 5 deaths in ICE detention in FY 2021) (last accessed June 16, 2023).

¹²⁰ Chart listing deaths in ICE Custody (Oct. 1, 2003–June 5, 2017), <https://www.ice.gov/doclib/foia/reports/detaineedeaths-2003-2017.pdf> [<https://perma.cc/89YQ-A979>].

¹²¹ *Id.* Four of the six suicides in detention during this period of time took place at the same location, Eloy Detention Center. See Megan Granski, Allen Keller &

chronic or terminal illnesses, such as cancer, HIV/AIDS, or chronic kidney failure.¹²² The ages of the detainees points to premature death. Of those reported, the average age was 53.¹²³ Of the sixteen women reported, the average age was 42.¹²⁴ For comparison, the lowest life expectancy in any country is 53 years,¹²⁵ and the average life expectancy globally during the reported deaths in detention was 67 years or greater.¹²⁶ Despite the relatively low average age of those who died in detention, the report also demonstrates ICE's willingness to detain older adults. Fourteen percent were over the age of sixty, with fourteen detainees in their sixties, nine in their seventies, and one Haitian man in his eighties.¹²⁷

There exist alternatives to detention, such as ankle monitors and community-based management.¹²⁸ Nonetheless, ICE chooses to imprison individuals regardless of their precarious health status or advanced age, including during the COVID-19 pandemic, potentially preventing them from seeking superior medical care and precipitating avoidable deaths.¹²⁹ Numerous

Homer Venters, *Death Rates Among Detained Immigrants in the United States*, 12 INT'L J. ENV'T RSCH. PUB. HEALTH 14414, 14417 (2015) (finding that for the period studied, five suicides occurred in the Eloy Federal Contract Facility, while no other facility had more than one suicide), <https://pdfs.semanticscholar.org/e94b/05e90c8ac8ae31108aa58b3f6bb3fe0ead05.pdf> [<https://perma.cc/4GKC-2P9K>].

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Life Expectancy at Birth, Total*, WORLD BANK, https://data.worldbank.org/indicator/SP.DYN.LE00.IN?most_recent_value_desc=false (last accessed Dec. 3, 2023) [<https://perma.cc/W3CQ-73L9>]. Currently, the countries with the lowest life expectancy are Chad and Nigeria.

¹²⁶ *Global Health Estimates: Life Expectancy and Leading Causes of Death and Disability*, WORLD HEALTH ORG., <https://www.who.int/data/gho/data/themes/mortality-and-global-health-estimates/ghe-life-expectancy-and-healthy-life-expectancy> (last accessed Dec. 3, 2023) [<https://perma.cc/V4YN-CB3L>] (“Globally, life expectancy has increased by more than 6 years between 2000 and 2019 – from 66.8 years in 2000 to 73.4 years in 2019.”).

¹²⁷ Chart listing deaths in ICE Custody (Oct. 1, 2003–June 5, 2017).

¹²⁸ This is not to say that ankle monitors are the answer to reducing the number of people in detention. There are also myriad problems with this type of monitoring. See Fatma E. Marouf, *Alternatives to Detention*, 38 CARDOZO L. REV. 2141 (2017) (arguing for development of more community-based case management programs and less reliance on electronic monitoring); Sarah Sherman-Stokes, *Detention Abolition and the Violence of Digital Cages*, BOSTON UNIV. SCHOOL OF LAW RESEARCH PAPER NO. 22–21 (Aug. 16, 2022) (arguing for the abolition of all detention and an end to “ankle shackles” and “e-carceration”).

¹²⁹ See Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. FOR SOC. JUST. 693, 693–94, 708–09 (Spring/Summer 2019).

studies and reports have found that ICE provides substandard care, including for physical and psychological conditions, which contributes to premature fatalities.¹³⁰ In a report conducted by the American Civil Liberties Union (“ACLU”), Detention Watch Network, and National Immigrant Justice Center, for instance, the organizations found that “egregious violations” of ICE medical care standards contributed significantly to the death of eight detainees between 2010 and 2012.¹³¹ The report maintains that ICE itself identified violations of medical standards as contributors to the deaths, but the agency failed to implement necessary changes to prevent further loss of life.¹³² Congress is well aware of the substandard conditions in immigration detention. In 2020, the House of Representatives published a report examining death and medical neglect by for-profit detention contractors, finding “poor handling of infectious diseases,” “critical medical staff shortages,” and “a widespread failure to provide necessary medical care to detainees with serious and chronic medical conditions.”¹³³

While the reported deaths are disconcerting, they do not reflect fully the loss of life in ICE detention. In some cases, ICE releases detainees near death, insulating itself from reporting responsibilities and legal liability.¹³⁴ Although a 2018 Depart-

¹³⁰ Megan Shields Casturo, *Civil Immigration Detention: When Civil Detention Turns Carceral*, 122 PENN ST. L. REV. 825, 835–840 (2018). See also Allyson Zivec, *Don't Give Us Your Sick: Inadequate Medical Care in Immigration Detention Centers and How it Violates International Human Rights Law*, 5 PHOENIX L. REV. 229 (2011); Lisa A. Cahan, *Constitutional Protections of Aliens: A Call for Action to Provide Adequate Health Care for Immigration Detainees*, 3 J. HEALTH & BIOMED L. 343 (2007); *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention*, HUMAN RIGHTS WATCH (Jun. 20, 2018), <https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration> [https://perma.cc/VW7X-YB4L].

¹³¹ *Fatal Neglect: How ICE Ignores Deaths in Detention*, ACLU (Feb. 2016), <https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention> [https://perma.cc/XF2H-T6XZ].

¹³² *Id.*

¹³³ *The Trump Administration's Mistreatment of Detained Immigrants: Deaths and Deficient Medical Care by For-Profit Detention Centers*, U.S. HOUSE OF REPS. (Sept. 2020), <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2020-09-24.%20Staff%20Report%20on%20ICE%20Contractors.pdf> [https://perma.cc/36E5-7T7E]. The report further states, “Even though DHS’s own internal reports found that egregious medical deficiencies and negligence led to the deaths of multiple detainees and poor treatment for many others, the Trump Administration has continued to reward the companies that manage these facilities with lucrative contracts.” *Id.*

¹³⁴ Andrea Castillo & Jie Jenny Zou, *ICE Rushed to Release a Sick Woman, Avoiding Responsibility for her Death. She isn't Alone*, L.A. TIMES (May 13, 2022), <https://www.latimes.com/world-nation/story/2022-05-13/>

ment of Homeland Security Appropriations Bill requires that ICE disclose the death of anyone in its custody,¹³⁵ the agency does not report those it releases even shortly before someone dies. For instance, although Johana Medina Leon waited six weeks in 2019 to see a doctor in detention, she was released within six hours of her examination, dying shortly thereafter.¹³⁶ Such rapid release from detention is otherwise relatively rare.¹³⁷ On October 7, 2021, the ACLU filed suit, alleging that ICE withholds records related to these quick releases.¹³⁸ It is unclear how many migrants like Medina Leon remain uncoun-tered among detention deaths due to ICE's quick release methods.

Recent Supreme Court rulings may exacerbate the challenges migrants face in detention, permitting prolonged imprisonment and increasing the potential for deaths among detained migrants. In *Johnson v. Arteaga-Martinez*, the Court found the government does not need to offer bond hearings after six months of detention where the government would have to prove flight risk or danger to the community, under the INA provision that allows certain non-citizens to be detained beyond the 90-day removal period.¹³⁹ In *Jennings v. Rodriguez*, the Court had similarly concluded the INA provision does not place a six-month limit on detention or require periodic bond hearings.¹⁴⁰ As immigration detention becomes more widespread and conditions remain questionable, the Supreme Court's further limits on opportunities to challenge lengthy detention may contribute to further neglect and increased preventable deaths in immigration detention.

ice-immigration-detention-deaths-sick-detainees#:~:text=Despite%20de-taining%20hundreds%20of%20thousands,five%20for%20all%20of%202021 [https://perma.cc/8Z6Y-LPVK].

¹³⁵ Department of Homeland Security Appropriations Bill of 2018, H.R. 115-239, 115th Cong. at 23 (2017).

¹³⁶ Castillo, *supra* note 134.

¹³⁷ *Id.* ("The swift processing of Medina Leon's parole was highly unusual – such reprieves typically take several days or weeks.")

¹³⁸ Grace Vitaglione & Sammy Sussman, *Families, Activists, ACLU Question ICE's Accounting of Deaths in Detention*, IRW (Nov. 15, 2021), <https://investigativereportingworkshop.org/investigation/dying-in-silence/> [https://perma.cc/FKS8-5HFF].

¹³⁹ 142 S. Ct. 1827 (2022).

¹⁴⁰ 138 S. Ct. 830 (2019).

E. Death by Deportation

The final enforcement mechanism that leads to death is deportation. Challenges in accessing asylum, for instance, contribute to deaths by deportation. Under international law and U.S. law, the principle of non-refoulement prohibits the removal of migrants to countries where they will face persecution.¹⁴¹ Despite mandates to the contrary,¹⁴² CBP agents fail to advise migrants of their right to apply for asylum or remove them even when they express a fear of return. In 2014, the ACLU produced a report based on 136 cases of noncitizens removed without a hearing before an immigration judge.¹⁴³ Of the 89 cases that received a summary removal order,

[o]nly 25 (or 28 percent) said they were asked about fear of returning to their country of origin by a border officer or agent, and 10 of those individuals (40 percent) said they told the officer they were afraid of returning to their country but were nevertheless not referred to an asylum officer.”¹⁴⁴

There is no formal process to challenge removal when a non-citizen is denied their rights in this manner.

For those able to request asylum, the law itself presents obstacles to asylum seekers. Even those able to demonstrate clearly they may be persecuted, or even killed, if removed from the United States must overcome further legal obstacles, such as showing that they fall within an established protected ground, that there is a nexus between the protected ground and the persecution, that they are unable or unwilling to avail themselves of the protection of the country, and that they merit asylum

¹⁴¹ *The Principle of Non-Refoulement Under International Human Rights Law*, OHCHR, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> [<https://perma.cc/8NQC-5LRW>] (last accessed Oct. 16, 2022); 8 U.S.C. § 1231(b)(3)(A) (stating that “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion”).

¹⁴² *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (upholding an injunction requiring the government to notify migrants of their right to apply for asylum); *Jean v. Nelson*, 727 F.2d 957, n. 35 (11th Cir. 1984) (stating in a footnote that the Refugee Act requires INS officials to inform migrants of their right to seek asylum provided that they express a fear of persecution if returned to their home country).

¹⁴³ *American Exile: Rapid Deportations that Bypass the Courtroom*, ACLU at 9 (Dec. 2014), https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf [<https://perma.cc/MTD4-MU4Y>].

¹⁴⁴ *Id.* at 33.

as a matter of discretion.¹⁴⁵ Notably, protected grounds are limited¹⁴⁶ and fluctuate with the evolution of legal precedents, including abrupt changes in the law effectuated by presidential administrations.¹⁴⁷ Regardless of the vicissitudes of the law, immigration judges and immigration courts have dramatically different approval rates for asylum cases, with some judges granting less than one percent of cases heard.¹⁴⁸ Since October 2000, immigration judges have denied more than half of the over 545,000 asylum cases they have heard.¹⁴⁹ The result is the routine removal of asylum seekers, even when they present genuine fears of harm in their home countries.

¹⁴⁵ 8 U.S.C. 1158; 8 U.S.C. 1101(a)(42)(A); 8 C.F.R. § 1208.14(a).

¹⁴⁶ See, e.g., *Matter of W-G-R-*, 26 I. & N. Dec. 210 (BIA 2014) (finding that “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” is not a social group); *Gonzalez Cano v. Lynch*, 809 F.3d 1056, 1058–59 (9th Cir. 2016) (escapee Mexican child laborers are not socially distinct); *Nolasco v. Garland*, 7 F.4th 180 (4th Cir. 2021) (rejecting the particular social groups “former members of MS-13” and “former members of MS-13 who leave for moral reasons”); *Sicaju-Diaz v. Holder*, 663 F.3d 1 (1st Cir. 2011) (finding that “a family returning to Guatemala after lengthy residence in the United States perceived as wealthy and, therefore, particularly susceptible to extortionate and/or kidnapping demands” is not a particular social group); *Mendez-Barrera v. Holder*, 602 F.3d 21 (1st Cir. 2010) (concluding that the group defined as “young women recruited by gang members who resisted recruitment” was not particular enough to be a social group).

¹⁴⁷ Gender-based particular social groups are one such area of asylum law that has fluctuated significantly depending on the presidential administration in power. For example, *Matter of A-R-C-G-* (decided during the Obama administration) served as the first precedential decision recognizing gender-based particular social groups predicated on domestic violence. 26 I. & N. Dec. 388 (BIA 2014). However, in *Matter of A-B-* (decided during the Trump administration), Attorney General Sessions asserted that *Matter of A-R-C-G-* was wrongly decided, overruling the decision. 27 I. & N. Dec. 316 (2018). The tide turned once again in 2021, when Attorney General Garland (appointed by President Biden) overturned *Matter of A-B-* and re-asserted the ability of migrants to use gender as a basis for particular social group claims. *Matter of A-B-*, 28 I. & N. Dec. 307 (2021).

¹⁴⁸ See generally Philip G. Schrag, Andrew I. Schoenholtz & Jaya Ramji-Nogales, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007); PHILIP G. SCHRAG, ANDREW I. SCHOENHOLTZ & JAYA RAMJI-NOGALES, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* (2011). See also *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015–2020*, TRAC IMMIGRATION (2020), <https://trac.syr.edu/immigration/reports/judge2020/denialrates.html> [https://perma.cc/CL6J-HNGX] (see Judges George W. Riggs of Charlotte, Bruce Imbacuan of Houston, Cassie A. Thogersen of Jena, and Agnelis L. Reese of Oakdale among the many immigration judges with low asylum grant rates); *Asylum Decisions Vary Widely Across Judges and Courts – Latest Results*, TRAC IMMIGRATION (Jan. 13, 2020), <https://trac.syr.edu/immigration/reports/590/> [https://perma.cc/EG9Q-ZGFM] (reporting an overall asylum denial rate of 91.9% for the Houston Immigration Court as compared to a 26.1% overall asylum denial rate for the New York Immigration Court).

¹⁴⁹ *Asylum Decisions*, TRAC IMMIGRATION (2022), <https://trac.syr.edu/php-tools/immigration/asylum/> [https://perma.cc/Z2UC-GRSC].

When migrants are deprived of their right to apply for asylum or denied asylum and other forms of relief providing protection, they are sometimes removed to countries with governments unable or unwilling to control persecution against them, including violence resulting from political and economic instability caused or exacerbated by U.S. influences such as neoliberal economic policies, political interventions, and demand for drugs. In his book *Deported to Death: How Drug Violence is Changing Migration on the US-Mexico Border*, anthropologist Jeremy Slack recounts how drug-related violence has reshaped migration and deportation in Mexico.¹⁵⁰ In his ethnographic research, he finds that the drug war has contributed to Mexican deportees facing extreme forms of violence in unfamiliar Mexican cities after removal from the United States.¹⁵¹ Central American deportees also often return to violent conditions, finding themselves removed to countries with among the highest femicide and homicide rates in the world as well as rampant gang violence.¹⁵²

With no agency or organization systematically monitoring deportees, the number of deaths caused by deportation, and whether that number is rising, is unknown. It is known, however, that deportation results in death. Through press accounts, court files, and interviews, Human Rights Watch identified 138 cases of Salvadorans killed between 2013 and 2019 after they were deported.¹⁵³ At least another 70 people identified faced sexual violence, torture, or other harm, primarily

¹⁵⁰ JEREMY SLACK, *DEATH: HOW DRUG VIOLENCE IS CHANGING MIGRATION ON THE US-MEXICO BORDER* (2019).

¹⁵¹ *Id.* at 205. As Slack notes, “Not only does the violence of forced removal place people in extreme danger, separating families and banishing people from the place they call home, it exacerbates a complex and volatile conflict in Mexico.” *Id.*

¹⁵² See *At Least 4,473 Women Were Victims of Femicide in Latin America and the Caribbean in 2021* (Nov. 24, 2022), <https://www.cepal.org/en/press-releases/eclac-least-4473-women-were-victims-femicide-latin-america-and-caribbean-2021> [<https://perma.cc/97YC-X464>] (illustrating that the highest femicide rates in Latin America are in Honduras (4.6 for every 100,000 women), the Dominican Republic (2.7 for every 100,000 women), El Salvador (2.4 for every 100,000 women), Bolivia (1.8 for every 100,000 women), and Brazil (1.7 for every 100,000 women)). See *Global Study on Homicide: Homicide Trends, Patterns and Criminal Justice Response*, UNODC (2019), <https://www.unodc.org/documents/data-and-analysis/gsh/Booklet2.pdf> [<https://perma.cc/458B-MNG8>] (showing that Brazil and Mexico are among the countries with the highest murder rates).

¹⁵³ *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse*, HUMAN RIGHTS WATCH (Feb. 5, 2020), <https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and> [<https://perma.cc/CL37-J2T8>].

in encounters with gangs.¹⁵⁴ In many cases, Human Rights Watch found a clear link between the harm or death and the original motivations for fleeing El Salvador.¹⁵⁵ It is estimated that the United States and Mexico deported approximately 213,000 Salvadoran citizens from 2014 through 2018.¹⁵⁶ The organization believes the proportion of those harmed or killed is likely greater than the number identified.¹⁵⁷ The government deported this large number of Salvadorans while their asylum applications increased tenfold, making them the largest group of asylum seekers in the United States.¹⁵⁸ While this report provides valuable information about death after deportation, further research is needed to understand more fully the attendant harms of deportation.¹⁵⁹

While deportation itself causes migrant deaths, even the threat of deportation causes harm and death for migrants in the United States. For instance, the fear of deportation prevents workers from calling attention to dangerous working conditions and deters potential complainants from reporting crime. According to the International Organization for Migration, migrants are overrepresented in hazardous jobs, such as construction, mining, and agriculture.¹⁶⁰ The number of fatal work injuries was also higher among migrants, with 15 percent more foreign-born workers losing their lives than native-born workers in the United States.¹⁶¹ Undocumented migrants

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

Between 2012 and 2017, the number of Salvadoran annual asylum applicants in the US grew by nearly 1,000 percent, from about 5,600 to over 60,000. By 2018, Salvadorans had the largest number (101,000) of any nationality of pending asylum applications in the United States. At the same time, approximately 129,500 more Salvadorans had pending asylum applications in numerous other countries throughout the world.

Id. In the United States, Salvadorans receive asylum in 18.2 percent of cases, whereas their asylum success rate is 36.5 percent in Mexico and up to 75 percent in other Central American countries. El Salvador has one of the highest homicide rates per capita in the world. *Id.*

¹⁵⁹ This section primarily provides examples from Mexico and Central America because of the dearth of information about other countries and regions. The death of deportees is undoubtedly a problem beyond countries immediately south of the United States. Further research is needed to understand the impact of deportation on nationals of many countries, particularly countries beyond Mexico and El Salvador.

¹⁶⁰ *Occupational Fatalities among International Migrant Workers: A Global Review of Data Sources* (Oct. 2021).

¹⁶¹ *Id.*

are particularly vulnerable and unlikely to report hazardous working conditions and workplace injuries.¹⁶² Undocumented migrants are also less likely to report crime to law enforcement.¹⁶³ Fearing deportation, domestic violence survivors may remain in abusive and even lethal relationships rather than seek assistance from authorities.

Like those who attempt to prevent deaths in the desert, advocates who have attempted to avert deaths by deportation have also faced criminalization by the federal government. Cast as economic rather than political refugees, Central Americans overwhelmingly received denials to their applications for asylum during the civil wars that erupted in the latter half of the twentieth century.¹⁶⁴ During the sanctuary movement of the 1980s, activists worked to prevent the death of Central American migrants fleeing the wars by providing refuge in churches, where immigration enforcement officials were unlikely to pursue migrants identified for deportation.¹⁶⁵ In response to sanctuary workers' efforts, the federal government prosecuted several advocates, arresting more than 60 people, including clergypersons working to shield migrants from the possibility of death by deportation.¹⁶⁶ In *United States v. Aguilar*, the Ninth Circuit upheld the convictions of eight sanctuary workers.¹⁶⁷ For decades, advocates attempting to prevent death by deportation have worked in the shadow of these prosecutions.

II

LEGITIMIZING LETHALITY: RACIALIZED RATIONALES FOR FATAL ENFORCEMENT

Ostensibly vital objectives undergird the Homeland Security State's lethal enforcement and production of migrant mortality, such as reducing crime, protecting national security,

¹⁶² Leticia M. Salcedo, *The Making of the "Wrongfully" Documented Worker*, 93 N.C. L. Rev. 1505, 1546 (June 2015).

¹⁶³ Azadeh Shahshahani & Amy Pont, *Sanctuary Policies: Local Resistance in the Face of State Anti-Sanctuary Legislation*, 21 *Cuny L. Rev.* 225, 241 (Fall 2018).

¹⁶⁴ *Id.*

¹⁶⁵ Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 *TENN. L. REV.* 899, 990 (1995).

¹⁶⁶ *Id.*; See also Kristina M. Campbell, *Operation Sojourner: The Government Infiltration of the Sanctuary Movement in the 1980s and Its Legacy on the Modern Central American Refugee Crisis*, 13 *U. ST. THOMAS L.J.* 474 (2017).

¹⁶⁷ 883 F.2d 662, 709 (9th Cir.); See also Karen E. Lavarnway, *The Closing of the Golden Door: Necessity, International Law and Freedom of Religion Are Failing as Defenses for Sanctuary Movement Workers*, 25 *U. RICH. L. REV.* 367 (1991).

and preserving national sovereignty.¹⁶⁸ Firmly entrenched not only in law and policy but in the American imagination, these vaunted rationales render death an inevitable externality to protecting fundamental national interests. These justifications have afforded presumptive legitimacy to an enforcement system that perpetuates preventable deaths. The racialized motivations imbuing these aims hollow these rationales, however, evincing interests rooted more firmly in preserving racial hierarchies and racial exclusion than addressing concerns about upholding state autonomy or securing the homeland from genuine threats. These racialized motives have reinforced unfounded presumptions of migrant lawlessness, conflated migrant labor with aggression against the state, and undermined the integrity of mutually recognized state autonomy. In practice, they have engendered militarized approaches to immigration enforcement and violent policing of migrants resulting in preventable loss of life.

A. Perpetuating the Crime Reduction Narrative

In 2006, Juliet Stumpf named the ongoing convergence of criminal and immigration law the “crimmigration crisis.”¹⁶⁹ Since that time, scholars have written extensively about the deleterious effects of the merger of these areas of law, policy, and enforcement. The specter of the “criminal alien” has played significant part in rationalizing intensified migration control and increased violence against migrants.¹⁷⁰ The criminal justice system has increasingly targeted noncitizens for prosecution, primarily for immigration-related offenses, and the immigration system has expanded the types of offenses that trigger deportation, exacerbating the perceptions of lawlessness among noncitizens.¹⁷¹ In the late twentieth century, as César García Hernández explains, “policymakers turned to criminal law and procedure to do what race had done in earlier generations: sort the desirable newcomers from the undesirable.”¹⁷² Despite the aggressive criminalization of immigrant communities, studies

¹⁶⁸ U.S. *Immigration and Customs Enforcement Strategic Plan 2021–2025*, ICE (Aug. 2020), <https://www.ice.gov/doclib/about/pdf/iceStratPlan2021-2025.pdf> [<https://perma.cc/YST5-PCE5>].

¹⁶⁹ Stumpf, *supra* note 8.

¹⁷⁰ JEREMY SLACK, *DEPORTED TO DEATH: HOW DRUG VIOLENCE IS CHANGING MIGRATION ON THE US-MEXICO BORDER*, 6 (2019).

¹⁷¹ César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457 (Nov. 2013).

¹⁷² *Id.* at 1459.

consistently contradict the persistent and pervasive myth of immigrant criminality.¹⁷³ Simply put, immigrants do not raise crime rates.

Rather than combat high crime rates among migrants, the convergence of criminal and immigration enforcement serves as a racialized form of social control. Particularly since the 1980s, immigration policy has reified racialized notions of immigrant criminality through criminal and immigration enforcement. By conflating migrants with criminality, immigration enforcement may be used to exclude, detain, remove, and even end the lives of noncitizens of color. The “criminal alien,” as crimmigration scholar Yolanda Vázquez argues, has been racialized as Latinx.¹⁷⁴ More than 96% of deportations impact people from Mexico, El Salvador, Guatemala, and Honduras.¹⁷⁵ Of deportations triggered by criminal convictions, 94% are Latinx noncitizens.¹⁷⁶ As Vázquez contends, laws and policies contribute to the organization of society.¹⁷⁷ When Latinx noncitizens are primarily targeted for crimes, this reality contributes to racial inequality and their racial subordination.¹⁷⁸

Latinx immigrants also find themselves overrepresented, albeit to a lesser degree, among those who lose their lives in detention. Immigrants from Latin America constitute approximately 50% of the foreign-born population in the United States.¹⁷⁹ Of the 172 people who died in detention between 2003 and 2017, 75% were from Latin America.¹⁸⁰ Most were from Mexico (35), Cuba (32), or the Northern Triangle countries of Guatemala (17), Honduras (12) and El Salvador (12). The immigration detention system primarily imprisons those targeted by the criminal justice system. According to death

¹⁷³ Michael T. Light, Jingying He & Jason P. Robey, *Comparing Crime Rates between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, 171(51), 32340 (2020).

¹⁷⁴ Vázquez, *supra* note 6, at 142.

¹⁷⁵ *Id.* at 143.

¹⁷⁶ *Id.* at 145.

¹⁷⁷ *Id.* at 148.

¹⁷⁸ Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 606–07 (2015).

¹⁷⁹ Abby Budiman, Christine Tamir, Lauren Mora, and Luis Noe-Bustamante, *Facts on U.S. Immigrants, 2018*, PEW RESEARCH CENTER (Aug. 20, 2020), <https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants/> [<https://perma.cc/KCN7-DCB4>].

¹⁸⁰ Chart listing deaths in ICE Custody (Oct. 1, 2003 – June 5, 2017), <https://www.ice.gov/doclib/foia/reports/detaineedeaths-2003-2017.pdf> [<https://perma.cc/748M-Q2ZL>].

statistics in detention, those who succumb to premature death in the immigration detention system reflect the racialization of the “criminal alien” as Latinx.

Legal scholar Karla McKanders further argues that the intersection of criminal and immigration law contributes to structural and anti-Black racism.¹⁸¹ Black immigrants constitute 7.2% of the immigrant population generally.¹⁸² Yet they represent 10.6% of those in deportation proceedings and 20.3% of those deported on criminal grounds.¹⁸³ In 2013, “more than 75% of Black immigrants were removed from the United States on criminal grounds, compared to less than 50% of immigrants overall.”¹⁸⁴ In her analysis of the violence of deportation, Angélica Cházaro recognizes the reality that “[c]ontending with safety, particularly when discussing safety through deportation of criminals, means contending with the idea that in the United States criminality has historically been defined through proximity to Blackness.”¹⁸⁵ Indeed, the consequences of imputed criminality most directly impact noncitizens racialized as Black.

Deaths in detention reflect the reality of anti-Blackness perpetuated by the crimmigration system in detention, deportation, and criminal deportation. While racial identification does not constitute part of the extant data related to deaths in detention, a disproportionate number were from countries with populations racialized as Black.¹⁸⁶ Of those who died in detention, 7% were nationals of African countries.¹⁸⁷ Another 6% were from Haiti, Jamaica, Antigua, and Barbados.¹⁸⁸ Yet another 20% were from Cuba and the Dominican Republic, countries with significant Black populations.¹⁸⁹ While precise data on the racial makeup of those who died in detention cannot be confirmed, it stands to reason that the disproportionate impact of other facets of the immigration system on Black im-

¹⁸¹ McKanders, *supra* note 6, at 1139.

¹⁸² *Id.* at 1145.

¹⁸³ *Id.* at 1145, 1161.

¹⁸⁴ *Id.* at 1161.

¹⁸⁵ Cházaro, *supra* note 6, at 1090.

¹⁸⁶ Chart listing deaths in ICE Custody (Oct. 1, 2003 – June 5, 2017), <https://www.ice.gov/doclib/fota/reports/detaineedeaths-2003-2017.pdf> [<https://perma.cc/748M-Q2ZL>].

¹⁸⁷ *Id.* Deaths in detention included nationals of Mozambique, Gabon, Angola, Liberia, Ethiopia, Ghana, Guinea, Algeria, Cameroon, and Nigeria.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

migrants also exists in the number of lives lost in detention. Even a conservative estimate would reflect that among deaths in detention, Black immigrants are represented at least twice their 7.2% representation within the immigrant community generally.¹⁹⁰ Rather than control crime, immigration detention reinforces punitive anti-Blackness and prematurely ends Black lives.

B. Conflating National Security Concerns

For most of the nineteenth century, the United States empowered states to regulate migration through police power and state sovereignty while rooting the federal government's involvement in migration control in the Commerce Clause.¹⁹¹ In 1889, the Supreme Court divorced migration control from the Commerce Clause, and the Constitution altogether, establishing the federal government's plenary power to regulate immigration.¹⁹² From the outset, the Court tethered the plenary power doctrine to national security concerns.¹⁹³ In *Chae Chan Ping v. United States*, the Court referenced the California constitutional convention's assertions of an "Oriental invasion" constituting a "menace to our civilization" in justifying the

¹⁹⁰ Jultana Morgan-Trostle, Kexin Zheng & Carl Lipscombe, *The State of Black Immigrants*, BLACK ALL. FOR JUST IMMIGR. & N.Y.U. SCH. OF L. IMMIGR. RIGHTS CLINIC (2016).

¹⁹¹ See *New York v. Miln*, 36 U.S. 102, 102 (1837) (holding that migration regulation represents an exercise of state police power); see also *Passenger Cases*, 48 U.S. 283, 572 (1849) (holding that the power to regulate migration using head taxes belongs to the federal government under the Commerce Clause); *Henderson v. Mayor of City of New York*, 92 U.S. 259, 272–73 (1875) (holding that the power to regulate migration is rooted in the federal government's Commerce Clause power).

¹⁹² *Chae Chan Ping v. United States*, 130 U.S. 581, 592–93 (1889) (holding that the power to regulate migration by statutorily forbidding immigrants to re-enter the country is inherent in the United States' sovereign authority, even when doing so conflicts with international treaties); see also *Fong Yue Ting*, 149 U.S. 698, 715 (holding that the power to regulate migration by excluding or expelling immigrants as it sees fit is an inherent right of all sovereign nations); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (holding that every sovereign nation has the power to regulate migration by restricting who can enter its borders and detaining immigrants upon arrival).

¹⁹³ See Matthew Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 4 (2010) (tracing the origins of federal immigration enforcement, critiquing the "constitutional exceptionalism" of the plenary power doctrine, and arguing for the denaturalization of the national security rationale for federal immigration power).

federal government's exclusive control over immigration.¹⁹⁴ In its decision, the Court further stated,

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.¹⁹⁵

Granting the federal government broad power to regulate migration, the Court situates dangerousness as a standard for migration control that may be presumed absent any objective aggression or hostility. Instead, subjective concerns based in immeasurable standards of assimilation undergird the power to exclude. Impacting intending immigrants, the power to exclude involves prospective assessments regarding the potential assimilability of particular races. In subsequent decisions, the Court affirmed Congress' power to exclude, citing the nation's inherent sovereignty under international law as well as its interest in "self-preservation,"¹⁹⁶ and it extended this power beyond exclusion to the deportation of noncitizens.¹⁹⁷

Central to these notions of security and self-preservation were preoccupations with race and "pauper labor." As examined by legal scholar Alina Das, the establishment of the plenary power and the immigration laws that developed on their foundation were motivated in significant part by racial animus.¹⁹⁸ As migration control shifted to the federal government, "[the quality of the citizenry] would be defined in opposition to and defended against the forces of invasion: the uncivilized, racially inferior, citizenship-decaying material of unfit immigrant laborers."¹⁹⁹ This shift to conceptualizing immigration as an invasion resulted in conflating labor provided by the working poor with foreign aggression, reimagining migrants of color as a danger to the nation.²⁰⁰ Thus, national security justifications

¹⁹⁴ Chae Chan Ping, 130 U.S. at 595, 595–96 (citing the 1878 convention framing the constitution of California).

¹⁹⁵ *Id.* at 606.

¹⁹⁶ Nishimura Ektu, 142 U.S. at 659.

¹⁹⁷ Fong Yue Ting, 149 U.S. at 705-07.

¹⁹⁸ Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 177 (2018).

¹⁹⁹ Lindsay, *supra* note 193 at 39–40.

²⁰⁰ *Id.*

rooted in racial concerns constituted a central and early rationale for regulating immigration.²⁰¹

Since the nineteenth century, national security has remained central to reasoning concerning immigration enforcement.²⁰² In recent examples of this reasoning, the Supreme Court cited national security concerns in *Hernandez v. Mesa*²⁰³ and *Egbert v. Boule*.²⁰⁴ In *Egbert*, Justice Sotomayor vigorously critiques the national security rationales provided in both cases. Addressing the *Hernandez* decision, dealing with a cross-border shooting, Justice Sotomayor critiques the Court's reticence, rooted in national security concerns, toward "regulating the conduct of [Border Patrol] agents."²⁰⁵ Bluntly, she characterizes the Court's national security concerns as "sheer hyperbole."²⁰⁶ Furthermore, in response to the majority's opinion in *Egbert*, Justice Sotomayor again critiques the use of national security to justify the Court's denial of a *Bivens* claim for CBP's excessive force against a U.S. citizen, stating that the Court's ruling "stretches national-security concerns beyond recognition" and its "effort to raise the specter of national security is mere sleight of hand"²⁰⁷ Justice Sotomayor's critiques allude to concerns about rendering national security hollow as a basis for migration control.

Beyond the Supreme Court, the framing of migrants as aggressors and migration as invasion has continued to pervade the American imagination. As of August 2022, a majority of

²⁰¹ *Id.*

²⁰² U.S. ex rel. Barbour v. Dist. Dir. of Immigr. & Naturalization Serv., San Antonio, Tex., 491 F.2d 573, 578 (5th Cir. 1974) (upholding denial of a writ of habeas corpus to an immigrant who was refused bail while awaiting a final decision in his deportation proceedings because classified evidence suggested that he was a "threat to national security"); *Ziglar v. Abbast*, 137 S. Ct. 1843, 1869 (2017) (declining to extend *Bivens* to detention policy claims seeking monetary relief in the wake of 9/11 because doing so would "require an inquiry into national-security issues" whose resolutions are best left to the judgment of Congress); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (upholding President Trump's "Muslim ban" on the basis that the Executive branch provided significant national security justifications for limiting immigration from certain countries; accordingly, the ban passed constitutional muster under the rational basis standard of review).

²⁰³ 140 S. Ct. 735, 747 (finding that "regulating the conduct of agents at the border unquestionably has national security implications").

²⁰⁴ 142 S. Ct. 1793, 1804–05 (2022) ("Because 'matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention,' . . . we reaffirm that a *Bivens* cause of action may not lie where, as here, national security is at issue.").

²⁰⁵ *Hernandez v. Mesa*, 140 S. Ct. at 747 (2020).

²⁰⁶ *Egbert v. Boule*, 142 S. Ct. at 1820 (2022).

²⁰⁷ *Id.* at 1811.

Americans believe the United States is “experiencing an invasion” at its southern border.²⁰⁸ Americans reach this conclusion as support declines for immigrants and unfounded claims persist about immigrants’ relationship to criminality, drug smuggling, and public benefits.²⁰⁹ Even those fleeing persecution as asylum seekers and those who undergo extensive vetting as refugees do not escape the scrutiny of people concerned with national security.²¹⁰ As immigration scholar Jeremy Slack notes, however, “To those who cite security concerns, regarding refugees and immigrants, there is little to no evidence of dangerous individuals infiltrating Western countries through the long, arduous, expensive, and nearly impenetrable asylum system.”²¹¹

The legal and public constructions of migrants as aggressors have engendered a militarized approach to immigration enforcement that contributes to preventable migrant mortality. In recent decades, the federal government has significantly militarized the U.S.-Mexico border.²¹² In addition, as legal scholar Jaya Ramji-Nogales notes, “Military culture has already suffused the immigration enforcement branches,” such as CBP and ICE, and “many former military personnel now work as immigration judges in the Executive Office for Immigration Review (“EOIR”).”²¹³ Notably, immigration judges with military backgrounds have the lowest grant rates for immigration relief.²¹⁴ With higher denial rates for relief, these judges presumably order the removal of more noncitizens to places where they face harm or death. The militarization permeating the immigration enforcement and court systems contribute to the factors causing migrant death.

As a result of the militarization of the immigration enforcement system, migrants who encounter this system may now

²⁰⁸ Joel Rose, *A Majority of Americans See an ‘Invasion’ at the Southern Border*, NPR Poll Finds, NPR (Aug. 18, 2022), <https://www.npr.org/2022/08/18/1117953720/a-majority-of-americans-see-an-invasion-at-the-southern-border-npr-poll-finds> [<https://perma.cc/GAN5-DTZR>].

²⁰⁹ *Id.*

²¹⁰ Slack, *supra* note 150, at 113.

²¹¹ *Id.*

²¹² Yessenia Renee Medrano-Vossler, *Sniff and Search Border Militarization*, 14 SEATTLE J. FOR SOC. JUST. 915, 919 (2016).

²¹³ Jaya Ramji-Nogales, *The War on Immigrants: Changing Military Culture*, 32 TEMPLE INT’L & COMP. L.J. 87, 92 (2018) (arguing against further militarization of the immigration regime and noting that judges with military backgrounds had the lowest grant rates for immigration relief in their courtrooms).

²¹⁴ *Id.*

face levels of lethality akin to war. If it is accurate that CBP undercounts deaths by half, as the aforementioned report by the Government Accountability Office suggests,²¹⁵ then it is possible that more than 1,700 migrants died on the U.S.-Mexico border in 2022.²¹⁶ Adding fatal encounters with immigration enforcement agents, deaths in ICE detention, and deaths by deportation, this figure may be considerably higher.²¹⁷ For comparison, according to the United Nations, the number of civilian casualties in Afghanistan, a nation experiencing a protracted war, averaged 1,472 yearly between 2009 and 2021.²¹⁸ The analogy to war is bolstered by enforcement realities such as the use of military style weapons by CBP and ICE and the use of tear gas at the border.²¹⁹

The conflation of migrant labor with foreign aggression and the consequent national security justifications for militarized enforcement have led to preventable deaths of individuals posing no risk to the nation, including those simply fleeing persecution, poverty, or political instability.²²⁰ According to federal regulations, national security refers to “those activities which are directly concerned with the foreign relations of the United States, or protection of the Nation from internal subversion,

²¹⁵ See Anderson, *supra* note 60.

²¹⁶ Camilo Montoya-Galvez, *At Least 853 Migrants Died Crossing the U.S.-Mexico Border in the Past 12 Months – a Record High*, CBS (Oct. 28, 2022), <https://www.cbsnews.com/news/migrant-deaths-crossing-us-mexico-border-2022-record-high/> [<https://perma.cc/JTH9-Z9SU>] (reporting FY 2022 as the deadliest year for migrants, according to Border Patrol data, recorded by the U.S. government).

²¹⁷ If these deaths were further added to the more than 1,000 police shooting deaths and thousands of prison deaths in FY 2022, the aggregate number of fatalities caused by enforcement would eclipse many war-torn regions. *Police Shootings Database 2015-2023*, WASH. POST (last accessed Jan. 29, 2023), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/MZF7-SYAM>].

²¹⁸ *Civilian Casualties Set to Hit Unprecedented Highs in 2021 Unless Urgent Action to Stem Violence - UN Report*, UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN (July 26, 2021), <https://unama.unmissions.org/civilian-casualties-set-hit-unprecedented-highs-2021-unless-urgent-action-stem-violence-%E2%80%93-report> [<https://perma.cc/LS8Z-KNEZ>].

²¹⁹ Megan Specia and Rick Gladstone, *Border Agents Shot Tear Gas into Mexico. Was It Legal*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/world/americas/tear-gas-border.html> [<https://perma.cc/E7G9-BCLE>].

²²⁰ See e.g., John Burnett, *Why People Are Fleeing Honduras for the U.S.: ‘All That’s Left Here Is Misery,’* NPR (May 10, 2021), <https://www.npr.org/2021/05/10/994065661/why-people-are-fleeing-honduras-for-the-u-s-all-thats-left-here-is-misery> [<https://perma.cc/7XHQ-NSHW>] (detailing self-reports citing poverty, food insecurity, threats of gang violence, climate disasters, and political corruption as driving forces for Hondurans to migrate to the United States).

foreign aggression, or terrorism.”²²¹ Therefore, national security justifications for lethal immigration enforcement raise the specter of migrants participating in potential terrorist acts, forced invasion, or economic calamity. These national security rationales belie the reality of who is dying within the immigration enforcement system.

Of the over 265 known fatal encounters with Border Patrol since 2010, there were no reports of suspected terrorism, organized invasion, or intended economic harm.²²² Of the known individuals that may have posed some risk to individual Border Patrol agents, twelve allegedly shot at agents, and eight others purportedly possessed weapons when they were killed.²²³ Ten were alleged rock throwers, though it is unclear in some cases whether the person killed actually threw rocks themselves.²²⁴ Even in cases where the safety of individual agents is implicated, there are no reported instances of broader threats to national security or the citizenry beyond the agents themselves.²²⁵ There is not a case reported in which Border Patrol claims it used lethal force because agents believed the individual intended to commit terrorist acts, undermine national interests, subvert relations with other nations, or disrupt the nation’s economic stability. Instead, these fatal encounters have largely impacted Latin American migrants fleeing circumstances beyond their control.

Foundational Supreme Court doctrine regarding immigration enforcement conflated migration with invasion and workers with aggression. A plenary power rooted in concerns regarding national security empowers the federal government with enforcement powers to exclude and expel migrant workers. Examining individual cases of migrant mortality confirms that the federal government continues to conflate migrant workers with aggression, demonstrating that individual cases

²²¹ 5 C.F.R. § 1400.102(a)(3) – Definitions and applicability. *See also* Eric C. Chaffee, *Emerging National Security Issues*, 52 U. Tol. L. Rev. 517 (Winter 2021) (“National security can be defined as the maintenance and safekeeping of the defense, economic, and foreign relations interests of a nation.”).

²²² *Fatal Encounters with CBP Since 2010*, SBCC (Aug. 11, 2022), https://www.southernborder.org/deaths_by_border_patrol [<https://perma.cc/P5A5-VMVN>].

²²³ *Id.*

²²⁴ *Id.* Cases involving vehicles have not been included here since Border Patrol agents have been reported to step in front of vehicles intentionally. Border Patrol agents alleged that those killed drove their cars at agents in three of the cases reported.

²²⁵ *Id.* In many of the lethal encounters with Border Patrol agents, migrants attempted to flee from rather than cause harm to the agents. For instance, both Jose Luis Arambula and Carmelo Cruz-Marcos were fatally shot for attempting to flee arrest by Border Patrol agents.

of lethal force fail to implicate true national security concerns. These lethal enforcement actions reify notions of the dangerousness of Latin American migrants, casting them as a threat to the security of the nation. As a result, the increasing deaths within the immigration system hollow national security justifications for immigration enforcement, detract attention from true threats to the nation's safety, and further conflate Latinx people with aggression and criminality.

C. Enforcing Nonreciprocal Sovereignty

Sovereignty provides the legal foundation on which all immigration enforcement actions rest. In the foundational cases discussed in the previous section, the Supreme Court established sovereignty as the basis of the exclusion,²²⁶ expulsion,²²⁷ and detention²²⁸ of noncitizens. Since the late nineteenth century, sovereignty has remained the bedrock on which modern immigration cases continue to render decisions regarding federal powers to regulate migration.²²⁹ This right to self-governance

²²⁶ *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.”).

²²⁷ *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (“The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the state, are too clearly within the essential attributes of sovereignty to be seriously contested.”).

²²⁸ *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”).

²²⁹ *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (stating while the Court held that indefinite detention of migrants violates the Due Process Clause of the Fifth Amendment, the Court “nowhere [denied] the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions” pursuant to its “plenary power”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952) (maintaining that in holding that the United States may deport lawful permanent residents because of their membership in the Communist Party, the Court said: “That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it”); *Arizona v. United States*, 567 U.S. 387, 394-95 (2012) (stating that in holding that Arizona state laws purporting to regulate immigration were preempted by federal law, the Court emphasized that “the Government of the United States has broad, undoubted power over the subject of immigration

informs the scope of immigration enforcement, including migration control, yet it has failed to compel reciprocity with other nations or impede U.S. intervention abroad.²³⁰ Instead, the double standard of taking migrant lives in the name of self-governance while routinely piercing the sovereignty of fellow nations results in nonreciprocal sovereignty²³¹ and reinforces the racial subordination of nations in the global south.

Legal scholar Angélica Cházaro argues that sovereignty as the basis for deportation is arbitrary and should be challenged.²³² She provides three key examples contesting sovereignty as the tenuous justification for the violence that is deportation: settler colonialism and Indigenous people's struggle for self-determination, the interconnectedness between imperialist nations and those who migrate, and the lack of definable borders as a result of the United States' global interventionism.²³³ As Cházaro suggests, "the United States's repeated and well-documented violations of the sovereignty of other nations can be wielded to dismantle the notion that U.S. sovereignty should remain sacrosanct in its expression in the practice of deportation."²³⁴ Migrant mortality caused by immigration enforcement provides poignant examples of the imperialism and interventionism that undermine U.S. claims to sovereignty as the foundation to current enforcement tactics.

It is well beyond the scope of this Article to catalogue comprehensively U.S. imperialism in global south nations. Scholars and journalists have documented extensively the numerous instances of U.S. intervention abroad.²³⁵ In fact, few countries

and the status of aliens" and that "[t]his authority rests, in part, on . . . its inherent power as sovereign to control and conduct relations with foreign nations").

²³⁰ Cházaro, *supra* note 6, at 1102.

²³¹ Jean-Paul Sartre discussed "nonreciprocal sovereignty" in the philosophical context of authority and institutions. See Thomas R. Flynn, *L'Imagination Au Pouvoir: The Evolution of Sartre's Political and Social Thought*, Political Theory, Vol. 7, No. 2, 157–180 (May 1979). For the purposes of this Article, nonreciprocal sovereignty refers to self-governance as the justification for the violent exclusion and removal of migrants while the foreign intervention of imperialist states routinely violates the sovereignty of global south countries, thereby exacerbating conditions leading to emigration from those nations.

²³² Cházaro, *supra* note 6, at 1096–1113.

²³³ *Id.*

²³⁴ *Id.* at 1102.

²³⁵ See, e.g., NOAM CHOMSKY, *TURNING THE TIDE: U.S. INTERVENTION IN CENTRAL AMERICA AND THE STRUGGLE FOR PEACE* (2015); ALAN MCPHERSON, *A SHORT HISTORY OF U.S. INTERVENTIONS IN LATIN AMERICA AND THE CARIBBEAN* (2016); LARS SCHOULTZ, *BENEATH THE UNITED STATES: A HISTORY OF U.S. POLICY TOWARD LATIN AMERICA* (1998); Anatoly Kurmanaev and Jody García, *The U.S. Vowed to Defend Central American Democracy*,

remain untouched by the effects of U.S. interference. In the name of sovereignty, however, the immigration enforcement system attempts to impede migration and routinely takes migrant lives. This double standard represents a form of American exceptionalism that undermines the very principles of sovereignty on which immigration enforcement relies. In particular, death in the immigration system surfaces the reality of racial subordination in foreign relations. Domination in the form of imperialism is rooted in notions of racial dominance. As racialized aggression against global south nations force displacement, racialized violence in the form of immigration enforcement attempts to curtail the consequent migration to the very nations destabilizing migrants' home countries.

Examining the loss of life in the immigration system demonstrates the "imperial interconnection" and "slippery borders" Cházaro describes.²³⁶ The lethal violence of the immigration enforcement system primarily impacts nationals of countries whose political and economic stability U.S. intervention has undermined. For instance, reported deaths in encounters with Border Patrol largely impact nationals of Mexico, Guatemala, and Honduras, countries profoundly impacted by coercive neocolonial tactics,²³⁷ detrimental economic policies such as NAFTA and CAFTA-DR,²³⁸ and U.S.-backed dictatorships and human rights abuses.²³⁹ In Central America, for example, the

Autocrats Had Other Plans, N.Y. TIMES (Sept. 17, 2022), <https://www.nytimes.com/2022/09/17/world/americas/central-america-democracy-biden.html> [<https://perma.cc/N2G4-MG2T>]; Mark Tseng-Putterman, *A Century of U.S. Intervention Created the Immigration Crisis*, MEDIUM (June 20, 2018), <https://medium.com/s/story/timeline-us-intervention-central-america-a9bea9ebc148> [<https://perma.cc/Q42X-CTCF>]; Micah Zenko, *When the U.S. Doesn't Respect Other Countries' Sovereignty*, THE ATLANTIC (May 13, 2012), <https://www.theatlantic.com/international/archive/2012/05/when-the-us-doesnt-respect-other-countries-sovereignty/257889/> [<https://perma.cc/3KF2-TCLU>].

²³⁶ Cházaro, *supra* note 6, at 1102–12.

²³⁷ See, e.g., Scott Horsley, *Trump Threatens Aid Cuts to Central American Countries in Response to Migrant Caravan*, NPR (Oct. 22, 2018), <https://www.npr.org/2018/10/22/659611134/trump-threatens-aid-cuts-to-central-american-countries-in-response-to-migrant-ca> [<https://perma.cc/FB34-TSRP>].

²³⁸ Mark Weisbrot, Lara Merling, Vitor Mello, Stephan Lefebvre & Joseph Sammut, *Did NAFTA Help Mexico? An Update After 23 Years*, 11 MEX. L. REV. 159 (2018) ("While some of the policy changes were undoubtedly necessary and/or positive, the end result has been decades of economic failure by almost any economic or social indicator. This is true whether we compare Mexico to its developmentalist past, or even if the comparison is to the rest of Latin America since NAFTA.").

²³⁹ AVIVA CHOMSKY, *CENTRAL AMERICA'S FORGOTTEN HISTORY: REVOLUTION, VIOLENCE, AND THE ROOTS OF MIGRATION* (2021); JUAN GONZALEZ, *HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA* (2011).

U.S. government installed and supported right-wing dictatorships that waged civil wars on its citizens and committed genocide against its indigenous people.²⁴⁰ The region continues to grapple with the devastating ripple effects of these civil wars. In addition, of the 172 people who lost their lives in ICE detention between 2003 and 2017, 95% hailed from global south countries managing the consequences of colonialism and imperialism.²⁴¹ Three in four were from Latin American countries that have been destabilized by U.S. interventionism.²⁴² Nearly half of the people who died in detention were also from Mexico or Central America.²⁴³

Cubans represent a particularly perplexing example among deaths in detention. From 2003 to 2017, 32 Cubans (19% of the 172 deaths) died in detention.²⁴⁴ This figure is puzzling because Cubans represent only 3% of the immigrant population,²⁴⁵ and the actual removal of Cubans from the United States has been relatively rare.²⁴⁶ Cuba has also been one of the Latin American countries most profoundly impacted by U.S. imperialist policies. The United States government began its empire building in Cuba and has undermined the island nation's sovereignty for more than a century, treating the island as a colony until its revolution in 1959.²⁴⁷ Since that time, the island has experienced neocolonialism in the form of an economic embargo, causing the collapse and continued depression of the Cuban economy.²⁴⁸ For Cubans, like emigrants of many other countries, poverty remains one of the primary motivators for

²⁴⁰ *Id.*

²⁴¹ Chart listing deaths in ICE Custody (Oct. 1, 2003 – June 5, 2017), <https://www.ice.gov/doclib/foia/reports/detaineedeaths-2003-2017.pdf>.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Brittany Blizzard & Jeanne Batalova, *Cuban Immigrants in the United States*, MIGRATION POLICY INST. (June 11, 2020), <https://www.migrationpolicy.org/article/cuban-immigrants-united-states-2018> [<https://perma.cc/M74V-SQMT>].

²⁴⁶ Lindsay Daniels, *The End of Special Treatment for Cubans in the U.S. Immigration System: Consequences and Solutions for Cubans with Final Orders of Removal*, 122 DICK. L. REV. 707 (2018).

²⁴⁷ Schoultz, *supra* note 235 (arguing that formalized U.S. hegemony in Cuba through the Platt Amendment was an important part of establishing the American empire).

²⁴⁸ Joseph Bradica, *Havana Club Rum: One Step Back from U.S. International Trademark Policy*, 16 TEMP. INT'L & COMP. L.J. 147 (2002) ("The economic sanctions imposed on Cuba brought about the total collapse of the Cuban economy.").

migration.²⁴⁹ While Cubans possess relative privilege within the immigration legal system,²⁵⁰ they are also disproportionately impacted by lethal detention practices when they run afoul of those laws. Cubans fleeing the conditions exacerbated by acute U.S. indifference to their nation's sovereignty also face disproportionate death in immigration detention.

In the Caribbean, nonreciprocal sovereignty particularly impacts the lives of migrants racialized as Black. In particular, Haitians lose their lives more than other migrants in the region.²⁵¹ Based in state autonomy, the United States limits paths to authorized immigration, including for nationals of neighboring Caribbean nations it has deeply impacted through intervention. As a result, many Caribbeans pushed into migration attempt perilous journeys across the ocean. Of the 1,287 migrants who have gone missing in the Caribbean since 2014, Haitians represent the highest number of the dead or disappeared (380), followed by Cubans (305) and Dominicans (244).²⁵² Causing or exacerbating many of the conditions forcing Haitians into migration, the U.S. government has undermined Haiti's sovereignty repeatedly. After failing to recognize Haiti's independence from France for more than half a century, the U.S. government invaded and occupied Haiti from 1915-1934.²⁵³ In 1991 and 2004, U.S. forces removed democratically elected president Jean-Bertrand Aristide from Haiti after coups against him.²⁵⁴ Haitian experts, including Aristide, contend the United States orchestrated his forced removal.²⁵⁵ These

²⁴⁹ Daniels, *supra* note 246. See also Christine Armario, *Last Year, Cubans Took to the Streets. Now They're Fleeing the Island*, WASH. POST (July 11, 2022), <https://www.washingtonpost.com/world/2022/07/11/cuba-migrants-protesters-patria-vida/> [https://perma.cc/46UZ-8AA4].

²⁵⁰ See Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

²⁵¹ Ana Claudia Chacin & Syra Ortiz Blanes, *More Than 300 Migrants Disappeared or Died in the Caribbean in 2022 - And That's An Undercount*, MIAMI HERALD (Jan. 29, 2023), <https://www.miamiherald.com/news/local/immigration/article271592467.html> [https://perma.cc/QJ87-2B2Z].

²⁵² *Id.*

²⁵³ Edwidge Danticat, *The Long Legacy of Occupation in Haiti*, THE NEW YORKER (July 28, 2015), <https://www.newyorker.com/news/news-desk/haiti-us-occupation-hundred-year-anniversary> [https://perma.cc/VD6E-2AEP].

²⁵⁴ *Intervention in Haiti, 1994-1995*, DEPT. OF STATE OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/Haiti> [https://perma.cc/7U6Q-3K26]; Lydia Polgreen & Tim Weiner, *Haiti's President Forced Out; Marines Sent to Keep Order*, N.Y. TIMES (Feb. 29, 2004), <https://www.nytimes.com/2004/02/29/international/americas/haitis-president-forced-out-marines-sent-to-keep.html> [https://perma.cc/Y6XD-QLWS].

²⁵⁵ Jeffrey D. Sachs, *From His First Day in Office, Bush Was Ousting Aristide*, L.A. TIMES (Mar. 4, 2004), <https://www.latimes.com/archives/la-xpm-2004-mar-04-oe-sachs4-story.html> [https://perma.cc/RLY6-VBLH].

interventions have undermined the nation's economic and political stability, critical factors that force people into migration.

Migrant mortality resulting from lethal immigration enforcement represents an extension of the racialized violence against nations destabilized by imperialist policies. U.S. imperialist action in Latin America has been significantly motivated and justified by notions of racial hierarchy and inferiority.²⁵⁶ Using lethal force, the federal government attempts to repel the people it deems racially inferior and subjects to its military and economic interference. People forced into migration are often those most deeply impacted by the destabilization of interventionist actions, those who are subjugated due to their race, class, and gender.²⁵⁷ Fleeing circumstances well beyond their control, these individuals encounter violence when they migrate to the very power that has attempted to convince them of its superiority and dominance. The result is the subjugation of migrants of color both within their home countries and within the immigration enforcement system when they reach the United States.

III

LEGALIZING LETHALITY: WRONGFUL DEATH ACTIONS AND RACIAL SUBORDINATION

While the Homeland Security State increasingly causes migrant mortality, Supreme Court doctrine has virtually foreclosed judicial remedies against CBP and ICE officials for constitutional violations, opening the door to increased racialized violence and death in the immigration enforcement system. In *Egbert v. Boule*, the Supreme Court removed redress for federal agents' constitutional violations from the ambit of the courts, thereby insulating federal agents from causes of action. As the

²⁵⁶ See THOMAS O'BRIEN, MAKING THE AMERICAS: THE UNITED STATES AND LATIN AMERICA FROM THE AGE OF REVOLUTION TO THE ERA OF GLOBALIZATION (2007); McPherson, *supra* note 235.

²⁵⁷ See Shannon Speed, *States of Violence: Indigenous Women Migrants in the Era of Neoliberal Multicriminalism*, 0 CRITIQUE OF ANTHROPOLOGY 1, 6-7 (2016) (analyzing how United States interventionism has promoted the violent subjugation of indigenous women abroad based on both their race and gender, causing them to flee their home countries as refugees and asylum seekers); Julian Borger, *Fleeing a Hell the US Helped Create: Why Central Americans Journey North*, THE GUARDIAN (Dec. 19, 2018), <https://www.theguardian.com/us-news/2018/dec/19/central-america-migrants-us-foreign-policy> [<https://perma.cc/QBQ8-TP2U>] (assessing how the United States' destabilizing intervention in Central America has led to greater violence and poverty in the region, resulting in increased migration by its inhabitants to the United States).

state sanctions use of force against migrants to deter migration, immigration enforcement agents operate in the shadow of the law. The law now provides nominal deterrence to agents who use excessive force and end migrant lives. As Justice Sotomayor warns in *Egbert*, “The consequences of the Court’s drive-by, categorical assertion will be severe. Absent intervention by Congress, CBP agents are now absolutely immunized from liability in any *Bivens* actions for damages, no matter how egregious the misconduct or resultant injury.”²⁵⁸ Indeed, with the virtual abrogation of *Bivens*, there is little deterrent to the racialized violence that takes migrant life. An examination of *Bivens*’ progeny and wrongful death actions under these precedents evince the challenges migrants subject to excessive force will now face in the wake of *Egbert*.

A. *Egbert v. Boule* and the Narrowing Limits of Judicial Remedies

Legal avenues for redress related to wrongful deaths are narrow. While migrants may pursue civil actions under state-law tort claims, the Alien Tort Statute,²⁵⁹ the Federal Tort Claims Act (“FTCA”),²⁶⁰ and actions under *Bivens*,²⁶¹ the odds of prevailing under any of these forms of recourse have been limited.²⁶² For migrants’ families seeking justice for wrongful death, most have pursued remedies under the FTCA and *Bivens*, each with its considerable limitations. The FTCA, for instance, precludes plaintiffs from seeking injunctive relief or punitive damages from individual agents and requires exhaustion of administrative remedies.²⁶³ *Bivens* and its progeny, which permit actions against individual federal officers, limited actions to particular factual contexts.²⁶⁴ Regardless of the avenue pursued, no plaintiff pursuing civil redress for wrongful death against CBP has prevailed in federal court. Sovereign and qualified immunity have posed particular challenges to the success of these claims.²⁶⁵

²⁵⁸ *Egbert v. Boule*, 142 S. Ct. 1793 (2022) (Sotomayor, J., dissenting).

²⁵⁹ 28 U.S.C. § 1350.

²⁶⁰ 28 U.S.C. § 1346(b).

²⁶¹ 403 U.S. 388 (1971) (recognizing an implied remedy under the Constitution in certain areas where Congress did not expressly provide one).

²⁶² Altholz, *supra* note 87.

²⁶³ 28 U.S.C. § 1346(b).

²⁶⁴ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 388–98 (1971).

²⁶⁵ Altholz, *supra* note 87.

In *Bivens*, Federal Bureau of Narcotics agents entered Mr. Bivens's apartment, arresting him in front of his family and threatening to arrest them as well.²⁶⁶ Lacking probable cause or a warrant, the agents conducted a complete search of the apartment.²⁶⁷ Mr. Bivens challenged the search and arrest, alleging they constituted violations of his Fourth Amendment right against unreasonable searches and seizures. The Court found that the petitioner's complaint stated a cause of action under the Fourth Amendment, entitling him to money damages for injuries resulting from the constitutional violations.²⁶⁸ The Court, finding this right implied in the Constitution, thus forged a path to causes of action against individual federal officials for constitutional violations.

To be sure, *Bivens* held the greatest promise for chilling violent enforcement actions by individual CBP and ICE agents by holding federal agents accountable in their personal capacity. For decades, this seminal decision set the standard for claims related to constitutional violations, including excessive force, by individual federal officials.²⁶⁹ In the wake of the decision, the Supreme Court fleetingly expanded its reach. In 1979 and 1980, respectively, gender-based discrimination and prison medical neglect suits prevailed under *Bivens* at the highest court.²⁷⁰ Plaintiffs in lower courts also prevailed under *Bivens* in other contexts, such as cases dealing with prison conditions and Fourth Amendment violations.²⁷¹ In subsequent cases, however, the Court eroded the path to *Bivens* remedies, denying claims for a variety of alleged constitutional violations.²⁷²

²⁶⁶ 403 U.S. 388 (1971).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See Christian Patrick Woo, *The Final Blow to Bivens? An Analysis of Prior Supreme Court Precedent and the Ziglar v. Abassi Decision*, 43 OHIO N.U. L. REV. 511 (2017).

²⁷⁰ *E.g.*, *Davis v. Passman*, 442 U.S. 228 (1979) (finding that a case of gender-based discrimination in the employment context constituted a violation of the Fifth Amendment Equal Protection Clause); *Carlson v. Green*, 446 U.S. 14 (1980) (finding that medical neglect in prison constituted cruel and unusual punishment under the Eighth Amendment).

²⁷¹ See Alexander Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010).

²⁷² See *Bush v. Lucas*, 462 U.S. 367 (1983) (declining to recognize a *Bivens* claim when an employee was improperly disciplined for exercising First Amendment rights because Congress is better suited to determine whether there should be a remedy in this context); *Chappell v. Wallace*, 462 U.S. 296 (1983) (finding that it would be improper to provide men in the military with a *Bivens* remedy against their superiors because the military structure and Congress's activity

In more recent decisions, the Supreme Court continued to narrow *Bivens* actions. In particular, two cases signaled the Supreme Court's intent to curtail causes of action against federal agents in their personal capacity. In 2017, the Court in *Ziglar v. Abassi* circumscribed claims to contexts recognized in its established legal precedents.²⁷³ That is, if the factual basis of a claim extended beyond those previously recognized by the Court, plaintiffs were foreclosed from seeking remedies. In the same term, in *Hernandez v. Mesa*, the Court was asked to extend *Bivens* to the cross-border shooting death of 15-year-old Sergio Adrián Hernández Güereca.²⁷⁴ In *Hernandez*, the Supreme Court neglected to extend *Bivens*, citing a new context and national security concerns.²⁷⁵ With *Hernandez*, the Court insulated CBP agents from consequences for shooting foreign nationals in their homeland. In effect, the Supreme Court put remedies out of reach for those who were not on U.S. soil when they suffered wrongful death.

In 2022, the Supreme Court revisited constitutional violations for use of force in *Egbert v. Boule*, further limiting and virtually foreclosing causes of action against federal agents.²⁷⁶ In *Egbert*, a Border Patrol agent entered the property of Mr. Boule, the owner of a bed and breakfast at the U.S.-Canada Border who also served as an informant for CBP and ICE.²⁷⁷ After a tip from Mr. Boule, Agent Egbert entered the property

regarding the military are special factors that counsel hesitation); *United States v. Stanley*, 483 U.S. 669, 681 (1987) (holding that *Bivens* actions should be denied in the military context whenever the injury arises out of activity that is "incident to service" because Congress's authorization to make rules that govern the military, the disciplinary structure of the military, the military's internal justice system, and the possible disruption in the chain of command are all special factors that counsel hesitation); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (refusing to extend a *Bivens* remedy for due process violations that resulted in the improper denial of social security benefits); *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471 (1994) (concluding that *Bivens* actions cannot be brought against federal agencies, only federal agents); *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61 (2001) (precluding *Bivens* remedies against private entities acting under the color of federal law because there is not deterrent value). *But see Maria v. Garza*, No. 1:13-CV-108, 2015 WL 4394745 (S.D. Tex. Jul. 15, 2015) (extending a *Bivens* action in the specific context of a death caused by a violation of due process rights during deportation from the United States).

²⁷³ 137 S. Ct. 1843 (2017) (finding that detention policy claims arose in a new *Bivens* context, requiring a special factors analysis before allowing damages suit against federal executive officials to proceed).

²⁷⁴ 137 S. Ct. 2003 (2017).

²⁷⁵ *Id.*

²⁷⁶ 142 S. Ct. 1793 (2022).

²⁷⁷ *Id.*

without a warrant.²⁷⁸ When Mr. Boule asked CBP Agent Egbert to leave his property, Egbert physically attacked him, pushing him into a car and throwing him to the ground. When Mr. Boule reported the attack, Egbert allegedly retaliated by having Mr. Boule's business investigated by several agencies, including the Internal Revenue Service. Egbert's investigation at the bed and breakfast and the inquiries into Mr. Boule's business were all fruitless.

After the incident, Mr. Boule sued for Fourth Amendment excessive force violations and First Amendment violations for retaliation against him after filing a complaint against Egbert. Despite the federal agent's unprovoked attack, the Supreme Court reversed the Ninth Circuit Court of Appeals' decision and failed to recognize the cause of action, citing national security concerns, CBP's regulatory grievance procedure to address these wrongs, and Congress' power to determine causes of action for damages.²⁷⁹ While it did not overrule *Bivens*, as Justice Sotomayor states in the partial concurrence, *Egbert* "marks yet another erosion of *Bivens*' deterrent function in the law enforcement sphere."²⁸⁰ In pointing up this erosion, Justice Sotomayor's analysis stops short of naming the inevitable consequence of diminished deterrence: the potential for increased racialized violence that already pervades the law enforcement sphere.

B. Elusive Justice Pre-*Egbert*

1. *The Production of Impunity*

Indeed, the Supreme Court's decision in *Egbert* has all but foreclosed remedies against individual agents perpetuating racialized violence as part of the Homeland Security State. Mr. Boule himself, as Justice Sotomayor asserts, did not represent a threat to national security.²⁸¹ Instead, as a United States citizen assaulted by a CBP agent, he served as a proxy for future migrants subjected to violent encounters with immigration agents. The ramifications of the ruling are particularly stark when one considers the obstacles already faced in pursuing *Bivens* and FTCA claims pre-*Egbert*. An examination of wrongful death cases against CBP and ICE make evident that courts have already sanctioned violence against migrants of

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 1823 (Sotomayor, J., concurring in part).

²⁸¹ *Id.* at 1820.

color, particularly Latinx migrants. Such barriers to wrongful death remedies have ensured broad latitude for violent agents, and they have racialized threats to national security as Latinx. By systematically denying wrongful death suits involving migrants, courts have effectively produced impunity for immigration enforcement agents taking the lives of migrants of color.²⁸²

Between 2005 and 2017, the U.S. government provided more than \$60 million in settlements to individuals or families of individuals who issued complaints against CBP agents.²⁸³ These violations included wrongful death, assaults, injuries resulting from vehicle accidents, and wrongful detention. Among these complaints, twenty wrongful death claims were settled for over \$9 million as a result of CBP violence, including shootings, beatings, use of tasers, and vehicle collisions.²⁸⁴ More than \$650,000 was paid out in four cases in which people were shot by CBP agents but survived.²⁸⁵ A large portion of the settlements, nearly \$47 million, were paid as a result of reckless driving, some of which resulted in amputations and disability. Despite these payments, CBP settlements are relatively rare, even in cases of clear policy violations and significant injury.²⁸⁶

Beyond the extraordinary cases that reach settlements, remedies have been elusive in use of force and wrongful death suits in the immigration enforcement context. *Bivens* and its progeny set a challenging legal standard within which courts must consider cases, even prior to the Supreme Court's decision in *Egbert*. Rather than forge a standard tied to the severity of the constitutional violation or injury, the Court has largely limited claims to particular contexts that would warrant remedies, which it formalized in *Ziglar v. Abbasi*.²⁸⁷ The outcome of

²⁸² For an analysis of the production of state impunity in the context of South American human rights work, see Winifred Tate, *Counting the Dead: The Culture and Politics of Human Rights Activism in Colombia*, University of California Press at 215–255 (2007).

²⁸³ Sarah Macaraeg, *Border Patrol Violence: US Paid \$60m to Cover Claims Against Agency*, THE GUARDIAN (May 1, 2018), <https://www.theguardian.com/world/2018/may/01/border-patrol-violence-us-paid-60m-to-cover-claims-against-the-agency> [<https://perma.cc/T7W2-DV5N>]. When property and employment claims are included, the sum of settlements becomes \$177 million. The actual total is likely higher since the figures reported only include settlements that could not be paid through the agency's budget. The amount paid through CBP's annual budgets is unknown.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ 137 S. Ct. 1843, 1848 (2017) (“*Bivens* will not be extended to a new context if there are ‘special factors counselling hesitation in the absence of affirmative

such an approach has been that courts dismiss even egregious violations of constitutional rights. Given the limits of *Bivens*, exceedingly few excessive force cases involving CBP or ICE that have reached federal courts have been resolved in a plaintiff's favor.²⁸⁸ Even prior to *Egbert*, the path to judicial remedies has been narrow for victims of constitutional violations, including wrongful death, committed by federal immigration agents.

Courts of appeals and district courts have routinely denied the cases of decedents and survivors of violent enforcement actions. Qualified immunity has presented particular challenges to plaintiffs seeking relief for wrongful death. In *Mendez v. Poitevent*, for instance, the Fifth Circuit affirmed the district court's finding that the CBP agent was entitled to qualified immunity and acted reasonably when he shot a noncitizen running away from him after the two engaged in a physical altercation.²⁸⁹ The Ninth Circuit granted qualified immunity to a supervisor who hired a CBP agent with a significant record of constitutional violations.²⁹⁰ The agent shot a U.S. citizen several times who refused to provide her name and date of birth during a "knock and talk," then attempted to leave the encounter.²⁹¹ In *Estate of Martin v. United States*, a California district court found CBP agents were entitled to qualified immunity and granted summary judgment to the government on *Bivens* and FTCA claims in the death of Alex Martin.²⁹² After a car chase, CBP agents broke Martin's car window and tased him, causing a forceful explosion because he was inexplicably covered in gasoline.²⁹³

Border Patrol's "rocking policy" has also contributed to the culture of violence among its agents. Border Patrol has killed at least thirteen people, including Jesús Alfredo Yañez Reyes, and injured others as a result of the policy.²⁹⁴ As described in the California district court decision considering the wrongful death of Yañez Reyes, "Border Patrol agents along the nation's southern border deem the throwing of rocks at them by persons of Hispanic descent and presumed Mexican nationality to be per se lethal force to which agents can legitimately respond

action by Congress.").

²⁸⁸ Altholz, *supra* note 87.

²⁸⁹ 823 F.3d 326 (5th Cir. 2016).

²⁹⁰ *Estate of Alvarado v. Shavatt*, 673 F. App'x 777 (9th Cir. 2017).

²⁹¹ *Estate of Alvarado v. Tackett*, No. 13-CV-1202 W (JMA), 2015 WL 13239184 (S.D. Cal. Apr. 27, 2015).

²⁹² No. 13cv1386-LAB (BGS), 2015 WL 5568049 (S.D. Cal. Sept. 22, 2015).

²⁹³ *Id.*

²⁹⁴ *Perez v. United States*, 103 F.Supp.3d 1180, 1191 (2015).

with fatal gunfire.”²⁹⁵ Sanctioned by officials at the highest levels of the agency, the policy permits agents to use lethal force, regardless of whether there is imminent risk of death or serious injury to the agents or whether non-lethal means are available.²⁹⁶ After considerable discussion of the policy, the California district court denied relief to the decedent’s family, despite arguments that it was “impossible for Yañez (or any person) to throw rocks or wood at the agents with lethal force or accuracy.”²⁹⁷ The Ninth Circuit affirmed the decision.²⁹⁸

While claims against CBP have garnered more public attention, wrongful death actions have also concerned ICE. In *Newbrough v. Piedmont Regional Jail Authority*, the Virginia district court describes health conditions suffered by Mr. Newbrough that led to death in ICE custody, including skin lesions, staph infection, back pain, dizziness, elevated heart rate, fatigue, difficulty standing, and trouble walking.²⁹⁹ Despite these significant health conditions, Newbrough received “minimal medical attention” and was allegedly physically abused by correctional staff.³⁰⁰ The court found the family’s claim failed to meet its burden under *Bivens* and the FTCA.³⁰¹ In *Lopez v. United States*, the family of Nelson Ávila López challenged ICE’s death by deportation.³⁰² After being removed to Honduras, Mr. Ávila López was tortured and killed in a prison fire “under suspicious circumstances.”³⁰³ Although ICE failed to comply with a stay of removal, the California district court found the FTCA claim failed on extraterritorial jurisdiction grounds because the injury was suffered in a foreign country.³⁰⁴

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Quintero Perez v. United States*, 8 F.4th 1095 (9th Cir. 2021) (finding the *Bivens* claim arose in new context, FTCA relief was time barred, and the Alien Tort Statute did not reach the challenged conduct).

²⁹⁹ *Newbrough v. Piedmont Regional Jail Authority*, No. 3:10CV867-HEH, 2012 WL 169988 at *1 (E.D. Va. Jan. 19, 2012).

³⁰⁰ *Id.*

³⁰¹ *Id.* at *9.

³⁰² *Lopez v. United States*, No. CV 13-09107 RZ, 2014 WL 12589666 (C.D. Cal. Mar. 17, 2014). Perhaps because of the difficulty of pursuing it, the plaintiff voluntarily dismissed the *Bivens* claim.

³⁰³ *Id.* See also Sarah Stillman, *When Deportation is a Death Sentence*, THE NEW YORKER (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence>.

³⁰⁴ *Id.*

Cases deciding issues collateral to wrongful death claims further illustrate the potential for abuses when courts produce a culture of impunity. In *Romero-Garcia v. CoreCivic*, for instance, the Georgia district court describes how Efrain Romero de la Rosa was placed in solitary confinement under conditions that exacerbated his schizophrenia.³⁰⁵ On the morning of July 10, 2018, ICE guards laughed and mocked him when he informed them that he intended to take his own life.³⁰⁶ He committed suicide that evening.³⁰⁷ In *Martinez v. United States*, a Texas district court described how several Mexican nationals drowned in the Rio Grande when Border Patrol agents shouted obscenities and threw rocks at them.³⁰⁸ They were overpowered by the current while attempting to swim back to Mexico. In *Nino v. United States*, government attorneys in California obdurately argued a wrongful death claim was barred because part of the decedent's body lay in a foreign country.³⁰⁹ A portion of his body rest in Mexico after a Border Patrol agent shot him while at the top of a fence.³¹⁰

The Supreme Court's decision in *Johnson v. Arteaga-Martinez* further contributes to impunity for actors in the immigration enforcement system. In *Arteaga-Martinez*, as mentioned above, the Court held that the government is not required to provide noncitizens detained for six months with bond hearings in which it bears the burden of proving, by clear and convincing evidence, that the noncitizen poses a flight risk or danger to the community.³¹¹ This ruling removes one of the few protections granted to detainees in the immigration detention system. Studies show that immigration detention causes physical, psychological, and financial hardships to detainees and their families.³¹² Inability to secure release on bond results in diminished access to social and economic resources that would allow noncitizens to pursue relief from removal,

³⁰⁵ *Romero-Garcia v. CoreCivic, Inc.*, No. 4:20-CV-158 (CDL), 2021 WL 2910571 (M.D. Ga. Jun. 25, 2021).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Martinez v. United States*, No. DR-05-CA-055-AML/VRG, 2005 WL 8155760 (W.D. Tex. Dec. 12, 2005).

³⁰⁹ *Nino v. United States*, 334 F. Supp. 3d 1108 (2018). While the court dismissed this argument, it proceeded to grant summary judgment for the government.

³¹⁰ *Id.*

³¹¹ *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827 (2022).

³¹² Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 *LAW & Soc'y REV.* 117, 117 (Mar. 2016).

including removal to places where some will face persecution or death.³¹³ Because of the remote locations of immigration detention centers, detainees have more difficulty securing legal counsel. Without legal representation, it becomes more difficult not only to challenge one's removal but also to seek legal recourse for any abuses in detention or deprivation of rights in removal proceedings.

Despite the difficulty of pursuing judicial remedies, advocates have persisted in seeking legal redress for those who lose their lives to immigration enforcement. For example, the Transgender Law Center, a trans-led organization advocating for universal self-determination, is in a legal battle with the federal government for records related to the death of Roxsana Hernández, a transgender asylum seeker from Honduras.³¹⁴ Hernández died in ICE detention after being denied access to the medical care she needed and requested.³¹⁵ In addition, the ACLU has investigated and brought suit in multiple cases, including cases involving deaths at the border and records related to deaths in ICE detention.³¹⁶ Relatedly, the Civil Rights Education and Enforcement Center ("CREEC") is pursuing a class action against ICE alleging it failed to ensure adequate detention conditions at facilities across the country during the COVID-19 pandemic.³¹⁷

While civil remedies have been elusive for wrongful death, prosecutors also have been reticent to curb the violent actions of immigration agents. Prosecutions against immigration agents for lethal force are exceedingly rare, less likely even than prosecutions against police.³¹⁸ As human rights scholar Roxanna Altholz states, "During the border patrol's 100-year

³¹³ *Id.* at 118.

³¹⁴ *See generally* Transgender Law Center v. Immigration and Customs Enforcement, 33 F.4th 1186 (9th Cir. 2022). Co-counsel in the lawsuit is the Transgender Law Center, the Law Office of R. Andrew Free, and the Law Office of Daniel Yohalem.

³¹⁵ *Id.* at 1192.

³¹⁶ Press Release, ACLU Files Lawsuit for Withholding Documents Related to Practice of Releasing People from Custody Prior to Imminent Death (July 13, 2022); Press Release, Analise Ortiz, ACLU Files Lawsuit against ICE for Wrongfully Withholding Public Records about Unreported Detainee Deaths (Oct. 7, 2021); Press Release, ACLU of Texas Files Legal Claim to Seek Justice for Young Woman Killed by Border Patrol Agent (May 24, 2019); Press Release, ACLU Sues Department of Homeland Security for Information on Deaths in Immigration Detention Centers (June 25, 2008).

³¹⁷ *See generally* Fraihat v. U.S. Immigr. & Customs Enforcement, 445 F.Supp.3d 709 (C.D. Cal. 2020).

³¹⁸ Altholz, *supra* note 87, at 16.

history, state prosecutors have pursued charges against CBP agents for the use of deadly force in only a handful of cases. Federal authorities have closed all but one investigation of a border killing without pursuing criminal charges.”³¹⁹ That solitary federal case resulted in the acquittal of Lonnie Swartz, a CBP agent who shot José Antonio Elena Rodríguez across the U.S.-Mexico border, as well as the denial of any civil remedies against him.³²⁰ The impunity granted to violent agents is further bolstered by executive clemency. In 2009, for instance, President George W. Bush commuted the sentences of two CBP agents serving ten- and eleven-year sentences; the agents later received a presidential pardon in 2020. In 2005, the agents had attempted to assault Osvaldo Aldrete-Davila, shot him in the buttocks when he tried to flee their assaults, and attempted to conceal the shooting.³²¹

2. *The Presumption of Prevarication*

In wrongful death decisions, a notable feature in producing impunity is the supposition that witnesses of color are unreliable. For these witnesses, there is a presumption of prevarication,³²² a supposed inability to testify truthfully, accurately, or otherwise credibly. In these cases, one hears the echoes of the white witness rule of the nineteenth century. In 1893 in *Fong Yue Ting v. United States*, the Supreme Court

³¹⁹ *Id.*

³²⁰ See Julia Jacobs, *Border Patrol Agent Who Shot Mexican Teenager is Acquitted of Involuntary Manslaughter*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/border-patrol-acquitted-involuntary-manslaughter.html> (discussing the attention this case has received because Lonnie Swartz was the first border agent to face federal murder charges and was acquitted); see also *Rodríguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018) (allowing the *Bivens* claim to proceed, but this judgment was later vacated in response to *Hernandez v. Mesa*).

³²¹ Lauren Villagran, *Trump Pardons El Paso Border Patrol Agents Convicted of Shooting Mexican Drug Smugglers*, EL PASO TIMES (Dec. 23, 2020, 6:20 PM), <https://www.elpasotimes.com/story/news/2020/12/23/trump-pardons-two-former-border-patrol-agents-convicted-shooting-el-paso/4025071001/> [<https://perma.cc/U4X7-M355>] (explaining that President Trump pardoned the two agents, as their supporters called them “heroes”); see also *United States v. Ramos*, 537 F.3d 439 (5th Cir. 2008) (affirming the following convictions after the agents shot at a drug smuggler who abandoned his van and ran toward the Mexican border, and then attempted to cover-up the incident: Assault with intent to commit murder, assault with a dangerous weapon, assault with serious bodily injury, aiding and abetting all three assault charges, discharge of a firearm in commission of a crime of violence, and deprivation of rights under color of law).

³²² The term “presumption of prevarication” was also used in discussing witnesses in *A Narrative of the Persecution of Hippolyto Joseph Da Costa Pereira Furtado de Mondonca by Hipólito José da Costa in 1811*.

upheld laws requiring Chinese immigrants either to possess a certificate verifying their right to residence in the United States or prove that right by “at least one credible white witness.”³²³ The Court questioned the ability of Chinese witnesses to testify truthfully or comprehend the meaning of an oath, thereby endorsing the solution of requiring the supposed superior testimony of white witnesses.³²⁴ Although the white witness rule is no longer the law of the land, scholars have noted the continued relevance of racial hierarchies in presenting evidence and navigating courtrooms.³²⁵ The presumed mendacity and unreliability of witnesses of color continue to find expression in cases considering lethal immigration enforcement.

Among the lengthiest and perhaps most illustrative wrongful death decisions published by a lower court, *Barraza v. United States* provides one example of the presumption of prevarication for two witnesses of color.³²⁶ In *Barraza*, a federal district court in El Paso, Texas, considered the CBP shooting of Juan Patricio Peraza, a 19-year-old from Mexico.³²⁷ Presumably engaging in racial profiling, CBP agents approached Peraza in the parking lot of the shelter where he was staying in El Paso. After answering agents’ questions, Peraza ran into a nearby neighborhood and scuffled with the CBP agent chasing him.³²⁸ After the chase, Peraza was confronted at gunpoint by multiple CBP agents. He had a pipe, which the CBP agents claim he held in a threatening position while charging at one of the agents.³²⁹ The last agent to arrive shot Peraza twice within moments of arriving at the scene. The agent then attempted to handcuff Peraza as he died on the pavement.

³²³ *Fong Yue Ting v. U.S.*, 149 U.S. 698, 727 (1893) (requiring “at least one credible white witness” to establish prior residency in the United States).

³²⁴ *Id.* at 730.

³²⁵ See generally Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (June 2017) (arguing that evidence law has been applied in ways that structurally disadvantage people of color and advantage whites); Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450 (Feb. 2016) (noting that race and class status have served to exclude people of color from courtroom spaces and discredit their testimony).

³²⁶ *Barraza v. US*, No. EP-05-CV-352-KC, 2008 WL 11417204 at *18 (W.D. Tex. July 24, 2008). Juan Patricio Peraza’s father, César Peraza Barraza, filed suit. The court mistakenly used his maternal surname, Barraza, for the case name.

³²⁷ *Id.* at *1.

³²⁸ *Id.* at *2.

³²⁹ *Id.*

In *Barraza*, the court denied remedies to the Peraza family, who sought relief under the FTCA. Reminiscent of the nineteenth century white witness rule established in *Fong Yue Ting*,³³⁰ the district court dismissed the testimony of two women of color, who both assured the court Peraza never raised the pipe or charged at any of the agents. Despite lacking any incentive to misrepresent what they observed, the court readily found the Latinx witnesses unreliable.³³¹ The court found Ms. Barrientos unreliable because she did not witness every moment of the confrontation, although she witnessed the most salient details, and because she testified that Peraza wore a baseball cap, although it may have fallen off during the confrontation.³³² The court found Ms. Muniz unreliable because she is diabetic, which causes her vision to blur.³³³ The court gave greater weight to the agents' testimony, despite their deficient recollection of key details and significant incentive to embellish or misrepresent the events. Although the court itself noted the "failure to investigate properly," which included rapidly removing agents from the scene and allowing them to confer with one another at a central location, it found in favor of the government.³³⁴ Ultimately, the court found a reasonable agent would have believed Peraza posed an imminent threat of death or serious injury, that the agent who shot Peraza acted reasonably under the circumstances, and the use of deadly force was justified.³³⁵

In *Quintero Perez v. United States*, the Ninth Circuit similarly considered claims pursuant to the FTCA, *Bivens*, and the Alien Tort Statute.³³⁶ The case involved contested facts in the CBP shooting death of José Alfredo Yañez Reyes. Border patrol agents alleged Mr. Yañez and José Ibarra Murietta entered the United States without authorization.³³⁷ When the agents confronted them, Ibarra ran from the agents on U.S. soil while Yañez returned to the Mexican side of the border fence.³³⁸ The

³³⁰ *Fong Yue Ting v. United States*, 149 U.S. 698, 727 (1893).

³³¹ *Barraza v. US*, No. EP-05-CV-352-KC, 2008 WL 11417204, at *18 (W.D. Tex. July 24, 2008) (finding the eyewitnesses unreliable because their testimony contradicted the physical evidence, with no further explanation).

³³² *Id.* at *18.

³³³ *Id.*

³³⁴ *Id.* at *19–20.

³³⁵ *Id.* at *20.

³³⁶ *Quintero Perez v. United States*, 8 F.4th 1095 (9th Cir. 2021).

³³⁷ *Id.* at 1099.

³³⁸ *Id.*

agents claim Yañez climbed a tree and threw rocks and a table leg studded with nails at them while they assaulted Ibarra.³³⁹ The court provides no explanation as to how Yañez scaled the tree with these items. Ibarra testified that, based on his observations, Yañez did not throw anything at the agents; instead, Yañez held a phone to record the agents striking Ibarra.³⁴⁰ The agents claim they shot Yañez in the head when he cocked his fist back as if to throw something at the agents.³⁴¹ Ibarra testified that Yañez held the fence with one hand and only his phone with the other.³⁴² The agents sustained no injuries related to the alleged rocks or board. In its *Bivens* analysis, the court reasoned that the claim against the agent implicates a special factor, the “high-level” rocking policy.³⁴³ This finding was central to its ruling. The court dismissed the claims against the agents, implicitly accepting the implication of the rocking policy and dismissing Ibarra’s testimony that Yañez did not throw rocks at the agents.

As this examination of wrongful death suits illustrates, efforts to pursue judicial remedies have faced formidable legal obstacles under *Bivens* and the FTCA. Even convincing claims and compelling witness testimony have failed to overcome the culture of impunity and the presumption of prevarication. As a result, few federal courts have found in favor of a plaintiff seeking remedies for wrongful death involving CBP or ICE, despite egregious misconduct in many cases. Meanwhile, the Supreme Court’s decision in *Egbert* virtually forecloses judicial remedies against agents in their personal capacity, thus removing the deterrent effect of possible causes of action for constitutional violations. With *Egbert*, the Court has reinforced impunity for federal agents, opening the door to increased racialized violence and death in the immigration enforcement system. In effect, the Supreme Court has ensured the continued subordination of migrants of color, reinforcing the racial hierarchies produced by immigration law and perpetuated through violent immigration enforcement.³⁴⁴

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* at 1106.

³⁴⁴ See IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 18 (Richard Delgado & Jean Stefancic eds., 2d ed. 2006) (“The operation of law does far more than merely legalize race; it defines as well the spectrum of domination and subordination that constitutes race relations.”).

IV

POSITING PERSPECTIVES: LEGAL RESPONSES TO LETHAL ENFORCEMENT

In his law review article titled "The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives," Howard Lesnick set forth a framework to understand worldviews and perceptions related to human interaction, legal regulation, and legal representation.³⁴⁵ To frame his analysis, Lesnick presented a trichotomy of worldviews—namely conservative, liberal, and radical perspectives—with the intent of fostering a more complete understanding of the evolution of the law.³⁴⁶ Lesnick contended the conservative perspective, with limited influences from a liberal worldview, represents the default of the U.S. legal system.³⁴⁷ This approach provides a compelling schema to probe potential justifications for and responses to migrant mortality. The prevailing approaches of lawmakers, judges, scholars, and advocates to immigration enforcement have resulted in preventable deaths among migrants. This section proceeds by implementing Lesnick's framework and arguing that a paradigm shift espousing more radical perspectives is necessary to address preventable migrant mortality meaningfully.

A. A Conservative Perspective

In Lesnick's estimation, a conservative perspective views imbalances of power as an essential aspect of freedom.³⁴⁸ Those who adhere to a conservative worldview tend to applaud the legitimacy of the prevailing social order as well as lend legitimacy to the actions of individuals in positions of power. A conservative approach "tends to attribute inequality to differences in the abilities of people, including the ability to overcome obstacles of one variety or another," and these differences in talent and motivation may enhance productivity.³⁴⁹ Success is defined in

³⁴⁵ Lesnick, *supra* note 16, at 413.

³⁴⁶ *Id.* at 414–15.

³⁴⁷ *Id.* at 420. Lesnick understands the conservative perspective as the legal system's default because it was "embraced whole-heartedly by the architects of nineteenth century common law development, and it is still widely supported in our legal and political practice." *Id.* He goes on to say that the "liberal perspective contends with the conservative for major input into current legal regulation, but the legal world is, in my view, more accurately described as a partial lamination of the liberal onto the conservative perspective than a clear acceptance of one or the other." *Id.*

³⁴⁸ *Id.* at 421.

³⁴⁹ *Id.* at 422.

competitive terms, and there is relative reluctance to attribute current inequalities to past inequities, particularly with regard to wealth. Human decision making is primarily a response to incentives, positing people as maximizers of self-interest and wealth in a world of scarcity. In this view, the law proceeds in an impersonal manner, acting in the interest of autonomy and privacy rather than paternalistically in the service of compassion or empathy.³⁵⁰

The Supreme Court's decision in *Egbert v. Boule* provides a salient example of a conservative perspective. Perhaps with the intent of eschewing judicial paternalism, the Court finds there is no viable *Bivens* claim, despite a Border Patrol agent's unprovoked physical attack against a U.S. citizen and retaliation against him when he reported the attack.³⁵¹ Instead of acknowledging the abuses suffered by Mr. Boule, the Court points to the availability of administrative remedies and suggests Congress provide for remedies in similar cases.³⁵² Notably, the administrative remedies the Court suggests provided no relief to Mr. Boule despite significant violations of his constitutional rights.³⁵³ Writing for the majority, Justice Thomas' compassion for the victim of the attack is conspicuously absent. Instead, the Court defers to the authority of the agent and provides the perfunctory solution of congressional remedies.³⁵⁴ Reluctant to acknowledge further abuses that will result from its ruling, the Court provides broad latitude for violent enforcement under the pretext of preserving national security.

Egbert reflects the broader conservative perspective regarding immigration policy, namely a restrictionist approach that has largely driven U.S. enforcement tactics policing migration. A restrictionist approach to migration coincides with the conservative perspective's premises related to inequality and autonomy.³⁵⁵ A conservative perspective is reluctant to view the United States as contributing to poverty or persecution in the global south. Instead, global inequality and political instability abroad is more likely to be viewed as the result of the differences in the abilities of each nation to compete economically and govern itself effectively. Therefore, views on migration may

³⁵⁰ *Id.*

³⁵¹ *Egbert v. Boule*, 142 S. Ct. 1793, 1809 (2022).

³⁵² *Id.* at 1806–07.

³⁵³ In addition to being denied administrative remedies, Mr. Boule's claims pursuant to the FTCA were also denied. *Id.* at 1802.

³⁵⁴ *Egbert v. Boule*, 142 S. Ct. 1793, 1804–07 (2022).

³⁵⁵ See Lesnick, *supra* note 16, at 421–22.

be impersonal and primarily promoting national self-interest. Abuses or violence that occur as a result of immigration enforcement are a necessary and collateral consequence of preserving the nation's rights to protect national security, preserve national autonomy, and exclude individuals deemed undesirable to wealth accumulation and law and order objectives.³⁵⁶

As the primary driver of the legal system, conservative premises permeate immigration law and policy. Compelling arguments can be made to those espousing a conservative approach in attempts to alter policy in favor of reducing migrant deaths. Implementing policies that would decrease immigration enforcement, and therefore migrant death, would mean diminishing a large state apparatus that currently requires billions of dollars in federal funding to maintain.³⁵⁷ Those holding a conservative perspective may hesitate to support further increases in government spending and federal regulation to control migration.³⁵⁸ Furthermore, appeals related to freedom of movement and the economic benefits of the movement of labor hold appeal to some promoting a conservative perspective.³⁵⁹ These interests are typically superseded, however, by the aforementioned values related to national security and crime control.³⁶⁰ They are also overshadowed by preoccupations with preserving racial hierarchies.

In response to migrant death, those holding a conservative perspective may advocate more migration control enforcement, rather than less. Their reasoning may be that increased agents, technology, and physical barriers at the border, for instance, may mean that fewer migrants would find themselves in distress in isolated areas.³⁶¹ Other responses may include

³⁵⁶ See *supra* Section II.

³⁵⁷ *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security> (noting \$26 billion in ICE and CBP spending for 2021).

³⁵⁸ See generally JASON L. RILEY, *LET THEM IN: THE CASE FOR OPEN BORDERS* (2008) (arguing for increased authorized immigration pathways and critiquing the ineffectiveness of increased spending on immigration enforcement in support of a free-market conservative approach).

³⁵⁹ *Id.*

³⁶⁰ See, e.g., *National Security*, CTR. FOR IMMIGR. STUD., <https://cis.org/Immigration-Topic/National-Security> (last accessed Dec. 3, 2023) [<https://perma.cc/3HPR-NQWH>]; *Sanctuary Cities*, CTR. FOR IMMIGR. STUD., <https://cis.org/Immigration-Topic/Sanctuary-Cities> (last accessed Dec. 3, 2023) [<https://perma.cc/AB9J-PKFW>].

³⁶¹ See *Answering the Call*, CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/frontline/cbp-makes-lifesaving-rescues> [<https://perma.cc/2UTZ-NVLN>].

increased detention, prosecutions, and criminal penalties for those who violate immigration laws. They may also seek to limit avenues to immigration relief, such as pathways to asylum or family-based petitions. The objective of these measures would be to deter potential migrants from considering entering or attempting to remain in the United States. These approaches may decrease deaths while complementing conservative objectives of restricting migration to the country. In essence, a conservative response to increasing migrant deaths would likely mean further expansion of the Homeland Security State.

The primary challenge of these proposals is that they largely represent the existing approach to immigration enforcement. For the past three decades, dramatic increases in spending, personnel, technology, and prosecutions have accomplished little in curbing migration, and they have led to increased migrant deaths.³⁶² With nominal attention to the root causes of migration, deterrence efforts have largely failed.³⁶³ It is unknown what, if any, level of increased enforcement would meaningfully impact migration and reduce deaths. Lacking evidence to the contrary, it is likely this approach would lead to increased migrant deaths. Even if the number of migrant deaths decreased, it is possible that increased enforcement would result in increased use of force against migrants. Given the current abuses inflicted by immigration detention, deportation, prosecution, and border policing, more enforcement would likely mean increased prevalence of violence against those in migration.

B. A Liberal Perspective

A liberal perspective “manifests a more complex understanding of human actions than does a conservative perspective.”³⁶⁴ Those who espouse a liberal perspective demonstrate strong concern about inequality, which they perceive as self-reinforcing, and they are more incredulous regarding an incentives approach to human motivation, the level of detachment with which legal actors view the lives of people impacted by the law, and the belief that those in positions of power will limit abuses.³⁶⁵ In that vein, “a liberal perspective, being conscious of social consequences that it deems harmful rather

³⁶² See *supra* Section I.

³⁶³ *Id.*

³⁶⁴ Lesnick, *supra* note 16, at 427.

³⁶⁵ *Id.*

than benign, is more likely to perceive abuses in the exercise of power, which it regards as casting a shadow on the legitimacy of the prevailing social order.”³⁶⁶ A liberal perspective incorporates empathy into its thinking, ultimately allowing judgment to supersede empathy.³⁶⁷ It seeks to limit suffering, accepting the law’s role in circumscribing abuses to “tolerable limits.”³⁶⁸ Lacking a theoretical basis to reject conservative premises, a liberal perspective accepts many of the underlying suppositions of a conservative perspective, albeit reluctantly in some instances.³⁶⁹ Ultimately, a liberal approach will choose practicality over its significant concern with injustice.³⁷⁰

Justice Sotomayor’s opinion in *Egbert*, joined by Justices Breyer and Kagan, exemplifies a liberal perspective. In response to the denial of Mr. Boule’s cause of action, Justice Sotomayor’s opinion perceives the abuses within the immigration enforcement system and the increased suffering that may result from the Court’s decision. In contrast to the majority, she acknowledges the importance of the constitutional violations—the entry without a warrant and the assault—and the reality that the decision will “strip many more individuals who suffer injuries at the hands of other federal officers, and whose circumstances are materially indistinguishable for those in *Bivens*, of an important remedy.”³⁷¹ Foregrounding concerns with future abuses, the opinion acknowledges the federal government’s power and scope, noting the already diminished rights of individuals in the 100-mile border zone policed by CBP’s 20,000 Border Patrol agents.³⁷²

Though limited, a liberal perspective influences immigration law and policy. As evidenced by *Egbert*, a liberal perspective identifies injustices in the immigration system and calls for the limited existing protections for migrants to be upheld. Those who hold this view advocate for higher refugee caps, more generous asylum laws, and broader protections for victims of crimes. They often support reforms that would grant status to particularly vulnerable immigrants and advocate for increased legal representation for people in removal

³⁶⁶ *Id.* at 426.

³⁶⁷ *Id.* at 427.

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 429.

³⁷⁰ *Id.* at 428.

³⁷¹ *Egbert v. Boule*, 142 S. Ct. 1793, 1811 (2022).

³⁷² *Id.* at 1821.

proceedings, including advocacy for universal representation programs. While offering paths to a more just immigration system, a liberal perspective often overlooks systemic forms of oppression reinforced by migration control, such as structural racism, as well as tropes regarding deserving immigrants and the criminality of migrants. Ultimately, the liberal perspective's influence on immigration law and policy typically influences conservative frameworks rather than drive approaches to migration control.

Liberal perspectives on immigration law and policy are prevalent in legal scholarship. This body of work examines the deficiencies and abuses inherent in the immigration system while often providing practical solutions to remedy inherent problems. For instance, these analyses aim to limit suffering within the immigration enforcement system,³⁷³ ensure more proportional government responses to immigration violations,³⁷⁴ provide further legal protections for noncitizens,³⁷⁵ and enhance fairness and due process in the legal system.³⁷⁶ This scholarship insightfully identifies injustices for migrants and aspires to improve their conditions while largely preserving the legal and enforcement structures currently in place that regulate who is eligible to enter and remain in the country. It advocates for a Homeland Security State with more compassionate

³⁷³ See, e.g., Ong Hing, *supra* note 49.

³⁷⁴ See, e.g., Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. 20149 (2012) (arguing that a reframing of penalties in U.S. immigration law would rein in government excess by requiring adequate justification and proportionality for government actions and responses); Jason Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029 (Feb. 2017); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 UC IRVINE L. REV. 415 (Feb. 2012) (contending that removal orders should be subject to Fifth and Eighth Amendment proportionality review).

³⁷⁵ See, e.g., Mukhopadhyay, *supra* note 129; Darnell L. Weeden, "We the People" Should Extend Constitutional Protections to Undocumented Resident Immigrants Killed Unreasonably by the Police, 4 T. MARSHALL L. REV. 187 (2019) (recommending that the United States Supreme Court should create unequivocal case law granting constitutional rights such as equal protection and due process to undocumented immigrants).

³⁷⁶ See, e.g., Anthony O'Rourke, *Windsor Beyond Marriage: Due Process, Equality & Undocumented Immigration*, 55 WM & MARY L. REV. 2171 (June 2014) (applying the *Windsor* doctrine to determine whether laws that appear to target a politically unpopular group is permissible under the Due Process clause); Nasim Emamdjomeh, *Walking through the U.S. Immigration System and Its Missing Right to Counsel*, 59 Hous. L. REV. 673 (2022) (arguing that foreign nationals should be provided counsel in immigration proceedings though constitutional or statutory right or local right to counsel legislation).

approaches, but not an end to or reimagining of the Homeland Security State itself.

With regard to migrant death, a liberal perspective seeks reforms that create conditions making loss of life less likely and provide recourse for deaths that may occur. For instance, those who hold a liberal perspective may advocate for a political solution to *Egbert*; they may seek legislation providing remedies for victims of constitutional violations, including violations related to excessive force and death. Others may advocate for reexamination of use of force policy standards and acknowledgment of wrongful death remedies that include border deterrence policies, cross-border shootings, and deportation. They may also work more zealously to ensure the actions of immigration officials are not contrary to international law regarding non-refoulement, or returning people to places where they will be persecuted. They may advocate for informing migrants of their right to apply for asylum and allowing them the chance to seek protection when they express a fear of return. In addition, they may increase efforts to ensure asylum laws are more expansive, protecting more of those who fear harm in their home countries.

The deficiencies of the liberal perspective include its continued acceptance of many of the premises of the conservative perspective. With limited frameworks of their own that do not accept conservative premises, those holding a liberal perspective struggle to articulate a cogent vision of immigration law and policy beyond piecemeal, incremental reforms to the established, restrictionist immigration system. While reforms put forth by those holding a liberal perspective would reduce violence, suffering, and death within the immigration system, abuses would continue absent structural change. To be sure, fewer people overall would lose their lives within the immigration system as a result of liberal reforms, which is a desirable outcome for those concerned with migrant mortality, but the racialization of migrants within immigration enforcement would persist and lives would continue to be lost. Although altered, the Homeland Security State would continue to do its work and prematurely end migrant lives.

C. A Radical Perspective

A radical perspective directly addresses and rejects the premises of the conservative perspective.³⁷⁷ Rather than accept-

³⁷⁷ Lesnick, *supra* note 16, at 431.

ing individuality as the way of the world, “a radical perspective sees a world in which we are to a significant degree responsible for each other; it sees people as linked as well as separate, and deems the systematic emphasis on separateness, rather than innate, as the product of social organization.”³⁷⁸ A radical approach rejects the legitimacy of “allocations of status” accepted, to differing degrees, by conservative and liberal perspectives.³⁷⁹ It views difference in status, material success, and abilities as a “profound reproach to the social order,” resulting as the consequence of existing inequalities.³⁸⁰ For those who espouse a radical approach, their view is often rooted either in the religious conviction of the common humanity of all persons or the secular critique of lost potential resulting from race, class, and gender hierarchies.³⁸¹ In this view, power is self-reinforcing, and there is profound identification with “those lacking the traditional indicia of worldly success.”³⁸² As Lesnick contends, “The radical perspective has almost never manifested itself in legal regulation, or otherwise achieved wide acceptance.”³⁸³

True to form, the *Egbert* decision is devoid of a radical perspective. To be sure, Justice Sotomayor vigorously dissents from the majority opinion regarding a cause of action pursuant to the Fourth Amendment, underscoring the abuses that may result from the ruling.³⁸⁴ Her decision, however, leaves unquestioned the underlying violence of mass detention and deportation. She critiques the Court’s use of national security as a “talisman” to rationalize CBP violence for the particular facts in *Egbert* but overlooks the racial subordination this rationale has produced more broadly.³⁸⁵ A radical perspective would reject the very premises that underlie the court’s conservative reasoning: national security concerns, deference to the power wielded by the Homeland Security State, disparity in power between immigration agents and those they police, and reticence for judicial intervention. This approach would not only perceive the abuses experienced by Boule and others similarly situated; it would reject practical solutions that

378 *Id.*

379 *Id.*

380 *Id.* at 432.

381 *Id.*

382 *Id.* at 433, 436.

383 *Id.* at 420.

384 *Egbert v. Boule*, 142 S. Ct. 1793, 1810–24.

385 *Id.* at 1820.

uphold the current social order causing the abuses. A radical perspective would demand an end to the underlying status and power hierarchies that allowed Egbert to inflict violence with impunity.

Given the dearth of radical perspectives in legal opinions, prevailing policy approaches, or established enforcement strategies, it is necessary to look to scholars and activists for radical approaches to addressing migrant mortality. For a radical perspective, abolitionists provide a path forward. Legal scholars have vigorously critiqued the arbitrary nature of the U.S. immigration system.³⁸⁶ Scholars now argue the detention and deportation systems, given their myriad problems, must be abolished. César García Hernández, for instance, examines the punitive nature of detaining immigrants³⁸⁷ and argues for abolishing detention because of its racialized, profit-driven nature.³⁸⁸ Similarly, Angélica Cházaro argues that deportation, rather than punishment, is a form of violence against migrants that must be ended.³⁸⁹ She urges scholars and advocates to challenge the common sense of deportation and the notions of sovereignty on which it rests.³⁹⁰ This scholarship draws from and bolsters the abolitionist work of national grassroots immigrant rights organizations such as Mijente and Detention Watch Network.³⁹¹ As abolitionist legal scholarship gains trac-

³⁸⁶ See Jennifer Lee Koh, *Criminalization and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127 (2016) (“Arbitrary enforcement plagues immigration law.”). See also Anita Sinha, *Arbitrary Detention? The Immigration Detention Quota*, 12 DUKE J. CONST. L. & PUB. POL’Y 77 (2017) (noting that Congress’ bed quota requiring DHS to maintain 34,000 beds per day leads to arbitrary detention and the production of private detention facilities); Rafael Lamberti, *Coming to America: How Destructive and Arbitrary Immigration Laws Burden the Artistic Community*, 4 FAULKNER L. REV. 137 (2012) (exploring the negative impacts of arbitrary immigration laws on foreign artists); Brent Newcomb, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 OKLA. L. REV. 697 (1998) (discussing the contributions of the three branches of the federal government to the arbitrary deportations of noncitizens convicted of aggravated felonies).

³⁸⁷ García Hernández, *supra* note 7, at 1349–51.

³⁸⁸ César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 BOS. U. L. REV. 245, 300 (2013); see also García Hernández, *supra* note 111).

³⁸⁹ Cházaro, *supra* note 6, at 1070–83.

³⁹⁰ *Id.* at 1043–50, 1096–1111.

³⁹¹ See Silky Shah, *The Immigrant Justice Movement Should Embrace Abolition*, THE FORGE (Mar. 4, 2021), <https://forgeorganizing.org/article/immigrant-justice-movement-should-embrace-abolition> [<https://perma.cc/H2PJ-T5TH>]; *Leading Latinx Racial Justice Organization Releases “Free Our Future” Policy Platform in Wake of War Waged Against Immigrants*, MIJENTE (June 28, 2018), <https://mijente.net/2018/06/leading-latinx-racial-justice-organization-releases-free-our-future>

tion, immigration scholars have built upon these foundational abolitionist frameworks.³⁹²

As abolitionist scholar Dorothy Roberts states, “Abolitionists always have their eyes set on a future they are in the process of creating. At the very same time they are deconstructing structures inherited from the past, they are constructing new ones to support the future society they envision.”³⁹³ Abolitionist work in the immigration sphere has begun to lay the foundations for deconstructing the migration control structures inherited from the past. Advocates are calling for an end to private prison contracts, insisting that a just immigration system must eschew profits predicated on the incarceration of people of color. In addition, activists are fighting to end the development of technologies used to surveil and deport immigrant communities.³⁹⁴ These initiatives provide the bridge between today and a future in which the end of detention and deportation is a reality.

The primary challenge of a radical approach to addressing migrant death is the need for dramatic change in a context dominated by restrictionist philosophies. A radical approach—ending detention, deportation, and migrant death—requires systemic change. As Angela Davis argues, abolition entails reimagining structures of power perpetuating inequality, requiring a “constellation of alternative strategies and institutions” to bring abolition to fruition.³⁹⁵ Ending the immigration en-

policy-platform-in-wake-of-war-waged-against-immigrants-policy-calls-for-full-scale-decriminalization-of-immigrat/ [https://perma.cc/7UWL-XLPK].

³⁹² See Daniel Hatoum, *Abolition of Immigrant Family Detention: Tracing an Evolving Standard of Decency from Separation Through Imprisonment*, 47 HOFSTRA L. REV. 1229 (2019) (arguing for the abolition of immigrant family detention because it violates the Fifth Amendment Due Process Clause); Shiu-Ming Cheer, *Moving Toward Transformation: Abolitionist Reforms and the Immigrants’ Rights Movement*, 68 UCLA L. REV. DISC. 68 (2020) (arguing that calls to invest in immigrant communities and to release immigrants from detention can be radical reforms that move us closer to abolition if they are paired with demands to end mass incarceration and to defund the police); Anna Hales, *Beyond Borders: How Principles of Prison Abolition Can Shape the Future of Immigration Reform*, 11 UC IRVINE L. REV. 1415 (2021) (applying tenets of prison abolition to argue for an “open borders” approach to immigration, present viewpoints as to what such a regime may look like, and discuss how it would shape immigration reform efforts); Laila Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CAL. L. REV. 1597 (Oct. 2022) (mapping deportation abolition theory onto lawyering practice).

³⁹³ Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 120 (2019).

³⁹⁴ *Take Back Tech*, MIJENTE, <https://mijente.net/support-a-campaign/> [https://perma.cc/3CHU-FTCV] (last accessed Dec. 3, 2023).

³⁹⁵ ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 107 (2003).

forcement system would achieve critical advances to protecting human rights and ending premature migrant death; however, it would require reimagining legal, political, and economic frameworks on a global scale. It would necessitate significant shifts in economic approaches, foreign policy, environmental strategies, and race relations in order to assuage global inequality and economic migration, promote true sovereignty and stability abroad, address climate-induced migration, and end violence and premature death for migrants of color still forced into migration. Despite these challenges, abolitionist approaches provide the brightest paths toward ending racialized violence and the needless death of migrants of color.

CONCLUSION

Immigration law and policy have become devices of death, particularly for the past three decades. As migrant mortality rises, lethal border policies show no signs of abating, CBP and ICE continue to use violent policing tactics, profit-driven detention centers neglect detainees, and immigration law ensures noncitizens are removed to countries where they face harm or even death. Meanwhile, judicial remedies for constitutional violations and wrongful death have become more elusive. Justifications for such violent immigration policies stand on shaky ground, perpetuating racialized legal fictions of migrants as criminals, foreign workers as aggressors, and sovereignty as a shared right that preserves autonomy and protects democratic principles. The purported rationales for enforcement, which ostensibly protects the nation from peril, hold diminished weight under the scrutiny of critical analysis, particularly in light of increasing preventable deaths among migrants of color.

It is critical to contemplate more meaningfully how immigration law and policy have contributed to racialized violence and rendered migrants expendable. In recounting the horrors of the Holocaust, Elie Wiesel states in the preface to his memoir *Night*, "To forget would not only be dangerous but offensive; to forget the dead would be akin to killing them a second time."³⁹⁶ It is imperative not to forget those who have lost their lives prematurely in migration or the causes of their displacement and death. It is also necessary to look forward as the United States stands on the precipice of increased racialized violence in the immigration enforcement system with little recourse for those

³⁹⁶ ELIE WIESEL, *NIGHT* (2006).

migrants directly impacted. With each year that passes, thousands more displaced people lose their lives, perpetuating the racial subordination of migrants of color. As migrant mortality rises, it is time to reimagine an immigration system that values and preserves human life.