IMMIGRATION IN THE SHADOW OF DEATH

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In this piece, I examine the immigration enforcement and adjudication system as a whole from the perspective of life and death. Drawing upon social theory frames as well as legal scholarship, I look to how doctrines and laws continually devalue and risk noncitizens' lives. Although scholarly work has examined how differing aspects of immigration law and enforcement take lives—e.g., via detention, cross-border shootings, and deportation—explorations have yet to consider the system as a whole from this perspective.

My contribution illuminates how laws as well as legal doctrines serve as mechanisms for assigning differential value to human life, ultimately taking immigrants' lives. They do so in part by normalizing death as the inevitable cost of upholding the rule of law. And yet, there is nothing normal or inevitable about the myriad policy choices, statutory provisions, and evacuations of constitutional protection that undergird immigration law and enforcement. These choices form an architecture that, in the words of Achille Mbembe, "subjugate(s) life to the power of death."1 I consider death by design, death by enforcement, death by denial, and death by expulsion—then show how jurisprudence and laws accept and contribute to these deaths. In the final sections of my paper, I consider how we might dismantle the assumptions, laws, doctrines that devalue and take noncitizen life throughout our immigration system.

INTRODUCTION

Every month and week in the United States and just across the U.S.-Mexico border, immigrants swept up in our immigration system die in both visible and nonvisible ways. Customs and Border Protection (CBP) shootings, vehicular chases, and cartel violence result in direct killings of migrants. Immigrants also die from desert crossings, denial of essential public services, exclusions from health care, conditions in Immigration and Customs Enforcement (ICE) facilities, and expulsions. All of these deaths can be traced back to immigration enforcement and adjudication, which normalize the taking of life as the cost of upholding our laws.

This article asks why and how our immigration legal system accepts so much death. The deaths are not random or unexpected. Laws and doctrines structure and allow a system that risks lives in known and predictable ways, often by explicitly valuing citizen over noncitizen life.

We saw this particularly with COVID-19. Former President Trump's invocation of Title 42 authority to "shut down the border" hinged on the premise that stopping the flow of migration was essential to preserving the

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1 Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 39-40 (Libby Meintjes trans., 2003).

lives of those in the U.S.—without seriously considering testing, screening, and quarantine measures. Any questionable public health utility for this policy was vastly outweighed by steps that the federal and most state governments did not take: universal masking requirements, vaccine mandates, and shelter in place orders. And, of course, the policy directly risked the lives of those subject to it, particularly asylum seekers forced back to extreme risk and precarity in Mexico. President Biden continued this policy for almost two years, allowing an exception only for children arriving alone, before finally terminating it.

Even before the pandemic, our immigration system tolerated risks to immigrant life via mass detention, desert crossings, use of force, deportations, and more. Where direct and intentional state violence is involved, racial profiling threatens the lives of Latinx people in particular. In all circumstances, communities of color disproportionately suffer the brunt of deadly immigration laws and practices.

Legal doctrines undergird this system of difference. Plenary power curbs the reach of the Fifth Amendment's core protections for life for immigrants in that system, limiting both due process and equal protection rights. The doctrine, racist in its origins, is often described as sovereign overreach.[2] Yet the doctrine also expresses what social theorists have long identified as essential attributes of sovereign power, or relatedly, necropolitics: the right to let die, impose death, and/or assign differential value to human life. Plenary power and its seemingly anomalous results reflect a paradigmatic exercise of these: wherein doctrine itself "subjugate[s] life to the power of death."[3]

Although scholars have written about different aspects of risks to life—e.g., deaths in detention, at the border, or via deportation—academic explorations have yet to look at the immigration system as a whole from this lens. My article engages in this critical examination, proceeding in four parts. First, I look at social and cultural theory conceptions of territory, sovereignty, citizenship, and death to guide my discussion. Second, I examine four contexts in which our immigration system risks noncitizens' lives: via design, enforcement, denial, and expulsion. I next examine how legal doctrines structure this system and themselves devalue and diminish immigrant lives. In my penultimate section, I look at the limits of current immigration legislation. Finally, I conclude with thoughts on how both doctrine and law could begin to disentangle death from immigration enforcement and jurisprudence.

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2 *See* Section III.A., *infra* (discussing critiques of plenary power).

3 Mbembe, *supra* note 1, at 39-40.

I. SOVEREIGNTY, TERRITORY, LIFE & DEATH

Death pervades our immigration system in numerous ways. Many scholars have conceptualized death and immigration along the lines of citizenship, sovereign power, borders, and more. I draw upon the work of several theorists and legal scholars to guide my analysis, grappling with two underlying and related questions. First, why do we allow systems of immigration enforcement to risk and take life itself? And second, why do we tolerate conceptions of citizenship and personhood that negate the value of immigrant lives?

An important note: this is not to say that the law values citizens' lives fully, ideally, or equally. Other systems of law and power—including many interrelated with our immigration system—devalue and take the lives of citizens in innumerable ways. Indeed, Mbembe's own intervention traces necropolitical technologies to the plantation and the colony:[4] legacies that structure state power and its uses in the United States today most starkly in Black and Native American communities, including many comprised predominantly of formal citizens. As acknowledged below, many scholars have elsewhere explored these legacies as they structure and persist in policing, incarceration, and elsewhere.[5] A similar lens applied to the layers, doctrines, and practices that comprise our immigration system reveals impositions of state power that are both unique to that system and not so unique.

A. CITIZENSHIP AND LIFE

From classical to liberal formulations, citizenship has centered on the meaning and value of life. Sometimes, this has meant life in terms of human flourishing and community: in the sense of the Aristotelian "good life."[6] But citizenship has also explored the question of life in the sense of survival, or as Aristotle would say, "zoe" or mere life. Aristotle juxtaposed "good life" and "life" with the assertion that: "Men come together in cities in order to live, but they remain together in order to live the good life."[7] In the *polis*, or political

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4 Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 22 (Libby Meintjes trans., 2003) ("If the relations between life and death, the politics of cruelty, and the symbolics of profanity are blurred in the plantation system, it is notably in the colony and under the apartheid regime that there comes into being a peculiar terror formation…").

5 *See* Section II(B), *infra*.

6 THE POLITICS OF ARISTOTLE 108 (Ernest Baker ed. & trans., 1948). In Book III of his Politics, Aristotle explains how men come together to form the *polis*, a spatially-bound political community. He considers the various relations among men, starting with *oikos*, the elementary associations of household and family. *Id*. These combine in number into villages, which in turn aggregate to form the polis, a body of citizens large enough to achieve self-sufficient existence, or what Aristotle terms the "perfect association. *Id.*

7 *Id.* at 112.

sphere, men pursue the good life via a citizenship rooted in shared moral commitments. In the space of *oikos*, or household, Aristotle relegates mankind's "lower" needs: reproduction, sustenance, and economic production.[8] *Oikos* enables *polis* in practical effect, guaranteeing citizens the self-sufficiency required for entry into the life of the *polis*. Only via domination in *oikos*—where man rules as the master of women, children, and lesser men, including foreigners—can privileged citizens stand in equal footing with each other.

Scholars of citizenship have long pointed out that this binary renders citizenship inherently exclusionary. In order to confer membership rights upon individuals within, the polity must exclude others. Hannah Arendt famously identified this exclusion as lying at the heart of the modern nation-state. Arendt—herself German and Jewish, and stripped of her citizenship by the Nazis—explained:

> We become aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation.[9]

In our current system, the collectives that guarantee the right to have rights take the form of territorial nation-states. For Arendt, refugees and stateless persons reveal the contingent nature of rights: the loss of national rights is also a loss of human rights. Moreover, she observed that violence and exclusion are inherent in the establishment and maintenance of nation-states.[10]

In *Homo Sacer*, Giorgio Agamben reads Arendt together with Aristotle, Michel Foucault, and others to explicitly interrogate power. For Agamben, as for Arendt, the "originary activity" of sovereign power is exclusion. In particular, he examines how the separating out of Aristotelian *zoe* from *polis* results in "bare life" outside juridical order in both classical and modern contexts. Figures such as the migrant, the concentration camp prisoner, and the refugee in "spaces of exception" reveal the "limit concept" of modern citizenship.[11] For, "by breaking the continuity between man and citizen, nativity and nationality . . . [the refugee] put[s] the originary fiction of modern sovereignty in crisis."[12] Agamben concludes that bare life—life without membership or juridical status—is interior to and never apart from the operation of sovereignty. "The state of exception actually constituted, in

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8 *Id*.

9 HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 177 (1968); *see also* SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA (2002).

10 HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 177 (1968).

11 GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 6 (Daniel Heller-Roazen trans., 1998).

12 *Id*. at 133.

its very separateness, the hidden foundation on which the entire political system rested."[13]

B. NECROPOLITICS AND THE BORDER

Arendt's insights on the limits of rights outside the territorial nation-state and Agamben's concept of "bare life" illuminate the dynamics of the border. In border regions, governments withdraw the normal operation of law and create a "state of exception."[14] Where the law moves out, the bodies subject to sovereign power cease to be recognized as political agents and are, according to Agamben, reduced to "bare life."

These same zones also become places of *necropolitics*, which as mentioned, Achille Mbembe defines as the "subjugation of life to the power of death."[15] Mbembe describes "the ultimate expression of sovereignty" as "the power and capacity to dictate who is able to live and who must die."[16] Mbembe takes up Foucault's conception of biopower[17]—those domains of life subject to power's control—and interrogates the practical conditions that give rise to power over life. He is concerned, in particular, with how those wielding the power select whom to put to death, whom to let die, and whom to let live—in ways bound up in race. "That race (or indeed racism) figures so prominently in the calculus of biopower is easy to understand."[18] This, he explains, is because "racism is above all a technology aimed at permitting the exercise of biopower, 'that old sovereign right to kill.'"[19] Moreover, in addition to

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13 *Id*. at 6.

14 Giorgio Agamben takes up and modifies Foucault's concept of biopower, which he reads together with and against the theories of Hannah Arendt and Carl Schmitt. Disagreeing with Foucault's characterization of biopower – power over populations and over biological lives – as emerging in 19th century statehood, Agamben instead posits that sovereign power and the biopolitical have been entangled since Aristotle's *Politics*. Adopting Schmitt's move on the state of exception—which defines sovereignty via the power to declare exception—Agamben argues that bare life (or the Aristotelian *zoe*) has in fact been included by way of exclusion. Thus, "[t]he state of exception actually constituted, in its very separateness, the hidden foundation on which the entire political system rested." *Id*. at 6. For Agamben, the production of a biopolitical body is the original activity of sovereign power, and biopolitics dates back at least as far as the sovereign exception. The exception is a necessary and constitutive element of rule.

15 Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 39 (Libby Meintjes trans., 2003).

16 Achille Mbembe, NECROPOLITICS 66 (Steven Corcoran trans., Duke Univ. Press 2019) (2016).

17 Foucault identifies three forms of power. *Sovereign power* concerns dominion over land; goods and wealth; and discourses of legal right and juridical rules. In his famous formulation, Foucault describes sovereign power as the power to "let live and make die." *See* Michel Foucault, *Governmentality*, in POWER 45 (Paul Rabinow, ed. 1978). *Disciplinary power* first appeared not in state institutions but rather asylums, schools, and factories. It fixates on time, labor, and discourses of "natural rule" or norms. *Id*. Biopower targets the "life force" of human population for regulation and maximization for the ends of, e.g., state security and/or capitalism; it entails the power to "make live and let die." MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 241 (1975).

18 Achille Mbembe, NECROPOLITICS 71 (Steven Corcoran trans., Duke Univ. Press 2019) (2016).

19 *Id.*

exercising control over life and death itself, *necropower* also entails the "capacity to define who matters and who does not, who is *disposable* and who is not."[20]

Scholars of border studies have trained necropolitical and Foucaultian power analyses on the U.S.-Mexico border in particular. Anthropologist Jason De León describes the U.S. government's exercise of power over life and death in the Sonoran Desert as follows:

> Sovereign power produced migrants as excluded subjects to be dealt with violently while simultaneously neutralizing their ability to resist or protest. The environment becomes a form of deterrence so that 'the raw physicality' of the desert 'can be exploited and can function to mask the workings of social and political power.[21]

Legal scholarship, too, has engaged with necropolitics, violence, and law. Drawing upon Mbembe's insights on the production and maintence of borders and hierarchy, Sherally Munshi describes U.S. conquest as "a founding violence that is never transcended" in urging a critical re-examination or "unsettling" of the U.S.-Mexico border.[22] Melissa Sow and Devon Carbado have explored the policing and killing of Black bodies,[23] and Christoph Zhang the regulation and denial of transgender bodies,[24] via necropolitical frames.

Most immigration scholars have examined the operation of power in spaces, however, via different terms and frames. Ayelet Shachar has conceptualized a shifting border—observing a border shaped by State power that moves inward and outward via new technologies and practices, rather than being fixed.[25] Juliet Stumpf has engaged membership theories and conceptions of sovereignty in interrogating criminal law and immigration

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20 *Necropolitics*, 15 PUB. CULTURE at 27.

21 Jason De León, THE LAND OF OPEN GRAVES: LIVING AND DYING ON THE MIGRANT TRAIL 28 (2015) (quoting Roxanne L. Doty, *Bare Life: Border-Crossing Deaths and Spaces of Moral Alibi*, 29 ENV'T & PLAN. D: SOC'Y & SPACE 599, 607 (2011)).

22 Sherally Munshi, *Unsettling the Border*, 67 UCLA L. REV. 1720, 1735 (2021) (citing Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 11-14 (2003)); 67 UCLA L. REV. 1720, 1723 ("I want to suggest that before we can meaningfully address the question of open borders, we need to unsettle borders--to defamiliarize, disenchant, and recontextualize borders by critically examining the historical processes, legal developments, and intellectual and discursive formations that naturalize and legitimate them.").

23 *See, e.g.*, Marissa Jackson Sow, *Protect and Serve*, 110 CAL. L. REV. 743, 750–51 (2022) ("[T]he author uses the theories of Afropessimism and necropolitics to describe policing as a mechanism of subordinating Black people below humanity, and between life and death, as a governing strategy."); Devon W. Carbado, *Strict Scrutiny & the Black Body*, 69 UCLA L. REV. 2, 9 (2022) (describing police encounter with "necrological feel"); *see also* Shatema Threadcraft, *North American Necropolitics and Gender: On #BlackLivesMatter and Black Femicide*, 116 S. ATL. Q. 553, 566, 568-69 (2017) (examining violent deaths of Black women through the lens of gender and necropolitics).

24 *See* Christoph M. Zhang, *Biopolitical and Necropolitical Constructions of the Incarcerated Trans Body*, 37 COLUM. J. GENDER & L. 257, 261 (2019) ("I outline the theories of biopolitics and necropolitics respectively and discuss how each theory produces a way of viewing the incarcerated trans subject.").

25 Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. C.R. & C.L. 165, 189 (2007) (explaining the changing regulations in immigration law).

law's convergences.[26] Leti Volpp and Linda Bosniak have written about manipulations of space in immigration law, resulting in the erasure of noncitizens as legal non-persons[27] and the rendering of boundaries "chimerical."[28]

Scholars have also increasingly examined settler-colonial underpinnings in immigration law via analytical/historical frameworks that have close relation to necropolitics. Carrie Rosenbaum, Natsu Taylor Saito, and others—including Profesesors Volpp and Munshi—draw connections between Asian exclusion, Mexican and Native American conquest, and/or slavery to understand present day immigration practices.[29] More recently, Angela Riley and Kristen Carpenter have critically centered Indigenous people and the legacies of conquest and colonization to understand U.S. immigration law and its path forward.[30]

Additional attention to necropower and the necropolitical underpinnings of our entire immigration system build upon these valuable bodies of work. Law and doctrines render the protection of noncitizen life throughout our immigration system contingent on what our jurisprudence has termed acts of "grace" rather than on inherent value. This rendering, and those contingencies, are precisely about subjugating life to the power of death.

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26 Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 410 (2006) ("In immigration law, sovereign power is the authority that enables the government to exercise enormous discretion to decide who may be excluded from the territory and from membership in the society.").

27 *See generally* Leti Volpp, *Imaginings of Space in Immigration Law*, 9 L. CULTURE & HUMANS. 456, 463 (2012); *see also* Section III(D), infra.

28 Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 392–96 (2007) (discussing MICHAEL WALZER, SPHERES OF JUSTICE (1974)).

29 Carrie L. Rosenbaum, *Crimmigration-Structural Tools of Settler Colonialism*, 16 OHIO ST. J. CRIM. L. 9, 45 (2018) ("While settler colonialism at first glance appears to be a thing of the past, its implications are present today in U.S. immigration and crimmigration policy and have a dynamic interconnectedness with respect to crimmigration and integration."); Natsu Taylor Saito, *Asserting Plenary Power over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 429 (2002) ("[T]he plenary power doctrine, though rarely discussed in general constitutional jurisprudence, is core U.S. law relating to American Indian nations, immigrants, and colonized territories such as Puerto Rico and Guam."); *see also* Munshi, *supra* note 22, at 1740-48 (examining history of Asian exclusion, denial of formal and realized citizenship to Black and Native Americans, and conquest of Mexico).

30 Angela R. Riley & Kristen A. Carpenter, *Decolonizing Indigenous Migration*, 109 CAL. L. REV. 63, 70 (2021); *id*. at 72 ("[W]e argue that accounting for the experience of Indigenous Peoples in the creation and regulation of borders is critical to advancing a human rights approach to migration and to addressing the legacies of conquest and colonization that undergird nation-state territorial sovereignty."); *see also* Leti Volpp, *The Indigenous As Alien*, 5 UC Irvine L. Rev. 289, 292 (2015) ("My focus in this Article is the nonrecognition of settler colonialism underpinning immigration law scholarship."); Munshi, *supra* note 22, at 1735.

C. DEATH, SLOW & SPECTACLE

Finally, the discussions that follow also draw upon legal and sociolegal scholars who have theorized death in different ways. Stephen Lee has written on slow death, engaging the work of Lauren Berlant and others to examine family separation in the U.S. immigration system. In her influential *Public Culture* essay, Berlant uses obesity as a lens to rethink agency, causality, temporality, and sovereignty.[31] Professor Berlant opens by defining slow death as the "physical wearing out of a population and the deterioration of people in that population that is very nearly a defining condition of their experience and historical existence."[32] She posits that obesity takes place in the space of slow death, an "attrition of life or pacing of death where the everyday evolves within complex processes of globalization, law, and state regulation [that] is an old story in a new era."[33] Professor Lee demonstrates how the space of slow death also drives our immigration system. He contrasts the spectacular violence of the Trump Administration's family separation at the border with the slow death of family separation normalized as the rule, and not the exception.[34] He parses, in particular, four aspects of that system that maintain family separation as slow death: admissions policies; enforcement policies; restrictions on adjustment of status (and privileged status distinctions for citizen family members in this context); and legal regimes around remittances.[35] In these normalized contexts, the immigration system renders family separation pervasive and extracts continuous harms upon immigrant communities.

In her work, Jennifer Chacón trains focus on the spectacular, but hidden. She examines the "[s]pectacular immigration enforcement" of workplace raids, which "involve[ ] planned, coordinated, high-visibility, high-publicity enforcement efforts."[36] Around the country, meatpacking facilities employ immigrant workers—mostly Latinx, as well as Black and Asian—in largely

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31 Lauren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency)*, 33 CRITICAL INQUIRY 754, 754 (2007). Professor Berlant contends that Mbembe's necropower "renders life and mortality transparent" but loses the precision of Foucaultian forms of power. *See id.* at 756 ("Foucault's phrasing is precise. Sovereignty . . . 'is the right to take life or let live.'") (quoting Michel Foucault, *17 March 1976*, *in* "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE, 1975–1976 240-41 (David Macey trans., Mauro Bertani et al. eds., 2003)).

32 Berlant, *supra* note 31, at 754.

33 *Id.* at 780.

34 Stephen Lee, *Family Separation As Slow Death*, 119 COLUM. L. REV. 2319, 2322 (2019) (exploring concepts of "slow death" and "social violence" from the humanities to argue that "our immigration system is pervasively organized around principles of family separation.").

35 *Id*. at 2323-24.

36 Jennifer M. Chacón, *Spectacular Immigration Enforcement in Hidden Spaces*, *in* Carceral Logics: Human Incarceration and Animal Captivity 105, 115 (Lori Gruen & Justin Marceau eds., 2022).

hidden spaces.[37] Under the Bush II and Trump Administrations, ICE subjected workers at this sites to highly-publicized and heavily-militarized mass raids that shone a "bright, but selective, spotlight"[38] and rendered enforcement as "racial spectacle."[39] The raids tore apart hundreds of families and caused devasting economic and social impacts: communities upended, jobs lost, and families impoverished.[40]

Professor Chacón engages the work of anthropologist Nicholas De Genova, who examines how "illegalization" of workers produces "deportability,"[41] wherein the "totalizing procedures of otherwise partitioned 'politics' and 'economy' enter a zone of indistinction."[42] These conditions enable both labor exploitation and expansive intrusions of state power into the lives of migrants. Professor Chacón argues that "race is central to, constituted by" these processes and arrangements.[43]

In related work, Professor De Genova has trained his insights on U.S. border policing. As he explains, the "sociopolitical production of migrant 'illegality'" and resulting "images and discourses" rationalize what he terms "Border Spectacle": "a spectacle of enforcement at 'the' border wherein migrant 'illegality' is rendered spectacularly visible."[44] Within this scene, material and performative practices of policing comprise a "emphatic and grandiose gesture of exclusion" that reifies illegality. At the same time, the large-scale recruitment of these same, illegalized migrants as precarious labor remains a "shadowy, publicly unacknowledged" accompaniment to the spectacle.[45]

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37 *Id*. at 106 (describing workers as "predominantly Black, Asian and Latinx"); *id*. at 109 ("By 2000, over half of the country's quarter-million poultry workers were immigrants, the vast majority of these foreign-born Hispanics.") (quoting ANGELA STUESSE, SCRATCHING OUT A LIVING: LATINOS, RACE, AND WORK IN THE DEEP SOUTH 10 (2016)).

38 Chacón, *supra* note 36, at 114.

39 *Id*. at 115-16 (discussing "racial spectacle" of raids accomplished through "heavy armaments" as well as "rapid mass prosecution and removal").

40 *Id*. at 118-22 (discussing conduct of raids in Iowa, Tennessee, Ohio, and Mississippi and their impacts).

41 *Id*. at 112 (quoting Nicholas de Genova, *The Deportation Regime: Sovereignty, Space and the Freedom of Movement*, in THE DEPORTATION MACHINE 47 (Nicholas de Genova & Nathalie Peutz, eds., 2010)); *see also* Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOL. 419, 440 (2002) (describing how sociolegal processes of immigration enforcement produce migrant "deportability" and "illegality").

42 Nicholas de Genova, "The Deportation Regime: Sovereignty, Space and the Freedom of Movement," in THE DEPORTATION MACHINE 47 (Nicholas de Genova & Nathalie Peutz, eds. 2010) (quoted in Chacón, *supra* note 36, at 112).

43 Chacón, *supra* note 36, at 113.

44 Nicholas De Genova, *Spectacles of Migrant 'Illegality': The scene of Exclusion, The Obscene of Inclusion*, 36:7 ETHNIC AND RACIAL STUDIES 1180, 1181 (2013); *see also id*. at 1182 ("Through the operation that I designate as the Border Spectacle, the law, which, in demonstrable and calculated ways, has in fact produced the terms and conditions for the 'illegality' of the migrants in question, is utterly naturalized".).

45 *Id*. at 1181.

II. IMMIGRATION AND DEATH

Below, I delve into four categorical ways that our immigration system imposes mortal risks to life: by design, enforcement, denial, and expulsion. I analyze relevant laws and policies as well as research and reporting on the taking of noncitizens' lives. I consider, as well, how these practices devalue immigrant life.

A. DEATH BY DESIGN (BORDER WALL, DESERT CROSSINGS)

In the past three decades, thousands of individuals have died while trying to cross the US-Mexico border. The deaths tracked an era of increased border militarization and an explicit policy goal of preventing migration through deterrence. Early 1990s initiatives such as Operation Blockade / Hold the Line in El Paso (TX), Operation Gatekeeper in San Diego (CA), and Operation Safeguard in Nogales (AZ) stopped migrants from traversing the border in populated areas, previously used frequently as crossing points.[46] A Border Patrol[47] Strategic Plan document from 1994 outlined "a strategy of 'prevention through deterrence'"[48] targeting major corridors including El Paso, San Diego, South Texas, and Tucson.[49] A combination of greater physical barriers, lighting, increased personnel, technological monitoring, and other measures drove migrants further out into the desert. The inhospitable landscape there rendered crossings far more dangerous.

The Plan itself anticipated high human costs of the new policies. It recognized, for example, that "[i]llegal entrants crossing through remote, uninhabited expanses of land and sea along the border can find themselves in mortal danger."[50] But this acknowledgement did not deter officials from adopting the proposed course of action. The Plan, in fact, described these dangers as a positive and necessary deterrent: "Border Patrol planners recognized that only a decisive level of resources would increase the 'cost' to

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46 For a comprehensive exploration of these policies, *see* JOSEPH NEVINS, OPERATION GATEKEEPER AND BEYOND: THE WAR ON "ILLEGALS" AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY (2d ed. 2010); *see also* JASON DE LEÓN, THE LAND OF OPEN GRAVES: LIVING AND DYING ON THE MIGRANT TRAIL 27 (2015).

47 U.S. Border Patrol is part of Customs and Border Protection ("CBP"), which has jurisdiction over the 100-mile area from any land or sea border as well as over ports of entry. Immigration and Customs Enforcement ("ICE") assumes jurisdiction over interior immigration enforcements. Both sit within the Department of Homeland Security ("DHS"), created after the September 11, 2001 attacks. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2195–96.

48 DEP'T OF HOMELAND SEC., U.S. BORDER PATROL, NATIONAL STRATEGY: BORDER PATROL STRATEGIC PLAN 1994 AND BEYOND (1994), at 6.

49 *Id*. at 9 ("The current enforcement posture in AA1 [San Diego] and AA2 [El Paso] is to first control the entry of illegal entrants into and through the large urban areas."); *id.* at 10 ("In these areas also [South Texas and Tucson], the initial focus will be on attaining control of the urban areas first and then the rural areas."); *id.* at 14 ("All sector strategies focus first on the urban areas, concentrate resources on the line and checkpoints and maintain a baseline staffing level.").

50 *Id.* at 2.

illegal entrants sufficiently to deter entry."[51] The same planners expressed optimism that through such measures, "the border can be brought under control."[52]

As predicted by Border Patrol itself, the "cost" (as they called it) of migration increased dramatically. A 2021 report from the Binational Migration Institute (BMI) at the University of Arizona documented increased lethality of crossings in the years following Border Patrol's "prevention through deterrence" policy. Analyzing data from the Pima County Office of the Medical Examiner from 1990-2020,[53] the report documented recovery of the "remains of at least 3,356 undocumented border crossers in the region,"[54] the majority since 2005.[55] While U.S. Border Patrol apprehensions decreased in the Tucson Sector since the mid-2000s, the rate of recovered remains increased, "a dynamic that suggests undocumented migration in southern Arizona has become increasingly dangerous."[56] Over time, undocumented border crossers' remains were recovered in more and more remote areas,[57] reflecting a "funnel effect" that channeled migratory flows into the most dangerous parts of southern Arizona.[58]

Over the period of time of the study, the Medical Examiner's office successfully identified 64% of the 3,356 remains investigated. The deceased individuals represented thirteen Latin American countries, India, and Jamaica—but 98% came from Mexico, Guatemala, El Salvador, or Honduras.[59] Most were males between the ages of 20-39 years old, although 11% were 10-19 years old and 15% were females.[60] In all time periods, the vast majority of determined causes of death was exposure to the elements:

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51 *Id.* at 8.

52 *Id.* at 1.

53 Daniel E. Martínez et al., *Migrant Deaths in Southern Arizona: Recovered Undocumented Border Crosser Remains Investigated by the Pima County Office of the Medical Examiner, 1990-2020*, UNIV. OF ARIZ. BINATIONAL MIGRATION INST. 3-4 (2021) (explaining that the office provides death investigations for most of southern Arizona, including services provided to the counties of Pinal, Gila, Nabajo, Apache, and Greenlee counties in Arizona).

54 *Id.* at 3, 6. (defining the term "undocumented border crossers" as "foreign-born non-US citizens actively involved in crossing the US-México border without authorization from the United States government").

55 *Id.* at 3.

56 *Id.*

57 *Id.*

58 More specifically, the report describes four periods of funnel effects: the Initial Funnel Effect (1990-1999); Secondary Funnel Effect (2000-2005); Tertiary Funnel Effect (2006-2013); and Localized Funnel Effect (2014-2020). *See id.* at 7. Increased infrastructure and personnel spending forced migrants to take ever more extreme routes to avoid detention by U.S. authorities over each of these periods. During the last of these time periods, the "Tertiary Funnel Effect," recovered remains shifted notably toward the "west desert" areas "where the climactic and environmental conditions of southern Arizona are at their most extreme." *Id.* at 8–9.

59 *Id.* at 18–19.

60 *Id.* at 18, 25.

hyperthermia or hypothermia, often along with dehydration.[61] The report concluded:

> [W]e find that the approximate rate of recovered [undocumented border crosser] remains in southern Arizona increased substantially since the early 2000s. This suggests that migrants' clandestine travel in southern Arizona occurs over longer periods routed through more remote areas to avoid detection by US authorities, thus increasing the probability of death. Though fewer migrants are crossing, they continue to die (or be recovered) in large numbers and are perishing in some of the most treacherous and rugged terrain within southern Arizona.[62]

In Southern Texas, a study conducted by the University of Texas, Austin documented thousands of deaths from crossing attempts as well increasing lethality of the desert and the Rio Grande. Researchers there found "2,655 cases of migrant deaths in South Texas from 1990 to 2020 and an additional 615 cases of migrants who drowned in the Rio Grande but whose bodies washed up on the Mexican shore,"[63] with the number of deaths spiking sharply from 2010 onward.[64] Throughout documented time periods, individuals whose nationalities could be verified overwhelmingly came from Mexico and Central America.[65]

The government's own prior studies largely align with academic researchers' findings. A 2006 report by the GAO concluded that the number of border-crossing deaths doubled from 1995 to 2005, and that three quarters of that increase "can be attributed to increases in deaths occurring in the Arizona desert."[66] Data from U.S. Border Patrol documented 9,515 migrant bodies recovered from 1998-2023, with the highest number of remains spiking to over 890 in 2022—more than double the number from most previous years.[67]

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61 *Id.* at 23. In later years, however, an increasing proportion of remains had undetermined causes of death, due to the degree of decomposition or lack of evidence. *See id*. That increase correlated with the increasing proportion of remains discovered in remote areas: the longer period of time between death and recovery of remains in these locales posed challenges in determining cause of death, particularly due to decomposition of remains. *Id.*

62 *Id.* at 27.

63 Stephanie Leutert, Sam Lee & Victoria Rossi, *Migrant Deaths in South Texas*, 2020 UT AUSTIN STRAUSS CTR. FOR INT'L SEC. AND LAW 2.

64 *Id*. at 20.

65 From the 1990s to 2000s, the vast majority of those identified were Mexican citizens. From 2012-2019, Mexican citizens continued to comprise more deaths than any other nationality, but the proportion of individuals from Central America—and in particular El Salvador, Guatemala, and Honduras—rose sharply. *Id.*; *see also id.* at 20 n.r (explaining that nationality data comes from two sources: "the identification cards that individuals had in their possession when they passed away" and "death certificates added to files after an individual was identified through DNA testing or other means").

66 U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-770, ILLEGAL IMMIGRATION: BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995; BORDER PATROL'S EFFORTS TO PREVENT DEATHS HAVE NOT BEEN FULLY EVALUATED (Aug. 2006).

67 *See 9,515 Migrant Remains Recovered By Border Patrol in 25 years: By Gender*, WOLA BORDER OVERSIGHT, https://borderoversight.org/2023/02/28/7805-migrant-remains-found-by-border-patrol-in-22-years/ [https://perma.cc/LGR8-PTFS] (last visited Sept. 28, 2023).

As social scientists working in desert regions have long argued, the "natural" deaths caused by dehydration, heat stroke, wild animals, or other environmental factors reflect intentional policies and political calculations of the U.S. government. Drawing upon interviews and extensive forensic and archaeological work, Jason De León uncovers the massive scale of suffering and death occurring daily in the Sonoran Desert of Arizona. Professor De León describes deaths in the desert as "fruits of an innovation in murder technology,"[68] in which "[n]ature" "does the dirty work" of killing.[69] The deaths do not merely happen, but are instead conscious choices made by the government to deem undocumented border crossers as "killable and disposable."[70] "[T]he desert is a tool of boundary enforcement *and* a strategic slayer of border crossers."[71] In short, "Prevention Through Deterrence is necropower operationalized."[72]

Oftentimes, the desert works in conjunction with human actors in similarly predictable ways. In June 2022, emergency responders found dozens of dead and dying migrants abandoned inside a sweltering tractor-trailer in San Antonio.[73] Fifty adults and three children from Mexico, Honduras, and Guatemala ultimately died.[74] Following an international outcry, the U.S. Attorney's Office for the Western District of Texas indicted two men allegedly responsible for transporting the migrants.[75] Yet, although the tractor-trailer deaths followed a well-documented pattern driven by U.S. deterrence strategies,[76] no re-examination of those underlying strategies accompanied the indictments.

B. DEATH BY ENFORCEMENT

Sometimes, the government does not simply "let" nature do the killing. Border enforcement officials' shootings also kill noncitizens. So, too, do

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68 De León, *supra* note 21, at 68.

69 *Id.* at 68.

70 *Id.* at 73.

71 *Id.* at 67.

72 *Id.* at 68. De León also describes *necroviolence*, a continuing violence against dead bodies "aimed at the victim's spirit, soul, or afterlife." *Id.* at 70. The remote location of bodies, and the resulting decomposition, animal scavenging, and other harms constitute this violence. *Id.*

73 Ray Sanchez, Nicole Chavez & Priscilla Alvarez, *On a Texas road called 'the mouth of the wolf,' a semitruck packed with migrants was abandoned in the sweltering heat*, CNN (June 29, 2022, 2:26 PM), https://www.cnn.com/2022/06/29/us/san-antonio-migrant-truck-deaths/index.html [https://perma.cc/UWJ9-VAVZ].

74 Paulina Villegas, *Two men indicted in Texas tractor-trailer tragedy that left 53 dead*, WASH. POST (July 21, 2022, 3:04 PM), https://www.washingtonpost.com/nation/2022/07/21/texas-migrants-death-smuggling-trailer/ [https://perma.cc/8FYN-ND7E].

75 *Id.*

76 *See* Lomi Kriel and Uriel García, *Death is a constant risk for undocumented migrants entering Texas*, TEXAS TRIBUNE (June 28, 2022, 12:00 PM), https://www.texastribune.org/2022/06/28/texas-migrant-deaths-smuggling/ [https://perma.cc/F4EU-2B64] (describing deaths in tractor-trailers and railway boxcars over the years).

deficiencies in medical care in ICE facilities. In these contexts, individuals die at the hands of government officials more directly. Below, I explore deaths arising from the enforcement actions and decisions of both CBP and ICE.

CBP Shootings and Vehicular Killings

In June 2010, Border Patrol Agent Jesus Mesa, Jr. stood on U.S. soil and fired two shots that killed Sergio Adrián Hernández Güereca, a 15-year-old Mexican boy. One of those bullets, shot through the U.S.-Mexico border wall, pierced Sergio Adrián in the face. At the time, he and his friends had been playing a game in the concrete culvert that separated El Paso, Texas, from Ciudad Juarez, Mexico. The culvert, designed to hold overflow water from the Rio Grande, was dry at the time; an invisible line over the culvert separated the U.S. from Mexico.[77] The friends dared each other to run across the culvert and touch the fence on the U.S. side. As Sergio Adrián did so, while on the Ciudad Juarez side of the border, Agent Mesa shot him. Although Agent Mesa claimed that Sergio Adrián had been throwing rocks at the time he was shot, cell phone video footage contradicted that assertion.[78]

Two years later, in October 2012, CBP officer Lonnie Swartz shot and killed José Antonio Elena Rodríguez, a 16-year-old boy also from Mexico. José Antonio was walking along the border fence in his hometown of Nogales, Mexico, when Swartz, standing on U.S. soil, issued a barrage of shots through the fence.[79] Ten of these shots hit José Antonio from behind, causing multiple wounds to his lungs, head, and arteries.[80] José Antonio was carrying only his cell phone.[81] As described below, the Supreme Court in 2020 foreclosed the possibility of the families of both José Antonio and Sergio Adrián of ever obtaining constitutional relief.

These shootings were not isolated incidents but rather part of a larger pattern identified by CBP's own commissioned researchers. In 2012, CBP requested a study by the Police Executive Research Forum, which reviewed

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77 Vanessa Romo, *Supreme Court Rules Border Patrol Agents Who Shoot Foreign Nationals Can't Be Sued*, NPR (Feb. 25, 2020, 6:21 PM) https://www.npr.org/2020/02/25/809401334/supreme-court-rules-border-patrol-agents-who-shoot-foreign-nationals-cant-be-sue [https://perma.cc/BP3T-HRDT].

78 Ann E. Marimow, *Supreme Court seems wary of allowing families of slain Mexican teens to sue U.S. border agents*, WASH. POST (Nov. 12, 2019, 5:03 PM) https://www.washingtonpost.com/local/legal-issues/supreme-court-seems-wary-of-allowing-families-of-slain-mexican-teens-to-sue-us-border-agents/2019/11/12/ddcb3430-0259-11ea-8bab-0fc209e065a8_story.html [https://perma.cc/R2J6-CRF6].

79 Mark Binelli, *10 Shots Across the Border: The killing of a Mexican 16-year-old raises troubling questions about the United States Border Patrol*, N.Y. TIMES (Mar. 3, 2016), https://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html [https://perma.cc/62DX-8PJC]. Although the government initially refused to identify the agent responsible for the shooting, a federal court ordered the unsealing and release of Lonnie Swartz's name. *Id.*

80 *Id.*

81 *Id.*

all of CBP's use-of-deadly-force cases spanning from January 2010 through October 2012, or 67 incidents in less than two years. The report found CBP's use of deadly force in need of "significant change" in two key areas: shootings at rock throwers and shootings at vehicles.[82] The review looked at the twenty-five case files involving agents firing shots at rock throwers and found that:

> [I]n some cases agents put themselves in harm's way by remaining in close proximity to the rock throwers when moving out of range was a reasonable option. Too many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force.[83]

Despite these findings, however, CBP shootings at the border continue unabated.[84]

The same CBP-commissioned report also considered vehicle chases that resulted in the deaths of both passengers and drivers.[85] It explained, "[m]ost reviewed cases involved non-violent suspects who posed no threat other than a moving vehicle."[86] Moreover, based on their review, the authors "suspected that in many vehicle shooting cases, subject driver was attempting to flee from the agents who intentionally put themselves into the exit path of the vehicle."[87] In these cases, CBP agents themselves "thereby expos[ed] themselves to additional risk and creat[ed] justification for the use of deadly force."[88]

CBP itself does not systemically track the number of noncitizen deaths caused by its vehicle killings or shootings. Some non-profit groups, however, have tried to do so. Looking at data from 2010 to the present, the Southern Border Communities Coalition identified 283 individuals who have died in encounters with CBP.[89] Sixty-seven of these deaths resulted from "an on-duty CBP agent's use of force including a fatal shooting, asphyxiation, a Taser, beating or a chemical agent."[90] The Coalition also determined that "[a]nother 100 deaths were due to vehicle collisions involving Border Patrol, the majority (89) of which occurred during high-speed car chases initiated by Border Patrol."[91]

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82 Police Exec. Rsch. F., *Use of Force Review: Cases and Policies*, U.S. CUSTOMS AND BORDER PROT., 2 (Feb. 2013), https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf [https://perma.cc/6F3N-B3QM] (reviewing the use of force by U.S. Customs and Border Protection officers and agents).

83 *Id.* at 6.

84 *See Fatal Encounters With CBP Since 2010*, S. BORDER CMTYS. COAL. (Sept. 12, 2023), https://www.southernborder.org/deaths_by_border_patrol [https://perma.cc/Y4TN-DFXU] (documenting 67 CBP use-of-force killings from 2010-2023); *see also infra* notes 89-91 and accompanying text.

85 *Use of Force Review: Cases and Policies*, *supra* note 82, at 8.

86 *Id.*

87 *Id.*

88 *Id*.

89 *Fatal Encounters With CBP Since 2010*, *supra* note 84.

90 *Id.*

91 *Id.*

ICE and CBP Detention

Each day, ICE detains tens of thousands of people in its facilities, the majority operated by private prison companies at the cost of billions of taxpayer dollars a year.[92] And, every year, people die in these facilities. Criticisms of ICE detention have been legion. For decades, researchers have documented physical violence, sexual abuse, lack of adequate medical care, spoiled food, unsanitary conditions, and deprivation of leisure and outdoor time: conditions that risk the physical and mental health of detained immigrants, and in many cases, their lives.[93] Experts predicted that COVID-19 would pose disastrous to individuals in ICE detention, leading to infections and deaths of not only detained individuals but also ICE employees and the general public.[94] And they were correct. Over the course of the pandemic, ICE detained thousands of people each day. The number of people dropped significantly following litigation by advocates (and the change in Administration)—from 38,058 people in March 2020 to 13,914 by March 2021.[95] However, even under the Biden Administration, ICE at all times detained over 13,000 people a day throughout the COVID-19 pandemic.[96]

Detention conditions drew widespread condemnation for contravening public health experts' pandemic mitigation recommendations in countless instances. ICE facilities across the country refused to release medically-vulnerable people; failed to provide personal protective equipment; rendered

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92 For example, on November 19, 2023, ICE detained 39,013 people in its facilities. *See Ice Detainees*, TRAC IMMIGR., https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html (last visited Dec. 10, 2023) [https://perma.cc/J796-VXEY]. Figures close to or above 30,000 have been typical for the Biden Administration in the latter part of 2023, following termination of COVID-19 public health emergency declaration.

93 *See, e.g.*, AM. C.L. UNION, DET. WATCH NETWORK & NAT'L IMMIGRANT JUST. CTR., FATAL NEGLECT: HOW ICE IGNORES DEATHS IN DETENTION 3 (2016), https://www.detentionwatchnetwork.org/sites/default/files/reports/Fatal%20Neglect%20ACLU-DWN-NIJC.pdf [https://perma.cc/NZ7Y-KSTP] (examining violations of U.S. Immigration and Custom Enforcement medical care standards by the agency itself); *US: Deaths in Immigration Detention: Newly Released Records Suggest Dangerous Lapses in Medical Care*, HUM. RTS. WATCH (July 7, 2016, 12:00 AM), https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention [https://perma.cc/CYD2-G6GB] (describing investigations into newly released U.S. government records revealing subpar medical care for migrants in custody).

94 *See* Isaí Estévez, *A Case for Community-Based Alternatives to Immigration Detention*, 64 ARIZ. L. REV. 1185, 1192 (2022) ("As early as March 2020, medical experts for DHS's Office of Civil Rights and Civil Liberties began to warn of the danger of COVID-19 and the immense threat it would pose to the more than 50,000 people in immigration detention facilities nationwide.") (discussing Letter from Dr. Scott Allen, Professor Emeritus, Clinical Med., Univ. of Cal. Riverside, & Dr. Josiah Rich, Professor of Med. & Epidemiology, Brown Univ., to Hon. Bennie Thompson, Chairman, House Comm. on Homeland Sec., et al. (Mar. 19, 2020), https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020-Letter-to-Congress.pdf [https://perma.cc/7FCH-A9TM]).

95 *Ice Detainees*, TRAC IMMIGR., https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html [https://perma.cc/NSH4-BXM3] (last visited Dec. 10, 2023).

96 *See id.* (reflecting lowest figure for daily detention from 2019 to 2023 as 13,258 in February 2021).

social distancing impossible; failed to equip facilities with hand sanitizer and adequate soap and water; and denied vaccine access to detained individuals who desperately sought them.[97] When detainees in some facilities protested via hunger strikes, prison officials reacted with harsh crackdowns, using pepper spray and solitary confinement against noncitizens seeking basic safety measures.[98]

Not surprisingly, the virus spread rapidly in ICE facilities. A slew of lawsuits from 2020 onward challenged ICE COVID-19 conditions, in many cases securing court orders of release for individuals as well as classes of medically-vulnerable people.[99] But as discussed below, none of them succeeded in closing an ICE facility, or in getting a broad order of release for all detained individuals, even at the height of the pandemic.

During and before COVID, ICE detention center conditions have taken people's lives. Since December 2015 to the present, at least 77 individuals have died in ICE detention, based on ICE detention death reports collected by the American Immigration Lawyers Association.[100] Deaths in ICE detention in the early months of the COVID-19 pandemic spiked dramatically. In fiscal year 2020, ICE reported 21 deaths in detention—over double the number of deaths in FY2019 and triple that in FY2018.[101] A 2021 study examining deaths during the preceding three years (2018-2020) found that "[t]he death rate among individuals in ICE detention has increased seven-fold between FY2019 and FY2020 amidst the COVID-19 pandemic,

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97 *See* Estévez, *supra* note 94, at 1192–93. Many of these conditions violated ICE's own COVID-19 guidelines. *See id.* at 1194 (discussing findings of DHS's own Office of Inspector General of violations at the La Palma facility); *see also* Fatma E. Marouf, *The Impact of COVID-19 on Immigration Detention*, FRONTIERS IN HUM. DYNAMICS, Apr. 8, 2021, https://www.frontiersin.org/articles/10.3389/fhumd.2020.599222/full [https://perma.cc/D6P7-QJ6P] (examining reasons for the rapid spread of COVID-19 in detention centers); *compare* U.S. IMMIGR. AND CUSTOMS ENF'T, ENF'T AND REMOVAL OPERATIONS: COVID-19 PANDEMIC RESPONSE REQUIREMENTS (Oct. 19, 2021), https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities-v7.pdf [https://perma.cc/9X6C-8KBQ] (describing requirements and best practices to implement at detention facilities during the COVID-19 pandemic).

98 *See* Estévez, *supra* note 94, at 1193–94 (discussing crackdown at La Palma facility in Arizona).

99 *See infra* notes 246-50 and accompanying text (describing cases).

100 *Deaths at Adult Detention Centers*, AM. IMMIGR. LAW. ASS'N (June 29, 2023), https://www.aila.org/library/deaths-at-adult-detention-centers [https://perma.cc/WV9A-RKEG] (reflecting author's count based on ICE detention death announcements posted from December 2015 through June 2023); *see generally Detainee Death Reporting*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detainee-death-reporting [https://perma.cc/RA9T-GF3V] (last updated July 7, 2023) (explaining ICE protocol for reporting detention center deaths and listing deaths in ICE custody).

101 *Id*. (referencing author's tally based on reports for FY2018, FY2019, and FY2020); *see* Catherine E. Shoichet, *The death toll in ICE custody is the highest it's been in 15 years*, CNN (Sept. 30, 2020, 8:11 AM), https://www.cnn.com/2020/09/30/us/ice-deaths-detention-2020/index.html [https://perma.cc/U7AP-FZ3Y] (noting the increase in ICE detainee deaths in 2020).

while the average daily population in custody decreased by nearly a third."[102] The average age of those who died was just 47.3 years of age. That figure is drastically lower than the life expectancy of foreign-born individuals in the United States – just a handful of years shy of half of the average lifespan of 86.7 years for women and 83.9 years for men.[103]

ICE's own reports of deaths, moreover, almost certainly undercount the number of people who contracted coronavirus in ICE detention and died of related causes. ICE does not include people whom it releases to hospitals who die even just a few days later.[104] New reports document how ICE "rushed" to release critically ill individuals from ICE detention, "avoiding responsibility for [their] death."[105]

The pandemic exacerbated already harmful conditions in ICE detention. As noted above, scholars and researchers have for decades documented inadequate medical care, unsafe conditions, and other human rights abuses in ICE detention.[106] And even before COVID, ICE's own reports and officials' conclusions have validated these findings. In June 2019, for example, the DHS Office of Inspector General ("OIG") found dangerous conditions in ICE facilities in its own inspections.[107] In unannounced visits to four ICE detention

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102 Sophie Terp et al., *Deaths in Immigration and Customs Enforcement (ICE) detention*: *FY2018-2020*, 8(1) AIMS PUB. HEALTH 81, 86 (Jan. 11, 2021).

103 *Id.* at 86.

104 *See id.* at 87 ("These data also do not include individuals released by ICE just prior to death. Thus, the calculated death rate likely underestimates deaths related to immigrant detention."); Katy Murdza, *How Many ICE-Related COVID-19 Deaths Have Gone Unreported?*, IMMIGR. IMPACT (Mar. 26, 2021), https://immigrationimpact.com/2021/03/26/unreported-covid-deaths-ice/#.YZX7Ay-B1hE [https://perma.cc/SL2T-LRMC] (describing gaps in ICE reporting the number of people who die of COVID-19 while in their custody).

105 *See* Andrea Castillo, *ICE rushed to release a sick woman, avoiding responsibility for her death. She isn't alone,* L.A. TIMES (May 13, 2022, 3:00 AM), https://www.latimes.com/world-nation/story/2022-05-13/ice-immigration-detention-deaths-sick-detainees [https://perma.cc/2U4C-WWLC] (telling the story of Johana Medina Leon, a transgender woman who died shortly after being released from ICE custody); Norma Ribeiro, *Man Dies After Contracting COVID-19 While in ICE Custody, Lawsuit Says*, NBC L.A. (Mar. 23, 2021, 10:50 AM), https://www.nbclosangeles.com/news/local/man-dies-after-contracting-covid-19-while-in-ice-custody-lawsuit-says/2556682/ [https://perma.cc/F6EN-AF7V] (telling the story of Martín Vargas Arellano, a man who died after contracting COVID-19 in ICE custody); Murdza, *supra* note 104 (noting the high number of people who died shortly after being released from ICE custody).

106 *See, e.g.*, KAREN TUMLIN, LINTON JOAQUIN & RANJANA NATARAJAN, A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS (Nat'l Immigr. L. Ctr., ACLU of S. Cal. & Holland & Knight 2009), https://www.nilc.org/wp-content/uploads/2016/02/A-Broken-System-2009-07.pdf [https://perma.cc/7ZYT-XFHM] (detailing the many human rights abuses in ICE detention facilities); AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (2009), https://www.amnestyusa.org/wp-content/uploads/2011/03/JailedWithoutJustice.pdf [https://perma.cc/FY94-DL2U] (describing experiences of people detained by US immigration authorities); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 42–48 (2010) (discussing myriad concerns raised by excessive immigration detention policies and practices).

107 JOHN V. KELLY, OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (June 3, 2019),

centers, OIG found rampant violations of ICE's own detention standards. These included inadequate medical care, lack of sanitation, failure to provide hygiene items, and spoiled and contaminated food.[108] In a memorandum dated December 2018 and leaked to the public, an ICE official described ICE's own health corps as "severely dysfunctional" and concluded that "[m]any detainees have encountered preventable harm and death" under their care.[109]

Nor are deaths limited to ICE custody: CBP facilities have also proven deadly to migrants, and in particular to children. From 2018-19— a period of time overlapping with the Trump Administration's notorious family separation policy—at least seven children died while in CBP custody.[110] Deaths have continued under the Biden Administration, which reported two children dying CBP custody in 2021.[111] Earlier this year, in May 2023, eight-year-old Anadith Danay Reyes Álvarez died after over a week in CBP detention.[112] CBP-contracted medical personnel saw Anadith nine times over the course of three days but refused her mother's repeated requests to transfer her to an emergency room. Not until the ninth and last visit, when Anadith was already unresponsive and seizing, did CBP finally call an ambulance. Emergency personnel took Anadith to the Valley Baptist Medical Center in Harlingen, TX on May 17, but doctors there were unable to save her.[113] She passed away that afternoon.

CBP detention facilities are even worse than ICE detention in many ways and are particularly unsuited to children. Immigrants subjected to them have reported crowding, extreme cold, and a lack of food, water, blankets, beds, soap, toothpaste, and showers.[114] Adults as well as children have died in

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https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf [https://perma.cc/CG2E-3SC6] (describing the findings from unannounced inspections at detention facilities).

108 *Id.* at 2–6.

109 Ken Klippenstein, *ICE Detainee Deaths Were Preventable: Document*, TYT (June 3, 2019), https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/688s1LbTKvQKNCv2E9bu7h [https://perma.cc/DUD7-ZCVU] (citing December 3, 2018 email from ICE supervisor to Acting Deputy Director of ICE).

110 Nicole Acevedo, *Why are migrant children dying in U.S. custody?*, NBC NEWS (May 29, 2019, 4:44 PM), https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316.

111 *Deaths in CBP Custody*, AM. IMMIGR. LAW. ASS'N, (June 22, 2022), https://www.aila.org/infonet/deaths-in-cbp-custody [https://perma.cc/62E5-CKRE] (referencing author's tally of reported deaths of children in FY2021).

112 Eileen Sullivan & Emiliano Rodríguez Mega, *8-Year-Old Migrant Died After a Week in U.S. Detention*, N.Y. TIMES (May 19, 2023), https://www.nytimes.com/2023/05/19/us/politics/8-year-old-migrant-died-border.html [https://perma.cc/P9BQ-5VUR].

113 *June 1, 2023 Update: Death in Custody of 8-Year-Old in Harlingen, Texas*, U.S. CUSTOMS & BORDER PROT., (June 1, 2023), https://www.cbp.gov/newsroom/speeches-and-statements/june-1-2023-update-death-custody-8-year-old-harlingen-texas [https://perma.cc/WCY2-9T3T].

114 *See In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells*, HUM. RIGHTS WATCH (Feb. 28, 2018), https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells [https://perma.cc/5G7N-3VSF] (citing the Human Rights Watch's report on the poor conditions in holding cells).

CBP's holding cells—places where CBP generally prohibits attorney and press access.[115]

Operation Lone Star

The federal government has also largely stood by while border states escalated their own enforcement regimes to deadly effect. In March 2021, Texas Governor Greg Abbott announced Operation Lonestar, citing the need for greater state efforts to enforce immigration law in light of the Biden Administration's perceived failures.[116] A formal declaration by Abbott in May 2021 instructed the Texas Department of Public Safety (DPS) to use state resources to enforce both federal and state laws to prevent "criminal activity along the border, including criminal trespassing, smuggling, and human trafficking, and to assist Texas counties in their efforts to address those criminal activities."[117]

Through dedicated legislative funding and diversion of health, criminal justice, and public safety funds, Texas has spent over $4.5 billion dollars on the initiative.[118] The Operation encompasses several efforts, including traffic stops; deployment of National Guard troop; trespass charges pursued against migrants; and busing of migrants to perceived "sanctuary cities."[119]

In June 2023, Governor Abbott announced and directed the installment of floating barriers made of buoys and razor wire in the Rio Grande. The set-up has injured and imperiled migrants. In July 2023, an internal complaint by a Texas state trooper alleged "inhumane" results from the barriers and

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115 *Deaths in CBP Custody*, *supra* note 111.

116 Press Release, Greg Abbott, Governor, DPS Launch "Operation Lone Star" To Address Crisis At Southern Border, Office of the Tex. Governor (Mar. 6, 2021), https://gov.texas.gov/news/post/governor-abbott-dps-launch-operation-lone-star-to-address-crisis-at-southern-border [https://perma.cc/NN58-FVM6].

117 Proclamation by the Governor of the State of Tex., Greg Abbott, Governor, (May 31, 2021), https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf [https://perma.cc/X5L6-J2TS].

118 Elizabeth Findell, *Texas Spent Billions on Border Security. It's Not Working.*, WALL ST. J. (July 21, 2023, 7:00 AM), https://www.wsj.com/articles/texas-billion-dollar-border-security-migration-isn-t-paying-off-16ed598d [https://perma.cc/V58V-UKXQ]; Patrick Strickland, *Running Tab: With $4 Billion Already Spent, Abbott's Operation Lone Star Gets Another $359 Million*, DALL. OBSERVER (Oct. 29, 2022), https://www.dallasobserver.com/news/running-tab-with-4-billion-already-spent-abbotts-operation-lone-star-gets-another-359-million-15147757 [https://perma.cc/EP62-Q8VG] (describing increases in funding for Operation Lone Star); *see generally* H.B. No. 9, 87th Leg., 2d Sess. (Tex. 2021) (noting Texas's allocation of funding to Operation Lone Star in 2021).

119 *See* Emily Hernandez, *What is Operation Lone Star? Gov. Greg Abbott's Controversial Border Mission, Explained*, Tex. Trib. (Mar. 30, 2022), https://www.texastribune.org/2022/03/30/operation-lone-star-texas-explained/ [https://perma.cc/M8EH-K5XY] (describing the Operation's efforts regarding trespassing and the National Guard); Press Release, Office of the Texas Governor, Operation Lone Star Takes Historic Action Throughout 2022 (Dec. 29, 2022), https://gov.texas.gov/news/post/operation-lone-star-takes-historic-action-throughout-2022 [https://perma.cc/J7YP-3QL4] (citing Gov. Abbott's announcement on the Operation's efforts including traffic stops, busing of migrants, and sanctuary cities).

related practices.[120] He recounted treating lacerations and rescuing individuals caught in razor wire, including a pregnant 19-year-old who was having a miscarriage and in "obvious pain."[121] In August 2023, Mexican officials recovered two bodies around the buoys, one caught directly in the barrier and one found nearby.[122]

Other Lone Star operations have also posed deadly risks. In July 2022, civil rights groups submitted a complaint under Title VI of the Civil Rights Act to the US Department of Justice, documenting the involvement of Texas DPS officers in at least 30 vehicular deaths in Operation Lone Star counties.[123] And, at least one child has died on a bus route sponsored by Operation Lonestar.[124] Three-year-old Jismary Alejandra Barboza Gonzalez fell ill during the bus journey from Brownsville, TX to Chicago, IL and died in a hospital in Illinois.[125]

Thus far, the Biden Administration has allowed Operation Lonestar to continue largely unimpeded, save for action against the buoy and razor wire barriers. In August 2023, the Administration brought suit against Governor Abbott, alleging that the barriers violate the federal River and Harbors Act, which requires a U.S. Army Corps of Engineers permit for any structure maintained in navigable waters.[126] Yet the federal government has declined to challenge other aspects of Operation Lonestar that imperil migrants.

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120 Camilo Montoya-Galvez, *Texas Trooper Alleges Inhumane Treatment of Migrants by State Officials Along Southern Border*, CBS NEWS (July 18, 2023, 8:02 PM), https://www.cbsnews.com/news/texas-border-migrants-treatment-razor-wire-buoys-rio-grande [https://perma.cc/798X-J2KN].

121 *Id.*

122 *Mexico Recovers 2 Bodies from the Rio Grande, Including 1 Found Near Floating Barrier that Texas Installed*, CBS NEWS (Aug. 3, 2023), https://www.cbsnews.com/news/rio-grande-buoy-barrier-body-texas-abbott/ [https://perma.cc/BP3U-5X9K].

123 LETTER FROM ACLU OF TEX. AND TEX. CIVIL RIGHTS PROGRAM TO U.S. DEP'T OF JUSTICE, OPERATION LONE STAR: RACIAL PROFILING IN TEX. DEP'T OF PUB. SAFETY (DPS), TRAFFIC STOPS AND HIGH DEATH TOLL FROM VEHICLE PURSUITS (July 28, 2022), https://static.texastribune.org/media/files/eb613c7907c0e7385ac02da70fbc4e07/OLS%20Traffic%20Stops%20Title%20VI%20Complaint.pdf [https://perma.cc/XFL5-VFKZ]. The complaint also alleged racial profiling of individuals targeted by Texas officers under the program. *Id.* at 1.

124 J. David Goodman & Edgar Sandoval, *3-Year-Old Migrant Dies During Trip to Chicago on Bus Sponsored by Texas*, N.Y. TIMES (Aug. 11, 2023), https://www.nytimes.com/2023/08/11/us/migrant-child-abbott-bus.html [https://perma.cc/TNE5-99CV].

125 Rosa Flores & Sara Weisfeldt, *CDC Is Among Federal Agencies Investigating the Death of a 3-Year-Old Asylum-Seeker Who Was on a Texas-Sponsored Bus to Chicago*, CNN (Aug. 17, 2023, 9:47 PM EDT), https://www.cnn.com/2023/08/15/us/migrant-child-death-texas-bus/index.html [https://perma.cc/U6ZA-G78F].

126 *See* Complaint at 1-4, United States v. Greg Abbott, No. 23-00853, 2023 WL 4744192, (W.D. Tex. Aug. 3, 2023) (setting forth claims that Gov. Abbott violated the Act); *see also* Tony Romm, *How federal pandemic aid helped Texas pay for its border crackdown*, WASH. POST. (May 6, 2022), https://www.washingtonpost.com/us-policy/2022/05/06/texas-coronavirus-stimulus-immigration-border/ [https://perma.cc/6MQG-UUCB] (explaining Operation Lone Star funding).

C. DEATH BY DENIAL (PUBLIC CHARGE)

Additionally, the public charge provisions of our immigration laws[127] limit and deter immigrants from seeking vital social services—even those for which they are eligible. Although the provisions directly impact people applying for permanent residence (green cards) and admission to the United States,[128] the law deters other noncitizens from seeking out safety nets vital to health and wellbeing.

The public charge provisions date back to the earliest immigration laws in the era of Chinese Exclusion. The Immigration Act of 1882—passed just a few months after the 1882 Chinese Exclusion Act—directed the exclusion of "any convict, lunatic, or idiot, or any person unable to take care of himself or herself without becoming a public charge."[129] A version of public charge exclusion has persisted in our immigration laws ever since.[130] The relevant statute today provides that any noncitizen who is "likely at any time to become a public charge" is inadmissible, with only limited exceptions for refugees, asylum grantees, and certain crime victims.[131] Apart from those exclusions, the laws render noncitizens ineligible to enter the United States on the vast majority of visas and unable to obtain lawful permanent resident status if the government concludes they meet the "likely . . . to become a public charge" provision.[132]

In 1996, the federal government also drastically expanded restrictions on immigrants' eligibility for public benefits and services.[133] Thus, in addition to the significant deterrent effect of fear of being deemed a public charge,

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127 8 U.S.C. § 1182(a)(4)(A) (2022).

128 *Id.* Specifically, the statute renders applicants for admission and those seeking adjustment of status inadmissible: "Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." *Id.*

129 An Act to Regulate Immigration, Pub. L. No. 47-376, §2, 22 Stat. 214, 214 (1882).

130 *See* Immigration Act of 1891, ch. 551, 26 Stat. 1084, 1084 (referencing the 1891 public charge exclusion); Immigration Act of 1907, ch. 1134, § 2, 34 Stat. 898, 898-99 (referencing the 1907 public charge exclusion); Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875 (referencing the 1917 public charge exclusion); Immigration and National Act of 1952, ch. 477, § 212(a)(15),, 66 Stat. 163, 183 (referencing the 1952 public charge exclusion); Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, § 531(a), 110 Stat. 3009-546, 3009-674-75 (1996) (referencing the 1996 public charge exclusion).

131 8 U.S.C. § 1159 (2022).

132 8 U.S.C. § 1182(a)(4)(A) (2022). Congress has exempted certain forms of immigration relief from the public charge inadmissibility ground, including asylees, those with Temporary Protected Status, Special Immigrant Juveniles, and VAWA self-petitioners, among others.

133 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, § 402, 110 Stat. 2105, 2262; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, Title V, 110 Stat. 3009-546 (codified as amended in different sections of 8 U.S.C.).

noncitizens are also more directly ineligible to access a range of essential services.[134]

Officers making a public charge determination employ a "totality of the circumstances" test.[135] Since 1999, the Department of Homeland Security limited consideration of public charge to those receiving means-tested cash benefits: Supplemental Security Income; Temporary Assistance for Needy Families; state, local, and tribal cash assistance programs; and long-term institutional medical care paid for by the government.[136] The regulation, moreover, defined public charge exclusion as applying to individuals who will likely become "primarily dependent on the government for subsistence."[137] Both the public charge exclusion ground and the restriction on benefits have had devastating impacts on immigrants' overall health and well-being.[138]

In February 2019, the Trump Administration issued a wide-ranging new rule vastly expanding the scope of public benefits considered in applying the public charge provision.[139] The new rules directed DHS to consider for the first time the following programs on top of previous categories: SNAP (food stamps), Medicaid for non-emergency health care; and housing and rental assistance.[140] Litigation ensued, and a number of lower courts issued preliminary injunctions enjoining the implementation of the new rule.[141] The Supreme Court stayed the preliminary injunctions that lower courts allowed

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134 U.S. Dep't of Just., Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689–93 (May 26, 1999) (referencing the government's consideration of cash benefits in making public charge determinations); *see also* U.S. Dep't of Just., Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28676, 28676–88 (May 26, 1999) (referencing the government's consideration of cash benefits in making public charge determinations); U.S. Dep't of State, Immigration and Nationality Act 212(A)(4) Public Charge: Policy Guidance, 9 FAM 40.41 (referencing the examination of poverty status of noncitizens for public charge determinations); Tanya Broder & Gabrielle Lessard, *Overview of Immigrant Eligibility for Federal Programs*, NAT'L IMMIGRATION L. CTR. (Mar. 2023), https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/#_ftn45 [https://perma.cc/Z6YH-T754] (referencing the denial of public benefits to noncitizens).

135 8 C.F.R. § 212.22(b) (2022).

136 U.S Dep't of Just., Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28692 (Mar. 26, 1999).

137 *Id.*

138 *See* Cori Alonso-Yoder, *Publicly Charged: A Critical Examination of Immigrant Public Benefit Restrictions*, 97 DENV. L. REV. 1, 6–8 (2019) (discussing the myriad consequences immigrants face due to public charge regulations).

139 Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019).

140 It further directed that rather than consider whether an individual is likely to become "primarily dependent" on governmental assistance, adjudicators must consider as a public charge anyone "who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)". Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41295 (Aug. 14, 2019).

141 Casa de Md., Inc. v. Trump, 414 F. Supp. 3d 760 (D. Md. 2019); Cook Cnty v. McAleenan, 417 F. Supp. 3d 1008 (N.D. Ill. 2019); City of S.F. v. USCIS, 408 F. Supp. 3d 1057 (N.D. Cal. 2019); Wash. v. U.S. Dep't of Homeland Sec., 408 F.Supp.3d 1191 (E.D.Wash. 2019).

to go into effect.[142] The federal district court of the Southern District of New York. however, subsequently reinstated its injunction in light of new evidence related to the COVID-19 pandemic, unavailable at the time of the Supreme Court's stay decision.[143]

Notwithstanding the shifting landscape of actual implementation, the Trump-era rule succeeded in chilling access to essential programs for immigrants—even those who would have been eligible under the restrictions. A study by the Migration Policy Institute found that, in the first three years of the Trump Administration, participation in federal means-tested benefits programs for welfare, food stamps, and Medicaid "declined twice as fast among noncitizens as citizens."[144] Writing for the Annals of Family Medicine, a group of Southern-California-based physicians reported in 2020 that:

> [M]any of our patients are reluctant to enroll in programs for which they are eligible due to concerns about the proposed rules. One mother shared that she was hesitant to bring her children for immunizations. Another patient shared that he would not enroll in the federal supplemental nutrition assistance program even though his family met income criteria due to similar concerns.[145]

The authors warned that the Trump rule "has the potential to influence the health of millions of individuals by decreasing the use of health services, exacerbating health disparities, increasing poverty rates, and increasing the costs of US health care."[146] Analyzing the likely impact on health, housing, employment, and overall well-being, legal and public health scholar Medha Makhlouf concluded in 2019 that "the proposed rule has already inflicted suffering on millions of people living in the United States."[147]

President Biden reversed the Trump-era changes early in his Administration. On March 9, 2021, his Administration announced that it would no longer defend the Trump-era rule; a few days later, DHS published

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142 Wolf v. Cook Cnty., 140 S.Ct. 681 (mem.) (2020) (staying the District of Illinois's Illinois-wide injunction); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (mem.) (2020) (same for S.D.N.Y.'s nationwide injunction). The Fourth and the Ninth Circuits stayed the preliminary injunction in cases pending before it on pending appeal, but the Second and Seventh Circuits declined to issue a stay. City of S.F. v. USCIS, 944 F.3d 773 (9th Cir. 2019); Casa de Md., Inc. v. Trump, No. 19-2222 (4th Cir. Dec. 9, 2019); Cook Cnty. v. Wolf, No. 19-3169 (7th Cir. Dec. 23, 2019).

143 N.Y. v. U.S. Dep't of Homeland Sec., 475 F.Supp.3d 208 (S.D.N.Y. 2020). The district court found the Trump-era rule "deters immigrants from seeking testing and treatment for COVID-19, which in turn impedes public efforts . . . to stem the spread of the disease." *Id.* at 226.

144 Randy Capps, Michael Fix & Jeanne Batalova , *Anticipated "Chilling Effects" of the Public-Charge Rule Are Real: Census Data Reflect Steep Decline in Benefits Use by Immigrant Families* MIGRATION POL'Y. INST. (Dec. 2020), https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real [https://perma.cc/E6D4-7ZWM].

145 Haq, Cynthia et al., *Immigrant Health and Changes to the Public-Charge Rule: Family Physicians' Response*, 18 ANNALS OF FAM. MED., 458, 458 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7489958/ [https://perma.cc/FGP9-A4RS]

146 *Id.*; *see also* Krista M. Perreira et al., *A New Threat to Immigrants' Health - the Public-Charge Rule*, 379 NEW ENG. J. MED. 901, 901–903 (2018).

147 Medha D. Makhlouf, *The Public Charge Rule as Public Health Policy*, 16 IND. HEALTH L. REV. 177, 208 (2019).

a final rule vacating it.[148] On September 9, 2022, the Department issued a new proposed rule that reverted to the prior interpretation of the public charge provisions.[149]

The chilling effects of the Trump-era rule, however, continue. From interviews conducted in summer 2022—well after the Biden Administration had withdrawn the prior rule—Migration Policy Institute researchers found that "confusion and fear over triggering negative immigration consequences are keeping—and will likely continue to keep—many immigrants and their U.S.-born relatives from accessing benefits and services for which they are eligible."[150]

Moreover, these effects pre-date the Trump era and are impacted by states' enforcement orientation toward immigrants. A 2015 study demonstrated that in "states with broader and more intense immigration enforcement, eligible Latino citizens, and to a lesser extent noncitizens in general, are 'chilled' away from public support to which they are entitled."[151] In 2014, researchers similarly found that Medicaid participation among children of noncitizens—even eligible U.S. citizen children—diminished in times of heightened immigration enforcement.[152]

D. DEATH BY EXPULSION

Title 42 and Asylum Ban

One salient way that our immigration system has recently valued the lives of citizens over immigrants was through the questionable exercise of quarantine controls. Since 1893, Congress has provided that federal officials may prohibit "in whole or in part, the introduction of persons and property from such countries"[153] in order to counter the spread of contagious diseases. Today, that authority rests in 42 U.S.C. § 265 ("Section 265"), which provides that when a serious danger of introduction of a communicable disease "is so

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148 Dep't of Homeland Sec., Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14221. The notice announced "[t]his rule is effective on March 9, 2021, as a result of the district court's vacatur." *Id.* at 14221.

149 Dep't of Homeland of Sec., Public Charge Ground of Inadmissibility, 87 Fed. Reg. 55472. The State of Texas sued to enjoin implementation of the new rule, litigation over which which remains ongoing. *See* Complaint, Texas v. Mayorkas, No. 6:23-1 (S.D. Tex. Jan. 5, 2023), https://www.texasattorneygeneral.gov/sites/default/files/images/press/Public%20Charge%20Complaint%20-%20File%20Stamped%20Copy_0.pdf [https://perma.cc/RAL4-GYSN]. In the meantime, however, Biden rule remains in effect.

150 Jonathan Beier & Essey Workie, The *Public-Charge Final Rule Is Far from the Last Word,* MIGRATION POL'Y. INST. (Sept. 2022), https://www.migrationpolicy.org/news/public-charge-final-rule-far-last-word [https://perma.cc/BA3H-L7PW].

151 Francisco I. Pedraza & Ling Z, Stanford Center on Poverty and Inequality, *The "Chilling Effect" of America's New Immigration Enforcement Regime*, PATHWAYS 13, 17 (Spring 2015).

152 Tara Watson, *Inside the Refrigerator: Immigration Enforcement and Chilling Effects in Medicaid Participation*. 6 AM. ECON. J.: ECON. POL'Y 313 (2014).

153 Act of Feb. 15, 1893, ch. 114, § 7, 27 Stat. 449, 452 ("1893 Act").

increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health," the government has "the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as [it] shall designate in order to avert such danger, and for such period of time as [it] may deem necessary for such purpose."[154]

In March 2020, the Director of the Center for Disease Control (CDC)[155] invoked Section 265 in an order suspending the "introduction" of "covered aliens," for 30 days, defined as "persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land Port of Entry [("POE")] or Border Patrol station at or near the United States borders with Canada and Mexico."[156] The order noted that the CDC itself could not implement this policy, and requested that the Department of Homeland Security do so in its stead.[157]

On April 2, 2020, U.S. Customs and Border Protection issued a memorandum outlining procedures for implementing the CDC Order.[158] "Subjects encountered" would be brought to the nearest port of entry and "immediately" returned to Mexico or Canada—or, if "not amenable to immediate expulsion to Mexico or Canada," would be transported to a dedicated facility prior to expulsion to their home countries.[159] In April 2020, the CDC extended the order for another 30 days.[160] In May 2020 it extended the order indefinitely until such future time that the CDC director

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154 42 U.S.C. § 265 (2022).

155 In 1966, the Surgeon General delegated Title 42 authority to Health and Human Services, which in turn delegated it to the Center for Disease Control. 31 Fed. Reg. 8855 (June 25, 1966), 80 Stat. 1610 (1966).

156 Dep't of Health and Hum. Servs, Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060, 17061 (Mar. 26, 2020). An interim version of this rule, issued two days before, preceded the final version. *See* Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559 (Mar. 24, 2020) ("Interim Final Rule"). This article will refer to the successive invocations of Section 362 and 365 authority as the "Title 42 policy."

157 85 Fed. Reg. 17060-02 ("I consulted with DHS before I issued this order, and requested that DHS implement this order because CDC does not have the capability, resources, or personnel needed to do so.").

158 Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately—Ignoring Asylum Law*, PROPUBLICA, (Apr. 2, 2020), https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law [https://perma.cc/WXY3-BU3J].

159 Memorandum from the Centers for Disease Control and Prevention to U.S. Customs and Border Protection (Nov. 2021) https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/COVID%2019%20Capio.pdf [https://perma.cc/KMM5-N8GU] (granting the CBP the authority to "prohibit the introduction of certain persons in the United States who . . . create a serious danger of the introduction of [Covid 19] into the United States.").

160 U.S. Dep't of Health and Human Services & Centers for Disease Control and Prevention, Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 22424, 22425 (Apr. 22, 2020) (to be codified at 42 C.F.R. 71.40).

"determine[s] that the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health."[161]

Prior to this rule, regulations provided only for the stoppage of flows of goods and the quarantine—not expulsion—of people.[162] Moreover, the Title 42 policy as designed did little to actually "shut down" the border insofar as it targeted asylum seekers while allowing millions of others into the country for trade, commerce, and educational reasons.[163]

Advocates sued to enjoin the overly broad application of Title 42. In November 2020, a federal district court held Title 42 unlawful for unaccompanied immigrant children.[164] Under immigration laws, those children must be transferred promptly to the custody of the Department of Health and Human Services,[165] and any children whom the government wishes to remove must receive a full hearing through normal immigration court procedures.[166] The federal court held that Title 42 violated provisions mandating special care and custody of unaccompanied children.

Broader litigation attempts to stop implementation of the policy for adults and families did not succeed under the Trump Administration, although plaintiffs did secure an injunction against the entire Title 42 policy in late 2022, which the Supreme Court promptly stayed.[167] Moreover, while

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161 U.S. Dep't of Health and Human Services & Centers for Disease Control and Prevention, Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31503, 31504 (May 26, 2020) (to be codified at 42 C.F.R. 71.40).

162 Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minor*s, JUST SECURITY (Apr. 13, 2020), https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/ase [https://perma.cc/45ZK-267R] ("The regulations never before – in over seventy-five years — sought to use the statute as a substitute or mechanism for regulating admission under the immigration laws or for authorizing a noncitizen's deportation or return to their home country.").

163 *See* U.S. Dep't of Health and Human Services & Centers for Disease Control and Prevention, Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into the United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559, 16562 (2020) (issuing an interim final rule that "provides a procedure for CDC to suspend the introduction of persons from designated countries or places, if required, in the interest of public health.").

164 *See* P.J.E.S. by & through Escobar Francisco v. Wolf, 502 F. Supp. 3d 492 (D.D.C. 2020).

165 *See id.* at 540-41. In particular, enforcement officers must transfer children to the custody of the Department of Health and Human Services Office of Refugee Resettlement (ORR) within 72 hours of apprehension. ORR must provide for the care and custody of children in non-punitive, non-enforcement settings. *See* 8 U.S.C. § 1232(b)(3) (2022); *see also* 6 U.S.C. § 279(a), (b)(1)(A), (b)(1)(H), (b)(3) (2022). Most children in ORR custody are released to family members; many, however, are detained in state childcare facilities.

166 8 U.S.C. § 1232(a)(5)(D) (2022).

167 Advocates sued to enjoin Title 42 as unlawful and succeeded in securing vacatur of and an injunction against the entire Title 42 policy in late 2022. Huisha-Huisha v. Mayorkas, 642 F. Supp. 3d 1 (D.D.C. 20202), *cert. and stay granted sub nom*. Arizona v. Mayorkas, 143 S. Ct. 478, (2022), and vacated, No. 22-5325, 2023 WL 5921335 (D.C. Cir. Sept. 7, 2023). The D.C. district court held that the policy was arbitrary and capricious in violation of the Administrative Procedures Act. *Id*. at 16-24. In an

President Biden issued numerous executive orders and directives in his early days in office to end or wind down Trump-era immigration policies, his Administration allowed Title 42 to remain in place for almost two years.

Since its inception, U.S. immigration officials have used Title 42 over 2 million times to swiftly return migrants to Mexico or their home countries—including over 1 million times in FY2022 alone.[168] The consequences for asylum seekers at the border have been devastating. The policy ended the normal functioning and screening mechanisms for asylum at the U.S.-Mexico border. It did so, moreover, with little regard to the grave risks imposed upon refugees who were turned back to Mexico or sent to home countries where they feared persecution. Although Title 42 in practice contained some limited protections for non-return to persecution, these case-by-case exceptions were rarely approved.[169]

Meanwhile, those returned to Mexico faced immediate threats from lack of shelter and food and from cartels that violently targeted migrants. Since President Biden took office, Human Rights First "has tracked over 8,705 reports of kidnappings and other violent attacks against migrants and asylum seekers blocked in and/or expelled to Mexico by the United States government."[170] One account describes a man presenting at the Laredo port of entry while bloodied from torture at the hands of cartel members.[171] CBP officials still turned him away.[172] Other reports also document deadly circumstances faced by migrants subject to Title 42, including multiple experiences of cartel violence and extortion.[173]

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unusual procedural posture—a petition for certiorari on the denial of states' intervention motion—the Supreme Court stayed the lower court injunction. *Id.*. After the termination of the COVID-19 public health emergency, the Supreme Court vacated the D.C. Circuit's order denying intervention and remanded the case with instructions to dismiss the intervention motion as moot. *See* Arizona v. Mayorkas, 143 S. Ct. 1312 (2023).

168 CONG. RSCH. SERV., U.S. BORDER PATROL APPREHENSIONS AND TITLE 42 EXPULSIONS AT THE SOUTHWEST BORDER: FACT SHEET (Dec. 19, 2022).

169 *See* AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER 1, 3 (May 22, 2022), ("[Out of 1.8 million returns] [f]rom March 2020 through September 2021, just 3,217 people were screened for torture prior to being expelled, and only 272 people were granted an exemption and permitted to seek asylum.").

170 Julia Neusner & Kennji Kizuka, *A Shameful Record: Biden Administration's Use of Trump Policies Endangers People Seeking Asylum*, HUM. RTS. FIRST, (Jan. 13, 2022), https://humanrightsfirst.org/library/a-shameful-record-biden-administrations-use-of-trump-policies-endangers-people-seeking-asylum/ [https://perma.cc/GMQ4-YRWX].

171 HUMAN RIGHTS FIRST, TRACKER OF REPORTED ATTACKS DURING THE BIDEN ADMINISTRATION AGAINST ASYLUM SEEKERS AND MIGRANTS WHO ARE STRANDED IN AND/OR EXPELLED TO MEXICO 19 (Sept. 19, 2021).

172 *Id.*

173 *See, e.g.*, KATHRYN HAMPTON ET AL., NEITHER SAFETY NOR HEALTH: HOW TITLE 42 EXPULSIONS HARM HEALTH AND VIOLATE RIGHTS, PHYSICIANS FOR HUMAN RIGHTS 3, 12 (2021), https://phr.org/wp-content/uploads/2021/07/PHR-Report-United-States-Title-42-Asylum-Expulsions-July-2021.pdf.pdf [https://perma.cc/P2YZ-X5GB] (noting that six out of twenty-seven people interviewed were extorted by cartels after U.S. officials returned them to Mexico pursuant to Title 42).

Notably, public health scholars and experts forcefully objected to the ban for failing to serve its stated purposes. Writing in the *New England Journal of Medicine*, public health and medical experts concluded that "[t]here was — and remains — no public health evidence that singling out asylum seekers or other migrants for exclusion is effective in stemming the spread of COVID-19."[174] Physicians for Human Rights concluded that, despite being justified as a public health policy, "every aspect of the expulsion process, such as holding people in crowded conditions for days without testing and then transporting them in crowded vehicles, increases the risk of spreading and being exposed to COVID-19."[175]

In January 2021, a group of public health scholars and administrators delivered detailed recommendations to President Biden's new Administration on how to better manage COVID-19 at the border.[176] The experts noted Title 42's imposition of "restrictions on asylum seekers and other migrants based on immigration status is discriminatory and has no scientific basis as a public health measure."[177] They recommended measures such as "masks, social distancing, hand hygiene, distancing demarcations, and barriers"; "avoid[ance] of congregate and high-density situations"; "the "[r]amp up [of] testing capacity . . . and scale up [of] quarantine and isolation capacities"; and ending use of detention as better, evidence-based approaches to preventing the spread of COVID-19 from border processing.[178]

Yet, President Biden continued Title 42. Finally, in April 2022, his Administration announced that it would terminate the policy effective May 23, 2022.[179] Dr. Rochelle Walensky, Center for Disease Control Director, explained in her memorandum and order that:

> Following an assessment of the current epidemiologic status of the COVID-19 pandemic and the U.S. government's ongoing response efforts, I find there is no longer a public health justification for the August Order and previous Orders issued under these authorities; employing such a broad restriction to preserve the health and safety of U.S. citizens, U.S. nationals, and lawful permanent residents, and personnel and noncitizens in POE and U.S. Border Patrol stations is no longer necessary to protect the public health.[180]

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174 Anne G. Beckett, et al., *Misusing Public Health as a Pretext to End Asylum — Title 4*2, 36 NEW ENG. J. MED. e41(1), e41(1) (Apr. 21, 2022).

175 HAMPTON, *supra* note 173, at 4.

176 Letter from Public Health Experts to Norris Conchron, Acting Secretary, Dept' of Health and Hum. Servs. and Rochelle Walensky, Director, Ctrs. for Disease Control and Prevention (Jan. 28, 2021), https://www.publichealth.columbia.edu/file/7597/download?token=F5AyPn5M [https://perma.cc/3HEM-QHE4].

177 *Id*.

178 *Id*. at 3.

179 U.S. Dep't of Health and Human Services & Centers for Disease Control and Prevention, Public Health Determination and Order Regarding the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 87 Fed. Reg. 19941 (Apr. 6, 2022).

180 *Id.* at 19955.

She further explained that "although COVID-19 remains a concern, the readily available and less burdensome public health mitigation tools to combat the disease render a [Title 42 order] . . . unnecessary."[181] Yet, even in terminating the policy, the memorandum places emphasis on the health and safety of status-privileged persons within the United States: namely U.S. *citizens* (mentioned first), U.S. *nationals*, *lawful permanent residents*, and *U.S. personnel*. Although it also mentions "noncitizens in POE [ports of entry] and U.S. Border Patrol stations,"[182] broader concern about noncitizens within our nation and beyond is absent. Title 42 section 265 itself, moreover, delineates the protection of the "United States" and "public health" generally as its purposes—and does not differentiate on the protection priorities of persons based on immigration status.

States attorneys general sued to block termination, garnering a preliminary injunction against its winddown.[183] And, although the Biden Administration has continued to fight the states' challenge in litigation, it also paradoxically expanded the scope of Title 42 even after the intended end date of the entire program. In October 2022, it broadened Title 42 to apply to migrants from Venezuela.[184]

Finally, on May 11, 2023, the Biden Administration successfully ended the Title 42 program in light of the expiration of the COVID-19 public health emergency.[185] That same day, however, the Administration put into effect new regulations that drastically limited access to asylum.[186] The new rules bar asylum for individuals who passed through a country other than their own to reach the U.S.-Mexico border. The rule exempts individuals who have travel documents; apply in advance for parole; make an appointment through CBP One[187]; or are denied asylum in the country of transit. It also exempts

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181 *Id.* at 19953.

182 *Id.* at 19955.

183 *See* Louisiana v. Ctr. for Disease Control, 603 F.Supp.3d 406 (W.D. La. 2022). The states contended that the Biden Administration had not provided sufficient rationale for termination of Title 42. The district court agreed that states were likely to prevail on administrative law grounds and issued a preliminary injunction.

184 U.S. DEP'T OF HOMELAND SEC., DHS ANNOUCES NEW MIGRATION ENFORCEMENT PROCESS OF VENEZUELANS, DHS.GOV, https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans (Oct. 12, 2022). As noted above, advocates secured an injunction against the entire Title 42 policy in late 2022, which the Supreme Court stayed. *See* note 167, *supra*.

185 *See* CENTER FOR DISEASE CONTROL AND PREVENTION, END OF THE FEDERAL COVID-19 PUBLIC HEALTH EMERGENCY (PHE) DECLARATION, https://www.cdc.gov/coronavirus/2019-ncov/your-health/end-of-phe.html [https://perma.cc/ZWL9-YRVB] (Sept. 12, 2023); *See also* H.J. Res. 7, 118th Cong. (2023) Pub. L. 118-3. 137 Stat. 6 (Apr. 10, 2023) (joint resolution of Congress terminating COVID-19 national emergency).

186 Dep't of Homeland Sec., Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023) (effective date May 11, 2023).

187 *Id.* Numerous reports have shown that the application is riddled with glitches and often inaccessible. Dark-skinned users in particular have reported failures of the application—which uses facial

unaccompanied children and those who present "exceptionally compelling circumstances," such as an acute medical emergency or imminent threats to life.[188]

Individuals deemed subject to the ban—via cursory border screening processes—are prohibited from seeking asylum and subject to expedited removal. The Mexican government, moreover, has agreed to accept non-Mexican nationals subject to swift removals.[189] As immigrants' rights groups have pointed out, these processes place individuals in precisely the same circumstances of precarity and danger they experienced under Title 42.[190]

Advocates representing immigrants' rights groups sued to enjoin the rule and won a nationwide injunction; however, the Ninth Circuit stayed the lower court decision.[191] As of now, the rule remains in place.

Deportation to Death

Finally, one of the starkest ways in which our immigration system causes death is deportation to places where individuals face serious mortal risks. In immigration courts throughout the country and in border screening interviews, people daily raise claims of fear of persecution, torture, and death. And also daily, judges deny these claims and enforcement officers fail to credit them. In every case, deportation entails the forcible return of individuals by the machinery of our government. As scholar Angélica Cházaro has written, "deportation is violence."[192] In some cases, it also entails the near-immediate death of the individual deported.

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recognition technology—to validate their faces as "live." *See* Melissa del Bosque, *Facial Recognition Bias Frustrates Black Asylum Applicants to US, Advocates Say*, THE GUARDIAN, Feb. 8, 2023, https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias [https://perma.cc/UAM5-36JU]; *see also* NATIONAL IMMIGRATION PROJECT & TOGETHER & FREE, FACING AN IMPOSSIBLE CHOICE at 3, Jul. 24, 2023, https://nipnlg.org/sites/default/files/2023-07/2023_Facing-An-Impossible-Choice.pdf [https://perma.cc/B5E2-HT6P]. Moreover, the application offers only English, Spanish, and Haitian Creole text, leaving speakers of other languages and those who are illiterate unable to understand its instructions.

188 *See* 88 Fed. Reg. 31314*; see also* 8 C.F.R. § 208.33(a)(2), (3) (2023).

189 *See US: Biden 'Asylum Ban' Endangers Lives at the Border*, HUMAN RIGHTS WATCH (May 11, 2023), https://www.hrw.org/news/2023/05/11/us-biden-asylum-ban-endangers-lives-border [https://perma.cc/8VJP-N4XN].

190 *See id.* (asserting that Biden Administration policies lead to similar outcomes for immigrants attempting to cross the border as the outcomes under Title 42*); see also* HUMAN RIGHTS FIRST, A LINE THAT BARELY BUDGES: U.S. LIMITING ACCESS TO ASYLUM NOGALES, ARIZONA PORT OF ENTRY 2–5 (June 2023), https://humanrightsfirst.org/wp-content/uploads/2023/06/A-Line-That-Barely-Budges_Nogales-Arizona-1.pdf [https://perma.cc/X6GN-5R37].

191 *See* E. Bay Sanctuary Covenant v. Biden, No. 23-16032, slip op. at 1 (9th Cir. Aug. 3, 2023) (ordering stay of lower court injunction); E. Bay Sanctuary Covenant v. Biden, No. 18-cv-06810, 2023 WL 4729278, at *19 (N.D. Cal. July 25, 2023) (ordering a nationwide injunction against the rule).

192 Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1049 (2021). Professor Cházaro takes as a starting point Ruth Wilson Gilmore's definition of violence as "the state-sanctioned or

The United States itself does not track the number of people killed after deportation by its immigration enforcement system.[193] A February 2020 Human Rights Watch report, however, examined deportations to El Salvador and "identified or investigated 138 cases of Salvadorans killed since 2013 after deportation from the US."[194] The majority of these 138 people died within a few days to two years following deportation.[195] Many individuals sought asylum or other protections from return based on fear of persecution or torture, but had their claims rejected by an immigration court.[196] The report authors posit that "El Salvador's high homicide rates (alongside many other types of harm), and the fact that these cases have been reported publicly over time, has put the United States government and its immigration officials on notice."[197] The deaths that follow are, as a result, predictable. And yet they continue.

One account cited in the Human Rights Watch report, and also separately explored in a news article, is that of Ronald Acevedo, a 20-year-old Salvadoran youth who died just days after the U.S. deported him. Mr. Acevedo fled after receiving repeated threats from the MS-13 gang. Mr. Acevedo wrote in his asylum application, "They already kill my friends, and they are going to do the same to me."[198]

U.S. immigration officers detained him in an ICE facility in Arizona for eight months. His family members explained that he gave up only after immigration officials told him that he would be detained for many more months and that he had no chance of winning his asylum case.[199] Nor were

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extralegal production and exploitation of group-differentiated vulnerability to premature death." However, she also cautions that "describing deportation as violence risks abstraction," and we should analyze the concrete, everyday ways that individuals enact and perpetuate the violence of deportation. *Id.* (quoting RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 28 (2007)).

193 *See* Sarah Stillman, *When Deportation is a Death Sentence,* NEW YORKER (Jan. 8, 2018) https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence (asserting that the United States does not track the number of deaths of deportees); Kevin Sieff, *When Death Awaits Deported Asylum Seekers*, WASH. POST (Dec. 2 https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/?noredirect=on [https://perma.cc/KW5F-7HNX] ("Some nongovernmental groups have made efforts to track the number of deaths, but there are no official mechanisms to catalogue them.").

194 ELIZABETH G. KENNEDY AND ALISON PARKER, DEPORTED TO DANGER: UNITED STATES DEPORTATION POLICIES EXPOSE SALVADORANS TO DEATH AND ABUSE, HUMAN RIGHTS WATCH 351 (Feb. 2020) https://www.hrw.org/sites/default/files/report_pdf/elsalvador0220_web_0.pdf [https://perma.cc/CW8U-NS29]

195 *Id*. The study excluded from its count anyone killed over five years after being deported, as well as individuals who returned to El Salvador voluntarily. *Id.* at 36, 36 n.113.

196 *See generally id.* (recounting cases in which asylum and other relief were sought but denied).

197 *Id.* at 27.

198 Sieff, *supra* note 193.

199 *See id.* ("His family says that he expressed a willingness to return to El Salvador only after immigration officers told him that he had no chance of gaining asylum and could spend many more months in detention.").

the officials even completely misleading – in the Eloy immigration court that heard his case, every single judge had an asylum denial rate of over 90% in 2013-2018.[200] He had no chance of having his case heard in a different court so long as ICE continued to detain him. In his last hearing before the immigration judge, Mr. Acevedo withdrew his claim for asylum,[201] and on November 29, 2017, the U.S. government deported him back to El Salvador. On December 5, 2017, he disappeared. His body was discovered in the trunk of a vehicle with signs of torture.[202] In a statement responding to reporting over Mr. Acevedo's death, a Department of Justice spokesperson denied that the U.S. government deported asylum seekers to danger.[203] He proclaimed that the Trump Administration, rather, was "doing exactly what we are supposed to do: executing the laws written by Congress and bringing precedents in line with those laws."[204]

Mr. Acevedo's death shows how intersecting forms of violence in our immigration system cause the deaths of individuals. Although his fears were legitimate, Mr. Acevedo's extended time in detention, combined with his hopelessness about his immigration case, led him to simply give up at the cost of his own life.

New reports have also documented deported individuals' deaths in other countries. In one coordinated effort, Columbia School of Journalism has attempted to track deaths of individuals deported. From 2016 to 2018, the Global Migration Project database contained cases of more than sixty individuals deported to death by the U.S. government.[205] Nelson Avila-Lopez, a gay asylum seeker from Honduras, died in a prison fire in early 2012 four months after being deported.[206] Juan Carlos Coronilla-Guerrero—who came to the attention of ICE after being charged with a misdemeanor for possession of a quarter of a gram of marijuana—was deported to Mexico in June 2017 and awoken in bed by gunmen three months later.[207] His body was found with multiple bullet holes.

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200 *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013-2018*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Jan. 23, 2023), https://trac.syr.edu/immigration/reports/judge2018/denialrates.html [https://perma.cc/63EJ-Z97H].

201 Sieff, *supra* note 193.

202 *Id.* ("He disappeared on Dec. 5, 2017, and his body was later found in the trunk of a car, wrapped in white sheets. An autopsy showed signs of torture.").

203 *Id.*

204 *Id.*

205 *See Postgraduate Fellowship Archive: Global Migration Project*, COLUM. JOURNALISM SCH., https://journalism.columbia.edu/postgraduate-fellowships-archive#Global_Migration_Project [https://perma.cc/VR84-VQXK] (last visited Feb. 15, 2023) (tracking the cases of more than sixty individuals deported by the U.S. government who subsequently died).

206 Stillman, *supra* note 193.

207 *Id.*

As with other forms of violence described, deportation is racialized state violence. Over 98% of U.S. deportations are of citizens of Latin American countries, including over 90% from just four countries: Mexico, Guatemala, Honduras, and El Salvador.[208] As many scholars have demonstrated, the U.S. bears particular responsibility for conditions of violence and death in these countries given decades of foreign interventions and its deportation policies. Cecilia Menjívar and Néstor Rodríguez describe the formation and crisis of a "U.S.-Latin American Interstate Regime."[209] They and others have detailed how U.S. support of authoritarian governments, economic extraction, and/or intervention in counterinsurgency wars have destabilized El Salvador, Honduras, Guatemala, and regions of Mexico in particular.[210] And yet, none of this factors in when the U.S. decides to deport individuals to those same countries, even to conditions of mortal risk that the U.S. helped create.

III. DOCTRINE, LIFE, AND DEATH

The above accounts show how our immigration system causes death and the risk of death through enforcement, exclusion, denial, and deportation. Law and jurisprudence structure and enable the same. In each of the deadly aspects of our system described, the people subject to the risk of death and death are persons, whom constitutional principles ought to protect. And yet, immigration law and constitutional law doctrines strip noncitizens of personhood in multiple ways that contribute to the taking and diminishment of life. I posit that they, too, form an essential part of the necropolitical architecture of our immigration system.

In my discussion, I focus on constitutional law frameworks because, in our system, these principally guide understandings of personhood, territory, and sovereignty. But I would be remiss not to mention that my discussion omits administrative law challenges, including to some of the policies discussed in Section II.[211] This developing area of caselaw, and the Supreme Court's

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208 Tanya Golash-Boza, *Racialized and Gendered Mass Deportation and the Crisis of Capitalism*, 22 J. WORLD-SYS. RSCH. 38, 39 (2016) (parsing data from 2017) (discussed in Cházaro, *supra* note 192).

209 *See generally* WHEN STATES KILL: LATIN AMERICA, THE U.S., AND TECHNOLOGIES OF TERROR 8-10 (Cecilia Menjívar & Néstor Rodriguez eds., 2005) (tracing and exploring the formation of a "U.S.-Latin America interstate regime").

210 *See id.* (explaining wartime activities conducted in Latin American countries by the U.S. government and its agencies); *see also* Mark Peceny & William D. Stanley, *Counterinsurgency in El Salvador*, 38 POL. & SOC'Y 67 (2010) (examining U.S. government counterinsurgent policies and outcomes in El Salvador); Philip L. Shepherd, *The Tragic Course and Consequences of U.S. Policy in Honduras*, 2 WORLD POL'Y J. 109, 110 (1984) (detailing the "disastrous effect[ ]" Reagan Administration policies have had on Honduras); Susanne Jonas, *Dangerous Liaisons: The U.S. in Guatemala*, 103 FOREIGN POL'Y 144 (1996) (recalling U.S. government and agency involvement in Guatemala tracing back to the 1950s).

211 In fact, administrative legal challenges have proven essential to noncitizen litigants wishing to challenge executive overreach—precisely because their constitutional rights have been so constrained. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom*

varying inclinations to intervene (or not) under different presidential administrations, also illuminates critical judgments on the value of noncitizen life.

An important caveat: in the sections below, I discuss various ways that legal doctrines normalize and condone death and risks to life woven throughout our immigration system. In some ways, these doctrines do so uniquely; in other ways, they resemble failures of protections for life in other areas, such as policing and mass incarceration. The resemblance is not coincidence, but rather a reflection of interrelated practices, histories, and forms.[212] State violence against Black and brown communities and the attendant failures of legal doctrine abound for citizens as well as noncitizens. Given the scope of this article, I focus here on how doctrine fails noncitizens swept up in our immigration legal systems.

A. BACKDROP: PLENARY POWER (AS EVER)

In the immigration context, plenary power has long limited the constitutional protections available to noncitizens targeted by our immigration enforcement systems.[213] These include limited protections against those aspects of the immigration system that contribute to its deadly nature. The Court in 1889 in *Chae Chan Ping v. United States* declared the power to exclude immigrants from territory "an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the [C]onstitution."[214] Accordingly, "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."[215] A few years later, in *Fong Yue Ting v. United States*,[216] the Court extended this principle to *expulsion* (or deportation) from territory – upholding a law providing for deportation of Chinese immigrants who cannot show residency via testimony of "one credible white witness."[217] In 1896, the Court in *Wong Wing v. United States*[218] determined that deportation (and attendant detention)

Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 549, 580-603 (1990) (discussing seminal administrative law cases that rely on what Motomura terms "phantom constitutional norms"). It has also grown increasingly important to states wishing to re-assert their own sovereign interests against the federal government, as well as against the arrival of noncitizens themselves.

212 *See, e.g.*, César Cuauhtémoc García Hernández, *Immigration Detention As Punishment*, 61 UCLA L. Rev. 1346, 1360, 1368 (2014) (examining the "common roots of immigration and penal incarceration" and the "growing nexus between immigration and criminal policing").

213 *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5 (1998) (examining the development of the plenary power doctrine of immigration law).

214 130 U.S. 581, 609 (1889).

215 *Id.*

216 149 U.S. 698 (1893).

217 *Id.* at 1028.

218 163 U.S. 228 (1896).

were *not* punishment subject to the greater protections afforded to criminal process.[219] The *Wong Wing* Court, however, proceeded to strike down a statutory provision imposing hard labor for immigration infractions—holding that this consequence did constitute punishment and necessitated a judicial trial.[220]

Immigration and constitutional law scholars have parsed plenary power's contours and implications for decades, calling for its curtailment or termination.[221] They have criticized the doctrine's racist origins and applications, both in the context of immigration law and in its use against Native American tribes and non-White communities in U.S. territories.[222] Yet, the doctrine persists, in ways that eviscerate the constitutional protections that immigrants would otherwise have against governmental overreach—including actions that imperil their lives. Below, I discuss how the doctrine and developments within in it do so in several respects.

B. SPECTACLE AND SLOW DEATH, REVISITED (SUBSTANTIVE DUE PROCESS)

The Court has recognized that deportation "may result . . . in loss of both property and life, or of all that makes life worth living."[223] And yet, despite these statements on the stakes of deportation, constitutional law has not recognized any substantive due process right of noncitizens to remain in the United States via immigration processes.[224] Rather, the ability to stay here—

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219 *See id.* at 235–237.

220 *Id*. at 237-38.

221 *See, e.g.*, Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 212 (2003) (explaining plenary power's incompatibility with liberal theory); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 260–261 (describing doctrinal errors and faulty reasoning in plenary power cases); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) ("[Plenary power] doctrine had long been under heavy fire from many quarters.").

222 *See. e.g.*, Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 7 (2002) (examining how plenary power targeted Native American tribes, non-White communities in U.S. territories, and immigrants); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 30 (2003) (examining plenary power and racialized exclusions of those deemed "Other").

223 Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); *see also* Bridges v. Wixon, 326 U.S. 135, 147 (1945) (quoting *id.*). In *Ng Fung Ho*, the Court held that U.S. citizens have clear due process protections against deportation. 259 U.S. at 284–85. The petitioners in that case were individuals of Chinese descent whom the government attempted to deport despite their claims of U.S. citizenship. *See id.* at 281–82.

224 *See, e.g.,* Herrera-Inirio v. I.N.S., 208 F.3d 299, 309 (1st Cir. 2000) ("The removal order in this case, while strong medicine, in no way sinks to the level of 'outrageous, uncivilized, and intolerable' conduct . . . nor does it 'shock the conscience.'") (citation omitted); Mwagile v. Holder, 374 F. App'x 809, 817 (10th Cir. 2010) ("To the extent Mr. Mwagile argues that the BIA's removal order shocks the

no matter the ties that bind a person to their family or community, or the harm they will face in their home countries, is but a "legislative grace."[225]

With regard to matters other than deportation itself, courts have recognized that immigrants retain certain substantive due process rights even within our immigration enforcement system. Where courts have recognized these protections, they have done so by differentiating the governmental action at issue from the "normal" operation of that system. For example, in *Ms. L v. ICE*, a district court in June 2018 issued a nationwide preliminary injunction against the Trump-era family separation policy.[226] Under that policy, the U.S. government forcibly separated adults arriving at or near the U.S. border from their children,[227] referring parents for criminal prosecution or ICE detention and transferring the children as "unaccompanied minors" to the custody of the Department of Health and Human Services. Over the course of the program, enforcement arms of the government separated over 2,600 children from their parents.[228] Years later, many children remain apart from their parents.[229]

Plaintiffs argued, and the district court agreed, that they were likely to show a violation of the class members' substantive due process rights under

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conscience, we cannot agree. The removal order merely applied the laws enacted by Congress. We therefore reject Mr. Mwagile's substantive due process claim.").

In one notable exception, a district court found governmental action, including a U.S. prosecutor's interference in a Chinese national's asylum claim, to violate an individual's substantive due process right. Xiao v. Reno, 837 F. Supp. 1506, 1511, 1547, 1559 (N.D. Cal. 1993), *aff'd sub nom.*, Wang v. Reno, 81 F.3d 808 (9th Cir. 1996). But the district court there focused on the use of compulsory criminal process to force the asylum seeker to testify under oath in a U.S. courtroom and face execution in China. It found a substantive due process violation only after characterizing the actions of the government as non-immigration related. *See* 837 F. Supp. at 1549 ("Wang's substantive due process claim does not implicate the federal government's power over immigration.").

225 *See* Kerry v. Din, 576 U.S. 86, 97 (2015) ("Although Congress has tended to show a continuing and kindly concern . . . for the unity and the happiness of the immigrant family this has been a matter of legislative grace rather than fundamental right.") (internal quotation and citation omitted); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 214 (1953) ("[T]emporary harborage, an act of legislative grace, bestows no additional rights."); *see also* Negusie v. Holder, 555 U.S. 511, 549 (2009) (Thomas, J., dissenting) ("The decision to admit an alien is a matter of legislative grace . . . .").

226 Ms. L. v. U.S Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1136 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019), *and enforcement in part, denied in part sub nom.*, Ms. L. v. U.S. Immigr. & Customs Enf't, 415 F. Supp. 3d 980, 985 (S.D. Cal. 2020).

227 Jeff Sessions, U.S. Att'y. Gen., Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions [https://perma.cc/J53T-58R8]; Ms. L., 310 F. Supp. 3d at 1136.

228 *See Family Separation: By the Numbers*, ACLU (Oct. 2, 2018), https://www.aclu.org/issues/family-separation [https://perma.cc/7EHC-GW2R] ("The government has since provided the court with data that indicates at least 2,654 immigrant children were separated from their parents or caregivers as a result of Trump administration policies.").

229 *See id*. (describing over 100 children who remained separated); Geoff Bennett, *Hundreds of Migrant Children Remain Separated from Families Despite Push to Reunite Them*, PBS (Feb. 6, 2023), https://www.pbs.org/newshour/show/hundreds-of-migrant-children-remain-separated-from-families-despite-push-to-reunite-them [https://perma.cc/J33A-952D] (recounting the prevalence of still separated immigrant children years after the Trump Administration policy ended).

the Fifth Amendment. The district court systemically considered both the justifications for the policy and its manner of implementation. It highlighted, in particular, the government's abject failure to keep track of the children so that the parents could contact and ultimately reunite with them.

The district court proceeded to determine that plaintiffs were likely to succeed in their Fifth Amendment claim, relying on *County of Sacramento v. Lewis*.[230] In *Lewis*, the Supreme Court considered the correct standard for a substantive due process claim arising from a high-speed police chase that left a teenage boy dead. It held that in emergency circumstances, officer conduct only violates due process if it "shocks-the-conscience" and exhibits an intent to harm.[231] Applying *Lewis*, the *Ms. L.* court found family separation an intentionally harmful act and concluded:

> This practice of separating class members from their minor children, and failing to reunify class members with those children, without any showing the parent is unfit or presents a danger to the child is sufficient to find Plaintiffs have a likelihood of success on their due process claim. When combined with the manner in which that practice is being implemented . . . . [a] practice of this sort implemented in this way is likely to be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience, interferes with rights implicit in the concept of ordered liberty, and is so brutal and offensive that it does not comport with traditional ideas of fair play and decency.[232]

As many have noted, the family separation policy was spectacle-like in its cruelty. But the more pervasive harms of the immigration enforcement system—even grave ones—have remained beyond the reach of substantive due process protections. In *Aguilar v. ICE*,[233] for example, the First Circuit rejected plaintiffs' claim that family separation resulting from an ICE raid violated substantive due process. ICE agents in that case had raided a factory in Massachusetts and transported undocumented workers to detention facilities in Texas, separating the parent workers from their children by nearly two thousand miles.[234] The First Circuit held such separation did not reflect willful malice and thus could not meet the "shock the conscience" standard. *Aguilar* reflects a spectacular use of violence—far beyond slow—that nevertheless fails to shock.[235]

Meanwhile, the family separation wrought by daily hundreds of deportation orders and immigration denials fails to merit real consideration in doctrine at all. As to the destruction of family unity imposed by an

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230 523 U.S. 833, 855 (1998).

231 *Id.* at 854.

232 Ms. L., 310 F. Supp. 3d at 1145-46 (internal quotation and alteration omitted) (citing Lewis, 523 U.S. at 847 n.8; Rochin v. Cal., 342 U.S. 165, 169 (1952) Breithaupt v. Abram, 352 U.S. 432, 435 (1957); Palko v. State of Conn., 302 U.S. 319, 325 (1937), *overruled in part by* Benton v. Maryland, 395 U.S. 784 (1969)).

233 510 F.3d 1, 21–24 (1st Cir. 2007).

234 *Id.* at 6.

235 *See* Section I.C., *supra* (discussing work of Professors Lee, Chacón, and De Genova).

"ordinary" immigration denial—crushing, enormous, and spectacular to those subject to it—the Ninth Circuit recently summarized the state of the case law succinctly: "Plaintiff's substantive due process claim is not colorable, and we decline to consider it further."[236]

C. CROSSING LINES: CIVIL VERSUS CRIMINAL (SDP, PART 2)

Another way that litigants have made inroads for substantive due process protections for noncitizens centers on the line between civil enforcement and criminal punishment. These challenges draw from Supreme Court precedent that creates a dividing line between civil and criminal forms of detention as well as punitive versus non-punitive conditions of confinement.[237]

In the ICE detention context, a governmental purpose of enforcing immigration law is permissible, but tipping into the realm of punishment is not. In *R.I.L–R. v. Johnson*,[238] plaintiffs used this line-drawing principle to challenge family immigration detention—and in particular, the use of certain justifications for such detention. A federal district court agreed that the government could not make individual family detention decisions based on the mass deterrence impact on *other* migrants who might seek to come to the United States. Discussing Supreme Court caselaw in the sexual offender civil commitment context,[239] the *R.I.L–R.* court reasoned that "civil detention may not become a mechanism for retribution or *general deterrence*—functions properly those of criminal law, not civil commitment."[240] The district court further discussed the permissible civil goals of immigration detention, which include ensuring the appearance of individuals in immigration proceedings

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236 Gebhardt v. Nielsen, 879 F.3d 980, 988 (9th Cir. 2018); *see also* Gallanosa by Gallanosa v. United States, 785 F.2d 116, 120 (4th Cir. 1986) ("The courts of appeals that have addressed this issue have uniformly held that deportation of the alien parents does not violate any constitutional rights of the citizen children."); Gonzalez-Cuevas v. Immigr. & Naturalization Serv., 515 F.2d 1222, 1224 (5th Cir. 1975) ("Legal orders of deportation to their parents do not violate any constitutional right of citizen children.").

237 *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee."); United States v. Salerno, 481 U.S. 739, 747 (1987) ("To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent.") (upholding requirements for pre-trial detention under the federal Bail Reform Act).

238 80 F. Supp. 3d 164, 170–71 (D.D.C. 2015).

239 *See* Kansas v. Crane, 534 U.S. 407 (2002); Kansas v. Hendricks, 521 U.S. 346 (1997). Both cases considered challenges to Kansas's sex offender civil commitment laws. 534 U.S. at 409–411. *Hendricks* held that the Kansas law did not violate substantive due process limits on civil commitment on its face. 521 U.S. at 356. In *Crane*, however, the Court later held that substantive due process does not permit civil commitment of dangerous sexual offenders without any lack-of-control determination, and struck down the law as applied to a petitioner who had not received such determination. 534 U.S. at 412.

240 *See* 80 F. Supp. 3d at 189 (quoting 543 U.S. at 412 (2002) (internal quotation marks omitted)).

and protecting against danger to the community.[241] The court entered a preliminary injunction preventing the government from detaining families for deterrence purposes rather than considering individualized flight risk or danger.[242]

Yet, operating in the backdrop of the *R.I.L–R.* court's determination was the novel nature of mass family detention under the Obama Administration. Prior Administrations had engaged in the practice but in far more limited scale. DHS under George W. Bush, for example, had maintained a 500-bed facility, the Don T. Hutto center in Texas, which opened in 2006 and shut down a year later following litigation.[243] A facility of a few dozen beds in Berks County, PA also detained families for most of its operation since 2001.[244] But President Obama's explicit use of family detention as deterrence—announced in 2014 and accompanied by the construction of new family facilities in Texas with over 2000 beds—exceeded the prior uses in scope and scale.

R.I.L–R. constitutes a rare instance of a court finding reasons for immigration enforcement decisions sufficiently punitive so as to likely violate substantive due process. In nearly every other context, including adult ICE detention, attempts to rely on this line have failed in the realm of court orders—although some have won the issue on policy grounds.[245]

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241 *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("The statute, says the Government, has two regulatory goals: 'ensuring the appearance of aliens at future immigration proceedings' and '[p]reventing danger to the community.'") (quoting Brief for Respondents in No. 99–7791, p. 24).

242 R.I.L-R., 80 F. Supp. 3d at 191.

243 The litigation challenging conditions at the Don T. Hutto facility centered on compliance with an earlier settlement agreement on permissible conditions of immigration confinement for children. Of note, plaintiffs in the Hutto litigation did not bring any constitutional claims for relief. *See* Complaint, Baubonyte v. Chertoff, No. 07-0164, Dkt. No. 1 at 24–29 (W.D. Tex. Mar. 6, 2007), https://www.aclu.org/legal-document/baubonyte-v-chertoff-complaint-declaratory-and-injunctive-relief-behalf-egle?redirect=cpredirect/28804 [https://perma.cc/B553-AGU3]; Stipulated Settlement Agreement, Flores v. Meese, No. 85-4544 (C.D. Cal. Jan. 17, 1997), https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement [https://perma.cc/PGP8-LYKJ].

244 *See* Sarah Betancourt, *Detained Child's Disease "Went Untreated for Weeks" at US Immigration Center*, GUARDIAN (Mar.27,2016), https://www.theguardian.com/us-news/2016/mar/27/pennsylvania-immigration-center-detainees-child-illness#:~:text=Detained%20child's%20disease%20'went%20untreated%20for%20weeks'%20at%20US%20immigration%20center,-This%20article%20is&text=Five%2Dyear%2Dold%20Briany%20nibbled,%2C%20Gladis%2C%20shook%20her%20head [https://perma.cc/JQM2-MSYL] (describing history and size of Pennsylvania facility, which was converted to house migrants starting in 2001).

245 *See, e.g.*, Oldaker v. Giles, No. 7:20-CV-00224, 2021 U.S. Dist. LEXIS 145563, at *8–*9 (M.D. Ga. Aug. 4, 2021) (describing, in context of an order on a motion to seal, litigation around Irwin County ICE facility on behalf of women who were allegedly forced to undertake gynecological procedures). The litigation did not generate a court-ordered shut down of the facility, but the Biden Administration in the midst of litigation announced that it would not renew the facility contract. *See ICE to Close Georgia Detention Center Where Immigrant Women Alleged Medical Abuse*, L.A. TIMES (May 20, 2021), https://www.latimes.com/politics/story/2021-05-20/ice-irwin-detention-center-georgia-immigrant-women-alleged-abuse [https://perma.cc/M3YX-N9RM] ("The Biden administration will close two immigration detention centers in Georgia and Massachusetts . . . including the Irwin County Detention Center in Georgia where scores of women said they suffered medical abuse.").

Conditions of confinement challenges to ICE detention during COVID-19 comprise another notable exception. Here, detained individuals met with success in eroding the civil versus criminal line to secure release, successfully arguing that deadly conditions in ICE facilities "amount[ed] to punishment" in violation of substantive due process.[246] Federal district courts ordered release of hundreds of persons in ICE detention due to COVID risks[247] and certified class actions brought on behalf of ICE detainees in multiple jurisdictions.[248] Yet court decisions also reveal the limits of doctrine: individuals typically secured release—even in the midst of a pandemic that posed deadly, unprecedented risks to *all* in ICE detention—only by showing exceptional, individualized vulnerability or extreme deficiencies in a given facility.[249] As one court explained in denying release, "[i]t is not enough for a

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246 *See* Bell, 441 U.S. 520. Following *Bell*, courts generally look to whether conditions "amount to punishment of the detainee." *Id.* at 535. Some courts, however, apply the Eighth Amendment's "deliberate indifference" standard to substantive due process challenges to conditions and care in ICE facilities or ICE-contrated state facilities. *See, e.g.*, Coronel, 449 F. Supp. 3d at 282 ("The Due Process Clause thus prohibits the federal government from being deliberately indifferent to the medical needs of civil detainees."); Coreas, 451 F. Supp. 3d at 422 ("[The Court concludes that the deliberate indifference standard applies to the Fourteenth Amendment health and safety and inadequate medical care claims asserted here."). The Ninth Circuit has disagreed with this approach, concluding that with regard to civil detainees, "to prevail on a Fourteenth Amendment [substantive due process] claim regarding conditions of confinement, the confined individual need not prove 'deliberate indifference' on the part of government officials." Jones v. Blanas, 393 F.3d 918, 934 (9th Cir. 2004). In a detailed decision canvassing Sixth Circuit and Supreme Court precedent, the district court in *Malam* rejected the government's contention that the court erred in failing to apply the higher "deliberate indifference" standard for ICE detainees' substantive due process claims. *See generally* Malam, 481 F. Supp. 3d 631 (E.D. Mich. 2020); *see also* Thakker, 456 F. Supp. 3d 658 n.8 (M.D. Pa. 2020) (describing Eighth Amendment conditions of confinement claim based on "deliberate indifference" test as a "more exacting standard" than that governing a substantive due process claim on conditions).

247 *See, e.g.*, Valenzuela Arias v. Decker, 612 F. Supp. 3d 307, 310 (S.D.N.Y. 2020) (ordering release of multiple individuals with heightened medical risks to COVID exposure); Ferreyra v. Decker, 456 F. Supp. 3d 538 (S.D.N.Y., 2020) (same); Malam v. Adducci, 469 F. Supp. 3d 767, 771 (E.D. Mich. 2020) (same); *see also* AM. C.L. UNION, THE SURVIVORS: STORIES OF PEOPLE RELEASED FROM ICE DETENTION DURING THE COVID-19 PANDEMIC 6 (2021), https://www.aclu.org/wp-content/uploads/legal-documents/20210512-ice-detention-report.pdf [https://perma.cc/6AF2-XPLR] ("The ACLU brought more than 40 cases on behalf of detained people in 32 facilities nationwide, resulting in the direct release of more than 800 people".).

248 *See* Zepeda Rivas v. Jennings, 445 F. Supp. 3d 36 (N.D. Cal. 2020) (certifying class of individuals in ICE detention in Mesa Verde Detention Facility and Yuma City Jail); Malam v. Adducci, 475 F. Supp. 3d 721 (E.D. Mich. 2020) (certifiying class of individuals in ICE detention in Calhoun Correctional Facility and subclass of individuals with heightened risks if exposed to COVID-19); Savino v. Souza, 453 F. Supp. 3d 441 (D. Mass. 2020) (certifying class of individuals in Bristol County House of Corrections and C. Carlos Carreiro Immigration Detention Center).

249 *Compare* Thakker v. Doll, 456 F. Supp. 3d 647, 658, 665 (M.D. Pa. 2020) (determining medically vulnerable petitioners are likely to show substantive due process violation due to exposure to heightened risks of COVID-19 and ordering release); Basank v. Decker, 449 F. Supp. 3d 205, 215 (S.D.N.Y. 2020) (same); Castillo v. Barr, 449 F. Supp. 3d 915, 922–23 (C.D. Cal. 2020) (same); Coronel v. Decker, 449 F. Supp. 3d 274, 290 (S.D.N.Y. 2020) (same), *with* Dawson v. Asher, 447 F. Supp. 3d 1047, 1050–51 (W.D. Wash. 2020) (determining that petitioners are unlikely to succeed in a claim that ICE detention during the COVID-19 pandemic violated substantive due process rights

petitioner to allege that he is detained and presented with a risk of contracting COVID-19 that is common to all prisoners."[250] (The use of term "prisoners" is perhaps illuminating, given that the petitioner in the case, Jhensy Salliant, was an ICE detainee.) Even courts courageous enough to order broad release stressed the special circumstances of the individuals whom they freed. The Middle District of Pennsylvania district court, for example, released 11 individuals in a single order, but made sure to stress in a titled section of its decision: "Petitioners are at uniquely high risk for contracting COVID-19."[251]

In line with the normalization of immigration detention even during a deadly pandemic, courts have also found even fairly minimal mitigation efforts by ICE to defeat detained individuals' substantive due process claims. Thus, in *Hope v. Warden York County Prison*, the Third Circuit reversed a lower court order of release for 22 individuals detained by ICE, all of whom were over age 65 or had medical conditions identified by the CDC as presenting special risk factors for COVID.[252] The district court had found that in the event of exposure to and contraction of COVID, petitioners' "ages and medical conditions put them at 'imminent risk' of serious illness, including possible death."[253] The Third Circuit upheld this finding under the clear error standard. Yet the appellate court went on to determine that "the District Court erred in holding that because age and medical conditions put them at increased risk if they contracted the virus, Petitioners were likely to show the Government subjected them to punishment."[254] The Third Circuit instead concluded that the conditions in York County did not amount to punishment in light of ICE's efforts to improve hygiene and reduce exposure, such as rotating mealtimes, providing masks, and reducing capacity.[255]

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and denying release); Sacal-Micha v. Longoria, 449 F. Supp. 3d 656, 665–66 (S.D. Tex. 2020) ("[T]he fact that ICE may be unable to implement the measures that would be required to fully guarantee [petitioner's] safety does not amount to a violation of his constitutional rights and does not warrant his release."); Coreas v. Bounds, 451 F. Supp. 3d 407, 430 (D. Md. 2020) (holding that given lack of confirmed cases of COVID-19 in facility and screening measures, petitioners did not establish a likelihood of success on their claim of ICE's deliberate indifference to health and safety).

250 Saillant v. Hoover, 454 F. Supp. 3d 465, 471 (M.D. Pa. 2020). The same court explained:

> A court considering a habeas corpus petition based on the COVID-19 pandemic may consider (1) whether the petitioner has been diagnosed with COVID-19 or is experiencing symptoms consistent with the disease; (2) whether the petitioner is among the group of individuals that is at higher risk of contracting COVID-19; (3) whether the petitioner has been directly exposed to COVID-19; (4) the physical space in which the petitioner is detained, and how that physical space affects his risk of contracting COVID-19; (5) the efforts that the prison has made to prevent or mitigate the harm caused by COVID-19; and (6) any other relevant factors.

Id.

251 Thakker v. Doll, 451 F. Supp. 3d 358, 368 (M.D. Pa. 2020).

252 Hope v. Warden York County Prison, 972 F.3d 310, 333–334 (3d Cir. 2020).

253 *Id.* at 325 (3d Cir. 2020).

254 *Id.* at 326.

255 *Id.* at 328. Reviewing courts have also vacated district court preliminary injunctions for consideration based on changing COVID-19 conditions. *See, e.g.*, Roman v. Wolf, 977 F.3d 935, 945 (9th Cir. 2020) ("We vacate the provisions of the injunction ordering specific reductions in the detainee

D. PERSONHOOD AND ERASURE (PROCEDURAL DUE PROCESS)

In the area of procedural due process, the Court has limited the rights of immigrants significantly with regard to immigration decisions. As Hiroshi Motomura has observed, courts have also sometimes used procedural "surrogates" to soften the lack of substantive constitutional rights in the area of immigration.[256] Yet, procedural due process caselaw also paradigmatically reflects manipulations of territory in declaring noncitizens as legal non-persons. As myself and others have written about elsewhere, constitutional caselaw has carved out exception spaces wherein noncitizens fully within U.S. territory lack procedural due process rights against immigration enforcement actions.[257]

Noncitizens who *are* recognized as properly *present* on U.S. territory do have procedural due process rights in their immigration cases.[258] The Court stated this overarching principle in the early days of the Chinese Exclusion era.[259] Lawful permanent residents who leave the United States and return after relatively short periods of time also have procedural due process rights in their immigration cases.[260] If the government wishes to exclude a permanent resident from return, it must do so in a way that comports with constitutional due process protections.

Yet, a major loophole in procedural due process caselaw denies these same rights to certain others. The entry fiction, as it's called – perhaps more rightly a fiction of non-entry – considers anyone stopped at "our gates" to lack procedural due process rights regarding admission.[261] Practically speaking, this means that asylum seekers and others presenting at land ports, sea ports,

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population and specific changes in conditions at the facility and remand to the district court for further proceedings consistent with this disposition and with the latest facts.").

256 Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1628 (1992) ("My thesis, briefly stated, is that procedural due process has served in a significant number of cases as a 'surrogate' for the substantive judicial review that the plenary power doctrine seems to bar.").

257 *See* Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565 (2021); César Cauauhtémoc Garcia Hernández, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 HOW. L.J. 869 (2014); Leti Volpp, *Imaginings of Space in Immigration Law*, 9 L. CULTURE & HUMANS. 456 (2012); Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIG. L.J. 407, 412 (2002); Richard A. Boswell, *Rethinking Exclusion—The Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 VAND. J. TRANSNAT'L L. 925, 970 (1984).

258 *See, e.g.*, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963–64 (2020) ("[A]liens who have established connections in this country have due process rights in deportation proceedings . . . .").

259 *See* Yamataya v. Fisher, 189 U.S. 86 (1903) (determining that due process principles apply to petitioner who had entered the United States just four days prior to an inspector's determination that she was excludable as a public charge).

260 Landon v. Plascencia, 459 U.S. 21, 32–33 (1982); Kwong Hai Chew v. Colding, 344 U.S. 590, 601 (1953).

261 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (explaining that "an alien on the threshold of initial entry stands on a different footing" than those who have "passed through our gates"); Nishimura Ekiu v. United States, 142 U.S. 651, 661 (1892).

and airports have no (constitutional) procedural due process rights in their immigration cases. They continue to lack procedural due process rights in these cases even when detained in ICE facilities deep within the interior for years. As the Court has stated, as to these individuals, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[262]

Traditionally, entry fiction exempted individuals who had crossed the U.S. border—following the long-held understanding that the Fifth Amendment due process clauses protects "any person" on U.S. territory.[263] Yet recently, in *Thuraissigiam v. Department of Homeland Security*,[264] the Supreme Court held that an asylum seeker who had entered onto U.S. territory between ports of entry nevertheless lacked procedural due process rights with regard to admission and removal. Immigration enforcement officers had apprehended Mr. Thuraissigiam 25 yards north of the U.S.-Mexico border within 24 hours of his crossing.[265] He asked to seek asylum, and immigration officials placed him in expedited removal—a curtailed administrative process that denies individuals a full hearing before an immigration court.[266] The circumstances and location of his apprehension, the Court held, put him in the same position as if he had never crossed at all—stripping him of procedural due process rights.[267]

As I've explored elsewhere, current understandings of entry fiction fail to account for the origins and purposes of that fiction—which served humanitarian purposes in the early days of immigration, allowing people to disembark for inspection rather than being forced to remain in dangerous

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262 United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

263 *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."); *id*. at 693–94 (discussing prior cases recognizing due process rights of immigrant entrants).

264 140 S. Ct. 1959 (2020).

265 *See id.* at 2013.

266 *See* 8 U.S.C. § 1225(b)(1)(A)(i) (2022). Expedited removal applies to certain noncitizens who either lack immigration documents or have fraudulent documents. Currently, individuals arriving at ports of entry, interdicted at sea, or apprehended within 100 miles of a land border and within two weeks of entering can be subject to expedited removal. Dep't of Homeland Sec., Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004). Although the Trump Administration sought to expand the scope of expedited removal, the Biden Administration withdrew that expansion. Dep't of Homeland Sec., Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019); *see generally* 8 U.S.C. § 1225 (2022) (including in title "expedited removal of inadmissible arriving aliens"). The statute and regulations, however, contain significant protections for those who wish to seek asylum, including initial screening of asylum claims by a DHS officer combined with limited review before an immigration judge. Individuals placed in expedited removal who can show "a significant possibility" that they "could establish eligibility for asylum" in this screening interview must be transferred to normal immigration court proceedings where they will have an opportunity to apply for asylum. *Id.* § 1225(b)(1)(B)(v) (2022); 8 C.F.R. § 208.30(f) (2023).

267 140 S. Ct. at 1983 (holding that, as a result of the application of entry fiction, "an alien in respondent's position has only those rights regarding admission that Congress has provided by statute").

conditions aboard passenger ships.[268] The Supreme Court later pointed to governmental policy decisions to minimize use of detention as justification for the fiction's existence.[269] Today's uses, which carve out enormous constitutional exception spaces in ICE detention and CBP holding facilities throughout the country, distort and drastically expand the fiction's original limited purpose.

These manipulations are not anomalies or oddities, but rather, reveal the underlying value judgments and structural design of our immigration systems. As explained above, necropolitics entails not only power over life and death but also the power to decide whose life matters. This power also extends to decisions about who exists in the space of law, and who in the state of exception.

E. TERRITORY AND ERASURE (HABEAS RIGHTS; REMEDIES)

Perhaps even more insidious than the denial of due process in *Thuraissigiam* was the Court's other holding in that same case: that the Suspension Clause does not offer protection for noncitizens' requests for federal court review of their expedited removal orders. Specifically, Mr. Thuraissigiam sought judicial review of faulty procedures and legal determinations in his asylum screening process. He challenged immigration laws limiting such review as a violation of his right to habeas corpus under the Suspension Clause.[270] The Court rejected the notion of any such right.

Although *Thuraissigiam* expanded, collapsed, and manipulated the bounds of due process entry fiction, some version of that fiction had long persisted in immigration and constitutional law doctrine—at least as to procedures and immigration decisions. But *Thuraissigiam* charted new ground on the Suspension Clause in holding that noncitizens fully present within U.S. territory lack a constitutional right to habeas review of challenges to removal orders.[271]

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268 *See* Lee, *supra* note 257, at 585–86. Many other immigration law scholars have also examined entry fiction and its anomalies from varying perspectives. *See supra* note 257 (citing work of several scholars).

269 *See* Lee, *supra* note 257, at 597; *see also* Leng May Ma v. Barber, 357 U.S. 185 (1958) (holding that immigrants "paroled" into territory, who therefore did not effect "entry," were subject to lesser statutory rights in exclusion proceedings); *id*. at 190 ("Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond. Certainly this policy reflects the humane qualities of an enlightened civilization.") (citation omitted).

270 *See* 140 S. Ct. at 1968 (detailing Petitioner's challenge); 8 U.S.C. § 1252(e)(2) (2022) (curtailing review of expedited removal orders to the limited questions of "whether the petitioner is an alien"; "whether the petitioner was ordered removed"; or whether the petitioner has been granted permanent resident, refugee, or asylee status).

271 *See* Ahilan Arulanantham & Adam Cox, *Immigration Maximalism at the Supreme Court*, JUST SEC. (Aug. 11, 2020), https://www.justsecurity.org/71939/immigration-maximalism-at-the-supreme-court/ [https://perma.cc/7ETY-FXKQ]; Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in* DHS v. Thuraissigiam, JUST SEC. (Aug. 25, 2020), https://www.justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam [https://perma.cc/QE8G-6KZW].

Justice Alito's majority opinion devoted most of its discussion to why, in his view, habeas rights under the Constitution extend only to matters that centrally concern release from executive detention.[272] In doing so, however, the *Thuraissigiam* Court also drew new distinctions based on the inside/outside fictions of immigration law—most notably, in its discussion of *INS v. St. Cyr*.[273] In that case, the Court previously applied the constitutional avoidance canon to interpret immigration statutes to *permit* federal courts habeas jurisdiction pver immigrants' legal challenges to their deportation orders.[274] *St. Cyr* did so after a lengthy exploration of the "historical core" of the writ of habeas corpus.[275]

Justice Alito's majority opinion in *Thuraissigiam* cabined the *St. Cyr* decision as one holding that "the writ could be invoked by aliens already *in* the country who were held in custody pending deportation."[276] In other words, he makes *territoriality* a key distinguishing factor in *St. Cyr*—even though *St. Cyr* itself engaged no such line in its discussion. *St. Cyr*, in fact, relied upon a Chinese-Exclusion-era case, *United States v. Jung Ah Lung*,[277] in which the Court exercised jurisdiction over a challenge to immigration exclusion brought via a habeas petition by a petitioner *still aboard his ship*.[278] Jung Ah Lung's circumstances reveal the departure wrought by *Thuraissigiam*: the Court had never before extended entry fiction's due process denials to the context of habeas rights. Habeas review, rather, served as the vehicle for deciding the due process issue at all.[279] As Ahilan Arulanantham, Adam Cox, Gerald Neuman and others have pointed out, Justice Alito's majority opinion

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272 *See generally* 140 S. Ct. 1968-81 (Sections II, III).

273 INS v. St. Cyr, 533 U.S. 289 (2001).

274 *Id.* at 313-314.

275 INS v. St. Cyr, 533 U.S. 289, 301 (2001). The Court discussed, for example, executive restraint and executive action inherent in the execution and issuance of any deportation order. *Id.*; *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1003 (1998).

276 Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1981 (2020) (citing St. Cyr, 533 U.S. 289 (2001)) (emphasis added).

277 U.S. v. Jung Ah Lung, 124 U.S. 621, 626–632 (1888).

278 *See* I.N.S. v. St. Cyr, 533 U.S. 289, 305 (2001) ("Before and after the enactment in 1875 of the first statute regulating immigration, 18 Stat. 477, that jurisdiction was regularly invoked on behalf of noncitizens, particularly in the immigration context.") (citing United States v. Jung Ah Lung, 124 U.S. 621, 626–632 (1888)); *see also* 124 U.S. at 622 ("On the 28th of September, 1885, a petition was presented to the district court alleging that Jung Ah Lung, a subject of the emperor of China, was unlawfully restrained of his liberty by the master of a steam-ship in the port of San Francisco; he having arrived in that vessel, and not being allowed to land[.]").

279 *See e.g.,* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 213 (1953) (" [Mr. Mezei] may by habeas corpus test the validity of his exclusion."); U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 540 (1950) ("To test the right of the Attorney General to exclude [Ms. Knauff] without a hearing for security reasons, habeas corpus proceedings were instituted in the Southern District of New York[.]").

necessarily mischaracterized decades of Court precedent grounding judicial review over deportation orders in the Suspension Clause to reach its result.[280]

Manipulations of territory also characterize *Thuraissigiam*'s treatment of the prevailing modern precedent on the Suspension Clause, *Boumediene v. Bush*.[281] In that case, the Court held that the Military Commissions Act of 2006 violated the Suspension Clause in withdrawing habeas review from individuals detained in Guantanamo Bay without providing an adequate judicial substitute.[282] Although Guantanamo Bay is located in Cuba—on leased land in a foreign sovereign territory—the Court adopted a functional analysis to recognize the habeas rights of noncitizens there detained by the U.S. military. It explained:

> [A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[283]

The *Thuraissigiam* Court's treatment of *Boumediene* is cursory. It begins by saying simply: "*Boumediene*[ ] is not about immigration at all."[284] But the Court never explains why the *Boumediene* factors—grounded in practical considerations related to territory rather than formal lines—prove so irrelevant for Mr. Thuraissigiam and noncitizens generally. The lack of any "practical obstacles inherent in resolving the prisoner's entitlement to the writ"—a factor so determinative in *Boumediene*[285]—simply drops away in favor of a cabined, static, and constrained view of the writ.[286]

Also curtailed is the Court's treatment of the petitioner's real-life circumstances. Mr. Thuraissigiam expressed a fear of persecution based on

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280 *See* Arulanantham & Cox, *supra* note 271, at 3–5 (discussing how the Supreme Court disregarded settled precedent establishing that the Suspension Clause requires judicial review in deportation cases); Neuman, *supra* note 271, at 1–2 (discussing Justice Alito's misreading of cases from immigration's "finality period"—during which federal statutes barred judicial review of deportation orders—and his misconstruction of petitioner's counsel's statements to focus narrowly on the writ as it existed in 1789); Jonathan Hafetz, *The Suspension Clause After* Department of Homeland Security v. Thuraissigiam, 95 ST. JOHN'S L. REV. 379, 447 (2021) (contending that the Court "was wrong to relegate this body of precedent [from immigration's finality era] to the realm of mere statutory interpretation, devoid of significance for the Suspension Clause"); *see also* Lee Kovarsky, *Habeas Privilege Origination and* DHS v. Thuraissigiam, 121 COLUMBIA L. REV. 23, 24–25 (2021).

281 553 U.S. 723 (2008).

282 Boumediene v. Bush, 553 U.S. 723, 771 (2008).

283 *Id.* at 727 (discussing Johnson v. Eisentrager, 339 U.S. 763 (1950)).

284 Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1981 (2020).

285 *See* 553 U.S. at 766.

286 *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 578 (2010) ("The [*Boumediene*] decision leaves open as many questions as it settles about the operation of the Clause, but it provides the appropriate methodology for answering them."); Hafetz, *supra* note 280, at 447 (arguing that "the kind of Suspension Clause jurisprudence promised in *Boumediene*," allowing for evolving and dynamic applications of the writ, would be "a jurisprudence more consistent with how courts would have evaluated a novel use of habeas in 1789").

his Tamil ethnicity and political opinion if returned to Sri Lanka.[287] His fears, although rejected by immigration officials, arose in the context of ongoing and well-documented human rights abuses in his home country, which continues to grapple with the impacts of a 26-year separatist war that killed an estimated 100,000 Sri Lankans and left 20,000 missing.[288] Justice Alito observes in an aside that "[w]hile respondent does not claim an entitlement to release, the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka."[289] A lack of care for the dignity of the petitioner before the Court, as well as the legal denial of personhood and rights, permeates the majority opinion.

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In an earlier opinion in the same term, the Court once again relied on territoriality and constitutional (non)personhood to deny the family of 15-year-old Sergio Adrián Hernandéz Güereca a remedy for his killing at the hands of CBP.[290] As discussed above, a CBP agent standing on U.S. soil shot and killed young Sergio Adrián just across the border in Mexico.[291] The Court here does acknowledge his death as presenting "a tragic case"[292]—then proceeds to deny his family any possibility of recovery or vindication under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*[293]

The majority decision in *Hernandez v. Mesa* applied a two-step inquiry set forth in a previous case, *Ziglar v. Abassi*, and asked (1) whether the claim arose in a new context or against new defendants; and (2) if so, whether any "special factors" disfavor judicial creation of a *Bivens* in those new circumstances. [294] The *Hernandez* majority concluded that the shooting presented a new context, and that both foreign relations and national security concerns "counsel hesitation" against creating a new claim.[295] It leaned heavily on potential effects on U.S.-Mexico relations, noting that: "[a] cross-border shooting is by definition an international incident; it involves an event that occurs

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287 140 S. Ct. at 1965, n.5 ("[T]he gravamen of his petition is that he faces persecution in Sri Lanka "because of " his Tamil ethnicity and political opinions.").

288 *See Sri Lanka civil war: Rajapaksa says thousands missing are dead*, BBC NEWS (Jan. 20, 2020), https://www.bbc.com/news/world-asia-51184085 [https://perma.cc/7ZXU-AAT4] ("The fighting killed an estimated 100,000 people and left about 20,000, mostly Tamils, missing."); Meenakshi Ganguly, *As Sri Lanka's Tamils Remember War Dead, Justice Remains Elusive*, HUM. RTS. WATCH (May 16, 2022, 3:21 PM), https://www.hrw.org/news/2022/05/16/sri-lankas-tamils-remember-war-dead-justice-remains-elusive [https://perma.cc/A6X6-KSFZ] (describing the 26-year war in Sri Lanka and deaths that resulted).

289 140 S. Ct. at 1970.

290 Hernandez v. Mesa, 140 S. Ct. 735 (2020).

291 *See* Section II.B., *supra* (describing circumstances of Sergio Adrían's shooting and death).

292 Hernandez, 140 S. Ct. at 739.

293 Bivens v. Six Unknown Named Agents Fed. Bureau Narcotics, 403 U.S. 388 (1971).

294 *See* Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020); Ziglar v. Abassi, 137 S. Ct. 1843, 1876 (2017).

295 140 S. Ct. at 744 ("Because petitioners assert claims that arise in a new context, we must proceed to the next step and ask whether there are factors that counsel hesitation. As we will explain, there are multiple, related factors that raise warning flags.").

simultaneously in two countries and affects both countries' interests."[296] The court also relied on the national security concerns presented by "the illegal entry of dangerous persons and goods"[297]—even though the complaint in the case alleged that Sergio Adrián and his friends were merely "playing a game" at the time of his killing.[298]

The majority recognized that Agent Mesa was standing on U.S. soil, bound to follow the U.S. Constitution, when he shot across the fence and killed Sergio Adrián.[299] It also noted that Mexico requested extradition of Agent Mesa, and that the United States refused.[300] Yet the Court denied any remedy for the killing simply because of where Sergio Adrián's body landed. As the four-justice dissent stated plainly, "[i]t scarcely makes sense for a remedy trained on deterring rogue officer conduct to turn upon a happenstance subsequent to the conduct—a bullet landing in one half of a culvert, not the other."[301] Rather, "concerns attending the application of our law to conduct occurring abroad are not involved, for plaintiffs seek the application of U.S. law to conduct occurring inside our borders."[302]

In 2022, the Court narrowed potential *Bivens* relief against CBP officers even further in *Egbert v. Boule*: a case that revealed the seemingly critical territorial lines in *Hernandez* to matter, in the end, very little at all.[303] In that case, Robert Boule, U.S. citizen who owned a bed-and-breakfast near the Canadian border, challenged actions and injuries taking place wholly within the United States.[304] Nevertheless, the Supreme Court denied his excessive force claim a remedy under *Bivens*.[305] Unlike in *Hernandez*, the Court did not (and could not) rely on foreign relations as a "special factor," as Canada had no real interest in a U.S. citizen's claim against a U.S. officer for actions and

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296 *Id.*

297 *Id.* at 746.

298 Hernandez, 140 S. Ct. at 740. Because the case was before the Supreme Court on appeal of a motion to dismiss, the Court should consider the allegations in the complaint as true—as it did when the *Hernandez* case was last before it. *See* Hernandez v. Mesa, 582 U.S. 548, 550 (2017) ("Because this case was resolved on a motion to dismiss, the Court accepts the allegations in the complaint as true for purposes of this opinion.") (citing Wood v. Moss, 572 U.S. 744, 757–758 (2014)). Nevertheless, the 2020 majority opinion in *Hernandez* also notes that "[a]ccording to Agent Mesa, Hernández and his friends were involved in an illegal border crossing attempt, and they pelted him with rocks." 140 S. Ct. at 740.

299 140 S. Ct. at 740 ("Agent Mesa fired two shots at Hernández; one struck and killed him on the other side of the border.").

300 140 S. Ct. at 737 ("The United States also denied Mexico's request for Agent Mesa to be extradited to face criminal charges in Mexico.").

301 *Id.* at 756 (Ginsburg, J., dissenting).

302 *Id.* at 753 (Ginsburg, J., dissenting).

303 Egbert v. Boule, 596 U.S. 482 (2022).

304 *See id.* at 487–88 (describing Mr. Boule's property location and bed-and-breakfast in the United States near the U.S.-Canada border, as well as his interactions with U.S. Border Patrol agents while in the United States).

305 *Id*. at 495 ("While Bivens and this case do involve similar allegations of excessive force and thus arguably present 'almost parallel circumstances' or a similar 'mechanism of injury' these superficial similarities are not enough to support the judicial creation of a cause of action.") (citation omitted).

injuries wholly in the United States.[306] Instead, the Court broadly deemed national security a special factor when considering damages actions against border patrol agents "generally."[307] It also centrally relied upon the existence of an administrative grievance procedure for Border Patrol misconduct—despite recognizing that that procedure provides no right for injured persons to participate or appeal.[308]

In the *Hernandez* decision, the happenstance of Sergio Adrián's body being on one side of an invisible line—unknowable to both the officer and the boy he killed—denied a constitutional remedy. In *Egbert*, the Court told us that the line matters very little at all: denial of remedy for *cross*-border CBP activity morphed into denial of a remedy for CBP generally, within U.S. territorial lines. In *Thuraissigiam*, the fact of a physical, known crossing into U.S. territory failed to figure into constitutional personhood. Analytically, as far as conceptions of territory are concerned, these decisions share very little. But what they do have in common is a lack of regard for human life and safety: for the threat to life asserted by a Sri Lankan asylum seeker, for the killing of an unarmed Mexican boy, and for injuries caused by border agents generally.

F. DISTINCTION, RACE, AND THE VALUE OF LIFE (EQUAL PROTECTION)

A final way that constitutional law maintains differential value between citizen and noncitizen life is through curtailment of equal protection principles throughout our immigration system. The Immigration and Nationality Act abounds with classifications that would normally receive heightened judicial scrutiny. These include express distinctions of national origin,[309] gender,[310]

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306 *See id.* at 494 (noting that "'[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention'" and concluding that "here, national security is at issue") (quoting Haig v. Agee, 453 U.S. 280, 292 (1981)).

307 Egbert v. Boule, 596 U.S. 482, 496 (2022) ("[W]e ask here whether a court is competent to authorize a damages action not just against Agent Egbert but against Border Patrol agents generally. The answer, plainly, is no."); *id.* at 494 ("[W]e reaffirm that a *Bivens* cause of action may not lie where, as here, national security is at issue.").

308 *Id.* at 497–98. The *Egbert* decision also collapses the prior two-step inquiry into one overarching and decidedly un-*Bivens*-friendly question: "While our cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Id.* at 492.

309 *See, e.g.*, 8 U.S.C. § 1153(c) (2022) (creating diversity visa lottery program for nationals of countries with low levels of admissions to the United States); 8 U.S.C. §1101(a)(27)(G) (2022) (creating special immigrant status for nationals of Panama who worked for the U.S. government in the former Canal Zone); 8 CFR § 214.6 (2023) (providing for special business-related admissions for nationals of Canada or Mexico).

310 *See* 8 U.S.C. § 1409 (2022) (imposing different physical presence requirements for transmission of birthright citizenship to children of U.S. citizen mothers as compared to U.S. citizen fathers). Note, however, that the Supreme Court struck down these distinctions in 2017 as a violation of the equal protection rights of U.S. citizen fathers. Sessions v. Morales-Santana, 582 U.S. 47 (2017).

and (of course) alienage itself.[311] As described above, immigration laws also disproportionately impact immigrants based on race in numerous ways.[312]

Plenary power severely curtails the protections that immigrants can claim under the equal protection clause of the Fifth Amendment against federal action. To see how severely it does so, one can look to the differential operation of Fourteenth Amendment equal protection in the context of state governmental action. As early as the Chinese Exclusion era, in *Yick Wo v. Hopkins*, the Supreme Court struck down a local ordinance—neutral on its face—targeting wood laundries. [313] Local legislators readily admitted the law was intended for and only used against Chinese-owned laundries.[314] Almost a century later, in *Graham v. Richardson*, the Supreme Court struck down a pair of state welfare laws that conditioned access to benefits on U.S. citizenship.[315] The Court applied heightened scrutiny and explained, "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[316]

For the laws of Congress, however, no such heightened scrutiny to protect noncitizens applies, although they are arguably no less "discrete and insular" in that context. In *Mathews v. Diaz*,[317] the Court rejected plaintiffs' equal protection challenge to Medicare eligibility rules. The relevant law made only citizens or lawful permanent residents with 5 years of continuous U.S. residence eligible for Medicare Part B.[318] The Court readily disposed of petitioners' claim–despite recognizing protection under the Due Process Clause for "aliens and citizens alike"–by highlighting the privileged space of citizens:

> The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are

311 *See, e.g.*, 8 U.S.C. § 1227(a) (2022) ("Classes of deportable aliens").

312 *See* Section II, *supra*.

313 *See* Yick Wo v. Hopkins, 118 U.S. 356, 373–374 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, materials to their rights, the denial of equal justice is still within the prohibition of the constitution.").

314 *Id*. at 374 ("[T]his consent of the supervisors is withheld from them, and from 200 others who have also petitioned, all of whom happen to be Chinese subjects, 80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted.").

315 Graham v. Richardson, 403 U.S. 365, 376 (1971) ("[W]e hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause.").

316 *Id*. at 372 (citation omitted) (quoting United States v. Carolene Products Co., 304 U.S. 144, 152–53, n. 4 (1938)).

317 *See* Mathews v. Diaz, 426 U.S. 67, 78-80 (1976) (explaining that although noncitizens are protected by the Due Process Clause, they are not entitled to enjoy every benefit of citizenship).

318 *See* 42 U.S.C. § 1395(a)(2) (1970).

> entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.[319]

Or, as the Court summed up: "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[320] And yet, the issue in *Diaz* was not about power over admissions or removal decisions, nor enforcement of the same. *Diaz*, rather, allowed the federal government to easily exclude immigrants from public benefits that were directly life-saving—a power that Congress would take advantage of two decades later with the passage of welfare reform laws broadly restricting immigrant access.[321]

The same "unacceptable if applied to citizens"[322] logic helps explain why the Supreme Court has yet to invalidate a federal immigration statute on equal protection grounds—no matter the impacts of the law on the lives (or risks to lives) of immigrants, the classifications employed, or blatant evidence of discriminatory intent.[323] Notably, in *Trump v. Hawai'i*, the Court relied significantly on *Mathews* and other plenary power cases to reject petitioners' religious discrimination challenge to President Trump's entry ban for nationals of Muslim-majority countries.[324] The Court assumed an abstemious rational basis review would apply and upheld the ban based on the government's stated policy justifications.[325] In doing so, the majority failed to

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319 426 U.S. at 78.

320 *Id.* at 79–80.

321 *See* Section II(C), *supra*.

322 426 U.S. at 80.

323 *See* Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 268 (2017) ("Of course, the Supreme Court has never struck down an immigration enforcement order or an act of Congress concerning immigration on equal protection grounds."); Fiallo v. Bell, 430 U.S. 787,799–800 (1977) (upholding family-based immigration laws that discriminated on the basis of sex and legitimacy). The Court has struck down statutory provisions, however, for violating the Equal Protection Clause in the *citizenship* context. *See* Sessions v. Morales-Santana, 582 U.S. 47, 76–77 (2017) (holding that the statutes limiting derivative citizenship had gender-based distinctions that violate the Equal Protection Clause).

324 138 S. Ct. 2392 (2018).

325 Although the Supreme Court considered the religious discrimination claim under the Establishment Clause, its analysis mirrored equal protection analysis and assumed (but did not decide) that rational basis review would govern. *Id.* at 2420 ("For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review."). The Court's characterization of rational basis inquiry was highly deferential and did not incorporate any heightened review for animus. *See id.* ("We will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds."); *compare* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759 (2011) ("[A]cademic commentary has correctly observed that 'rational basis review' takes two forms: ordinary rational basis review and 'rational basis with bite review.'"); *and* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1365–70 (2018) (describing rational basis review as "a doctrine that is deeply and persistently unsettled," reflecting a range between meaningful and ultradeferential forms). The Court also rejected petitioners' contention that the entry ban conflicted with a statutory non-discrimination provision, which provides: "[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex,

give weight to the President's or his advisors' numerous statements of intent to target Muslims made on the campaign trail and thereafter.[326]

The Supreme Court's failure to strike down any federal immigration statute as discriminatory persists despite a long history of race-driven immigration laws.[327] Rather, as far back as the Chinese Exclusion era, it has upheld racial classifications and justifications in immigration law.[328] The Court's 1889 decision in *Chae Chan Ping*—which remains good law—expressly validated racist views of Chinese individuals as "strangers in the land," unassimilable and "dangerous to . . . peace and security. [329]

As numerous scholars have noted, this glaring gap in equal protection renders immigration law "exceptional" and anomalous. [330] In one recent and notable departure, Judge Mirandu Du of the federal district court of Nevada struck down immigration law provisions criminalizing illegal entry on equal protection grounds.[331] The court held that that defendant Gustavo Carillo-Lopez succeeded in showing that the statute "was enacted with a discriminatory purpose and that the law has a disparate impact on Latinx persons,"[332] thus meeting the requirements for an equal protection violation under *Arlington Heights v. Metro Housing Development*.[333] The court engaged in a nuanced analysis, considering statements reflecting animus against Mexican nationals in the legislative history of the 1929 Act as well as expert testimony on the "nativism and eugenics" that became influential and "widely accepted"

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nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1) (2023). The Supreme Court determined that this provision did not constrain entry bans based on nationality—even for people seeking to enter on immigrant visas. 138 S. Ct. at 2414 ("Had Congress instead intended in § 1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end.").

326 *See id*. at 2421 ("[B]ecause there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.").

327 *See* note 323, *supra* (explaining limits of the Supreme Court's equal protection doctrine in the immigration context).

328 See Section III(A), *supra* (discussing Chinese Exclusion era cases).

329 130 U.S. at 606; *id*. at 595 ("[The subjects of China] remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living."); *id*. ("The differences of race added greatly to the difficulties of the situation.").

330 Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration* 46 UCLA L. REV. 1, 3 (1998) ("In immigration law alone, racial classifications are still routinely permitted."); Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS UNIV. L. REV. 563, 563–64 (2017) (describing "equal protection exceptionalism" as "an uneven and, at times, contradictory doctrine, unlike any other area of the Court's equal protection jurisprudence, that ultimately diminishes equality for immigrants").

331 United States v. Carrillo-Lopez, 555 F. Supp. 3d 996, 1001 (D. Nev. 2021) ("[T]he Court reviews whether the government has shown that Section 1326 would have been enacted absent discriminatory intent. Because the government fails to demonstrate, the Court finds its burden has not been met and that, consequently Section 1326 violates the Equal Protection Clause of the Fifth Amendment."), *rev'd and remanded*, 68 F.4th 1133 (9th Cir. 2023).

332 *Id*. at 1000.

333 429 U.S. 252, 265 (1977).

during that time.[334] The judge also considered evidence of disparate impact, including statistics showing that "over the course of a decade, well over 80% of border crossing apprehensions were those of Mexican or Latinx heritage."[335]

The Ninth Circuit reversed in a precedential decision, holding that the lower court had erred in its analysis of both discriminatory purpose and disparate impact.[336] The appellate decision squarely foreclosed Mr. Carillo-Lopez's equal protection challenge to the illegal entry provision.[337] The Ninth Circuit's unequivocal rejection of the lower court' substantive analysis reflects the extreme limits of equal protection rights in the immigration context.

IV. LAW AND THE LIMITS OF "LEGISLATIVE GRACE"

In curtailing the constitutional rights of noncitizens, the Court has often, as described, pointed instead to "legislative grace."[338] Below, I consider some of the limits of that grace.

A. STATUTORY EXCEPTION ZONES

Immigration law's statutory frameworks take ready advantage of the constitutional evacuations wrought by the Supreme Court. As constitutional scholars have long observed, Congress and the Court have an long-running dialogic relationship.[339] Sometimes Congress pushes back against Court decisions to protect minorities or curtail expansive views of executive power.

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334 United States v. Carrillo-Lopez, 555 F. Supp. 3d at 1008 ("Professor Lytle Hernández emphasized how racial animus 'bec[am]e more intense' heading into the 1920s, a period referred to as the 'Tribal Twenties,' when nativism and eugenics became more widely accepted and began to impact Congressional immigration proposals."); *id.* at 1008–09 (considering statements by eugenicists in support of the Act, as well as testimony by one representative who believed that "Mexicans were 'poisoning the American citizen'").

335 *Id.* at 1006.

336 United States v. Carrillo-Lopez, 68 F.4th 1133, 1138 (9th Cir. 2023) ("Because Carrillo-Lopez did not carry his burden of proving that § 1326 was encated with intent to be discriminatory towards Mexicans and other Central and South Americans, and the district court erred factually and legally in holding otherwise, we reverse.").

337 *Id.* at 1154 (9th Cir. 2023) ("'This conclusion ends the constitutional inquiry, and we reject Carrillo-Lopez's equal protection claim.'") (internal quotation and citation omitted).

338 *See* note 225, *supra*.

339 *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 334, 335–354 (1991) (engaging in empirical analysis of Congressional overrides of Supreme Court decisions from 1967-1990 and setting forth a theoretical model "that posits a dynamic game exists between the Court, the relevant congressional committees, Congress, and the President"); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205 (2013) (discussing the diminishing rate of Congressional overrides of Court decisions and its implications); James J. Brudney & Ethan J. Leib, *Statutory Interpretation As "Interbranch Dialogue"?*, 66 UCLA L. REV. 346, 346 (2019) (examining "numerous modes of dialogue that are initiated by the legislature and also by the courts").

In the immigration context, however, more often the dialogue spirals downward into ever-diminishing rights.

Take, for example, this sentence from *Knauff*: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[340] The Court here means that federal courts will not extend constitutional due process rights beyond whatever statutory processes Congress chooses to provide. And yet, where the Court has declared stark constitutional exception zones, Congress has withdrawn normal statutory rights and protections.

For example, Congress takes full advantage of constitutional law doctrine's entry fiction by eliminating normal statutory immigration court procedures for many individuals stopped at our gates.[341] It also deprives normal statutory consideration of release on bond for these same individuals when detained.[342] But, in line with Supreme Court caselaw that privileges the constitutional status of lawful permanent residents,[343] Congress has defined what it means to be "stopped at our gates" as exempting most lawful permanent residents. In technical terms, immigration laws consider return of a lawful permanent resident from abroad *not* to be a new immigration admission in most circumstances.[344] Thus, lawful permanent residents remain largely insulated from the lesser statutory protections that most noncitizens receive at ports of entry.[345] Moreover, Congress has chosen *not* to extend this benefit to any other class of noncitizen.[346] And so, a tautology emerges: "whatever the procedure authorized by Congress . . . is due process" as far as the Court is concerned, and whatever due process is required by the Court becomes the procedure authorized by Congress.

B. AFFIRMATIVE AND DEFENSIVE PROTECTIONS FOR LIFE

It also bears considering the limits of protection for life in substantive immigration law. As explained above, jurisprudence has framed permission to stay as a "legislative grace" over the decades and centuries.[347] Within our

340 U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

341 *See generally* 8 U.S.C. § 1225(b) (2022) (detailing expedited removal procedures).

342 *Id.* § 1225(b)(1)(B) (2022).

343 *See, e.g.*, Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) ("It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment."); Landon v. Plasencia, 459 U.S. 21, 322d 21 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.").

344 *See* 8 U.S.C. § 1101(a)(13)(C) (2022) ("An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien [meets listed criteria].").

345 *Id.*

346 *Id.*

347 *See* Section III(B), *supra*.

immigration laws, Congress has provided for humanitarian protections, flowing from international legal obligations to refugees and torture victims as well as from domestic policy choices.

Domestic laws implementing our obligations under the Refugee Convention and Protocol[348] prohibit refoulment of refugees to places where they will suffer persecution on account of race, religion, national origin, membership in a particular social group, or political opinion.[349] Courts have recognized threats to life as persecution—but only if tied to the aforementioned protected characteristics. Many courts have adopted restrictive definitions that largely exclude protection on the basis of, for example, gang violence.[350] Statutory bars also disqualify individuals convicted of certain crimes for refugee protection—sweeping in broad and non-violent conduct in addition to violent conduct.[351]

Meanwhile, policies such as Title 42 and the asylum ban prevent access to territory and the normal processing of claims that would even allow people to seek asylum or the protection of non-refoulment.[352] U.S. law, with only very limited exceptions, does not provide for what the international legal community has called "complementary protection," which would prevent return to countries where individuals would face serious harm even if they do not meet all the elements of the refugee definition.[353] This leaves protection against deportation for "generalized" severe threats to life non-existent under our refugee laws.

U.S. obligations under the Convention Against Torture also contain some protection for the lives of applicants who fear they will be killed upon return. The harm of death does meet the severity requirements for torture. But many of Convention Against Torture claims fail for lacking the requisite level of

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348 Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954); Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

349 8 U.S.C. § 1158(a) (2022); 8 U.S.C. § 1231(b)(3)(A) (2022).

350 *See, e.g.*, Gaitan v. Holder, 671 F.3d 678, 682 (8th Cir. 2012) (rejecting claim of Salvadoran youth fleeing gang violence); Ortiz-Puentes v. Holder, 662 F.3d 481, 483 (8th Cir. 2011) (rejecting asylum claim based on fear of persecution due to refusal to join gang).

351 *See* Jane McAdam, *Complementary Protection and Beyond: How States Deal with Human Rights Protection* 1 (United Nations High Comm'r of Refugees, Working Paper No. 118, 2005) (defining the bar for "particularly serious crimes," to include non-violent crimes such as theft, bribery, obstruction of justice, and drug crimes, all of which fall within the categories of aggravated felonies). Individuals who commit serious non-political crimes are also ineligible for asylum and withholding, as are those who engage in the persecution of others. *See id.* § 1158(b)(2)(A)(iii) (stating that serious non-political crimes are a bar for asylum); *id.* § 1231(b)(3)(B)(iii) (stating that serious non-political crimes are a bar for withholding); *id.* § 1101(a)(42) (stating that persecution of others is a bar for asylum); *id.* § 1231(b)(3)(B)(i) (stating that persecution of others is a bar for withholding).

352 Section II(D), *supra*.

353 *See* GUY GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 1–12 (2021) (discussing the general meaning of 'refugee' used by the United Nations).

state action.[354] A Convention Against Torture claimant must show not only that they will be tortured or killed, but also that the government of their home country would be directly involved or would consent or acquiesce to that torture. If applicants show only that the government would simply fail to protect them against death, without willful failure, they will not qualify for Convention relief.[355]

Congress's provisions for humanitarian protection outside of its international legal obligations are even more limited. T-visas provide legal status for survivors of trafficking,[356] and U-visas do so for survivors of crime, including domestic violence.[357] The definition of trafficking and the list of qualifying U-visa crimes are narrow, however, and neither of these visas consider harms in countries to which individuals may be deported.[358] U-visas also hinge on certification of assistance from a local or federal law enforcement agency.[359]

Temporary protected status (TPS) allows limited protection for noncitizens who are in the United States when civil unrest, environmental disaster or other "extraordinary and temporary conditions" arise in their home countries.[360] The Department of Homeland Security Secretary designates countries for TPS eligibility for a period of six to 18 months.[361] Although the Secretary can renew designations an unlimited number of times, the structure of TPS leaves it highly vulnerable to changes in presidential administrations and subjects recipients to continuing uncertainty.[362]

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354 *See* 8 C.F.R. § 208.18 (2023) (codifying Convention Against Torture definitions); *see e.g.*, Perez-Trujillo v. Garland, 3 F.4th 10, 21 (1st Cir. 2021) (determining that "evidence does not suffice to establish acquiescence" of state government); Martinez Manzanares v. Barr, 925 F.3d 222, 229 (5th Cir. 2019) ("[A] government's inability to protect its citizens does not amount to acquiescence [under CAT].").

355 *See* Jon Bauer, *Obscured by "Willful Blindness": States' Preventive Obligations and the Meaning of Acquiescence Under the Convention Against Torture*, 52 COLUM. HUM. RTS. L. REV. 739, 756–59 (2021) (discussing restrictive interpretations of acquiescence requirement that require willful acceptance); Anna Welch & SangYeob Kim, *Non-State Actors "Under Color of Law": Closing a Gap in Protection Under the Convention Against Torture*, 35 HARV. HUM. RTS. J. 117, 168 (2022) (discussing restrictive interpretations of acquiescence requirement).

356 8 U.S.C. § 1101 (a)(15)(T)(i-ii) (2022).

357 *Id.* § 1101(a)(15)(U) (2022).

358 *See* Pauline Portillo, *Undocumented Crime Victims: Unheard, Unnumbered, and Unprotected*, 20 ST. MARY'S L. REV. & SOC. JUST. 345, 371 (2018) (describing the challenges crime victims and their advocates confront when attempting to obtain a U-visa); Leslye E. Orloff et al., *Mandatory U-visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act's Immigration Protections and its "Any Credible Evidence" Rules – A Call for Consistency*, 11 GEO. J. GENDER & L. 619, 621–22 (2010) ("consider[ing] how the actual application of [U-visa] requirement[s] has . . . created a significant and unwarranted procedural hurdle for victims").

359 *See id.* at 622 (critiquing certification requirements).

360 *See* 8 U.S.C. § 1254b(b)(1) (2022).

361 *See* 8 U.S.C. § 1254b(b)(2) (2022).

362 President Trump, for example, terminated TPS for numerous countries, including El Salvador and Nicaragua—which had had designations extended for over two decades and whose TPS recipients were long-time members in our communities. *See* Dep't of Homeland Sec., Termination of the

Perhaps the starkest and most deficient form of relief – from the perspective of valuing the lives of noncitizens subject to the state violence of deportation – is cancellation of removal.[363] This domestic protection against deportation for longtime non-permanent residents fails to consider harms to the noncitizen themselves. Rather, the noncitizen must show "exceptional and extremely unusual hardship" to a *U.S. citizen or lawful permanent resident* child, spouse, or parent.[364] Only by familial relationship to a citizen or a privileged status immigrant—and above-normalized harm to that person—does this form of relief protect against deportation.

C. ENFORCEMENT AND FUNDING

Finally, on detention and enforcement, Congress has spoken largely by providing ever-increasing funding for the deadliest aspects of our immigration system. According to one calculation, "[s]ince the creation of the Department of Homeland Security (DHS) in 2003 [to FY2021], the federal government has spent an estimated $333 billion on the agencies that carry out immigration enforcement."[365] The figures reflect a dramatic increase among all the enforcement arms of the Department. CBP's FY2023 budget as enacted rose to $20,231,382, from $18,524,103 in FY2022. [366] ICE's budget rose to $9,138,570 in FY2023, from $8,877,494 in FY2022.[367] The latest figures amount to approximately triple the budgetary levels for these same units in 2003.[368] Large increases in enforcement officer staffing accompanied this

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Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59636-01 (Dec. 15, 2017); Dep't of Homeland Sec., Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654-01 (Jan. 18, 2018). Advocates sued to enjoin these and other terminations, securing an initial preliminary injunction. *See* Ramos v. Nielsen, 336 F. Supp. 3d 1075, 1085 (N.D. Cal. 2018*), vacated and remanded sub nom*. Ramos v. Wolf, 975 F.3d 872 (9th Cir. 2020), *reh'g en banc granted, opinion vacated*, 59 F.4th 1010 (9th Cir. 2023). While litigation remained ongoing, the Biden Administration rescinded the terminations. *See* Dep't of Homeland Sec., Reconsideration and Rescission of Termination of the Designation of El Salvador for Temporary Protected Status; Extension of the Temporary Protected Status Designation for El Salvador, 88 Fed. Reg. 40282 (June 21, 2023); Dep't of Homeland Sec., Reconsideration and Rescission of Termination of the Designation of Nicaragua for Temporary Protected Status; Extension of the Temporary Protected Status Designation for Nicaragua, 88 Fed. Reg. 40294 (June 21, 2023).

363 8 U.S.C. § 1229b(b) (2022) (outlining the cancellation of removal for non-permanent residents).

364 *Id.* at § 1229b(b)(1)(D) (2022). Cancellation of removal for permanent residents is also available and does not hinge on a showing of harm to others. *See id*. at § 1229b(a) (describing when permanent residents' removal may be cancelled).

365 AM. IMMIGR. COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 1 (Jan. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf [https://perma.cc/QB67-7VU3].

366 CONG. RSCH. SERV., COMPARING DHS COMPONENT FUNDING, FY2023: IN BRIEF 8 tbl. 2 (2023), https://crsreports.congress.gov/product/pdf/R/R47220 [https://perma.cc/L6PP-3ZT5].

367 *Id*.

368 *See* AM. IMMIGR. COUNCIL, *supra* note 365, at 2–3 (noting CBP budget of $5.9 billion in FY2003; ICE budget of $3.3 billion in FY2003; and U.S. Border Patrol budget of $1.515 billion in FY2003).

growth in spending–from just over 30,000 positions within ICE and CBP in 2003[369] to over 60,000 in FY2023.[370]

For the most part, Congress allowed these massive system-wide increases without mandating accountability measures for harms resulting from funded programs. One exception was the creation of the Office of Immigration Detention Ombudsman within DHS in 2019;[371] however, Congress did not provide the Ombudsman with any significant enforcement authority, focusing instead on access, complaint-taking, and inspections.[372] Nor did Congress write into law any minimum standards for detention conditions themselves. And it has failed to pass similar measures for CBP or ICE generally. Bills for a broader immigration enforcement Ombudsman have languished instead in committees.[373]

V. VALUING IMMIGRANT LIFE

From the above discussion, we can see that valuing citizens' lives over immigrants' lives is a feature rooted in the operation and design of our immigration system, as well as the legal doctrines that structure that system. In the section below, I re-imagine how we might begin to decouple at least some of the starkest forms of a politics of death from our doctrine and laws. Although some of the changes proposed appear broad in light of the longstanding operation of plenary power doctrine, viewed in light of "normal" constitution principles, most are far less so. I take as a starting point the premise that our immigration system should prevent, to the greatest extent possible, risking and devaluing the lives of immigrants swept up in it. In other words, I ask: how might we begin to delink necropower from the doctrines and laws that structure our immigration system?

A. CHANGING DOCTRINE

In asking this question, I realize that political will and judicial desire for any such delinking may well be lacking. The outcome and tenor of recent

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369 *See id*. at 4, tbl. 3.

370 DEP'T OF HOMELAND SEC., FY 2023 BUDGET IN BRIEF 29, tbl.2 https://www.dhs.gov/sites/default/files/2022-03/22-%201835%20-%20FY%202023%20Budget%20in%20Brief%20FINAL%20with%20Cover_Remediated.pdf [https://perma.cc/3NJM-2S8R] (noting President's FY 2023 request for funding for 61,049 FTE, or full time employees, for CBP). The funding enacted by Congress for CBP in FY2023 exceeded the amount requested by the President for that year. CONG. RSCH. SERV., COMPARING DHS COMPONENT FUNDING, FY2023: IN BRIEF 8 tbl. 2 (2023), https://crsreports.congress.gov/product/pdf/R/R47220 [https://perma.cc/L6PP-3ZT5]. (columns for FY2022 Enacted, FY2023 Request, and FY2023 Enacted).

371 *See* 6 U.S.C. § 205 (2022) (detailing the Office of Immigration Detention Ombudsman).

372 *See id*. at § 205(b) (2022) (describing the functions of the Ombudsman).

373 *See, e.g.*, S. 2691, 116th Cong. (2019) ("A bill. . . to establish the position of Ombudsman for Border and Immigration Enforcement Related Concerns in the Department of Homeland Security.").

Supreme Court precedent has moved in the opposite direction, of ever greater and more insidious denials of the personhood and value of noncitizen life. Yet, I contend we should still ask the question, in part because the possible answers reveal important truths about our doctrines. At minimum, we might interrogate how much death our doctrine has normalized in order to declare immigration exceptional and unreviewable.

On Legal Personhood and Life

Changing constitutional law doctrine to value the lives of immigrants can flow largely from the simple command of the Fifth Amendment Due Process Clause: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."[374] The reliance of constitutional law doctrine on the guarantees of due process in fact make this an easier argument than had protections developed more fully based on the privileges and immunities of citizenship.[375]

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374 U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .").

375 The terms "privileges" and "immunities" appear in two places in our Constitution: Article IV and the Fourteenth Amendment. *See* U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . . ").

As early as *Corfield v. Coryell*, the Supreme Court described Article IV, § 2 Privileges and Immunities as reaching only certain fundamental rights. Corfield v. Coryell, 4 Wash. C. C. 371 (C.C.E.D. Pa. 1823). And in 1873, in the *Slaughterhouse* cases, the Court famously limited Fourteenth Amendment privileges or immunities to enumerated constitutional rights. Slaughter-House Cases, 83 U.S. 36 (1873). Scholars have since urged more expansive interpretations of both Clauses. *See, e.g.*, Martin H. Redish & Brandon Johnson, *The Underused and Overused Privileges and Immunities Clause*, 99 B.U. L. REV. 1535, 1539 (2019) ("Early in the nation's history, the courts limited the Clause's protections to include only those rights deemed sufficiently 'fundamental,' even though nothing in the provision's text even suggests, much less dictates, such a limitation."); William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 156 (2002) ("Rather than calling for a change of privileges or immunities doctrine, I advocate taking the existing doctrine seriously."); Akhil R. Amar, *Foreword: The Document and the Doctrine*, 114 HARV L. REV. 2, 123 n.327 (2000) ("Virtually no serious modern scholar — left, right, or center — thinks [*Slaughterhouse* is] a plausible reading of the [Fourteenth] Amendment.").

Scholars have underscored that a robust understanding of the privileges and/or immunities of citizenship would more coherently and strongly protect fundamental rights than substantive due process caselaw. *See, e.g.*, Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1323 (2009) ("In many ways, protection of these rights under the Privileges or Immunities Clause would be more textually sound and correct than the use of substantive due process."). Still others have argued that academic interpretations of "privileges" and "immunities" have veered too far from the intent of the Framers and the text of the Constitution. *See, e.g.*, Redish & Johnson, at 1569 ("The majority of academic overuse [of the Privileges and Immunities clause] involves a manipulation of *Corfield's* limitation of Article IV's use of the words "privileges and immunities" to protection of so-called fundamental rights as an indirect means of imposing a litany of countermajoritarian "natural rights" on the exercise of a state's democratically ordained lawmaking power.") (footnote omitted).

As explained above, our immigration system deprives people of life and liberty without traditional protections of due process of law in numerous ways. These are inextricably linked to the notion that the political branches of the federal government have plenary authority over immigration—even to the point of declaring what due process *is*.[376] Thus, so much of immigration decision making and enforcement simply lies beyond the protection of courts.

Many, including myself, have called for plenary power doctrine's demise. But even if the doctrine persists, as it is likely to do, the fundamental guarantee of due process can carve out greater protection for life against death. On substantive due process rights–a category of rights under significant strain, to be sure[377]–the right to life has clearest possible textual support in the Due

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Another line of exploration examines the extent to which "privileges and immunities" incorporates natural rights into the U.S. Constitution. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 529 (2nd ed. 1988) ("*Corfield* can be understood as an attempt to import the natural rights doctrine into the Constitution by way of the [P]rivileges and [I]mmunities [C]lause of [A]rticle IV."); Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J.L. & PUB. POL'Y 1095, 1136 (2002) (explaining that the Fourteenth Amendment "protect[s] by national law the privileges and immunities of all the citizens of the Republic and the *inborn rights* of every person . . .") (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 2542 (1866)) (emphasis added). Although an in-depth exploration is beyond the scope of this paper, the interplay between new and/or modified interpretations of the clauses and the ramifications for the rights of noncitizens calls for greater attention. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.5.1 (6th ed. 2019) ("Nor can aliens sue under the privileges and immunities clause.").

376 *See* Section III(D) *supra*.

377 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood v. Casey, 505 U.S. 833 (1992), and holding that no right to abortion exists under the U.S. Constitution). *Dobbs*, of course, represents a culmination of the hostility to substantive due process claims expressed by originalist jurists—most notably Justice Scalia—and rendered into law by the current Court. *See* Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. FORUM 99, 129 (2023) (examining "the decades-long debate between Justice Kennedy and Justice Scalia over dynamic and backwards-looking substantive due process standards"); *see also* Dobbs, 597 U.S. at 261 (2022) (Thomas, J., concurring) ("Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity."). Of course, critiques of originalism as history and method abound, including against the forms deployed in *Dobbs*. *See, e.g.*, Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism As Anti-Democratic Living Constitutionalism-and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1175 (2023) ("[O]riginalism's memory games offer a special way of talking that dissolves hardball appointments politics into claims about constitutionally redemptive law."); Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us Dobbs-and How History Can Help Overrule It*, 133 YALE L.J. FORUM 65, 69 (2023) ("For those justices, the outcome in *Dobbs* came first; history was but a means to that end."). The debate over *Dobbs* among scholars and current and recent Justices is just one thread in a long-running debate over substantive due process doctrine's validity. *Compare, e.g.*, Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in A Democracy*, 96 N.Y.U. L. REV. 1902, 1959 (2021) (defending major substantive due process cases and arguing that "substantive due process cases can be understood as exercises of democracy-promoting review"); Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253 (2016) ("No inquiry into the propriety of some process--its "due"-ness—is or can be indifferent to the substance of the associated loss."); *with* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 501 (1997) (examining the "gap between these doctrines and the language of the Due Process Clauses" and scholarly textual critiques); John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY

Process Clause. And yet due process doctrine has rarely protected the right to life as such within our immigration (or related) systems. Rather, the Court has considered protections against deadly force under the Fourth Amendment, and protections against conditions of confinement under a constrained view of the Fifth Amendment that fails to capture the value of life (and that, for some courts, simply parallels the Eighth Amendment).[378] But to the extent that due process means anything substantive at all, we might imagine life as both explicitly and conceptually deserving of protection of greater substantive due process scrutiny. An immigration system with a substantive right to life built into it would shift the limits and operation of governmental power considerably. It would necessarily limit the power of deportation itself, as well as myriad enforcement actions that risk life.

Substance and Procedure

On substantive due process rights against immigration enforcement actions, jurists might rethink what "shocks the conscience." As discussed, in the immigration enforcement realm, this test has found its way into notable caselaw on the separation of families, but offers minimal protection against other truly egregious practices.

To be sure, substantive due process doctrine generally, and the "shocks the conscience" test specifically, face significant headwinds;[379] the latter even where applied often fails citizens as well.[380] As Jane Bambauer and Toni Massaro have noted, courts routinely employ an extremely stringent version of this test that condones egregious governmental conduct against citizens and noncitizens alike.[381] Nevertheless, the shocks the conscience test persists and is not toothless.[382] Nor should it be in the immigration space.

OF JUDICIAL REVIEW 18 (1980) (describing "substantive due process' [as] a contradiction in terms—sort of like 'green pastel redness'" and rejecting the doctrine for textual and structural reasons).

378 *See* note 246, *supra.*

379 *See* note 377, *supra.*

380 *See* Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 335 (2015) ("In short, conscience-shocking behavior happens, but courts only rarely call it unconstitutional.").

381 *Id.* at 291-96 (canvassing cases where courts applied the test but found no violation, including for claims of both citizens and a noncitizen). As Professors Bambauer and Massaro point out, the outrageousness test has been further—and they argue improperly—narrowed by *Graham v. Connor*, which requires courts to avoid analyzing claims under substantive due process outrageousness if any enumerated or fundamental right plausibly covers the contested action. *Id.* at 310 (discussing 490 U.S. 386, 395-96 (1989)).

382 *See* Bambauer & Massaro, *supra* note 380, at 296 ("[C]areful readers will also see frequent reassurance from the courts that the outrageousness test continues to constrain government acts."); Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 520 (2008) ("[S]ubstantive due process should be recognized as a meaningful limitation on arbitrary abuses of executive power"); Timothy M. Tymkovich, Joshua Dos Santos, Joshua J. Craddock, *A Workable Substantive Due Process*, 95 NOTRE DAME L. REV. 1961, 1964 (2020) (concluding via originalist analysis that the "'shocks the conscience' strand of substantive due process jurisprudence prohibits some egregious torts by the state" in limited forms).

It's easy to agree, from the viewpoint of inherent value of noncitizen life, that spectacularly cruel failures do shock the conscience. But the doctrine could go further. Why does it not reach the tearing apart of families by more "normal" immigration detention or deportation policy—if those intentional acts can be shown to cause harms as severe for families and children as border separations?[383]

Oppressive enforcement mechanisms at our southern border could also properly shock the conscience, as might mass incarceration of immigrants by for-profit prison companies. Only by accepting death on a mass scale within our immigration system can the conscience remain "unshocked," so to speak. Drawing from earlier parts of this paper, necropower has normalized nearly all deaths caused by immigration incarceration and deportation, rendering them unspectacular. If we can reconceptualize more deaths—even every death—as shocking, executive authority over life should give way to greater protections.

Even short of that major shift—an admittedly unlikely one, given acceptance of related governmental conduct in other realms (policing, prisons)—substantive due process caselaw in the immigration context could more robustly affirm life by re-examining "civil" versus "criminal" divides. As many scholars have meticulously demonstrated, simply acknowledging the lived reality of harms would tip much of immigration enforcement into impermissible punishment.[384] And as early as *Wong Wing* in 1886, the Court has made this inquiry a central—and yet jurisprudentially underutilized—feature of constitutional limits on immigration's plenary power as well. If we follow *Wong Wing* to its logical ends—supplemented by mid-20th century caselaw on due process constraints on civil commitment—then detention, deportation, and other harms would give way to greater due process rights.

Courts loathe to completely break down the civil/criminal divide—by acknowledging all of the ways in which our immigration system punishes people—might simply recognize that any significant risk of mortality wrought by our immigration system is punishment. Dana Leigh Marks, the former president of the National Association of Immigration Judges, has notably likened adjudicating immigration removals to trying death penalty cases in a

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383 *See* Section I(C), (discussing Lee, *supra* note 34).

384 *See, e.g.*, César Cuauhtémoc García Hernández, *Immigration Detention As Punishment*, 61 UCLA L. REV. 1346, 1382 (2014) (arguing that legislative intent as well as conditions of confinement render immigration detention as punishment); DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 136 (2012) ("However, for many deportees, one of the cruelest aspects of their plight is the complete disregard by the legal system of their family . . . ."); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1929 (2000) ("[T]he fiction that deportation is not punishment is especially hard to maintain when a person is incarcerated for a long period of time as part of the process.").

traffic court setting."[385] If we take seriously the reality that many immigration decisions impact life or death, then for these decisions at minimum, we can erode the fiction of mere "civil" determinations for detention and deportation. These would yield greater substantive due process protections: punishment recognized fully as such should never be a consequence of an immigration infraction. And as Judge Marks' comment and the lessons of *Wong Wing* reveal, eroding this fiction would yield greater procedural rights as well: punishment, if imposed, must be accompanied by far greater process protections than what our immigration adjudication system allows.[386]

Distinction and Race

With respect to distinctions in immigration law, we might first question *Diaz*'s sweeping statement that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens"—as many scholars have done and continue to do.[387] A simple qualifier would preserve critical or functional distinctions that Congress makes on the basis of alienage, national origin, or any other normally suspect or quasi-suspect class. Might Congress only "rarely" or even just "sometimes" make rules that would be unacceptable for citizens? Might it "regularly" make rules unacceptable for citizens—as long as the rules have to do directly with immigration decisions (rather than, say, health care as in *Diaz* itself)? Or what if we broadly let Congress "regularly" make rules unacceptable for citizens—as long as those rules don't pose threats to noncitizens' lives? We might also draw from equal protection's fundamental rights doctrine.[388] If a right to life is fundamental, should an immigration law that employs classifications in directly risking life receive strict judicial scrutiny, no matter plenary power doctrine? Pressing on *Diaz*

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385 Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014), http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/ [https://perma.cc/T5E9-G9V7].

386 *See* Section III(C), (D), *supra*.

387 Mathews v. Diaz, 426 U.S. 67, 79–80 (1976); *see* Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 39 (1996) (urging elimination of plenary power doctrine so as to "permit challenges to immigration laws that discriminate based on suspect classifications such as race."); note 330, *supra* (citing additional scholars).

388 Under this doctrine, governmental distinctions between groups of people receive strict scrutiny when they impinge upon a fundamental right, even if the distinctions would not otherwise receive heightened scrutiny. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974) ("Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest."); Smith v. Bennett 708, 714 (1961) (holding that requiring indigent petitioners to pay a court filing fee violated Equal Protection); Skinner v. Oklahoma, 316 U.S. 535 (1942) (striking down, as violation of Equal Protection, state statute that imposed forced sterilization on certain persons convicted of multiple crimes); *but see* Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 284 (1991) (describing the "substantial demise of the fundamental rights strand of equal protection").

even at the margins could protect noncitizen life at seemingly little detriment to the Congressional power to make rules over immigration, deemed so important by the Court.

Finally, we should be troubled by the near unanimous rejection by courts of race-based equal protection challenges to immigration statutes. Courts should at least consider nuanced approaches that account for immigration law's racist origins and reiterations. Judge Miranda Du's opinion in *United States v. Carillo-Lopez* thoughtfully departed from the norm. She took seriously the historical context of nativism and eugenics that permeated our illegal entry law, as well as the present-day effects of that law on Mexican and Latinx individuals.[389] The Ninth Circuit, however, roundly rejected her analysis.[390] Until legal doctrines more fully confront the racialized histories and disparate impacts of our immigration laws, equal protection for immigrant and minority communities will remain elusive.

Territoriality

Put simply, we should do away with fictions of non-presence and non-personhood in our immigration legal system. The doctrines serve no function other than sovereign power itself—and as the sections above (I hope) demonstrate, the inherent value of migrants' lives demands that that power give way when life itself is at stake. But even if legal doctrine remains committed to the concept of sovereign power over territory—as seems likely, to say the least—the nonsensical territorial fictions wrought by immigration jurisprudence are simply unnecessary.

Entry fiction in its origins served an underlying desire to preserve life—to allow noncitizens to disembark from dangerous, crowded passenger ships while immigration officers considered their cases for admission. As I've explained elsewhere, in the 1880s, when the doctrine emerged, those ships were deadly and pestilent, and mass immigration incarceration did not exist.[391] Entry fiction's founding case, in fact, involved a young Japanese woman rendered to the custody of a Methodist mission boarding house in San Francisco, with bedrooms and a parlor room.[392] Today, we see the doctrine risk rather than save lives when noncitizens are turned back from the border on an enforcement officer's say so or signed piece of paper, or detained in prison-like conditions without a bond hearing. We should ask not only whether this is tolerable, but also whether it is practical or necessary. What harm would result from extending procedural due process protections at the border, or for persons "stopped at our gates"? The prevailing procedural due

389 *See* Section III(F), *supra*.

390 *See id*.

391 Lee, *supra* note 257, at 585.

392 *See id*. at 589–92 (including photos of the Gum Moon Residence Hall).

process test under *Mathews v. Eldridge* is already eminently practical, considering private interest; the risk of wrong decisions under current procedures, and the value of additional procedures; and governmental interest.[393] That last factor requires judicial consideration of the very same sovereign interests that the Court relies so heavily upon in justifying the fiction.

To be sure, courts would have to balance any interest of the government against the interests of individual lives. I concede here that this entire paper has argued that life itself is a weighty interest deserving of judicial consideration. But courts have shown an inclination, even without *Mathews* balancing, to take governmental national security and foreign policy assertions very seriously. If anything, the *Mathews* framework may well continue the trend of too little concern for noncitizens' lives, at least when the risk of death is not certain, and when the government raises sovereign concerns.

B. CHANGING LAW

Congress has enormous authority to better value and protect immigrants' lives. A few ideas follow. These are necessarily non-exhaustive starting points rather than detailed legislative proposals.

On *Abolition* and *Necropower*

As it stands in current doctrine, plenary power is a double-edged sword. Precisely because of the political branches' "entire" authority over immigration, so expressly insulated from judicial review, Congress has enormous ability to upend and redesign our immigration system. When viewed in conjunction with Congress's Article I powers generally, that authority grows larger yet.

In recent decades, Congress has chosen to make immigration law ever more oppressive for noncitizens through militarization of border enforcement, a growing immigration-criminal nexus, and funding of surveillance programs, among many other measures (including those discussed above). But a future Congress could move in a different direction entirely.[394]

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393 424 U.S. 319, 335 (1976) (holding that rights under due process in administrative proceedings are determined by balancing "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.").

394 It seems paradoxical that plenary power—so oppressive in its origins and invocations—could be used this way. But a future Court wishing to stand in the way of a movement for transformative justice in our immigration system, enshrined in the laws of Congress, would have to upend plenary power doctrine to do so.

Congress could amend the deportability provisions of our immigration laws, ending removals altogether. It could abolish any aspect of our immigration enforcement system; any subagency within DHS (or DHS itself); and any and every use of detention. Congress could eliminate every currently curtailed form of immigration process and transfer all immigration matters to immigration court or the federal courts. Congress could decide to end differential treatment of citizens and noncitizens under its own laws in any respect. It could restore, in the form of a statutory protection or standard, almost any of the constitutional rights or levels of scrutiny that the Court has stripped down or away. It could also set every noncitizen in the United States on a pathway to citizenship.

A growing number of scholars and activists have called for measures along some of these lines under the frame of abolition.[395] They have trained abolitionist and movement perspectives on detention, deportation, and immigration enforcement—and increasingly concluded that carceral logics and transformative justice are historically and inherently incompatible. Only changes on this scale could begin to truly upend the necropolitical subjugation of life to death throughout our immigration system. Necropower will persist for as long as carceral and military logics do, and for as long as racial and colonial subjugation remain unaddressed and unredressed; in Mbembe's formulation, it is in fact inextricable from nation-state itself.

The measures outlined in the remaining sections below (and the doctrinal shifts described above) fall far short of those goals. In so doing, they all maintain in some or large part divides between the value of citizen/noncitizen life; impositions of violence; and, of course, the operation of necropower. With that major caveat, and with full acknowledgement of these limits, I nevertheless conclude with a few thoughts on how our immigration laws could better protect noncitizen life in the nearer term. As the aforementioned discussion I hope demonstrates, allowing the most dangerous and deadly aspects of our immigration system to remain as-is is untenable. Rejecting laws that "let" or "make die" in the most pernicious ways—and instead forcing

395 *See, e.g.*, Laila L. Hlass, *Lawyering from A Deportation Abolition Ethic*, 110 CAL. L. REV. 1597, 1658 (2022) (calling "on immigration lawyers, organizations, and associations to play their part in dismantling the racist immigration detention and deportation system and demanding investment in immigrant communities."); *see also* Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1051 (2021) (inviting "scholarship and advocacy that move in a new direction, one which reorganizes responses to deportation toward the goal of its downfall"); Shiu-Ming Cheer, *Moving Toward Transformation: Abolitionist Reforms and the Immigrants' Rights Movement*, 68 UCLA L. REV. DISC. 68, 71 (2020) (concluding 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."); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 246, 250 (2017) (embracing an "abolitionist vision of immigration imprisonment. . . . intended to gradually replace secure facilities and surveillance technologies with an alternative moral framing of migrants and migration that renders practices of control indefensible.").

greater recognition of the value of life—is a worthy and necessary goal. Put simply, we cannot accept so much death in our system in the near term, far term, or today. To streamline this discussion, I necessarily focus on broad-brush suggestions rather than on in-depth policies, proposals, or bills.

Right to Life (Complementary Protection)

As discussed above, substantive immigration law's major forms of protection against deportations that risk noncitizens' lives flow from our international treaty obligations: namely, the Refugee Convention and Protocol; and the Convention Against Torture. Both are limited by stringent definitional criteria. Congress could follow international guidance to provide for what U.N. High Commissioner for Refugees (UNHCR) has termed "complementary protection."[396] This relief would prevent the deportation of individuals who would face serious harm in their countries of origin or return. As commentators and the UNHCR have recognized, there is currently no set definition or approach to complementary protection—but UNHCR has urged use of expansive protections that would reach harms far short of likely loss of life.[397] Still, if that proves too ambitious, Congress could write provisions that would at minimum prevent return to life-threatening conditions.

Even apart from international complementary protection, Congress could simply provide for a new form of immigration relief for anyone who can show that deportation would cause a serious risk to life. This may be structured as an affirmative visa, similar to U- and T- visas, or as a protection against removal, similar to withholding of removal under the refugee definition and/or CAT. Affirmative visas would allow individuals to apply with USCIS, whereas "defensive" protections against removal would proceed in immigration court.

Congress could also expand existing cancellation of removal relief to allow immigration judges to consider harm to the immigrant themselves—rather than only harm to a U.S. family member. It could remove the requirement that harm (to the immigrant, or a citizen relative) be "extraordinary" and simply allow immigration judges to consider any harm. Or, Congress could define "extraordinary" harm as including any serious threats to life.

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396 Jane McAdam, Complementary Protection and Beyond: How States Deal with Human Rights Protection 1 (United Nations High Comm'r of Refugees, Working Paper No. 118, 2005) (defining the term as "protection granted by States on the basis of an international protection need outside the 1951 [Refugee] Convention framework"); *see also* GUY GOODWIN-GILL & JANE MCADAM , THE REFUGEE IN INTERNATIONAL LAW 29 (4th ed. 2021) (discussing the UN Refugee Agency's (UNHCR) broad interpretation of the term 'refugee' for which it offers its protection and assistance).

397 *See* McAdam, *supra* note 396, at 3 (discussing term and comparative definitions).

Public Charge

For decades, public health experts, social workers, legal scholars, and others have called for an end to the public charge provisions of immigration law, documenting its pernicious effects.[398] The exclusions have dark roots in misconceptions about immigrant morality and behavior.

I recognize that equality principles hardly drive the public debate around access to our social safety net; and that funding for these programs is far from limitless and abundant. But even if there are programs that Congress wishes to preserve for U.S. citizens and/or certain statuses of immigrants, it can do so simply by restricting *eligibility* for those benefits or services in the first instance. As described above, it has already done so with the 1996 welfare reform act.

For the reasons explained, I am decidedly not in favor of such restrictions—especially as essential services save lives and improve the wellbeing and health of communities, families, and individuals. But targeting eligibility for services at the outset is a better course of action than imposing immigration consequences for noncitizens' use of public benefits. Restrictions on eligibility, despite moral and efficacy failings, would at least avoid the pernicious chilling effects of current public charge exclusion grounds, which deter immigrants from seeking services for which they or their children are eligible. Doing away with these exclusions would help prevent future restrictive executive branch interpretations that sow confusion and fear in communities.

Detention

As mentioned above, Congress has the power to end ICE detention. It could do so by banning the practice explicitly or presumably by simply deleting every provision of the INA that authorizes detention currently. Should it allow ICE facilities to continue to operate, Congress can drastically decrease the scale of detention by cutting funding or eliminating the current minimum bed mandate. It could also take responsibility for conditions in facilities it allows to operate. For example, it might make funding contingent on adherence to minimum standards of care. As part of this, or even sans funding contingencies, it could empower the current Ombudsman for Immigration Detention to enforce safe conditions and adequate medical services via the ability to terminate facility contracts. And, if Congress shifts even a fraction of the billions spent each year on mass immigration incarceration, it could provide significant additional funding for ICE's medical corps—or, lawyers for those detained.

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398 *See* Section II(C), *supra*.

Or Congress might simply write in an unqualified right to release for medical or humanitarian reasons—so that no one with a life-threatening or terminal illness need risk death in ICE detention. To ensure that individuals in this circumstance do not experience a life-threatening gap in care, Congress should require ICE to coordinate and fund continuing treatment of sick people whom it releases. Congress could also mandate closure or significant capacity reduction of immigration facilities in the event of our current—or any future—pandemic.

Enforcement and Border

In much the same way that it could alter the terms and structure of immigration detention, Congress could build protective measures for life into the entire architecture of border security and immigration enforcement. Massive funding increases for ever-greater militarization of the border—leading to deadlier crossings deep within desert landscapes—could simply end. Congress could demilitarize border protection generally, transforming immigration enforcement into a system driven by more truly civil standards and practices rather than carceral logics. It could, for example, cease funding for high tech weaponry and surveillance technologies. Targeted measures might also make funding of specific programs or units contingent on minimization of threats to life.

Congress should consider statutory standards and limits on uses of force, including shootings and vehicular chases. At minimum, it could ensure remedies for victims when these killings take place—including for cross-border shootings presently excluded from protection by Court decisions. This could take the form of formalization and/or expansion of *Bivens* into law, or an expansion of the Federal Torts Claims Act. It could eliminate qualified immunity, as many have argued for in immigration and policing contexts.[399] Congress could also anticipate and pay for the medical needs of individuals whose near-death conditions result from border architecture. And it could pass laws expressly preempting Operation Lonestar's immigration enforcement functions.

Recent iterations of comprehensive reform bills do little to none of this. Rather, the (stalled) versions of comprehensive immigration reform maintain a "tough on border" approach, as a trade-off for modest liberalization of immigration policy and pathways to citizenship in the interior.[400] But this

399 *See, e.g.*, Tilman J. Breckenridge, *Qualified Immunity: History Demands Change*, NAT'L B. ASS'N MAG., JAN. 2021, at 12–13 (calling on the legal community to "consider and express the full panoply of qualified immunity's dangers so that they can be addressed accordingly").

400 *See generally* U.S. Citizenship Act, H.R. 1177, 117th Cong. (2021). While the bill contains worthwhile reforms and builds in some standards for CBP custody conditions and officer training, it by and large maintains current border operations.

tradeoff accepts so much death in our current immigration system and must be questioned.

Territory, Discrimination, and Rights

Finally, Congress can end manipulations of territory by enacting statutory protections for noncitizens facing risks to life in our immigration system. It could eliminate the entry fiction—if not from constitutional caselaw, then as a matter of "legislative grace."[401] With regard to process rights, Congress could do away with Title 42 and expedited removal entirely, instead mandating normal immigration court proceedings for anyone whom the government seeks to remove. On habeas rights, Congress could undo *Thuraissigiam*'s pernicious impacts by restoring jurisdiction to the federal courts for review of expedited removal orders. Congress could also eliminate other provisions of the immigration laws that strip immigrants of the ability to fully challenge deportation outside the expedited removal context.[402]

At minimum, Congress should define habeas jurisdiction of the federal courts to permit review of challenges brought by people on U.S. territory—doing away with *Thuraissigiam*'s expansion of entry fiction to Suspension Clause doctrine. It could also codify longstanding BIA caselaw recognizing a border crossing as an entry[403] for all statutory immigration process rights and all statutory jurisdictional provisions.

In light of the hostility of the Court to equal protection challenges in the immigration context, Congress should also strengthen the non-discrimination provisions of its own laws. It could significantly expand the scope of the current non-discrimination provision found at 8 U.S.C. § 1152(a)(1), which the Court in *Trump v. Hawai'i* construed restrictively to allow President Trump's entry ban.[404] Congress could extend that provision to clearly cover future entry bans—including ones that discriminate on the basis of religion—

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401 Because the concept of "entry" for constitutional purposes draws from statutory frameworks and definitions, Congress could possibly eliminate the constitutional entry fiction by changing, for example, the definition of an immigration admission. *See* 8 U.S.C. § 1101(a)(13) ("The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."). Congress could also certainly choose to provide identical processes irrespective of formal entry.

402 *See, e.g.*, 8 U.S.C. § 1252(f) (limiting injunctive relief and federal court jurisdiction for noncitizens' challenges to removal processes and decisions); *id.* § 1252(g) ("Except as provided in this section . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders . . . .").

403 *See, e.g.*, In re Z, 20 I.&N. Dec. 707, 714 (B.I.A. 1993) (finding that applicant had "made an entry into the United States when he debarked from his vessel at a place other than a port of entry and fled into the interior undetected"); *see also* In re Patel, 20 I.&N. Dec. 368, 374 (B.I.A. 1991) (remanding the case back to immigration judge for "submission of evidence regarding the alien's freedom (or lack thereof) from official restraint" in determining whether applicant had made legal entry into the country).

404 *See* note 325, *supra*.

or even to cover nearly all immigration processes.[405] It could also impose a standard of heightened scrutiny for future immigration policies that target suspect classes, allowing courts to finally subject discriminatory immigration actions to full-fledged review.

Congress should consider the real-life circumstances of any of the above measures in practice. Namely, it can ensure that future (and current) statutory due process, nondiscrimination, and habeas rights are actualized—e.g., by mandating government-funded right to counsel for immigrants.[406]

Finally, in any future comprehensive immigration reform, Congress should continue to re-evaluate our laws in light of their racist origins, seeking to break from that history through different policy choices and moral frames. While that may seem like an enormous undertaking, Congress has done so in huge ways in the past—e.g., through the end of Chinese Exclusion, the repeal of the national origins quota system, the passage of the Refugee Act[407]—and it can do still more. It should consider how its laws have targeted or disproportionately impacted Latinx communities, as well as Black and Asian communities; how they continue to do so; and how new laws and paradigms could do better.

C. VALUING CITIZENS AND NONCITIZENS

So many discussions around immigration law and policy—in doctrine, policy solutions, and public discourse—assume the primary of citizen life. Self-determination in a democratic system requires valuing members above nonmembers, the argument goes, and citizen life should take priority where resources are scarce.[408]

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405 A bill introduced in the House by Representative Judy Chu would expressly cover religious discrimination and also extend applicability of the provision to issuance of an immigrant visa "or a nonimmigrant visa, admission or other entry into the United States, or the approval or revocation of any immigration benefit"—thus squarely covering President Trump's travel ban. H.R. 2214, 116th Cong. (2019-2020), https://www.congress.gov/bill/116th-congress/house-bill/2214/text [https://perma.cc/4L4D-GC37].

406 *See, e.g.*, Lucas Guttentag & Ahilan Arulanantham, *Immigration, Deportation, and the Right to Counsel*, GPSOLO MAG., Sept. 2013, at 64–65 (favoring extending *Gideon* rights to appointed counsel in deportation cases).

407 *See generally* Jessica Bolter, *Immigration Has Been a Defining, Often Contentious, Element Throughout U.S. History*, MIGRATION POLICY INSTITUTe (Jan. 6, 2022), https://www.migrationpolicy.org/article/immigration-shaped-united-states-history [https://perma.cc/E82R-94VF] (providing a brief overview of major milestones); Andrew M. Baxter & Alex Nowrasteh, *A Brief History of U.S. Immigration Policy from the Colonial Period to the Present Day*, CATO INSTITUTE (Aug. 3, 2021), https://www.cato.org/policy-analysis/brief-history-us-immigration-policy-colonial-period-present-day [https://perma.cc/PCH2-D7DF] (same).

408 *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 52 (1974) ("The members of a political community have a collective right to shape the resident population – a right subject always to the double control that I have described: the meaning of membership to the current members and the principle of mutual aid.").

Yet, the examples I recount above reveal that—even setting aside the moral claims to inherent equivalence—pitting citizen life against noncitizen life is a false dichotomy. We have spent billions of dollars on ICE detention that does not make us safer, but in fact likely worsened the spread of COVID-19 in our communities.[409] We have apprehended ever more asylum seekers in spending billions on border control, yes—but the flow of deadly drugs across the U.S.-Mexico border has only grown as border control spending increased.[410] On public benefits, numerous studies have shown that exclusion of noncitizens from our modest social safety nets has risked wellbeing and opportunity for U.S. citizen children in mixed immigration status families.[411] In the public health context, noncitizens' exclusions from health insurance limits access to primary care that could prevent more costly emergency care.[412]

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409 *See* Emily Kassie & Barbara Marcolini, *'It was like a Time Bomb': How ICE Spread Coronavirus*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/2020/07/10/us/ice-coronavirus-deportation.html [https:// https://perma.cc/5Y9C-FFEX] (revealing how "unsafe conditions and scattershot testing helped turn ICE into a domestic and global spreader of the virus"); *see also Dennis* Kuo, Noelle Smart, Zachary Lawrence & Adam Garcia , *The Hidden Curve: Estimating the Spread of COVID-19 Among People in ICE Detention*, VERA INST. JUST., June 2020, at 4–11, https://www.vera.org/downloads/pdfdownloads/the-hidden-curve-report.pdf [https://perma.cc/CTH2-VYUG] (estimating that, after considering Vera's epidemiological model analyzing COVID-19 spread in detention facilities, "the true scale of the spread of COVID-19 in ICE detention is likely to be shockingly high").

410 *See* David J. Bier, *Fentanyl Is Smuggled for U.S. Citizens By U.S. Citizens, Not Asylum Seekers*, CATO INST.: CATO AT LIBERTY BLOG (Sept. 14, 2022, 3:46 PM), https://www.cato.org/blog/fentanyl-smuggled-us-citizens-us-citizens-not-asylum-seekers [https://perma.cc/Z826-XYAK] (criticizing traditional methods of drug trafficking interdiction like increasing the Border Patrol and erecting a border fence as ineffective methods of stemming the flow of fentanyl into the United States); Gabe Gutierrez and & Al Henkel, Fentanyl, *Seizures at U.S. Southern Border Rise Dramatically*, NBC NEWS (June 21, 2021), https://www.nbcnews.com/politics/immigration/fentanyl-seizures-u-s-southern-border-rise-dramatically-n1272676 [https://perma.cc/8VYV-46G8] (reporting a "staggering 4,000 percent increase in fentanyl seizures over the last three years").

411 *See, e.g.*, Susan Mapp & Emily Hornung, *Irregular Immigration Status Impacts for Children in the USA*, 1 J. HUM. RTS SOC. WORK 61, 67 (2016) (finding that because of restricted access to healthcare and education by the children of undocumented immigrants "a disenfranchised underclass has begun to develop without the means for full social and political integration into US society"); Edward Vargas, *Immigration Enforcement and Mixed-Status Families: The Effects of Risk of Deportation on Medicaid Use*, 57 CHILD YOUTH SERV REV. 83, 88 (2015) (finding that "[m]ixed-status families are extremely vulnerable in terms of access to health care").

412 *See* Jonathan Gruber, Adrienne Sabety, Rishi Sood & Jin Yung Bae, *Reducing Frictions in Healthcare Access: The ActionHealth NYC Experiment for Undocumented Immigrants*, NAT'L BUREAU OF ECON. RESEARCH, WORKING PAPER SERIES, No. 29838 3 (Mar. 2022), http://www.nber.org/papers/w29838 [https://perma.cc/84N8-PMYD] (reporting that after randomly enrolling undocumented immigrants in New York City in a pilot program that provided city-funded access to primary health care services, "[Emergency department (ED)] visits simultaneously decreased by 21% . . . causing ED spending on non-admitted visits to decrease by $195.60 per individual."); *compare* Fernando Wilson et al., *Comparison of Use of Health Care Services and Spending for Unauthorized Immigrants vs Authorized Immigrants or US Citizens Using a Machine Learning Model*, 3(2) JAMA NETWORK OPEN 1, 8 (2020) (finding that "unauthorized immigrants are 8 times more likely to be uninsured than US-born individuals" but also finding "no evidence that unauthorized immigrants pose a substantial economic burden on the health care delivery system in the US," including on emergency departments).

Creating new forms of immigration relief for people who might die if we deport them, or doing away with laws and policies such as Title 42 that could trap them in spaces of extreme danger, may indeed increase levels of immigration. But—again, even setting aside the moral arguments—economists have documented time and again the net *benefit* of loosening immigration policy given U.S. labor shortages and the looming demographic crisis of an aging population.[413]

Admittedly, there are situations where most Americans would agree that citizen life should take priority over non-citizens, e.g., where efforts may well be zero-sum or closer to it. Consular services addressing the needs of citizens abroad, governmental negotiation of return of U.S. hostages, and military evacuation of citizens in crisis zones come to mind as likely examples.[414] But the forms of death that our immigration system causes and accepts do not exist in a similar zero-sum space. As the analyses and proposed solutions above help demonstrate, it is both possible and morally imperative to prevent death in that system to create a better society for all.

CONCLUSION

In a welcome shift early in the Biden Administration, the federal government in February 2021 issued a statement on Equal Access to COVID-19 Vaccines and Vaccine Distribution Sites:

> DHS and its Federal government partners fully support equal access to the COVID-19 vaccines and vaccine distribution sites for undocumented immigrants. It is a *moral and public health imperative* to ensure that all individuals residing in the United States have access to the vaccine.[415]

Notably, the statement above does not hinge on greater benefits to U.S. citizens or privileged-status immigrants. While it is true that, as a public health matter, all are safer from COVID-19 with higher vaccination rates, this call emphasizes a moral obligation to provide a life-saving vaccine to people regardless of immigration status.

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413 *See, e.g.*, Michael J. Trebilcock & Matthew Sudak, *The Political Economy of Emigration and Immigration*, 81 N.Y.U. L. Rev. 234, 268 (2006) (analyzing data on "the economic benefits of immigration"); M. Jeanette Yakamavich, *NAFTA on the Move: The United States and Mexico on a Journey Toward the Free Movement of Workers - A Nafta Progress Report and EU Comparison*, 8 L. & BUS. REV. AM. 463, 487 (2002) (embracing a more liberal labor migration policy as "the free movement of workers from Mexico means big benefits to the United States" economically).

414 Social theorists, however, have complicated the underlying assumptions of these arguments as well. *See, e.g.*, JOSEPH H. CARENS, THE ETHICS OF IMMIGRATION 225 (2013) ("[I]n principle, borders should generally be open and people should normally be free to leave their country of origin and settle in another."); CHRISTOPHER HEATH WELLMAN & PHILLIP COLE, DEBATING THE ETHICS OF IMMIGRATION: IS THERE A RIGHT TO EXCLUDE? 105–116 (2011) (presenting authors' differing views, including Cole's argument that migrants have a moral right to cross borders).

415 Press Release, Dep't of Homeland Sec., Statement on Equal Access to COVID-19 Vaccines and Vaccine Distribution Sites (Feb. 1, 2021), https://www.dhs.gov/news/2021/02/01/dhs-statement-equal-access-covid-19-vaccines-and-vaccine-distribution-sites [https://perma.cc/4KPJ-WV4T] (emphasis added).

Yet, that normative imperative is simply missing throughout our actual immigration laws. Instead, noncitizens risk and lose their lives due to the design, enforcement, denials, and expulsions of our immigration system. This state of affairs—the acceptance and perpetuation of racialized risks to human life—reflects the necropolitics of immigration law. Both legal doctrines and legislative choices operationalize necropower and structure our immigration enforcement and adjudication system.

There is nothing inevitable about the loss of noncitizens' lives in the many ways explored above. There is also nothing "rogue" or inexplicable about it. The assumptions, choices, and acceptance of an entire architecture of law and jurisprudence undergird noncitizens' deaths. The question we must ask is what to do about them.