

THE NECROPOLITICS OF IMMIGRATION ENFORCEMENT

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ABSTRACT

Racialized migration control policies increasingly subject migrants of color to systemic harms, including death. As the root causes of migration remain unaddressed, global forced displacement and migrant deaths have reached unprecedented levels while receiving states respond with increasingly violent and lethal force. In the United States, the Trump administration's policies have built upon decades-long restrictionist migration control strategies, culminating in widespread border deaths, the disappearance of migrants, pervasive detention, and mass deportations. Furthermore, recent Supreme Court doctrine has eroded protections for migrants targeted by the immigration enforcement system, particularly in the critical contexts of immigration detention and deportation. This evolution of immigration law and policy has resulted in irreparable harms, including diminished rights, deleterious health effects, and record levels of documented migrant deaths, with the Mexico-U.S. border now representing the deadliest land migration route in the world while the immigration enforcement system perpetuates migrant mortality.

This Article provides a novel perspective on state violence and immigration enforcement. It provides a genealogy of contemporary migration control practices through the lens of necropolitics, arguing that immigration law and policy perpetuating migrant death represent a primary pillar of the nation's departure from democracy. Necropolitics provides a framework to understand how the state increasingly wields power over life and death. When applied to current U.S. immigration policy, this framing offers new understanding of the resurgence of nativist sentiments, the motivations for racialized exclusion, and their respective broader implications for diminishing democracy. After mapping both spectacular and slow deaths of migrants in the enforcement system, this Article examines the forces causing displacement and policies increasingly empowering state violence to curb the resultant migration to the United States. Ultimately, as the nation endures a restrictionist Supreme Court and a second Trump term focused on violent exclusion and mass deportations, this Article addresses the urgent need for non-reformist reforms to preserve migrant life and reorient democratic principles.

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INTRODUCTION

Migration levels have reached unprecedented rates. Within a global population exceeding eight billion,¹ the number of displaced individuals continued to rise in 2023, resulting in more than one hundred seventeen million displaced people worldwide.² As displacement surges, receiving countries increasingly rely on violent and even lethal

1. Conrad Hackett, *Global Population Projected To Exceed 8 Billion in 2022; Half Live in Just Seven Countries*, PEW RSCH. CTR. (July 21, 2022), <https://www.pewresearch.org/short-reads/2022/07/21/global-population-projected-to-exceed-8-billion-in-2022-half-live-in-just-seven-countries/> [https://perma.cc/KG5L-AJSF].

2. U.N. HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2023, at 2 (June 13, 2024), <https://www.unhcr.org/sites/default/files/2024-06/global-trends-report-2023.pdf> [https://perma.cc/6375-F3EH]. One in every sixty-nine people, or 1.5% of people globally, has been forcibly displaced. *Id.* at 6. This figure is nearly double the number of displaced people as of a decade ago. *Id.*

means to curb migration.³ As a result, 2024 was the deadliest year for migrants on record globally.⁴ In the United States, this increase in mass migration now results in a record 2.5 million border encounters annually⁵ and the continued detention and deportation of hundreds of thousands of noncitizens each year.⁶ In 2022, migrants experienced a record number of documented border deaths (853),⁷ as well as record deaths and disappearances in the Caribbean (341),⁸ while fatalities caused by detention, deportation, and encounters with immigration enforcement officials persist. Further compounding challenges for migrants, those surviving the enforcement system face systemic harms such as diminished rights in legal, political, and employment contexts. Migrants of color primarily bear the brunt of such state-sanctioned violence.⁹

Contemporary migration control laws and policies perpetuating violence continue to supersede any meaningful effort to address the root causes of migration. Rather than confront the consequences stemming from imperialist policies, protracted conflict, and the climate crisis, recent U.S. enforcement efforts continue to build on previous administrations' destructive migration control strategies, culminating in the

3. Annick Pijnenburg & Kris van der Pas, *Strategic Litigation Against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Route*, 24 EUR. J. MIGRATION & L. 401, 411–28 (2022) (discussing litigation strategies to address human rights violations caused by migration control policies in the Mediterranean); *Migrant Deaths Hit Record in 2024, with 10% Violently Killed, UN Agency Says*, REUTERS (Mar. 21, 2025, at 11:32 ET), <https://www.reuters.com/world/migrant-deaths-hit-record-2024-un-agency-says-2025-03-21/> [https://perma.cc/4MFU-G9KZ] (reporting that at least 10% of migrant fatalities are now considered violent deaths and noting that drownings after being forcibly repelled at sea by coastguards are not captured in the data).

4. *2024 Is Deadliest Year on Record for Migrants, New IOM Data Reveals*, INT'L ORG. FOR MIGRATION (Mar. 21, 2025), <https://www.iom.int/news/2024-deadliest-year-record-migrants-new-iom-data-reveals> [https://perma.cc/QB5B-WKKT].

5. *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT. (Aug. 12, 2025), <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> [https://perma.cc/HT8Z-SPQV] (reporting 2,475,669 border encounters for fiscal year 2023); Juliana Kim, *The U.S. Set a New Record for Apprehensions at the Southern Border*, NPR (Oct. 24, 2024, at 05:00 ET), <https://www.npr.org/2022/10/24/1130841306/new-record-in-border-patrol-apprehensions> [https://perma.cc/9REM-QRSG].

6. See U.S. DEPT' OF HOMELAND SEC., 2019 YEARBOOK OF IMMIGRATION STATISTICS 103 (2020); *Immigration Detention Quick Facts*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR., <https://trareports.org/immigration/quickfacts/> [https://perma.cc/SLB3-Q7EJ] (last visited Nov. 26, 2025).

7. Camilo Montoya-Galvez, *At Least 853 Migrants Died Crossing the U.S.-Mexico Border in the Past 12 Months—a Record High*, CBS NEWS (Oct. 28, 2022, at 10:37 ET), <https://www.cbsnews.com/news/migrant-deaths-crossing-us-mexico-border-2022-record-high/> [https://perma.cc/62T2-WRJV] (reporting fiscal year 2022 as the deadliest year for migrants recorded by the U.S. government). Due to the challenges of recording migrant fatalities, the true number of border deaths is likely higher. Data for 2023 is not yet available.

8. *2024 Is Deadliest Year on Record for Migrants, New IOM Data Reveals*, *supra* note 4.

9. See generally Abel Rodriguez, *Lethal Immigration Enforcement*, 109 CORN. L. REV. 465 (2024) (analyzing the impact on migrants of color of violent enforcement strategies, the rationales for such strategies, and the legal impunity perpetuated by courts for violence against noncitizens).

intensification of migrant expulsion,¹⁰ the disappearance of migrants,¹¹ and the externalization of borders to foreign nations.¹² Meanwhile, recent Supreme Court doctrine has bolstered impunity for violence perpetuated by immigration officials,¹³ diminished accountability within the immigration detention and removal systems,¹⁴ and affirmed broad executive discretion to exclude migrants, even when targeting nationals of selected countries.¹⁵

This Article provides a novel perspective on the evolution of immigration law and policy increasingly perpetuating racialized state violence. It applies the framework of necropolitics to the immigration enforcement system to examine the root causes of increased displacement and the corresponding role of immigration law and policy in empowering violent responses to migration.¹⁶ This examination reveals that the U.S. immigration regime's increasing power over life and death represents one of the primary pillars of the nation's departure from democracy. The ongoing erosion of democratic principles is furthered by legislators, courts, administrative agencies, and presidential

10. See *Mass Deportation: Analyzing the Trump Administration's Attacks on Immigrants, Democracy, and America*, AM. IMMIGR. COUNCIL (July 23, 2025), <https://www.americanimmigrationcouncil.org/report/mass-deportation-trump-democracy/> [https://perma.cc/J3UA-G2FM]; Michelle Hackman & Tarini Parti, *Biden Administration Leans on Trump-Era Policies To Combat Migrant Wave*, WALL ST. J. (Jan. 5, 2023, at 17:02 ET), <https://www.wsj.com/articles/biden-administration-expands-title-42-migrant-expulsions-to-more-countries-11672934432> (on file with the Temple Law Review).

11. See generally Valentina Azarova, *The Enforced Disappearance of Migrants*, 40 B.U. INT'L L.J. 133 (2022) (considering the relevance and practical benefits of the legal category of "enforced disappearances" in the context of migration and border violence); Diego F. Leal & Natalie L. Cadwalader, *Enforced Disappearance as a Border Management Tool: The Case of Border Patrol Detentions of Immigrant and Asylum-Seeking Families in the United States*, 13 J. ON MIGRATION & HUM. SEC. 234 (2024) (examining the experiences of international migrants and asylum-seeking families to assess their ability to make phone calls while in border patrol detention).

12. See Nick Miroff & Mary Beth Sheridan, *As U.S. Seeks To Outsource Immigration Enforcement, Mexico Gains Leverage*, WASH. POST (May 3, 2021), https://www.washingtonpost.com/national/mexico-immigration-enforcement-leverage/2021/05/02/ca2af3aa-a854-11eb-b166-174b63ea6007_story.html [https://perma.cc/EQ58-HJQE].

13. See *Egbert v. Boule*, 142 S. Ct. 1793, 1806–07 (2022) (declining to extend *Bivens* to a Fourth Amendment excessive force violation in contexts where Congress is better positioned to create remedies, nor to federal officials' retaliation against the exercise of First Amendment rights); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860–63 (2017) (denying noncitizens detained in the wake of the 9/11 terrorist attacks the ability to recover monetary damages from federal officials for the conditions of their confinement).

14. See *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1832–33 (2022) (citing *Jennings v. Rodriguez*, 583 U.S. 281 (2018) (holding the Immigration and Nationality Act (INA) allows certain noncitizens ordered removed to be detained beyond the ninety-day removal period and does not require the government to offer noncitizens bond hearings after six months of detention, in which the government bears the burden of proving by clear and convincing evidence that the noncitizen poses a flight risk or a danger to the community)); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2280 (2021) (finding noncitizens are not entitled to individualized bond hearings while pursuing withholding of removal); *Jennings v. Rodriguez*, 138 S. Ct. 830, 842–48 (2018) (holding that INA provisions related to detention of noncitizens seeking entry and release on bond pending removal could not be interpreted as placing a six-month limit on detention or requiring periodic bond hearings).

15. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2403–06, 2423 (2018) (upholding the Trump administration's entry bar on six predominantly Muslim countries).

16. This analysis engages primarily with the following scholarship: ACHILLE MBEMBE, *NECROPOLETTICS* (Steven Corcoran trans., Duke Univ. Press 2019) (2016); Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319 (2019); Amna Akbar, *Non-Reformist Reforms and Struggles Over Life, Death, and Democracy*, 132 YALE L.J. 2497 (2023) [hereinafter Akbar, *Non-Reformist Reforms*].

administrations regardless of political affiliation, culminating in a second Trump term effectuating mass deportations and significant restructuring of the immigration system to restrict migration.

The theory of necropolitics holds that the subjugation of life to the power of death defines contemporary global relations.¹⁷ Cameroonian theorist Achille Mbembe contends that “enmity now constitutes the spirit of liberal democracies,”¹⁸ fostering hostility toward those deemed undesirable and expanding the state’s power to define who is disposable within society.¹⁹ As increased conflict drives human displacement, the solution is increased border closure.²⁰ As increased migration persists, migrants and refugees reign prominent among so-called undesirables, who are subjected to various forms of subjugation—including actual mortality as well as more protracted harms—to ensure those with power may live.²¹ This reality reflects a “time of exit from democracy” and a return to colonial desires and strategies.²² Grounding necropolitics in U.S. immigration policy reveals the motivations and implications of the current racialized exclusion of migrants as well as the pressing need to reimagine the state’s role in its encounters with noncitizens.

With the underlying motive of deterring migration, the immigration enforcement system perpetuates death. After defining death for the purposes of this analysis, Section I catalogues both spectacular and slow death, or readily perceived and incremental mortality, resulting from migration control policies.²³ It places the record number of recently documented border deaths, which received relatively more media attention, within the context of other, often overlooked, forms of violence against migrants. While migrants lose their lives as a result of detention, deportation, and encounters with immigration officials, they also suffer less conspicuous harms—not only within these systems but also due to pernicious policies related to their employment, healthcare, government benefits, and voting rights. This mapping of migrant death serves to illuminate and quantify the increasing violence inflicted on migrants, illustrating the state’s increased inclination to exert power over life and death, while also providing context to examine broader implications for the nation’s trajectory and ethos. The various forms of death inflicted on migrants rest largely in power dynamics related to their subordination, racialization, and vilification.

Employing interrelated frameworks from the theory of necropolitics, Section I examines the role of colonialism, racism, and insecurity in creating a society imbued with hostility toward, and animus against, people who migrate. According to the theory of necropolitics, colonial desires undergird the violence of our times,²⁴ race drives the

17. MBEMBE, *supra* note 16, at 15–20.

18. *Id.* at 117.

19. *Id.* at 80.

20. *Id.* at 98.

21. *Id.* at 39.

22. *Id.* at 9.

23. For an analysis focused primarily on the spectacular death of migrants, see generally Rodríguez, *supra* note 9 (arguing that racialized policy rationales, impunity instituted by courts, and prevailing political paradigms have coalesced to increase spectacular death among migrants of color, rendering them expendable).

24. See MBEMBE, *supra* note 16, at 15–20.

concomitant devaluing of life,²⁵ and a state of insecurity justifies hostility and violence against undesirable members of society, including migrants and people of color.²⁶ Section I also considers how colonialism and neocolonialism represent primary root causes of migration, focusing on U.S. subordination of Global South nations. It also explores the role of hydraulic and nanoracism—akin to institutional and everyday racism, respectively—in rationalizing both (neo)colonial²⁷ actions and hostile migration control policies. Lastly, it addresses the construction of migrants of color as a threat to national security justifying violent migration control.

Immigration law and policy give force to the colonial and racial motivations underlying the violent exclusion of migrants. Contemporary immigration policies and recently established Supreme Court doctrine have, as Section II analyzes, built upon decades of restrictionist strategies to further entrench necrolaw and policy, defined here as jurisprudence and policy implementation that perpetuates death in nation-states exercising necropolitics.²⁸ Despite illusory promises to “fix” the immigration system,²⁹ the Biden administration’s policies increased migrant mortality and exacerbated slow death among migrants. These policies included approaches in line with the first Trump administration, such as outsourcing immigration enforcement to Latin American nations, particularly Mexico, and diminishing protections for asylum seekers. Federal officials have further escalated policies hostile to migrants under the second Trump administration. States have also taken unprecedented steps to enforce migration, including Texas legislation that empowers state officials to effectuate removals. Meanwhile, the Supreme Court has largely rendered decisions detrimental to migrants related to issues which are already rife with violence such as use of force, deportation, and detention.

In the first year of the second Trump term, the United States finds itself at an inflection point. As the nation embraces a resurgent ethos of animus toward migrants and enforces its hostility to migration through immigration law and policy, it further distances itself from its prior purported democratic aspirations. Section III argues that the United States is in the throes of embracing its “nocturnal body,” the dark and violent side of democracy, reverting to colonial desires and tactics.³⁰ In conjunction with diminished domestic civic representation (voter suppression, disenfranchisement, gerrymandering)

25. *See id.* at 57–65.

26. *Id.* at 54–57.

27. I use the term “(neo)colonial” to encompass both colonial and neocolonial actions. The use of this term is meant to avoid cumbersome references to both colonialism and neocolonialism throughout the Article.

28. The concepts of “necrolaw” and “necropolicy” employed in this analysis are derived from formulations of those terms by scholars whose work applies and expands the theory of necropolitics. See *infra* Section III for further elaboration on the definition of these terms. To avoid confusion at the outset, it may be helpful to note here that the term “necrolaw” has also been used in the context of burials, that is, to describe laws governing who determines where to bury a decedent. *See generally* Sonn MacMillan Walker, *Last Rites: Richard Easton Looks at the Problem of Necrolaw*, 179 CRIM. L. & JUST. 905 (2015) (describing “necrolaw” as the body of legal rules governing posthumous disputes over burial and the treatment of corpses).

29. Amna Nawaz & Saher Khan, *Biden Vowed To Fix America’s Immigration System. Here’s What He Achieved in His First Year*, PBS NEWS (Jan. 20, 2022, at 18:40 ET), <https://www.pbs.org/newshour/show/biden-vowed-to-fix-americas-immigration-system-heres-what-he-achieved-in-his-first-year> [https://perma.cc/NST7-HJPP].

30. *See* MBEMBE, *supra* note 16, at 15–20.

and unrelenting intervention abroad (imperialism, neocolonialism, war), security state strategies constitute one of the primary pillars of the nation's departure from democracy. These strategies include racialized immigration policing, lethal border policies, punitive immigration detention, and violent deportations. Immigration has become the primary fulcrum of the abandonment of democratic ideals. Achieving democracy will necessitate, among other significant changes, non-reformist immigration reforms and a radical reimagining of responses to migration.

This Article makes three central contributions. First, in addition to cataloguing migrant death, it provides novel analysis of largely overlooked data, such as those related to the disproportionate deaths of Black and Latinx immigrants in immigration detention, as well as the trajectory of deaths in encounters with Customs and Border Protection (CBP) officials.³¹ Second, it provides the first sustained, robust analysis of immigration law and policy through the lens of necropolitics, a powerful heuristic to understand violent contemporary migration control policies, particularly the racialization, militarization, and inequality driving these strategies. While scholars have noted the utility of necropolitics to examine asylum policy and due process,³² this Article applies this framing to understand the broader implications of immigration enforcement for U.S. society at large. Third, the Article contextualizes destructive and deadly immigration law and policy within broader questions regarding power and democracy. In this way, the Article bridges immigration law and the politics of democracy, contributing new insights to critical discussions of the nation's diminishing adherence to democratic principles.

This Article reaches publication shortly after the first year of the second Trump administration. Rather than an aberration or an errant detour on the nation's path toward democracy and just immigration policy, the second Trump term represents the culmination of the nation's pursuit of death as it embraces colonial desires and racialized social control. Through examination of immigration law and policy, it becomes evident that both liberal and conservative approaches to migration control have increasingly pursued agendas that escalate violence against migrants and abandon democratic

31. See *infra* Parts I.B. and II.B.

32. See Eunice Lee, *Immigration in the Shadow of Death*, 26 U. PA. J. CONST. L. 126, 159 (2023) (applying the term necropower to a constitutional analysis of laws contributing to migrant deaths); Brenda K. Wilson, Alexis Burnstan, Cristina Calderon & Thomas J. Csordas, "Letting Die" by Design: Asylum Seekers' Lived Experience of Postcolonial Necropolitics, SOC. SCI. & MED., Mar. 2023, at 1, 3 (suggesting that necropower is embedded in the structure of the U.S. asylum apparatus); Lucy Mayblin, Mustafa Wake & Mohsen Kazemi, *Necropolitics and the Slow Violence of the Everyday: Asylum Seeker Welfare in the Postcolonial Present*, 54 SOCIO. 107, 109–10 (2019) (proposing a conceptual framework drawing together sociologies of the everyday, necropolitics, and slow violence in tracing how hierarchical conceptions of human worth impact the everyday). Legal scholars have also recently applied the theoretical framework of necropolitics to various contexts in which law has subjugated life to the power of death, including incarceration and technology. See, e.g., Mary Anne Franks, *The Supreme Court as Death Panel: The Necropolitics of Bruen and Dobbs*, 98 N.Y.U. L. REV. 1881, 1883 (2023) (using necropolitics to analyze the Supreme Court's weaponization of the Constitution); Marissa Jackson Sow, *Protect and Serve*, 110 CALIF. L. REV. 743, 747–48 (2022) (arguing Black people are subjected to necropolitical governance, which is often carried out through deadly police intervention); Christoph M. Zhang, *Biopolitical and Necropolitical Constructions of the Incarcerated Trans Body*, 37 COLUM. J. GENDER & L. 257, 261 (2019) (analyzing the regulation and denial of transgender bodies and gender-affirming surgery in the context of necropolitics); Antonio Pele & Caitlin Mulholland, *On Facial Recognition, Regulation, and "Data Necropolitics"*, 30 IND. J. GLOB. LEGAL STUD. 173, 173 (2023) (arguing that unregulated use of technology and AI will lead to "data necropolitics").

principles. This bipartisan evolution of immigration law and policy has set the stage for the far-right policies of the Trump administration that extend and exceed the established boundaries of immigration enforcement. Framing these laws and policies through the lens of necropolitics serves to examine both the motivations and implications of such policies.

I. DEATH AS DETERRENCE: MIGRATION CONTROL THROUGH VIOLENT EXCLUSION

A. *Defining Migrant Death*

Death takes various forms. In Mbembe's estimation, "[t]he ultimate expression of sovereignty largely resides in the power and capacity to dictate who is able to live and who must die."³³ As such, being sovereign involves control over mortality and defining life as "the deployment and manifestation of power."³⁴ That power includes the capacity to define who matters and who is deemed disposable.³⁵ These notions of sovereignty stem from Michel Foucault's theories of biopower, or the capacity of the state to make people live or to let them die,³⁶ which give resonance to the state's power to impose death. Complementing Foucault's theory, Mbembe formulates a politics of death that more pointedly critiques the state's imposition of fatality, accounting for contemporary manifestations of power rooted in racism and colonialism and at times rendering its subjects in a state outside of life or literal death.³⁷ These manifestations of death include the slow death of exhaustion and abandonment in concentration camps,³⁸ the invisible death of economic deprivation and the destruction of civil institutions,³⁹ the social death of slavery,⁴⁰ as well as the perceived death of executions, war, and genocide.⁴¹ Among those most acutely confronting injustices and death in various forms are migrants and refugees.⁴²

33. MBEMBE, *supra* note 16, at 66. Given the importance in immigration jurisprudence of state sovereignty, or the authority over territory, it is important to note Mbembe's formulation of sovereignty, which is distinct from traditional legal conceptions of the notion. For Mbembe, the concern lies with those whose "central project is not the struggle for autonomy but the generalized instrumentalization of human existence and the material destruction of human bodies and populations." *Id.* at 68. Mbembe examines sovereignty "defined as the right to kill." *Id.* at 70.

34. *Id.* at 66.

35. *Id.* at 80.

36. See generally 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (Robert Hurley trans., Random House 1978) (1976) [hereinafter FOUCAULT, THE HISTORY OF SEXUALITY] (arguing power in modern states shifted toward biopower—a form of power focused on optimizing life itself); MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977–78 (Michel Senellart, François Ewald, Alessandro Fontana & Arnold I. Davidson eds., Graham Burchell trans., 2007) (2004) (emphasizing the government is the art of managing life); MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE 1978–79 (Michel Senellart, François Ewald, Alessandro Fontana & Arnold I. Davidson eds., Graham Burchell trans., 2008) (2004) (arguing the state's role is to create the conditions under which life can flourish on its own).

37. MBEMBE, *supra* note 16, at 66.

38. *Id.* at 126.

39. *Id.* at 83.

40. Mbembe defines social death as the "expulsion from humanity altogether." *Id.* at 75.

41. *Id.* at 87.

42. *Id.* at 38–39 (describing the disdain with which the world treats the marginalized). Mbembe states,

Like Foucault and Mbembe, scholars across disciplines have expounded on notions of death and its different manifestations. Cultural theorists and social scientists, for instance, have developed and applied the concepts of slow death, or harms that may be imperceptible and occurring over time, as distinct from spectacular death, or fatalities that are apparent.⁴³ As the scholar Lauren Berlant explains, slow death describes 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.”⁴⁴ The notions of slow death and slow violence have been ascribed to various, often invisible, forces causing harm over time, including health disparities,⁴⁵ environmental degradation,⁴⁶ the criminal justice system,⁴⁷ the recent COVID-19 pandemic,⁴⁸ and war.⁴⁹ In the immigration context, slow-death analyses have highlighted harms in the immigration system that occur over time and are often unnoticed, including the effects

This is the “world of undesirables”: of Muslims encumbering the city; of Negroes and other strangers that one owes it to oneself to deport; of (supposed) terrorists that one tortures by oneself or by proxy; of Jews, so many of whom one regrets managed to escape the gas chambers; of migrants who flow in from everywhere; of refugees and all the shipwrecked.

Id.

43. See Lee, *supra* note 16, at 2327–35 (providing a detailed discussion of the development in scholarship on the concepts of slow death and slow violence). See generally Geoff Ward, *The Slow Violence of State Organized Race Crime*, 19 THEORETICAL CRIMINOLOGY 299 (2015) (arguing racialized harm often happens through gradual and invisible forms of violence).

44. Lauren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency)*, 33 CRITICAL INQUIRY 754, 754 (2007) (coining and defining the term “slow death”). As Berlant explains,

Slow death prospers not in traumatic events, as discrete time framed phenomena like military encounters and genocides can appear to do, but in temporal environments whose qualities and whose contours in time and space are often identified with the presentness of ordinariness itself, that domain of living on, in which everyday activity; memory, needs, and desires; diverse temporalities and horizons of the taken for granted are brought into proximity.

Id. at 759.

45. *Id.* at 754.

46. See generally Thom Davies, *Toxic Space and Time: Slow Violence, Necropolitics, and Petrochemical Pollution*, 108 ANNALS AM. ASSOC. GEOGRAPHERS 1537 (2018) (exploring how time deeply shapes the experience of residing in toxic environments); Rob Nixon, *Neoliberalism, Slow Violence, and the Environmental Picaresque*, 55 MOD. FICTION STUD. 443 (2009) (highlighting how neoliberalism amplifies environmental harm by eroding state accountability).

47. See Alexis Karteron, *Family Separation Conditions*, 122 COLUM. L. REV. 649, 661–68 (2022) (explaining how the carceral state extends far beyond prison).

48. See Tony Sandset, *The Necropolitics of COVID-19: Race, Class, and Slow Death in an Ongoing Pandemic*, 16 GLOB. PUB. HEALTH 1411, 1412–16 (2021) (arguing COVID-19 is better understood as a necropolitan event rather than a health crisis).

49. See Michelle C. Velasquez-Potts, *Between Past and Future: The Slow Death of Indefinite Detention*, 9 CATALYST 1, 12–17 (2023) (explaining that rather than ending, war morphs into indefinite detention and chronic violence).

of family separation,⁵⁰ protracted immigration court proceedings,⁵¹ and deprivation of substantive due process.⁵²

As the product of institutional and everyday racism, death has become a cornerstone of the current U.S. immigration regime, acting as a means to deter migration, exclude migrants from society, and sustain racial hierarchies. This Article adopts an expansive view of death, including how law and policy inflict both spectacular and slow death on migrants. It addresses both the observably lethal as well as the gradually lethal, yet profoundly pernicious forms of migrant marginalization—including the incremental effects of diminished access to worker rights, healthcare, housing, and voting rights imposed in the enforcement system’s shadow. For the purposes of this discussion, unless otherwise specified, the term “migrant” is also used broadly, encompassing all noncitizens who have journeyed from their homes, including those seeking to enter, already within, or previously deported from the United States.⁵³ While noncitizens and their families generally suffer harms in the immigration system, this discussion focuses on those the immigration system targets most violently and systematically: migrants of color.

B. Spectacular Death of Migrants

According to the International Organization for Migration (IOM), 2023 was the deadliest year for migrants on record with nearly eight thousand six hundred identified deaths worldwide, a significant increase even from recent years.⁵⁴ Among the many perilous areas migrants traverse, the Mexico-U.S. border is the deadliest land route in the world.⁵⁵ As a result of Clinton-era policies implemented in 1994, border enforcement strategy shifted to secure more populated regions of the border, thereby sending migrants into more isolated and dangerous areas.⁵⁶ Consequently, as the number of border

50. See Lee, *supra* note 16, at 2336–84 (employing the concept of slow death to examine family separation caused by laws and policies related to admissions, enforcement, adjustment of status, and remittances).

51. See generally MAYA PAGNI BARAK, THE SLOW VIOLENCE OF IMMIGRATION COURT (2023) (applying the concept of slow violence to examine the fear caused by lengthy immigration court proceedings).

52. See Lee, *supra* note 32, at 126–27 (exploring how U.S. immigration enforcement and adjudication normalize the erosion of noncitizens’ right to life).

53. For a thoughtful discussion on terminology to describe people who migrate, see generally REBECCA HAMLIN, CROSSING: HOW WE LABEL AND REACT TO PEOPLE ON THE MOVE (2021).

54. The International Organization for Migration (IOM), the leading migration agency of the United Nations, has documented more than sixty-three thousand deaths since its inception in 2014. *Deadliest Year on Record for Migrants with Nearly 8,600 Deaths in 2023*, INT’L ORG. FOR MIGRATION (Mar. 6, 2024), <https://www.iom.int/news/deadliest-year-record-migrants-nearly-8600-deaths-2023> [https://perma.cc/D2LX-7E2C]. The organization acknowledges that the true number of deaths is likely significantly higher than those reported given the difficulties of data collection, especially in the remote areas in which migrants often find themselves. *Id.*

55. *US-Mexico Border World’s Deadliest Migration Land Route*, INT’L ORG. FOR MIGRATION (Sep. 12, 2023), <https://www.iom.int/news/us-mexico-border-worlds-deadliest-migration-land-route> [https://perma.cc/4Q8N-CQKP].

56. As the U.S. government developed its “prevention through deterrence” strategy, it anticipated that migrants would be forced to navigate “remote, uninhabited expanses of land and seas” that would place migrants in “mortal danger.” U.S. BORDER PATROL, BORDER PATROL STRATEGIC PLAN: 1994 AND BEYOND 2 (1994), <https://piedepagina.mx/wp-content/uploads/2022/06/Border-Patrol-Strategic-Plan-1994-and-Beyond.pdf>

crossings has fluctuated over the past three decades, the number of border deaths has continuously risen.⁵⁷ Human Rights Watch (HRW) estimates that between ten thousand and eighty thousand people have died at the border since 1994, most of whom are Indigenous, Black, and Brown migrants.⁵⁸ Of the recorded migrant deaths and disappearances throughout the Americas in 2022, nearly half took place at the Mexico-U.S. border.⁵⁹ In 2022, a record 853 migrants died at the Mexico-U.S. border,⁶⁰ more than two people per day. The major causes of death at the border included drowning (213), vehicle accidents or dangerous transport (142), environmental conditions or lack of basic needs (129), violence (21), and unknown causes (154).⁶¹ The reported number of deaths belies the actual mortality rates at the border since it is estimated that CBP undercounts border deaths by as much as half.⁶² Therefore, the actual number of migrant deaths is likely significantly higher.

While immigration policies at the Mexico-U.S. border drive rising migrant mortality rates, migrants also lose their lives to the enforcement mechanisms of detention and deportation. Between 2003 and 2023, at least two hundred twenty people lost their lives in U.S. Immigration and Customs Enforcement (ICE) detention.⁶³ On average, approximately one person in detention has died every month for the past two decades.⁶⁴ The average age of those who died during this period is forty-five years old.⁶⁵ For comparison, the lowest life expectancy of any country in the world is currently fifty-three

[<https://perma.cc/R2U8-Z7CD>]. Although the deterrence strategy largely failed, the policy has persisted for three decades. Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 279–80 (2018).

57. See Hing, *supra* note 56, at 279–80.

58. Ari Sawyer, “*Nothing but Bones*”: 30 Years of Deadly Deterrence at the US-Mexico Border, HUM. RTS. WATCH, <https://www.hrw.org/content/388364> [<https://perma.cc/P4UC-24WV>] (last visited Nov. 26, 2025).

59. For 2022, the IOM reported 1,457 migrant deaths throughout the Americas with 686 deaths identified at the Mexico-U.S. border. Although lower than estimates from U.S. sources, this figure represents 47% of deaths in the Americas. See *US-Mexico Border World’s Deadliest Migration Land Route*, *supra* note 55.

60. Edgar Sandoval, *Scorching Heat Is Contributing to Migrant Deaths*, N.Y. TIMES (Sep. 4, 2023), <https://www.nytimes.com/2023/08/31/us/heat-migrant-deaths-texas-mexico.html> (on file with the Temple Law Review); Montoya-Galvez, *supra* note 7. The government has yet to disclose the number of border deaths for fiscal year 2023.

61. INT’L ORG. FOR MIGRATION, PROYECTO MIGRANTES DESAPARECIDOS – RESUMEN REGIONAL ANNUAL – LAS AMÉRICAS [MISSING MIGRANTS PROJECT – ANNUAL REGIONAL OVERVIEW – THE AMERICAS] 2 (2022), https://missingmigrants.iom.int/sites/g/files/tmzb6l601/files/publication/file/MMP%20Americas%20briefing%202022%20-20%20ES_3.pdf [<https://perma.cc/J7WR-XUZ5>].

62. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-105053, SOUTHWEST BORDER: CBP SHOULD IMPROVE DATA COLLECTION, REPORTING, AND EVALUATION FOR THE MISSING MIGRANT PROGRAM 13–17 (2022); Stuart Anderson, *Border Patrol Agents May Have Missed Thousands of Immigrant Deaths*, FORBES (May 5, 2022, at 04:01 ET), <https://www.forbes.com/sites/stuartanderson/2022/05/04/border-patrol-agents-have-missed-thousands-of-immigrant-deaths/> [<https://perma.cc/S3M7-YK8Z>].

63. U.S. IMMIGR. & CUSTOMS ENF’T, LIST OF DEATHS IN ICE CUSTODY-DATA FROM: 10/01/2003 TO 06/05/2017, at 1–17 (2017) [hereinafter LIST OF DEATHS IN ICE CUSTODY], <https://www.ice.gov/doclib/foia/reports/detaineedeaths-2003-2017.pdf> [<https://perma.cc/GBP5-JMSE>]; see *Detainee Death Reporting*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/detain/detainee-death-reporting> [<https://perma.cc/YY5S-FSXC>] (last visited Nov. 26, 2025).

64. See *supra* note 63 for ICE data.

65. See *supra* note 63.

years.⁶⁶ The reported fatalities reveal not only premature death, but the causes of death also point to lack of adequate mental and physical health care in the detention facilities, as confirmed by various studies.⁶⁷ In fact, medical experts conclude that 95% of deaths in ICE detention between 2017 and 2021 were likely preventable with proper medical care.⁶⁸

In contrast to deaths in detention, there is a dearth of data documenting deaths resulting from deportation. Nonetheless, HRW has identified the deaths of 138 natives of El Salvador following their deportation between 2013 and 2019.⁶⁹ Verifying these deaths through press accounts, court files, and interviews, HRW identified in many cases that the causes of death and other harms were directly linked to the reasons the migrants originally fled El Salvador.⁷⁰

Still more migrants lose their lives in encounters with CBP, ICE, and local police. According to CBP's own estimates, the agency used force in 2,819 incidents during fiscal years 2021 through 2023.⁷¹ This figure represents, on average, approximately 2.6 instances of use of force per day. Approximately 18% of newly arrived migrants experienced abuse at the hands of CBP officials—likely a conservative estimate.⁷² Notably, only 1% of complaints of abuse filed resulted in disciplinary action.⁷³ Between

66. Steven Ross Johnson, *Countries with the Longest and Shortest Life Expectancies*, U.S. NEWS (Dec. 13, 2024), <https://www.usnews.com/news/best-countries/articles/countries-with-the-longest-and-shortest-life-expectancies> [https://perma.cc/L49F-4C9D].

67. See, e.g., Altaf Saadi, Maria-Elena De Trinidad Young, Caitlin Patler, Jeremias Leonel Estrada & Homer Venters, *Understanding US Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health*, 22 HEALTH & HUM. RTS. J. 187, 189 (2020); Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. FOR SOC. JUST. 693, 693–94 (2008); Megan Shields Casturo, *Civil Immigration Detention: When Civil Detention Turns Carceral*, 122 PENN. ST. L. REV. 825, 835–40 (2018); AM. IMMIGR. COUNCIL, *OVERSIGHT OF IMMIGRATION DETENTION: AN OVERVIEW* 4 (2022), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/oversight_of_immigration_detention_an_overview.pdf [https://perma.cc/8DPX-NA6F]; HUM. RTS. WATCH, *SYSTEMIC INDIFFERENCE: DANGEROUS & SUBSTANDARD MEDICAL CARE IN US IMMIGRATION DETENTION* 30–48 (2017), https://www.hrw.org/sites/default/files/report_pdf/usimmigration0517_web_0.pdf [https://perma.cc/LZ9A-X9HF].

68. EUNICE HYUNHYE & TESSA WILSON, ACLU, AM. OVERSIGHT & PHYSICIANS FOR HUM. RTS., *DEADLY FAILURES: PREVENTABLE DEATHS IN U.S. IMMIGRATION DETENTION* 7–8 (2024), <https://assets.aclu.org/live/uploads/2024/06/2024-07-01-ICE-Detainee-Deaths.pdf> [https://perma.cc/RL2C-REM5].

69. HUM. RTS. WATCH, *DEPORTED TO DANGER: UNITED STATES DEPORTATION POLICIES EXPOSE SALVADORANS TO DEATH AND ABUSE* 1 (2020), https://www.hrw.org/sites/default/files/report_pdf/elsalvador0220_web_0.pdf [https://perma.cc/P9RZ-EM3X].

70. *Id.* at 1–2.

71. Based on the government's reported data, CBP agents are nearly twice as likely to use force than to face assaults themselves. See *Assaults and Use of Force Statistics*, U.S. CUSTOMS & BORDER PROT. (Sep. 19, 2025), <https://www.cbp.gov/newsroom/stats/assaults-use-force> [https://perma.cc/QTN6-T79G]. As compared to the 2,819 incidents of use of force by CBP agents, the agency reported 1,436 assaults against its agents from 2023 to 2026. *Id.*

72. ADAM ISACSON & ZOE MARTEENS, *ABUSES AT THE U.S.-MEXICO BORDER: HOW TO ADDRESS FAILURES AND PROTECT RIGHTS* 23 (2023), https://www.wola.org/wp-content/uploads/2023/07/Abuses-at-the-US-Mexico-Border_How-To-Address-Failures-and-Protect-Rights.pdf [https://perma.cc/VZR6-5GAR].

73. *Id.* at 9.

2010 and September 2025, CBP has been responsible for 347 fatal encounters.⁷⁴ Of those deaths, 192 took place from 2021 through 2024.⁷⁵ Meaning that, more than half of fatal encounters in the past fifteen years have occurred in the past four years alone, with approximately an average of one fatal encounter each week now attributed to CBP. Of the total fatal encounters at the time of publication, most are caused by vehicle collisions (122), lack of medical attention (100), use of force (70), and off-duty homicide (15).⁷⁶ For ICE and local police, there are no long-term data available related to migrant deaths.⁷⁷

Beyond deaths resulting from immigration enforcement, migrants also lose their lives at disproportionate rates while working in the shadow of the enforcement system. In the employment context, migrants generally occupy more dangerous jobs and face increased risk of injury and death.⁷⁸ Foreign-born Latine workers represent 8.2% of the U.S. workforce but 14% of work-related deaths, and these deaths are particularly concentrated in the construction industry.⁷⁹ While the foreign-born Latine working population increased 16.7% from 2011 to 2021, deaths among these workers increased 42% in the same time period.⁸⁰ Workers also lose their lives at high rates in agricultural work, an industry in which the majority of workers are foreign-born. The U.S. Department of Agriculture estimates that approximately half of all U.S. farmworkers are undocumented migrants and nearly one-quarter are migrants with employment authorization.⁸¹ Farmworkers are at least twenty times more likely to die from heat stress than U.S. workers overall.⁸² Meanwhile, the Supreme Court has impeded the ability of

74. *Track Death and Abuse by Border Patrol: Fatal Encounters with CBP Since 2010*, S. BORDER CMTYS. COAL. (Nov. 20, 2025), https://www.southernborder.org/deaths_by_border_patrol [https://perma.cc/P4KV-EEA8].

75. *See id.*

76. *Id.*

77. In contrast to CBP, ICE does not report use of force incidents, and currently no organization tracks and reports ICE's lethal encounters. Similarly, there are no comprehensive data related to migrant deaths at the hands of local police or in criminal custody. *See id.*

78. INT'L ORG. FOR MIGRATION, OCCUPATIONAL FATALITIES AMONG INTERNATIONAL MIGRANT WORKERS: A GLOBAL REVIEW OF DATA SOURCES 3 (2021), <https://publications.iom.int/system/files/pdf/Occupational-Fatalities.pdf> [https://perma.cc/4UJD-FJ2X].

79. Jason Castillo, *Fatal Injuries to Foreign-Born Hispanic or Latino Workers*, U.S. BUREAU OF LAB. STAT. (Oct. 2023), <https://www.bls.gov/spotlight/2023/workplace-fatalities-among-foreign-born-hispanic-workers/home.htm> [https://perma.cc/Z2NH-6KQZ].

80. *Id.* at tab 3. While more research is needed to understand the level of injury and death among migrant workers beyond Latine workers, the available data point to rising death rates among foreign-born workers generally. *See id.*

81. *Farm Labor*, U.S. DEP'T OF AGRIC.: ECON. RSCH. SERV. (Nov. 18, 2025), <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#legalstatus> [https://perma.cc/2VMY-FGEQ].

82. Cresencio Rodriguez-Delgado & Chloe Jones, *Farmworkers Are Dying in Extreme Heat. Few Standards Exist To Protect Them*, PBS NEWS (Aug. 6, 2021, at 17:57 ET), <https://www.pbs.org/newshour/health/farmworkers-are-dying-in-extreme-heat-few-standards-exist-to-protect-them> [https://perma.cc/MD5D-SWKN] (citing a 2008 Centers for Disease Control report and acknowledging that, although the figure is dated, "researchers say this increased threat is the same if not worse than it once was as temperatures continue to rise").

union representatives to organize and assist farmworkers.⁸³ Migrants fear reporting abuses and hazardous conditions.⁸⁴ Their disproportionate deaths result not only from working in more dangerous jobs, but also presumably as a result of their fear of immigration sanctions if they report abusive employers.

C. Slow Death of Migrants

Each of the enforcement realities discussed in the previous Part—border policies, detention, deportation, encounters with immigration agents, and work in the shadow of enforcement—not only causes spectacular deaths but also contributes to slow death for migrants.⁸⁵ For instance, a key tool of the immigration system’s violent deterrence, immigration detention, needlessly subjects noncitizens to slow death. While noncitizens released from detention overwhelmingly appear at their scheduled immigration court hearings,⁸⁶ ICE detains hundreds of thousands of noncitizens each year, with an average of over fifty thousand people held in detention at any given moment.⁸⁷ This number is increasing with the significant infusion of funds provided to immigration enforcement by the bill known as the One Big Beautiful Bill Act in 2025.⁸⁸ These detainees report myriad abuses in immigration detention, from medical neglect and nutritional problems to cleanliness issues and sexual abuse.⁸⁹ As a result of detention conditions, detainees experience significant mental health challenges, which are exacerbated by prolonged detention.⁹⁰ During and after detention, noncitizens most commonly report anxiety, depression, and post-traumatic stress disorder.⁹¹ In addition to the harms to detainees

83. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (holding that a California regulation granting labor organizations a right to access an agricultural employer’s property constituted a *per se* physical taking, requiring just compensation under the Takings Clause).

84. Leticia M. Saucedo, *The Making of the “Wrongfully” Documented Worker*, 93 N.C. L. REV. 1505, 1546 (2014).

85. To illustrate slow and spectacular death, I provide an example from Professor Stephen Lee, who distinguishes between the “body counts” (spectacular death) of the Gulf War invasions as compared to the leukemia and infertility (slow death) that resulted from using depleted uranium bombs. Lee, *supra* note 16, at 2322. Unlike Professor Lee, I do not use the terms “slow death” and “slow violence” interchangeably, since it is helpful for this analysis to distinguish between the violence inflicted (e.g., the spectacular violence of deportation) and the harm that results from that violence (e.g., the slow death of deportation’s long-term adverse financial and mental health effects). *See id.*

86. *Most Released Families Attend Immigration Court Hearings*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR. (June 18, 2019), <https://tracreports.org/immigration/reports/562/> [<https://perma.cc/Y538-AZHS>] (finding that more than 99% of represented respondents and nearly six of every seven families released from custody generally appeared at their immigration court hearings).

87. See *ICE Detainees*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR., https://tracreports.org/immigration/detentionstats/pop_agen_table.html [<https://perma.cc/NV6X-C9PZ>] (last visited Nov. 26, 2025).

88. See Lauren-Brooke Eisen, *Budget Bill Massively Increases Funding for Immigration Detention*, BRENNAN CTR. FOR JUST. (July 3, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/budget-bill-massively-increases-funding-immigration-detention> [<https://perma.cc/4GHR-29JJ>].

89. *Detention by the Numbers*, FREEDOM FOR IMMIGR., <https://www.freedomforimmigrants.org/detention-statistics> [<https://perma.cc/BKV8-FEBP>] (last visited Nov. 26, 2025).

90. M. von Wethern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason & C. Katona, *The Impact of Immigration Detention on Mental Health: A Systematic Review*, BMC PSYCHIATRY, Dec. 6, 2018, at 1, 1 (“[D]etention duration was positively associated with severity of mental symptoms.”).

91. *Id.*

themselves, detention has ripple effects for detainees' families, including diminished financial stability, health status, emotional wellbeing, and academic performance.⁹² Similar harms stem from alternatives to detention, such as ankle monitors, which are generally imagined as a more benign form of surveillance.⁹³

For detained individuals, solitary confinement particularly exposes noncitizens to slow death. Despite the legal fiction classifying immigration detention as civil confinement, detention centers inflict the most punitive form of imprisonment.⁹⁴ Solitary confinement in immigration detention produces "a range of adverse health effects," including post-traumatic stress disorder, self-harm, and suicidality.⁹⁵ For people with preexisting conditions, protracted isolation can lead to more serious health effects persisting beyond the period of confinement, such as brain damage, reduced cognitive function, and hallucinations.⁹⁶ Disconcertingly, the practice is not uncommon. Between 2018 and 2023, ICE placed more than fourteen thousand detainees in solitary confinement for an average length of approximately one month, and forty-two of those detainees faced isolation for more than one year.⁹⁷ Indeed, the pervasiveness of solitary confinement and its attendant harms in the immigration and criminal contexts are well-documented.⁹⁸

Like detention, "deportation is violence."⁹⁹ This violence erodes the physical, mental, and financial health of migrants and their families. Deportees face not only the mental health effects of family separation but also increased risk of harassment from

92. Caitlin Patler & Tanya Maria Golash-Boza, *The Fiscal and Human Costs of Immigrant Detention and Deportation in the United States*, SOC. COMPASS, Nov. 2017, at 1, 6; Kalina M. Brabeck, M. Brinton Lykes & Cristina Hunter, *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496, 500 (2014).

93. See *infra* Part III.D for a more in-depth discussion of electronic surveillance.

94. Casturo, *supra* note 67, at 835.

95. PHYSICIANS FOR HUM. RTS., "ENDLESS NIGHTMARE": TORTURE AND INHUMAN TREATMENT IN SOLITARY CONFINEMENT IN U.S. IMMIGRATION DETENTION 1 (2024). The report also notes that ICE violates its own directives, using solitary confinement with punitive intent as retaliation or in response to minor infractions rather than as a measure of last resort. *Id.*

96. *Id.*

97. *Id.* at 2.

98. See generally Felipe de Jesús Hernández, *Extrajudicial Segregation: Challenging Solitary Confinement in Immigration Prisons*, 137 HARV. L. REV. F. 175 (2024) (examining the contemporary use of solitary confinement in immigration prisons and its various harms); Azadeh Shahshahani & Ayah Natasha El-Sergany, *Challenging the Practice of Solitary Confinement in Immigration Detention in Georgia and Beyond*, 16 CUNY L. REV. 243 (2013) (discussing the extensive injuries solitary confinement causes individuals subject to it in immigration detention centers and pathways to challenging the practice); Avlana K. Eisenberg, *The Case for Mercy in Policing and Corrections*, 102 TEX. L. REV. 1409 (2024) (analyzing the way solitary confinement is used to punish prisoners, risking their physical, mental, and emotional well-being); Keramet Reiter, Joseph Ventura, David Lovell, Dallas Augustine, Melissa Barragan, Thomas Blair, Kelsie Chesnut, Pasha Dashtgard, Gabriela Gonzalez, Natalie Pifer & Justin Strong, *Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017–2018*, 110 AM. J. PUB. HEALTH S56 (2020) (discussing the clinically significant negative health effects solitary confinement inflicts on those confined).

99. Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1049 (2021) ("The cataloguing of violence supports the conclusion that violence is not incidental to deportation, but rather that deportation is violence.").

police, gang members, or other persecutors in their home countries.¹⁰⁰ For women, deportation also increases the risk of physical and sexual assault due to ineffective law enforcement in some home countries.¹⁰¹ Even the fear of possible deportation causes “a constant state of threat and stress for the entire family,” including U.S. citizen children not subject to removal themselves.¹⁰² The children of deportees commonly experience anxiety, loss of appetite, sleep disruption, and withdrawal.¹⁰³ This fear also makes families less likely to avail themselves of assistance related to their basic needs or protections related to domestic violence in the United States.¹⁰⁴ Furthermore, deportation results in significant financial challenges, reducing a family’s overall income by approximately 45%.¹⁰⁵

Migrants also experience slow death in the shadow of the enforcement system. Although often essential, migrant work is frequently invisible and devalued, rendering migrants extremely vulnerable within society.¹⁰⁶ Often with the threat of deportation looming, migrant workers, particularly undocumented workers, are vulnerable to employer abuse and exploitation. Among these abuses, noncitizen workers face increased rates of wage theft and suppression in more dangerous jobs, sexual harassment and physical injury, denied access to bathroom breaks and time off, as well as diminished rights to seek redress against unscrupulous employers for mistreatment.¹⁰⁷ As the planet warms, migrant workers, particularly farmworkers, face increased risk of short-term and chronic illness related to the heat.¹⁰⁸ Migrant workers also abound in industries in which

100. See Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J.C.R. & C.L. 195, 218–21 (2007).

101. Brabeck et al., *supra* note 92, at 500–01.

102. *Id.* at 497–98; see also Sarah Elizabeth Richards, *How Fear of Deportation Puts Stress on Families*, THE ATL. (Mar. 22, 2017), <https://www.theatlantic.com/family/archive/2017/03/deportation-stress/520008/> (on file with the Temple Law Review) (discussing the “devastating effects” the specter of being removed from the United States has on the health of undocumented migrants and their families).

103. Brabeck et al., *supra* note 92, at 500.

104. Jacqueline Hagan, Brianna Castro & Nestor Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1814 (2010); Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*, N.Y. TIMES (June 3, 2018), <https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html> (on file with the Temple Law Review).

105. *U.S. Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL (June 24, 2021), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement> [https://perma.cc/MA8V-HYBL].

106. Paulina Segarra & Ajnesh Prasad, *Undocumented Immigrants at Work: Invisibility, Hypervisibility, and the Making of the Modern Slave*, 11 HUMANS. & SOC. SCIS. COMM’NS, Jan. 3, 2024, at 1, 1 (examining how “the dynamic interplay between the types of labor that [undocumented migrants] undertake and the socio-legal identity they are attributed function together to systematically disenfranchise them”).

107. Jennifer J. Lee, *Legalizing Undocumented Work*, 42 CARDozo L. REV. 1893, 1902–06 (2021) (arguing that undocumented work should be legalized separate and apart from immigration status).

108. See generally Kenneth Culp & Shalome Tonelli, *Heat-Related Illness in Midwestern Farmworkers: A Descriptive Analysis of Hydration Status & Reported Symptoms*, 67 WORKPLACE HEALTH & SAFETY 168 (2019) (examining heat-related illness in Midwestern migrant and seasonal farmworkers). For data related to chronic illness among migrant workers beyond the U.S. context, see *UAE: Migrant Worker Abuses Linked to Broader Climate Harms*, HUM. RTS. WATCH (Nov. 21, 2023, at 00:00 ET), <https://www.hrw.org/news/2023/11/21/uae-migrant-worker-abuses-linked-broader-climate-harms> [https://perma.cc/TMP9-MD37].

wage theft and unpaid overtime are prevalent,¹⁰⁹ resulting in losses of billions of dollars to already low-income immigrants, especially to women and migrants of color.¹¹⁰

While hostile migration control policies and difficult working conditions diminish physical and mental health, lack of access to healthcare further compounds the slow death of migrants.¹¹¹ Half of undocumented immigrants and one in five documented immigrant adults lack health insurance, making them more likely than non-immigrants to be uninsured, postpone care, and forgo treatment.¹¹² Among elderly undocumented people, a growing population in the United States, limited access to and use of healthcare services can result in high mortality and morbidity rates for “easily treatable” chronic conditions.¹¹³ Undocumented migrants often avoid emergency room visits or mental healthcare for fear of deportation.¹¹⁴ Even some immigrants who may secure healthcare coverage forgo treatment for similar reasons.¹¹⁵ Within the U.S. healthcare system itself, immigrants often face diminished health outcomes because of discrimination and linguistic and cultural barriers.¹¹⁶

Lack of access to public benefits and housing further contributes to slow death for migrants. Migrants are overrepresented both in the workforce¹¹⁷ and among the poor,

109. Janice Fine & Gregory Lyon, *Segmentation and the Role of Labor Standards Enforcement in Immigration Reform*, 5 J. ON MIGRATION & HUM. SEC. 431, 432 (2017).

110. IHNA MANGUNDAYAO, CELINE McNICHOLAS, MARGARET POYDOCK & ALI SAIT, ECON. POL’Y INST., MORE THAN \$3 BILLION STOLEN WAGES RECOVERED FOR WORKERS BETWEEN 2017 AND 2020, at 2 (2021), <https://files.epi.org/uploads/240542.pdf> [<https://perma.cc/N9RG-BZ52>] (“Wage theft also disproportionately impacts women, people of color, and immigrant workers because they are more likely than other workers to be in low-wage jobs.”).

111. See generally Arnaud Juanmarti Mestres, Guillem López Casasnovas & Judit Vall Castelló, *The Deadly Effects of Losing Health Insurance*, EUR. ECON. REV., Jan. 2021, at 1 (examining the effects of restricting access to health insurance on the mortality rates of undocumented immigrants).

112. *Key Facts on Health Coverage of Immigrants*, KFF (Jan. 15, 2025), <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-facts-on-health-coverage-of-immigrants/> [<https://perma.cc/NSV4-G3FE>].

113. Aparna Balakrishnan & Neil Jordan, *The Undocumented Elderly: Coverage Gaps and Low Health Care Use*, 30 J. HEALTH CARE FOR POOR & UNDERSERVED 891, 893 (2019).

114. Elizabeth Butterworth, “*What If You’re Disabled and Undocumented?*”: Reflections on Intersectionality, Disability Justice, and Representing Undocumented and Disabled Latinx Clients, 26 CUNY L. REV. 139, 160 (2023).

115. See Claudia Fendian, *Mental Healthcare for Immigrants and First-Generation Families: Erasing the Stigma and Creating Solutions*, 24 J. HEALTH CARE L. & POL’Y 1, 11–13 (2021) (examining the factors that contribute to disparities in access to mental healthcare resources for immigrants and potential policy solutions).

116. See Supriya Misra, Simona C. Kwon, Ana F. Abraido-Lanza, Perla Chebli, Chau Trinh-Shevrin & Stella S. Yi, *Structural Racism and Immigrant Health in the United States*, 48 HEALTH EDUC. & BEHAV. 332, 332–41 (2021) (“[S]tructural racism functions as a fundamental cause of disease, enumerating direct and indirect pathways to health that operate similarly even as specific outcomes change across time and place.”); *Refugee and Migrant Health*, WORLD HEALTH ORG. (May 2, 2022), <https://www.who.int/news-room/fact-sheets/detail/refugee-and-migrant-health> [<https://perma.cc/JVM2-FLEB>] (“Refugees and migrants often face worse health outcomes in countries of transit and destination due to barriers including language and cultural differences, institutional discrimination[,] and restricted use of health services.”).

117. Foreign-born individuals represent 15.4% of the total population and 19% of the U.S. workforce. Stephanie Kramer & Jeffrey S. Passel, *What the Data Says About Immigrants in the U.S.*, PEW RSCH. CTR. (Aug. 21, 2025), <https://www.pewresearch.org/short-reads/2024/07/22/key-findings-about-us-immigrants/> [<https://perma.cc/L3GS-4LHQ>].

with migrants accounting for 24%¹¹⁸ of the 37.9 million people who live in poverty in the United States.¹¹⁹ This economic insecurity begets significant challenges such as food, housing, and health insecurity.¹²⁰ Federal law prohibits many noncitizens, including migrants who have worked in the United States for years or even decades, from accessing vital federal and state benefits.¹²¹ The rules governing access to public benefits and work authorization are rooted in a long history of ableism and ability-based hierarchies.¹²² Even those who are eligible for benefits avoid seeking assistance for fear of adverse consequences, including deportation.¹²³ Poverty increases the risk of actual mortality, with short-term poverty increasing the risk of death by 42% and sustained poverty by 71%.¹²⁴ Relatedly, lack of access to secure housing can have devastating effects on migrants. Studies have found rent burdens and evictions linked to increased mortality.¹²⁵ For asylum seekers, the Immigration and Nationality Act (INA) prohibits working within their first six months in the United States,¹²⁶ often leading to challenges in securing sufficient income and stable housing.¹²⁷ Meanwhile, cities have curtailed their housing aid for recently arrived migrants, further increasing the chances of homelessness for those fleeing persecution in their home countries.¹²⁸

118. JEAN BATALOVA & MICHAEL FIX, MIGR. POL'Y INST., UNDERSTANDING POVERTY DECLINES AMONG IMMIGRANTS AND THEIR CHILDREN IN THE UNITED STATES 2 (2023), https://www.migrationpolicy.org/sites/default/files/publications/mpi-poverty-declines-immigrants-2023_final.pdf [https://perma.cc/HG65-LP98].

119. EMILY A. SHRIDER & JOHN CREAMER, U.S. CENSUS BUREAU, P60-280, POVERTY IN THE UNITED STATES: 2022, at 1 (2023), <https://www.census.gov/content/dam/Census/library/publications/2023/demo/p60-280.pdf> [https://perma.cc/P5B3-QV9V].

120. Devi Shastri, *Migrants in Cities Across the US May Need Medical Care. It's Not That Easy To Find*, AP NEWS (Nov. 2, 2023, at 10:19 ET), <https://apnews.com/article/immigration-migrants-border-health-care-us-mexico-79353b08f07933f66961a7f07cf3e397> [https://perma.cc/2WSR-RCQ6].

121. 8 U.S.C. §§ 1611, 1621.

122. See Nermene Arastu & Qudsya Naqui, *Standing On Our Own Two Feet: Disability Justice as a Frame for Reimagining Our Ableist Immigration System*, 71 UCLA L. REV. 236, 236–67 (2024) (examining the ways that ableism informs the modern immigration system regarding rules on public benefits and work authorization).

123. *Id.* at 245–47.

124. Paul S. Mueller & Allan S. Brett, *Poverty Is a Leading Cause of Death in the U.S.*, NEJM J. WATCH (Apr. 20, 2023), <https://www.jwatch.org/na56040/2023/04/20/poverty-leading-cause-death-us> (on file with the Temple Law Review).

125. Nick Graetz, Carl Gershenson, Sonya R. Porter, Danielle H. Sandler, Emily Lemmerman & Matthew Desmond, *The Impacts of Rent Burden and Eviction on Mortality in the United States, 2000–2019*, SOC. SCI. & MED., Jan. 2024, at 1, 1 (2024).

126. 8 U.S.C. § 1158(d)(2).

127. Mekonnen F. Ayano, *Tenants Without Rights: Situating the Experiences of New Immigrants in the U.S. Low-Income Housing Market*, 28 GEO. J. ON POVERTY L. & POL'Y 159, 179 (2021).

128. Philip Marcelo, *NYC Is Beginning To Evict Some People in Migrant Shelters Under Stricter Rules*, AP NEWS (May 22, 2024, at 20:19 ET), <https://apnews.com/article/nyc-migrants-immigrants-homeless-shelter-time-limits-d360b5db5478a350821390b44c7913b1> [https://perma.cc/9TB3-BZ2Y]; Jennifer Brown, *Denver Closing Four Shelters, Scaling Back Migrant Services To Save \$60M*, COLO. SUN (Feb. 28, 2024, at 09:58 MT), <https://coloradosun.com/2024/02/28/denver-migrant-crisis-shelters-services-scale-back/> [https://perma.cc/46UV-XN76].

II. EMBRACING ENMITY: NECROPOWER AT THE FOUNDATIONS OF MIGRATION

As the pervasive forms of spectacular and slow death above illustrate, the state exerts power over migrants' bodies, lives, and deaths.¹²⁹ Necropolitics theorizes how this potentially lethal power shapes our contemporary reality, "a world plagued by ever-increasing inequality, militarization, enmity, and terror as well as by a resurgence of racist, fascist, and nationalist forces determined to exclude and kill."¹³⁰ Mbembe contends that our era is defined by enmity, that is, hostility manifesting itself in the form of separation, hate movements, and struggle against an enemy.¹³¹ As nationalism and violence surge, most notably among self-proclaimed democratic states, "the political order is reconstituting itself as a form of organization for death."¹³² Drawing from key concepts of necropolitics, this Section considers how hostility fuels migration and comprises the thrust of U.S. immigration enforcement policies. It examines how this violence manifests in imperialism as a cause of migration, hydraulic and nanoracism as drivers of violence inflicted on migrants of color, and the nation's state of insecurity and fear of racialized people that undergirds enforcement rationales. Together, these factors have constructed a society of enmity, both driving and attempting to impede inevitable migration.

A. *(Neo)Colonialism as Root Cause of Migration*

The theory of necropolitics contends that our contemporary world is marked by an inversion of democracy and a reversion to the desires, fears, and violence that fueled colonialism and slavery.¹³³ Throughout history, colonial subjugation has taken the form of both settler colonialism (the displacement of indigenous peoples and occupation of their lands) and commercial colonialism (the asymmetrical trade relations between countries).¹³⁴ The colony—together with plantations, camps, and prisons—has constituted one of the racially stigmatized spaces in which dominant states strategically confine the most extreme manifestations of their violence.¹³⁵ It represents "a site in which sovereignty consists in exercising a power outside the law."¹³⁶ Rooted in envy and the desire for luxury, colonial imperialism provided the method to institutionalize inequality on a global scale.¹³⁷ As a result of neocolonialism, this inequality persists today.¹³⁸

129. See generally FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 36 (asserting that sovereign states have wielded power over death and increasingly over bodies and life).

130. *Necropolitics*, DUKE UNIV. PRESS, <https://www.dukeupress.edu/necropolitics> [https://perma.cc/AA4J-KU9L] (last visited Nov. 26, 2025).

131. MBEMBE, *supra* note 16, at 42.

132. *Id.* at 6–7 ("The hitherto more or less hidden violence of democracies is rising to the surface, producing a lethal circle that grips the imagination and is increasingly difficult to escape.").

133. *Id.* at 9–27. See *infra* Section IV for further discussion of necropolitics and democracy.

134. See *id.* at 11.

135. *Id.* at 34.

136. *Id.* at 76; see also *id.* at 78 ("In the colonies, the sovereign might kill at any time or in any manner. Colonial warfare is not subject to legal and institutional rules. It is not a legally codified activity.").

137. *Id.* at 19–20.

138. See E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445, 495 (2022) (analyzing the ways in which neocolonialism and borders produce political and racial inequality). For discussions generally of growing income and wealth inequality, see, for example, Lucas Chancel & Thomas Piketty, *Global Income Inequality*,

Addressing the root causes of migration is critical to ameliorating the challenges faced by Global South nations and stemming the rapidly rising number of forcibly displaced people.¹³⁹ Nevertheless, attempts to address causes of migration overlook the true root causes produced by colonial imperialism. President Biden's administration, for instance, acknowledged the need to address the root causes of migration from Central America, identifying "corruption, violence, trafficking, and poverty" as primary causes.¹⁴⁰ Indeed, the region has grappled with these issues. However, these considerable challenges represent symptoms, rather than true root causes, of the colonial and neocolonial forces that have subjugated Central American countries and other Global South nations for the purposes of wealth extraction and to establish proxy rule.¹⁴¹ To grapple with the true root causes of migration would require colonial powers to redress long histories of interventions abroad, particularly in the form of exploitation of resources,¹⁴² forced economic dependency,¹⁴³ foreign intervention,¹⁴⁴ and forcibly

1820–2020: *The Persistence and Mutation of Extreme Inequality*, 19 J. EUR. ECON. ASS'N 3025, 3026 (2020); Peter Coy, *Wealth Inequality Is the Highest Since World War II*, N.Y. TIMES (Feb. 2, 2022), <https://www.nytimes.com/2022/02/02/opinion/inequality-wealth-pandemic.html> (on file with the Temple Law Review); *2023 in Nine Charts: A Growing Inequality*, WORLD BANK GRP., <https://www.worldbank.org/en/news/feature/2023/12/18/2023-in-nine-charts-a-growing-inequality> [https://perma.cc/7KRP-QBKX] (last visited Nov. 26, 2025) (stating that better migration policies can "help boost prosperity in all countries").

139. MBEMBE, *supra* note 16, at 40 ("One cannot 'sanctuarize' one's own home by fomenting chaos and death far away, in the homes of others. Sooner or later, one will reap at home what one has sown abroad." (emphasis omitted)).

140. NAT'L SEC. COUNCIL, U.S. STRATEGY FOR ADDRESSING THE ROOT CAUSES OF MIGRATION IN CENTRAL AMERICA 1 (2021), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf> [https://perma.cc/9FV4-HM9Y].

141. See generally AVIVA CHOMSKY, CENTRAL AMERICA'S FORGOTTEN HISTORY: REVOLUTION, VIOLENCE, AND THE ROOTS OF MIGRATION (Gayatri Patanaik and Maya Fernández eds., 2021) [hereinafter CHOMSKY, CENTRAL AMERICA'S FORGOTTEN HISTORY] (considering the influence of colonial and neocolonial policies on Central American countries and identifying U.S. interventions as a root cause of migration and displacement in Central America); EDUARDO GALEANO, THE OPEN VEINS OF LATIN AMERICA (Cedric Belfrage trans., Monthly Rev. Press 1997) (1971) (discussing the effects of European and American economic exploitation of Latin America).

142. GRACE LIVINGSTONE, AMERICA'S BACKYARD: THE UNITED STATES & LATIN AMERICA FROM THE MONROE DOCTRINE TO THE WAR ON TERROR 45–46 (Jean McNeil ed., 2009); Patricia Foxen, *Understanding Central American Migrations*, UNIDOS US: BLOG (July 14, 2021), <https://unidosus.org/blog/2021/07/14/understanding-central-american-migrations/> [https://perma.cc/JW4D-N5PZ] (describing how American businesses "exploit [Central America's] natural resources through alliances with local elites and military dictatorships, backed by U.S. aid and, if necessary, overt or covert intervention").

143. See LIVINGSTONE, *supra* note 142, at 33. See generally Barbara Stallings, *A Dependency Perspective on the United States, China, and Latin America, in DEPENDENT CAPITALISMS IN CONTEMPORARY LATIN AMERICA AND EUROPE* 29 (2021) (examining dependency theory and the dependency frameworks underpinning the relationship between China, the United States, and Latin America in the twentieth and twenty-first centuries); FERNANDO HENRIQUE CARDOSO & ENZO FALETTI, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* (Marjory Mattingly Urquidi trans., Univ. Cal. Press 1979) (1971) (describing how the integration of Latin America into the global capitalist system has resulted in external economic pressures that lead to dependence on more developed nations).

144. See generally NOAM CHOMSKY, *TURNING THE TIDE: U.S. INTERVENTION IN CENTRAL AMERICA AND THE STRUGGLE FOR PEACE* (Haymarket Books 2015) (1985) [hereinafter CHOMSKY, TURNING THE TIDE] (exploring American intervention and involvement in Central and Latin America); ALAN MCPHERSON, *A SHORT HISTORY OF U.S. INTERVENTIONS IN LATIN AMERICA AND THE CARIBBEAN* (Jürgen Buchenau ed., 2016) (examining the political motivations behind American intervention in, and occupation of, Latin America); LARS

installed autocratic regimes.¹⁴⁵ Instead, various forms of influence and economic coercion persist,¹⁴⁶ and elected officials continue to call for military interventions abroad.¹⁴⁷

As legal scholar E. Tendayi Achiume has argued, Global North nation-states lack the right to exclude Global South migrants “for reasons tied to the distributive and corrective justice implications of the legacies of colonialism.”¹⁴⁸ Building on Achiume’s analysis, Professor Angélica Cházaro has further argued that this “imperial interconnection” calls into question not only the right to exclude, but also the right to deport noncitizens from the United States.¹⁴⁹ Latin Americans continue to represent the largest groups of migrants arriving to the United States.¹⁵⁰ Central American countries are among those most profoundly impacted by (neo)colonial intervention and have fueled recent waves of migration to the country.¹⁵¹ The number of African¹⁵² and Asian¹⁵³ migrants has also surged, and scholars have traced the effects of (neo)colonialism on

SCHOUTZ, BENEATH THE UNITED STATES: A HISTORY OF U.S. POLICY TOWARD LATIN AMERICA (1998) (exploring U.S. policy in Latin America).

145. CHOMSKY, TURNING THE TIDE, *supra* note 144, at 150, 153, 173. See generally PETER KORNBLUH, THE PINOCHET FILE: A DECLASSIFIED DOSSIER ON ATROCITY AND ACCOUNTABILITY (2d ed. 2013) (documenting the United States’ role in installing and supporting a seventeen-year authoritarian regime in Chile).

146. E.g., Ana Swanson & Alan Rappeport, *Trump Threatens Tariffs over Immigration, Drugs and Greenland*, N.Y. TIMES (Jan. 28, 2025), <https://www.nytimes.com/2025/01/28/us/politics/trump-tariffs-colombia-canada-greenland.html> (on file with the Temple Law Review).

147. See, e.g., Will Freeman, *The GOP’s Posturing Will Push Latin America into China’s Arms: Reviving the Monroe Doctrine Is a Dangerous Idea*, DALL. MORNING NEWS (Sep. 26, 2023, at 05:30 CT), <https://www.dallasnews.com/opinion/commentary/2023/09/26/the-gops-posturing-will-push-latin-america-into-chinas-arms/> [https://perma.cc/4S9Z-FCZN] (describing President Trump’s call for an invasion of Mexico and the GOP’s desire to “revive” the Monroe Doctrine); Juan Pablo Spinetto, *Trump Shows His Contempt for Latin America*, BLOOMBERG (July 23, 2024, at 05:00 ET), <https://www.bloomberg.com/opinion/articles/2024-07-23/trump-s-digs-at-el-salvador-s-bukele-highlight-his-contempt-for-latin-america> (on file with the Temple Law Review); Shannon K. O’Neil, *A U.S. Military Intervention in Venezuela Would Be a Disaster*, COUNCIL ON FOREIGN RELS. (Sep. 18, 2018, at 11:43 ET), <https://www.cfr.org/blog/us-military-intervention-venezuela-would-be-disaster> [https://perma.cc/2P2K-Q9SN] (“Calls for U.S. military intervention in Venezuela are growing, most recently from Senator Marco Rubio.”).

148. E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1517 (2019) (arguing for a theory of sovereignty that obligates former European colonial powers to open their borders to former colonial subjects, including economic migrants).

149. Cházaro, *supra* note 99, 1102–05.

150. Kramer & Passel, *supra* note 117.

151. See generally CHOMSKY, CENTRAL AMERICA’S FORGOTTEN HISTORY, *supra* note 141 (considering the influence of colonial and neocolonial policies on Central American countries and identifying U.S. interventions as a root cause of migration and displacement in Central America); JUAN GONZALEZ, HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA (rev. 2d ed. 2022) (2000) (documenting the Latin American experience in the United States).

152. Miriam Jordan, *African Migration to the U.S. Soars as Europe Cracks Down*, N.Y. TIMES (Jan. 5, 2024), <https://www.nytimes.com/2024/01/05/us/africa-migrants-us-border.html> (on file with the Temple Law Review).

153. Cate Cadell, Nick Miroff & Li Qiang, *Walking the Line: Chinese Migration Surge Tests President Biden and Chinese President Xi Jinping*, WASH. POST (July 29, 2024, at 00:00 ET), <https://www.washingtonpost.com/immigration/interactive/2024/china-migrants-us-border-san-diego-new-york/> (on file with the Temple Law Review).

migration flows from those regions as well.¹⁵⁴ To be sure, any efforts to address migration and the violence inherent in the immigration system must address the legacy of (neo)colonial violence against exploited nations as a root cause. These efforts must also acknowledge the state's ongoing and escalating reversion to its intrinsic colonial desires and strategies.

B. *(Nano)Racism as Source of Anti-Migrant Antipathy*

Racialized hostilities are the progeny of imperialism.¹⁵⁵ Race has justified the brutality of (neo)colonial practices, and it undergirds violent migration control strategies. In its framing, “[t]o a large extent, racism is the driver of the necropolitical principle,” which requires a devaluing of life and an inurement to loss.¹⁵⁶ With the politics of race linked to the politics of death, racism has been the “ever-present shadow hovering over Western political thought and practice, especially when the point was to contrive the inhumanity of foreign peoples and the sort of domination to be exercised over them.”¹⁵⁷ In addition to rationalizing colonial imperial rule, racism allows for the perpetuation of exclusion and the reestablishment of borders.¹⁵⁸ As a form of racialized social control, the immigration system primarily targets and perpetuates the death of migrants of color, whom officials portray as undesirable and expendable.¹⁵⁹ Indeed, race serves myriad purposes in retaining and exerting power, including undergirding violent migration control tactics resulting in pervasive slow and spectacular death for migrants.

Necropolitics parses racialized power into two categories: hydraulic racism and nanoracism.¹⁶⁰ Hydraulic racism consists of prejudice perpetuated by the “state machine,” which in part multiplies and shuffles around the undocumented, enforces removals and border violence, and invests in detention centers and deportation techniques.¹⁶¹ As hydraulic racism’s inexorable complement, nanoracism constitutes discrimination consisting of seemingly innocuous everyday gestures and malicious remarks intended to stigmatize, injure, and humiliate.¹⁶² These categories provide helpful framing and terminology for the various manifestations of racial discrimination, complementing other formulations of racialized othering, including systemic, institutional, and structural racism as compared to everyday racism and

154. See generally LUCY MAYBLIN & JOE TURNER, MIGRATION STUDIES AND COLONIALISM (2020) (tracking the dynamics of colonialism and migration throughout history); see also Marie-Laurence Flahaux & Hein De Haas, *African Migration: Trends, Patterns, Drivers*, COMPAR. MIGRATION STUD., Jan. 2016, at 1, 5; Tayyab Mahmud, *Colonial Migrations and Post-Colonial Identities in South Asia*, 23 S. ASIA: J.S. ASIAN STUD. 87, 89–100 (2000).

155. Amiri Baraka, *The Revolutionary Tradition in Afro-American Literature*, in THE LEROI JONES/AMIRI BARAKA READER 311, 329–30 (William J. Harris ed., 2d ed. 1999) (“I think [Nugritude poets] want a world not without race but without racism (which is impossible without the destruction of its parent, imperialism.”).

156. MBEMBE, *supra* note 16, at 38.

157. *Id.* at 71.

158. *Id.* at 61.

159. See Rodríguez, *supra* note 9, at 465, 468 (examining lethal immigration enforcement and arguing that racialized policies and political paradigms frame migrants of color as expendable).

160. MBEMBE, *supra* note 16, at 57–65.

161. *Id.* at 59.

162. *Id.* at 58.

microaggressions. While immigration legal scholars have directed more attention to hydraulic racism,¹⁶³ less attention has been focused on the impact of nanoracism on immigrant communities. Both have been integral to producing a society of enmity toward migrants.

Hydraulic racism drives the immigration enforcement system. It has been present in all aspects of migration control, from race-based federal plenary power reasoning¹⁶⁴ and the legacy of national origins quotas,¹⁶⁵ to laws governing naturalization¹⁶⁶ and immigration enforcement strategies.¹⁶⁷ In particular, anti-Black racism has led to disproportionate criminal and immigration enforcement against Black immigrants, reinforcing structural racism and rendering Black immigrant communities invisible at the intersection of their race and immigration status.¹⁶⁸ Even in comparison to other immigrant groups, Black immigrants are disproportionately detained, deported, given higher bonds, placed in solitary confinement, and subjected to electronic monitoring.¹⁶⁹ Similarly, the disproportionate targeting of Latin American migrants for deportation on criminal grounds has racialized the “criminal alien” as Latine, contributing to their racial subordination.¹⁷⁰

These forms of state racialization and discrimination have also led to disproportionate deaths within the immigration system. While Black immigrants

163. See, e.g., Yolanda Vázquez, *Enforcing the Politics of Race and Identity in Migration and Crime Control Policies*, in RACE, CRIMINAL JUSTICE AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING 142, 143 (Mary Bosworth, Alpa Parmar & Yolanda Vázquez eds., 2d ed. 2018); Karla McKanders, *Immigration and Racial Justice: Enforcing the Borders of Blackness*, 37 GA. ST. U. L. REV. 1139, 1175 (2021).

164. See Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 179–80 (2018); see also *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (justifying the exclusion of migrants because “the presence of foreigners of a different race” was found potentially to be dangerous to the country’s “peace and security”); *Fong Yue Ting v. United States*, 149 U.S. 698, 732, 738 (1893) (empowering the federal government to remove noncitizens in part on racial grounds and upholding the white witness rule).

165. See Angela M. Banks, *The Continuing Legacy of the National Origin Quotas*, 27 WM. & MARY J. RACE GENDER & SOC. JUST. 1, 30–31 (2020) (describing how “the LPR naturalization requirement has been an important tool in reinforcing immigration restrictions”); Elizabeth Aranda & Elizabeth Vaquera, *Racism, the Immigration Enforcement Regime, and the Implications for Racial Inequality in the Lives of Undocumented Young Adults*, 1 SOC. RACE & ETHNICITY 88, 90 (2015) (explaining how “racist immigrant quotas of the 1924 National Origins Act . . . curtailed immigration from southern and eastern Europe”).

166. See John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 818–23 (2000); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 42–46 (Richard Delgado & Jean Stefancic eds., 10th Anniversary ed. 2006) (describing how racism has shaped U.S. naturalization laws by creating barriers for people of color while privileging certain European immigrants that “assimilated”).

167. See Rodríguez, *supra* note 9, at 468, 500.

168. Karla McKanders, *Immigration and Racial Justice: Enforcing the Borders of Blackness*, 37 GA. ST. U. L. REV. 1139, 1139 (2021).

169. TOSCA GIUSTINI, SARAH GREISMAN, PETER L. MARKOWITZ, ARIEL ROSEN & ZACHARY ROSS, ALISA WHITFIELD, CHRISTINA FIALHO, BRITTANY CASTLE & LEILA KANG, *IMMIGRATION CYBER PRISONS: ENDING THE USE OF ELECTRONIC ANKLE SHACKLES* 3 (2021), <https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1002&context=faculty-online-pubs> (on file with the Temple Law Review).

170. See Vázquez, *supra* note 163, at 143 (explaining the racialization of the “criminal alien” as Latine and its effects on migration and criminal laws).

comprise 9% of the noncitizen population,¹⁷¹ they represent 30% of those who died in ICE detention between 2003 and 2023.¹⁷² Similarly, Latine immigrants comprise 72% of those who died in detention during the same period,¹⁷³ yet represent only 44% of U.S. immigrants.¹⁷⁴ Lastly, while data related to ICE shootings is very limited, an investigative report found that Homeland Security Investigations, a subagency of ICE, shot at least sixteen people between 2011 and 2020.¹⁷⁵ Of the victims, thirteen were Black, Latine, or Native American, and five died from the shootings.¹⁷⁶

In addition to the hydraulic racism of the immigration enforcement system, nanoracism contributes to a society of enmity for migrants. Nanoracism consists of placing the greatest number of “undesirables” in intolerable conditions through countless injuries—indignities leaving little trace and little chance of healing—to render them as racialized people with diminished rights until they have “no choice but to self-deport.”¹⁷⁷ The closest parallel to nanoracism in social science literature examines microaggressions and the harms they inflict on migrants of color. According to psychologists, “cumulative encounters with microaggressions are predictive of various mental and physical health outcomes, including depressive symptoms, suicidal ideation, trauma symptoms, and lower psychological well-being.”¹⁷⁸ Microaggressions may leave migrants feeling powerless¹⁷⁹ and provoke significant stress by “creating ambiguities in terms of social

171. Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION INFO. SOURCE 9 (Mar. 13, 2024), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2024> [https://perma.cc/M927-VYKB]. It is important to note this figure represents recent Census Bureau statistics for the number of Black immigrants in the United States; the percentage of Black immigrants was lower for much of the period considered here, making the disproportionate number of Black deaths even starker given the limited data. *See, e.g.*, McKanders, *supra* note 168, at 1145 (identifying the Black immigrant population to be 7.2% between 2003 and 2015).

172. *See* LIST OF DEATHS IN ICE CUSTODY, *supra* note 63; *Detainee Death Reporting*, *supra* note 63. The same definition is used here for Black immigrants as the definition used by the Black Alliance for Just Immigration: any person born outside the United States or one of its territories whose country of origin is located in Africa or the Caribbean. *See* JULIANA MORGAN-TROSTLE & KEXIN ZHENG, THE STATE OF BLACK IMMIGRANTS PART 1: A STATISTICAL PORTRAIT OF BLACK IMMIGRANTS IN THE UNITED STATES 7 (2016). The data related to deaths in detention include country of origin information, not racial identification or self-identification. While these figures are imperfect since some immigrants, particularly from the Caribbean, may not identify as Black, they provide an approximation of the violence against people racialized as Black. Furthermore, there may be additional Black immigrants unaccounted for in these figures since there are likely immigrants who identify as Black from other countries, such as Brazil and Colombia, who are not included among these figures.

173. *See* LIST OF DEATHS IN ICE CUSTODY, *supra* note 63; *Detainee Death Reporting*, *supra* note 63.

174. Batalova, *supra* note 171, at 6.

175. Derek Hall, Mackenzie Shuman, Devan Sauer, Nicole Ludden & José-Ignacio Castañeda Perez, *War Zone*, CRONKITE NEWS, <https://cronkitenews.azpbs.org/homeland-secrets/arizona-stories/war-zone.html> [https://perma.cc/EK6X-3ZVQ] (last visited Nov. 26, 2025).

176. *Id.*

177. MBEMBE, *supra* note 16, at 58.

178. *See* D. R. Gina Sissoko & K. L. Nadal, *Microaggressions Toward Racial Minority Immigrants in the United States*, in TRAUMA AND RACIAL MINORITY IMMIGRANTS: TURMOIL, UNCERTAINTY, AND RESISTANCE 85, 87–88 (Pratyusha Tummala-Narra ed., 2021) (citations omitted).

179. David Ortega-Jiménez, Luis Alvarado, Alejandra Trillo & Francisco D. Bretones, *Processes of Discrimination and Humiliation Experienced by Ecuadorian Immigrant Workers in Spain*, SOC. INCLUSION, Apr. 18, 2023, at 48, 48.

identity.”¹⁸⁰ For migrants, these more subtle forms of racial discrimination include interactions that are threatening, insulting, rude, and exclusionary.¹⁸¹ To mitigate trauma and self-deportation, migrants must develop coping mechanisms¹⁸² and discreet forms of resistance to such hostility, such as portraying racial offenders as ignorant so as to empower themselves as agents of positive change who work to educate unenlightened nonmigrants.¹⁸³

Firmly established in and by imperialist thinking, the use of race as the basis for violent exclusion is experiencing a resurgence.¹⁸⁴ In addition to and in conjunction with criminal mass incarceration, the immigration system serves as one of the state’s primary sources of hydraulic racism. Inextricably linked to the history of race and racism in the United States, the regulation of immigration and citizenship manages the nation’s racial population.¹⁸⁵ Migration governance thus constitutes a primary mode of racial governance.¹⁸⁶ This racialized regulation through law is rooted in white nationalism¹⁸⁷ and replicates racial hierarchies.¹⁸⁸ The inevitable result is the racial subordination of migrants of color, diminishing the value of noncitizens’ lives and inuring society to seemingly inevitable increases in migrant mortality. These racial dynamics perpetuate the contrived criminality and dangerousness of migrants, emboldening nonmigrants to continue to racialize noncitizens and construct a society of enmity targeting them.¹⁸⁹

C. (In)Security as Impetus for Migration Control

The state justifies its racialized actions by establishing a sense of uncertainty. The state “thrives on a state of insecurity, which it participates in fomenting and to which it

180. Samuel Noh, Violet Kaspar & K.A.S. Wickrama, *Overt and Subtle Racial Discrimination and Mental Health: Preliminary Findings for Korean Immigrants*, 97 AM. J. PUB. HEALTH 1269, 1272 (2007); see also Kyle Lorenzo, Gilbert Gee, Butch de Castro, Zhenqiang Zhao, Jinjin Yan, Natalie Hussein & Tiffany Yip, *Everyday Discrimination Among Migrant and Non-Migrant Filipinos: Longitudinal Analyses from the Health of Philippine Emigrants Study*, 26 J. IMMIGRANT & MINORITY HEALTH, 304, 304 (2023) (describing the relationship between discrimination and sleep quality).

181. See Noh et al., *supra* note 180, at 1270–72.

182. Marcus Nicolson, *Racial Microaggressions and Ontological Security: Exploring the Narratives of Young Adult Migrants in Glasgow, UK*, SOC. INCLUSION (Scot.), Apr. 18, 2023, at 37, 39.

183. Rowan El-Bialy & Shree Mulay, *Microaggression and Everyday Resistance in Narratives of Refugee Resettlement*, 8 MIGRATION STUD. 356, 365–67 (2020). See generally Fabio Quassoli & Monica Colombo, *Post-Migration Stress: Racial Microaggressions and Everyday Discrimination*, SOC. INCLUSION (Scot.), Apr. 18, 2023, at 1 (synthesizing findings regarding the effects of microaggressions on migrants and the forms of resistance they activate).

184. Rodríguez, *supra* note 9, at 534–35.

185. See Jennifer M. Chacón, *Immigration and Race*, in THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES ¶¶ 7–9 (Devon Carbado, Emily Huh & Khiara M. Bridges eds., 2022) (assessing the connection between immigration and citizenship regulation and racism in the United States).

186. See Achiume, *supra* note 138, at 495.

187. See Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 198–203 (2019) (describing the white nationalism driving immigration policies).

188. See Karla McKanders, *Deconstructing Race in Immigration Law’s Origin Stories*, 37 MD. J. INT’L L. 18, 18 (2022) (arguing that “facially neutral immigration laws outside of their historical context . . . continue to replicate racial hierarchy”).

189. See HARSHA WALIA, BORDER AND RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 102–59 (Stefanie Gude ed., 2021) (examining the criminalization of migration).

claims to be the solution.”¹⁹⁰ The nation’s violation of foreign state sovereignty while defending its own sovereignty with violence, or nonreciprocal sovereignty, creates a dichotomous state of insecurity. Implicitly, the state fears retribution for “having fomented misery and death far away—far from the gaze of its own citizens.”¹⁹¹ Its externalized violence in foreign nations is thus constitutive of its own insecurity and distrust of migrants. Outwardly, however, the state roots justifications for violent exclusion in security concerns which in turn are based in racialized fears of inherently “dangerous” migrants of color who purportedly bring crime and disorder to the country. As Mbembe notes of Western nations, to protect themselves from the potential “vengeful drives” of people subjugated by imperialist policies, these states “employ racism like a hooked blade, the poisonous addition to a beggar’s nationalism.”¹⁹²

Since its inception, the plenary power to regulate immigration has stemmed from racialized notions of security. In *Chae Chan Ping v. United States* (the authoritative precedent granting the U.S. federal government constitutional power to exclude noncitizens), the Supreme Court rooted the nation’s immigration enforcement powers in security rationales to exclude Chinese workers.¹⁹³ The Court unequivocally empowered Congress to create legislation to exclude migrants if lawmakers “consider[] the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security,” even in the absence of any “actual hostilities with the nation of which the foreigners are subjects.”¹⁹⁴ Shortly thereafter, in *Fong Yue Ting v. United States*, the Court empowered the government to arrest, detain, and deport noncitizens.¹⁹⁵ Again, rendering its decision in the context of Chinese migration, the Court justified its rationale by relying on racialized issues of danger, disorder, and injury considered contrary to public welfare.¹⁹⁶

Contemporary jurisprudence has produced a resurgence of cases citing national security as the rationale for excluding migrants. In the last decade, a string of recent denials of claims against federal officials for alleged violations of a person’s constitutional rights (or *Bivens* claims) have relied on national security grounds.¹⁹⁷ In *Ziglar v. Abbasi*, the Supreme Court denied *Bivens* claims related to immigration detention guards’ physical and verbal abuse of detained individuals in the aftermath of the 9/11 attacks, deferring to Congress because the matter implicated “sensitive issues of national security.”¹⁹⁸ In *Hernandez v. Mesa*, the Court similarly referenced national security concerns at the Mexico-U.S. border generally in denying remedies for a CBP

190. MBEMBE, *supra* note 16, at 54.

191. *Id.* at 61.

192. *Id.* at 61–62.

193. See 130 U.S. 581, 606 (1889).

194. *Id.*

195. See 149 U.S. 698, 707 (1893).

196. *Id.* at 707–08, 711.

197. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

198. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (declining to extend *Bivens* to abuses in immigration detention, in part, because doing so would require “an inquiry into sensitive issues of national security”).

agent's cross-border shooting and killing of a minor, Sergio Hernández Güereca.¹⁹⁹ Lastly, in *Egbert v. Boule*, the Court cited national security concerns in denying a *Bivens* claim after a CBP agent physically assaulted a U.S. citizen, virtually foreclosing causes of action for federal agents' constitutional violations.²⁰⁰ In addition to using this rhetorical tool to effectively dismantle and foreclose *Bivens* claims, in 2018 the Court rested on national security concerns in upholding a travel ban for nationals of particular (majority Muslim) countries in *Trump v. Hawaii*.²⁰¹

As these cases illustrate, the Supreme Court has formulated an expansive conception of national security and largely deferred to the political branches to define security concerns.²⁰² As a result, the political branches face minimal accountability for decisions rooted in these national security justifications, and security concerns have regained prominence as ostensibly race-neutral justifications for restrictive immigration policies.²⁰³

Particularly since the 9/11 attacks, immigration has remained central to discussions about national security and has been used as justification for selective enforcement along identity lines, including those of race, religion, nationality, and citizenship.²⁰⁴ These realities persisted into the Biden era. Under the Biden administration, national security concerns have justified restrictionist border policies and served as a proxy for anxieties about increased migration among migrants of color. For example, while lauding its own efforts to deploy "the most agents and officers ever to address the situation at the Southern border," the Biden administration rebuked congressional Republicans for putting "partisan politics ahead of national security" when legislators voted down more restrictionist border legislation.²⁰⁵ As anticipated, the second Trump administration has already relied on national security to justify more stringent enforcement.²⁰⁶

199. 140 S. Ct. 735, 747 (2019), *aff'd*, 140 S. Ct. 735 (2020) (concluding that "regulating the conduct of agents at the border unquestionably has national security implications" and that the "risk of undermining border security provides reason to hesitate before extending *Bivens* into this field").

200. *Egbert v. Boule*, 142 S. Ct. 1793, 1804–05 (2022) ("Because '[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention,' we reaffirm that a *Bivens* cause of action may not lie where, as here, national security is at issue." (alteration in original) (quoting *Haig v. Agee* 453 U.S. 280, 292 (1981))).

201. *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) ("But because 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.").

202. Ali Shan Ali Bhai, *A Border Deferred: Structural Safeguards Against Judicial Deference in Immigration National Security Cases*, 69 DUKE L.J. 1149, 1160 (2020).

203. Tina Al-khersan & Azadeh Shahshahani, *From the Chinese Exclusion to the Muslim Ban: An Immigration System Built on Systemic Racism*, 17 HARV. L. & POL'Y REV. 131, 133 (2022).

204. Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669, 672 (2017).

205. *Fact Sheet: President Biden Announces New Actions To Secure the Border*, THE WHITE HOUSE (June 4, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/04/fact-sheet-president-biden-announces-new-actions-to-secure-the-border/> [https://perma.cc/2ECF-A3JP] (describing the Biden administration's attempts to secure "emergency authority for the President to shut down the border when the system is overwhelmed").

206. See, e.g., Exec. Order No. 14161, 90 Fed. Reg. 8451, 8451–52 (Jan. 30, 2025) (instructing federal agencies to enhance vetting procedures for foreign nationals to protect national security); Proclamation No. 10949, 90 Fed. Reg. 24497, 24498–504 (June 4, 2025) (imposing full or partial restrictions on entry for nationals

III. ENFORCING ENMITY: NECROLAW AND POLICY IN IMMIGRATION ENFORCEMENT

As the state wields power abroad, it also exerts force at home to curb the inevitable migration of people from the Global South. Law and policy undergird the often violent and at times fatal enforcement employed to deter and impede this migration. In this way, the state exercises necropolitics “through a ‘[necrolaw],’ a normative and coercive order which, far from questioning the inequality as regards the property and privileges of a minority, protects it by denying the right to life or existence of others.”²⁰⁷ While the previous Section considered the underlying causes, motivations, and justifications of migration control, this Section examines the contemporary manifestations of violent migration control strategies that have culminated in the Biden and Trump eras, intending not to ascribe this evolution solely to presidential administrations, but to examine instead the recent escalating trajectory of immigration law and policy. It considers the recent evolution of necrolaw and necropolicy, or the jurisprudence and policy implementation of death to deter migration, at each branch of state power.

A. *Executive Border Externalization and Asylum Attrition*

Borders serve as bulwarks to exclude the colonized and racialized people of the Global South. As Mbembe notes, “everything leads back to borders,” which constitute “dead spaces of non-connection which deny the very idea of a shared humanity.”²⁰⁸ In a world in which survival has driven increased migration, “the brutality of borders is now a fundamental given of our time,” and “[m]any are those who, encountering them, now meet their ends.”²⁰⁹ In the United States, border militarization has evolved to become increasingly brutal to migrants, including those who fear harm or death in their home countries.²¹⁰ Contemporary border policy in the United States possesses two central features deeply entrenched in necropolicy increasing the state’s power over the death of migrants: the declaration of border emergencies justifying diminished protections for the

of 19 countries based in national security justifications); Proclamation No. 10973, 90 Fed. Reg. 46027, 46027–29 (Sep. 19, 2025) (imposing a \$100,000 fee for H-1B visa applications based on security and economic justifications).

207. Fernando Rovetta Klyver, *Enforced Disappearance: A Precedent of the Enemy Criminal Law*, in CRISIS OF THE CRIMINAL LAW IN THE DEMOCRATIC CONSTITUTIONAL STATE: MANIFESTATIONS AND TRENDS 55, 77 (Eduardo Demetrio Crespo, Alfonso García Figueroa & Gema Marcilla Córdoba eds., 2023).

208. MBEMBE, *supra* note 16, at 99.

209. *Id.* at 3.

210. See Elliot Spagat, *Behind Biden’s Asylum Halt: Migrants Must Say If They Fear Deportation, Not Wait to Be Asked*, AP NEWS (July 21, 2024, at 00:55 ET), <https://apnews.com/article/border-patrol-migrants-shout-test-faa388ed7164f3a658dd2383a36e6573> [https://perma.cc/FY5S-UEVA].

persecuted²¹¹ and the more robust externalization of borders to Global South nations.²¹² These realities have coalesced with past deterrence policies to make already perilous journeys and hostile immigration policies potentially more deadly for migrants.

In the Trump and Biden eras, the United States government has embraced an unprecedented escalation of border externalization. This outsourcing of borders shifts the onus onto developing nations to do the United States' bidding in terms of migration control. Effectively, the leaders of developing countries become "prison guards of the West, to whom the lucrative business of administering brutality can be subcontracted."²¹³ In the Americas, this outsourcing has largely taken the form of compelling Latin American nations to stem the tide of migrants to the United States. Under the Biden administration, less conspicuous persuasion drove other nations to aid U.S. immigration enforcement. Under the first and second Trump administrations, this persuasion has been more explicit, including public threats to end foreign aid to the Northern Triangle countries of El Salvador, Guatemala, and Honduras.²¹⁴

Initiatives throughout Latin America reflect the persistence in impeding migrants in reaching the U.S. border. In particular, Mexico has become a key buffer between the United States and the rest of Latin America, a development that has failed to curtail migration and instead has led to increased violence and human rights abuses in Mexico since the 1980s.²¹⁵ Under the Biden administration, Mexico entered into renewed agreements with the United States to deter migration, intercepting more migrants at its southern border with Central American countries and removing more migrants at its northern-border cities.²¹⁶ As a result, Mexico deported more than seven hundred eighty-eight thousand people between January and September 2023.²¹⁷ Mexico has also

211. See *Securing the Border*, 89 Fed. Reg. 48710, 48710 (June 7, 2024) (to be codified at 8 C.F.R. pts. 208, 235, 1208) (interim final rule); *Fact Sheet: President Biden Announces New Actions To Secure the Border*, *supra* note 205 (describing the Biden administration's attempts to secure "emergency authority for the President to shut down the border when the system is overwhelmed"); see also Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> (on file with the Temple Law Review) (reporting on the separation of powers challenges caused by declaring a national emergency on the border in order to access billions of dollars that Congress refused to provide to the executive branch to build a wall).

212. See Anita Sinha, *Transnational Migration Deterrence*, 63 B.C. L. REV. 1295, 1296 (2022) (framing externalized migration controls as "transnational migration deterrence" and examining these systems in the United States, Europe, and Australia); see also *Los Angeles Declaration on Migration and Protection*, THE WHITE HOUSE (June 10, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/> [https://perma.cc/6VPG-TR3L] (summarizing an agreement on migration among the United States and several other countries in the Americas, including "a shared approach to reduce and manage irregular migration").

213. MBEMBE, *supra* note 16, at 98.

214. Lesley Wroughton & Patricia Zengerle, *As Promised, Trump Slashes Aid to Central America over Migrants*, REUTERS (June 17, 2019, at 17:04 ET), <https://www.reuters.com/article/world/as-promised-trump-slashes-aid-to-central-america-over-migrants-idUSKCN1T12DS> [https://perma.cc/7L6U-27TU].

215. Ana Raquel Minian, *Offshoring Migration Control: Guatemala Transmigrants and the Construction of Mexico as a Buffer Zone*, 125 AM. HIST. REV. 89, 89–92 (2020).

216. Rosa Flores, Sara Weisfeldt, Emma Tucker & Macie Goldfarb, *Mexico Makes Agreement with US To Deport Migrants from Its Border Cities as One Mayor Warns His City Is at 'a Breaking Point'*, CNN (Sep. 24, 2023, at 22:45 ET), <https://www.cnn.com/2023/09/23/us/mexico-us-border-patrol-agreement-migration-surge/index.html> [https://perma.cc/LN85-6RGR].

217. *Id.*

negotiated with Venezuela, Brazil, Nicaragua, Colombia, and Cuba to “confirm receipt of their citizens deported from the [U.S.]–Mexico border.”²¹⁸ Yet increased violence in Mexico itself remains a significant basis of asylum claims.²¹⁹ Moreover, the Biden administration established migration processing centers in Latin America to keep migrants away from the Mexico-U.S. border.²²⁰ Known as the “Safe Mobility Initiative,” the project includes processing centers in Colombia, Ecuador, Costa Rica, and Guatemala.²²¹ The initiative has raised concerns among these partnering nations about migrants overwhelming their own borders.²²²

The outsourcing of borders also means externalizing migrant harms beyond U.S. soil. People who migrate are experiencing harms and death at higher levels in countries less accustomed to addressing the needs of large groups of migrants. For instance, a report from United Nations workers conveys the following: “The United States decision to outsource U.S. immigration enforcement to Mexico has led to serious cases of violence, abuse and exploitation. It has further forced migrants to wait in horrific conditions while trying to seek protection.”²²³ Furthermore, asylum seekers waiting in Mexico have faced kidnapping, extortion, and assault.²²⁴ Mexico’s evolving migration enforcement, including its detention practices, potentially violates its own constitution as well as international law.²²⁵ Strikingly, while harms abroad increase as the United States attempts to keep migrants from its border, deaths at the Mexico-U.S. border continue to rise.²²⁶ Even as migration control is outsourced, border necropolicy continues to perpetuate pervasive premature death among migrants.

In addition to border externalization, necrolaw and policy have eroded protections for those fleeing persecution in their home countries. In an unprecedented manner, the federal government has diminished asylum protections, stripping safeguards for those

218. *Id.*

219. *Id.*

220. Genevieve Glatsky & Zolan Kanno-Youngs, *Biden Plan Seeks To Keep Migrants Away from the Border. Will It Work?*, N.Y. TIMES (Sep. 21, 2023), <https://www.nytimes.com/2023/09/21/world/americas/border-migrants-biden-plan.html> (on file with the Temple Law Review).

221. Bureau of Population, Refugees, & Migration, *Safe Mobility Initiative*, U.S. DEP’T OF STATE, <https://www.state.gov/refugee-admissions/safe-mobility-initiative/> [<https://perma.cc/8GGG-5H9A>].

222. Glatsky & Kanno-Youngs, *supra* note 220.

223. *US-Mexico Relations and Their Impact on Migrant Safety*, MÉDECINS DU MONDE (Jan. 25, 2023), <https://reliefweb.int/report/united-states-america/us-mexico-relations-and-their-impact-migrant-safety> [<https://perma.cc/F69R-44J6>].

224. *Mexico: Abuses Against Asylum Seekers at US Border*, HUM. RTS. WATCH (Mar. 5, 2021, at 01:00 ET), <https://www.hrw.org/news/2021/03/05/mexico-abuses-against-asylum-seekers-us-border> [<https://perma.cc/M4XG-K6KJ>].

225. Alesia Ash, *The Militarization of Mexico’s Border and Its Impact on Human Rights*, 51 INT’L J. LEGAL INFO. 58, 58–59 (2023). Nonetheless, the Trump administration has imposed tariffs on Mexico to force its full cooperation on curbing migration to the United States. Andrew Selee, Rodolfo Cruz Piñeiro, Theresa Cardinal Brown & Ariel G. Ruiz Soto, *U.S.-Mexico Migration Cooperation in the Trump-Sheinbaum Era*, REVISTA: HARV. REV. OF LATIN AM. (June 26, 2025), <https://revista.drelas.harvard.edu/u-s-mexico-migration-cooperation-in-the-trump-sheinbaum-era/> [<https://perma.cc/PB82-E5PZ>].

226. See *US: Border Deterrence Leads to Deaths, Disappearances*, HUM. RTS. WATCH (June 26, 2024, at 09:00 ET), <https://www.hrw.org/news/2024/06/26/us-border-deterrence-leads-deaths-disappearances> [<https://perma.cc/6JWE-UAMW>].

fleeing persecution, torture, or death.²²⁷ Mirroring the restrictionist and violent policies of the first Trump administration, the Biden administration issued a proclamation and interim final rule, with very limited exceptions, limiting the ability to apply for asylum on manner of entry.²²⁸ The rule “restricts asylum eligibility for those who irregularly enter across the southern border.”²²⁹ In contrast to Title 42, the COVID-19-era health restrictions on asylum, the rule mandates removal orders for these noncitizens, subjecting them to potential reentry bans.²³⁰ As the American Civil Liberties Union argued in its legal challenge to the rule, the Biden administration’s asylum policy models previous rules courts have found unlawful.²³¹ For instance, in 2018 courts enjoined and vacated a similar policy under the first Trump administration that barred asylum for anyone entering between ports of entry.²³² Similarly, in 2023 a court vacated the “Lawful Pathways Rule,” which barred asylum to noncitizens from countries other than Mexico who failed to enter through a port of entry or schedule an appointment through the CBP One application,²³³ discussed further below.

Paradoxically, the Biden administration’s asylum rule was upheld,²³⁴ thereby making the process of seeking asylum more challenging during a time of particular need

227. Ximena Bustillo, *Asylum-Seekers Thought They Were Following the Rules. Now Some Are Told To Start Over*, NAT'L PUB. RADIO (Aug. 10, 2025, at 5:00 ET), <https://www.npr.org/2025/08/10/nx-s1-5487598/asylum-seekers> [https://perma.cc/TP29-GV6K].

228. *Fact Sheet: Presidential Proclamation To Suspend and Limit Entry and Joint DHS-DOJ Interim Final Rule To Restrict Asylum During High Encounters at the Southern Border*, U.S. DEP'T OF HOMELAND SEC. (June 4, 2024), <https://www.dhs.gov/news/2024/06/04/fact-sheet-presidential-proclamation-suspend-and-limit-entry-and-joint-dhs-doj> [https://perma.cc/6KJ2-EECL].

229. *Id.*

230. *Id.*; see also Elliot Spagat, *How Biden’s New Order To Halt Asylum at the US Border Is Supposed To Work*, AP NEWS (June 4, 2024, 19:10 ET), <https://apnews.com/article/biden-asylum-ban-halt-border-mexico-1905c3565b2dalcffb8f38a778c07118> [https://perma.cc/F5WN-SFDR] (outlining the halt to asylum processing at the Mexico-U.S. border when unauthorized entries reach a particular threshold).

231. *Las Americas Immigrant Advoc. Ctr. v. DHS*, 783 F. Supp. 3d 200, 206 (D.D.C. 2025).

232. See *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 844 (N.D. Cal. 2018) (holding the entry ban conflicts with 8 U.S.C. § 1158(a)(1), which allows applications for asylum for anyone “physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival[!])” (quoting 8 U.S.C. § 1158(a)(1))), *aff’d sub nom.*, *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2023); *O.A. v. Trump*, 404 F. Supp. 3d 109, 150 (D.D.C. 2019) (finding the entry ban incompatible with the “congressional mandate” that all noncitizens present in the country may apply for asylum “regardless of whether they entered the United States at a designated port of entry”); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 780 (9th Cir. 2018) (declining to stay the injunction), *aff’d*, 950 F.3d 1242 (9th Cir. 2020), *and amended and superseded on denial of reh’g en banc sub nom.*, *Biden*, 993 F.3d 640; *Trump v. E. Bay Sanctuary Covenant*, 139 S. Ct. 782, 782 (2018) (declining to stay the injunction), *aff’d*, 950 F.3d 1242, *amended and superseded on denial of reh’g en banc sub nom.*, *Biden*, 993 F.3d 640; *Biden*, 993 F.3d at 671, 675–77 (upholding the injunction of the entry ban on the merits).

233. *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1053 (N.D. Cal. 2023) (finding the rule procedurally improper and contrary to 8 U.S.C. § 1158(a)(1)), *vacated sub nom.*, *E. Bay Sanctuary Covenant v. Trump*, 134 F.4th 545 (9th Cir. 2025); *E. Bay Sanctuary Covenant v. Biden*, 93 F.4th 1130, 1131 (9th Cir. 2024) (holding the appeal of vacatur in abeyance), *vacated sub nom.*, *E. Bay Sanctuary Covenant v. Trump*, 134 F.4th 545 (9th Cir. 2025).

234. See *Fact Sheet: President Biden’s Presidential Proclamation and Joint DHS-DOJ Interim Final Rule Cut Encounters at Southwest Border by Over 40 Percent in First Three Weeks*, U.S. DEP'T OF HOMELAND SEC. (June 25, 2024), <https://www.dhs.gov/news/2024/06/25/fact-sheet-president-bidens-presidential-proclamation-and-joint-dhs-doj-interim> [https://perma.cc/ZY4D-RSJ7] (“Noncitizens who are subject to the

for those who may be unaware of the policy or their right to seek protection in the United States. Although border crossings were in decline when the Biden administration initially operationalized the interim rule,²³⁵ the policy was ostensibly put forward to deter border crossings further. The rule was likely also the result of political pressure, as liberals and conservatives alike called for increased enforcement at the border.²³⁶ After the shooting of two national guard members by a noncitizen, the Trump administration halted all asylum claim decisions.²³⁷ As more people cross the border in desperation, the path to asylum becomes more elusive for those who may face significant, even lethal, harms in their home countries. Increased violence and death have become acceptable externalities of the nation's desire to exclude migrants of color with little regard for the true causes of this forced displacement. Immigration policy continues to reconstitute itself as a form of organization for death.

B. Judicial Erosion of Limited Migrant Protections

In recent immigration decisions, the Supreme Court has purveyed necrolaw, opening the door to increased violence in the immigration enforcement system. During the Biden and Trump eras, the Court has ruled contrary to migrants' interests in the majority of immigration cases with implications for noncitizens. Systematically, the "restless and newly constituted Court"²³⁸ has granted certiorari in cases that have empowered state violence or otherwise ensured legal obstacles for migrants, often overruling lower courts' decisions. This increased empowerment has created what Mbembe describes as "domination without responsibility," the state's power of life and death over those it subjugates with limited, if any, recourse.²³⁹ Indeed, rather than restrain the violent immigration enforcement system, the Court has engaged in the production of legal impunity, empowering the immigration system and the officials who drive that system to produce death with limited legal consequences.²⁴⁰ These decisions have primarily addressed issues of detention, use of force, and the intersection of criminal and immigration law. Outside of those contexts, the Court has also diminished migrants' rights in the employment context.

As discussed above, immigration detention represents one of the state's most prevalent tools in inflicting slow death on migrants. Multiple recent Supreme Court decisions have considered immigration detention bond hearings, eroding protections for

rule's limitation on asylum eligibility and who do not establish a legal basis to remain in the United States are being promptly removed. Those removed are subject to at least a five-year bar to reentry and potential criminal prosecution.”).

235. Julia Ainsley, *Attempted Border Crossings Dropped to the Lowest Level of the Biden Presidency in September*, NBC NEWS (Oct. 8, 2024, at 17:00 ET), <https://www.nbcnews.com/investigations/border-crossings-dropped-lowest-level-biden-administration-september-rcna174574> [https://perma.cc/R6FH-3TX8].

236. Bernd Debusmann Jr. & James FitzGerald, *Biden Border Plan Attacked by Republican Rivals*, BBC (June 5, 2024), <https://www.bbc.com/news/articles/cv224kdxwm4o> [https://perma.cc/ZQ9N-GPDR].

237. Yang Tian & James FitzGerald, *US Halts All Asylum Claim Decisions After National Guard Shooting*, BBC NEWS (Nov. 29, 2025), <https://www.bbc.com/news/articles/edxweyy157go.amp> [https://perma.cc/9PJ5-VRR2].

238. *Egbert v. Boule*, 142 S. Ct. 1793, 1817–18 (2022) (Sotomayor, J., dissenting).

239. See MBEMBE, *supra* note 16, at 34.

240. See Rodríguez, *supra* note 9, at 514–20 (examining how the Court has empowered the immigration enforcement system to produce harm without legal checks).

migrants who find themselves confined by the immigration enforcement system. After holding in their 2018 decision *Jennings v. Rodriguez* that detainees do not possess a statutory right to periodic bond hearings,²⁴¹ the Court revisited the issue of bond in *Johnson v. Guzman Chavez* in 2021.²⁴² In *Guzman Chavez*, the Court found that noncitizens seeking withholding of removal (a form of relief from removal) after reinstatement of removal orders are not entitled to individualized bond hearings.²⁴³ In the 2022 case *Johnson v. Arteaga-Martinez*, the Court subsequently held that the government is not required to provide noncitizens detained for six months or more with bond hearings in which typically the government must show the noncitizen will be a flight risk or danger to the community to justify continued detention.²⁴⁴ Similarly, that same year in a companion case to *Arteaga-Martinez*, the Court held in *Garland v. Gonzalez* that INA Section 1252(f)(1) deprives district courts of jurisdiction to entertain detained aliens' requests for class-wide injunctive relief, such as in the case of government misconduct.²⁴⁵

While these decisions may appear to be procedural adjustments, they carry significant consequences for detained individuals. Bond hearings may ensure a noncitizen's freedom, which means access to the support of friends and family, increased chances of securing counsel, and significantly greater chances of obtaining relief from removal.²⁴⁶ The Court's decisions contribute to noncitizens' prolonged detention—and the attendant physical and psychological consequences—without hearings in place to determine whether continued detention is necessary. Recognizing the harms of detention and the need for collective recourse, Justice Sotomayor, concurring and dissenting in part in *Garland*, noted that the repercussions of the Court's decision will be "grave" and "leave many vulnerable noncitizens unable to protect their rights."²⁴⁷ The Court rendered these decisions as conditions in immigration detention centers have been under scrutiny.²⁴⁸

In the context of use of force, the Court has opened the door to increased violence against migrants in decisions related to *Bivens* claims. In *Egbert*, the Court held there is no *Bivens* cause of action against a CBP agent for Fourth Amendment excessive force or First Amendment retaliation, all but foreclosing causes of action for constitutional violations against federal agents in their individual capacity.²⁴⁹ In *Egbert*, a CBP agent physically assaulted Mr. Robert Boule, a U.S. citizen and CBP informant, when Mr.

241. *Jennings v. Rodriguez*, 138 S. Ct. 830, 833–34 (2018).

242. See *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2277 (2021).

243. *Id.* at 2280.

244. *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1831 (2022).

245. *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2062–63 (2022).

246. See IMMIGR. LEGAL RES. CTR., REPRESENTING CLIENTS IN BOND HEARINGS: AN INTRODUCTORY GUIDE 1 (2017), https://www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf [<https://perma.cc/FWB7-CKBX>].

247. *Garland*, 142 S. Ct. at 2068, 2077–78 (Sotomayor, J., dissenting).

248. See Bobbi-Jean Misick, *Immigrant Who Died in Louisiana ICE Detention Center Had Filed at Least 29 Grievances*, LA. ILLUMINATOR (July 13, 2023, at 06:00 ET), <https://lailluminator.com/2023/07/13/immigrant-who-died-in-louisiana-ice-detention-center-had-filed-at-least-29-grievances/> [<https://perma.cc/A8XX-3GXN>].

249. *Egbert v. Boule*, 142 S. Ct. 1793, 1799–1800 (2022).

Boule requested that the agent leave his property.²⁵⁰ While the decision directly impacted a U.S. citizen, its most significant consequences largely impact noncitizens, the primary targets of immigration enforcement officials. With its decision, based largely in specious national security concerns,²⁵¹ the Court reinforced impunity for individual agents committing constitutional violations, no matter how intentional or egregious. This legal production of impunity represents a critical component of entrenching necrolaw, allowing federal immigration agents to harm and kill with virtual impunity. The Court's decision creates fertile ground for unrestrained violence, including lethal violence, against migrants.²⁵²

The Court has affirmed further obstacles for noncitizens at the intersection of criminal and immigration law. In *Pugin v. Garland*, the Court found that an offense, including the offense of accessory after the fact, may relate to the obstruction of justice on aggravated felony grounds under the INA, even if the offense does not require an investigation or proceeding to be pending when the alleged offending actions take place.²⁵³ This decision further broadens the offenses that may carry the substantial consequences stemming from an aggravated felony conviction. In *Pereida v. Wilkinson*, the Court held that a nonpermanent resident seeking to cancel a lawful removal order cannot meet the burden of proving that his conviction is not a disqualifying offense so long as there is ambiguity regarding whether or not the statutory conviction on record is a disqualifying offense.²⁵⁴ In other words, although an applicant may well be eligible for relief, therefore allowing her to remain in the country, an ambiguous record produced by criminal courts, and attorneys largely unfamiliar with the vagaries of immigration law, results in an applicant failing to meet her burden. As noncitizens of color continue to be targeted by both the criminal and immigration systems, the Court has further expanded the offenses leading to the violence of detention and deportation as well as the obstacles to gaining lawful status.

Beyond issues directly related to enforcement, the Court has also imposed further legal barriers on migrant workers. In *Cedar Point Nursery v. Hassid*, the Court found that granting labor organizations the right to access agricultural employers' property to solicit support for unionization constitutes a *per se* physical taking.²⁵⁵ As agricultural workers face potential abuses and difficult work conditions, the Court has constructed legal walls restricting union organizers' access to these workers. With implications for freedom of association and union organizing rights for migrant workers, the Court's decision may have untold consequences for workers already suffering spectacular and slow death imposed by their work. The decision's selective approach to takings also has

250. *Id.* at 1801 ("On Boule's account, the situation escalated from there. Boule instructed Agent Egbert to leave his property, but Agent Egbert declined. Instead, Boule claims, Agent Egbert lifted him off the ground and threw him against the SUV.").

251. *See id.* at 1811 (Sotomayor, J., dissenting in part) (finding the Court avoided granting *Bivens* relief by "stretch[ing] national security concerns beyond recognition").

252. *See Rodríguez, supra* note 9, at 511–14 (discussing *Egbert*).

253. 143 S. Ct. 1833, 1838–39 (2023).

254. 141 S. Ct. 754, 756 (2021).

255. 141 S. Ct. 2063, 2080 (2021).

broader social consequences, entrenching patterns of property wealth that support the status quo.²⁵⁶

In recent decisions, the Supreme Court has also limited the power of federal circuit courts to review immigration decisions rendered by courts and the Board of Immigration Appeals,²⁵⁷ while at the same time overturning *Chevron* deference and expanding the power of federal courts to no longer defer to relevant agencies when interpreting immigration laws.²⁵⁸ In a series of more fine-grained immigration law matters, the Court further ruled contrary to migrants' interests. These decisions included findings that: U.S. citizens do not have a fundamental liberty interest in their noncitizen spouses being admitted to the country;²⁵⁹ a noncitizen whose "notice to appear" (the document initiating removal proceedings) does not contain information related to the time and date of the noncitizen's initial hearing has no recourse from a removal order if the government subsequently provides notice of that information;²⁶⁰ a statute criminalizing "encouraging" or "inducing" an undocumented immigrant to unlawfully reside in the United States is not overbroad and does not violate the First Amendment;²⁶¹ and individuals who have received "Temporary Protected Status" may not adjust status to lawful permanent resident if not lawfully inspected and admitted when they initially arrived to the United States.²⁶²

While this series of cases illustrates the abundance of recent legal decisions posing challenges for noncitizens, not every matter resulted in a negative outcome for migrants. For instance, the Court alleviated the burden for some noncitizens of filing motions to reconsider in immigration courts²⁶³ and found the "exceptional and extremely unusual hardship" standard for cancellation of removal to be a reviewable question of law,²⁶⁴ allowing noncitizens to appeal decisions related to a particularly stringent legal standard. In perhaps the most notable victory for migrants, the Court ruled that the Department of Homeland Security (DHS) was permitted to end the Remain in Mexico program, a Trump-era policy requiring migrants to seek asylum from outside the United States.²⁶⁵

256. See Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 1 (2022).

257. See *Garland v. Ming Dai*, 141 S. Ct. 1669, 1681 (2021) (finding that a court of appeals cannot presume that a noncitizen's testimony is credible and true simply because the immigration judge and Board of Immigration Appeals did not specifically find a lack of credibility); *Patel v. Garland*, 142 S. Ct. 1614, 1618 (2022) (finding that federal courts lack jurisdiction to review facts found as part of a judgment relating to discretionary immigration relief). In his dissent in *Patel*, Justice Gorsuch opined that the decision renders courts "powerless to correct bureaucratic mistakes . . . no matter how grave they may be." *Id.* at 1630 (Gorsuch, J., dissenting).

258. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2247 (2024).

259. *Dep't of State v. Muñoz*, 144 S. Ct. 1812, 1817–18 (2024).

260. *Campos-Chaves v. Garland*, 144 S. Ct. 1637, 1643–44 (2023).

261. *United States v. Hansen*, 143 S. Ct. 1932, 1962–63 (2023) (Jackson, J., dissenting). While the decision ostensibly protects migrants by facilitating the prosecution of someone defrauding undocumented immigrants by promising a path to legal status, it threatens free speech and leaves open the possibility of prosecution for aiding migrants, including "those on the ground who operate daily in the shadow of the law," including immigration lawyers, advocacy organizations, and journalists. *Id.* at 1963.

262. *Sanchez v. Mayorkas*, 141 S. Ct. 1809, 1810 (2021).

263. *Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1110 (2023).

264. *Wilkinson v. Garland*, 144 S. Ct. 780, 785 (2024).

265. *Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022).

Though not every Supreme Court decision in the Biden and Trump eras has further harmed migrants, this synthesis of cases illustrates the striking imbalance in legal outcomes for noncitizens. The overwhelming majority of these cases overturn circuit court decisions and interpret immigration law and procedure to diminish the lives and livelihoods of migrants. These Biden- and Trump-era decisions rest firmly on a robust foundation of restrictionist laws that drive racialized policing, exclusion, separation, and inequality. They stand as the contemporary culmination of deeply entrenched immigration necrolaw.

C. Legislative Subfederal Appropriation of Enforcement Power

As reported migrant death has increased for the past three decades, Congress has failed to pass immigration reform. At the federal level, lawmakers have chosen inaction as migration and migrant harms increase. Indeed, the migration control system works as intended, attempting to deter migration at the cost of harms to migrants, including rising migrant mortality. With federal immigration necrolaw firmly in place and a federal executive branch enforcing pernicious necropolicies targeting migrants, state legislatures have intervened to adopt policies seeking to make conditions inhospitable and escalate enforcement against migrants. For well over a century, courts have upheld the federal government's plenary power to regulate immigration, rooted in its authority over foreign policy matters.²⁶⁶ Subfederal actions seek to inflict further violence on migrants, nonetheless, passing legislation that appropriates the federal government's long recognized power to regulate migration.

As scholars have noted, state and substate actors²⁶⁷ have had a profound influence on immigration enforcement for some time.²⁶⁸ In a study of two California counties, for instance, Professor Jennifer Chacón notes that "line officers at the local level have the power both to dampen federal enforcement efforts and to circumvent state noncooperation restrictions," such as sanctuary policies.²⁶⁹ These actors influence immigration outcomes both through legislative advocacy and by cooperating with federal officials in a variety of ways, such as investigations purportedly related to trafficking, including in states with sanctuary policies meant to protect migrants.²⁷⁰

Even when local police and criminal courts do not directly cooperate with ICE, noncitizens experience adverse outcomes in the criminal justice system as courts consider immigration status in setting bail, determining eligibility for diversion

266. See, e.g., *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889) (barring Chinese laborers from the United States); *Fong Yue Ting v. United States*, 149 U.S. 698, 698 (1893) (expanding the Chinese Exclusion Act of 1882); U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce with foreign nations); *id.* art. II, § 2, cl. 2 (granting the president the power to make treaties with foreign nations).

267. As in the scholarship cited in this Section, "substate actors" here is used as shorthand for local actors, such as city, county, or municipal officials.

268. See generally Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008) (analyzing how state and local actors have gained and expanded their immigration enforcement powers over time).

269. Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1391 (2019).

270. *Id.* at 1364.

programs, and imposing jail sentences.²⁷¹ In states lacking sanctuary policies, law enforcement officials systematically funnel noncitizens to removal proceedings through low-level policing, including through proactive traffic stops.²⁷² These policies are often empowered by local or state actions through 287(g) programs that deputize local police to enforce federal immigration law.²⁷³

During the Biden administration, states became especially active in challenging the federal government's plenary power to regulate immigration.²⁷⁴ Testing the limits of this federal authority, Texas emerged particularly defiant to the long-established plenary power doctrine, passing legislation in 2023 referred to as Senate Bill 4, which authorizes subfederal law enforcement officers to detain people suspected of being noncitizens, empowers prosecutors to charge noncitizens with the newly codified state crimes of illegal entry and reentry, and allows courts to order noncitizens deported in some instances.²⁷⁵ The Fifth Circuit Court of Appeals initially stayed the district court's initial injunction of the law, later dissolving its own decision after the Supreme Court declined review.²⁷⁶ Shortly thereafter, the state legislatures of Arizona and Michigan introduced similar bills.²⁷⁷

As state legislatures heighten enforcement, state and local officials' desires to inflict harm on migrants have also escalated and become more explicit. In public statements, for instance, Texas Governor Greg Abbott lamented the fact that his state could not shoot migrants because murder is illegal.²⁷⁸ Governor Abbott made these statements as he bused more than one hundred nineteen thousand people to Democrat-led cities²⁷⁹ and

271. See generally Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 L. & SOC'Y REV. 241 (2015) (assessing how the integration of the criminal justice and immigration systems has led to greater criminal punishments for noncitizens).

272. See AMADA ARMENTA, PROTECT, SERVE, AND DEPORT: THE RISE OF POLICING AS IMMIGRATION ENFORCEMENT 3, 8 (2017) (arguing that vehicle stops play a "crucial role in depositing unauthorized immigrants into the deportation system").

273. *Id.* at 3.

274. See *Immigration—National Security—State Standing*—United States v. Texas, 137 HARV. L. REV. 350, 350 (2023) (discussing the "recent rise of state immigration enforcement"). Of course, this is not to say state and local immigration strategies are novel. See, e.g., Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 145–53 (2019) (analyzing subfederal migration control tactics under the previous Trump administration).

275. S.B. 4, 88th Leg., 4th Sess. (Tex. 2023).

276. United States v. Texas, No. 24-50149, 2024 WL 909612, at *1 (5th Cir. Mar. 2, 2024) (per curiam) (unpublished), vacated, 96 F.4th 797 (5th Cir. 2024) (per curiam); United States v. Texas, 719 F. Supp. 3d 640, 701–02 (W.D. Tex. 2024).

277. S.B. 1070, 49th Leg., 2d Sess. (Ariz. 2010); see also Jazmine Ulloa, *G.O.P.-Led States, Claiming 'Invasion,' Push To Expand Power To Curb Immigration*, N.Y. TIMES (June 15, 2024), <https://www.nytimes.com/2024/06/15/us/politics/republican-states-immigration-laws.html> (on file with the Temple Law Review) (providing coverage of state bills heightening immigration enforcement at the state level).

278. Bess Levin, *Greg Abbott Says the Only Thing Stopping Texas from Shooting Migrants Is the Headache of Potential Murder Charges*, VANITY FAIR (Jan. 12, 2024), <https://www.vanityfair.com/news/greg-abbott-shooting-migrants-headache-of-potential-murder-charges> [<https://perma.cc/QNY2-BHMU>].

279. J. David Goodman, Keith Collins, Edgar Sandoval & Jeremy White, *Bus by Bus, Texas' Governor Changed Migration Across the U.S.*, N.Y. TIMES (July 23, 2024), <https://www.nytimes.com/2024/07/20/us/abbott-texas-migrant-buses.html> (on file with the Temple Law Review).

placed floating barriers in the Rio Grande River to attempt to deter migration.²⁸⁰ While state intervention in immigration matters is not unprecedented,²⁸¹ the violent nature of such interventions has become more conspicuous. Presumably, these state officials realize their legal arguments related to migrants invading their states may fail. In effect, they are both signaling their animus for migrants to their constituents while pressuring the federal government to adopt more hostile policies by bringing national attention to the issue. Thus, these necropolicies serve multiple purposes and appear designed to garner full public display of increasingly aggressive approaches to migration control.

D. Administrative Rise of Technology in Enforcement

Challenging traditional notions of tripartite government in the United States, scholars and jurists have recognized and critiqued a fourth branch of government consisting of administrative agencies.²⁸² In the immigration context, these agencies include U.S. Citizenship and Immigration Services (USCIS), ICE, CBP, and immigration courts, whose functions include policing, detaining, and deporting migrants as well as adjudicating their applications for immigration benefits.²⁸³ These agencies have considerable power in implementing enforcement priorities and determining whom to exclude or remove.²⁸⁴ Increasingly, necropolicy related to migration control entails marshaling technology to augment agencies' enforcement efforts against migrants. These agencies have also claimed to implement new technologies to facilitate migrants' experiences within the immigration system even as those technologies create safety risks

280. Lauren Irwin, *Court Rules Texas Can Keep Floating Barrier on Rio Grande Amid Legal Battle*, THE HILL (July 31, 2024, at 11:07 ET), <https://thehill.com/regulation/court-battles/4802973-texas-rio-grande-buoy-barrier-immigration-enforcement/> [https://perma.cc/DFW6-DYGY].

281. See, e.g., Paige Newman, *Arizona's Anti-Immigration Law and the Pervasiveness of Racial Profiling*, 31 GEO. IMMIGR. L.J. 611, 613 (2017).

282. Bijal Shah, *The President's Fourth Branch?*, 92 FORDHAM L. REV. 499, 499 (2023) ("[R]ather than constituting a fourth branch that is unaccountable to the President, the administrative state has been encouraged by the President and courts to become unaccountable to Congress."). See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (noting that "the rise of administrative bodies has been the most significant legal trend of the last century," becoming a "veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking"); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (arguing that "the governmental structure, the rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances"); Ilya Shapiro, *Time To Rein in the Unconstitutional Fourth Branch of Government*, ADMIN. & REG. L. NEWS, Winter 2020, at 8; Neil Modi, *The Fourth Branch, Separation of Powers, and Transformative Constitutionalism*, 25 OR. REV. INT'L L. 49 (2024).

283. See generally HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., IF12424, IMMIGRATION 101: EXECUTIVE BRANCH AGENCIES INVOLVED WITH IMMIGRATION (2023) (describing the various roles of executive branch immigration agencies), <https://crsreports.congress.gov/product/pdf/IF/IF12424> [https://perma.cc/3XGJ-2NXC].

284. Although the Supreme Court's decision in *Loper Bright* has diminished the power of administrative agencies regarding the interpretation of laws, immigration agencies will undoubtedly continue to have significant power in enforcing immigration law and policy. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2247 (2024).

and cause harm.²⁸⁵ Scholars and advocates have critiqued how this increased use of technology has diminished privacy rights for those very migrants.²⁸⁶

In March 2024, DHS unveiled an unprecedented technological plan it refers to as its “Artificial Intelligence Roadmap.”²⁸⁷ The portions of the plan relevant to its immigration initiatives include using the tool to train USCIS officers and to enhance Homeland Security Investigations’ initiatives.²⁸⁸ Launched in 2020, CBP One was an application that “serve[d] as a single portal to a variety of CBP services,” including presenting oneself to a port of entry as the first step to seeking asylum.²⁸⁹ ICE also launched the Cash Electronic Bonds Online initiative (“CeBONDS”) meant to facilitate determination of bond eligibility and payment of cash immigration bonds.²⁹⁰ In addition, the agency has increased its use of electronic surveillance and facial recognition as well as its reliance on data brokers to provide information related to identifying details, court data, information about relatives, and social media usage.²⁹¹

Surveillance measures have reached unprecedented levels under the Trump and Biden administrations, stoking fear among noncitizens and stifling dissent by organizers and advocates.²⁹² ICE accomplishes this work through contracts with companies such as Amazon and Thomson Reuters, which provide cloud hosting and data sets of personally identifiable information.²⁹³ Contracts with LexisNexis in Colorado, for instance, have

285. Of course, the increased use of technology in racialized policing and incarceration is not unique to the immigration context. *See, e.g.*, Kate Weisburd, *Punitive Surveillance*, 108 VA. L. Rev. 147, 185 (2022) (examining the use of invasive electronic surveillance among those on probation or parole in the criminal justice context).

286. Saba Mengesha, Korinne Dunn & Narinton Luangrath, *The Rise of AI and Technology in Immigration Enforcement*, REGUL. REV. (Mar. 23, 2024), <https://www.theregreview.org/2024/03/23/the-rise-of-ai-and-technology-in-immigration-enforcement/> [https://perma.cc/88TS-6FZ4]; Hannah Tyler, *The Increasing Use of Artificial Intelligence in Border Zones Prompts Privacy Questions*, MIGRATION POL’Y INST. (Feb. 2, 2022), <https://www.migrationpolicy.org/article/artificial-intelligence-border-zones-privacy> [https://perma.cc/9DXQ-D9PU]. *See generally* Inma Sumaita, *Losing Dignity: Eroding Privacy Rights of Immigrants in Technology-Based Immigration Enforcement*, U. CIN. INTELL. PROP. & COMPUT. L.J., Apr. 2022, at 1, <https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1045&context=ipclj> (on file with the Temple Law Review) (examining the tension between immigration enforcement and privacy law).

287. *Department of Homeland Security Unveils Artificial Intelligence Roadmap, Announces Pilot Projects To Maximize Benefits of Technology, Advance Homeland Security Mission*, U.S. DEP’T OF HOMELAND SEC. (Mar. 18, 2024), <https://www.dhs.gov/news/2024/03/18/department-homeland-security-unveils-artificial-intelligence-roadmap-announces> [https://perma.cc/C5WL-TJ6J].

288. *Id.*

289. *CBP One™ Mobile Application*, U.S. CUSTOMS & BORDER PROT. (Apr. 9, 2024), <https://www.cbp.gov/about/mobile-apps-directory/cbpone> [https://perma.cc/4UQN-873T].

290. *ICE Launches Online CeBONDS Capability To Automate Bond Payments*, U.S. IMMIGR. & CUSTOMS ENF’T (Apr. 20, 2023) [hereinafter *ICE Launches Online CeBONDS*], <https://www.ice.gov/news/releases/ice-launches-online-cebonds-capability-automate-bond-payments> [https://perma.cc/TQX7-WPVC].

291. Johana Bhuiyan, *US Immigration Agency Explores Data Loophole To Obtain Information on Deportation Targets*, THE GUARDIAN (Apr. 20, 2022, at 13:35 ET), <https://www.theguardian.com/us-news/2022/apr/19/us-immigration-agency-data-loophole-information-deportation-targets> [https://perma.cc/4SZK-UFT6].

292. Maurizio Guerrero, *Surveillance Capitalism Has Taken Over Immigration Enforcement—Stifling Dissent and Sowing Fear for Profit*, PRISM (Jan. 9, 2024), <https://prismreports.org/2024/01/09/surveillance-capitalism-taken-over-immigration-enforcement/> [https://perma.cc/P9LP-HMxD].

293. *Id.* Thomson Reuters, for instance, has large ICE contracts and interfaces with other companies to provide these data. Bill Budington, *Thomson Reuters To Review Human Rights Impact of Its Data Collection*

allowed ICE to circumvent sanctuary policies by accessing criminal court records as well as other information including booking and release times, phone records, and address information.²⁹⁴ Furthermore, ICE has gathered information by issuing hundreds of administrative subpoenas to Google, Meta, and Twitter for information about their users.²⁹⁵ Advocates have worked to resist this surveillance. Organizations like Mijente and the Surveillance Resistance Lab work to strengthen privacy rights for migrants and create digital sanctuaries.²⁹⁶

As part of its direct surveillance initiatives, ICE's Alternatives to Detention (ATD) program has become a widespread method for technologically monitoring migrants, including through electronic surveillance.²⁹⁷ Building on the work of their predecessors, the Biden and Trump administrations have expanded electronic monitoring significantly. By December 2022, ICE was monitoring nearly three hundred seventy-six thousand people.²⁹⁸ While the number subsequently decreased, presumably as a result of limits on asylum, ICE continued to monitor more than one hundred sixty thousand noncitizens through the program.²⁹⁹ For many migrants, the surveillance hardware inflicts various physical harms, such as electric shocks, cuts and bleeding, numbness, and excessive heat.³⁰⁰ It also imposes other harms, including social isolation, financial hardship, familial instability, and psychological harms in the form of anxiety, depression, and

for ICE, ELEC. FRONTIER FOUND. (May 9, 2022), <https://www.eff.org/deeplinks/2022/05/thomson-reuters-review-human-rights-impact-its-data-collection-ice> [<https://perma.cc/QL9Z-PYTE>]. Amazon provides cloud hosting for various state and federal data systems integral to immigration enforcement. *See, e.g.*, *Vigilant Learn CJIS Security Compliance Guide*, MOTOROLA SOLS. 2, https://www.motorolasolutions.com/content/dam/msi/docs/products/license-plate-recognition-systems/reaperhd-mobile-lpr-system/vigilant_learn_cjis_security_compliance_guide.pdf [<https://perma.cc/26PS-LG6X>] (last visited Nov. 26, 2025) ("Motorola Solutions offers to its law enforcement . . . [p]late images [that] are stored separately at Amazon Web Services."). Partnerships with other companies, such as Forensic Logic and IDEMIA France, provide biometric technology and systems for information sharing between law enforcement and DHS. *See* JACINTA GONZALEZ, PAROMITA SHAH & MIZUE AIZEKI, WHO'S BEHIND ICE: THE TECH AND DATA COMPANIES FUELING DEPORTATIONS 10–11 (2023), https://mijente.net/wp-content/uploads/2023/02/Who-is-Behind-ICE-The-Tech-and-Data-Companies-Fueling-Deportations_v4.pdf [<https://perma.cc/YM3G-X9F9>].

294. *See* MIJENTE ET AL., SABOTAGING SANCTUARY: HOW DATA BROKERS GIVE ICE BACKDOOR ACCESS TO COLORADO'S DATA AND JAILS 10–11 (2022), https://notechforice.com/wp-content/uploads/2022/04/Sabotaging-Sanctuary_Final-Report_Design-4.pdf [<https://perma.cc/CNB9-9SLE>].

295. Johana Bhuiyan, *Revealed: The Contentious Tool US Immigration Uses To Get Your Data from Tech Firms*, THE GUARDIAN (May 25, 2023, at 06:00 ET), <https://www.theguardian.com/us-news/2023/may/25/us-immigration-surveillance-google-twitter-meta-personal-data> [<https://perma.cc/XWR5-GPX7>].

296. *See, e.g.*, IMMIGRANT DEF. PROJECT, PROTECT THE IDNYC: NO SMART CHIPS. NO PREPAID DEBIT CARDS. NO DIGITAL IDs. 1–2 (2023), <https://surveillanceresistancecelab.org/wp-content/uploads/2023/01/IDNYC-Factsheet.pdf> [<https://perma.cc/VN2W-LWZH>] (last visited Nov. 26, 2024).

297. Mary Holper, *Immigration E-Carceration: A Faustian Bargain*, 59 S.D. L. REV. 1, 9–18 (2022).

298. *Alternatives to Detention (ATD)*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR., https://tracreports.org/immigration/detentionstats/atd_pop_table.html [<https://perma.cc/4SR8-ZQL7>] (last visited Nov. 26, 2024).

299. *Id.* As of July 19, 2024, approximately 164,391 people are being monitored in the ATD program. *Id.*

300. In this study, 90% of individuals experienced physical harms while shackled. GIUSTINI ET AL., *supra* note 169, at 3. Of those surveyed, 74% of individuals reported aches, pains, and cramps; 57% reported excessive heat; 55% reported numbness; 27% reported cuts and bleeding; and 22% reported electric shocks. *Id.* at 13.

suicidality.³⁰¹ Scholars have called for decreased reliance on electronic monitoring³⁰² as well as its outright abolition.³⁰³ Digital cages in the form of ankle shackles, as Professor Sarah Sherman-Stokes has argued, constitute a form of invisible violence that harms migrants and should be abolished with the “brick-and-mortar carceral state.”³⁰⁴

Technology also informs enforcement decisions. ICE has used risk-assessment tools that employ algorithms to determine whether someone is a flight risk or a risk to public safety.³⁰⁵ The agency uses this information to recommend whether a noncitizen should be released or held in immigration detention.³⁰⁶ While acknowledging the potential of exacerbating racial disparities in enforcement, experts have argued this type of technology may also assist immigration courts by enhancing due process, reducing human bias, and potentially decreasing the number of people in immigration detention while preserving public safety.³⁰⁷ Others have examined the deficiencies in risk classification assessment, arguing DHS manipulated the algorithm, tailoring it to political preferences rather than its purported criteria, thus violating constitutional standards.³⁰⁸ Challenging the flaws in this automated system, the New York Civil Liberties Union and the Bronx Public Defenders have sued ICE, claiming the system has been used to detain migrants more systematically.³⁰⁹

Even technologies designed to streamline processes for migrants have caused significant harms. Bonds allow migrants not subject to mandatory detention to regain their freedom when detained by ICE.³¹⁰ In the instance of CeBONDS, the government has eliminated alternative methods of posting bonds, such as in-person payments.³¹¹ Meant to facilitate bond payments, the CeBONDS system has been riddled with glitches, design flaws, and additional onerous requirements that have prolonged the release of

301. Of those surveyed, 88% experienced negative effects to their mental health, many of whom experienced harms beyond removal of the shackle and believed their symptoms were permanent. *Id.* at 3. Among those impacted, 80% reported anxiety, 73% sleeplessness, 71% depression, and 12% suicidal thoughts. *Id.* at 15.

302. Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2143 (2017) (arguing for community-based observation in lieu of electronic monitoring).

303. Sarah Sherman-Stokes, *Immigration Detention Abolition and the Violence of Digital Cages*, 95 U. COLO. L. REV. 219, 231 (2024). This scholarship complements arguments to abolish immigration detention. See César García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 246 (2017); Yuri Han & Katrina Landeta, *How States Can Play a Role in Abolishing Immigration Prisons*, 38 CHICANX-LATINX L. REV. 125, 132 (2022).

304. Sherman-Stokes, *supra* note 303, at 266.

305. Anu Chugh, Note, *Risk Assessment Tools: An Algorithmic Solution to the Due Process Problem in Immigration*, 6 COLUM. HUM. RTS. L. REV. ONLINE 272, 292 (2022).

306. *Id.*

307. *Id.* at 311–12; Richard Frankel, *Risk Assessment and Immigration Court*, 80 WASH. & LEE L. REV. 1, 54–70 (2023).

308. Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24 LEWIS & CLARK L. REV. 789, 794 (2020); Robert Koulish & Kate Evans, *Punishing with Impunity: The Legacy of Risk Classification Assessment in Immigration Detention*, 36 GEO. IMMIGR. L.J. 1, 7 (2021).

309. Hannah Bloch-Wehba, *A Lawsuit Against ICE Reveals the Danger of Government-by-Algorithm*, WASH. POST (Mar. 5, 2020), <https://www.washingtonpost.com/outlook/2020/03/05/lawsuit-against-ice-reveals-danger-government-by-algorithm/> (on file with the Temple Law Review).

310. See 8 U.S.C. § 1226(a), (c) (defining conditions for mandatory detention and release on bond).

311. See ICE Launches Online CeBONDS, *supra* note 290.

people in ICE custody.³¹² Advocates have also questioned its accessibility, particularly for people with visual impairments, limited English proficiency, and lack of access to technological devices such as laptops and scanners.³¹³ Similarly, the CBP One application's inaccessibility and malfunctions created barriers for immigrants, including asylum seekers with darker skin whose photos the system often does not recognize.³¹⁴ Given its myriad problems, Amnesty International declared the mandatory use of CBP One, which has subsequently been taken out of use, a violation of human rights law.³¹⁵

The instances of violence inflicted on migrants of color outlined throughout the preceding Parts provide salient examples of the inversion of U.S. democracy. Through immigration law and policy, the nation has embraced its desires to vilify migrants as undesirable and subject them to hostility while exploiting their labor and contributions to society. The four branches of governmental power work in virtual lockstep to violently exclude and remove migrants from the country. Enhancing immigration enforcement tactics, digital technologies increasingly ensure the systemic detention and deportation of noncitizens. In the framing of necropolitics, the prevalence of digital technologies tightly overlaps with capital and violence to produce “constellations of power” that directly threaten democratic principles.³¹⁶ The following Section explores the implications for democracy of this increased violence and the potential horizons for a democratic future.

IV. DEPARTING DEMOCRACY: REVERSAL AND REORIENTATION OF PRINCIPLES

As noted, death constitutes a cornerstone of migration control strategies. The immigration enforcement system's infliction of increased migrant mortality and pervasive slow violence reflects the nation's reversion to colonial practices and desires. This reversion signals and drives the nation's “exit from democracy.”³¹⁷ The global community is at an inflection point in which liberal democracies increasingly embrace their colonial instincts and desires, the dark side of democracy. As Mbembe explains:

The colonial world, as an offspring of democracy, was not the antithesis of the democratic order. It has always been its double or . . . its nocturnal face. No democracy exists without its double, without its colony—little matter the name and the structure. The colony is not external to democracy and is not necessarily located outside its walls. Democracy bears the colony within it, just as colonialism bears democracy, often in the guise of a mask.³¹⁸

312. Tina Vásquez, *Biden Is ‘Modernizing’ Immigration with New Tech. None of It Works*, PRISM (May 10, 2023), <https://prismreports.org/2023/05/10/immigration-tech-cbp-one-cebonds-none-works/> [https://perma.cc/NXC3-752K].

313. *Id.*

314. Bernd Debusmann Jr., *At US Border, Tech Issues Plague New Migrant Applications*, BBC (Mar. 8, 2023), <https://www.bbc.com/news/world-us-canada-64814095> [https://perma.cc/V38A-TBUF].

315. *USA: Mandatory Use of CBP One Mobile Application Violates Right To Seek Asylum*, AMNESTY INT'L (May 8, 2023), <https://www.amnesty.org/en/latest/news/2023/05/usa-mandatory-cbp-one-violates-right-asylum/> [https://perma.cc/RQB7-CXYA].

316. MBEMBE, *supra* note 16, at 15.

317. *Id.* at 9.

318. *Id.* at 26–27.

Democracy, the plantation, and colonialism constitute parts of the same historical matrix, which remains central to pervasive violence in the current global order.³¹⁹ As nations revert to their colonial instincts, their hostility toward “undesirables” accelerates and expands, creating societies of enmity.³²⁰ As a liberal democracy, the United States is no exception. Its democracy is increasingly in peril under both Democratic and Republican administrations, but certainly culminating in a second Trump term as evidenced in large part by its increased violence toward migrants.³²¹ In this era of democratic departure, it is critical to build democratic power to ensure self-determination for Global South nations and migrants, as well as the citizens of liberal democracies.

A. *Migration Control and the Dark Side of Democracy*

While arguably never a true democracy, the nation’s departure from purported democracy is, in part, due to the evolution of institutional deficiencies in political and judicial processes. For example, legal scholars have pointed to life tenure of Supreme Court Justices, a Congress beholden to corporate power and gerrymandered districts, and presidential elections predicated on Electoral College victories rather than the popular vote.³²² Political scientists have expressed concern that U.S. democracy is declining at a faster rate than anticipated, noting the authoritarian backlash to demographic change and minority rule facilitated by the political structures just mentioned.³²³ Moreover, U.S. imperialism undermines democratic will in subjugated nations and degrades claims to democratic integrity within this country. Security state enforcement tactics, including those used to control migration, further diminish democratic principles while migrants are largely subjected to laws and policies they have limited power to shape or transform.

Claims to democracy are rooted in attempts to control and regulate individual violence through moral condemnation or legal sanctions.³²⁴ From the outset, however, democracies have tolerated certain forms of violence, having integrated it into their culture.³²⁵ Neither violence nor the devaluing of life are new phenomena. Nonetheless, anti-immigrant sentiment and xenophobia have experienced a significant resurgence, arguably rooted in white nationalism. Embracing this escalating violence and hostility marks a reversion to colonial desires and strategies, which include the regulation of movement, racial animus toward people of color, and further entrenchment of inequality. As the nation embraces these core colonial desires, it diminishes its adherence to democratic principles. The collective hardening stance on migrants among liberals and conservatives³²⁶ is both a bellwether and an active step toward the nation’s departure from democracy.

319. *Id.* at 23.

320. *Id.* at 42.

321. See *supra* Section II and accompanying discussion of necropolitics in the United States.

322. Akbar, *Non-Reformist Reforms*, *supra* note 16, at 2500.

323. STEVEN LEVITSKY & DANIEL ZIBLATT, *TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT* 9–10 (2023).

324. MBEMBE, *supra* note 16, at 16–17.

325. *Id.*

326. See Jazmine Ulloa, *Trump’s Harder Line on Immigration Appears To Resonate, Polls Show*, N.Y. TIMES (July 3, 2024), <https://www.nytimes.com/2024/06/03/us/politics/trump-immigration-deportations.html> (on file with the Temple Law Review); Will Weissert & Jill Colvin, *Why Trump’s Alarmist Message on*

With the exit from democracy comes enclosure, including walls, barbed wire fences, and camps.³²⁷ This promise of enclosure has become the foundation of right-wing, autocratic campaigns in the West.³²⁸ That is, immigration and its concomitant changes in racial demographics have represented primary bases for increased nationalism and authoritarian power.³²⁹ In the United States, immigration has become the top problem voters identify for the country,³³⁰ effectively fueling conservative politicians' anti-immigrant rhetoric³³¹ and pushing liberals further to the right in embracing restrictionist policies.³³² Under the Biden administration, DHS continued construction of border walls³³³ and increasingly forced migrants to live in makeshift camps in Mexico,³³⁴ policies often attributed to the first Trump administration. As the nation has consistently experienced in the past, a second Trump term has built on the restrictionist policies of its predecessors. However, immigration enforcement has now become central to the

Immigration May Be Resonating Beyond His Base, AP NEWS (Apr. 1, 2024, at 16:54 ET), <https://apnews.com/article/border-immigration-trump-biden-rhetoric-2024-election-327c08045edcc200f850d893de6a79d6> [https://perma.cc/328Z-GPG9].

327. MBEMBE, *supra* note 16, at 40.

328. See generally Leila Hadj-Abdou, *Illiberal Democracy and the Politicization of Immigration*, in RUTLEDGE HANDBOOK OF ILLIBERALISM 299 (András Sajó, Renáta Uitz & Stephen Holmes eds., 2021) (examining the role of immigration in the crisis of liberal democracy).

329. See JUSTIN GEST, MAJORITY MINORITY 18 (2022).

330. Megan Brenan, *Immigration Named Top U.S. Problem for Third Straight Month*, GALLUP (Apr. 30, 2024), <https://news.gallup.com/poll/644570/immigration-named-top-problem-third-straight-month.aspx> [https://perma.cc/5AQ9-HZ3G].

331. For examples of escalating rhetoric against migrants, see Nikki McCann Ramirez, *Greg Abbott Laments that Texas Can't Shoot Migrants Because Murder Is Illegal*, ROLLING STONE (Jan. 11, 2024), <https://www.rollingstone.com/politics/politics-news/greg-abbott-murder-charges-shooting-migrants-1234945121/> (on file with the Temple Law Review); Chris Kahn & David Morgan, *Republicans' Hostility Grows Toward Illegal Immigrants as Party Attacks Biden on Border*, REUTERS (Mar. 17, 2021, at 13:58 ET), <https://www.reuters.com/article/world/republicans-hostility-grows-toward-illegal-immigrants-as-party-attacks-biden-on-idUSKBN2B919I> [https://perma.cc/YP2T-2FW6]; Alexander Burns & Astead W. Herndon, *Trump and G.O.P Candidates Escalate Race and Fear as Election Ploys*, N.Y. TIMES (Oct. 22, 2018), <https://www.nytimes.com/2018/10/22/us/politics/republicans-race-divisions-elections-caravan.html> (on file with the Temple Law Review).

332. Ari Paul, *The Media Is Cheering Dems' Rightward Turn on Immigration*, JACOBIN (Feb. 16, 2024), <https://jacobin.com/2024/02/tom-suozzi-election-democratic-party-immigration-right-wing> [https://perma.cc/YJN8-ZW6G]. The New York Times, for instance, has provided extensive coverage on the growing divisions among Democrats on immigration, including among Latinx voters. See, e.g., Lisa Lerer & Trip Gabriel, *Influx of Migrants Exposes Democrats' Division on Immigration*, N.Y. TIMES (Sep. 22, 2023), <https://www.nytimes.com/2023/09/22/us/politics/migrant-crisis-democrats-cities.html> (on file with the Temple Law Review); Edgar Sandoval, *Latinos on the Border, Once Reliable Democrats, Waver Over Migrant Surges*, N.Y. TIMES (June 7, 2024), <https://www.nytimes.com/2024/06/07/us/immigration-border-latinos-biden.html> (on file with the Temple Law Review); Michael D. Shear & Miriam Jordan, *Biden Faces Pressure on Immigration, and Not Just from Republicans*, N.Y. TIMES (Jan. 4, 2024), <https://www.nytimes.com/2024/01/04/us/politics/biden-immigration-republicans-democrats.html> (on file with the Temple Law Review).

333. Valerie Gonzalez, *The Biden Administration Says It Is Using Executive Power To Allow Border Wall Construction in Texas*, AP NEWS (Oct. 5, 2023, at 13:36 ET), <https://apnews.com/article/border-wall-biden-immigration-texas-rio-grande-147d7ab497e6991e9ea929242f21ceb2> [https://perma.cc/YQK6-DZA9].

334. See generally AL JAZEERA ENGLISH, *US-Mexico Border: Number of Makeshift Camps Growing* (YouTube, Mar. 14, 2024), <https://www.youtube.com/watch?v=VtGEQV1lmfU> [https://perma.cc/HR37-AGWF] (revealing that migrants increasingly must live in makeshift camps because border patrol does not provide shelter).

nation's accelerating departure from democracy as the executive branch consolidates power and circumvents the legislative and judicial branches. Notably, in the first year of its second term, the Trump administration has already disregarded a court order to return a wrongly deported noncitizen to the United States,³³⁵ denied due process rights to noncitizens,³³⁶ and attempted to reinterpret the Fourteenth Amendment through executive order.³³⁷

It is also critical to note that imposing restrictionist laws and violent immigration enforcement policies on migrants while suppressing their political will is itself a form of slow violence. A conspicuous example of this political suppression is an essential yet prosaic form of democratic agency: voting rights. While migration control strategies inflict widespread harms on migrants, imposing slow death as described above, the government impedes those migrants from changing pernicious policies by excluding them from the democratic process of voting. More than 80% of undocumented migrants have been in the country in excess of ten years.³³⁸ Nonetheless, they are unable to express their political will by choosing elected officials in federal or state elections, notwithstanding their active membership in society for significant portions of their lives.³³⁹ Some have argued for voting rights more broadly for migrants,³⁴⁰ but noncitizens largely remain ineligible to vote. While many migrants can and do advocate for reform and abolition in various and vigorous ways, noncitizens are effectively subjected to the nation's will without a formal political voice at the polls.

Even among naturalized citizens, voter identification laws suppress voter turnout among migrants. Despite recent claims to the contrary, migrant voter fraud is exceedingly rare.³⁴¹ Not only is attempting to register to vote as a noncitizen criminalized

335. Kyle Cheney & Josh Gerstein, *Judge Scolds Trump Officials for Continued Recalcitrance in Abrego Garcia Case*, POLITICO (May 16, 2025, at 18:42 ET), <https://www.politico.com/news/2025/05/16/judge-scolds-trump-officials-abrego-garcia-00355259> [https://perma.cc/WB4S-D395].

336. See, e.g., *Make the Rd. N.Y. v. Noem*, No. 25-cv-190, 2025 WL 2576701, at *2 (D.D.C. Sep. 5, 2025) (enjoining the Trump administration's expanded expedited removal policy).

337. Exec. Order No. 14160, 90 Fed. Reg. 8449, 8449–50 (Jan. 20, 2025) (seeking to restrict birthright citizenship to preclude children born in the United States to certain noncitizens).

338. *Why Don't Immigrants Apply for Citizenship?*, AM. IMMIGR. COUNCIL (Oct. 6, 2021), <https://www.americanimmigrationcouncil.org/research/why-don%28%29t-they-just-get-line> [https://perma.cc/PW67-QTFR].

339. 18 U.S.C. § 611 (prohibiting noncitizens from voting in federal elections and delegating the power of enfranchisement to states and local authorities). Only a handful of municipalities around the country have enfranchised noncitizens to vote. See Mikaela Lefrak, *Some Cities Allow Noncitizens To Vote in Local Elections, Their Turnout Is Quite Low*, NPR (May 4, 2024, at 08:21 ET), <https://www.npr.org/2024/05/04/1248787453/noncitizen-voting-local-elections-vermont> [https://perma.cc/8WVZ-VHQG]; Jeffery C. Mays & Annie Correal, *New York Moves To Allow 800,000 Noncitizens To Vote in Local Elections*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/11/23/nyregion/noncitizen-voting-rights-nyc.html> (on file with the Temple Law Review).

340. Monet Gonneman & Ryan Willett, *Noncitizen Voting: A Case Study of Oregon*, 25 LEWIS & CLARK L. REV. 361, 363 (2021) (arguing for an amendment to the Oregon state constitution that would repeal citizenship as a requirement for voting).

341. Ali Swenson, *Noncitizen Voting, Already Illegal in Federal Elections, Becomes a Centerpiece of 2024 GOP Messaging*, AP NEWS (May 18, 2024, at 12:13 ET), <https://apnews.com/article/voting-immigrants-noncitizen-trump-republicans-2024-1c65429c152c2a10514b5156eacf9ca7> [https://perma.cc/T5VG-2GEB]; Sean Morales-Doyle, *Noncitizens Voting Isn't Affecting Federal or State Elections – Here's Why*, BRENNAN

at the federal level and punishable by up to five years in prison, but claiming U.S. citizenship is an immigration violation triggering the inadmissibility and deportability grounds in the INA.³⁴² Nonetheless, Republicans have recently proposed redundant legislation requiring proof of citizenship to vote,³⁴³ possibly stoking anti-immigrant sentiment and eroding confidence in election results. For naturalized citizens, voter challenger and identification laws create barriers that disenfranchise immigrants, resulting in decreased voting among racially minoritized citizens.³⁴⁴ In states with strict voter identification laws, for instance, the turnout rate is 7.1% lower for Latine voters and 5.4% lower for Asian Americans.³⁴⁵ By contrast, white voter turnout increased by 0.2%, pointing to significant racial disparities caused by these obstacles to voter participation.³⁴⁶

In addition to barriers created by voter identification and challenger laws, lack of access to election materials in migrants' native languages and backlogs related to naturalization compound challenges for noncitizens.³⁴⁷ When addressing voting rights in the United States, migrants "face barriers to political participation that can prevent them from achieving full political membership and belonging," even after completing the naturalization process.³⁴⁸ This disenfranchisement continues to exclude particular groups from the polity, deeming them "outside" the community and creating a legacy of political inequality.³⁴⁹ Thus, migrants' inability to directly exercise political power through voting requires some reliance on courts for political change through litigation, which is hindered by courts' inability to write or rewrite legislation.³⁵⁰ This constellation of obstacles and consequent enervation of migrant political power throughout the nation's history has hampered political action among immigrant communities to combat punitive immigration measures.³⁵¹

Immigration policy and the public's concerns about migrants of color are mutually constitutive. The restrictionist dynamics between lawmakers and their constituents have largely led to pernicious policies causing death to migrants in many forms. Much of the

CTR. (Apr. 12, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/noncitizens-are-not-voting-federal-or-state-elections-heres-why> [https://perma.cc/LDP8-BBQR].

342. 8 U.S.C. §§ 1182(a)(6)(C)(ii)(I), 1227(a)(3)(B).

343. Ali Swenson & Farnoush Amiri, *House Passes GOP Bill Requiring Proof of Citizenship To Vote, Boosting Election-Year Talking Point*, AP News (July 10, 2024, at 19:34 ET), <https://apnews.com/article/congress-voting-migrants-citizenship-elections-republicans-8056bde9ea64b13fd20985d56a6a0fde> [https://perma.cc/KQM9-JFHA].

344. See Ming H. Chen & Hunter Knapp, *The Political (Mis)representation of Immigrants in Voting*, 92 U. COLO. L. REV. 715, 726–34 (2021).

345. Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 368 (2017).

346. *Id.*

347. Chen & Knapp, *supra* note 344, at 740.

348. *Id.* at 724–25.

349. *Id.*

350. Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 NW. U. L. REV. ONLINE 1, 12 (2021).

351. See *id.* (citing a U.S. history of excluding Chinese immigrants, repatriation of persons of Mexican ancestry during the Great Depression, the internment of persons of Japanese ancestry during World War II, and mass removals of Mexican immigrants in 1954).

nation supports migrants, and yet elected officials have ignored the will of a majority of voters by failing to pass immigration reform and by continuing to espouse less punitive policies for asylum seekers. While support for a path to legalization for undocumented migrants has eroded over the past decade, a majority (59%) of voters continue to support a path to legalization, provided migrants meet certain requirements.³⁵² In addition, a Data for Progress poll found that a majority of likely voters (also 59%) prefer that lawmakers take a humane approach to asylum seekers, maintaining civil rights and providing basic needs, until adjudicators render decisions on their cases.³⁵³ Far fewer (34%) support taking a punitive approach to asylum seekers, such as using force or placing people in detention.³⁵⁴ Yet Congress has failed to enact meaningful immigration reform since the 1980s, and paths to asylum have been narrowed by the administrations of both parties.³⁵⁵

The violence inflicted on migrants, including their exclusion from the polis, erodes the legitimacy of the nation's claims to democracy. Immigration law lacks authority because it concretely governs those unable to shape its formation and evolution, violating a core tenet of democratic rule.³⁵⁶ A reality often overlooked, citizens are poorly positioned to shape laws governing those whose experience they do not share, namely noncitizens.³⁵⁷ Furthermore, while political membership is morally significant, and states may abide by inclinations to their own members, democratic nation-states also have duties to those beyond their borders.³⁵⁸ In addition to the need to incorporate noncitizens as members of society, it is imperative to adhere to moral duties due to nonmembers. While these remain critical questions for the vitality of U.S. democracy, it is also critical to examine the immigration system's implications for democracy beyond electoral agency.

In the United States and other Western nations, rising resistance to increased migration has caused conundrums for liberal democracies. Journalist Charles Dunst argues that immigrants are critical to combatting authoritarianism.³⁵⁹ He contends that

352. *Immigration Attitudes and the 2024 Election*, PEW RSCH. CTR. (June 6, 2024), <https://www.pewresearch.org/politics/2024/06/06/immigration-attitudes-and-the-2024-election/> [https://perma.cc/XN42-LDKX].

353. Voter Survey April 5 to 6, 2024, DATA FOR PROGRESS 1, https://www.filesforprogress.org/datasets/2024/4/dfp_asylum_approach_tabs.pdf [https://perma.cc/W74F-44E6] (last visited Nov. 26, 2025).

354. *Id.*

355. See AM. IMMIGR. COUNCIL, MASS DEPORTATION: ANALYZING THE TRUMP ADMINISTRATION'S ATTACKS ON IMMIGRANTS, DEMOCRACY, AND AMERICA 8 (2025), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/07/mass_deportation_trump_attacks_democracy.pdf [https://perma.cc/WC9J-6ABK].

356. See Daniel I. Morales, *An Immigration Law for Abolitionists (And Reactionaries)*, 13 U.C. IRVINE L. REV. 1291, 1301 (2023) (“Noncitizens, who are most affected by immigration law, are denied electoral power and adequate standing in the immigration law debate, and the quality of immigration law is worse for that exclusion.”).

357. *Id.* at 1300–01 (arguing that immigration law is deficient because “citizens are legislating blind when it comes to immigration”).

358. See generally SARAH SONG, IMMIGRATION AND DEMOCRACY (2018) (arguing for a qualified right to control borders while affirming duties to outsiders and recognizing that democratic states owe moral consideration to nonmembers).

359. See CHARLES DUNST, DEFEATING THE DICTATORS: HOW DEMOCRACY CAN PREVAIL IN THE AGE OF THE STRONGMAN 288–96 (2023) (arguing that immigrants, by embracing democratic values and contributing to open societies, play a vital role in resisting authoritarianism and revitalizing democracy).

migrants bolster democracy since their economic contributions undermine illiberal populists' ability to exploit economic insecurities.³⁶⁰ Lamentably, the inverse of this reality means authoritarian leaders may exploit immigration to stoke fear of the racialized Other while taking advantage of the economic insecurity stemming from their restrictionist policies, making anti-migrant approaches a powerful tool for antidemocratic leaders. Philosopher Zsolt Kapelner has argued this reality has led to the "democratic dilemma"—the predicament of democracies either to take more restrictive approaches to migration to appease restrictionists or to espouse liberal approaches that may drive the public's support to autocratic leaders who promise closed borders.³⁶¹ These dynamics have resulted in more restrictionist and less democratic approaches to migration in the United States and beyond. As liberal democracies resist demographic change and embrace restrictionist leaders, they embrace their violent proclivities, revert to their colonial cores, and stray further from their purported democratic ideals.

B. Non-reformist Reforms and Reimagining Migrant Justice

The previous Sections examine the significant role of violent migration control in the nation's reversion to colonial desires and its attendant departure from democratic ideals. A massive mechanism of social control, the immigration enforcement system serves as the primary method by which the state regulates who may enter the polis, a racialized process employing force to regulate the nation-state's racial composition. By analyzing the various forms of death inflicted on migrants, the hostility that undergirds migration, and the enforcement mechanisms in place to exclude migrants, a clearer picture emerges of the motivations and implications of restrictionist immigration strategies. This clearer understanding of state violence provides a foundation from which to envision abolition, migrant-centered self-determination, and a democratic path forward for migrant justice.

Like much of the West, the United States finds itself at an inflection point. It must decide whether to embrace an identity as a true multiracial democracy or continue down the path of authoritarian rule.³⁶² While the thrust of the theory of necropolitics insightfully provides a genealogy of our era, it points only broadly to a possible path forward, allowing others to envision the practical means toward a more just world. Necropolitics centers the importance of reimagining humanity to eschew exclusion and embrace the "Other" in working toward transformation.³⁶³ This approach and the above analysis rooted in necropolitics provides potential paths forward to reimagine democracy and self-determination in the context of migrant rights. This reimagining draws from recent formulations of non-reformist reforms and abolition democracy, seeking to propose a horizon that envisions the end of enmity and state-imposed death for migrants. At least in the U.S. context, the path to embracing the Other, as Mbembe envisions, will

360. *Id.*

361. See Zsolt Kapelner, *Anti-Immigrant Backlash: The Democratic Dilemma for Immigration Policy*, COMPAR. MIGRATION STUD., Dec. 2024, at 1, 3.

362. See generally LEVITSKY & ZIBLATT, *supra* note 323 (arguing that fears of an increasingly multiracial society have led to the erosion of democratic norms among conservatives seeking to maintain political power).

363. See MBEMBE, *supra* note 16, at 157–66. Mbembe uses the term "Other" to refer to marginalized people. *See id.* at 162.

necessitate abolition of the pervasive and deeply ingrained systems perpetuating the Other's violent exclusion, including inherently violent immigration enforcement.

Necropolitics deconstructs democracy as it has emerged and evolved, in the same historical matrix as colonialism and slavery, pernicious forces to which democracy reverts in our era. As such, its objective, naturally, is not to evaluate the merits of particular democracies in specific contexts. Abolitionists, on the other hand, have examined particular claims to democratic ideals. Building on the work of philosopher and activist Angela Davis, abolitionist legal scholar Allegra McLeod notes that contemporary abolitionists recognize democracies as a farce, particularly that of the United States.³⁶⁴ McLeod adeptly critiques U.S. democracy as "characterized by hollow pretensions of inclusion in the face of a collective failure to reckon honestly with histories of slavery, genocide of indigenous peoples, lynching, segregation, exploitation of the working poor, gendered violence, and the persistent inequalities those practices have wrought."³⁶⁵ While necropolitics dissects democracies as they have emerged and evolved, abolitionists interrogate the legitimacy of these very democracies.

Rooted in the intellectual foundations of W.E.B. Du Bois,³⁶⁶ Davis has considered the continued need for "abolition democracy."³⁶⁷ In describing this need, Davis considers the example of slavery, in which its abolition should have been accompanied by a constellation of democratic institutions to incorporate Black people into society.³⁶⁸ In that vein, she argues that prison abolition must be accompanied by "the creation of an array of social institutions that would begin to solve the social problems that set people on the track to prison, thereby helping to render the prison obsolete."³⁶⁹ McLeod further expands on these notions to envision abolition democracy, using examples from the work of interracial coalitions in Chicago working for immigrant justice, racial inclusion, reparations, and participatory budgeting.³⁷⁰ These coalitions illustrate the efforts of abolitionists throughout the country to transform the social and political dynamics currently perpetuating inequality and violence, including border policies and immigration enforcement.

Abolitionists bridge the past and the future. As Professor Dorothy Roberts and other scholars have noted about abolitionists, "[a]t the very same time they are deconstructing structures inherited from the past, they are constructing new ones to support the future society they envision."³⁷¹ In the immigration context, the path to deconstruction lies in non-reformist reforms, and the construction of new social, political, and economic structures must be based, in part, in migrant self-determination. The deconstruction

364. Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1618 (2019).

365. *Id.*

366. See generally W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (Routledge 2017) (1935) (reframing the Reconstruction era as an effort led in part by Black workers to build a multiracial democracy that was systematically undermined by white supremacy and capitalist interests).

367. See ANGELA Y. DAVIS, *ABOLITION DEMOCRACY* 9 (Greg Ruggiero ed., 2005) (ebook) (arguing that for authentic democracy to emerge, abolition democracy must be enacted, which involves abolishing institutions that advance the dominance of any one group over another).

368. *Id.* at 53.

369. *Id.* at 54.

370. See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019).

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

entails the end of violent detention, deportation, and racial borders. It will also require an end to imperialism and racial capitalism underlying forced migration. To be sure, this work is underway. Many immigrant advocacy organizations—including Detention Watch Network, Freedom for Immigrants, and Free Migration Project—are fighting for the abolition of migration control and prisons.³⁷² A growing body of legal scholarship explores paths to abolition of the immigration regime.³⁷³ Even some elected officials, as politicians generally espouse more restrictionist approaches to migration, now wish to abolish ICE.³⁷⁴

As legal theorist Amna Akbar argues, to achieve abolition activists must reconceive their frameworks to reconstitute the terms of life, death, and democracy.³⁷⁵ This work is accomplished through non-reformist reforms.³⁷⁶ Non-reformist reforms are a means to challenge racial capitalism, democratize relations of power, and build democratic capacity toward emancipatory horizons.³⁷⁷ In this way, they seek to disrupt the prevailing political, economic, and social order, constructing a different one that redistributes power.³⁷⁸ In the immigration context, Detention Watch Network has insightfully mapped a series of reformist reforms and non-reformist reforms related to detention to guide their abolitionist work.³⁷⁹ Consistent with the paradigm of non-reformist reforms, the actions described, such as reducing funding to immigration enforcement agencies and curtailing ICE collaboration with local police, work toward abolition of the enforcement system rather than simply decreasing harms for migrants within the extant system or producing new potential for further harms. To achieve liberation for migrants and all people of color, as advocates and scholars have acknowledged, these radical immigration reforms must be paired with other movements, such as defunding the police and ending mass incarceration.³⁸⁰

For non-reformist reforms to achieve abolition democracy, a new theory of self-determination is needed in the immigration context. As necropolitics instructs,

372. See *About Detention Watch Network*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/about> [https://perma.cc/BD5J-GRYX] (last visited Nov. 26, 2025); *About Us*, FREEDOM FOR IMMIGR., <https://www.freedomforimmigrants.org/about-us> [https://perma.cc/G873-KGYH] (last visited Nov. 26, 2025); *Mission & Vision*, FREE MIGRATION PROJECT, <https://freemigrationproject.org/mission/> [https://perma.cc/LD7E-RC34] (last visited Nov. 26, 2025).

373. See, e.g., Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CALIF. L. REV. 1597, 1602 (2022); Cházaro, *supra* note 99, at 1045; Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1787 (2020); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 246 (2017).

374. Daniella Diaz, *These Democrats Want To Abolish ICE*, CNN (July 3, 2018, at 10:57 ET), <https://www.cnn.com/2018/07/02/politics/abolish-ice-democrats-list/index.html> (on file with the Temple Law Review).

375. See Akbar, *Non-Reformist Reforms*, *supra* note 16, at 2507.

376. See *id.*

377. *Id.* at 2507, 2527–28.

378. *Id.* at 2531.

379. DET. WATCH NETWORK, ENDING IMMIGRATION DETENTION: ABOLITIONIST STEPS VS. REFORMIST REFORMS 2–4, https://www.detentionwatchnetwork.org/sites/default/files/Abolitionist%20Steps%20vs%20Reformist%20Reforms_DWN_2022.pdf [https://perma.cc/DK9Q-HWEA] (last visited Nov. 26, 2025).

380. See Shiu-Ming Cheer, *Moving Toward Transformation: Abolitionist Reforms and the Immigrants' Rights Movement*, 68 UCLA L. REV. DISCOURSE (L. MEETS WORLD) 68, 71 (2020).

colonialism is the flip side of the coin of democracy as currently understood³⁸¹—what abolitionists deem a farcical democracy. The other side of the coin of true democracy, however, is self-determination.³⁸² While scholars typically consider self-determination the right of nation-states to determine who may be excluded,³⁸³ a migrant-centered theory of self-determination is critical to realizing abolition democracy as well as fulfilling Mbembe's aspirations of inclusion of the Other.³⁸⁴ Transformation from self-determination in the immigration context centered on political membership to one focused on the needs of migrants of color will require paradigm shifts brought to fruition through non-reformist reforms leading to abolition of the immigration enforcement system.

Migrant self-determination will require a transformation from the abject subordination of migrants through various forms of violence and death to creating a society that fosters agency empowering migrants to determine their own futures and the communities they wish to join. In addition to dramatic changes in the narrative about noncitizens,³⁸⁵ this pursuit will require a holistic engagement with structures that cause migrant suffering and a thorough transformation of our political, social, and economic realities.³⁸⁶ While this vision would likely create a constellation of democratic institutions that integrate migrants into society, end imperialism causing migration, abolish systems that impede freedom of movement, and provide reparations to migrants and their home countries, the path forward must ultimately be decided by those directly impacted by violent migration control systems: migrant communities.

CONCLUSION

Increasingly, the U.S. immigration system subjects migrants of color to slow and spectacular death. Rooted in deterrence strategies, these harms target migrants largely fleeing the destabilizing effects of colonialism, neocolonialism, and racial capitalism. The current prevailing doctrine of migration control empowers the immigration enforcement regime to treat migrants as threats to national security and correspondingly to use force against them with diminishing limitations. Immigration law and policy empower state actors to respond to migration with such violence. As this hostility escalates, the nation further embraces the dark, violent side of democracy rooted in its (neo)colonial past, slipping further from its democratic ideals and eroding its standing in the international community. Given the urgency of increased migrant death and this democratic decline, showing no signs of abating, it is imperative to reorient to non-reformist reforms to abolish violent systems of migration control and construct democratic institutions that redistribute power and ensure migrant self-determination.

381. See MBEMBE, *supra* note 16, at 26–27.

382. See Baraka, *supra* note 155, at 550 (“Democracy is at root a struggle for self-determination, they are two sides of one coin.”).

383. See, e.g., Ilya Somin, *Migration and Self-Determination*, 18 GEO. J. L. & PUB. POL’Y 805, 807 (2020); LUARA FERRACIOLI, LIBERAL SELF-DETERMINATION IN A WORLD OF MIGRATION 49 (2021).

384. See *supra* Part IV.B.

385. See Jennifer M. Chacón, *Recounting: An Optimistic Account of Migration*, 110 CAL. L. REV. 1041, 1061 (2022) (arguing for ending exclusionary, racist tropes and “rethinking the knee-jerk assumption that welcoming refugees is costly”).

386. See McLeod, *supra* note 364, at 1616.