

A photograph of a wooden cross standing in a dry, wooded area. The trees are mostly bare, suggesting a winter or late autumn setting. The ground is covered in dry grass and twigs. The sky is a clear, bright blue. The cross is made of light-colored wood and is set on a small, rough stone base. The overall mood is somber and desolate.

NO RIGHT TO LIFE

**Lives Lost and the Legalized Violence
That Shaped a Humanitarian Crisis
in the Arizona Borderlands**

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Acknowledgments

This report was created as part of the **Loyola University Chicago School of Law Immigration Law Practicum**. In connection with the Immigration Law Practicum, Loyola Law students travel the U.S.-Mexico border through a service immersion program in which students partner with legal services providers working with detained migrants in need of protection. The service trip brings students in contact with non-profit organizations who provide holistic services to migrants at the U.S.-Mexico border. Those groups include the **Colibri Center for Human Rights, No Mas Muertes**, and the **Florence Immigration and Refugee Rights Project (FIRRP)**. The immigration service trip taken by Loyola students would not be possible without the generous support of **John & Kathy Schreiber**.

Through the work of organizations on the ground at the border, the denial of the right to life of migrants has been elevated. This report would not be possible without the ongoing effort of these amazing organizations, fighting for migrant rights along the border. This report was furthered by the generosity of many individuals and agencies who willingly shared their knowledge, experience, and data, especially the close working relationship with **Perla Torres and her colleagues at the Colibri Center for Human Rights**.

Loyola's immigration work is sustained by the committed faculty, staff, and students at the **Center for the Human Rights of Children (CHRC) at Loyola University Chicago School of Law**. The CHRC is an interdisciplinary center committed to protecting and advancing the human rights of children. The CHRC is engaged in research, scholarship, advocacy, and outreach programs to address critical issues affecting the lives of children. The Immigration Practicum is directed by **Sarah J. Diaz, JD LLM**, Associate Director of the Center for the Human Rights of Children and Lecturer at the School of Law. Continuous technical, legal, and operational support from the Center is generously offered to the Immigration Practicum by Center Director and LUC Clinical Professor of Law, **Katherine Kaufka Walts**.

This report is being published in connection with the Conference on **Race and the Borderlands: Human Rights, Human Triumphs, and Forging Peace on the U.S.-Mexico Border**, held on April 7-8, 2023 at San Diego State University. Special thanks to **Grace Cheng, Ph.D.**, Director of the **Center for Human Rights at San Diego State University** for the Center's operational support in the publication of this report.

Cover Image: Gravesite belonging to one of the over seven thousand migrants who have lost their lives crossing the southern border. Courtesy: Loyola University Chicago School of Law Immigration Law Practicum



TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	1
The Xenophobic Narrative Which Shaped American Border Policy	2
The Border Policy that Legitimized the Narrative of the Criminal or Illegal Migrant	3
Border Enforcement Plays Little Part in Discouraging People from Attempting to Cross	6
STATE VIOLENCE & VIOLENT STATE ACTORS: THE “PERVASIVE CULTURE OF CRUELTY” WITHIN BORDER PATROL	7
The Lethal Consequences of Prevention through Deterrence	7
The Intentional Monopolization of Care for (and Neglect of) Dying Migrants	8
The Unbridled Militarization of the Southern Border	8
Death is an Integral Part of the Border Enforcement Strategy	8
FAILURES OF A POLICY OF PREVENTION THROUGH DETERRENCE	11
“This is where the American Dream Ends”: Inadequate Recovery and Identification	11
Failure in Accountability: Passing the Human & Economic Cost to American Communities	12
Environmental, economic, and Community Consequences	13
STRUCTURAL, CULTURAL, AND LEGAL VIOLENCE AT THE U.S.-MEXICO BORDER	14
“Engineered to be Invisible”: Structural Violence at the U.S.-Mexico Border	14
NO RIGHT TO LIFE: THE U.S. IS IN VIOLATION OF INTERNATIONAL NORMS	16
International Human Rights Obligations: The Right to Life	16
The Right to Life of Migrants Around the World: A Comparative Perspective	17
Recategorizing Migrant Deaths as Forced Disappearance	17
The Right to Life of the Migrant Child	19
The United States has an Obligation to Protect Human Life in its Territory	20
RECOMMENDATIONS	22
CONCLUSION	24

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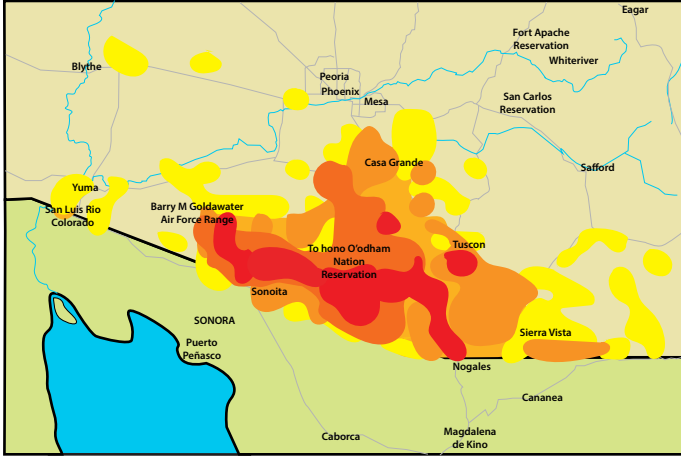
Entering the United States at the Nogales-Mariposa Port of Entry located in Nogales, Arizona. Courtesy: Loyola University Chicago School of Law Immigration Law Practicum

INTRODUCTION

Along the U.S.-Mexico border, particularly within California, Arizona, and Texas, exists one of the largest mass graves in the world, both perpetuated and ignored by the U.S. government. Since 1998, the remains of over 7,500 migrants¹ have been recovered around the U.S.-Mexico border and over 7,667 are still missing.² According to data compiled by the Missing Migrants Project, “more lives are known to be lost in the United States of America than in all other countries in the Americas combined.”³ The International Organization for Migration (IOM) has found that the Mexico-United States border is the zone of the most border deaths in the Americas, due in large part to the “harsh conditions of the arduous desert trek,” and is the third-highest zone of border deaths in the world.⁴ These numbers, while incredibly high, are a significant undervaluation, as thousands of migrants are reported missing each year, yet to be discovered.⁵ Many of these missing perished in the remote regions of the desert, their bodies will never be recovered, and their stories may never be told. An accurate calculation of the death toll will never be known.⁶ This brutal reality is the product of our nation’s immigration laws and policies:

Border Patrol disguises the impact of its current enforcement policy by mobilizing a combination of sterilized discourse, redirected blame, and “natural” environmental processes that erase evidence of what happens in the most remote parts of southern Arizona. The goal is to render invisible the innumerable consequences this sociopolitical phenomenon has for the lives and bodies of undocumented people.⁷

In Arizona alone, the remains of approximately 3,500 migrants have been recovered since 1990.⁸ Over one third of those recovered remain unidentified due to the state of decomposition in the harsh conditions of the Sonoran Desert.⁹ The Pima County Office of the Medical Examiner



Recovered UBC remains per 10 square miles

1-5	6-14	15-29	30-47	48-137
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Recovered Human Remains by the Pima County Office of the Medical Examiner (PCOME), 1990-2020. Source: Pima County Office of the Medical Examiner, Humane Borders, Migrant Death Mapping, available at: <https://humaneborders.org/migrant-death-mapping/>

(PCOME), located in southern Arizona along the Tucson sector of the border, continues to be the agency that investigates the highest number of migrant deaths in the United States.¹⁰ While the local medical examiners work diligently to recover and identify missing migrants, the federal government does nothing to ameliorate the problem they created. It leaves that task to the border communities affected by this silent violence.

For over twenty years, humanitarian organizations, NGOs, and scholars have sounded the alarm, expecting the United States government to take action to prevent the preventable.¹¹ Instead of enacting policies to stop the deadly policies, the Department of Homeland Security (DHS) and within it, Customs and Border Patrol (CBP) have consistently enacted policies that have only amplified the problem.¹²

BACKGROUND

This humanitarian crisis is the result of years of border policies implemented to address a xenophobic narrative around migration. The term “illegal immigrant” is so deeply rooted in American discourse that we have lost sight of its origins:

Migrants can only become 'illegal,' however, if there have been legislative or enforcement-based measures to render particular migrations or type of migration 'illegal'- to illegalize them. From this standpoint, there are not really 'illegal' migrants or migrations so much as they have been illegalized.¹³

The ubiquity of the term casts a nefarious shadow over anyone who comes into the United States without inspection or who overstays their permitted time after entry. But the term belies the reality of the immigration system: that our system is constantly evolving to maintain the racial status quo by casting a wider net over those we seek to exclude.¹⁴ The criminalization of migration is a relatively recent phenomenon, but it has been a forceful tool in the effort to maintain America's racial status quo and to normalize the violence experienced in our legal immigration system.

"The blunt truth is that some migrants must die- which is to say, some are killed and many more are made to die- yet most survive as illegalized migrants who may proceed from this deadly endurance test to commence their lifelong careers as precarious, ever-deportable workers."¹⁵

THE XENOPHOBIC NARRATIVE WHICH SHAPED AMERICAN BORDER POLICY

To bring contemporary migration flows into context, one must go back to the immigration reforms that converted traditional migration "into the picture of illegality."¹⁶ 1965 saw the passage of the Hart-Celler Act which brought quotas to Latin America that made traditional migration flows impossible to sustain:

[T]he Hart-Celler Act propagated a more subtle set of policies that converted immigration from particular countries with significant and long-standing ties to the United States, especially México, into the picture of illegality by inaugurating an era



Approximately thirty minutes outside of Nogales, Arizona, the border wall transforms into "Normandy" barricades for several miles. Courtesy: Loyola University Chicago School of Law Immigration Law Practicum

of immigration controls from Latin America unlike anything previously imposed. The hemisphere-wide cap and the country specific limit as applied to Mexican immigration proved woefully lower than demand.¹⁷

This came at a time when refugees and asylum-seekers were entering the United States in record-breaking numbers.¹⁸ The end of the war in Vietnam and civil unrest in the Americas saw the significant growth of asylum-seekers.¹⁹ The heightened number of migrants from the Global South became a source of concern for policymakers:

[n]ot only did the number of refugees grow dramatically, but the pool of applicants, which was originally almost entirely European, became largely Asian and Cuban. At the same time, initial waves of the educated and largely acculturated upper and middle-class applicants gave way to poorly educated and culturally dissimilar applicants. These shifts aroused considerable distress regarding a number of issues, some old and some new.



Routes taken through Mexico to the various ports of entry into the United States. Source: Dallas Morning News

High-level government officials were reporting that as many as 2 to 3 million undocumented [migrants] entered the United States each year and that perhaps as many as 8 million resided there. These estimates proved to be greatly exaggerated. Nonetheless, they both stimulated and reflected the domestic fear that traditional control strategies were no longer effective and that the nation was losing control of its borders.²⁰

Born from this xenophobia was the criminalization of the traditional flow of migration via aggressive migration control:

Net unauthorized migration— that is, the difference between the number of unauthorized individuals who entered the country and those who left— jumped from zero before the 1965 Act was enacted to approximately 300,000 per year by the close of the 1980s. The Border Patrol responded by “return[ing] to aggressive migration control tactics” targeting unauthorized Mexicans.²¹

The Hart-Celler Act effected racial diversity in the latter half of the twentieth century, but it “ignored [the] social and economic realities that drive migration.”²² This framework laid the groundwork for the criminal or illegal migrant narrative: “By framing its formal equality regarding the number of people from a given country who could lawfully immigrate each year as a gesture of fairness, immigration law pinned the onus of unauthorized

immigration on the migrants themselves.”²³ To legitimize the unlawfulness of migration, Congress pushed for sanctions for violating immigration law and policy.

THE BORDER POLICY THAT LEGITIMIZED THE NARRATIVE OF THE CRIMINAL OR ILLEGAL MIGRANT

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), with the mission to intensify inspection and enforcement to prevent unauthorized migration into the United States.²⁴ Border Patrol staffing was increased by 50% and the national fervor against preventing illegal entry commenced.²⁵ Widespread anxiety permeated the United States with the perception that the southern border was overrun by “illegal” immigrants and drug traffickers.²⁶ DHS fueled this perception of the southern border and enforced a rhetoric that the border was lawless and needed to be better directed.²⁷

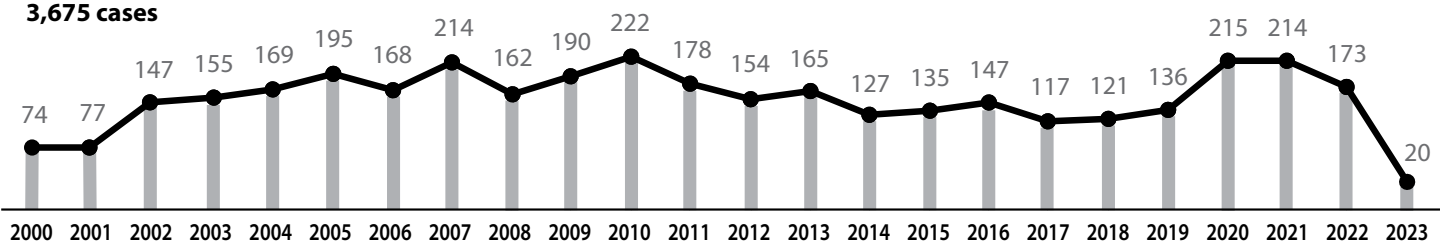
To quell the anxiety of millions of Americans, Border Patrol implemented a new strategy of border enforcement. That strategy was memorialized in Border Patrol’s 1994 Strategic Plan, which is understood as the tactic of



Looking across the border into Mexico, approximately thirty minutes outside of Nogales, Arizona. Courtesy: Loyola University Chicago School of Law Immigration Law Practicum

ANNUAL UBC RECOVERIES

3,675 cases



Recovery of Human Remains by the Pima County Office of the Medical Examiner, 1990-2020. Source: Humane Borders, Pima County Office of the Medical Examiner, Arizona Open GIS Initiative for Deceased Migrants, available at: <https://humaneborders.info>

“prevention through deterrence”.²⁸ This strategy sought to gain control of the borderlands by increasing the enforcement and surveillance in major entry corridors by predicting migrants would be deterred from using the traditional entry routes and consequently, “forced to more hostile terrain, less suited for crossing and more suited for enforcement.”²⁹ The strategy of prevention through deterrence flooded the heavily traveled regions of the border with personnel, technology, fencing, and other infrastructure.³⁰

Prevention through deterrence was a device which conscripted nature to do Border Patrol’s dirty work, while providing the agency with an alibi for the lives lost in the desert.³¹ Anthropologist Jason de León argues that the specific phrasing of “hostile terrain” within the plan indicated a more aggressive and violent form of border enforcement, one in which the desert would work as the enforcer of border policies and the rationalization for any death.³² The INS recognized this goal, Commissioner Doris Meisner stated, “we did believe that geography would be an ally for us. It was our sense that the number

of people crossing through the Arizona desert would go down to a trickle once people realized what [its] like.”³³ The Sonoran Desert is one of the most dangerous areas of the country, due to the extreme weather conditions, the dangerous terrain, and wildlife. While the physical border line is easily crossed, the most dangerous part of the journey is in Arizona as migrants are forced to remain in the desert for extended periods of time to avoid detection, even though already in the United States.³⁴

The immediate repercussion of prevention through deterrence was the “funneling” of migrants into desolate and harsher areas of the border, which did little to deter migration.³⁵ The “funnel effect” was a “redistribution of migratory flows away from traditional urban crossing points into remote and dangerous areas.”³⁶ In order to avoid detection at the heavily enforced sections of the border, migrants took to the less traversed and much more dangerous paths.³⁷ This further shifted migratory paths away from Texas and California into the vast and unforgiving expanse of the Sonoran Desert.³⁸ Within Arizona, migrants were now crossing the border and entering the desolate and dangerous Organ Pipe Cactus National Forest and the Tohono O’odham Indian Reservation.³⁹ This strategy did not decrease the number of those attempting to cross, apprehensions in Arizona increased by 351% in the six years after the 1994 Strategic Plan was implemented.⁴⁰ The link between United States border patrol policies and the increase in death of migrants attempting to cross the border was almost immediately recognized by the communities surrounding the border but was not addressed by the United States government.⁴¹



Plaque denoting the US-Mexico border in Nogales, Arizona. Courtesy: Loyola University Chicago School of Law Immigration Law Practicum



A look across the border wall in Nogales, Arizona. Courtesy: Loyola University Chicago School of Law Immigration Law Practicum

Prevention through deterrence was further reshaped after the terrorist attack on September 11, 2001, with the creation of the Department of Homeland Security (DHS). Customs and Border Patrol was restructured to a new strategy which utilized technology to better enforce remote areas along the southern border.⁴² The National Border Patrol Strategy of 2004 focused on the use of cameras, sensors, and other technology to assist Border Patrol agents in inspecting and apprehending migrants.⁴³ In 2005, DHS implemented the Secure Border Initiative, which focused on securing the border and reducing illegal immigration.⁴⁴ These policy shifts built upon the 1994 prevention through deterrence strategy not in spite of, but because of its deadly consequences.⁴⁵

The REAL ID Act established new proof requirement for asylum seekers and granted the Secretary of Homeland Security the authority to waive all laws, other than the U.S. Constitution, to expedite construction of the border wall.⁴⁶ The Secure Fence Act created the border wall, where all but 119 miles of the current border infrastructure was erected after its passage.⁴⁷ It was believed that fortifying the landscape around the invisible border line would halt the flow of undocumented migrants. Another strategy that came into play in the mid-2000s was the policy “enforcement with consequences.”⁴⁸ Included within this policy was weightier consequences for people caught attempting to cross the border, a shift away from voluntary return as the primary deportation method. Instead, formal removal,

criminal charges, and lateral repatriation were used to discourage future attempts to cross the border.⁴⁹ Lateral repatriation was implemented through the Alien Transfer and Exit Program (ATEP) where Border Patrol deported individuals to ports of entry distant from where they were apprehended in an attempt to make it more difficult to cross again.⁵⁰ This resulted in the separation of family members and deportation into unknown and dangerous areas, and it did little to prevent future crossings.⁵¹

One of the most consequential measures was Operation Streamline, which intended to expedite criminal justice processing and allow for quicker and massive deportations. Groups of up to forty undocumented migrants were presented before an immigration judge who ordered deportations *en masse*.⁵² As of December 2018, prosecutions for unlawful entry into the United States constituted 65% of all criminal prosecutions in federal court.⁵³ In other words, the criminalization of migration in the United States has resulted in 65% of all federal criminal prosecutions coming under the rubric of “immigration violations.”⁵⁴

Pandemic-era immigration policies created a crisis within a crisis. In March 2020, emergency restrictions on individuals allowed to enter the United States, referred to as “Title 42” officially closed the border to immigrants and asylum seekers.⁵⁵ This order allowed CBP to expel asylum seekers from the U.S. and return them to dangerous situations.⁵⁶ In the first five months, 105,000 individuals were removed to Mexico on



The rugged terrain encountered by migrants as they cross the US-Mexico border outside of Nogales, Arizona.. Courtesy: Loyola University Chicago School of Law Immigration Law Practicum

the basis of the public health order.⁵⁷ By October 2020, over 260,000 migrants and asylum seekers were expelled from the border and into Mexico.⁵⁸ Title 42 officially ended on May 11, 2023, but not without first expelling approximately 2.7 million migrants from the southern border.⁵⁹

BORDER ENFORCEMENT PLAYS LITTLE PART IN DISCOURAGING PEOPLE FROM ATTEMPTING TO CROSS

Border enforcement does little to deter migration, instead social and economic factors are greater determinants in predicting migration.⁶⁰ Economic reasons have largely been recognized as the main driver for migration at the southern border.⁶¹ Migrants are in search of work and opportunity for themselves and their loved ones.⁶² Economic opportunity has steadily transformed into economic necessity.⁶³

Economic and political instability for migrants, in particular Central American migrants, are the central drivers of migration from the region. These drivers are often inextricably tethered to U.S. foreign policy. Like the mass migration of Mexican farmers in the aftermath of NAFTA,⁶⁴ the “deluge of below-cost agricultural exports under CAFTA” has predictably displaced subsistence farmers and campesinos, further fueling the purported migration crisis.⁶⁵

Climate change in the region is also driving migration.⁶⁶ Climate impact in the region is also, predictably, tied to U.S. policy. Despite the *de minimus* contribution of Central America to the climate crisis, it is recognized as “one of the world’s most climate-vulnerable regions.”⁶⁷ The United States, is “deeply implicated in Central America’s climate injustice: “[t]he United States, the European Union, China, Russia, and Japan are responsible for seventy percent of global carbon dioxide emissions between 1751 and 2017.”⁶⁸

In the midst of economic precarity and employment scarcity, historic levels of violence plague a region with histories of “inequality and violence, in which the U.S. has long played a defining role.”⁶⁹ It bears noting that, “much of the violence that currently plagues El Salvador, Honduras, and Guatemala has its origins in U.S. mass incarceration, drug enforcement, and counterinsurgency policies.”⁷⁰

This violence has forced an ever-increasing number of unaccompanied children to flee the Northern Triangle region.⁷¹ These children reported that the primary reason they fled was to avoid forced recruitment into gangs



Along the border wall in Nogales. Courtesy: Loyola University Chicago School of Law Immigration Law Practicum

and other gang related violence.⁷² The trend in unaccompanied children began around 2008 and has grown exponentially each year.⁷³

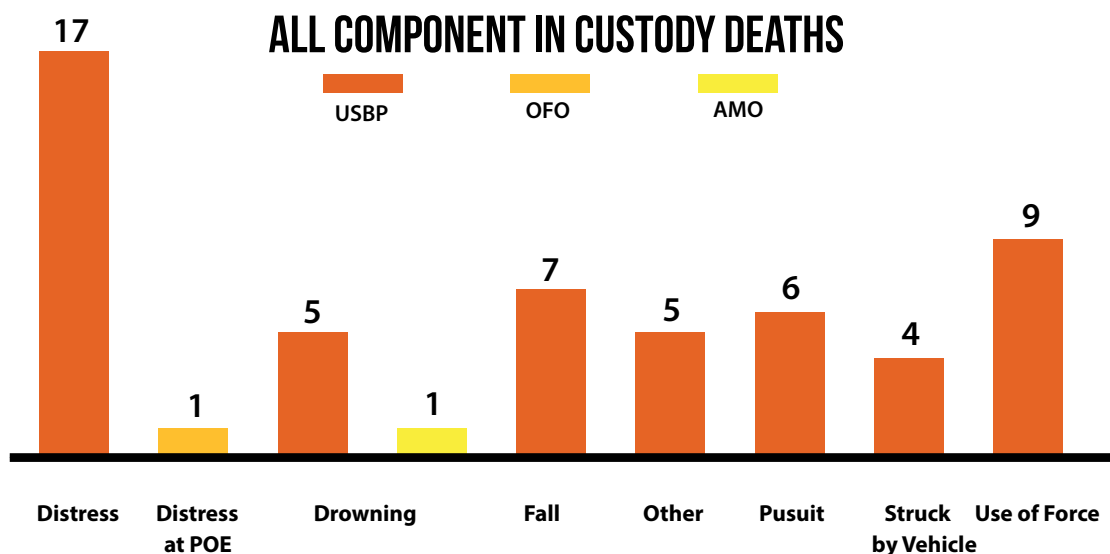
STATE VIOLENCE & VIOLENT STATE ACTORS: THE “PERVASIVE CULTURE OF CRUELTY”⁷⁴ WITHIN BORDER PATROL

THE LETHAL CONSEQUENCES OF PREVENTION THROUGH DETERRENCE

Prevention through deterrence has remained the main strategy for over twenty years, and government agencies have cited the massive increase in migrant deaths as an “unintended consequence” of the policy.⁷⁵ However, these “deaths are fruits of an innovation in murder technology” where border patrol has “outsourced mountains, extreme temperatures, and thousands of square miles of uninhabited terrain” to increase the separation between victim and perpetrator.⁷⁶ Notably, this strategy has done little to quell migration. Despite the advent of personnel, fencing, and surveillance, the likelihood of apprehension has only risen slightly.⁷⁷ The intended effects of the strategy are somewhat reflected in the steady decrease in apprehensions

after 2007, but the “unintended” consequences have ballooned this matter into a humanitarian crisis.

The lethal consequences of prevention through deterrence were immediate and largely felt in Arizona. From 1990-1999, the Pima County Office of the Medical Examiner (PCOME) reported 125 bodies recovered in the desert.⁷⁸ However once migration shifted into Arizona, this number increased from 2000-2005 to 802 recovered bodies.⁷⁹ Within years of its implementation, evidence of migrant mortality in the desert skyrocketed, largely caused by environmental exposures such as hyperthermia and dehydration.⁸⁰ The desert became the new “‘victimizer’ of border transgressors.”⁸¹ The average number of human remains of migrants discovered increased from twelve to two hundred and eighty five by 2005.⁸² In particular, the PCOME recorded a twenty-fold increase in migrant deaths due to the impact of the “funneling effect,” indicating that the increase in remains found coincided directly with the militarization of the southern border in Arizona.⁸³ These deaths were caused by the desert climate and dangerous terrain, as temperatures in the summer can reach as high as one hundred and twenty degrees Fahrenheit and can drop below freezing in the winter.⁸⁴ The number of migrant remains found is much lower than the actual number of deaths, as the desert elements sucked the migrants away like quicksand, never to be seen or heard from again.



Causes of migrant fatalities in CBP custody, 2010-2023. Source: ALCU of Texas CBP Fatal Encounter Tracker, available at: www.aclutx.org/en/cbp-fatal-encounters-tracker

THE INTENTIONAL MONOPOLIZATION OF CARE FOR (AND NEGLECT OF) DYING MIGRANTS

The need for emergency aid was immediately recognized, and in 1998 Border Patrol added rescue services to its repertoire.⁸⁵ Border Patrol, through its search-and-rescue unit, BORSTAR, has neglected migrants desperate for help.⁸⁶ In 2007, Arizona began transferring its 911 calls to BORSTAR, and consequently, “. . . Border Patrol has monopolized emergency services for undocumented people in the borderlands and become the de facto responder for thousands in need of life-saving search or rescue.”⁸⁷ Those calling are not aware that their call has been transferred to Border Patrol agents, and the agents do not inform the callers.⁸⁸ This is problematic, as Border Patrol’s priority of keeping weapons and terrorists out of the U.S. does not correspond with the priorities of search and rescue.⁸⁹ Additionally, the majority of these calls do not go through, or the call is not picked up by



Memorial for missing migrant in Nogales. Source: Loyola University Chicago School of Law Immigration Law Practicum


agents without the knowledge of the 911 dispatcher who transferred the call.⁹⁰ Even when the call is able to go through, agents are not always able to find the person in need or do not even attempt to search.⁹¹

THE UNBRIDLED MILITARIZATION OF THE SOUTHERN BORDER

The United States southern border extends 2,000 miles and is the heaviest patrolled land border in the world with thousands of border patrol agents stationed at the various ports of entry.⁹² Today, Border Patrol utilizes a vast arsenal of modern technology and weaponry to enforce the borderlands. Specifically, it employs a system of Remote Video Surveillance (RVS) with cameras and infrared systems, sensors- including seismic, magnetic, and thermal, “intended to ensure seamless coverage of the border by combining the feeds of multiple cameras and sensors into one remote-controlled system.”⁹³ Air surveillance has also risen to the forefront in border enforcement technology, including drones, helicopters, and other various aircraft.⁹⁴ The influx of border technology, suggested to make the border safe, has only aggravated the deadly problem.⁹⁵

DEATH IS AN INTEGRAL PART OF THE BORDER ENFORCEMENT STRATEGY

The staggering number of lives lost in the Sonoran Desert can be attributed to Border Patrol policies that purposefully abandon or ignore people desperate for help. Rather than being an “unintended consequence,” the practice of abandoning people to die in the desert is an integral part of the border enforcement strategy.⁹⁶ Border Patrol agents often locate and track migrants but allow them to continue their journey and let the elements do their dirty work.⁹⁷ As anthropologist Jason de León observed:



“Border crossers are easier to apprehend if they are exhausted or dead”⁹⁸

Loyola University Chicago
School of Law Immigration
Practicum student looking
across the border.

b. Courtesy: Loyola



Items abandoned by migrants in the Sonoran Desert, recovered by volunteers outside of Nogales, Arizona. Courtesy: Loyola University Chicago School of Law Immigration Law Practicum

Border patrol recognizes that it is better to let migrants go a few rounds with heat stroke, bajadores, and whatever else they might encounter in the wilderness. Only after they have taken some licks does law enforcement become interested in chasing people down and trotting them back to Mexico. Border crossers are easier to apprehend if they are exhausted or dead.⁹⁸

This strategy came about because of the observed failures in strategies such as catch and release, where Border Patrol realized that migrants would often reenter the desert immediately after being deported.⁹⁹ Monitoring migrants and letting them continue walking before apprehension makes apprehension easier and any reattempt to cross much more difficult.¹⁰⁰ This has serious consequences for those in desperate need of aid:

Most walkers die a relatively short distance from salvation. Most walkers are fresh and strong when they start the journey. After a day of baking in the sun, they get disoriented, they drink too much water. They're dizzy and weak. By the second or third day, they are near death. And they drop, within a few miles or yards or feet from water, home, road, or border patrol.¹⁰¹

Border Patrol agents perpetuate a daily violence that is rooted in its institutional attitude of disregard for the lives of migrants.¹⁰² This violence is almost encouraged by the culture of impunity rampant among agents:

“Well, I pepper spray them in the face, of course, drag them to the ground, kick them, and handcuff them” the U.S. Border Patrol agent laughed and waited a beat before giving a more vague, but less horrifying answer to my question regarding what an apprehension at the border looks like.¹⁰³

Since 2010, over 200 people have died after an encounter with Border Patrol agents. Many of these victims were killed in fatal shootings, often across the border or during a vehicle pursuit.¹⁰⁴ 2021 was the deadliest year, with fifty-eight deaths attributed to encounters with Border Patrol agents. The total number of migrant deaths at the U.S. southern border in fiscal year 2022 totaled 856 – the highest and deadliest ever on record.¹⁰⁵ This violence does not end once in custody; in the past decade over thirty individuals, six of those being children, died while in CBP custody.¹⁰⁶

Border Patrol agents employ methods that directly lead to injury and death, such as scatter tactics that separate groups of migrants, often chasing them into even more remote terrain and almost assuredly to their death.¹⁰⁷ Border Patrol agents utilize several methods in its “chase and scatter” tactics, including helicopters, ATVs, dogs, and vehicles.¹⁰⁸ This intentionally results in the disorientation and dispersal of groups.¹⁰⁹ Frequently, migrants abandon their water, food, or other belongings during the chase.¹¹⁰ Migrants are left alone, in extreme weather, without access to water or food.¹¹¹ Even in custody, migrants still face grave risk from Border Patrol agents. Lack of medical care, food, and water have led to deaths while in custody.¹¹²

It is widely recognized that CBP has proliferated with a culture of impunity, corruption, and abuse.¹¹³ This impunity was encouraged by the Supreme Court in its 2020 decision that the family of a 15-year-old boy shot by Border Patrol agents through the border fence had no authority to sue for damages.¹¹⁴ Agents act with impunity, with the confirmed understanding that they will not

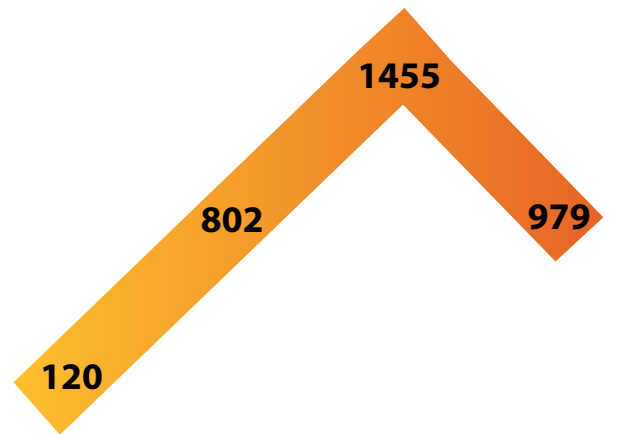
be held accountable for their conduct or abuse.¹¹⁵ The direct violence perpetrated by Border Patrol agents, however, is only a small fraction of the violence established by prevention through deterrence. For the most part, Border Patrol allows the Sonoran Desert to be its executioner.

FAILURES OF A POLICY OF PREVENTION THROUGH DETERRENCE

“THIS IS WHERE THE AMERICAN DREAM ENDS”¹¹⁶: INADEQUATE RECOVERY AND IDENTIFICATION

There is no federal law or policy regarding the recovery and identification of human remains found in the borderlands. Absent any policy, humanitarian organizations and local governments are forced to fill the gap left behind by Border Patrol negligence. Law enforcement agencies largely treat the deaths of migrants as not warranting a response or documentation, which is reflected in the lack of any federal agency or initiative to recover and identify the remains found in the desert.¹¹⁷

When the remains of an unidentified person are found in Arizona, state law requires that the Arizona, migrant’s remains are processed through the Pima County Office of the Medical Examiner (PCOME).¹¹⁸ The PCOME works to identify the remains and inform families of the discovery; however it is unique among jurisdictions along the border. Outside Pima County, recovered remains are often not distinguished as unidentified migrants and are not tracked within any formal database.¹¹⁹ The exclusion of unidentified migrants in any sort of formal tracking reinforces social narratives of those who count and those who don’t, largely at the cost of the marginalized and vulnerable.¹²⁰ Without any type of coordination, however, the mission to recover and identify missing migrants will never be realized, and families will be left forever wondering.¹²¹



Initial	Secondary	Tertiary	Localized
(1990-1999)	(2000-2005)	(2006-2013)	(2014-2020)

The initial funnel effect, from 1990-1999, saw an average of 120 remains recovered each year by the Pima County Office of the Medical Examiner. The secondary funnel effect, from 2000-2005, saw an average of 802 remains recovered each year. The tertiary funnel effect, from 2006-2013, saw an average of 1455 remains recovered each year. The localized funnel effect, from 2014-2020, saw an average of 979 remains recovered each year.

Source: Binational Migration Institute, *Migrant Deaths in Southern Arizona: Recovered Undocumented Border Crosser Remains Investigated by the Pima County Office of the Medical Examiner, 1990-2020* (April 2021), available at: https://sbs.arizona.edu/sites/sbs.arizona.edu/files/BMI%20Report%202021%20ENGLISH_FINAL.pdf

A look at the border wall in Nogales, Arizona. It reads “Our Dreams of Justice are Not Stopped by Any Wall”
 Courtesy: Loyola University Chicago School of Law Immigration Law Practicum





Source: *The Southern Border Communities Coalition*

loved ones, recovering the remains of twenty-four missing migrants in 2019.¹²⁵ Filling this gap means witnessing firsthand the horrors of U.S. border enforcement, as one volunteer with *Aguilas del Desierto* summarized their experience, “We volunteered for a search in the Ocotillo Desert. Within two hours, we found a human skull, part of a body, and a child’s shoe still containing some of her foot.”¹²⁶

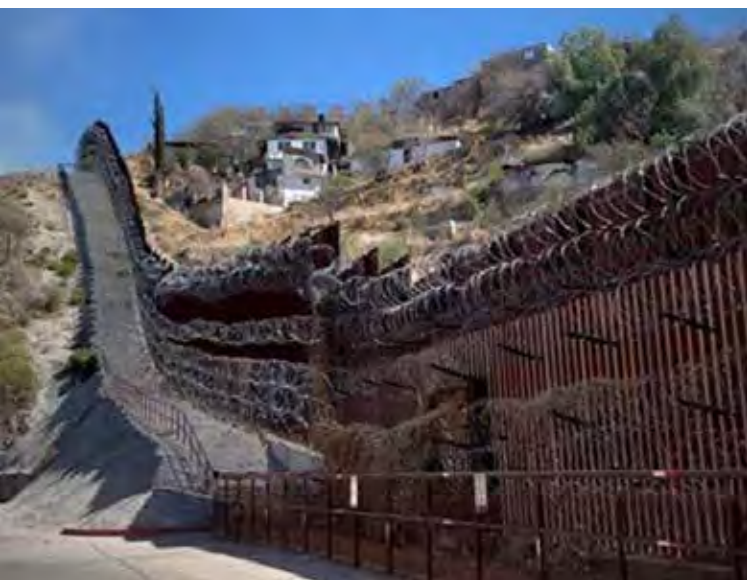
FAILURE IN ACCOUNTABILITY: PASSING THE HUMAN & ECONOMIC COST ON TO AMERICAN COMMUNITIES

The mortal consequences of prevention through deterrence has led to a movement of humanitarian organizations seeking to prevent further harm by providing aid or searching for missing migrants.¹²² For example, groups like *Aguilas del Desierto* fill the gap of official search and rescue and conduct monthly searches in the Sonoran Desert for migrants reported lost or missing.¹²³ In 2019, this group of local volunteers working unaided by the government to rescue migrants, saved twenty-seven individuals lost and disoriented in the desert.¹²⁴ *Aguilas del Desierto* also works to recover remains and provide closure for families in search of missing

Not surprisingly, these humanitarian organizations are often met with hostility and disruption from Border Patrol agents. Border patrol agents have been documented destroying humanitarian supplies left by aid organizations along the border.¹²⁷ The vandalization of humanitarian aid is widely reported, and common, because agents face no consequences, and instead are encouraged to do so to “remove littering.”¹²⁸ The organization, *No More Deaths*, tracks the use and vandalism of cached drinking water supplies it set up throughout southern Arizona.¹²⁹ In this investigation, *No More Deaths* discovered Border Patrol agents destroying water supplies.¹³⁰ Further, CBP has punished humanitarian organizations for depositing aid in the desert and has commenced legal action against volunteers, including three felony prosecutions, and dozens of citations for storing water on public lands without a permit.¹³¹ Volunteers are also harassed, threatened, and accused of smuggling migrants, are followed and closely monitored by agents, or are forced to abandon searches or aid distributions.¹³²

In other instances, the federal government relies on humanitarian organizations to pick up the slack. The organization, *Humane Borders*, obtains permits from varying governmental bodies to maintain water tanks and receive money from Pima County to maintain these water tanks.¹³³ Pima County authorized around \$25,000 in funding for water tanks along migration routes, relying on humanitarian organizations to maintain these water tanks.¹³⁴

Border fortification that separates Nogales, Arizona and Nogales, Sonora
 Courtesy: *Loyola University Chicago School of Law Immigration Law Practicum*



ENVIRONMENTAL, ECONOMIC AND COMMUNITY CONSEQUENCES

The consequences of prevention through deterrence extend beyond the human toll. Substantial environmental damage has occurred due to the rush to construct a border wall. Much of the border runs through environmentally sensitive areas, hosting over ninety endangered species in Arizona alone.¹³⁵ Border infrastructure has threatened these already rare and endangered species and has greatly damaged ecosystems by restricting the movement of animals.¹³⁶ DHS has largely gotten away with the destruction because of the ability to waive federal law to construct the wall, at great objection to U.S. Fish and Wildlife.¹³⁷

Local Residents have experienced enhanced surveillance, racial profiling, and wrongful detention, among other consequences.¹³⁸ This harm stems from the overbroad authority of Border Patrol agents to conduct searches at checkpoints throughout border communities and within the 100-mile enforcement zone, disrupting the daily lives of its residents and subjecting them to a constitutionally questionable surveillance state.¹³⁹ It is important to note that this enforcement zone consists of two-thirds of the U.S. population and contains nine out of the ten largest cities in the United States.¹⁴⁰

The criminalization of migration has resulted in the greater reliance on, and rising cost, of smugglers, which in turn, has placed migrants in increasing danger. The increase in human smuggling coincides with increased border enforcement; however as more migrants attempt to cross, the prices of smuggling have increased.¹⁴¹ The profitability of the smuggling network has also attracted drug cartels to control smuggling routes, subjecting migrants to more dangerous and vulnerable routes.¹⁴² This has also led to the extortion, kidnapping, and greater violence faced by migrants on their journey into the United



Border fortification in Nogales, Arizona. Courtesy: Loyola University Chicago School of Law Immigration Law Practicum

States.¹⁴³ The rising cost of migrating and the increased use of smuggling have coincided with border enforcement, whereas the “intensification in one process provokes a heightened response in the second.”¹⁴⁴ Women and children are particularly vulnerable to the dangers of human smuggling.¹⁴⁵ Additionally, cartels recruit children to transport drugs across the borderlands, taking advantage of the fact that children are often immediately released upon apprehension.¹⁴⁶

The number of human remains recovered in Arizona has consistently remained high, regardless of the level of apprehensions each year.¹⁴⁷ The number of apprehensions has greatly increased following 2020 where there were around 460,000 people apprehended at the southern border, to almost one million apprehensions in 2021.¹⁴⁸ This number skyrocketed in 2022, with over 2 million apprehensions at the southern border.¹⁴⁹ Over 500,000 of those apprehensions occurred in Arizona.¹⁵⁰ With this increase in apprehensions, it is evident there will be an increase in migrant deaths, not just because there are more migrants crossing, but because migrants are crossing in remote areas for longer periods of time in a strategy to avoid detection from the border enforcement machine.¹⁵¹



A look at the border wall in Nogales, Arizona. Courtesy: Loyola University Chicago School of Law Immigration Law Practicum

STRUCTURAL, CULTURAL, AND LEGAL VIOLENCE AT THE U.S.-MEXICO BORDER

“ENGINEERED TO BE INVISIBLE.”¹⁵²

Structural violence may better explain the harm and mass death at the southern border.¹⁵³ Structural violence is the indirect violence caused by inequities in social structures, which creates disparities in power and resources.¹⁵⁴ This type of violence is evident where populations are denied access to food, water, or medicine.¹⁵⁵ Because it is a systemic issue, it is less visible than direct violence and is difficult to identify a perpetrator.¹⁵⁶ Structural violence can be seen in the disparate levels of health and prosperity between groups and is visible at the intersections of race, gender, and socioeconomic status.¹⁵⁷ Those who suffer at the hands of structural violence experience much greater risk from threats that are easily preventable or extinguished in privileged societies, such as death from curable diseases.¹⁵⁸ Structural violence is further maintained and perpetuated through cultural violence, including the narratives that dehumanize migrants and characterize them as criminal or culpable for their own death.¹⁵⁹ Structural violence may take the form of “legal violence” – which is “[] structural in that it is exerted without identifiable perpetrators, ... [and] is so thoroughly imposed by the social order that it becomes normalized as part of the cognitive repertoire of those exposed.”¹⁶⁰

Legal violence captures the suffering that results from and is made possible through the implementation of the body of laws that delimit and shape individuals’ lives on a routine basis. Under certain circumstances, policy makers and political leaders enact laws that are violent in their effects and broader consequences. [Violence] is imbedded in legal practices, sanctioned, actively implemented through formal procedures, and legitimated – and consequently seen as “normal” and natural because it “is the law.”¹⁶¹

Structural, legal violence clashes at the border with cultural violence: “Cultural violence makes direct and structural violence look, even feel, right - or at least not wrong.”¹⁶² “One way [in which] cultural violence works is by changing the moral color of an act from red/wrong to green/right or at least to yellow/acceptable; an example being ‘murder on behalf of the country as right, on behalf of oneself wrong.’”¹⁶³ American sensibilities around nationalism and commitment to sovereignty has created an environment rife with cultural violence, where we legitimize lethal policies and excuse the dead migrants, because they broke the law and because they are not one of us.

In the context of the U.S.-Mexico border, state violence, including structural, legal and cultural violence, is the result of federal policy, which leaves no one responsible and portrays mass death as a natural consequence of criminal behavior.¹⁶⁴ The desert environment often erases any evidence of harm, allowing the government to avoid culpability.¹⁶⁵ The harms done by

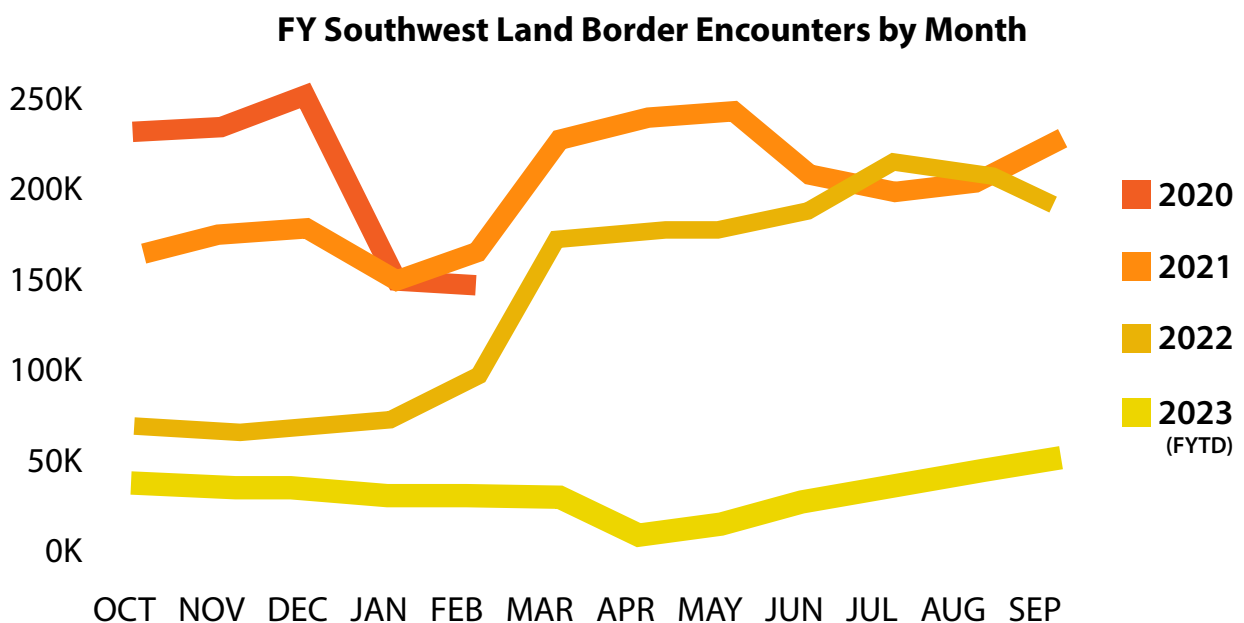
migrants and border communities from Border Patrol policies is treated as collateral damage to enforcing border security.¹⁶⁶ The preventable but purposeful violence against migrants itself is a manifestation of structural violence, stemming from political conditions and policies focused on obstructing migration.¹⁶⁷

Unaccompanied migrant children are especially vulnerable as, “violent structures do not perpetuate violence in equal ways for all people.”¹⁶⁸ Children are especially susceptible due to their status as children.¹⁶⁹ These harms are compounded by the legal violence of pandemic-era immigration policy, particularly Title 42, which has forced migrating families to make the impossible decision to self-separate, as Title 42 does not apply to unaccompanied migrant children.¹⁷⁰ This has further created a crisis within the U.S. shelter system, in 2022, over 130,000 unaccompanied migrant children were placed in shelters across the U.S., despite approximately 80% having U.S. relatives able to sponsor them.¹⁷¹ This structural violence has allowed the government to avoid blame, instead placing it on the desert environment and labeling migrant death as an “act of nature,” thus purposefully ignoring the tactics of “prevention through deterrence” that have been perpetuated for over twenty years.¹⁷² The U.S. government has

consistently used the extreme conditions of the Sonoran Desert as an alibi for the thousands for preventable deaths, which even further normalizes migrant deaths and ignores the identifiable enforcement practices that cause it.¹⁷³ While environmental conditions have worsened and temperatures are rising due to the effects of climate change, this does not itself explain the exponential rise in migrant deaths. The primary cause of migrant death is the increased time and exertion necessary to avoid detection by Border Patrol agents by traversing remote areas of the desert.¹⁷⁴ As has been recently noted,

[Undocumented border crosser] deaths along the U.S. border are not a natural feature of the landscape, but instead a consequence of particular, identifiable, structural conditions and political decisions, and are therefore largely avoidable. Thus, rather than a consequence of changing environmental conditions, we echo previous assertions that these deaths reflect an ongoing articulation of structural violence.¹⁷⁵

The environment cannot alone be blamed for the mass grave of migrants in the Sonoran Desert, despite the best attempts from government officials and media to point to desert heat as the main factor in fatalities.



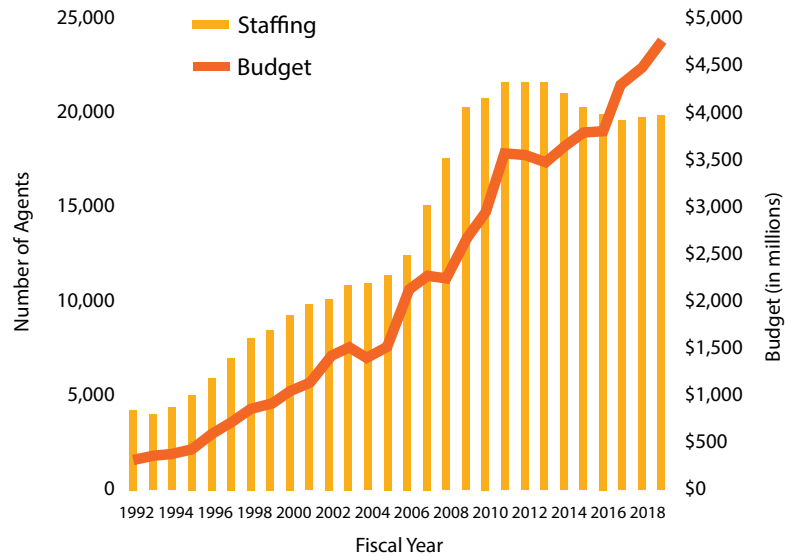
Apprehensions at the Southern Border, 2020-2023. Source: U.S. Customs and Border Patrol

NO RIGHT TO LIFE: THE U.S. IS IN VIOLATION OF INTERNATIONAL NORMS

INTERNATIONAL HUMAN RIGHTS OBLIGATIONS: THE RIGHT TO LIFE

Migrant deaths and U.S. border policy do not exist in a vacuum. Across the world, the rights of migrants to life and dignity are upheld through a legal framework on the “right to life.” The guarantee of the right to life is customary international law.¹⁷⁶ The right to life is understood to be foundational, described as the “prerequisite for enjoyment of all other human rights;”¹⁷⁷ “one of the most obvious basic human rights;”¹⁷⁸ the most elementary human right.¹⁷⁹ Indeed, it has consistently been recognized that “[w]ithout life in the sense of existence, it would not be possible to exercise rights or to be the bearer of [any other rights.]”¹⁸⁰ It is a “prior condition for [the] realization of [all] other rights.”¹⁸¹

Moreover, the right to life is more than merely a guarantee against the arbitrary deprivation of life: “[t]he right to life is more than existence; it is the right to be treasured as a human being with dignity, without such dignity, human life is



CBP Staffing and Budget, 1992-2019. Source: U.S. Customs and Border Patrol

substantially diminished. Without life, there cannot be dignity.”¹⁸² As such, the rest of the world has recognized that the right to life involves not only the negative obligation to not deprive anyone of their life arbitrarily, but also the positive obligation to take steps to ensure that this basic right is not abridged.¹⁸³ The right to life:

requires not only that no person be arbitrarily deprived of her life (negative obligation), but also that the States adopt all appropriate measures to protect and preserve the right to life (positive obligation), under their duty to ensure full and free exercise of the rights **by all persons under their jurisdiction** ¹⁸⁴

The right to life extends into death, where the state has obligations to repatriate remains, coordinate with humanitarian organizations, and notify next of kin. A state’s failure to orderly collect dead bodies is a violation of its positive obligations under the right to life.¹⁸⁵ This duty extends to permitting the collection of the dead by humanitarian organizations.¹⁸⁶ Consent to external assistance, including the collection of bodies, may not be withheld arbitrarily.¹⁸⁷ Additionally, authorities cannot wait for the next-of-kin to take the initiative to file a formal complaint or take responsibility for the conduct of the investigation.¹⁸⁸ The authorities must initiate the investigation.¹⁸⁹



Views of the border wall from Nogales, Arizona. Courtesy: Loyola University Chicago School of Law Immigration Law Practicum



“THERE IS NO GREATER RESPECT FOR THE DIGNITY AND WORTH OF A PERSON THAN TO PREVENT DEATH.”

THE RIGHT TO LIFE OF MIGRANTS AROUND THE WORLD: A COMPARATIVE PERSPECTIVE

The United Nations Human Rights Committee (UNHRC) has addressed the migration crises, not unlike the US-Mexico border. It has found that the lack of adequate search and rescue for migrants in jeopardy even outside of the nation-state’s jurisdiction, such as on the high seas, can violate the right to life.¹⁹⁰ The UNHRC determined that Italy and Malta violated the right to life of passengers on a vessel that went down in the Mediterranean sea which was in the search and rescue area over which both states had jurisdiction.¹⁹¹ Because the state parties’ exercised control over the area for search and rescue operations, the omission of aid to capsized migrants was the direct and reasonably foreseeable cause of the drowning deaths.¹⁹² With regard to Italy, the Committee extended jurisdiction because “a special relationship of dependency had been established between the individuals on the vessel in distress and Italy.”¹⁹³ Italy and Malta therefore had an obligation

to respond effectively to the emergency, and their failure to do so violated international human rights obligations.¹⁹⁴ In this case, the UNHRC effectively held states responsible for the preventable deaths of migrants – deaths that occurred outside the territorial jurisdiction of the nation-state. The migration crisis in the Mediterranean is caused by nations preventing migrants from ever stepping onto European soil.¹⁹⁵ In the United States, preventable migrant deaths take place inside our borders, as a direct result of our border policies, “despite having succeeded to cross the border into U.S. territory, many migrants never, in fact, arrive.”¹⁹⁶

RECATEGORYING MIGRANT DEATHS AS FORCED DISAPPEARANCE

We are witnessing “state induced disappearances in U.S.-Mexico borderlands.”¹⁹⁷ Forced disappearance may more accurately describe the border enforcement policies that allow not only death, but disappearance of migrant’s bodies, overtaken by the animals and the elements.¹⁹⁸ The crucial element of this is the invisibility of migrant death:

The annihilation of bodies in the desert is never meant to be seen. When the system functions perfectly, corpses are drained of blood and viscera by unseen monsters, bones dry, splinter, and blow away. When deterrence and erasure are fully achieved, the disappeared can be known or remembered only in stories, unsettling dreams, and outdated photos.¹⁹⁹

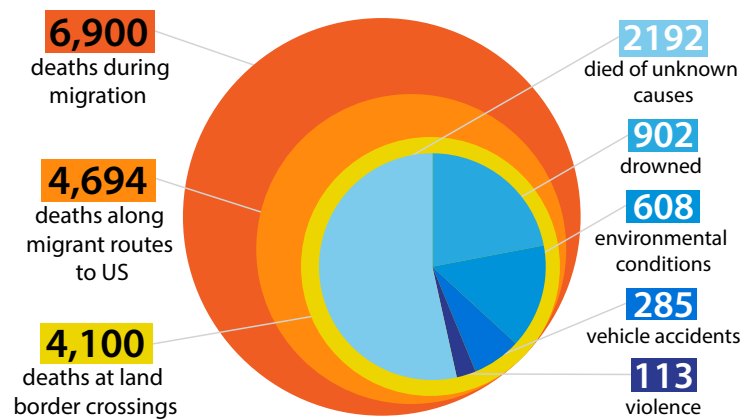
Invisibility is part of the suffering, and those disappeared will forever be lost in the Sonoran Desert.

The disappearance of thousands of migrants in southern Arizona has left the families of the lost in a state of “ambiguous loss,” which is argued to be the most stressful form of loss, as there is no resolution, no answers, and no proper way to say goodbye.²⁰⁰ It is extremely painful to come to terms with death when the only answer is the unknown,

To presume the death of people you have not seen dead, without knowing the conditions of their death, implies that one has to kill them oneself. I believe that this is one of the subtler and complex mechanisms of torture for the relatives and for all the members of the community. . . To accept their deaths, we have to kill them ourselves.²⁰¹

Sometimes it is easier to refuse to accept the missing are dead, largely because there are no rituals or healing processes for families of the missing, and lack of a body prevents a “proper” burial or site where the family may mourn and pray.²⁰² The destruction of bodies by the desert erases the evidence of harm done by federal policy. “Nature sanitizes the killing floor.”²⁰³

Classically, the term “enforced disappearance” conjures images of repressive dictatorships in Latin America and other parts of the world, where political dissidents were simply taken off the streets and “disappeared” – families left to the uncertainty of their loved one’s fate or the



Deaths in migration, 2014-2022. Source: Missing Migrants Project

location of their remains. Yet, advocates and international mechanisms alike propose that “refugees, asylum seekers and other migrants have also often fallen victim to enforced disappearances at international borders and within transit and destination countries.”²⁰⁴ “Under the guise of border enforcement, often with continued impunity” states, including the United States, have disappeared migrants.²⁰⁵ The UN Committee on Enforced Disappearances (CED) recognizes that

“[a]mong missing migrants are persons who have been subjected to “enforced disappearances”, in the meaning of article 2 of the International Convention for the Protection of All Persons Against Enforced Disappearances (ICPPED)... This phenomenon has been initially articulated in the UN Working Group on Enforced or Involuntary Disappearances (WGEID) 2017 Report on Enforced disappearances in the context of migration...

Despite the identification of the issue of enforced disappearance of migrants, it remains marginalized in the political and legal discourse, including the specificities of legal obligations of States in these cases. Rigid migration policies of States such as refusal of entry, pushbacks often accompanied by violence, expulsion or detention, and the increasingly perilous journeys of migrants cause a particular risk to become victims of enforced disappearances. . .

Recognising the particular vulnerability of migrant victims itself, but also of their family members who are frequently either migrant, either facing shortcomings in searching for their disappeared loved ones, the General Comment aims to assist states in their efforts to ensure access to justice for victims and their families.²⁰⁶

The Committee goes on to illustrate the obligations of states in the context of migrant deaths to include an obligation to investigate deaths, a prohibition on the secret detention of migrants (a phenomenon widely reported during the Trump Administration’s policy of family separation), and, among other obligations, the acknowledgement that states “have an obligation to ensure that all victims [or families] of enforced disappearance can exercise their right to know the truth and to obtain justice, reparation and guarantees of non-repetition.”²⁰⁷

The right to life for the disappeared has been implicated where “state authorities had given rise to a culture of impunity for acts of violence against [vulnerable groups].”²⁰⁸ In fact, upon evaluation of the “phases of police and prosecutorial (mis)conduct,” the right to life has been found to be violated where there was an established failure of the appropriate state actors to properly and thoroughly investigate allegations of disappearance.²⁰⁹

THE RIGHT TO LIFE OF THE MIGRANT CHILD

Migrant children are *first and foremost* children. Pursuant to the Convention on the Rights of the Child, ratified by every country on earth except the United States, migrant children must not simply be treated as adults in miniature.²¹⁰ “The duty to protect the right to life requires States parties to take special measures of protection towards persons in vulnerable situations... including unaccompanied migrant children.”²¹¹ Around the world, migrant children are recognized

as deserving of special protections that account for their age and vulnerability. Yet, in the United States, children are found dying in the Sonoran Desert.²¹² Indeed, CBP reported that “the Tucson Sector has seen a 12% increase in unaccompanied minors being smuggled across the border compared to 2021 and a 234% increase since 2020.”²¹³ The U.S. government’s policy of prevention to deterrence is known to be deadly also to children.²¹⁴

In the context of the “right to life”, the Inter-American Court of Human Rights has consistently held that children are afforded special protection and heightened attention. The Court established that the right to life includes the right to access to conditions that ensure a decent existence of life with dignity, and for the life of children, there are special measures that must be implemented.²¹⁵ Failure to comply with obligations to adopt special protections for children are especially egregious, and states must follow the principle of the best interest of the child.²¹⁶ The right to life takes on a special role in regards to children; the state’s role as guarantor of the right to life requires it to prevent situations that could lead to a violation of that right, either by act or omission.²¹⁷ Measures that must be taken include heightened vigilance and care toward the vulnerable situations that children are placed in as victims of trafficking, including expedited proceedings and the appointment of guardians.²¹⁸





State jurisdiction over immigration and border control naturally implies State liability for any human rights violations occurring during the performance of this control. The applicable rules on international liability for human rights violations are those established in the Articles on State Responsibility for Internationally Wrongful Acts.²²¹

THE UNITED STATES HAS AN OBLIGATION TO PROTECT HUMAN LIFE IN ITS TERRITORY

The United States has an obligation to protect the life of all individuals within its jurisdiction. This obligation is blatantly ignored with respect to migrants at the southern border. The United States is bound by norms related to the right to life as a matter of customary international law and various convention obligations.²¹⁹ Nevertheless, the United States persistently violates the right to life through its border policy, through acts of state violence, and through its fatal rhetorical narrative of the “illegal” migrant.

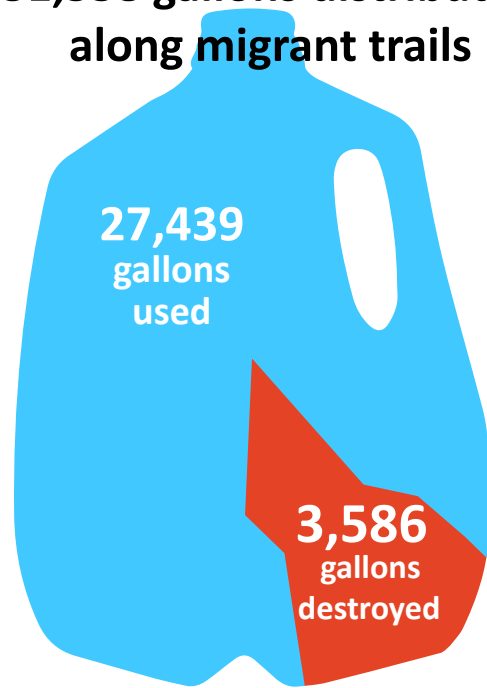
The United States has an obligation to protect and uphold the right to life of every person within its jurisdiction, irrespective of migration status or arrival method.²²⁰ The right to life is non-derogable and must be applied to all migrants crossing the southern border. The United States is required to respect the right to life of persons, irrespective of their immigration status. The right to life triggers both the Refugee Convention and the Convention Against Torture, and the United States cannot maintain its obligations under these conventions if it does not respect the right to life of migrants.

The duty to protect the right to life further requires state parties to take measures to protect vulnerable populations at risk.²²² Children, in particular, are deserving of heightened protections. Children in migration are more vulnerable than adults, particularly when they are unaccompanied. Their vulnerability makes them more exposed to violence, exploitation, and trafficking in human beings, as well as physical, psychological, and sexual abuse.²²³

The United States is required to prevent the foreseeable death of migrants, and because the southern border has been recognized as one of the most dangerous border areas, the United States must protect vulnerable populations.²²⁴ As a member state of the OAS, the United States has an obligation to ensure human rights of every person in its jurisdiction are protected.²²⁵ The Inter-American Court of Human Rights (IACHR) has defined the right to life to include both negative and positive obligations.²²⁶ This includes the obligation on state parties to protect against the loss of life in addition to the obligation on state parties to adopt measures to protect the right to life.²²⁷ The right to life in the Inter-American system does not end when the life does, as the Court has extended the right to life in the context of forced disappearances to continue after the decedent has died.²²⁸ The Court held that the

practice of hiding or desecrating bodies constitutes a violation of the right to life.²²⁹ The Court has ordered implicated states to locate and repatriate the remains of disappeared persons to their families.²³⁰ This interpretation of the right to life implicates the United States, because it has taken little action in recovering the bodies of migrants and has therefore not respected this temporal extension of the right to life.²³¹ Under the case law of the IACHR, it would appear that the US failure to prevent loss of life, locate and repatriate remains may also constitute a violation of the right to life. This is particularly salient when we look at the right to life through the lens of forced disappearance.

31,558 gallons distributed along migrant trails



No More Deaths recorded 3,586 gallons of water were vandalized from 2012-2015. Source: No More Deaths



“To presume the death of people you have not seen dead, without knowing the conditions of their death, implies that one has to kill them oneself.”

RECOMMENDATIONS

The Inter-American Court of Human Rights has held that there are certain basic principles that must be adhered to by member states when creating immigration policies controlling the entry and departure of migrants. These policies must strictly adhere to due process and respect for human dignity.²³² The United States has an obligation to ensure the respect of human rights for all persons, regardless of their country of origin or their immigration status.²³³

While the United States has yet to ratify the American Convention, the Inter-American Commission has held that, consistent with principles of international law, it may interpret and apply provisions of the American Convention to member states that are not signatories to the American Convention.²³⁴ Specifically, “While the Commission clearly does not apply the American Convention in relation to member States that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration.”²³⁵ Additionally, the Inter-American Court has held the advisory jurisdiction of the Court can be exercised over international treaties with regard to protections of human rights in the American States:²³⁶

According to the well-established jurisprudence and practice of the IAHRs, the American Declaration is recognized as constituting a source of legal obligation for OAS Member States, including those States that are not parties to the American Convention on Human Rights. These obligations are considered to flow from the human rights obligations of Member States under the OAS Charter. Member States have agreed that the content of the general principles of the OAS Charter is contained in and defined by the American Declaration, as well as the customary legal status of the rights protected under many of the Declaration’s core provisions.²³⁷

Advisory Opinions that discuss the rights of undocumented migrants as “appl[ing] to the OAS member states that have signed either the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified the International Covenant on Civil and Political Rights, regardless of whether or not they have ratified the American Convention or any of its Optional Protocols.”²³⁸ Therefore, because the U.S. has ratified the Charter of the OAS, there are enforceable legal obligations under the American Convention.²³⁹ While the Inter-American Court does not have jurisdiction to prosecute human rights violations in the United States, its advisory opinions and judgments may serve as persuasive authority.²⁴⁰

The Inter-American Commission on Human Rights may address the human rights crisis, particularly by filing Petitions against the United States for these human rights violations.²⁴¹ The Commission had the opportunity to address the ills of prevention through deterrence in 2005, when a Petition was brought against the United States for its policies that “knowingly and ineluctably led to deaths of an increasing number of immigrants seeking to enter the United States.”²⁴² The Petition alleged the US violated Article 1 of the American Declaration in implementing “Operation Gatekeeper” which knowingly led to the death of migrants entering the United States.²⁴³ The Petition claimed that no domestic remedies were available in the US that would address the violations complained of in the Petition.²⁴⁴ In response, the United State argued that the right to life was a decision that rested in the hands of the individual attempting to cross the border, and that it cannot be held responsible for the natural landscape.²⁴⁵ The Commission found the Petition inadmissible, on the basis that domestic remedies had not yet been pursued and exhausted.²⁴⁶ However, the Commission left open the door for a future Petition:

Notwithstanding its decision on the admissibility of the Petitioners' claims, however, the Commission wishes to express its concern regarding the matters raised in the petition, as they point to the existence of longstanding and serious circumstances in which the lives and physical integrity of people who traverse the border between two OAS Member States have been and continue to be threatened. Accordingly, the Commission will continue to monitor the situation, consistent with its broad mandate to promote the observance and protection of human right in the Hemisphere as well as the specific authority under its Statute to make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions, and international commitments.²⁴⁷

The Commission has an opportunity to address the humanitarian crisis at the southern border. Either through filing a Petition or the Commission making a recommendation, it has the authority and ability to not only bring attention to these violations, but to put pressure on the United States to end the inhumane practices of prevention through deterrence.

Overwhelmingly, scholars and aid organizations have called for the end of prevention through deterrence and the adoption of a policy that accounts for the influx of those seeking asylum. Instead of a policy focused on enforcement and apprehension, Border Patrol should focus on saving human lives.²⁴⁸ However, as noted, Border Patrol was not created to be an aid organization; nor is its purpose to prevent death. What is needed is an understanding of the root causes of undocumented migration and solutions that address these causes to stem the problems. As long as immigration policies do not account for root causes, they will perpetuate the harm.²⁴⁹ The enactment of new immigration legislation that

addresses the root cause of migration will benefit rather than harm those communities, such as by combining legal avenues of work and immigration through temporary work visas to greatly reduce the rate of illegal immigration and dangers associated with it.²⁵⁰ Furthermore, a more humanitarian approach to the border will ensure those seeking asylum will be properly processed and protected.²⁵¹

Moreover, Border Patrol agents and CBP as an agency need to held accountable for the harm inflicted by individual agents. The lack of discipline and oversight have created a horrifying force that must be better regulated and disciplined.²⁵² Additionally, the harassment of humanitarian volunteers and the destruction of aid must be stopped and should be criminalized.²⁵³ Despite these measures, as noted by Ewing, “. . . no amount of reform within CBP can compensate for the fact that U.S. immigration law and policy is out of balance. The growing criminalization of both legally present and unauthorized immigrants is a systemic problem that requires a systemic fix.”²⁵⁴ CBP requires a complete overhaul, and no further funding or budget increase should be provided to the agency without proper use of force policies, hiring and disciplinary practices, and complaint mechanisms.²⁵⁵

CONCLUSION

The humanitarian crisis caused by prevention through deterrence continues unabated and will only worsen for the foreseeable future. This, however, is not a concern for CBP, which views the border as a warzone and its agents its fiercest soldiers. Javier Duran succinctly summarized the problem:

Desert borderlands has become a space of terror where some of the more blatant abuses of human rights are not only occurring but are occurring visibly. These abuses are accepted and even condoned by the public, because those suffering have been successfully characterized as “illegals” rather than human beings.²⁵⁶

The mass graves in the Sonoran Desert will only grow if there is no accountability, no reform, and no attention. No immigration policy will prevent the violence as long as prevention through deterrence is the undercurrent of CBP policy and practice. The desert will continue to be used as a weapon in its fabricated war, and migrant death will continue to be the “unintended consequence” of border enforcement.

Endnotes

- 1 In this report, the term “migrant” is used to refer to persons who are not citizens in the United States, which encompasses a large group including asylum seekers, temporary visitors, undocumented border crossers, victims of human trafficking, and other non-immigrant statuses. This umbrella term is used to ensure that an analysis is not restricted to a limited understanding of the problem. The push and pull factors that explain the influx of migration at the southern border include both humanitarian and economic considerations, and an analysis should not be restricted to one subset of the larger migration movement.
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