FAMILY SEPARATION AS SLOW DEATH

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During the Trump Administration, disturbing images of immigration officials forcibly separating parents from their children at the U.S.-Mexico border have rightly invited an onslaught of criticism. Voices across the political spectrum have called these actions immoral and insisted that this is not who we are. The underlying moral imperative of this critique is correct, but this Essay argues that it rests on a mischaracterization of our immigration system. In fact, the principle of "family separation" pervasively defines our entire immigration system. The law governing admissions, enforcement, adjustment of status, and remittances routinely leaves noncitizens waiting, marooned, left out, and helpless in their efforts to remain or reunite with their family members. In other words, a legal system predicated on principles of family separation captures precisely who we are. To make this argument, I borrow insights developed by scholars in the humanities and social sciences who have developed the theory of "slow death" or "slow violence." Unlike acts of "spectacular violence" (a label for which border apprehensions and forcible separations certainly qualify) the process of slow death happens over time, offering no signs of impending ruination, a reality that frustrates the ability to generate momentum for change. Reframing the experience of migrants in terms of slow death can help recontextualize immigrant suffering in terms of family separation thereby drawing the public's attention to the need for systemic, and not just episodic, change.

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INTRODUCTION

In May 2018, senior immigration officials in the Trump Administration announced a "zero tolerance" policy for border apprehensions. As then-Attorney General Jeff Sessions stated: "If you cross this border unlawfully, then we will prosecute you. It's that simple. . . . If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law."[1] This policy, of course, assumes the thing that officials have to prove: that an adult's child companion is merely a ruse and not the recipient of guardianship. For migrants caught at the border seeking asylum, immigration officials began charging immigrants with child smuggling, thereby transforming a humanitarian and public-spirited case into a criminal and national security one.[2] An outcry followed. Predictably, immigrant rights advocates objected,[3] but so did a slew of elected and former officials across the political spectrum,[4] as well as the Chief Executive

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[1] See Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration, U.S. Dep't of Justice (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions [https://perma.cc/E7TR-JGHW].

[2] This also allowed immigration officials to then intercede "on behalf of" children, who become "unaccompanied minors" in that process, thus justifying the separation of children from parents.

[3] See Our Children Are the World's Hope for Justice for All, El Centro de la Raza (June 11, 2018), http://www.elcentrodelaraza.org/our-children-are-the-worlds-hope-for-justice-for-all/ [https://perma.cc/6ZMS-NY75]; Press Release, NAACP, Civil Rights Leaders Slam Trump Administration's Policy of Separating Children from Their Families at Southern U.S. Border, Demand End to Devastating Policy (June 20, 2018), https://www.naacp.org/latest/civil-rights-leaders-slam-trump-administrations-policy-separating-children-families-southern-u-s-border-demand-end-devastating-policy/ [https://perma.cc/LD5N-UUBS].

[4] See, e.g., Maria Cantwell, Facebook (June 15, 2018), https://www.facebook.com/senatorcantwell/posts/2143990432544515 [https://perma.cc/678Q-TJYN]; Dianne Feinstein (@SenFeinstein), Twitter (May 31, 2018), https://twitter.com/senfeinstein/status/1002330634558234624 [https://perma.cc/LC37-MMLX]; Tim Hains, Sen. Kamala Harris: Time to "Reexamine ICE and Its Role," Real Clear Politics (June 25, 2018), https://www.realclearpolitics.com/video/2018/06/25/sen_kamala_harris_time_to_reexamine_ice_and_its_role.html [https://perma.cc/X7HX-4YQ5]; Sharon Nelson, Sen. Nelson: Family Separations

Officer of the Chamber of Commerce.[5] From this chorus of critics, a common message emerged: This is not who we are.[6] As time passed, a number of commentators have provided historical context for this most recent chapter of family separation.[7] This Essay builds on this impulse but sets out to show that the

"Run Counter to Who We Are as Human Beings," Wash. State Wire (June 20, 2018), https://washingtonstatewire.com/sen-nelson-family-separations-run-counter-to-who-we-are-as-human-beings/ [https://perma.cc/HYK4-68F2]; Chuck Raasch, Blunt: Separating Families at Border 'Does Not Meet the Standard of Who We Are,' St. Louis Post-Dispatch (June 18, 2018), https://www.stltoday.com/news/local/govt-and-politics/blunt-separating-families-at-border-does-not-meet-the-standard/article_472bfd95-1a1e-5384-a64f-977b4d0b4990.html [https://perma.cc/RWT3-3YSJ]; Ian Schwartz, Sen. Cory Booker: Obama-Holder Immigration Policy "Violation of Our Values", Real Clear Politics (June 21, 2018), https://www.realclearpolitics.com/video/2018/06/21/cory_booker_obama_holder_immigration_policy_violation_of_our_values.html [https://perma.cc/Y8MH-4PJY]; Trump and His Critics on "Lost" Immigration Children--AP Fact Check, CBS News (June 4, 2018), https://www.cbsnews.com/news/trump-border-missing-lost-immigration-children-fact-check/ [https://perma.cc/CMV8-ULWZ] ("Democrat Antonio Villaraigosa, former Los Angeles mayor now running for governor, tweeted that he was: 'Speechless. This is not who we are as a nation.'").

[5] See Thomas J. Donohue, Separating Children from Families Must End Now, U.S. Chamber of Commerce: Above the Fold (June 19, 2018), https://www.uschamber.com/series/above-the-fold/separating-children-families-must-end-now [https://perma.cc/8WN9-6NDL].

[6] See Kris Schneider, Republican Senator Slams Proposal to Again Separate Families at Border: It 'Simply Is Un-American,' ABC News (Oct. 14, 2018), https://abcnews.go.com/Politics/republican-senator-slams-idea-separating-families-border-simply/story?id=58479031 [https://perma.cc/N83C-3UPH]; Michael D. Shear, Sheryl Gay Stolberg & Thomas Kaplan, G.O.P. Moves to End Trump's Family Separation Policy, but Can't Agree How, N.Y. Times (June 19, 2018), https://www.nytimes.com/2018/06/19/us/politics/trump-immigration-children-separated-families.html [https://perma.cc/L65J-SQLS] (quoting former Republican Senator Orrin Hatch as characterizing the policy as "not American"); Transcript: Sen. Susan Collins on "Face the Nation," CBS News (June 17, 2018), https://www.cbsnews.com/news/transcript-sen-susan-collins-on-face-the-nation-june-17-2018/ [https://perma.cc/4HP2-S3K5] (noting that such a policy is "contrary to our values in this country").

[7] See Randall Akee, Family Separation Policy Repeats Our Dystopian Past, Hous. Chron. (Sept. 10, 2018), https://www.houstonchronicle.com/opinion/outlook/article/Family-separation-policy-repeats-our-dystopian-13216468.php [https://perma.cc/SW7S-E8SH]; Adam Serwer, Trumpism, Realized, Atlantic (June 20, 2018), https://www.theatlantic.com/ideas/archive/2018/06/child-separation/563252/ [https://perma.cc/AAG7-Q9DH]; Mark Trahant, Indian Country Remembers the Trauma of

past is not the past. Even a cursory glance at our broader immigration system shows that this is exactly who we are. Put more precisely, a great deal of our immigration system thwarts or frustrates the ability of migrants to be reunited with their family members.

In this Essay, I argue that our immigration system is pervasively organized around principles of family separation. To make this case, I borrow the insights of scholars writing within the traditions of the humanities and social sciences who have developed the concept of "slow death" or "slow violence."[8] Focused primarily on health-related harms, these scholars use the notion of slow death to capture harms that vulnerable communities experience but cannot always identify or explain. Acts of slow violence stand apart from acts of "spectacular" violence, the harms of which are immediately discernible. To use somewhat reductive examples, the destruction wrought by military invasions like the 1991 Gulf War can be assessed in terms of body counts. But the leukemia and infertility linked to the use of uranium-depleted bombs are not so easily assessed or quantified, and certainly not immediately.[9] Similarly, few would find controversial the notion that natural disasters like Hurricane Maria demand attention and resources to help console and support the lives that might have been lost and ruined. But as days pass into weeks and months, debates about the adequacy of the federal response in Puerto Rico focused in part on how much of "excess" loss and ruin could be fairly attributed to Hurricane Maria.[10] In other words, the realities of space and time combined with political realities and cognitive limitations make it hard for members of the public to appreciate the full range of harms flowing from points of relative consensus.

Children Taken from Their Parents, PRI (June 19, 2018), https://www.pri.org/stories/2018-06-19/indian-country-remembers-trauma-children-taken-their-parents [https://perma.cc/R8YG-6QQK].

[8] Throughout this Essay, I use these terms interchangeably.

[9] Rob Nixon, Slow Violence and the Environmentalism of the Poor 211 (2011).

[10] See Ascertainment of the Estimated Excess Mortality From Hurricane María in Puerto Rico, Milken Institute School of Public Health, The George Washington University (estimating that 2,975 "excess deaths" took place in the six-month period immediately following Hurricane Maria); Arelis R. Hernández, Samantha Schmidt, and Joel Achenbach, Study: Hurricane Maria and its aftermath caused a spike in Puerto Rico deaths, with nearly 3,000 more than normal, Wash Post Aug 28, 2018.

In the immigration context, the recent outrage directed at family separation at the border stems from a broader principle on which there is some degree of consensus, namely that our modern admissions system should be committed to principles of family *reunification*---the opposite, and the rule to the exception, of family separation.[11] But a holistic examination of the broader immigration system shows that the exception of family separations operates much more like the rule in at least four respects. First, while federal admissions policy does give preference to family-based relationships, extended wait times for immigrant visas leave many migrants *waiting* for years, sometimes decades, for a visa to become eligible.[12]

Second, the harsh enforcement of immigration laws within the interior of the United States impacts mixed-status families, most obviously through detention and removal policies, which isolate and expel noncitizens, leaving citizen and other authorized family members behind. For those unauthorized migrants not swept into the removal pipeline, border enforcement policy counterintuitively worsens this problem by raising the costs of leaving the United States. Many unauthorized migrants who might otherwise be inclined to leave choose to stay for fear that they won't be able to reenter at the later date. Thus, enforcement policies leave many noncitizens and their family members *marooned* in the United States.

Third, limited opportunities to adjust status further exacerbates this dynamic. While marriage to a United States citizen remains a viable option for many unauthorized migrants who have overstayed their visas to obtain a green card, this process largely excludes those who have surreptitiously crossed a border. Because the vast majority of surreptitious border entrants are racialized as Latinx, allocating the benefit of adjustment of status in this way creates disparate impact harms. By contrast, the majority of unauthorized Asian Americans and Africans---

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[11] See Kerry Abrams, What Makes the Family Special?, 80 U. Chi. L. Rev. 7, 7--8 (2013).

[12] See Jie Zong, Jeanne Batalova & Micayla Burrows, Frequently Requested Statistics on Immigrants and Immigration in the United States, Migration Policy Inst. (Feb. 8, 2018), https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states [https://perma.cc/RJN6-GGJR]; see also Miriam Jordan, Wait Times for Citizenship Have Doubled in the Last Two Years, N.Y. Times (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/us/immigrant-citizenship-naturalization.html [https://perma.cc/AZF5-2AM6].

the second and third largest racial groups with unauthorized migrants---are visa overstayers; adjustment of status remains a viable option to them in a way that it is not for unauthorized Latinxs, leaving many migrants *left out* of this process designed to keep families together.

Fourth and finally, anti-money laundering laws impose what can feel at times like arbitrary limitations on the ability of migrants to remit wages---the vast majority of which goes to family members. Residents of some countries, such as Somalia, are completely excluded from the transnational remittance market for reasons related to money laundering policies. But even residents of other countries without these concerns, such as Mexico or El Salvador, suffer from exorbitant transaction costs associated with remittances from the United States, leaving many migrants in the United States *helpless* to support family members abroad.

Slow death scholars seek to put things in their proper context, but not just for the sake of descriptive clarity. Much of this scholarship rests on an activist foundation. Pollution exacts on the poor the types of harms that unfold slowly and that fail to capture the broader public's attention until the health of those who have been harmed becomes irreversibly compromised. The challenge for environmentalists, therefore, is "to convert into dramatic form urgent issues that unfold too slowly to qualify as breaking news---issues like climate change and species extinction that threaten in slow motion."[13] In the immigration context, a clearer understanding of family separation can help sharpen advocacy efforts. With the "zero tolerance" policy currently enjoined by the federal courts and being reevaluated by the President, we might be tempted to believe that our moral obligation to address the harms of family separation has been discharged. But the reality is that the crisis at the border comprises a part of a continuum of family separation harms. Reconceptualizing family separation in terms of slow death shows that these are half measures designed to contain the spectacle of separating asylum seekers from their children at the border. A full commitment to eradicating or reducing the harms of family separation demands a more holistic approach that reforms the entire immigration apparatus.

I should also provide an important caveat. As a motif, family separation has defined large swathes of our nation's history. To state the obvious, the United

[13] Rob Nixon, supra note 9, at 210--11.

States has a long history of dehumanizing nonwhite populations, and separating and breaking apart families has often operated as a tool for dehumanization. The enslavement of black Americans,[14] the eradication of the first Americans,[15] and the internment of Japanese Americans[16] stand as just a few notorious examples of the law operating to keep those families apart. All of these stories could be retold in terms of family separation. And while there is value in situating modern immigration policy within the broader historical sweep of white supremacy,[17] that is not the aim of this Essay. My primary interest is in giving the current political moment some context, which in turn might shape our understandings of which types of political action demand the most attention.

Part I summarizes the slow death paradigm. Part II then applies that paradigm to the rules governing our immigration system. Here, I show how migrants are waiting, marooned, left out, and helpless in our immigration system.

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[14] See Wilma A. Dunaway, The African-American Family in Slavery and Emancipation (2003) (explaining that interstate sales were a central cause of the forced relocation of slaves between states during the Antebellum Period in the United States); Thomas D. Russell, Articles Sell Best Singly: The Disruption of Slave Families at Court Sales, 1996 Utah L. Rev. 1161, 1166–67 (explaining that "[a]ntebellum courts routinely sold a great many slaves, and that "fifty-two percent of the slaves sold at court sales were sold individually," rather than with their families).

[15] See Marilyn Irvin Holt, Indian Orphanages 8 (2001) ("Numerous pieces of federal and state legislation, as well as court decisions, spoke to the mechanism of jurisdiction that allowed non-Indian intervention into domestic life. Jurisdiction could . . . allow actions under which Indian children became wards of the state, parents lost custody, or children were placed into non-Indian homes."); David Wallace Adams, Fundamental Considerations: The Deep Meaning of Native American Schooling, 1880–1900, 58 Harv. Educ. Rev. 1, 8 (1988) (explaining that policymakers were motivated by the view that "the elimination of tribal sovereignty would facilitate the individual Indian's entry into citizenship" and that "[o]nly when Indians were separated from the larger tribal unit . . . would they be truly fit for citizenship").

[16] See Donna K. Nagata, Intergenerational Effects of the Japanese American Internment, *in* International Handbook of Multigenerational Legacies of Trauma 125, 125 (Yael Danieli ed., 1998) ("Japanese Americans underwent numerous traumata during their internment. . . . Many also experienced the destruction of social and family networks.") (citation omitted).

[17] See generally, e.g., K-Sue Park, Self-Deportation Nation, 132 Harv. L. Rev. 1878 (2019) [hereinafter Park, Self-Deportation Nation] (situating the phenomenon of "self-deportation" within the broader history of "legal strategies [used] to pursue the mass removal of unwanted groups" in the United States, including "natives, American-born black people, and nonwhite immigrants").

While several immigration scholars have already drawn attention to the ways that our laws promote both reunification and separation principles, these treatments have largely focused on discrete parts of our immigration system with a particular focus on admissions and to a lesser extent on enforcement. My goal here is to draw a fuller and more comprehensive picture of the role that family separation plays in our immigration system as a regulatory principle, which means discussing not just admission and enforcement policies but also synthesizing adjustment of status and remittance policies. Broadening the discussion in this way shows how a wide array of laws work together to confirm Lauren Berlant's observation that "slow death refers to 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."[18]

Part III revisits the example of family separation at the border. Here, I note that much of the discourse in this setting has revolved around crisis, individual choice, and moral innocence. These framing choices allow migrants and their advocates to reframe discussions of immigrant detention in terms of family separation thereby pushing back against any judicial impulse to categorically defer to governmental policies simply because the issue arises at the border. Still, as I explain, one consequences of framing border detentions in terms of spectacle is obscuring the larger reality of family separation. To be clear, my intent is not to discount the benefits created by these frames nor to diminish efforts undertaken by these migrants and their allies to reduce human suffering. My main point is to highlight that these benefits come with real costs, especially in terms of making it more difficult to engage in and seriously consider structural types of reform that might alleviate human suffering throughout our immigration system.

Although this Essay borrows heavily from the humanities, focusing on pragmatic solutions reveals the comparative advantage that legal scholarship offers. Pulitzer Prize–winning writer Viet Nguyen observes that while humanists can tell "powerful stories about individual people" the telling of the story without more "[doesn't] change the conditions that produce those refugees in the first

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[18] See Lauren Berlant, Slow Death (Sovereignty, Obesity, Lateral Agency), 33 Critical Inquiry 754, 754 (2007) [hereinafter Berlant, Slow Death] (emphasis omitted).

place."[19] Legal scholarship and lawmaking offers a chance to fill in the "more." Thus, in Part IV, I address how the slow death concept might be translated into a useful intervention against a broader array of family separation harms than is currently being captured by border detentions. Central to this effort is creating discursive space for migrants themselves to describe the nature and importance of how family separation has affected their lives.

I. THE SLOW DEATH PARADIGM

The paradigm of slow death or violence captures the kinds of harms that happen slowly and over time, which can often go overlooked or unnoticed. Harms arising from exposure to lead paint or airborne pollutants are classic examples of such harms.[20] So is the dumping of toxic waste in countries in the Global South.[21] These types of harms stand in contrast to what slow death scholars call "spectacular" acts of violence, those that can be appreciated immediately in the moment.

As a body of work, slow death scholarship does not arise from a single, cohesive discussion. Rather, it is comprised of at least two overlapping conversations both of which focus to varying degrees on the health-related vulnerabilities created by poverty. One can trace its starting point to Lauren Berlant's powerful essay, *Slow Death (Sovereignty, Obesity, Lateral Agency)*.[22] A humanist by training, Berlant focuses on the condition of obesity, which she observes is often a function of poverty and economic insecurity. This link to poverty helps to explain why obese people are blamed for their own obesity or, as she explains, "provide[s] an alibi for normative governmentality and justified moralizing against inconvenient human activity."[23] The concept of slow death, as

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[19] See Interview by Piper French with Viet Thanh Nguyen, Asymptote, https://www.asymptotejournal.com/interview/an-interview-with-viet-thanh-nguyen/ [https://perma.cc/24S6-8VPE] (last visited Aug. 15, 2019).

[20] See Sarah L. Swan, Plaintiff Cities, 71 Vand. L. Rev. 1227, 1249--1250 (2018).

[21] See Matiangai V.S. Sirleaf, Not Your Dumping Ground: Criminalization of Trafficking in Hazardous Waste in Africa, 35 Wis. Int'l L.J. 326, 329--30 (2018).

[22] Berlant, Slow Death, supra note 18.

[23] See id. at 755.

Berlant explains it, refers to harms that are not only or even mostly caused by bad individual choices but stem from broader structural conditions leading to "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."[24]

In subsequent elaborations, Berlant poses slow death as a critique of cultural and psychological fantasies of "the good life."[25] Slow death is the answer to the question: "What happens when those fantasies start to fray---depression, dissociation, pragmatism, cynicism, optimism, activism, or an incoherent mash?"[26] This version of slow death---that is, as critique of "good life" fantasies---has produced its own generative line of scholarship reaching into the realms of queer theory,[27] critical race studies,[28] rural geography,[29] and familial relationships.[30]

A second thread to this conversation comes from Rob Nixon, a humanist as well but also an environmentalist, who uses the concept of slow violence to explain why it is so hard to amass the political will and emotional fortitude to stave off environmental disasters like climate change. We have short attention spans, Nixon explains straightforwardly enough. This is a relatively modern phenomenon, he insists, one that possesses some connection to the 9/11 attacks and the string of crises that have followed. With so many "bad" things swirling around in the news---many real, some manufactured---the public has difficulty focusing on any one particular type of crisis. But the larger impact, according to Nixon, is that information registers with the public only when it provides "a spectacular, immediately sensational, and instantly hyper-visible image of what constitutes a violent threat."[31]

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[24] See id. at 754.

[25] See Lauren Berlant, Cruel Optimism 2 (2011) [hereinafter Berlant, Cruel Optimism].

[26] See id.

[27] See Eithne Luibhéid, Queer/Migration: An Unruly Body of Scholarship, 14 GLQ 169, 190 n.44 (2008).

[28] Susan Greenhalgh & Megan A. Carney, Bad Biocitizens?: Latinos and the US "Obesity Epidemic," 73 Hum. Org. 267, 274 (2014).

[29] Karen Scott, Cynthia Claire Hinrichs & Leif Jensen, Re-Imagining the Good Life, 59 J. Rural Stud. 127, 127 (2018).

[30] Susan Koshy, Neoliberal Family Matters, 25 Am. Literary Hist. 344, 370 (2013).

[31] Nixon, supra note 9, at 13.

In this way, spectacular violence presents a form of storytelling, one that is necessary for activists and decisionmakers to convey their point. Our country's history, settled and recent, offers several examples of both the strategic deployment of disaster narratives to usher in broadscale change as well as brazen attempts to avoid such narratives to quell reform (and rescue) efforts.[32] The point is that stories of spectacular violence, like all stories, rely on narrative choices, which means highlighting and intensifying some details while ignoring and muting others. Slow violence, according to Nixon, helps us see what is ignored and muted. Rather than "[f]alling bodies, burning towers, exploding heads, avalanches, volcanoes, and tsunamis," slow violence captures "[s]tories of toxic buildup, massing greenhouse gases, and accelerated species loss due to ravaged habitats"---harms which are also "cataclysmic, but . . . in which casualties are postponed, often for generations."[33]

Nixon's work has spawned a significant body of work related to a range of environmental harms across disciplines.[34] Legal and sociolegal scholars have extended Nixon's concept of slow violence to other arenas. Criminal law scholars have used the concept to describe the banal and ordinary harms that criminal law actors and institutions exact upon communities of color. Aya Gruber, for example,

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[32] Compare Michele Landis Dauber, The Sympathetic State: Disaster Relief and the Origins of the American Welfare State 7 (2013) (noting that disaster narratives were a "central element in the political mobilization of the New Deal"), with Yxta Maya Murray, "FEMA Has Been a Nightmare:" Epistemic Injustice in Puerto Rico 71 (Loyola Law Sch., L.A. Legal Studies Working Paper No. 2018-34, 2018), https://papers.ssrn.com/abstract=3249220 (on file with the *Columbia Law Review*) (arguing that the federal government's failure to "access[] and utilize[]" disaster narratives following Hurricane Maria worsened relief efforts).

[33] Nixon, supra note 9, at 3.

[34] See, e.g., Chloe Ahmann, "It's Exhausting to Create an Event Out of Nothing": Slow Violence and the Manipulation of Time, 33 Cultural Anthropology 142, 146 (2018) (explaining how activists in the Curtis Bay neighborhood of Baltimore have used the concept of slow violence to campaign against industrial projects, which have slowly polluted the area); Shannon O'Lear, Climate Science and Slow Violence: A View from Political Geography and STS on Mobilizing Technoscientific Ontologies of Climate Change, 52 Pol. Geography 4, 4--5 (2013) (discussing the concept of slow violence as it pertains to climate narratives); Matiangai V.S. Sirleaf, Not Your Dumping Ground: Criminalization of Trafficking in Hazardous Waste in Africa, 35 Wis. Int'l L.J. 326, 329--30 (2018) ("The concept of slow violence allows us to consider more forcefully the violence caused by environmental harms like toxic dumping.").

observes: "Fast violence occurs when racist police officers kill unarmed black civilians, and slow violence occurs when the cumulative conditions of racialized inequality and disenfranchisement leave an island vulnerable to a hurricane."[35] Elsewhere, Gruber elaborates that entire categories of brutality evade detection because they happen at the hands of state actors, which also fits within a slow violence ethos. For example, she notes that the "routine" acts of violence committed by prison guards and police officers enjoy immunity under the law, which over time creates a social order that slowly kills vulnerable communities.[36]

Geoff Ward further develops this concept to help explain how state actors police and manage juveniles of color. Ward explains that, in contrast to "spectacular violence," slow violence as experienced by black Americans involves "subtler personal or structural violence contributing to dis-accumulation, collective under-development, and generational disadvantage."[37] Ward observes that "[m]ost common to Jim Crow juvenile justice was the structural violence of systematic malign neglect, a slow violence of individual and group underdevelopment."[38] Thus, he argues, dramatic and undoubtedly horrific acts of lynching and bombings comprise only a smaller part of a larger apparatus that sought to demean and control the bodies of black youth through "state administered whippings . . . , which white officials believed especially appropriate and efficient means of sanctioning descendants of slaves they did not intend to serve with rehabilitative ideals and resources."[39]

In this way, both Gruber's and Ward's work fit comfortably alongside the work of critical race theorists and feminists who have been attuned to what Patricia Williams referred to as "spirit-murder" more than 30 years ago.[40] Adrien Katherine Wing and Monica Nigh Smith make this point in unmistakable terms:

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[35] Aya Gruber, Equal Protection Under the Carceral State, 112 Nw. U. L. Rev. 1337, 1365 (2018).

[36] Aya Gruber, A Provocative Defense, 103 Calif. L. Rev. 273, 325--26 (2015).

[37] Geoff Ward, The Slow Violence of State Organized Race Crime, 19 Theoretical Criminology 299, 302 (2015).

[38] Id. at 304.

[39] Id. at 305.

[40] See Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism, 42 U. Miami L. Rev. 127, 129 (1987).

"Racism, sexism, and other forms of discrimination can lead to the slow death of a person's soul or psyche."[41] Thus, the various conversations focused on the concepts of slow death, slow violence, and spirit-murder all operate as a critique of structural forms of oppression, which aims to make visible harms that go undetected by mainstream legal analytical frameworks.

The concept of slow violence provides descriptive clarity in two important ways. First, it shrinks time. Unlike spectacular acts of violence, certain harms cannot be appreciated in the moment. Such a dynamic proves particularly challenging for those waging battle against large-scale polluters. The temporal dimension of slow death affects how we perceive, and therefore respond to, physical, psychological, and environmental harms that we often associate with discrete events.[42] As some political geographers explain it, violence can be a "processual and unfolding moment, rather than . . . an 'act' or 'outcome.'"[43] Although the arena of environmental protection has witnessed its share of stunning calamities---think Deepwater Horizon oil spill[44]---scores of other types of harms, such as the global amassing of greenhouse gases, can go unnoticed or disregarded for years or decades before reaching a tipping point in our lives.[45]

Subordination in the form of slow death, then, obfuscates broader structural conditions. Lauren Berlant makes this point in the context of obesity and the array of health problems that it can generate: "Slow death prospers not in

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[41] See Adrien Katherine Wing & Monica Nigh Smith, Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban, 39 U.C. Davis L. Rev. 743, 777 (2006).

[42] See Nixon, supra note 9, at 3 ("We need to account for how the temporal dispersion of slow violence affects the way we perceive and respond to a variety of social afflictions---from domestic abuse to posttraumatic stress and, in particular, environmental calamities.").

[43] Simon Springer & Philippe Le Billon, Violence and Space: An Introduction to the Geographies of Violence, 52 Pol. Geography 1, 2 (2016).

[44] See generally David Barstow, David Rohde & Stephanie Saul, Deepwater Horizon's Final Hours, N.Y. Times (Dec. 25, 2010), https://www.nytimes.com/2010/12/26/us/26spill.html [https://perma.cc/6446-GVE5].

[45] Phenomena like "toxic buildup, massing greenhouse gases, and accelerated species loss" are "cataclysmic, but they are scientifically convoluted cataclysms in which casualties are postponed, often for generations." Nixon, supra note 9, at 3. Such calamities "are slow and long lasting" and "patiently dispense their devastation while remaining outside our flickering attention spans---and outside the purview of a spectacle-driven corporate media." Id. at 6.

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 . . . ."[46] In other words, slow death is by its very nature taken for granted.[47] In a later treatment of this idea, Berlant refines this idea to critique popular obsessions with crises. She points out that if suffering for the poor is experienced as "the work of getting through it," then humanists and advocates "require other frames for elaborating contexts of doing, being, and thriving."[48] People may be able to survive crises with enough time to recover and recalibrate for life as it returns to ordinary conditions, but poor people and especially people of color live "[u]nder a regime of crisis ordinariness," which can make life feel "more like desperate doggy paddling than like a magnificent swim out to the horizon."[49] This "wash, rinse, repeat" quality of subordination can stymie even the most committed of activists and organizers. Slow death scholar Chloe Ahmann points to the frustration experienced by one Baltimore resident fighting against the presence of a hazardous waste dump in his neighborhood: "It's exhausting to create an event out of nothing."[50]

A second way that slow death illuminates our understandings of inequality and subordination is that it pierces through cramped notions of individual or personal choice. Consider, again, the example of poor and malnourished people struggling against obesity. Blame is often placed at the feet of obese individuals rather than with supermarkets that refuse to open locations in blighted neighborhoods.[51] In striving to create a healthier food system, elite food activists have become unproductively obsessed with obesity as the ultimate bogeyman that policy should seek to eradicate.[52] But this avoids other structural problems that

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[46] Berlant, Slow Death, supra note 18, at 759.

[47] See id.

[48] Berlant, Cruel Optimism, supra note 25, at 105.

[49] Id. at 117.

[50] Ahmann, supra note 32, at 146.

[51] See Alison Hope Alkon, Daniel Block, Kelly Moore, Catherine Gillis, Nicole DiNuccio & Noel Chavez, Foodways of the Urban Poor, 48 Geoforum 126, 127 (2013).

[52] See Julie Guthman, Weighing In: Obesity, Food Justice, and the Limits of Capitalism 5-6 (2011) (critiquing the fixation of food writers such as Michael Pollan on obesity).

might also exacerbate the harms of poverty, such as wage theft[53] or the weakening of worker bargaining power.[54] Under this line of reasoning, the way forward involves eating smarter or working harder, not reorganizing our nation's workplace laws or creating affirmative entitlements for the poor.[55] By focusing so singularly on people's food choices, discussions about health lead to conclusions that those afflicted with obesity have made poor choices out of ignorance or a lack of self-restraint. Therefore, their obesity is their fault. Again, as Berlant helpfully observes: "In an ordinary environment, most of what we call events are not of the scale of memorable impact but rather are *episodes*, that is, occasions that make experiences while not changing much of anything."[56] The problem is one of vocabulary, and our language of rights fails us.[57]

In this regard, the concept of slow violence fits within a broader set of critiques designed to question the degree to which individual choice and personal worth should govern the ability to obtain relief under the law. While a variety of intellectual traditions speak to this dynamic, three are notable. One is Pierre Bourdieu's theory of "symbolic violence," which more or less refers to the

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[53] See Jennifer J. Lee & Annie Smith, Regulating Wage Theft, 94 Wash. L. Rev. 759, 766 (2019) ("Unsurprisingly, wage theft results in increased poverty rates. An Employment Policy Institute (EPI) study from 2017 found that workers who experience minimum wage violations are more than three times as likely to live in poverty as someone chosen at random in the eligible workforce."); see also Stephen Lee, Policing Wage Theft in the Day Labor Market, 4 U.C. Irvine L. Rev. 655, 656 (2014) (noting that wage theft often leaves workers in the informal labor economy without a meaningful remedy).

[54] See Tabatha Abu El-Haj, Public Unions Under First Amendment Fire, 95 Wash. U. L. Rev. 1291, 1292 (2018) ("Unions, once a pillar of modem civil society, are under attack in both legislatures and courts."); Aaran Tang, Life After *Janus*, 119 Colum. L. Rev. 677, 679 (2019) (explaining that public unions have perhaps suffered a "death blow" as a result of the Supreme Court's decision in *Janus v. AFSCME*).

[55] Lauren Berlant observes that within our capitalist labor market, "sickness is defined as the inability to work." Berlant, Slow Death, supra note 18, at 754.

[56] Id. at 760.

[57] See id. at 757; see also Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law 38--49 (Duke Univ. rev. and expanded ed. 2015) (2009) (discussing why the legal reform strategy born from trans rights discourse "fails to remedy the harms it claims to attend to, and actually can empower systems that maldistribute life chances").

internalization and normalization of social hierarchies.[58] Such a formulation helps zero in on how social, economic, and legal institutions naturalize hierarchy and inequality. Anthropologists, like Seth Holmes, have observed that in the context of migrant-dominated workplaces like farms, ethnicity and immigration status often dictate one's job assignment and pay. Observations about segregation in the farm work context yield no surprise. But what is notable is the natural and unremarkable manner in which such segregation develops. Using the example of a berry farm in Washington, Holmes explains that the delegation of the most degrading work to indigenous Mexican migrants becomes justified because managers and coworkers over time come to believe that indigenous migrants "like to work bent over."[59] In other words, the belief that Oaxacan migrants have "chosen" to take on this work overrides a broader set of questions focused on the segregated nature of the workplace, which might in turn lead to legal action.

Indeed, with immigration enforcement authority insinuating itself into the lives of migrant families, work, and schools, Cecilia Menjívar and Leisy Abrego explain that migrant lives reflect a kind of "legally sanctioned social suffering."[60] Beyond physically disruptive acts like detaining and removing migrant families, Menjívar and Abrego insist that agencies and regulators enact policies that "are more subtle but equally damaging (in the short and long term)."[61]

A second is Dean Spade's theory of administrative violence. Noting that racist or transphobic harms happen pervasively and not just in discrete moments, Spade argues that remedies grounded in theories of antidiscrimination and equality cannot achieve meaningful reform with a focus on the "few bad apples."[62] He argues that "legal equality demands are a feature of systemic injustice, not a

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[58] See Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field, 38 Hastings L.J. 805, 812 (1987); Pierre Bourdieu, Social Space and Symbolic Power, 7 Soc. Theory 14, 16 (1989); Seth M. Holmes, "Oaxacans Like to Work Bent Over": The Naturalization of Social Suffering Among Berry Farm Workers, 45 Int'l Migration 39, 58 (2007) [hereinafter Holmes, Berry Farm Workers]; Cecilia Menjívar & Leisy J. Abrego, Legal Violence: Immigration Law and the Lives of Central American Immigrants, 117 Am. J. Soc. 1380, 1386 (2012).

[59] See Holmes, Berry Farm Workers, supra note 58, at 58--60; see also Seth M. Holmes, Fresh Fruit, Broken Bodies: Migrant Farmworkers in the United States 170--72 (2013).

[60] See Menjívar & Abrego, supra note 58, at 1413 (2012).

[61] See id. at 1400.

[62] See Spade, supra note 57, at 7.

remedy."[63] Shelters, for example, serve as a crucial lifeline for homeless people. But because access to shelters requires beneficiaries to provide identification, trans homeless people---whose identification may misclassify their gender---remain largely excluded from these valuable resources.[64] Unlike many legal scholars who focus on courts as sites of legal conflict and resolution, Spade trains his attention on the administrative state, which offers a clearer example of how legal categories destabilize people's lives and warp the distribution of life chances throughout society. For Spade, individual rights are beside the point because, as he observes: "Legal systems that have official rules of nondiscrimination still operate in ways that disadvantage whole populations---and this is not due solely, or even primarily, to individual bias."[65]

A third and final intellectual sibling to the slow death paradigm is the well-established critique of neoliberalism. With "efficiency" firmly entrenched as a core principle guiding the allocation of government resources,[66] the regulatory landscape has become hostile to the notion that the government is responsible for addressing and solving social and economic problems. The array and extent of public benefits have shrunk and become more punitive in nature.[67] Critics of this type of shift in policy decry the overemphasis on personal choice and individual responsibility and the deemphasis on structural conditions generating poverty in

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[63] See id. at 19.

[64] See id. at 81 ("Misclassification is . . . a significant problem because sex segregation is used to structure so many services and institutions . . . . Trans women in need of shelter . . . often remain on the streets because they are unfairly rejected from women-only domestic violence programs and they know the homeless shelter system will place them in men's facilities, guaranteeing sexual harassment and possibly assault.").

[65] See id. at 9.

[66] See, e.g., Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) ("With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process."); Executive Order 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011) ("Our regulatory system must . . . . identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative."); Executive Order 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017) ("It is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources.").

[67] See Kaaryn Gustafson, The Criminalization of Poverty, 99 J. of Crim. L. & Criminology 643, 715 (2009).

the first place.[68] As sociologist Lisa Sun-Hee Park offers: Within a neoliberal governance framework, "poverty is individualized as personal moral failings so that the solution centers on disciplining non-normative bodies to perform in 'responsible' and 'entrepreneurial' ways."[69] Park rejects the notion that poor people can climb out of poverty by simply making better choices. Environmentalists similarly spurn consumer-oriented strategies to fight global degradation and inequality.[70] Arguing against the individual choice rhetoric, a growing number of legal scholars and advocates argue for structural changes that address root causes to social and economic suffering.[71]

All of these frameworks speak to the "taken-for-granted" nature of subordination within American life, which resonates with the slow death conception of the world. But slow death scholarship seeks to capture a particular type of ethos, one that claims to be moving in one direction but is actually moving in the opposite direction. Slow death describes a world that is committed to protecting people against sickness and poverty, and this commitment obfuscates life at the bottom, which reveals how social, political, cultural, and economic systems engender exactly those ills. Common remedies to poverty such as public benefits programs don't actually cure poverty but merely prolong it.[72] This leads to an unreflective consensus that when people are discarded, it is just a case of bad

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[68] See, e.g., Lisa Sun-Hee Park, Entitled to Nothing: The Struggle for Immigrant Health Care in the Age of Welfare Reform 9 (2011) [hereinafter Park, Entitled to Nothing]; Sandy Brown & Christy Getz, Privatizing Farm Worker Justice: Regulating Labor Through Voluntary Certification and Labeling, 39 Geoforum 1184, 1994--95 (2008).

[69] Park, Entitled to Nothing, supra note 68, at 9.

[70] See George Monbiot, We Won't Save the Earth with a Better Kind of Disposable Coffee Cup, Guardian (Sept. 6, 2018), https://www.theguardian.com/commentisfree/2018/sep/06/save-earth-disposable-coffee-cup-green [https://perma.cc/X5NB-4PV8].

[71] See, e.g., Amna A. Akbar, Toward a Radical Imagination of Law, 93 N.Y.U. L. Rev. 405, 415 (2018); Allegra M. McLeod, Envisioning Abolition Democracy, 132 Harv. L. Rev. 1613, 1616 (2019).

[72] See Oscar Wilde, The Soul of Man Under Socialism, *in* In Praise of Disobedience: The Soul of Man Under Socialism and Other Writings 1--3 (Mark Martin ed., 2018) (1891). I am grateful to Tiffani Burgess for making this connection.

luck.[73] Thus, slow death injects urgency into debates about legal reform by putting front and center what is stake: the degree to which migrants struggle to avoid death for themselves and their loved ones. Slow death scholarship shows that in many industries, migrants are working themselves to death[74] and that they continue to take these risks to help alleviate the slow violence of poverty their family members suffer in sending countries.

Finally, it's worth noting that the slow death framework arises from an interventionist impulse. It is meant simultaneously to dramatize a dynamic that goes unnoticed and to teleport us to the "aha" moment, which typically happens much later with the benefit of hindsight. To avert disaster, scholars and activists must find ways to describe a form of "violence that is by definition image weak and demanding on attention spans."[75] The slow death framework offers no spoiler alerts and instead jumps right to the unsavory conclusion: poor people are not likely to ever enjoy "the good life" promised by those who exploit them.[76] This then forces the question of what we, the reform-minded and justice-minded members of the public, must do to effectuate these structural changes.

II. FAMILY SEPARATION AS SLOW DEATH

With the slow death paradigm firmly in hand, this Part begins examining how our immigration system creates and contributes to a range of harms that frustrate or outright prevent migrants from being reunited or remaining with their

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[73] See Nixon, supra note 9, at 205 (Noting that the reasons given for discharging for military personnel for medical reasons can focus on the "catastrophic physical collapse" in ways that are "dissociated entirely from the environment of war.").

[74] See Agricultural Safety, Nat'l Inst. for Occupational Safety & Health, https://www.cdc.gov/niosh/topics/aginjury/default.html [https://perma.cc/9SSW-P7M4] (last visited Aug. 19, 2019) ("Agriculture ranks among the most hazardous industries. Farmers are at very high risk for fatal and nonfatal injuries; and farming is one of the few industries in which family members (who often share the work and live on the premises) are also at risk for fatal and nonfatal injuries.").

[75] Nixon, supra note 9, at 276.

[76] Lauren Berlant poses the difficult question: "What does it mean for thinking about the ethics of longevity when, in an unequal health system, the poor and less poor are less likely to live long enough to enjoy the good life whose promise is a fantasy bribe that justifies so much exploitation?" Berlant, Slow Death, supra note 18, at 764–65.

family members. Here, my aim is to place border detentions on a spectrum of family separation harms. I want to suggest that a variety of laws governing admissions, enforcement, adjustment of status, and remittances leave noncitizens waiting, marooned, left out, and helpless to be united with their family members. The precise nature of the family separation varies across these contexts but what connects these examples is the ordinariness of the violence that migrants experience. Moreover, it is the ordinary nature of the suffering experienced by these migrants that obfuscates how these harms differ from those at the border in degree and not in kind.

a. Waiting (Admissions)

In the immigration context, admissions refer to all instances in which a noncitizen effectuates an entry into the United States after inspection at a port of entry.[77] This covers those instances in which a noncitizen seeks admission permanently (like for a green card) or temporarily (like as a tourist or a student). Both contexts permit a significant degree of family separation.

The story of permanent admissions begins with the Hart-Celler Act. As students and scholars of immigration law know, the Hart-Celler Act of 1965 reshaped our immigration admissions system. While white migrants had long enjoyed the right to sponsor and travel with spouses and children, migrants of color, especially from Asia, enjoyed no comparable right.[78] The Hart-Celler Act, which amended the federal immigration code, was passed by the same Congress and signed into law by the same President that had created legislative monuments of egalitarianism, such as the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act.[79] The 1965 amendments, likewise, attempted to reorient immigration law around principles of equity by expanding the family reunification principle to make it broadly applicable no matter one's national origin---to make universal

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[77] Noncitizens who do not effectuate an entry are referred to as those who have "entered without inspection" (EWIs).

[78] See Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America (2004).

[79] See Aristide R. Zolberg, A Nation by Design: Immigration Policy in the Fashioning of America 333-34 (2006).

what had been reserved for the few.[80] For decades, residents of large swaths of countries across the world, but especially from Asia, were denied the opportunity to seek formal migration opportunities to the United States. The Hart-Celler Act changed this by allocating to each country the same number of visas.[81]

To implement this set of reforms, Congress expanded the existing immigration architecture, which was grounded in a system driven by sponsorship choices. Unlike other countries that require would-be migrants to apply directly to state agencies, in the American context most migration opportunities begin with a citizen or sometimes a lawful permanent resident submitting a petition on behalf of the intended beneficiary.[82] Typically, petitioners can sponsor only those with a qualifying familial relationship.[83] The system is supposed to work so that beneficiaries who qualify as "immediate relatives"---spouses, children, and parents[84]---gain the most preferential treatment. Congress did not create a cap on these types of immigrant visas, so in theory, these beneficiaries can always gain admission.[85] Beneficiaries who qualify on the basis of other familial relationships--e.g., adult sons, daughters, or siblings of citizens---must contend with a limited

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[80] See, e.g., Gabriel J. Chin & Rose Cuison Villazor, Introduction, *in* The Immigration and Nationality Act of 1965: Legislating a New America 1, 1 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015) (explaining that the "principal consequence" of the Immigration and Nationality Act of 1965 was "ending formal discrimination in immigration law").

[81] See Hart-Cellar Act, Pub. L. No. 89-236, 79 Stat. 911, 911 (1965).

[82] See Alan Hyde, The Law and Economics of Family Unification, 28 Geo. Immigr. L.J. 355, 359-60 (2014) ("About two-thirds of lawful immigration to the United States is authorized because of the immigrant's relation to a U.S. citizen or lawful permanent resident."); see also 8 U.S.C. § 1154(a)(1)(A)(i) (2012) ("[Subject to certain exceptions,] any citizen of the United States claiming that an alien is entitled to classification by reason of a relationship . . . or to an immediate relative status . . . may file a petition with the Attorney General for such classification.").

[83] See 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(a) (classifying "immediate relatives" as aliens not subject to direct numerical limitations and detailing the procedure for filing a petition).

[84] See id § 1151(b)(2)(A)(i).

[85] Like all those who seek admission, whether on a permanent or temporary basis, "immediate relative" visa holders can still be excluded from the United States on the basis of inadmissibility or deportability. See id. §§ 1182, 1227 (admissibility and deportability); see also Kerry v. Din, 135 S. Ct. 2128, 2131 (2015) (explaining that a consular office may deny the visa of an "immediate relative" on inadmissibility grounds).

supply of visas that is doled out yearly on the basis of petition date.[86] Our admissions rules can facilitate family separation either because there aren't enough migration opportunities or because family members are seen as dangerous.

The system seems fair enough. As with other government-created benefits, immigrant visas come in limited supply, which means that a certain degree of family separation is inevitable. But the experience of being separated from one's family members does not fall evenly across the pool of petitioners and applicants, which was the point of the reforms in the first place. Among the many goals that President Lyndon Johnson hoped the Hart--Celler Act would realize was the end to arbitrary family separation. In his signing statement, President Johnson noted:

> Under [the previous] system the ability of new immigrants to come to America depended upon the country of their birth. Only 3 countries were allowed to supply 70 percent of all the immigrants. *Families were kept apart because a husband or a wife or a child had been born in the wrong place*.[87]

This equality narrative links the origin story of our admissions system to the civil rights era of lawmaking. But in setting aside the same number of visas for each country, the immigration code left very little room to account for the unequal demand for visas across countries. While the reordering of admissions opportunities certainly had a "liberating" effect on migration from Europe and especially from Asia,[88] the 1965 amendments stifled and significantly curtailed migration opportunities for those seeking admission from Central and South American countries and especially from Mexico.[89] The year before the Hart--Celler Act, Congress terminated the Bracero Program, which had provided significant formal (albeit temporary) opportunities for Mexican workers to enter and leave

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[86] See 8 U.S.C. §§ 1151(a)(1), 1153(a).

[87] President Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill, LBJ Presidential Library (Oct. 3, 1965), http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/lbj-on-immigration [https://perma.cc/J5R3-7SFH] (emphasis added).

[88] See Ngai, supra note 78, at 262--63.

[89] See id. at 263; see also Zolberg, supra note 79, at 334--35.

the United States.[90] The combined elimination of temporary admissions opportunities and consolidation of permanent admissions opportunities into family-based channels contributed to, if not directly caused, the first major flow of illegal or unauthorized migration into the United States from Mexico.[91]

Fast-forwarding half a century brings us to our present admissions system, one defined by long wait times for family-based petitions. While hundreds of thousands of migrants are eligible for some family-based immigrant visa, wait times can extend for years and sometimes decades.[92] The supply of available immigrant visas rarely meets the public's demand. In this regard, visas resemble other publicly created goods of limited quantity, such as admission to a magnet high school or a public university or a government contract for goods or services. But students and contractors who miss out on the opportunity to secure those goods often move on with their lives and seek opportunities elsewhere---at other schools or with other economic partners. The nature of immigration makes it harder for visa applicants to move on. The *reason* a migrant seeks admission to the United States is often because of a pre-existing familial relationship, which simply isn't as easily replaceable as other public goods.[93] While common perceptions of immigration can paint migrants as simply seeking out economic opportunities, this reductive and stripped down view of migration gets complicated when

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[90] See Kitty Calavita, Inside the State: The Bracero Program, Immigration, and the I.N.S. 141--42 (John Brigham & Christine B. Harrington eds., 2010).

[91] See Muzaffar Chishti, Faye Hipsman & Isabel Ball, Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States, Migration Policy Inst. (Oct. 15, 2015), https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states [https://perma.cc/Q8SN-45U4].

[92] See Madeleine Sumption & Claire Bergeron, Migration Policy Inst., Remaking the U.S. Green Card System: Legal Immigration Under the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, at 6 (2013), https://www.migrationpolicy.org/sites/default/files/publications/CIRbrief-LegalFlows%5B1%5D.pdf [https://perma.cc/5RDD-ZZVD] ("Waiting times exceed a decade for all sibling applicants and two decades for applicants from the Philippines.").

[93] Migrants seeking admissions into the United States might not have family members here or might have family members across many developed nations. In those instances, an immigrant visa to the United States might be seen as interchangeable with similar admission opportunities in other destinations.

reintroducing the emotional elements of familial relationships that provide the context for a migrant's search for work. In many instances, family provides the impetus,[94] the means,[95] and the reward[96] for seeking admission into the United States. And extended wait-times can keep families apart.

Even where visas are available, as is the case with citizens seeking to sponsor "immediate relatives," petitioners still face the possibility of separation when a particular petition touches upon national security concerns. Recently, the Supreme Court has been forced to revisit whether and how much the Constitution protects familial relationships when a government officials denies an immediate relative application with the barest of assertions that the case triggers national security concerns.[97] Fauzia Din, a U.S. citizen, married her husband, Kanishka Berashk, who is a citizen of Afghanistan.[98] When the State Department denied her husband's visa application with little explanation, she argued to the Supreme Court that this denial violated her right to due process.[99] While Din lost before the Court---five Justices concluded that she received all the process that she was due under the Constitution---the various opinions laid bare the anxieties related affirming the full range of marital rights for citizens married to noncitizens.

Justice Scalia wrote on behalf of himself, Chief Justice Roberts, and Justice Thomas, concluding that Din simply had no right that was protectable under the due process clause.[100] By contrast, Justice Kennedy concurred on behalf of himself and Justice Alito but without reaching a conclusion as to whether Din's right to be

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[94] See Joanna Dreby, Divided by Borders: Mexican Migrants and Their Children 203 (2010) (explaining that parents in Mexico "weigh the costs and benefits of migration" and choose to leave their children behind in order to "move to a place where they can earn more for their labor").

[95] See Hyde, supra note 82, at 359--60 ("Together, the immediate relatives and those admitted in the family preference categories make up about 65% of lawful migration to the United States.").

[96] See Kerry Abrams, The Rights of Marriage: *Obergefell*, *Din*, and the Future of Constitutional Family Law, 103 Cornell L. Rev. 501, 511--14 (2018) (describing Fauzia Din's efforts to gain admission for her husband in order to enjoy "the companionship of [her] spouse").

[97] See, e.g., Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018) (noting that the Court's "inquiry into matters of entry and national security is highly constrained").

[98] Kerry v. Din, 135 S. Ct. 2128, 2131 (2015).

[99] Id.

[100] Id. at 2138 (plurality opinion) (Scalia, J.).

with her noncitizen spouse was a protectable interest. Instead, he affirmed the denial of the visa application on the grounds that the process Din received was sufficient for due process purposes--that is, a bare assertion by the State Department denying the petition was all that the due process clause demanded on those facts.[101] In dissent, Justice Breyer, writing on behalf of himself and Justices Ginsburg, Sotomayor, and Kagan, would have held that Din both possessed a protectable interest in being with her spouse in the United States and was entitled to greater process than what she received.[102] On the question of whether being with one's spouse amounted to a protectable interest, no opinion garnered a majority of the Court.

Din illustrates how longstanding doctrines of deference continue to permit family separation even for the most-favored status of migrant, namely the spouses of U.S. citizens. Put differently, *Din* suggests that family reunification is at best a subconstitutional principle that offers a limited degree of certainty even to U.S. citizens.[103] As a point of comparison, consider *Klenidienst v. Mandel*, on which the *Din* Court relief. In *Mandel*, a Marxist scholar was denied admission into the United States to participate in an academic debate.[104] While the Court upheld this denial, it recognized that the U.S. citizen academics had an associational interest in engaging with Mandel. Only four justices in *Din* found that marriage entailed a constitutionally-protected interest to be with one's spouse. Moreover, *Mandel* considered whether technological innovations like the telephone might serve as a substitute to protect the interests of the professors who wished to participate in the event with Professor Mandel. The Supreme Court rejected this argument, recognizing that "technological developments" could not replace the experience of actually being in someone's physical presence.[105] Meanwhile, during the pendency

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[101] Id. at 2139 (Kennedy, J., concurring in the judgment).

[102] Id. at 2141--42 (Breyer, J., dissenting).

[103] See Kerry Abrams, Family Reunification and the Security State, 32 Constitutional Commentary 247 (2017); Kerry Abrams, The Rights of Marriage: *Obergefell*, *Din*, and the Future of Constitutional Family Law, 103 Cornell L Rev 501 (2018).

[104] 408 U.S. 753, 756--57 (1972).

[105] See id. at 765.

of her case, Din reported staying in touch with phone cards,[106] which was the only way she could maintain her connection given her fear of visiting her husband in Afghanistan.[107]

Family separation principles also circumscribe temporary admissions, although in a less obvious way. In the context of transnational families, temporary visas offer an important legal device for allowing loved ones to share important life-defining events for periods of time. Family separation is one of the consequences of the travel ban, which restricted the ability of migrants from several countries to enter the United States because those countries failed to utilize sufficiently demanding screening procedures.[108] In *Trump v. Hawaii*, the President argued that these screening deficiencies meant that migrants from those countries---almost all of which are predominantly Muslim---posed a threat to national security.[109]

The Supreme Court ultimately upheld the substance of the travel ban, focusing much of its analysis on the authority of the Executive to set policy to effectuate national security goals.[110] Here again, an important consequence of the travel ban was to thwart the ability of American citizens and residents to connect with relatives in the affected countries. A whole host of life-defining events including the birth of a child, a wedding, a graduation, or the death of an elder might prompt someone---a citizen or a green card holder---to seek the company or comfort of an overseas relative, which the travel ban categorically prohibits in most

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[106] See Monica Campbell, Why One Woman's Fight to Be with Her Husband Wound Up at the Supreme Court, PRI (Mar. 12, 2015), https://www.pri.org/stories/2015-03-12/why-one-womans-fight-be-her-husband-wound-supreme-court [https://perma.cc/5BBV-EDA9].

[107] See id.

[108] On January 27, 2017, President Trump issued an initial executive order prohibiting the admission of migrants from predominantly Muslim countries. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). As that executive order was being challenged, President Trump issued a substantially similar order modifying the travel ban. See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). The President's word on the ban came on September 24, 2017. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

[109] See 138 S. Ct. 2392, 2403, 2417 (2018).

[110] See id. at 2418--23 (noting that "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments'" and concluding that "the Government [had] set forth a sufficient national security justification to survive rational basis review" (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977))).

cases.[111] A part of the imagined good life involves celebrating or mourning significant moments with one's affinity community. But for those with loved ones in Libya, Syria, or any of the other affected countries, the travel ban serves as a reminder that the "good life" has long been, almost by definition, a fantasy that excluded Muslims.[112]

The example of the travel ban once again illustrates how the Court's deferential attitude toward the political branches has exacerbated problems of family separation even in fairly routine admissions contexts. The test that the Court used in *Trump v. Hawaii* to evaluate the constitutionality of the travel ban derives from a long line of cases in which the Court has exhibited reluctance in overturning the admissions decisions made by immigration officials.[113] Specifically, the Court explained that when an immigration official provides a "facially legitimate and bona fide reason" courts will not second-guess the motivations of the executive branch.[114] As is the case for judicial review under a "rational basis" test, ambiguities get resolved in favor of the executive branch. Unlike the rational basis test, which has been used in certain instances to invalidate laws motivated by animus,[115] the outcome in *Trump v. Hawaii* reaffirms the suspicion that the "facially legitimate" test functions more as a rubberstamp than as a meaningful check on arbitrary decisionmaking or executive overreach even with significant evidence of anti-immigrant sentiment.

The Court has also exhibited a willingness to defer to the executive outside of the national security context. Consider again the challenge of backlogs. These backlogs can pose specific problems for child beneficiaries of these immigration

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[111] This is an argument I develop with other law professors in an amicus brief for that case. See generally Brief of Amici Curiae Immigration, Family, and Constitutional Law Professors in Support of Respondents, *Hawaii*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 1585891.

[112] More to the point, in the modern United States, the travel ban means that anti-Muslim sentiment doesn't appear only as hot flashes of violence like hate crimes but also in the quieter moments of living and dying. See Edward W. Said, Orientialism 1 (1978) ("The Orient was almost a European invention, and has been since antiquity a place of romance, exotic beings, haunting memories and landscapes, remarkable experiences.").

[113] See *Hawaii*, 138 S. Ct. at 2218--20.

[114] See id. at 2419 (quoting Kleindienst v. Mandel, 408 U.S. 753, 769 (1972)).

[115] See Susannah W. Pollvogt, Unconstitutional Animus, 81 Fordham L Rev 887 (2012).

opportunities. Certain immigration opportunities are reserved for "children," defined by the immigration code as those who are under twenty-one years of age.[116] Because the admissions process can take so long, children who are eligible for a visa at the start of the process (i.e., are under twenty-one years of age) may not be at the end of the process once a visa actually becomes available. Congress addressed this problem with the Child Status Protection Act (CSPA).[117] In cosponsoring the bill that eventually became the CSPA, Congresswoman Sheila Jackson Lee explained that the bill "supports the underlying premise of the immigration policy in this country, which is a reunification of families."[118]

Ambiguities in statutory text have forced advocates, agencies, and the courts to embrace competing interpretations of these provisions all the while negotiating the contours of doctrines of deference such as those lodged in *Chevron*.[119] This issue arose a few years ago in *Scialabba v. Cuellar de Osorio*, which wrestled with key provisions in the CSPA.[120] The immigration code allows citizens (petitioners) to sponsor a noncitizen family member (principal beneficiary).[121] If those beneficiaries have a child, then the child is also eligible for a visa as a derivative beneficiary.[122] Because the visa process can take years, timing matters. A two-year-old might have been eligible for a derivative beneficiary visa when the initial petition was filed but be twenty-two once the visa finally becomes available thus aging out of the visa process. This aging-out problem thus forces the question of whether that twenty-two-year-old must start the process all over again because of the realities of time. The CSPA tries to solve this problem by requiring that in those scenarios "the alien's petition shall automatically be converted to the appropriate

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[116] See 8 U.S.C. § 1101(b)(1) (2012).

[117] See Child Status Protection Act, Pub. L. No. 107-208, § 2, 116 Stat. 927, 927 (2002) (codified as amended in scattered sections of 11 U.S.C.) (providing that the age requirement determination would be made using "the age of the alien on the date on which the petition is filed").

[118] H.R. Rep. No. 107-45, at 12 (2001) (statement of Rep. Jackson).

[119] See generally Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842--45 (1984).

[120] Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014).

[121] See 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a)(1)--(4), 1154(a).

[122] See id. §§ 1153(d), 1153(h)(2).

category and the alien shall retain the original priority date issued upon receipt of the original petition."[123]

The *Cuellar de Osorio* decision reviewed a rule articulated by immigration officials in a prior agency decision, *Matter of Wang*,[124] which interpreted the CSPA.[125] The key provision appears to create two interconnected benefits for the "aged-out" population.[126] One is that petitions can seamlessly jump tracks if the would-be beneficiary lost eligibility as a child over time. This is the clause requiring that the petition "automatically" shift to the "appropriate category."[127] A second is that the noncitizen does not have to get back into line as she awaits a visa under this new category. This is the "shall retain the original priority date" clause.[128]

Cuellar de Osorio's precise holding is that the agency's interpretation of the immigration code's automatic conversion provision was entitled to deference under the *Chevron* doctrine.[129] But as a "slow death" decision, the case also illustrates how time functions as a public good, which can be maldistributed in nonobvious ways that harm immigrants. Writing for the plurality of the Court, Justice Kagan noted the role of time in the immigration process:

> All of this takes time---and often a lot of it. At the front end, many months may go by before USCIS approves the initial sponsoring petition. On the back end, several additional months may elapse while a consular official considers the alien's visa application and schedules an interview. And the middle is the worst. After a sponsoring petition is approved but before a visa application can be filed, a family-sponsored immigrant may stand in line for years---or even decades---just waiting for an immigrant

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[123] Id. § 1153(h)(3).
[124] 25 I & N Dec. 28 (2009).
[125] *Cuellar de Osorio*, 134 S. Ct. at 2201.
[126] Id. at 2213 (noting that § 1153(h)(3) is "self-contradictory").
[127] 8 U.S.C. § 1153(h)(3).
[128] Id.
[129] See *Cuellar de Osorio*, 134 S. Ct. at 2213 ("This is the kind of case *Chevron* was built for.").

> visa to become available. . . . And as the years tick by, young people grow up, and thereby endanger their immigration status.[130]

The reasoning in Justice Kagan's plurality illustrates the subjectivity and competing social meanings that judges can attribute to time in this context. For Justice Kagan, at heart, the purpose of the CSPA was to "prevent an alien from 'aging out' because of---but only because of---bureaucratic delays: the time Government officials spend reviewing (or getting around to reviewing) paperwork at what we have called the front and back ends of the immigration process."[131] By contrast, time that an immigrant spends waiting for a visa to finally become available "is a day he grows older, under the immigration laws no less than in life."[132]

Equally telling was the Board's characterization of aging out as a "natural consequence" of the admission process.[133] Again, a hallmark of slow death is the obfuscation of structural context. And because time functions, not just as an objective phenomenon but also as the reflection of political compromises,[134] telling the story of the CSPA in terms of the "natural" phenomenon of growing older minimizes the role that judges play in interpreting and giving content to legal provisions born of political compromises. In her dissent, Justice Sotomayor zeroed in precisely on the constructed nature of the CSPA's time provisions:

> Congress could have required aged-out children like Ruth Uy to lose their place in line and wait many additional years (or even decades) before being reunited with their parents, or it could have enabled such immigrants to retain their place in line—albeit at the cost of extending the wait for other immigrants by some shorter amount. Whatever one

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[130] Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2199 (2014).

[131] Id. at 2201.

[132] Id.

[133] Wang, 25 I & N Dec. 28, 38 (2009).

[134] See Elizabeth F. Cohen, The Political Value of Time: Citizenship, Duration, and Democratic Justice 103 (2018).

> might think of the policy arguments on each side, however, this much is clear: Congress made a *choice*.[135]

Justice Sotomayor's dissent is a lucid statement of the trade-offs Congress wrestled with and ultimately resolved (in her mind at least) in favor of family reunification. It also illustrates how the Court can minimize or obfuscate its role in exacerbating the separation of transnational families. A majority of the Court effectively reduced the categories of derivative beneficiaries who might qualify for the automatic conversion of a visa application, with prolonged separation as the predictable result. And the Board of Immigration Appeal's rule derives from an organic statute that was amended to eliminate or at least minimize family separation for arbitrary reasons.

b. Marooned (Enforcement)

Limited opportunities for formal admission often mean that migrants have entered the United States or overstayed their visas without authorization, subjecting them to a sprawling immigration enforcement apparatus. Enforcement policies, then, work in tandem with limited admissions opportunities to also break apart immigrant families that have formed ties within the United States. The most obvious example is deportation, which make it difficult if not impossible for family members to visit those who have been expelled from the United States. Deportation-related policies such as mandatory detention also disrupt families by severely constraining the ability of family members to visit and spent time with detained populations. Again, these are obvious examples of the family reunification principle giving way to broader societal goals such as deterring unauthorized migration. A persistent critique of these policies has been their cruelty, the overly broad and unnecessarily harsh nature of detained and deporting with virtually no opportunity to obtain relief from these sanctions. Of course, when one family member gets deported, family members can follow them back to sending countries and some do. My point is that a part of the cruelty and harshness stems from

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[135] Id. at 2228 (Sotomayor, J., dissenting) (emphasis added).

uprooting family members from a place where a family has strong community ties, which is often the case with parents of U.S.-born children.[136]

Enforcement policies create problems of family separation in other less obvious ways. These types of family separation concern the ability of migrants in the United States to connect and reunite with loved ones left behind in sending countries. A significant literature has documented that many migrants have no intention to permanently settle in the United States. Rather, their preferred relationship to the United States is one of circular migration.[137] Enforcement policies disrupt this in a migration stream that runs within the context of transnational families.[138] Today, for a variety of reasons, migrants live within transnational families---that is, "families in which members of the nuclear unit (mother, father, and children) live in two different countries."[139] The separation of families across national boundaries is often (though not always) on account of parents leaving behind children.[140] And once these migrants are in the United

[136] See Dreby, U.S. Immigration Policy, supra note 140, at 245 ("In the United States, the government has forcibly removed a record high of 1.06 million immigrants from this country, nearly 400,000 each year since 2009, many of whom are the parents of U.S. born citizen children." (citations omitted)). Generally speaking, deportation has contributed to disrupting all sorts of familial relationships. See Leisy J. Abrego, Sacrificing Families: Navigating Laws, Labor, and Love Across Borders 7--9 (2014) (noting that deportation---and the fear of deportation---has "devastating consequences for families and entire communities").

[137] See, e.g., Jenna Nobles, Luis Rubalcava & Graciela Teruel, After Spouses Depart: Emotional Wellbeing Among Nonmigrant Mexican Mothers, 132 Soc. Sci. & Med. 236, 237 (2015) ("The circular flows between Mexico and the United States are large and well-studied.").

[138] Id. (noting that the absence of migrant family members is "decreasingly 'temporary'" due to "mounting physical and political barriers to border-crossing" which prolong family separation).

[139] Joanna Dreby, Honor and Virtue: Mexican Parenting in the Transnational Context, 20 Gender & Soc'y 32, 33 (2006) [hereinafter Dreby, Honor and Virtue].

[140] See Joanna Dreby, U.S. Immigration Policy and Family Separation: The Consequences for Children's Well-Being, 132 Soc. Sci. & Med. 245, 246 (2015) [hereinafter Dreby, U.S. Immigration Policy] (noting that "parent--child separations are fairly typical during international migration"); see also Michaella Vanore, Valentina Mazzucato & Melissa Siegel, 'Left Behind' but Not Left Alone: Parental Migration & the Psychosocial Health of Children in Moldova, 132 Soc. Sci. & Med. 252, 252 (2015) (noting that an estimated "31 percent of all children aged 0--14" in Moldova "had one or both parents abroad"). The reasons for separation are usually (though again not always) for the purposes of seeking out economic opportunities to support family members. See Dreby &

States, border enforcement policies raise the costs of leaving and returning across the border, leaving migrants effectively marooned in the United States.[141]

Let's start with the interior. The last several decades have shown that interior enforcement strategies have not significantly decreased the unauthorized immigrant population.[142] These limited opportunities have also contributed to the pool of unauthorized migrants, which recent estimates place at roughly 10.5 million.[143] Because of resource constraints, most of these migrants fly under the

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Adkins, supra note **Error! Bookmark not defined.**, at 171 ("Like children whose parents migrate for work, parents in transnational families often leave their children in order to better provide for them economically."); see also Ester Hernandez & Susan Bibler Coutin, Remitting Subjects: Migrants, Money and States, 35 Econ. & Soc'y 185, 202--03 (2006) (noting the "worldwide growth in remittances," which has been "made possible by a lack of opportunities in [migrants'] home countr[ies]").

[141] More than thirty years ago, the federal government began expressly incorporating deterrence rationales into enforcement policies, and while regulatory strategies have become more punitive over the years, very little suggests that these policies have done much to deter unauthorized migration into the country. See generally Zolberg, supra note 79, at 382--431 ("While a number of anti-immigration measures were enacted at the state and federal levels, none of them substantially reduced either the legal or the illegal flow, and as the twentieth century approached its close, the wave rolled on, largely undisturbed.").

[142] The primary impact of more than three decades of workplace enforcement policies have not pushed immigrants out of the country so much as they have pushed them out of the formal economy and into the informal one. See infra notes 145--154 and accompanying text; see also Hernan Ramirez & Pierrette Hondagneu-Sotelo, Mexican Immigrant Gardeners: Entrepreneurs or Exploited Workers?, 56 Soc. Probs. 70, 70 (2009) ("Concentrated numbers of Latin[x] immigrant workers are now working in unregulated, informal economy jobs in U.S. suburbs and cities." (citation omitted)). Whether employers pay workers through the modern economic machinery of banking and automatic payments or through the premodern vestiges of a cash economy, immigrants continue to plant roots in the United States and engage in productive behavior. See, e.g., id. ("Throughout the twentieth century and into the present era, Latin[x], and particularly Mexican immigrant gardeners, have transformed the landscape of Los Angeles, enabling the lush, leafy, suburban visual character of the city and surrounding areas.").

[143] See Jens Manuel Krogstad, Jeffrey S. Passel & D'Vera Cohn, 5 Facts About Illegal Immigration in the U.S., Pew Research Ctr. (June 12, 2019), http://www.pewresearch.org/fact-tank/2018/11/28/5-facts-about-illegal-immigration-in-the-u-s/ [https://perma.cc/H9FN-8AWB]. This includes both those migrants who were admitted and inspected at a port of entry and who overstayed their visas as well as those who crossed the border surreptitiously. The population of migrants who are removable includes migrants in this pool as well as those with some form of

radar living and working in the United States without authorization. The impact of this law has not been to compel migrants to leave but simply to generate suffering within the interior of the United States.[144]

The informal and tenuous nature of work is critical to understanding the slowly violent nature of migrant experiences in the United States.[145] Since 1986, federal immigration laws have regulated access to formal workplace opportunities.[146] Across presidential administrations, immigration officials have alternated between deploying audits of business records or "silent raids," which penalized employers for failing to keep their paperwork in order (as officials did during the Obama administration)[147] and rounding up workers en masse for

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lawful status but who committed some kind of postentry conduct (like criminal activity) rendering them removable.

[144] The Pew Research Center did note that the unauthorized population has declined since its peak at 12.2 million in 2007. Id. But even with this decline, the unauthorized population has shown remarkable consistency over the last ten years. See id. (finding that the number of unauthorized immigrants in the United States had declined from 12.2 million in 2007 to 10.5 million in 2017).

[145] By "informal," I mean work for which employers do not create a transactional record on hours worked, taxes withheld, and wages dispersed. Almost a quarter-century ago, Saskia Sassen explored the close and indelible relationship between the informal economy and immigrants, and in doing so, she highlights the important role that economic structures play in fostering such economic activity. She observed: "Although immigrants, insofar as they tend to form communities, may be in a favorable position to seize the opportunities presented by informalization, immigrants do not necessarily *create* such opportunities. Instead, the opportunities may well be a structured outcome of the composition of advanced economies." Saskia Sassen, The Informal Economy: Between New Developments and Old Regulations, 103 Yale L.J. 2289, 2990 (1994).

[146] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1101 (2012)); see also Muzaffar Chishti, Doris Meissner & Claire Bergeron, At Its 25th Anniversary, IRCA's Legacy Lives On, Migration Policy Inst. (Nov. 16, 2011), https://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives [https://perma.cc/U25T-7JW7] (noting that the IRCA "establish[ed], for the first time, federal civil and criminal penalties for employers who knowingly hired unauthorized immigrants").

[147] See Julia Preston, Illegal Workers Swept from Jobs in 'Silent Raids,' N.Y. Times (July 9, 2010), https://www.nytimes.com/2010/07/10/us/10enforce.html [https://perma.cc/WLG8-ARNU] (describing the Obama Administration's practice of "scour[ing] companies' records for illegal immigrant workers" and conducting "silent raids").

deportation, which punished the migrants themselves for working in defiance of the immigration code (as officials have done under the Bush and Trump administrations).[148] But whether immigration officials enter workplaces announcing an audit or wielding a warrant, their broader impact has been to remove migrants from employer records, not out of the country.

When regulators announce a pending audit, employers have a chance to get their house in order by asking for workers to verify or re-verify their work authorization status. In many instances, workers without that authorization simply leave work or never show up.[149] But they typically don't leave the country. Even if a handful of employers get audited, resource[150] and political constraints[151] mean that thousands of other employers remain more or less active and willing to

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[148] See Natalie Kitroeff, Workplace Raids Signal Shifting Tactics in Immigration Fight, N.Y. Times (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/business/economy/immigration-raids.html [https://perma.cc/R7TH-EQHC] (discussing the notable "7-Eleven raids" of undocumented immigrants working in the well-known convenient store chain).

[149] See Leslie Berestein Rojas, More ICE Work Site Audits Underway in LA as Enforcement Steps Up, KPCC (Feb. 24, 2018), https://www.scpr.org/news/2018/02/24/81065/more-ice-work-site-audits-underway-in-la-as-enforc/ [https://perma.cc/R7BQ-QBM6] ("[A]dvocates say the visits led to some immigrants walking away from their jobs. Fearful they could be arrested, they don't show up to work, essentially firing themselves.").

[150] During the Obama Administration, the DHS claimed it had enough resources to remove no more than 400,000 immigrants in any given year, a figure it met with some regularity. See Texas v. United States, 809 F.3d 134, 188 (5th Cir. 2015) (King, J., dissenting) ("[F]or the last several years Congress has provided the Department of Homeland Security (DHS) with only enough resources to remove approximately 400,000 of those aliens per year."); Stef W. Kight & Alayna Treene, Trump Isn't Matching Obama Deportation Numbers, Axios (June 21, 2019), https://www.axios.com/immigration-ice-deportation-trump-obama-a72a0a44-540d-46bc-a671-cd65cf72f4b1.html [https://perma.cc/DDU8-EJGR] ("[T]otal ICE deportations were above 385,000 each year in fiscal years 2009-2011, and hit a high of 409,849 in fiscal 2012."). In 2017, the first year of the Trump presidency, the DHS claims to have removed 226,119 illegal aliens. See By the Numbers FY 2017, ICE (2017), https://www.ice.gov/sites/default/files/documents/Document/2017/iceByTheNumbersFY17Infographic.pdf [https://perma.cc/8GPP-LPZ7].

[151] See Walter J. Nicholls, The DREAMers: How the Undocumented Youth Movement Transformed the Immigrant Rights Debate 147--49 (2013) (describing the rise of political resistance to local government enforcement of immigration law).

hire that same worker.[152] This is how a line cook at a national food chain like Chipotle ends up working in the back of the house at a smaller "mom and pop" store.[153] This is also how that line cook is forced to swap a clear path toward management for a more precarious set of workplace protections.[154] Thus, the primary consequence of focusing immigration enforcement resources into the workplace has been simply to change *the type* of work that immigrants can do.

Border enforcement strategies exacerbate this dynamic. The cruelty that surrounds the Trump administration's zero tolerance policy fits within a broader set of border enforcement policies. In some ways, it is remarkable that advocates secured a victory against the zero tolerance policy because the rule is that even broad delegations of power to the President and agencies at the border are upheld by courts. By way of example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) empowers the Secretary of Homeland Security to build a physical barrier at or near the U.S. border. Ordinarily, as a matter of environmental policy, when an agency wants to take action, it must first

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[152] Moreover, while immigration laws prohibit the hiring of unauthorized migrants, that prohibition becomes murkier and less certain when applied to informal employment relationships, such as those involved in independent contract work. See Michael Mastman, Note, Undocumented Entrepreneurs: Are Business Owners "Employees" Under the Immigration Laws?, 12 N.Y.U. J. Legis. & Pub. Pol'y 225, 228 (2008) (observing the difficulty of determining whether immigrant business owners are "hired for employment" under federal law).

[153] See Steve Raabe, Chipotle Reluctantly in Spotlight as Immigration Investigators Increase Their Focus on Employers, Denv. Post (May 6, 2011), https://www.denverpost.com/2011/05/06/chipotle-reluctantly-in-spotlight-as-immigration-investigators-increase-their-focus-on-employers/ [https://perma.cc/BL83-YCQ2] (last updated May 3, 2016) (reporting that in the wake of federal investigations into Minnesota-area Chipotle restaurants, "450 workers were either fired or never returned to work after being asked to submit new verification").

[154] See Ruth Gomberg-Muñoz, Labor and Legality: An Ethnography of a Mexican Immigrant Network 69 (2011) (quoting from an interview with an undocumented worker who says that "[i]t's just the whole point that you have no papers and they can fire you at any minute"); Shannon Gleeson, Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making, 35 L. & Soc. Inquiry 561, 581--86 (2010) (discussing interviews with undocumented workers who describe constant fear of management and frequent difficulty obtaining privileges normally available to employees).

assess any potential environmental consequences of that proposed action.[155] But this process allows the DHS to opt-out of this process.[156] Section 102 of IIRIRA empowers the Homeland Security Secretary "to waive all legal requirements" that are deemed "necessary to ensure expeditious construction" in the Secretary's "sole discretion."[157] This is precisely what the DHS did in September 2017, when it began identifying stretches of land covering the U.S.-Mexico border for infrastructural improvement.[158] Environmental protection groups challenged the agency's use of this waiver and lost on appeal in the Ninth Circuit. This both reflects the idea that it is perfectly constitutional for Congress to delegate broad authority to unelected officials in making policy[159] and also evinces the reality that the federal government's power to regulate migration is at its zenith at the border and ports of entry—which may be why federal officials felt so confident that its zero tolerance policy would withstand challenge and experienced surprise when it was invalidated. The counterexample of the construction of a barrier at the border also tends to affirm the power that the family separation frame offers given that it is one of the few times a judicial challenge was able to defeat executive prerogative in this context.

Indeed, border enforcement is one area where the political branches have found a consistent degree of agreement. Congress and the President have steadily poured resources into border enforcement policy with the hopes of deterring

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155. *See* 40 C.F.R. §§ 1508.1–.28 (2017) (detailing the procedures of the National Environmental Policy Act).

156. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 102(a), 110 Stat. 3009, 3654–65 (1996) (granting the waiver of certain environmental protection provisions to ensure timely construction of infrastructure at the border).

157 See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 102(c)(1).

158. *See* Executive Order 13,767, 82 Fed Reg 8793, 8793-94 (Jan. 25, 2017). See also Press Release, Dep't of Homeland Sec., DHS Issues Waiver to Expedite Border Construction Projects in San Diego Area (Aug. 1, 2017) ("The Department of Homeland Security has issued a waiver to waive certain laws, regulations and other legal requirements to ensure the expeditious construction of barriers and roads in the vicinity of the international border near San Diego.")

159. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) (stating that so long as there is an "intelligible principle" behind the transfer or delegation of power, then Congress can do so).

surreptitious entries and future unauthorized migration generally.[160] Thus, while circular migration remains the preference among unauthorized migrants, the intensification of border enforcement ultimately dissuades those migrants from returning to their home countries for fear of the costs associated with reentering the United States down the road.[161] Taken together, interior and border enforcement strategies work together to create oppressive conditions that achieve a degree of ordinariness in the lives of migrants.[162]

One response might be that these policies haven't been punitive enough. Some might argue that a knock at the door by the police, or for that matter, threats by landlords and other private actors to call ICE,[163] would do more to scare migrants out of the country than a letter from a government accountant.[164] Or as then Attorney General Sessions attempted to do, use zero tolerance enforcement policies as a deterrent to migrants from undertaking the journey in the first place thereby realizing the goals of compliance while avoiding the human costs that come with deportation once families have developed ties to the United States.

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[160] See Mariano-Florentino Cuéllar, The Political Economies of Immigration Law, 2 U.C. Irvine L. Rev. 1, 7 (2012) (describing how "the institutional realities of modern immigration law have served up a constant ratcheting up of border security resources").

[161] See id. at 72 ("[T]he border buildup appears to have dramatically changed migrants' willingness to attempt returning to Mexico as part of a pattern of circular migration.").

[162] See Jacqueline Hagan, Karl Eschbach & Nestor Rodriguez, U.S. Deportation Policy, Family Separation, and Circular Migration, 42 Int'l Migration Rev. 64, 82--85 (2008) (explaining the extreme disruption to family and economic life that deportation and family separation pose). As Berlant notes, ordinariness provides a breeding ground for slow death. See Berlant, Slow Death, supra note 1817, at 759.

[163] See K-Sue Park, Self-Deportation Nation, 132 Harv. L. Rev. 1878, 1919 1932--33 (2019) [hereinafter Park, Self-Deportation Nation] (explaining "self-deportation" policies, which encourage private citizens to behave hostilely to undocumented migrants to encourage them to leave the United States).

[164] Those making this argument might point to statistical data suggesting that while the unauthorized migrant population has remained mostly stable, there has been a slight but noticeable decline from its peak of 12.2 million in 2007. See Jeffrey S. Passel & D'Vera Cohn, U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade, Pew Research. Ctr. (Nov. 27, 2018), http://www.pewhispanic.org/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/ [https://perma.cc/Y5F9-Y8UR].

From this perspective, the solution is a matter of wattage: Increase the energy we pour into this endeavor, and a depletion of the migrant population will follow.

But increases in enforcement resources yield poor results for the regulatory goal of shrinking the pool of unauthorized migrants. The numbers suggest that the effort has been costly.[165] President Obama was labeled by some as the "deporter in chief" given the number of immigrants DHS removed under his leadership.[166] But despite the focused attention removal has received in the last ten years, the unauthorized population has declined only modestly.[167] All of this means that unauthorized migrants are stuck here. In most cases, they are unable to change or adjust their status through family-based petitions because of lengthy wait times. And their lives, while difficult, seem better compared to the possibility of leaving the United States without a meaningful way back.[168] Indeed, the value of a green

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[165] Am. Immigration Council, The Cost of Immigration Enforcement and Border Security 1--4 (May 2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf [https://perma.cc/U4T3-QFXA] (last visited Aug. 16, 2018) ("Since the creation of the Department of Homeland Security in 2003, the federal government has spent an estimated $324 billion on the agencies that carry out immigration enforcement.").

[166] See Muzaffar Chishti, Sarah Pierce & Jessica Bolter, The Obama Record on Deportations: Deporter in Chief or Not?, Migration Polic'y Inst. (Jan. 26, 2017), https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not [https://perma.cc/BD7E-B5BJ] (noting that critics within both the immigrants rights community and anti-immigration community were unhappy with President Obama's immigration policies).

[167] See Jeffrey S. Passel & D'Vera Cohn, Unauthorized Immigrant Population Stable for Half a Decade, Pew Research. Ctr. (Sept. 21, 2016), http://www.pewresearch.org/fact-tank/2016/09/21/unauthorized-immigrant-population-stable-for-half-a-decade/ [https://perma.cc/8NZP-RWYF] (noting that the unauthorized immigrant population has remained relatively constant in recent years). Another study suggested that the unauthorized migrant population in 2016 was estimated to be 16.7 million. See Mohammed M. Fazel-Zarandi, Jonathan S. Feinstein & Edward H. Kaplan, PLoS ONE, The Number of Undocumented Immigrants in the United States: Estimates Based on Demographic Modeling with Data from 1990 to 2016, PLos ONE, Sept. 21, 2018, at 1, 2 (2018). For skepticism on these finds, see Randy Capps, Julia Gelattl, Jennifer Van Hook & Michael Fix, PLoS ONE, Commentary on "The Number of Undocumented Immigrants in the United States: Estimates Based on Demographic Modeling with Data from 1990--2016," PLoS ONE, Sept. 21, 2018, at 1, 2 (2018).

[168] See Park, Self-Deportation Nation, supra note 163, at 1937 ("The more dangerous, economically difficult, and insupportable life elsewhere remains, the less likely people will be to

card for many migrants is often measured in terms of the freedom to move across boundaries.[169] Like those noncitizens subject to the travel ban, unauthorized migrants must routinely forego opportunities to reaffirm their affinity bonds with loved ones in their home countries.

In a world where families opt to have some members migrate to the United States to provide financial support for those left behind, U.S. enforcement strategies in the interior and at the border effectively prolong family separation. This is consistent with statistical data that suggests that the percentage of long-term residents within the pool of unauthorized migrants has steadily grown over the last 15 years.[170] Around sixty percent of the unauthorized population has resided in the United States for at least 10 years.[171] Thus, enforcement policies will continue to play an outsized influence in the lives of migrants so long as opportunities to regularize status remain scarce. In the meantime, long-term unauthorized residents will either continue waiting for a green card that is not yet available and perhaps never will be. Either way, these migrants neither have the opportunity to bring family members to the United States nor can afford the costs and dangers of visiting family in sending countries.[172]

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self-deport, and the more likely it is that the policy's effects will stop at its mechanism---subordination.").

[169] See Jennifer M. Chacón, Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions, 52 U.C. Davis L. Rev. 1, 29--33 (2018) ("Many respondents suggested that one of the most troubling dimensions of their unauthorized status was their inability to travel to their country of origin to visit family members or dying loved ones.").

[170] See Larger Share of Unauthorized Immigrants are Long-Term Residents, Pew Research Ctr. (Sept. 19, 2016), http://www.pewhispanic.org/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/ph_2016-09-20_unauthorized-04/ [https://perma.cc/8WAT-LHQV].

[171] See Bryan Baker, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2014, at 4 fig.4 (2017), https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202014_1.pdf [https://perma.cc/49TW-ZGNY]; Profile of the Unauthorized Population: United States, Migration Policy Inst., https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US [https://perma.cc/Q6YJ-Q4K7] (last visited Aug. 16, 2019).

[172] A similar dynamic operates in the domestic penological context. Family members of the incarcerated often live a great distance from prisons, creating obstacles and costs for families

Despite the increased allocation of resources into border enforcement, federal agencies have tried to accommodate limited forms of departure and re-entry in other, limited ways. The clearest example followed from the DACA program. DACA did not confer lawful status, offering instead temporary "de-priorization" statuses renewable on a two-year basis. This arrangement left DACA beneficiaries in a state of long-term uncertainty or liminality.[173] Many DACA beneficiaries, like other immigrants, have family members in sending countries but feared visiting them because of the potential consequence that doing so would mean being unable to return. To accommodate this concern, the United States Citizenship and Immigration Services (USCIS) permitted DACA beneficiaries to apply for advance parole, a sort of travel certificate allowing them to be admitted back into the United States despite their otherwise tenuous legal status.[174] USCIS considered applications and would grant them on a limited number of bases including for humanitarian reasons related to ailing or deceased family members.[175] While providing a tremendous benefit for DACA beneficiaries, such a regulatory approach created uncertainty in that such applications were adjudicated on a case-by-case basis.[176]

While advance parole created a kind of equitable benefit for DACA beneficiaries, the program also typified the nature of relief in an era of immigration hyper-enforcement in which such programs exist at the pleasure of the Executive,

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interested in visiting loved ones in prison. See Megan Comfort et al, The costs of incarceration for families of prisoners, 98 International Review of the Red Cross 783 (2016). In some ways, the burden runs the opposite direction in the migration context. The family stays put in the sending country while the migrants leave for the United States.

[173] See Lorraine T. Benuto, Jena B. Casas, Caroline Cummings & Rory Newlands, Undocumented, to DACAmented, to DACAlimited: Narratives of Latino Students with DACA Status, 40 Hisp. J. Behav. Sci. 259, 268 (2018).

[174] See Frequently Asked Questions (Archived Content), U.S. Citizenship & Immigration Servs., https://www.uscis.gov/archive/frequently-asked-questions [https://perma.cc/G5MN-FWHJ] (last updated Mar. 8, 2018) (explaining, at question 57, the availability of advance parole for DACA recipients).

[175] See id. (explaining, at question 57, the circumstances in which parole might be granted).

[176] Id.

as evidenced by the USCIS's rescission of the program under President Trump.[177] This provides important context for agency actions undertaken during the Trump Administration, which have eliminated the few opportunities for movement by unauthorized migrants and have intensified the problem of being marooned. President Trump has continued the Obama-era DHS policy of focusing on the removal of "criminal aliens,"[178] but parts ways in some significant respects, most notably by broadening the types of immigrants who might be deemed a high priority.[179]

c. Left Out (Adjustment of Status)

Limited and discriminatory admissions opportunities prevent migrants from being reunited with their family members in the United States while punitive and far-reaching enforcement policies restrict the ability of migrants to visit or be visited by their family members who remain in sending countries. While these two dynamics do a lot to explain the prolonged state of isolation in immigrant communities, a third dynamic helps round out the picture. One of the reasons citizenship and lawful permanent resident (LPR) status are so important to migrants is the change they offer to reconcile the tension between a commitment to life in the United States for reasons of economic necessity and a desire to remain

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[177] See Kate Linthicum, Another Thing Trump Stripped from 'Dreamers': A Loophole that Helped 40,000 of Them Get Green Cards, L.A. Times (Sept. 7, 2017), https://www.latimes.com/world/mexico-americas/la-fg-daca-mexico-20170907-story.html [https://perma.cc/LN7E-HBB3].

[178] See Exec. Order No. 13,768 § 10(c), 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (reinstating 2014 programs focused on the "identification, detention, and removal of criminal aliens").

[179] See id. § 5(a)–(b), at 8800 (including additional categories of individuals to consider high priority). For example, Executive Order 13,768 instructs DHS officers to prioritize those who have been "convicted" of or "charged" with "any criminal offense;" have "committed acts that constitute a chargeable criminal offense;" or anyone who "[i]n the judgment of an immigration officer, otherwise pose[s] a risk to public safety or national security." Id. §§ 5(a)–(c), (g), at 8800. For a more detailed comparison of the Obama and Trump Administrations' immigration enforcement priorities, see generally Lazaro Zamora, Comparing Trump and Obama's Deportation Priorities, Bipartisan Policy Ctr. (Feb. 27, 2017), https://bipartisanpolicy.org/blog/comparing-trump-and-obamas-deportation-priorities/ [https://perma.cc/7X9N-LJTF].

connected to family members spread across the globe. Again, while many unauthorized migrants might dream about citizenship for affective and emotional reasons of feeling accepted by the law, many also crave the more pragmatic benefits of freedom of movement.[180] A key legal device for achieving this is adjustment of status, which refers to the process by which noncitizens can obtain or change their immigration status.[181] A core benefit of adjustment of status rules is that they unburden the noncitizen of having to apply for a status change at overseas embassies, which is the default process for doing so.[182]

The adjustment of status process is relatively straightforward for those who are in the United States on temporary visas and still within status.[183] But for those who have long been out of status---which is the majority of unauthorized migrants---the process can pose serious complications or simply exclude them altogether. Adjustment of status allows unauthorized migrants to circumvent adverse immigration consequences that are triggered once a noncitizen leaves and attempts to be admitted (or in this case, readmitted) into the United States. Under the immigration code's enforcement provisions, unauthorized migrants are barred from seeking entry for a period of three or ten years depending on the duration of unlawful presence.[184] The immigration code provides a workaround to this dilemma. Because the "3/10 year bar" is triggered only at the point of entry, a noncitizen who never leaves the country never has to seek readmission.

Adjustment of status covers many situations in which a noncitizen can obtain a more permanent form of lawful status,[185] but perhaps the most well-known situation is the noncitizen attempting to secure a green card through marriage. In this scenario, adjustment of status allows many unauthorized immigrants to avoid a difficult choice: Either move overseas with their citizen

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[180] See Chacón, supra note 169, at 29--33 (2018) (describing the restrictions on freedom of movement resulting from a lack of citizenship).

[181] See generally Adjustment of Status, U.S. Citizenship & Immigration Servs., https://www.uscis.gov/greencard/adjustment-of-status [https://perma.cc/Q2PR-YD9G] (last visited Sept. 11, 2019).

[182] See generally 8 U.S.C. § 1255 (2012).

[183] See id. § 1255(a).

[184] See id. § 1182(a)(9)(B)(i)(I)--(II).

[185] See id. § 1255.

spouse and wait out the three or ten year penalty or remain in the United States married but without the immigration benefits marriage typically confers. The 3/10-year bar perversely penalizes the noncitizen precisely at the moment when their ties to the United States are greatest.[186] In other words, the adjustment of status helps to avoid or mitigate the harms of family separation by allowing a newly formed transnational family to continue building a new life in the United States without interruption. The immigration code effectively waives the cost of travel and time away from the United States, which is the default procedure, provided the basis for adjustment of status is marriage to a citizen.

The family separation arising within the context of adjustment of status is different than the kind that is embedded within admissions and enforcement policy. The uneven distribution of adjustment of status opportunities does not lead to the physical separation of family members. Rather, the separation is one measured in terms of status differentials. It concerns U.S. citizens who are empowered to sponsor spouses for green cards, but only if they are willing to leave the United States for three or ten years first. In this context, family separation is about the failure—or refusal—of law to deliver the good life that marriage promises.[187] This benefit is mostly limited to those who have been "inspected and admitted or paroled into the United States."[188] In other words, the procedural route of adjustment of status is limited to those migrants whose lack of authorization stems from a visa overstay, not a surreptitious border entry. On its face, the visa

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[186] See David A. Martin, Waiting for Solutions, 24 Legal Times (May 28, 2001) (on file with the *Columbia Law Review*) ("The bars carry real consequences only when individual aliens are finally poised for immigration benefits. At that point, they invariably have U.S. citizens or permanent residents deeply invested in their staying. It is exactly the moment when enforcement will seem maximally cruel and controversial.").

[187] "Why do people stay attached to conventional good-life fantasies---say, of enduring reciprocity in couples, families, political systems, institutions, markets, and at work---when the evidence of their instability, fragility, and dear cost abounds?" Berlant, Cruel Optimism, supra note 25, at 2.

[188] 8 U.S.C. § 1255(a). For a period of years, Congress opened up the adjustment of status benefit to those whose lack of status was on account of a surreptitious border entry, but it has since allowed that benefit to lapse. See id. § 1255(i) (allowing those who were in the United States without authorization to adjust their status despite their initial surreptitious entry into the United States).

overstay/surreptitious entry distinction is a neutral basis for allocating adjustment of status benefits. But in this context, facial neutrality hides the deeply inegalitarian consequences of this design choice.[189]

A snapshot of the unauthorized immigrant population shows that it is comprised of both those who have entered the United States lawfully but have overstayed or violated the terms of a temporary visa, like one that is issued to tourists or students, as well as those who effectuated a surreptitious entry across a border.[190] And while exact figures remain elusive, rough estimates suggest that the overstay pool represents a significant minority of the entire unauthorized pool.[191] Over the years, the stream of overstayers has increased while the stream of border crossers, or entries without inspection (EWIs) has diminished.[192] Importantly, these groups break down along specific racial and ethnic lines. The racial groups with the largest unauthorized migrant populations identify as Asian Pacific American (APA) or as Latinx.[193] The vast majority of unauthorized APAs

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[189] See Spade, supra note 57, at 9--10 (noting that "systems that administer life chances through purportedly 'neutral' criteria . . . are often locations where racist, sexist, homophobic, ableist, xenophobic, and transphobic outcomes are produced").

[190] See Robert Warren, US Undocumented Population Continued to Fall from 2016 to 2017, and Visa Overstays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year, Ctr. for Migration Studies (Jan. 16, 2019), https://cmsny.org/publications/essay-2017-undocumented-and-overstays/ [https://perma.cc/FXZ5-9G4C] ("Of the estimated 515,000 [unauthorized] arrivals in 2016, a total of 320,000, or 62 percent, were overstays and 190,000, or 38 percent, were [those who entered without inspection].").

[191] See Robert Warren & Donald Kerwin, The 2,000 Mile Wall in Search of a Purpose: Since 2007 Visa Overstays Have Outnumbered Undocumented Border Crossers by a Half Million, 5 J. on Migration & Hum. Security 124, 130--31 (2017) (estimating that in 2014, the overstay pool constituted 42% of the undocumented population residing in the U.S.); Neil G. Ruiz, Jeffrey S. Passel & D'Vera Cohn, Higher Share of Students than Tourists, Business Travelers Overstayed Deadlines to Leave U.S. in 2016, Pew Research Ctr. (June 6, 2017), http://www.pewresearch.org/fact-tank/2017/06/06/higher-share-of-students-than-tourists-business-travelers-overstayed-deadlines-to-leave-u-s-in-2016/ [https://perma.cc/23QM-ML2Q].

[192] See Warren, supra note 190.

[193] Data about unauthorized migrant demographics are often organized by national origin, which provides a highly imperfect proxy for race. Still, using national origin data as a guide, the Migration Policy Institute estimates that about 77% of all unauthorized migrants hail from Mexico, Central America, and South America. Mexico alone accounts for 56% of the unauthorized migrant population. Asia accounts for 14% of the unauthorized migrant population. Marc R. Rosenbaum &

are visa overstayers. Most unauthorized APAs presumably travel to the United States directly from Asia, which explains this data point.[194] By contrast, the unauthorized Latinx migrant population reflects more of a mix between visa overstayers and border crossers, which means by extension that the vast majority of border crossers identify as Latinx. In concrete terms, this difference in status means that adjustment of status through marriage remains a viable downstream option for most unauthorized APAs while the unauthorized Latinx experience reflects greater unevenness in terms of the ability to capitalize on similar legal benefits.

This legal distinction, combined with other enforcement practices, contributes to the racialization of Latinxs as outsiders in the context of immigration.[195] Legal scholars have focused on how various immigration enforcement programs[196] as well as criminal procedure doctrine[197] contributes to the racialization of Latinxs. Disparate opportunities to adjust status show that immigration benefits programs also contribute to this racialization project. Of

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Ariel G. Ruiz Soto, Migration Policy Inst., An Analysis of Unauthorized Immigrants in the United States by Country and Region of Birth 4 fig.1 (2015), https://www.migrationpolicy.org/sites/default/files/publications/Unauth-COB-Report-FINALWEB.pdf [https://perma.cc/RP3B-LNGY].

[194] For a historical perspective on Asian border crossings, see generally Julian Lim, Porous Borders: Multiracial Migrations and the Law in the U.S.-Mexico Borderlands (Andrew R. Graybill & Benjamin H. Johnson eds., 2017); Emily Ryo, Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration During the Chinese Exclusion Era, 31 L. & Soc. Inquiry 109 (2006).

[195] See Jennifer M. Chacón & Susan Bibler Coutin, Racialization Through Enforcement, *in* Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging 159, 168-69 (Mary Bosworth, Alpa Parmar & Yolanda Vazquez eds., 2018) (describing how enforcement decisions have led to the construction of Latinx identity).

[196] See Jennifer M. Chacón, Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Members," 2007 U. Chi. Legal F. 317, 337-44 ("[I]n the immigration enforcement context, 'racial profiling has been condoned to a certain extent . . . .'" (quoting Kevin R. Johnson, Racial Profiling After September 11: The Department of Justice's 2003 Guidelines, 50 Loyola L. Rev. 67, 74-75 (2004)).

[197] See Devon W. Carbado & Cheryl I. Harris, Undocumented Criminal Procedure, 58 UCLA L. Rev. 1543, 1545-50 (2011) (describing how the criminal law sanctions racial profiling against Latinxs as a basis for determining immigration status).

course, immigration law has played a central part in racializing Asian Americans[198] and black Americans[199] as well.

More generally, it is important to remember that marriage is having a moment in the United States right now. There is now a constitutional right to same-sex marriage.[200] Yet, despite this affirmation of marriage as a life-enhancing commitment, the full benefits of this institution remain out of reach for many unauthorized migrants. It shows that "life building" exercises can also "wear people down."[201] Thus, adjustment of status laws not only exclude migrants precisely at the moment that their commitment to the United States is greatest, but they also ensure that the act of committing oneself to married life with a U.S. citizen will inevitably lead to diminishment.[202] For those whose lives in the United

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[198] See Lim, supra note 194, at 9 (noting that "U.S. immigration law has racially constructed Asian Americans as 'perpetual foreigners'"); Leti Volpp, The Citizen and the Terrorist, 49 UCLA L. Rev. 1575, 1576--86 & n.2 (2002) (describing how immigration law facilitates racial profiling, which in turn contributes to the racialization of "persons who appear 'Middle Eastern, Arab, or Muslim,'" a category that includes South Asians).

[199] See Eleanor Marie Lawrence Brown, The Blacks Who "Got Their Forty Acres": A Theory of Black West Indian Migrant Asset Acquisition, 89 N.Y.U. L. Rev. 27, 36--45 (2014) (discussing how restrictions on black migration have led to particular perceptions of black migrants); Devon W. Carbado, Racial Naturalization, 57 Am. Q. 633, 637 (2005) (discussing how "the law has structured . . . the racial terms of . . . naturalization").

[200] Obergefell v. Hodges, 135 S. Ct. 2584, 2604--05 (2015) (holding that "same-sex couples may exercise the fundamental right to marry").

[201] See Laura Gutiérrez, Christina B. Hanhardt, Miranda Joseph, Adela C. Licona & Sandra K. Soto, Nativism, Normativity, and Neoliberalism in Arizona: Challenges Inside and Outside the Classroom, 21 Transformations 123, 133 (2010). As Miranda Joseph observes in the context of unauthorized migrants and work:

> [A]s workers do what they need to do to live, to pursue their desires, their American Dreams, they simultaneously undermine their own lives. Immigrants who come to the US seeking work, money to send home to families, to provide a better life for their kids, subject themselves to the simultaneous attrition of their own lives, health, and well-being. Usually, capitalists deny the attrition side of the dialectic; but here there is no pretense that the lives of those subject to attrition are valued and thus attrition can be an explicit strategy.

Id.

[202] See Martin, supra note 186.

States can be traced to a surreptitious entry, marriage will not offer the same degree of belonging.

d. Helpless (Remittances)

A final example of how the law can foment slow death in immigrant communities is the regulatory structure surrounding remittance channels. Remittances are wages or earnings sent overseas from the United States.[203] Remittances are closely tied to immigrant communities because migrants frequently remit wages to loved ones.[204] The remittances help with child support,[205] buy basic personal and household items,[206] serve as seed money for new businesses,[207] and sometimes enable upward mobility.[208] This is a key part of the

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[203] See Ezra Rosser, Immigrant Remittances, 41 Conn. L. Rev. 1, 3 (2008) (describing the function of remittances and their role as a potential tool to alleviate poverty). For a discussion of the economic effects of remittances, see generally Charles B. Keely & Bao Nga Tran, Remittances from Labor Migration: Evaluations, Performance and Implications, 23 Int'l Migration Rev. 500 (1989) (finding that labor supply data from Europe and the Middle East do not demonstrate increased dependence, instability, or economic decline from remittances).

[204] The remittance outflow for the United States in 2017 was approximately $148 billion. See Remittance Flows Worldwide in 2017, Pew Research Ctr. (Apr. 3, 2019), https://www.pewresearch.org/global/interactives/remittance-flows-by-country/ (on file with Columbia Law Review). In particular, a 2008 Pew Research Center survey also found that 54% of foreign-born Hispanics and 17% of U.S.-born Hispanics say they send remittances to their home country. See Hispanics and the Economic Downturn: Housing Woes and Remittance Cuts, Pew Research Ctr. (Jan. 8, 2019), https://www.pewresearch.org/hispanic/2009/01/08/hispanics-and-the-economic-downturn-housing-woes-and-remittance-cuts/ [https://perma.cc/88S4-DCKR].

[205] See Cecilia Menjívar, Julie DaVanzo, Lisa Greenwell & R. Burciaga Valdez, Remittance Behavior Among Salvadoran and Filipino Immigrants in Los Angeles, 32 Int'l Migration Rev. 97, 104 (1998) ("Relatives back home . . . may care for the immigrants' children and, therefore, expect financial contributions from the immigrants in return.").

[206] Jorge Durand, Emilio A. Parrado & Douglas S. Massey, Migradollars and Development: A Reconsideration of the Mexican Case, 30 Int'l Migration Rev. 423, 424 (1996).

[207] Ester Hernandez & Susan Bibler Coutin, Remitting Subjects: Migrants, Money and States, 35 Econ. & Soc'y 185, 202 (2006).

[208] David Pedersen, American Value: Migrants, Money, and Meaning in El Salvador and the United States 28--52 (2013) (describing how remittances in El Salvador "changed from small wads

story surrounding the "transnationalization" of families.[209] For a migrant population that remains physically cut off from their relatives in sending countries, remittances offer the foreign-born population in the U.S. a way to stay connected to members of their family. In the context of remittances, family separation is measured, not in terms of geographic distance (as is often the case in admissions) nor in terms of nonrecognition (as is the case with surreptitious entrants for adjustment of status purposes). Rather, family separation in this context is about having the financial means to support family members subject to unreviewable exercises of discretionary to advance national security goals. Central to this account is the insight that remittances are economic expressions of affinity. In the same way that many Americans consider saving for their children's college tuition or paying for their parents' end-of-life hospice care to be acts of love, the act of wiring money to those residing in sending countries moves over the same type of emotional landscape.[210]

Remittances are heavily impacted by anti-money-laundering laws.[211] In important ways, the impact that such laws have on the remittance economy parallels, in design and effect, the impact of interior and border enforcement policies on the ability of migrants to be physically reunited with their families. At

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of well-worn US dollars used to store and exchange wealth in El Salvador into . . . interest-bearing capital").

[209] See Dreby, Honor and Virtue, supra note 139, at 45 (explaining that the most common Mexican transnational family is really a separated one, in which the father is often the one to immigrate to the United States, remit money to their loved ones, and occasionally make return visits).

[210] See Hung Cam Thai, Insufficient Funds: The Culture of Money in Low-Wage Transnational Families 33 (2014) (noting that "economic distribution within the transnational family is a crucial, if not the most important, measuring stick for conferring affection and emotional depths"); Leah Schmalzbauer, Searching for Wages and Mothering from Afar: The Case of Honduran Transnational Families, 66 J. Marriage & Fam. 1317, 1325--28 (2004) (noting that many Honduran migrants "believe that sending what they can to family and sacrificing in order to keep family and kin well is the 'right thing to do,' and 'the only way *para seguir adelante*, to move ahead'").

[211] See Marco Nicoli, De-Risking and Remittances: The Myth of the "Underlying Transaction" Debunked, World Bank Blog, (June 13, 2018), https://blogs.worldbank.org/psd/de-risking-and-remittances-myth-underlying-transaction-debunked [https://perma.cc/C83L-7LFW] (describing how anti-money-laundering regulations have led to banks' hesitance to engage with money transfer operators (MTOs), to the detriment of migrant workers and their families).

the level of design, anti-money-laundering laws aim to disrupt the financing of criminal and terrorist activity.[212] A key part of the modern regime involves enlisting the help of banks, which are required to create and maintain a program for identifying economic transactions to further anti-laundering and other crime-fighting objectives.[213] These "know your customer" schemes put pressure on financial institutions to take broader goals of public safety and integrity seriously by making it harder for criminals and terrorists to shuffle around ill-gotten profits anonymously or through false identities.

As is true in the immigration context, some of the broadest delegations of authority to the Treasury Secretary in the anti-money-laundering context stem from the Patriot Act.[214] Across contexts, concerns with terrorism animate policies governing the interior, the border, and our banks. Regulators in these parallel fields

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[212] See Mariano-Florentino Cuéllar, The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance, 93 J. Crim. L. & Criminology 311, 313--15 (2003) (noting that "broader patterns of criminal financial activity . . . might in principle be motivating the fight against laundering"); Stavros Gadinis & Colby Mangels, Collaborative Gatekeepers, 73 Wash. & Lee L. Rev. 797, 846--74 (2016) (describing how Congress began to implement anti-money-laundering laws in order to combat the financing of drug deals).

[213] See 31 C.F.R. § 1020.220 (2019) (requiring banks and other financial institutions to gather customer information); 31 C.F.R. § 103.22 (2010) (setting out reporting obligations by financial institutions for transactions greater than $10,000).

[214] See USA PATRIOT Act, Pub. L. No. 107-56, § 352, 115 Stat. 272, 322 (2001) (describing the Secretary of the Treasury's authority to prescribe minimum standards for anti-money-laundering programs).

even employ identical vocabulary.[215] The Treasury Secretary can exercise her broad authority to shut down remittance corridors to fight overseas terrorism.[216]

To be clear, remitters reflect a diverse cross section of immigration and citizenship statuses. Citizens and green card holders as well as temporary and unauthorized migrants all participate in and bolster the remittance economy. So the slow death harms generated by the enforcement of these laws can be experienced differently across statuses. Those who have the legal sanction and financial means to come and go from the United States (as U.S. citizens and green card holders typically do) won't be impacted the same way as those who are marooned here (as temporary and unauthorized migrants usually are). Still, legal status and resource differentials do not completely immunize these migrants against the helplessness that the enforcement of these laws can create. Two types of broader considerations can affect remitters irrespective of personal resources.

One is the basic infrastructure and remittance-distribution channels in the receiving country. Consider this example: Concerned with terrorist groups like al-Shabab, the Treasury Department during the Obama Administration issued cease and desist letters to U.S. banks facilitating the transfer of cash to Somalian customers.[217] Thus, Somali migrant-serving money transmitters, which gathered

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[215] Just as advocates for partnerships with local law enforcement agencies use the language of force multiplication, financial regulators in this context use similar language and logic of partnerships and collaboration. As one regulator observed:

> So, even in this new era of terrorist financing, banks must continue to be vigilant partners in protecting the global financial system from being infiltrated by terrorist groups and their facilitators. They can and must continue to be force multipliers, including by helping us as we work to identify new typologies of abuse, sharing that knowledge with their colleagues and the government, and implementing effective risk management strategies to address current and forthcoming terrorist financing threats.

Press Release, Dep't of Treasury, Remarks of Under Secretary for Terrorism and Financial Intelligence David Cohen Before the Center for a New American Security on "Confronting New Threats in Terrorist Financing" (Mar. 4, 2014), https://www.treasury.gov/press-center/press-releases/Pages/jl2308.aspx [https://perma.cc/BX47-XNMK].

[216] See id.

[217] See Jamila Trindle, Bank Crackdown Threatens Remittances to Somalia, Foreign Pol'y (Jan. 30, 2015), https://foreignpolicy.com/2015/01/30/bank-crackdown-threatens-remittances-to-somalia/ [https://perma.cc/XX5V-QSJV].

and bundled remittances, increasingly struggled to find banks to facilitate international money transfers. And as more and more banks refused to wire money to Somalia, the remittance flow to Somalia dried up.[218] Many Somali migrants and their advocates opposed this policy, pointing to the widespread poverty of that nation.[219]

Money laundering, like many crimes, transpires in the shadows, often through informal channels. But the informality of an economic transaction doesn't always stand as proxy data for criminal behavior. Many countries rely on informal economic relationships grounded not in Anglo American principles of offer and acceptance but rather by a commitment to a principle of reciprocity and clan affiliation.[220] These sorts of transactions are unregulated by law and therefore tend to lack formal enforcement mechanisms.[221] This is consistent with the critique that, more than anything, "anti-money laundering laws turn some innocent

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[218] See Jamila Trindle, Feds Choke Off Vital Somali Lifeline, Foreign Pol'y (May 16, 2014), https://foreignpolicy.com/2014/05/16/feds-choke-off-vital-somali-lifeline/ [https://perma.cc/588X-P82N].

[219] By some estimates, 40% of the Somali population relies on remittances to meet basic needs such as food and shelter. See Katy Migiro, Somalis Panic as Cash Flow Dries Up After U.S. Remittance Lifeline Cut, Reuters (Feb. 19, 2015), http://news.trust.org//item/20150219075507-v4rn8/ [https://perma.cc/8XBB-CL42]. Critics of this policy have argued that regulators have things backwards: Remittances, they argue, are all that stand between impoverished family members and the swift fall into recruitment into terrorist activities. See Keith Ellison, Don't Block Remittances to Somalia, N.Y. Times (Apr. 10, 2015), https://www.nytimes.com/2015/04/11/opinion/dont-block-remittances-to-somalia.html [https://perma.cc/C2T6-JDEX].

[220] See, e.g., Khalid M. Medani, Financing Terrorism or Survival? Informal Finance and State Collapse in Somalia, and the US War on Terrorism, 223 Middle E. Rep., Summer 2002, at 2, 6 ("While hawwalat transfers are not regulated by formal institutions, they are regulated by norms of reciprocity embedded in sub-clan affiliation and familial relations."); Menjívar et al., supra note 205, at 98 (noting that for Filipino immigrants, "the decision to remit . . . [does] not take place in a social vacuum, as social ties bind immigrants with relatives back home into relations of trust and mutual obligation"); Bernard Poirine, A Theory of Remittances as an Implicit Family Loan Arrangement, 25 World Dev. 589, 606 (1997) (concluding that implicit loan theory best explains South Pacific migrants' remittance behaviors).

[221] These transactions usually transpire on an intra-clan basis, which is why some scholars argue that, should a broker in Somalia ever fail to do right by his broker counterpart in the United States, law is beside the point. Interest in maintaining standing and authority within the clan will do much of the work we typically expect the law to do. See Medani, supra note 220, at 6.

conduct into guilty conduct, allowing prosecutors to have more tools with which to secure convictions."[222] The relevant economic unit for many immigrants is the family rather than the individual. A common assumption is that an individual immigrant's lawful status correlates to the family's economic security. But the Somali example shows how transnational realities and broader enforcement powers in the anti-terrorism context can complicate this narrative.

A second dynamic that can render migrants helpless is broader shifts in political climate. Anti-money laundering laws cast a shadow over the U.S.-Mexico remittance corridor, which is the largest remittance flow streaming out of the United States.[223] In his search to make good on his campaign promise to build a wall at the U.S.-Mexico border, President Trump outlined a plan to curtail access to the transnational remittances market for Mexican migrants.[224] This plan involved traditional immigration enforcement measures like increasing visa fees and cancelling visas outright, but it also involved a proposed expansion to the regulation of banking services.[225] Focusing on statutory authority to compel financial institutions like banks to reveal the identities of their customers, then-candidate Donald Trump promised to expand this "know-your-client" rule to money transfer services like Western Union to exclude unauthorized workers from international transfer services, a key part of the infrastructure supporting the remittances economy.[226]

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[222] Cuéllar, supra note 212, at 395.

[223] Remittance Flows Worldwide in 2017, Pew Research Ctr. (Apr. 3, 2019), https://www.pewresearch.org/global/interactives/remittance-flows-by-country/ [https://perma.cc/4EQN-3P74].

[224] See Stephen Wilks, A Complicated Alchemy: Theorizing Identity Politics and the Politicization of Migrant Remittances Under Donald Trump's Presidency, 50 Cornell Int'l L.J. 285, 285 (2017) (describing then-presidential candidate Trump's "strategy to force Mexico to build a wall along its border with the United States" by threatening to halt remittance flows to Mexico).

[225] See id. at 288-90 (discussing Trump's proposed increased regulation of Money Service Businesses, banks, credit unions, and other financial actors in order to track the movements of migrants).

[226] See id. at 289 ("Trump's proposal would fundamentally transform the current structure of ['know-your-client'] rules by extending their financial reporting functions into the realm of immigration enforcement."); Bob Woodward & Robert Costa, Trump Reveals How He Would Force Mexico to Pay for Border Wall, Wash. Post (Apr. 5, 2016),

III. CRISIS ON A CONTINUUM

In this Part, I revisit the example of family separation at the border. Here, I show how the slow death framework helps explain the parameters defining the legal and political discourse on this topic. Concepts tied to crises, choice, and flourishing all help explain the justifications immigration officials have offered and arguments that advocates have deployed. They all reflect examples of stories organized around acts of spectacular violence, which helps to focus the public's attention on the harms caused by the Trump administration's zero tolerance policy. At the same time, these exchanges have obfuscated the broader structural reasons that generate migration to the United States. That is, while these narrative choices are understandable and laudable, they fail to capture the ordinary and routine acts of family separation exacted upon immigrants standing just beyond the reach of the border.

a. Crisis as a Weapon

The example of forcible separation at the border illustrates the importance of crisis narratives to generating political momentum. The slow death framework suggests that forcible separation is an act of violence, sharp and in the form of a spectacle. But even with the formal end to the policy of forcibly separating families at the border, both advocates and government officials continue to shape discussions around border enforcement in terms of crises. In this way, crises are malleable and can operate as weapons within highly contested political exchanges.

The "crisis" that unfolded at the U.S.–Mexico border during the summer of 2017 is a crisis about federal detention policy—that is, whether and to what extent the government has to show that a parent is "unfit" before separating that parent

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https://www.washingtonpost.com/politics/trump-would-seek-to-block-money-transfers-to-force-mexico-to-fund-border-wall/2016/04/05/c0196314-fa7c-11e5-80e4-c381214de1a3_story.html [https://perma.cc/5U6R-LRSZ] (detailing Trump's plan to track money transfers though businesses like Western Union).

from their child.[227] This is the key finding that justifies the separation and allows the government to characterize and charge adult arrivals as smugglers.[228] In the lawsuit challenging this practice, detainees argue, among other things, that the government never made the requisite finding justifying the separation.[229] This type of "spectacular" harm naturally and easily invites public outrage and crafting a "crisis" narrative is central to the work that advocates do. Lawyers, in particular, must draw a court's limited attention to critical or dispositive facts that fit within pre-existing legal scripts and that permit sympathetic judges to minimize inconvenient facts.

Family separation provides a compelling frame for blunting the force of government overreach. For many advocates, the key to prevailing is constructing a disaster that highlights the harms that plaintiffs, like immigrant detainees, experience on account of some remote set of bad actors far removed from the site of disaster, such as President Trump and his political proxies in Washington D.C. For example, a seminal work by Michele Landis (now Dauber) explains that the key to developing plausible claims for relief from disaster is to draw a causal connection between the event and some remote actor; otherwise, claimants run the risk of carrying the blame themselves.[230] As she observes:

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[227] See Ms. L v. ICE, 302 F. Supp. 3d 1149, 1161–67 (S.D. Cal. 2018) (discussing whether due process rights are violated when the government separates families without a showing that the parents are unfit).

[228] See Lomi Kriel & Dug Begley, Trump Administration Still Separating Hundreds of Migrant Children at the Border Through Often Questionable Claims of Danger, Hous. Chron. (June 22, 2019), https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-administration-still-separating-hundreds-of-14029494.php [https://perma.cc/2NPX-XA2X]; Nick Miroff, 'The Conveyer Belt': U.S. Officials Say Massive Smuggling Effort Is Speeding Immigrants To—and Across—the Southern Border, Wash. Post (Mar. 15, 2019), https://www.washingtonpost.com/national/the-conveyor-belt-us-officials-say-massive-smuggling-effort-is-speeding-immigrants-to--and-across--the-southern-border/2019/03/15/940bf860-4022-11e9-a0d3-1210e58a94cf_story.html [https://perma.cc/SV2V-RGY4].

[229] In her complaint, Ms. L alleged that she was separated from her child without "a finding (or even any accusation) that Ms. L was abusing or neglecting S.S., or that she is an unfit parent." Complaint at 2, *Ms. L*, 302 F. Supp. 3d 1149 (No. 18CV0428 DMS MDD), 2018 WL 1310160.

[230] See, e.g., Michele L. Landis, Fate, Responsibility, and "Natural" Disaster Relief: Narrating the American Welfare State, 33 Law & Soc'y Rev. 257, 284–85 (1999).

> It is not enough to identify a need or loss. In fact, the loss is always a potential embarrassment to a claim, because it is necessarily closely linked to the victim. The most easily available candidate for blame, after all, is the claimant himself or herself, who can too easily slip from victim to malfeasor.[231]

Dauber expresses some ambivalence toward claims rooted in disaster narratives,[232] and the example of family separation intimates why this is so. Much of judge-made law in this arena is so deferential to executive and agency discretion that courts must rely on the finest of distinctions---that adult migrants were detained with their children---in order to justify an intervention. But entire communities stricken by family separation remain hidden within those distinctions.

Consider the district court's decision to uphold the challenge to the government's policy of separating migrants from their children at the border.[233] In denying the government's motion to dismiss the claim, the district court distinguished cases on which the government relied.[234] The court focused on the timing of the separation to distinguish the current family separation from other examples. The government relied on *Aguilar v. ICE*, a circuit decision in which detained migrants argued that their separation from their children violated their substantive due process rights to family integrity. That case involved migrants who were identified, apprehended, and detained during a worksite raid. The district court in *Ms. L*, observed: "However, unlike Plaintiffs in this case, none of the plaintiffs in *Aguilar* were detained with their children. Instead, the plaintiffs in *Aguilar* appear to have been detained at the worksite while their children were elsewhere in the community."[235] This exemplifies the slow death critique: The

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[231] Id.

[232] See Michele Landis Dauber, The Sympathetic State: Disaster Relief and the Origins of the American Welfare State 225 (2013) ("For disaster victims it is enough to show blameless loss; for others, it is not enough even to show great need if blamelessness is in question.").

[233] See Ms. L v. U.S. Immigr. & Customs Enf't, 302 F. Supp. 3d 1149, 1160--67 (S.D. Cal. 2018).

[234] See id.

[235] Id. at 1163.

ability to state a legally cognizable claim for family separation is tied to the timing of the detention. The focus is on whether or not the state was the "but for" cause of the separation. But if our concern is protecting individuals against the harms of familial disintegration, this kind of narrow focus leaves many families beyond the reach of the law. A migrant parent who is at work without their children may be detained immediately, even if the consequence is for children to fend for themselves at home, at school, and through the various legal proceedings that are triggered by enforcement proceedings against a parent.[236]

For the government, the border also represents a crisis, but one that stems from insufficient resources to carry out its ambitious enforcement strategy. Many political appointees and elected officials blame Congress for the crisis, pointing to its refusal to allocate enough funding to support the transfer of migrants into long-term ICE detention.[237] Conceding that the current conditions are "risking the lives of children every day," Acting Homeland Security Secretary Kevin McAleenan

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[236] See Jenny Jarvie, Mississippi Raids Split Families and Leave Children Adrift: 'I Just Want My Mom and Dad', L.A. Times (Aug. 10, 2019), https://www.latimes.com/world-nation/story/2019-08-09/mississippi-ice-raids-split-families-leave-children-adrift-i-just-want-my-mom-and-dad [https://perma.cc/JJN6-BN3J]; see also Schuyler W. Henderson & Charles D.R. Baily, Parental Deportation, Families, and Mental Health, 52 J. Am. Acad. Child & Adolescent Psychiatry 451, 451–52 (2013) (describing the "impact of worksite immigration raids" on children). The reverse scenario—one in which the parent resides and works in the United States while the child remains behind—can create its own sorts of challenges. Seasonal migrants have a particularly difficult time seeing their children, sometimes only once a year. See Dreby, Honor and Virtue, supra note 139, at 45.

[237] See Anya van Wagtendonk, As Immigrant Children Go Without Soap and Toothbrushes, Trump and Pence Say Congress Is to Blame, Vox (June 23, 2019), https://www.vox.com/policy-and-politics/2019/6/23/18714699/immigrant-children-soap-toothbrushes-detention-trump-pence-congress [https://perma.cc/L2S9-H2HG]. Some officials, especially within the Border Patrol, have contested the severity of the detention conditions. See Julio Rosas, Border Patrol Video Shows Inside of Migrant Detention Center to 'Dispel' Claims About Poor Conditions, Wash. Examiner (July 5, 2019), https://www.washingtonexaminer.com/news/border-patrol-video-shows-inside-of-migrant-detention-center-to-dispel-claims-about-poor-conditions [https://perma.cc/5E4A-NBHV]. But cf. Chantal Da Silva, CBP Tries to 'Dispel' Reports on Conditions at Migrant Detention Centers by Showing Off Facility 300 Miles Away, Newsweek (July 5, 2019), https://www.newsweek.com/cbp-arizona-migrant-detention-conditions-texas-1447723 [https://perma.cc/BUT8-TV33].

reframed the enforcement challenges in terms of public safety: "To address this crisis, Mexico must take significant action to secure their southern border, stop the unlawful flow of migrants across their territory, and attack the criminal groups preying on vulnerable migrants and profiting from these smuggling enterprises."[238]

Again, the use of crisis as a descriptor is telling. As Lauren Berlant explains:

> Often when scholars and activists apprehend the phenomenon of slow death in long-term conditions of privation they choose to misrepresent the duration and scale of the situation by calling a *crisis* that which is a fact of life and has been a defining fact of life for a given population that lives it as a fact in ordinary time.[239]

Shaping events in terms of crises serves the interests of advocates. As Berlant continues:

> [The] deployment of crisis is often explicitly and intentionally a redefinitional tactic, a distorting or misdirecting gesture that aspires to make an environmental phenomenon appear suddenly as an event because as a structural or predictable condition it has not engendered the kinds of historic action we associate with the heroic agency a crisis seems already to have called for.[240]

Baselines matter for evaluating the scope of harm wrought by family separation. President Trump has brought a formal end to the zero-tolerance policy.[241] But even assuming that children can be reunited with their parents---a

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[238] See Press Release, U.S. Dep't of Homeland Sec., Background Press Call by Senior Administration Officials on the Crisis at Our Southern Border (May 30, 2019), https://www.dhs.gov/news/2019/05/30/background-press-call-senior-administration-officials-crisis-our-southern-border [https://perma.cc/7MNP-U9NN].

[239] Berlant, Slow Death, supra note 18, at 760.

[240] Id.

[241] See Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018).

policy outcome that appears doubtful[242]---as I explained earlier, immigration law's infrastructure will continue to thwart the ability of families to remain together. Commenting on the state of unauthorized migration generally, Cecilia Menjívar and Leisy Abrego explain, "the definition of a successful migration today, compared to 15 years ago, has been reduced to simply surviving the trip."[243] In other words, the problem is that de-escalating a crisis to achieve normal conditions ignores the harsh realities of the new "normal."

With formal family separation at an end, advocates have moved their attention to the generally deplorable conditions of the immigrant detention system near the border. By design, the Border Patrol is empowered to oversee the short-term detention of migrants apprehended or processed at the border. The responsibility of managing long-term detention belongs to ICE.[244] But with such a large influx of migrant arrests, border facilities have exceeded their capacity, causing dangerous conditions. Both advocates and government officials have framed this in terms of a crisis. A 2019 report produced by the DHS's Office of the Inspector General (OIG) describes in great detail the horrid conditions in which migrants are being detained. All of the Border Patrol's detention centers reflect conditions of prolonged detention in facilities designed for short-term, temporary stays. According to the report, nearly all detention centers struggle with problems of overcrowding, conditions which were documented in disturbing photographs included in the report.[245] One was of migrants of all ages sitting and lying down

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[242] See Amanda Holpuch, Thousands More Migrant Children Separated Under Trump than Previously Known, Guardian (Jan. 17, 2019), https://www.theguardian.com/us-news/2019/jan/17/trump-family-separations-report-latest-news-zero-tolerance-policy-immigrant-children [https://perma.cc/88E5-KWLT]; Hannah Wiley, Hundreds of Migrant Kids Haven't Been Reunited with Their Parents. What's Taking So Long?, Tex. Trib. (Oct. 4, 2018), https://www.keranews.org/post/hundreds-migrant-kids-havent-been-reunited-their-parents-whats-taking-so-long [https://perma.cc/3CEV-SU23].

[243] See Menjívar & Abrego, supra note 58, at 1381.

[244] See Zolan Kanno-Youngs, Squalid Conditions at Border Detention Centers, Government Report Finds, N.Y. Times (July 2, 2019), https://www.nytimes.com/2019/07/02/us/politics/border-center-migrant-detention.html [https://perma.cc/5ACV-C2EY].

[245] See Memorandum from Jennifer L. Costello, Acting Inspector Gen., to The Honorable Kevin K. McAleenan, Acting Secretary, Dep't of Homeland Sec. 3--6 (July 2, 2019),

with no room to move.[246] This photograph showed migrants using crinkly, reflective solar blankets. The design marvel of these reflective sheets---they can keep astronauts warm in the cold and cool in the heat[247]---confirms that technology bears no inherent value, showing that agencies can marshal their resources for uplifting and oppressive missions alike.[248] More to the point, migrants, including children,[249] have died under these conditions. Official DHS statistics tally the number of deaths at twelve since the beginning of April 2018,[250] and other sources suggest at least twenty-four deaths since the start of the Trump Administration.[251] And at least one of these deaths was by suicide.[252]

Again, advocates and government officials largely agree that existing enforcement realities imperil the lives of migrants, children and adults alike. My larger point here is that treating family separation as a crisis risks missing the

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https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf [https://perma.cc/U6N4-E4GT] (describing the overcrowding at Border Patrol facilities in the Rio Grande Valley).

[246] Id. at 5 fig.3.

[247] See NASA, Spinoff 2006, at 56 (2006), https://spinoff.nasa.gov/Spinoff2006/PDF/accessible.pdf [https://perma.cc/T2T9-7LPR].

[248] See Moni Basu, 'Blankets' Designed for Spacecraft Keep Refugees Warm, CNN (Aug. 30, 2016), https://www.cnn.com/2016/08/30/health/space-blankets/index.html [https://perma.cc/8M6Q-EGMQ].

[249] See Molly Hennessy-Fiske, Six Migrant Children Have Died in U.S. Custody. Here's What We Know About Them, L.A. Times (May 24, 2019), https://www.latimes.com/nation/la-na-migrant-child-border-deaths-20190524-story.html [https://perma.cc/K839-RREF].

[250] Death Detainee Report, ICE, https://www.ice.gov/death-detainee-report [https://perma.cc/J543-46CN] (last updated Aug. 1, 2019).

[251] See Lisa Riordan Seville, Hannah Rappleye & Andrew W. Lehren, 22 Immigrants Died in ICE Detention Centers During the Past 2 Years, NBC News (Jan. 6, 2019), https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781 [https://perma.cc/G7A6-BBES]; see also Hannah Rappleye & Lisa Riordan Seville, 24 Immigrants Have Died in ICE Custody During the Trump Administration, NBC News (June 9, 2019), https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291 [https://perma.cc/W3K3-D9FS].

[252] See Jeffrey C. Mays & Matt Stevens, Honduran Man Kills Himself After Being Separated from Family at U.S. Border, Reports Say, N.Y. Times (June 10, 2018), https://www.nytimes.com/2018/06/10/us/border-patrol-texas-family-separated-suicide.html (on file with the *Columbia Law Review*).

harms that are waiting in the immediate future as we pass into a period of *postcrisis*. Whether we move forward by abating mandatory detention (which advocates demand) or by expanding detention center capacity (which the government prefers), a full and accurate accounting of harms exacted upon migrants is crucial to shaping the scope of relief---whether in the form of court-ordered remedy, statutory enactment, or administrative fix.

The law cannot repair all of the harm that has already been exacted upon these families. This is precisely the point that members of the American Psychological Association emphasized in imploring President Trump to abandon his mandatory separation policy at the border: The migrants who experienced family separation at the border are likely to experience long-lasting trauma, anxiety, and depression.[253]

b. No Choice but to Migrate

A part of the objection to the punitive nature of the family separations at the border was that these migrants were precisely the wrong type of migrant to penalize. As advocates argued, this is because many of these migrants were fleeing violence and other forms of persecution making them plausibly eligible for asylum or some other form of humanitarian relief. In simpler terms, these people had no choice but to migrate. The political urgency of the "crisis" frame combined with the moral innocence of "asylum seekers" allows advocates to highlight the cruelty of family separation policies. (And the critique is right: The cruelty is the point of the Trump Administration's immigration policies.[254]) But the machinery that

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[253] See Letter from Jessica Henderson Daniel, President, Am. Psychological Ass'n, and Arthur C. Evans, Chief Exec. Officer, Am. Psychological Ass'n, to President Donald Trump (June 14, 2018), https://www.apa.org/images/separating-families-letter_tcm7-236390.pdf [https://perma.cc/TU97-QLEP] (describing the adverse effects of family separation during immigration enforcement including "emotional trauma," "anxiety and depression," "post-traumatic stress disorder," and other psychological damage).

[254] See Adam Serwer, The Cruelty Is the Point, Atlantic (Oct. 3, 2018), https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/ [https://perma.cc/CBK6-K8YE] (arguing that President Trump's immigration policies suggest that "his only real, authentic pleasure is in cruelty"); Ishaan Tharoor, The Enduring Cruelty of Trump's

enables cruelty in the form of family separation runs throughout our immigration system. And those types of family separation—of the waiting, marooned, left out, and helpless variety—do not translate so easily into asylum claims.

The content and context of asylum law help explain the broader fixation on choice and individual responsibility. Those defending the interests of migrants often insist that the migrants who are being detained are seeking asylum, which is not a decision to migrate motivated purely or even partly by a desire for self-enrichment but rather for survival and the right to exist.[255] Migrants, these advocates might insist, are being unfairly punished and entitled to protection for the bad luck of residing in a dangerous place.[256] In many ways, then, notions of choice set the parameters of public debate. In the public's mind, there is a difference between a migrant who effectuates an unauthorized entry into the United States "merely" for the purposes of seeking a better life for their family and a migrant who has fled a country for fear of death and persecution. Many constituencies might bristle at those who are pulled into the United States by a fantasy but relent when those arriving at borders have been pushed by circumstances beyond their control.

The absence of choice is crucial to winning over skeptics who might have a hard time accepting the "slow motion" version of family separation as a harm that

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Immigration Agenda, Wash. Post (July 26, 2019), https://www.washingtonpost.com/world/2019/07/26/enduring-cruelty-trumps-immigration-agenda/ (on file with the *Columbia Law Review*) (criticizing President Trump's immigration policies as cruel); Tim Hains, Jonathan Capehart on Mississippi ICE Raids: "The Cruelty Is the Point Here," Real Clear Politics (Aug. 8, 2019), https://www.realclearpolitics.com/video/2019/08/08/jonathan_capehart_on_mississippi_ice_raids_the_cruelty_is_the_point_here.html [https://perma.cc/L88P-TF7J] (arguing that a recent immigration enforcement raid evinced the President's cruelty toward migrants).

[255] See Complaint, supra note 229, at 1 (alleging that the plaintiff fled her native country of Congo "[f]earing near certain death").

[256] In the context of health care policy, Allison Hoffman has called this the "Brute Luck" account of health care. Under this version of health care, insurance policies should cover hereditary diseases or random and unavoidable injuries but not the "harms resulting from an insured's own acts or choices, such as the costs of setting a broken leg from a rock climbing accident." See Allison K. Hoffman, Three Models of Health Insurance: The Conceptual Pluralism of the Patient Protection and Affordable Care Act, 159 U. Pa. L. Rev. 1873, 1926 (2011).

merits addressing because migrants have "chosen" to come to the United States and have "chosen" to stay.[257] If the pain of separation is truly unbearable, some might argue, then migrants can always return to their countries of origin.[258] In other words, just as migrants have chosen to come to the United States, they may choose to leave.[259] This type of reasoning---that migrants have "chosen" to come to the United States, thereby assuming the risks of their choice---runs through immigration law debates.[260] Asylum law is uniquely designed to get around this, much the way excuse or justification operates in other areas of the law to mitigate or neutralize culpability.

To be clear, as a matter of law, a lack of choice is not enough to secure passage into the United States. Those who are lucky enough to obtain asylum or refugee status comprise only a small fraction of those propelled to the United States under duress.[261] Indeed, the content of asylum law itself has arguably

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[257] See E. Tendayi Achiume, Migration as Decolonization, 71 Stan. L. Rev. 1509, 1512--23 (2019) (arguing that distributive justice demands the admission of third-world "economic migrant[s]," a term "typically reserved for [those] whose movement is popularly and legally understood to be a matter of [choice]," as remediation for "the failures of formal decolonization").

[258] See, e.g., Alene Tchekmedyian, 'You're Just There, Trapped': Why One Mexican Woman Decided to 'Self-Deport,' Long Before Trump, L.A. Times (May 29, 2017), https://www.latimes.com/world/mexico-americas/la-fg-self-deportation-tijuana-2017-story.html [https://perma.cc/4GKQ-N4GC] (reporting the story of how the persistent fear and humiliation of being caught by immigration enforcement compelled a woman who had lived in Los Angeles for over ten years to voluntarily move to Tijuana, Mexico).

[259] Some, like those in favor of self-deportation policies, might even embrace this position with relish. For a summary of the rise of modern self-deportation policies, see generally Park, Self-Deportation Nation, supra note 17, at 1911--20.

[260] In a similar fashion, a migrant's decision to come to the United States negates and displaces any discussion over whether migrants are coerced into remaining in the United States. A handful of important laws passed pursuant to the Thirteenth Amendment protect migrants against coercion, but obtaining relief under those laws can be difficult and is limited. See Kathleen Kim, Beyond Coercion, 62 UCLA L. Rev. 1558, 1568--69 (2015). Kathleen Kim astutely observes that for migrant workers the modern challenge is to break free from the "illusion of consent and contract" to reveal the realities of unauthorized workers being "unwillingly bound to . . . exploitive employment arrangement[s]." Id. at 1573.

[261] See Snapshot of U.S. Immigration 2019, Nat'l Conference State Legislatures, http://www.ncsl.org/research/immigration/snapshot-of-u-s-immigration-2017.aspx (on file with the *Columbia Law Review*) (showing that in 2017, only 146,003 out of approximately 1.1 million people

contributed to the chaos. As legal scholar Jaya Ramji-Nogales astutely observes, asylum law, and the broader principle of non-refoulement that it embodies, contributes to the construction of crises within the immigration law context. As she explains, our immigration system "lures migrants with the promise of lawful status if they can enter territory and prove themselves to be refugees" even while it pours greater resources into "powerful externalized border controls" that increase the dangers of this journey.[262] As a result, public discourse avoids the harder question of whether categories that were established more than half a century ago are still up to the task of allocating benefits to migrants seeking safe passage into the United States.[263] While Ramji-Nogales questions the continuing relevance of asylum categories, as Part II demonstrates, the relevant categories throughout our immigration system bear the signs of ossification. What the "no choice but to migrate" framing hides is that the choices facing immigrants are bad.

Recent litigation related to the Temporary Protected Status (TPS) program further illustrates the pervasiveness of the "no choice but to migrate" logic in the context of immigration-related disputes. The TPS program offers humanitarian relief akin to asylum---albeit, as the name of the program suggests, on a limited and renewable basis.[264] By statute, the Executive has the authority to grant TPS to migrants who are unable to return to their home countries because some unforeseen set of circumstances imperils them.[265] The Executive may revisit TPS

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who obtained lawful permanent status did so as refugees or asylees). Asylees and refugees must show that their exodus was due to persecution on the basis of some protected category---and importantly, the unavailability of work or other economic opportunities in one's home country is not relevant. See 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

[262] Jaya Ramji-Nogales, Migration Emergencies, 68 Hastings L.J. 609, 614 (2017).

[263] See id.

[264] For an overview of the Temporary Protected Status program, see generally Temporary Protected Status, U.S. Citizenship & Immigration Services, https://www.uscis.gov/humanitarian/temporary-protected-status [https://perma.cc/DN6Y-Z3LK] (last updated Aug. 1, 2019).

[265] See 8 U.S.C. § 1254a(b)(1). This provision was passed as a part of the Immigration Act of 1990. See Susan Bibler Coutin, Temporary Status Means Permanent Uncertainty: Salvadorans and TPS, Soc. Justice (Feb. 12, 2018), http://www.socialjusticejournal.org/temporary-status-means-permanent-uncertainty/ [https://perma.cc/WE9N-TB4F] ("TPS was created through the 1990 Immigration Act as a remedy for foreign nationals who are in the United States when their

designation from time to time to ensure that the underlying circumstances justifying the relief continue to exist.[266]

In October 2017, then-acting Homeland Security Secretary Elaine Duke began to issue notices of the agency's intent to terminate TPS designations for a number of countries.[267] Litigation ensued and a district court enjoined the implementation of this policy.[268] In doing so, Judge Edward Chen explained:

> TPS beneficiaries who have lived, worked, and raised families in the United States (many for more than a decade), will be subject to removal. Many have U.S.-born children; those may be faced with *the Hobson's choice* of bringing their children with them (and tearing them away from the only country and community they have known) or splitting their families apart.[269]

Debates about individual culpability and moral hazards offer little, if any, promise to find a way forward. Again, to revisit for a moment the hope of creating a mass legalization program, the debate often focuses on how to calibrate benefits in a way that both deters future migration flows and avoids "over-rewarding" those who have already entered the United States by "cutting in line."[270] This type of

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countr[y] experiences a national disaster or political conflict that makes it dangerous for them to return."); see also Madeline Messick & Claire Bergeron, Temporary Protected Status in the United States: A Grant of Humanitarian Relief that Is Less Than Permanent, Migration Policy Inst. (July 2, 2014), https://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent [https://perma.cc/62Q7-V5DW] (describing the origins of and current debates about TPS).

[266] See 8 U.S.C. § 1254a(b)(3).

[267] The countries include Haiti, Sudan, Nicaragua, and El Salvador. Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1092 (N.D. Cal. 2018).

[268] Ramos v. Nielsen, 336 F. Supp. 3d 1075, 1081 (N.D. Cal. 2018) (granting a preliminary injunction).

[269] Ramos v. Nielsen, 336 F. Supp. 3d 1075, 1080 (N.D. Cal. 2018) (emphasis added).

[270] See Reihan Salam, Trump's 'Animals' Remark Explains Why He's Losing the Immigration Debate, The Atlantic, May 16, 2018 (noting that an important and predictable set political compromise in immigration reform must include "amnesty," which would satisfy the

debate misses the larger structural elements to migration. The analogy to climate change points to the need for a multinational or global response to migration. Exactly what this response should look like is something that legal scholars have explored in a limited fashion,[271] but again, as Jaya Ramji-Nogales brilliantly explains, the existing international law structure that manages the refugee population is hopelessly outdated and in many ways culpable for the modern fixation on emergencies.[272] Characterizing the international legal regime as "a generally fragmented and weak field," Ramji-Nogales notes, "This awkward structure plays a central role in constructing migration emergencies. Migrants have few options but to take risky journeys to seek asylum inside the borders of destination states, whatever their reason for moving."[273]

Crisis conditions that leave migrants with no choice but to seek safety in the United States point to the importance of moral innocence and deservingness in remedying harms of family separation. Asylum and TPS both offer varying degrees of legal relief and signify a form of insider or membership status. Moral innocence is central to modern formulas for distributing membership benefits. Critiquing this type of membership, Professor Muneer Ahmad argues: "Echoing the social construction of welfare recipients, this is a pathological understanding of undocumented immigration. Such an 'individual responsibility' approach ignores the structural features of migration and unfairly allocates the entirety of the moral burden for undocumented immigration to immigrants themselves."[274]

American political left, and "effective workplace enforcement" which would placate restrictionists).

[271] For two exceptions, see Hiroshi Motomura, The New Migration Law: Migrants Refugees, and Citizens in an Anxious Age, 105 Cornell L. Rev. (forthcoming 2020) (manuscript at 4--6) (on file with author) (laying out a roadmap for an ambitious "reset" of migration law by abandoning the old limitations imposed by a civil rights conception of what the law is supposed to achieve); Ramji-Nogales, supra note 262, at 612--16 (laying out a blueprint for a new immigration legal regime that does not, through its own structure, create the migration crises it is purported to solve).

[272] Ramji-Nogales, supra note 262, at 615

[273] Id. at 644--45.

[274] Muneer I. Ahmad, Beyond Earned Citizenship, 52 Harv. C.R.-C.L. L. Rev. 257, 261--62 (2017).

Michele Dauber's work on early conceptions of federal benefits and relief programs again provides a helpful springboard: "Ultimately, whether or not an event was a 'calamity' deserving of federal intervention turned upon the ability of claimants to argue that they, like those who previously received aid, were innocent victims of fate rather than irresponsible protagonists in their own misery."[275] A similar story might be told about asylum seekers who had no choice but to undertake the journey north.

Slow death scholarship encourages a healthy dose of skepticism toward arguments grounded in notions of individual choice, and the examples of border detentions and TPS show why. Focusing on the migrant's choice to come to the United States and their choice to stay unburdens the state of any responsibility. Indeed, the state appears magnanimous. As anthropologists Ester Hernandez and Susan Bibler Coutin observe, the allure of remittances derives from its ability to allow those within the United States to paint themselves as "benevolent providers of resources" while simultaneously allowing them to "elide their own roles in producing global inequalities in the first place."[276] This is how misery and dread become naturalized and how "mistreatment" comes to be treated as "not only possible but uneventful, familiar, and legal."[277]

Again, the observation that a migrant had no choice but to migrate depends on a threshold construction of crisis. The notion of a crisis belongs in the same universe as terms like "act of God" and "disaster" for their ability to capture terrible events for which no one bears responsibility. Categories of "crisis" and "disaster" are worth studying because, even though they "may at first appear intuitively natural and unproblematic," those categories reveal "precisely what is at stake in many contests over the allocation of resources."[278] Doing so reveals how the allocation of state benefits has as much if not more to do with the *framing* of state beneficiaries' circumstances than it does with the circumstances themselves.[279]

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[275] Landis, supra note **Error! Bookmark not defined.**, at 271.

[276] Esther Hernandez & Susan Bibler Coutin, Remitting Subjects: Migrants, Money and States, 35 Econ. & Soc'y 185, 201 (2006).

[277] Menjívar & Abrego, supra note 54, at 1414.

[278] Landis, supra note **Error! Bookmark not defined.**, at 262.

[279] See id. at 262.

c. Obstacle to Flourishing

So far, I have tried to make the point that the sociolegal frames of "crisis" and "moral innocence" help advocates invalidate family separation policies at the border. At the same time, these frames make it harder to generate momentum to challenge other types of family separation. Here, let me take seriously the most plausible and legitimate justification for the zero tolerance policy at the border: protecting children against predatory adults.

From the government's perspective, child smuggling and human trafficking present a legitimate and compelling set of enforcement targets. Putting aside the cruel and volatile nature of the Trump Administration as a whole, a cadre of government lawyers and agents work across administrations to eradicate trafficking-related harms.[280] Some border patrol officials argue that the critiques of family separation sweep too broadly by ignoring those officials who are genuinely interested in protecting children. Defenders of the border patrol emphasize how difficult a task it is to determine a bona fide parent or guardian relationship on the basis of imperfect and fleeting information such as the verbal and nonverbal cues of children.[281] Against this backdrop, one might argue that the enforcement of anti-smuggling and anti-trafficking laws is a legitimate exercise of power, and more to the point, one that is not inconsistent with the principle of family reunification. Yet viewing these policies against other immigration laws and provisions highlights how difficult it is to disentangle legitimate enforcement goals from immigration law's broader family separation infrastructure.

As a reminder, slow death obfuscates either by excluding harms from the public's view or else by foisting blame on individuals when they fall short in their pursuit of security, prosperity, and contentment.[282] This is the promise of the "good life," or what Berlant calls a form of "cruel optimism." Berlant's critical insight is

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[280] See Federal Government Efforts to Combat Human Trafficking, U.S. Dep't of Health & Human Servs., https://www.acf.hhs.gov/otip/resources/federal-efforts [https://perma.cc/M9JE-S49E] (last updated May 4, 2019) (listing the federal agencies which "implement[] programs to protect and assist victims of human trafficking and to capture and prosecute their traffickers").

[281] See Molly Hennessy-Fiske, Migrants, young and old, are not always related. Border Patrol says fear of child trafficking forces separations, LA Times, May 8, 2018.

[282] See supra notes 45--56 and accompanying text.

that "cruel optimism exists when something you desire is actually an obstacle to your flourishing."[283] A number of programs and policies seek to protect migrant children but do so on an in loco parentis basis. That is, state actors step into a guardian role to confer immigration-related benefits to minors, who must agree to give up any claim or legal relationship to their family. In these arrangements, a migrant minor's family is treated as an obstacle to that minor's flourishing.

The most obvious example of this dynamic is the Special Immigrant Juvenile Status (SIJS) program. Migrant children who cannot be cared for by their parents for personal safety reasons can obtain a green card provided that migrant child foregoes the right to seek to sponsor that parent at some later time.[284] In the abstract, the SIJS category reflects a sensible instance of immigration officials intervening on behalf of the child against incompetent, insidious, or injurious parents. In practice, SIJS has been implemented with mixed results. For one thing, the underlying mechanisms can be overbroad in their exclusionary impact. SIJS categorically prevents child beneficiaries from eventually sponsoring any parents even if only one parent was responsible for the abuse of the child, or worse, directed abuse at the child and the other parent.[285] Moreover, the program also suffers from screening problems. Noncitizen children in the child welfare or foster system represent the paradigmatic example of a potential SIJS beneficiaries, and yet many commonly slip through the cracks because state officials---both the bureaucrats who manage and oversee the state child welfare as well as the judges who must provide the underlying factual findings---often lack the expertise to identify SIJS as a potential source of relief to children.[286] The dearth of lawyers with expertise

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[283] Berlant, Cruel Optimism, supra note 25, at 1.

[284] See 8 U.S.C. § 1153(b)(4) (2012) (noting that immigrant visas are available to "special immigrants"); id. § 1101(a)(27)(J)(i) (defining "special immigrant" to include migrant children "whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law").

[285] See Irene Scharf, Second Class Citizenship? The Plight of Naturalized Special Immigrant Juveniles, 40 Cardozo L. Rev. 579, 583 (2018); see also UNICEF, Behind Closed Doors: The Impact of Domestic Violence on Children 7 (2006), http://www.unicef.org/protection/files/BehindClosedDoors.pdf [https://perma.cc/ZTQ8-VGQZ] (noting the relationship between child abuse and domestic violence).

[286] See Karen Musalo, Lisa Frydman & Misha Seay, Immigration Remedies and Procedural Rights of Migrant Children and Acolescents, *in* Childhood and Migration in Central and North

in both (federal) immigration and (state) family law issues can place SIJS benefits further out of reach.[287]

All of this establishes a foundational logic to effectuating the zero-tolerance policy at the border. For children seeking refuge in the United States---at least from the perspective of immigration officials sizing up a migrant child's chances---traveling as a family actually hinders a migrant child's chances for a new life in the United States. Indeed, by treating as criminals adults who seek to smuggle children into the United States as cover for entry, immigration officials are interceding on the children's behalf to secure their safe passage into the United States.[288] By enforcing immigration laws at the border in this manner, the government is ostensibly acting on the child's behalf.[289] What is notable about the Trump

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America: Causes, Policies, Practices and Challenges 402 (2015), https://cgrs.uchastings.edu/sites/default/files/15_CGRS_English_0.pdf [https://perma.cc/KM2Y-95TT].

[287] See Elizabeth Keyes, Evolving Contours of Immigration Federalism: The Case of Migrant Children, 19 Harv. Latino L. Rev. 32, 36 (2016) ("Difficult cases crossing multiple areas of law limits the availability of lawyers willing and able to represent [children in immigration proceedings] . . . . For the many, many children who cannot afford representation, the pool of non-profit and pro bono attorneys trained and able to take on . . . cases is lamentably low."); see also Elizabeth Keyes, Unconventional Refugees, 67 Am. U. L. Rev. 89, 147--50 (2017) (discussing how SIJS provides an incomplete and awkward legal remedy for unaccompanied minors).

[288] See President Donald J. Trump Calls on Congress to Secure Our Borders and Protect the American People, White House (Jan. 8, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-calls-congress-secure-borders-protect-american-people/ [https://perma.cc/KHW6-QGQK] (describing the enforcement challenge at the border in terms of a "humanitarian crisis" caused in part by children being smuggled into the United States); see also Kirstjen Nielsen Addresses Families Separation at Border: Full Transcript, N.Y. Times (June 18, 2018), https://www.nytimes.com/2018/06/18/us/politics/dhs-kirstjen-nielsen-families-separated-border-transcript.html (on file with the *Columbia Law Review*) (arguing that existing trafficking laws "encourage[] families to put children in the hands of smugglers to bring them alone on [a] dangerous trek northward").

[289] See Ms. L. v. ICE, 302 F. Supp. 3d 1149, 1163 (S.D. Cal. 2018) (noting the government's reliance on "cases where interference with the right to family integrity was upheld in furtherance of identified safety or other penological interests"). Here, the government was trying to keep minors safe the way that the state does in criminal settings, such as when the state prevents children from visiting incarcerated parents for safety reasons. See, e.g., Overton v. Bazzetta, 539 U.S. 126, 129, 133 (2003) (holding that restricting a prisoner's access to nonincarcerated family members in order to

Administration's approach to interceding on behalf of children was the extent to which it did so. In *Ms. L. v. ICE*, the district court enjoined the government's practice of separating families.[290] The plaintiffs in that case did not challenge the government's ability to intercede on behalf of migrant children whose parents were found to be unfit. Rather, their argument focused on the fact that the government had not made the requisite finding of unfitness at all before proceeding to separate families.[291]

In this regard, the socio-legal landscape surrounding debates over the zero-tolerance policy bears some resemblance to the landscape undergirding debates over DACA. At first glance, this connection seems odd given that DACA is one of President Obama's signature immigrant-inclusive legacies. This program has played---and continues to play[292]---a central part in the process of normalizing and demystifying the presence of large numbers of unauthorized immigrants. In modern history, this began with the Supreme Court's 1982 decision, *Plyler v. Doe*, and continued on to debates over the DREAM Act, and then to DACA. The through line connecting all of these debates has been the perceived moral innocence of childhood arrivals---that is, the view that children should not be penalized under the law because they did not *choose* to enter or overstay without authorization.

At the same time, DACA treated the parents of Dreamers on different terms. This is the reality that sits in the other hand: Everyone else who chose to violate our nation's immigration laws deserves no such relief. Parents didn't "earn" anything. In fact, they are the lives against whom Dreamers are measured. Liminality gets closer to it, in that obtaining DAPA wouldn't necessarily lead to a green card. But a closer look shows that this doesn't account for everything either. For example, a central part of the regulatory justification for DAPA was that the beneficiaries had pending applications that had not yet produced an available visa.

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protect children against "harmful conduct" does not violate due process and other constitutional rights).

[290] 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

[291] Id. at 1141.

[292] See, e.g., Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 908 F.3d 476, 485--86 (9th Cir. 2018), cert. granted, 139 S.Ct. 2779 (2019) ("It is no hyperbole to say that Dulce Garcia embodies the American dream . . . . [She] appears no different from any other productive . . . young American. But one thing sets her apart. Garcia's parents brought her to this country in violation of United States immigration laws when she was four years old.").

This fits within the slow death framework and the "cruel optimism" that immigration law advocates. It gives migrants hope, but a hope that isn't ultimately fruitful—as evidenced by the Fifth Circuit litigation.

Both SIJS and DACA illustrate how the law seeks to absorb migrant children into the law's protections, but only at the cost of devaluing their parents and the rest of their family members. In some important ways, these programs reflect legally-sanctioned violence through obfuscation. Both of these programs are presented as humanitarian and equitable expressions of immigration law, but the effort to protect (in the case of SIJS) and praise (in the case of DACA) migrants detracts from the fissures that such programs can create within transnational families.

Immigration officials might say that critics have it exactly backward. The problem isn't that immigration policy treats families as an obstacle to child migrants from flourishing in the United States. Rather, it is all of the migrants seeking a life in America that prevents families from remaining intact within sending countries. One can imagine immigration officials wondering to themselves (or even aloud): "If only migrants would *stay put*, then there would be no families to detain and forcibly separate at the border."[293] In this formulation, it is migration channels that stand in the way of migrants realizing the fantasy of an intact and geographically consolidated family experience---*in the sending country*. And again, none of this is meant to critique the broader commitment to eradicating child and human trafficking. Our legal system should create mechanisms for eradicating such harms. *Of course it should*. But the slow death analytical framework provides a more nuanced approach to identifying the destructive elements of aspirational and morally unimpeachable political and legal commitments. The disregard of basic procedural protections by immigration officials[294] and the counter-messaging issued by high-ranking officials[295] made it easy to see a "best interests of the child" argument as an attempt to secure political cover for deeply punitive goals.

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[293] See Katie Zezima, Could rumors be partially responsible for an influx of unaccompanied children to the U.S.? Wash Post, June 6, 2014.

[294] *Ms. L.*, 310 F. Supp. 3d at 1140--42.

[295] See Jeff Sessions, Remarks Discussing the Immigration Enforcement Actions of the Trump Administration, Dep't of Justice (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions [https://perma.cc/97M8-H5W6].

IV. WHY SLOW DEATH?

The Trump administration's zero-tolerance policy has fixed the public's attention on the problem of family separation. It has cut through the malaise created by our immigration system to cull an idea that presents the possibility of generating momentum for reform. Objections that people might ordinarily have towards unauthorized migration soften and relent when the price of clinging to these objections is the forced separation of children from parents and the generational damage that comes with it.

The reports from border detention centers---the stories of children caring for infants and women being told to drink from toilets[296]---spark what Judith Butler calls ethical outrage, an anger born of Americans taking stock of the harms that we have exacted on others. Ethical outrage emerges when disturbing images capturing America's crimes engenders "a sense of ethical outrage that is, distinctively, for an Other, in the name of an Other."[297] For advocates, then, the temptation is clear: to produce more reports and to procure more images that can foster more outrage to spurn lawmaking that will eradiate family separation as a a part of detention policy at the border.

I want to suggest that we need more than just outrage to motivate chance because outrage, even of the ethical variety, has its limits. As Viet Nguyen explains, ethical outrage "continues to reassert the centrality of the person feeling that emotion, which justifies viewing the other as a perpetual victim[.]"[298] Nguyen continues:

> As much as I also feel Butler's ethical outrage, it appears to me that seeing the other only as a victim treats the other as

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[296] See Zolan Kanno-Youngs, Squalid Conditions at Border Detention Centers, Government Report Finds, N.Y. Times (July 2, 2019), https://www.nytimes.com/2019/07/02/us/politics/border-center-migrant-detention.html [https://perma.cc/5ACV-C2EY]; see also Memorandum from Jennifer L. Costello to Kevin K. McAleenan, supra note **Error! Bookmark not defined.**, at 3--6 (describing the overcrowding at Border Patrol facilities in the Rio Grande Valley).

[297] See Judith Butler, Precarious Life: The Powers of Mourning and Violence 150 (2006).

[298] See Viet Thanh Nguyen, Nothing Ever Dies: Vietnam and the Memory of War 75 (2016)

> an object of sympathy or pity, to be idealized or patronized. Existing as the object of or excuse for one's theory or outrage, the other remains, at worst, unworthy of study, and, at best, beyond criticism.[299]

Nguyen's critique illuminates the limitations of theorizing family separation as an episodic crisis afflicting our border infrastructure. While this most recent chapter of family separation has provided compelling insights into how our immigration laws and infrastructure fail migrants, it provides only a glimpse into the harms of family separation. In this final Part, I explain both why I believe slow death scholarship provides a useful set of insights for developing a more comprehensive account of family separation and how this scholarship might grow and evolve in response to the case study of migration to the United States.

In some ways, the proposition I lay out in this Essay is straightforward: family separation as a phenomenon is much more pervasive than is commonly perceived. So why slow death? Why not simply show that migrants are waiting, marooned, left out, and helpless and leave it at that? What slow death scholarship provides is the chance to structure a productive conversation around the immigrant body and specifically focus on what that body is allowed to feel and the life it is allowed to lead. Without this mooring, conversations about family separation risk getting subsumed by episodic crises. Slow death theory can reintroduce context that is critical to exploring the elasticity of principles like family reunification.

At the highest level of abstraction, slow death refers to a form of widespread suffering that deserves condemnation but evades meaningful detection. The concept of slow death implies that affected parties meet a premature demise. Some might argue that the harms exacted by obesity, and certainly cancer, *feel* different than longing to see one's family. Some might argue that the harms exacted by obesity, and certainly cancer, *feel* different than longing to see one's family. Some might ask: doesn't slow death mean actual death and demise?

While death, demise, and suffering are universal experiences, the expression of those experiences are not universal. For example, unauthorized

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[299] Id. at 76.

workers non uncommonly know that their immigration status cannot be used against them in a labor enforcement proceeding, yet they often decline to pursue claims anyway, choosing instead to bear the costs of wage theft and dangerous working conditions.[300] Shannon Gleeson calls this a form of health capital that unauthorized workers are aware that they possess. The result is that migrants lose their wages (which is economic capital) but they maintain their standing in the workplace as tough and resilient immigrant workers through the strategic spending of their "health capital." Notice the broader insight: a legal structure and culture that normalizes a workplace in which workers are taxed in the form of injuries and slights.

Assumptions about immigrant workers as tough and resilient are caricatures and stereotypes and hide. Treating migrants as superhuman, subhuman, or something other than human, operates to hide the pain that circumscribes these lives. By focusing on the capacity of migrants to tolerate pain draws attention to their fortitude and minimizes the pain. The skills and traits that predispose indigenous migrant workers to weeding crops ignores the ways that this work literally breaks their backs. Highlighting the work ethic of dishwashers and cooks in the restaurant industry ignores the reality that these workers pay for this reputation in the form of health capital—that is, they are willing to ignore the burns and lacerations they endure in order to demonstrate their value as workers.[301] The images of migrants being held in cages are horrific and morally outrageous, which helps to create their "viral" quality and they draw comparisons to the treatment of Iraqi prisoners at the hands Blackwater military contractors.[302] And this comparison isn't necessarily wrong. But the comparisons don't end there. Slow death theory shows that the mental and physical harms that migrants experience in connection to our immigration system run well into the interior of the United States even if they are hiding behind cultural and racialized tropes of migrant perseverance and superhuman strength.

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[300] See Shannon Gleeson, Leveraging Health Capital at the Workplace: An Examination of Health Reporting Behavior Among Latino Immigrant Restaurant Workers in the United States, 75 Soc. Sci. & Med. 2291, 2292--93 (2012).

[301] Cite Gomberg Munoz.

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Still, slow death scholarship has undertheorized the types of maladies and injuries that might qualify as a form of slow death. Family separation provides a helpful opportunity to clarify these boundaries. A part of what makes family separation at the border so noteworthy, and therefore capable, of generating momentum for social change is the palpable nature of the anguish created by the image of losing track of one's child. Losing a child to government separation feels like losing a child to death, which can adversely affect one's health.[303] But in what ways does this experience impact health?

For this reason, legal scholars might find common cause with those public health scholars interested in identifying and measuring the health consequences of immigration policies. While public health scholarship hasn't explicitly engaged the work of slow death scholars, there is plenty to suggest that a synergy is possible. Public health scholarship often focuses on "acute" and "chronic" harms, which more or less tracks the difference between harms created by spectacular violence and those incubated over time through slow violence.[304] Slow death scholarship can help organize a growing body of empirical work tracking the health consequences of immigration enforcement. Social scientists have documented the various ways that long-term separation[305] immigration-related

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[303] See, e.g., Catherine H. Rogers, Frank J. Floyd, Marsha Mailick Seltzer, Jan Greenberg & Jinkuk Hong, Long-Term Effects of the Death of a Child on Parents' Adjustment in Midlife, 22 J. Fam. Psychol. 203, 206–07 (2008) (finding that parents who have lost a child suffer from higher levels of depressive symptoms and more cardiovascular health problems).

[304] See, e.g., Florencia Torche & Uri Shwed, The Hidden Costs of War: Exposure to Armed Conflict and Birth Outcomes, 2 Soc. Sci. 558, 558 (2015) ("Recent research focuses on chronic stress resulting from persistent, continuous or cumulative difficult or demanding exposures. This attention is certainly warranted. Chronic stress has been shown to be harmful to health . . . . However, acute stress may also be harmful . . . ."); Florencia Torche & Andrés Villarreal, Prenatal Exposure to Violence and Birth Weight in Mexico: Selectivity, Exposure, and Behavioral Responses, 79 Am. Soc. Rev. 966, 973 (2014) (studying the "effect of acute exposure to local homicides on birth weight").

[305] See Dreby, U.S. Immigration Policy, supra note 140, at 247–49 (discussing the consequences on U.S. citizen children when their parents are deported); Joanna Dreby, The Burden of Deportation on Children in Mexican Immigrant Families, 74 J. Marriage & Fam. 829, 839–41 (2012) (suggesting that although the removal of a parent obviously disrupts the lives of children, even the constant threat of removal can negatively impact children).

detention policies negatively impacts the entire family, especially children.[306] Enforcement policies in this context not only impose a mark of inferiority, they reduce the number of life chances available to migrants[307] and can contribute to emotional and physical harms[308] such as depression[309] and alcohol abuse.[310]

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[306] See Caitlin Patler & Nicholas Branic, Patterns of Family Visitation During Immigration Detention, 3 Russell Sage Found. J. Soc. Sci. 18, 33 (2017) (noting that "detainees with undocumented children receive fewer face-to-face visits," that less visitation may "lead to increased despair and reduce family cohesion in immigrant families," and that "the immigration detention experience mirrors criminal incarceration in many ways"). For additional perspectives on the impact of imprisonment on families, see generally Comfort, supra note **Error! Bookmark not defined.**, at 65--98 (discussing the effects experienced by women who are partners of incarcerated individuals); Priscilla A. Ocen, Incapacitating Motherhood, 51 U.C. Davis L. Rev. 2191, 2221--23 (2018) (analyzing the impact of incarceration on women and motherhood); Tasseli McKay, Megan Comfort, Christine Lindquist & Anupa Bir, If Family Matters: Supporting Family Relationships During Incarceration and Reentry, 15 Criminology & Pub. Pol'y 529, 532 (2016) (suggesting that public policy should address the impact of incarceration on family relationships).

[307] See Spade, supra note 57, at 5.

[308] See Yao Lu, Household Migration, Social Support, and Psychosocial Health: The Perspective from Migrant-Sending Areas, 74 Soc. Sci. & Med. 135, 141 (2012) ("[A]dults left behind by internal migrants tend to be more prone to stress-related health conditions and psychological distress."); see also Feinian Chen, Hui Liu, Kriti Vikram & Yu Guo, For Better or Worse: The Health Implications of Marriage Separation Due to Migration in Rural China, 52 Demography 1321, 1336--39 (2015) (finding from a comparative study of married couples living apart due to migration in China that such couples suffered greater negative emotional and health consequences exacerbated by duration of separation).

[309] Yao Lu, Rural--Urban Migration and Health: Evidence from Longitudinal Data in Indonesia, 70 Soc. Sci. & Med. 412, 417 (2010) (concluding from a study of the health of migrants who moved compared to those who stayed behind in rural areas that family separation has an adverse effect on psychological health through a measurement of depressive symptoms).

[310] See Miguel Angel Cano, Mariana Sanchez, Mary Jo Trepka, Frank R. Dillon, Diana M. Sheehan, Patria Rojas, Mariano J. Kanamori, Hui Huang, Rehab Auf & Mario De La Rosa, Immigration Stress and Alcohol Use Severity Among Recently Immigrated Hispanic Adults: Examining Moderating Effects of Gender, Immigration Status, and Social Support, 73 J. Clinical Psychol. 294, 302 (2017) (finding a statistically significant relationship between higher immigration stress and higher alcohol use severity among recent Hispanic immigrants, an effect that was also stronger in men than in women); see also Frank R. Dillon, Mario De La Rosa, Mariana Sanchez & Seth J. Schwartz, Preimmigration Family Cohesion and Drug/Alcohol Abuse Among Recent Latino Immigrants, 20 Fam. J. 256, 263 (2012) ("[H]igher preimmigration family cohesion

At the same time, the paradigmatic examples of slow death harms are obesity and cancer, which are given expression in the form of physical symptoms in the body. Identifying examples in the immigration context can help push the slow death conversation to consider harms beyond these examples. How do psychic and mental harms figure into this universe? Does slow death require actual death and demise or do harms that are unseen but felt also count? A growing body of work has focused on the developmental disorders linked to immigration enforcement.[311] Much of the mental anguish that immigrants feel also can manifest themselves in physical ways as well. To the extent that physical deterioration is required in order to establish slow death, public health scholars have focused on whether and how stress and emotional abuse affects the body.[312]

Using family separation as a basis for evaluating the harms that the entire immigration system exacts upon migrants can help keep discussions about immigration reform to a manageable scale. The dysfunction that defines our immigration system can seem intractable, and the suffering that this system causes can seem unimaginable. Immigration law operates within a complex political economy.[313] These realities, combined with general problems of cognitive

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was linked with lower levels of engagement in illicit drug use, less harmful/hazardous alcohol use, and lower frequency and quantity of alcohol use . . . .").

[311] See Edward Vargas & Viridiana L. Benitez, Latino parents' links to deportees are associated with development disorders in their children, 47 Journal of Community Psychology (2019).

[312] See Atheendar S. Venkataramani, Sachin J. Shah, Rourke O'Brien, Ichiro Kawachi & Alexander C. Tsai, Health Consequences of the U.S. Deferred Action for Childhood Arrivals (DACA) Immigration Programme: a Quasi-Experimental Study, 2 Lancet Pub. Health e175, e178–79 (2017) ("[W]e found that exposure to the DACA programme led to meaningful reductions in symptoms of psychological distress among DACA-eligible individuals."). But see Heide Castaneda, Seth M. Holmes, Daniel S. Madrigal, Maria-Elena DeTrinidad Young, Naomi Beyeler & James Quesada, Immigration as a Social Determinant of Health, 36 Ann. Rev. Pub. Health 375, 383 (2015) ("[T]he variable of legal status [for DACA recipients] changed virtually overnight, but the lifelong experiences that affect health status may remain.").

[313] See generally Mariano-Florentino Cuellar, The Political Economies of Immigration Law, 2 U.C. Irvine L. Rev. 1 (2012).

overload,[314] can lead to citizens and residents of the United States struggling to grapple with the "bigness" of the nation's immigration "problem." In the related context of climate change-induced migration, legal scholars often describe the challenges of formulating a response to an existential problem meriting a global response. Maxine Burkett argues that existing categories animating migration law are wholly inadequate to deal with climate change-induced migration.[315] Entire areas of the law are predicated on climate stability, Burkett observes.[316] But uncertainty has become a defining feature of the climate change challenge. Much of our global migration system that addresses humanitarian relief is grounded in the notion of crisis. Thus, the notion of crisis "is inadequate and inaccurate as it connotes a temporary or isolated incident."[317] Such a regime cannot meet head on the migration challenges wrought by climate change as it is neither "temporary nor simple."[318] The global scale of the phenomenon renders the challenge posed by climate change a sort of singularity, a problem that fundamentally differs from other problems facing our legal system.[319]

CONCLUSION

In this Essay, I have tried to make three points: (1) that slow death offers a paradigm that helps identify unspectacular and therefore hard-to-notice acts of violence such as those that occur within the context of immigration admissions, enforcement, adjustment, and transnational banking; (2) that current debates over enforcement policy at the border illustrate how justifications and solutions offer very little insight into broader structural causes of exploitative migration conditions; but (3) that broadening debates to account for slow death introduces

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[314] See Cass R. Sunstein, Cognition and Cost-Benefit Analysis 18–19 (Univ. of Chi., John M. Olin Law & Econ. Working Paper No. 85, 1999), https://ssrn.com/abstract=186669 (on file with the Columbia Law Review) (noting that "predictable features of cognition will lead to a demand for regulation that is unlikely to be based on the facts").

[315] See Maxine Burkett, Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice, 53 Harv. C.R.-C.L. L. Rev. 445, 450–51 (2018).

[316] Id.

[317] Id. at 473.

[318] Id.

[319] See Eric Biber, Law in the Anthropocene Epoch, 106 Geo. L.J. 1, 6–7 (2017).

the opportunity to focus on time as an organizing principle within our immigration system.

In trying to develop an account of slow death, I don't mean to diminish the human toll of family separation of the spectacularly violent variety. I want to emphasize that my goal was not to browbeat or lecture people out on the front lines trying to stop the family separations at the border. Rather, I offer a perspective that I hope can contribute to a conversation about how to eradicate family separation across our entire immigration system. It is imperative that we teach ourselves to recognize the kinds of insidious harms that migrants experience on a daily basis. The right against family separation is here, there, everywhere, and at all times. As slow death scholar Chloe Ahmann observes through the weary words of one Baltimore resident fighting against the presence of a hazardous waste dump in his neighborhood: "It's exhausting to create an event out of nothing."[320]

[320] Ahmann, supra note 34, at 146.