

DEATH AT THE DOOR OF RELIEF:  
THE CRIMINALIZATION OF HUMANITARIAN WORK  
AND ASYLUM

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## INTRODUCTION

In 2015, the world was appalled when photos of a drowned Syrian boy, lying face down on a Turkish beach, were published on the front page of news outlets across the globe.<sup>1</sup> His name was Aylan Kurdi.<sup>2</sup> He died alongside his five-year-old brother when their boat capsized en route to the Greek Island of Kos.<sup>3</sup> Aylan, like millions of other Syrians, was fleeing a civil war in his country, hoping to find relative safety in the European Union (“EU”).<sup>4</sup> In 2019, Americans were forced to confront similar inhumanity when photos surfaced of a deceased Óscar Alberto Martínez Ramírez and his infant daughter, Valeria.<sup>5</sup> The father and daughter, originally from El Salvador, had drowned while trying to cross the Rio Grande into Texas.<sup>6</sup> Valeria died with her arm around her father, locked in his embrace.<sup>7</sup> These horrifying stories depict the human cost of increasingly dangerous migration routes.<sup>8</sup>

By mid-2022, the United Nations High Commissioner for Refugees (“UNHCR”), the United Nations’ (“UN”) agency responsible for protecting refugees and other displaced individuals, reported that there are 103 million forcibly displaced people in the world.<sup>9</sup> In 2023, the UNHCR estimated that this number had increased to over 117 million.<sup>10</sup> Despite the pressing need for humanitarian relief, governments have routinely elected to militarize their borders to prevent the so-called “invasion”<sup>11</sup> of asylum-seekers and migrants.<sup>12</sup> Policies that discriminate on the basis of a protected ground, and

<sup>1</sup> *Eleven Migrants Drown Heading from Turkey to Greek Island: Media*, REUTERS (Sept. 2015, 4:19 AM), <https://www.reuters.com/article/idUSKCN0R20IJ>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Daniella Silva, *Family of Salvadorian Migrant Dad, Child Who Drowned Say He ‘Loved His Daughter So Much’*, NBC NEWS (June 26, 2019, 3:24 PM), <https://www.nbcnews.com/news/latino/family-salvadoran-migrant-dad-child-who-drowned-say-he-loved-n1022226>.

<sup>6</sup> *Id.*; see generally *Temporary Protected Status Designated Country: El Salvador*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-el-salvador> (last visited Jan. 2, 2024).

<sup>7</sup> Silva, *supra* note 5.

<sup>8</sup> John D. Márquez, *Latinos as the “Living Dead”*: Raciality, Expendability, and Border Militarization, 10 *LATINO STUD.* 473-98 (2012).

<sup>9</sup> UNITED NATIONS HIGH COMM’R FOR REFUGEES, *MID-YEAR TRENDS 2022* (2022) [hereinafter *MID-YEAR TRENDS 2022*].

<sup>10</sup> *Global Appeal 2023*, UNITED NATIONS HIGH COMM’R FOR REFUGEES, <https://reporting.unhcr.org/globalappeal-2023> (last visited Feb. 20, 2024).

<sup>11</sup> President Donald Trump, Remarks by President Trump on the Illegal Immigration Crisis and Border Security (Nov. 1, 2018) (available at: <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security>).

<sup>12</sup> See generally Raymond Michalowski, *Border Militarization and Migrant Suffering: A Case of Transnational Social Injury*, 34 *SOC. JUST.* 62 (2007).

those that prevent access to asylum and other forms of protection, are made in spite of international legal obligations.<sup>13</sup> Specifically, border control policies that are advanced under the pretense of national security and counterterrorism efforts have effectively villainized immigrants and minority groups.<sup>14</sup>

Although it is contested whether stringent immigration control measures are effective at reducing the number of asylum-seekers and migrants presenting themselves at a country's border,<sup>15</sup> evidence clearly suggests that strict border enforcement increases the risk of death and injury for immigrants.<sup>16</sup> As part of national border enforcement efforts, the United States government has acknowledged the increased dangers posed by harsh border controls, yet it has continued to pursue a policy of "prevention through deterrence"<sup>17</sup> despite an increase of deaths along the border.<sup>18</sup>

With the U.S. Customs and Border Protection ("CBP") nationwide encounters at a record high,<sup>19</sup> immigration law and policy remains a divisive issue in the United States.<sup>20</sup> Between 1998 and 2020, CBP reported that over seven-thousand-five hundred migrants died crossing the Southwest border of

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<sup>13</sup> G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965).

<sup>14</sup> See generally HARSHA WALIA, BORDER AND RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM (2021); Alan Fram & Jonathan Lemire, *Trump: Why Allow Immigrants from 'Shithole Countries'?*, AP (Jan. 12, 2018, 12:09 AM), <https://apnews.com/article/immigration-north-america-donald-trump-ap-top-news-international-news-fdda2ff0b877416c8ae1c1a77a3cc425> (former President Trump referring to immigrants from Africa and Haiti). Disturbingly, Haitians are denied asylum in eighty-two percent of cases, despite UNHCR recommendations to stop forced returns to the country. *The Impact of Nationality, Language, Gender and Age on Asylum Success*, TRAC IMMIGR. (Dec. 7, 2021), <https://trac.syr.edu/immigration/reports/668>. See also UNHCR Calls on States to Refrain from Forced Returns of Haitians, UNITED NATIONS HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/us/news/press-releases/unhcr-calls-states-refrain-forced-returns-haitians> (last visited Nov. 18, 2023).

<sup>15</sup> Mathias Czaika & Hein de Haas, *The Effectiveness of Immigration Policies*, 39 POPULATION & DEV. REV. 487, 487-508 (2013); Karl Eschbach, Jacqueline Hagan, Nestor Rodriguez, Rubén Hernández-León & Stanley Bailey, *Death at the Border*, 33 INT'L MIGRATION REV. 430 (1999); Edward Alden, *Is Border Enforcement Effective? What We Know and What It Means*, 5 J. ON MIGRATION & HUM. SEC. 481 (2017); VERA INST. JUST., OPERATION STREAMLINE: NO EVIDENCE THAT CRIMINAL PROSECUTION DETERS MIGRATION (2018).

<sup>16</sup> Eschbach, Hagan, Rodriguez, Hernández-León & Bailey, *supra* note 15, at 431.

<sup>17</sup> U.S. BORDER PATROL, BORDER PATROL STRATEGIC PLAN 1994 AND BEYOND 6 (1994) [hereinafter BORDER PLAN].

<sup>18</sup> U.S. GEN. ACCT. OFF., GAO/GGD-98-21, ILLEGAL IMMIGRATION: SOUTHWEST BORDER STRATEGY RESULTS INCONCLUSIVE; MORE EVALUATION NEEDED 11, 49-50, 84 (1997) [hereinafter ILLEGAL IMMIGRATION].

<sup>19</sup> *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last modified Feb. 13, 2023).

<sup>20</sup> Colleen Long, *Immigration Will Vex Biden No Matter Who Controls Congress*, AP (Oct. 6, 2022, 6:52 PM), <https://apnews.com/article/biden-immigration-congress-government-and-politics-a6b7a3f19297e9d6675fd625634dd41f>.

the United States.<sup>21</sup> In 2022, CBP reported that “800 migrants have died border-wide,” representing a grim annual record.<sup>22</sup> These statistics only represent officially reported deaths and do not include unreported deaths or those of individuals whose remains have never been found.<sup>23</sup> Indeed, the Government Accountability Office (“GAO”) recently released a report highlighting the problems with CBP data collection and reporting on migrant deaths, concluding that the number of deaths is likely twice as high.<sup>24</sup>

Troublingly, many countries have gone so far as to criminalize and target third-party non-governmental organizations (“NGOs”) and humanitarian workers who work on the frontlines providing indispensable assistance to refugees, asylum-seekers, and migrants.<sup>25</sup> No More Deaths (No Más Muertes) is an Arizona-based non-profit faith group whose mission “is to end death and suffering in the Mexico-US borderlands” through advocacy and direct humanitarian assistance.<sup>26</sup> No More Deaths operates in the CBP’s Tucson Sector, approximately forty miles from the border, which “covers most of the State of Arizona from the New Mexico State line to the Yuma County line” and is “one of the busiest sectors in the country” for unauthorized entries and border patrol apprehensions.<sup>27</sup> This area lies within the Sonoran Desert, a particularly inhospitable region where “summer air temperatures routinely exceed 40 [degrees Celsius] (104 [degrees Fahrenheit]).”<sup>28</sup> The need for humanitarian assistance in this region is clear; “[a]ccording to the Pima County Medical Examiner, 2,816 sets of

<sup>21</sup> U.S. BORDER PATROL, SOUTHWEST BORDER SECTORS (2021).

<sup>22</sup> Joel Rose & Marisa Peñaloza, *Migrant Deaths at the U.S.-Mexico Border Hit a Record High, in Part Due to Drownings*, NPR (Sept. 29, 2022, 5:00 AM), <https://www.npr.org/2022/09/29/1125638107/migrant-deaths-us-mexico-border-record-drownings>.

<sup>23</sup> United States v. Hoffman, 436 F. Supp. 3d 1272 (D. Ariz. 2020); see also Camilo Montoya-Galvez, *At Least 853 Migrants Died Crossing the U.S.-Mexico Border in Past 12 Months - A Record High*, CBS NEWS (Oct. 28, 2022, 10:37 AM), <https://www.cbsnews.com/news/migrant-deaths-crossing-us-mexico-border-2022-record-high>.

<sup>24</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-105053, SOUTHWEST BORDER: CBP SHOULD IMPROVE DATA COLLECTION, REPORTING, AND EVALUATION FOR THE MISSING MIGRANT PROGRAM (2022) [hereinafter CBP SHOULD IMPROVE DATA COLLECTION, REPORTING, AND EVALUATION].

<sup>25</sup> Olivia Marti & Chris Zepeda-Millán, *Criminalizing Humanitarian Aid at the U.S.-Mexico Border*, UCLA LATINO POL’Y & POL. INITIATIVE (Sept. 2020), <https://latino.ucla.edu/research/criminalizing-humanitarian-aid-at-the-u-s-mexico-border>.

<sup>26</sup> *About No More Deaths*, NO MORE DEATHS, <https://nomoredeaths.org/about-no-more-deaths> (last visited Nov. 18, 2023).

<sup>27</sup> *Tucson Sector Arizona*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/tucson-sector-arizona#:~:text=> (last modified Aug. 21, 2023). The Tucson Sector covers the most noncitizen apprehensions and marijuana seizures. *Id.*

<sup>28</sup> *Sonoran Desert Network Ecosystems*, NAT’L PARK SERV., <https://www.nps.gov/im/sodn/ecosystems.htm> (last updated May 2, 2023).

‘undocumented border crosser remains’ were recovered in Arizona between the years 2000 and 2017.”<sup>29</sup>

In addition to leaving water along migration routes, a practice for which they were convicted of misdemeanor charges,<sup>30</sup> No More Deaths established a facility, known as The Barn, in CBP’s Tucson Sector.<sup>31</sup> The Barn provided a reprieve to asylum-seekers and migrants crossing the border.<sup>32</sup> On January 17, 2018, Scott Daniel Warren, a volunteer with No More Deaths, was arrested by CBP Border Patrol Agents for “concealing, harboring, or shielding [unauthorized noncitizens]” after he “provid[ed] them with at least food and water, which included preparing food for their consumption.”<sup>33</sup> Although Warren was ultimately found not guilty after a retrial,<sup>34</sup> the criminalization of humanitarian work is part of a problematic larger policy to deter irregular migration<sup>35</sup> into the United States.<sup>36</sup>

As an initial matter, it is important to distinguish between the various terminologies used to describe those forcibly displaced from their homelands. This Note uses the term “refugee” to describe individuals, outside of their country of origin, who “due to a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion” are unable or unwilling to return to their home country.<sup>37</sup> Typically, to be considered a refugee, an individual must go through a Refugee Status Determination, a “process by which governments or UNHCR determine whether a person seeking international protection is considered a

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<sup>29</sup> United States v. Hoffman, 436 F. Supp. 3d at 1272 (D. Ariz. 2020).

<sup>30</sup> *Id.*

<sup>31</sup> Bob Ortega, *Trial Begins for No More Deaths Volunteer Who Aided Migrants*, CNN INVESTIGATES (June 3, 2019, 6:30 AM), <https://www.cnn.com/2019/06/03/us/trial-scott-warren-no-more-deaths-volunteer-migrants-arizona-invs/index.html>.

<sup>32</sup> *Id.*

<sup>33</sup> United States v. Warren, 2018 WL 5257807, at \*2 (Ariz. D.C. 2018).

<sup>34</sup> Jasmine Aguilera, *Humanitarian Scott Warren Found Not Guilty After Retrial for Helping Migrants at Mexican Border*, TIME, <https://time.com/5732485/scott-warren-trial-not-guilty> (last updated Nov. 21, 2019, 3:29 PM).

<sup>35</sup> Referring to the “[m]ovement of persons that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the State of origin, transit or destination.” *Key Migration Terms*, INT’L ORG. FOR MIGRATION, <https://www.iom.int/key-migration-terms> (last visited Feb. 1, 2024).

<sup>36</sup> Martí & Zepeda-Millán, *supra* note 25. For insight into the culture and opinions of CBP staff, see generally Irene Isela Vega, *Legitimacy, Morality, and Criminality: The Occupational Culture of U.S. Border Patrol Agents* (2017) (Ph.D. dissertation, University of California, Los Angeles).

<sup>37</sup> *Who We Serve - Refugees*, OFF. REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/policy-guidance/who-we-serve-refugees> (last updated Mar. 16, 2022). In the United States, “refugees” are typically considered those which satisfy the definitional requirements, and who are approved for resettlement (or “third country resettlement”) from an intermediate country to their final host country. *An Overview of U.S. Refugee Law and Policy*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy> (last modified Oct. 22, 2022).

refugee under international, regional or national law.”<sup>38</sup> The term “asylum-seeker” is used to denote those who are “seeking international protection” and who apply for such protection from within the country where they are seeking safe haven.<sup>39</sup> Finally, the term “migrant” generally refers to individuals who may not face persecution in their country of origin, but nonetheless are motivated to leave their country for other reasons.<sup>40</sup> While discussing United States domestic law, this Note uses the terms “noncitizen” or “unauthorized entrant” in place of the signaling terms “*alien*” and “*illegal*,” respectively, to indicate those without legal status in the United States.<sup>41</sup>

This Note argues that the stringent immigration control methods employed by the U.S. federal government—such as the deliberate funneling of migrants and asylum-seekers to dangerous areas of the border and the criminalization of humanitarian work—lead to increased deaths at the Southern border, implicate important human rights obligations, and severely limit the ability of humanitarian aid networks to provide services to those in need. Moreover, this Note argues that such draconian and inhumane immigration practices and procedures are ineffective at quelling the flow of asylum-seekers and migrants and create new dangers for individuals seeking international legal protection. This Note focuses primarily on migration routes from the Western Hemisphere to the U.S.-Mexico border.<sup>42</sup> To further illustrate the global nature of migration, additional references to migration “hotspots”<sup>43</sup> in the Mediterranean corridor, including Greece and Italy, are included.

Part I of this Note discusses the background of immigration at the Southern border, including an analysis of CBP procedures and administrative

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<sup>38</sup> *Refugee Status Determination*, UNITED NATIONS HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/us/what-we-do/safeguard-human-rights/protection/refugee-status-determination> (last visited Feb. 1, 2024).

<sup>39</sup> UNITED NATIONS HIGH COMM’R FOR REFUGEES, UNHCR GLOBAL REPORT 2005 - GLOSSARY (2005).

<sup>40</sup> The term “migrant” is generally understood to include only those who leave their country of origin for economic reasons or “in order to seek material improvements in their livelihood.” *Id.*

<sup>41</sup> The Department of Justice (“DOJ”) recently adopted this change in terminology. See Memorandum from Jean King, Acting Dir. Exec. Off. for Immigr. Rev. to All Exec. Off. for Immigr. Rev. on Terminology: Clarify the Agency’s Use of Terminology Regarding Noncitizens (July 23, 2021) (on file with author).

<sup>42</sup> Although the majority of individuals apprehended at the border are nationals of Mexico, Guatemala, and Honduras, this migration route includes thousands of people from the Caribbean, Europe, Africa and Asia. See U.S. BORDER PATROL, U.S. BORDER PATROL NATIONWIDE APPREHENSIONS BY CITIZENSHIP AND SECTOR IN FY2007 (2021).

<sup>43</sup> See DARREN NEVILLE, SARAH SY & AMALIA RIGON, EUR. PARL., ON THE FRONTLINE: THE HOTSPOT APPROACH TO MANAGING MIGRATION (2016) (available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL\\_STU\(2016\)556942\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf)).

actions in this area. Part II examines the international and domestic legal frameworks affecting the rights of noncitizens and the right to asylum more broadly. Part III considers how draconian immigration policies implicate vital human rights obligations and perpetuate instability. Part IV proposes remedial solutions including the increased use of humanitarian parole, temporary protected status, refugee resettlement, and the establishment of peacetime humanitarian corridors to help facilitate the movement of particularly vulnerable individuals across the border. Finally, Part V concludes with a summary of findings and arguments.

## I. BACKGROUND

The Treaty of Guadalupe Hidalgo of 1848 and the subsequent 1853 Gadsden Purchase formally ended the Mexican-American War and delineated the present day U.S.-Mexico border.<sup>44</sup> For much of their early history, and indeed still today, border communities economically benefited from their proximity to one another.<sup>45</sup> Throughout the late nineteenth and early twentieth century, the United States began to formalize entry procedures at the border, establishing inspection stations at points of entry and imposing certain restrictions on those who could enter the country.<sup>46</sup> Today, the U.S.-Mexico border is the busiest land crossing in the world.<sup>47</sup>

During the 1980s and early 1990s, the United States experienced a large increase in unauthorized entries<sup>48</sup> along the Southwest border.<sup>49</sup> Prior to 1994, the majority of unauthorized entries occurred at or near major urban

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<sup>44</sup> Treaty of Peace, Friendship, Limits, and Settlement, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922.

<sup>45</sup> See generally DAVID E. LOREY, *THE U.S.-MEXICAN BORDER IN THE TWENTIETH CENTURY* (1999).

<sup>46</sup> 1891: *Immigration Inspection Expands*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/about/history/1891-immigration-inspection-expands> (last modified May 9, 2023); *The Immigration Act of 1924 (The Johnson-Reed Act)*, OFF. HISTORIAN, <https://history.state.gov/milestones/1921-1936/immigration-act> (last visited Dec. 27, 2023); 1942: *Bracero Program*, LIBR. CONG., <https://guides.loc.gov/latinx-civil-rights/bracero-program> (last visited Dec. 27, 2023).

<sup>47</sup> Lizabeth Diaz & Jose Luis Gonzalez, *World's Busiest Border Falls Quiet with Millions of Mexicans Barred from U.S.*, REUTERS (Mar. 31, 2020) (available at: [https://news.yahoo.com/worlds-busiest-border-falls-quiet-173115639.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce\\_referrer\\_sig=AQAAAIpSgZWBy1J9HOK3rujcedeODID5yrL85gz526vODuyrvwf7FQhm5hfC0ZPe6ypbi2lmsTeET1vt13T9v6CLmgcMh0MoxltEHhvDcLdGWcPTIGQcei\\_iZsd7DVzazPIDORNCK2A1PH7cK5O7kBA7a4RCob6F4xDCXwpQjGz2v9](https://news.yahoo.com/worlds-busiest-border-falls-quiet-173115639.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAIpSgZWBy1J9HOK3rujcedeODID5yrL85gz526vODuyrvwf7FQhm5hfC0ZPe6ypbi2lmsTeET1vt13T9v6CLmgcMh0MoxltEHhvDcLdGWcPTIGQcei_iZsd7DVzazPIDORNCK2A1PH7cK5O7kBA7a4RCob6F4xDCXwpQjGz2v9)).

<sup>48</sup> See 8 U.S.C. § 1325(a) for the definition of “unauthorized entry.”

<sup>49</sup> *Border Patrol History*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/border-security/along-us-borders/history> (last modified July 21, 2020).

ports of entry, including San Diego, California and El Paso, Texas.<sup>50</sup> In response, the federal government, under leadership of then-President Bill Clinton, established policies that concentrated manpower and enforcement technology at the most populated portions of the border.<sup>51</sup> For example, Operation “Hold the Line” was established in El Paso in 1993 to provide “a ‘show of force’ to potential illegal border crossers.”<sup>52</sup> This policy resulted in “four hundred agents and vehicles every 100 yards from one side of El Paso to the other, creating a virtual and visible human wall of enforcement, in order to prevent illegal immigration.”<sup>53</sup>

One year later, in 1994, Operation “Gatekeeper” was implemented to address the influx of unauthorized border crossings in the San Diego Sector, which at the time “accounted for more than half of illegal entries[]” into the United States.<sup>54</sup> Influenced by the purported success of enforcement efforts in El Paso, Operation “Gatekeeper”:

[S]hifted the operational emphasis from apprehension to deterrence and prevention. Many agents were transferred to “high visibility” fixed positions along the border, and a three-tiered system of agent deployment was instituted to facilitate apprehension of illegal immigrants who made it past the first line of defense. The Station also received new equipment, including four-wheel drive vehicles, infrared night scopes, and electronic sensors.<sup>55</sup>

CBP reported that Operation “Gatekeeper” “reduced illegal entries in San Diego by more than 75% over the next few years.”<sup>56</sup> Although these operations were successful at averting individuals from the El Paso and San Diego Sectors, the total number of noncitizens apprehended annually rose exponentially during the 1990s.<sup>57</sup>

<sup>50</sup> See generally TIMOTHY J. DUNN, BLOCKADING THE BORDER AND HUMAN RIGHTS: THE EL PASO OPERATION THAT REMADE IMMIGRATION ENFORCEMENT (Howard Campbell, Duncan Earle & John Peterson eds., 2009).

<sup>51</sup> See generally ANDREW M. BAXTER & ALEX NOWRASTEH, CATO INST., POL’Y ANALYSIS, A BRIEF HISTORY OF U.S. IMMIGRATION POLICY FROM THE COLONIAL PERIOD TO THE PRESENT DAY (2021).

<sup>52</sup> *Border Patrol History*, *supra* note 49.

<sup>53</sup> *Operation Hold the Line 1993*, DIGIE, <https://www.digie.org/en/media/14437> (last visited Feb. 4, 2024).

<sup>54</sup> *Border Patrol History*, *supra* note 49.

<sup>55</sup> *Background to the Office of the Inspector General Investigation*, OFF. INSPECTOR GEN., <https://oig.justice.gov/sites/default/files/archive/special/9807/gkp01.htm> [<https://perma.cc/Y52J-939K>].

<sup>56</sup> *Border Patrol History*, *supra* note 49.

<sup>57</sup> See generally Dyfed Loesche, *A Long View of Migration Across the Southwest Border*, STATISTA (June 18, 2018), <https://www.statista.com/chart/13429/illegal-alien-apprehensions-at-the-united-states-southwest-border-by-fiscal-year>. For insights into annual apprehension records for fiscal years 2019-22 see *Southwest Land Border Encounters FY22*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters-fy22> (last modified July 27, 2023).



Following Operation “Hold the Line” and Operation “Gatekeeper,” CBP released a memorandum titled “Border Patrol Strategic Plan 1994 and Beyond,” which sought to “improve control of the border by implementing a strategy of ‘prevention through deterrence.’”<sup>58</sup> The policy of “prevention through deterrence” made permanent the increased enforcement capabilities of the El Paso and San Diego Sectors, incorporating these regional efforts into a larger nationwide campaign to further secure the Southwest border.<sup>59</sup> CBP officials predicted that “with traditional entry and smuggling routes disrupted, illegal traffic w[ould] be deterred, or forced over more hostile terrain, less suited for crossing and more suited for enforcement.”<sup>60</sup>

By funneling noncitizens into more remote areas of the border, thus utilizing natural geographic barriers,<sup>61</sup> CBP could “increase the ‘cost’ to [unauthorized] entrants to the point of deterring repeated attempts” at such entry.<sup>62</sup> Here, the increased “cost” of unauthorized border crossings would be the potential of dying due to the “more hostile terrain.”<sup>63</sup> Moreover, it has been argued that “prevention through deterrence” resulted in the emergence of a professionalized human smuggling business.<sup>64</sup> By shifting the blame from border policy towards the geographic nature of the Southwest, CBP and the federal government could limit their responsibility for migrant deaths.<sup>65</sup> In truth, the government understood that “prevention through deterrence” would result in more migrant deaths; a 1997 GAO report appendix titled “Indicators Measuring the Effectiveness of the Strategy to Deter Illegal Entry Along the Southwest Border” listed “[d]eaths of [noncitizens] attempting

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<sup>58</sup> BORDER PATROL STRATEGIC PLAN, *supra* note 17, at 7.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> LUIS ALBERTO URREA, *THE DEVIL’S HIGHWAY 19* (2004) (“Death by sunlight, hyperthermia, was the main culprit. But [noncitizens] drowned, froze, committed suicide, were murdered, were hit by trains and trucks, were bitten by rattlesnakes, had heart attacks.”); *see also* Press Release, Roderick Kise, Press Officer, U.S. Customs & Border Prot., RGV Sector Border Patrol Warns of the Dangers of Crossing the Border Illegally (Oct. 4, 2022), <https://www.cbp.gov/newsroom/local-media-release/rgv-sector-border-patrol-warns-dangers-crossing-border-illegally> [hereinafter RGV Sector Border Patrol].

<sup>62</sup> BORDER PATROL STRATEGIC PLAN, *supra* note 17, at 7; *see also* Daniel A. Scharf, *For Humane Borders: Two Decades of Death and Illegal Activity in the Sonoran Desert*, 38 CASE W. RES. J. INT’L L. 141 (2006).

<sup>63</sup> BORDER PATROL STRATEGIC PLAN, *supra* note 17, at 7.

<sup>64</sup> In fact, the border smuggling industry has developed into “a multi-billion-dollar international business controlled by organized crime, including some of Mexico’s most violent drug cartels.” Miriam Jordan, *Smuggling Migrants at the Border Now a Billion-Dollar Business*, N.Y. TIMES (July 25, 2022), <https://www.nytimes.com/2022/07/25/us/migrant-smuggling-evolution.html>; *see also* Radiolab Presents: *Border Trilogy*, RADIOLAB, <https://radiolab.org/series/border-trilogy> (last visited Dec. 27, 2023); *see also* Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 POPULATION & DEV. REV. 661 (2001).

<sup>65</sup> Radiolab, *Border Trilogy Part 2: Hold the Line*, RADIOLAB, at 41:30 (Apr. 5, 2018), <https://radiolab.org/podcast/border-trilogy-part-2-hold-line>.

entry” as one of the indicators of a successful deterrence policy.<sup>66</sup> For this indicator, the “[p]redicted outcome if [Attorney General]’s strategy is successful” was that “deaths may increase (as enforcement in urban areas forces aliens to attempt mountain or desert crossings).”<sup>67</sup>

In addition to the robust efforts made to physically limit the number of people crossing the border, the War on Drugs<sup>68</sup> further militarized the landscape of the border.<sup>69</sup> By equating unauthorized immigration with narco-trafficking and the drug trade, the War on Drugs racialized drug enforcement to the immediate detriment of authorized immigrants and others who might have valid claims to asylum.<sup>70</sup> Moreover, the discriminatory connection between immigration and the illicit drug trade imposes unfair stereotypes and unnecessary burdens on Latin American immigrants who live in, work in, and contribute to a burgeoning cross-border economy.<sup>71</sup>

<sup>66</sup> ILLEGAL IMMIGRATION, *supra* note 18, at 84.

<sup>67</sup> *Id.* This indicator also acknowledged that deaths “may be reduced or prevented (by fencing along highways, for example).” *Id.* This predicted outcome is debatable, especially considering recent developments on the border including the use of razor wire by Texas state authorities. See Holly Yan, Rosa Flores & Sara Weisfeldt, *Texas Seized Part of the US-Mexico Border and Blocked Federal Border Patrol Agents. Here’s What Happened Next*, CNN, <https://www.cnn.com/2024/01/27/us/texas-eagle-pass-us-mexico-border/index.html> (last updated Jan. 29, 2024, 10:26 PM).

<sup>68</sup> Referring to the concerted efforts by the United States government to reduce the illegal trade of drugs and narcotics. See *Legalize All Drugs? The ‘Risks Are Tremendous’ Without Defining the Problem*, NPR (Mar. 27, 2016, 9:31 AM), <https://www.npr.org/2016/03/27/472023148/legalize-all-drugs-the-risks-are-tremendous-without-defining-the-problem>.

<sup>69</sup> See generally WALIA, *supra* note 14. In 1969, President Nixon initiated Operation Intercept, which sought to halt the smuggling of marijuana from Mexico into the United States. *Id.* at 41. Although this policy momentarily led to a “pot drought” in the summer of 1969, the negative consequences far outweighed the purported benefits. Operation Intercept led to the emergence of hashish smuggling, increased imports of drugs from Southeast Asia, and contributed to the American youth’s experimentation with harder, more easily available drugs like LSD, amphetamines, and mescaline. EDWARD M. BRECHER, *THE CONSUMERS UNION REPORT ON LICIT AND ILLICIT DRUGS* (Consumer Reps. Mag. 1972). By instituting more meticulous border inspections, Operation Intercept discouraged routine border crossers and tourists from traveling between Mexico and the United States, which reduced the retail revenue of American businesses operating near the border by more than fifty percent. Operation Intercept also corresponded with the end of the Bracero Program in the United States, which provided legal work authorization to thousands of Mexicans who were instrumental to the domestic agricultural industry during harvest season. *Id.* As author Harsha Walia concludes, “As a result of these two changes . . . within a decade nearly all migration from Mexico was deliberately made illegal[.]” WALIA, *supra* note 14, at 41. Despite the reported ineffectiveness of Operation Intercept, President Reagan doubled down on efforts to combat the illicit drug trade. Alexander M. Stephens, *Reagan’s War on Drugs Also Waged War on Immigrants*, WASH. POST (Oct. 27, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/10/27/reagans-war-drugs-also-waged-war-immigrants>.

<sup>70</sup> “When Mexico sends its people, they’re not sending their best[.] They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists.” *Here’s Donald Trump’s Presidential Announcement Speech*, TIME (June 16, 2015, 2:32 PM), <https://time.com/3923128/donald-trump-announcement-speech>.

<sup>71</sup> See generally Judith Ann Warner, *The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping*, 1.2. J. SOC. & ECOLOGICAL BOUNDARIES 56 (2005).

Another profound change to United States border policy came following the terrorist attacks of September 11, 2001.<sup>72</sup> In response to the attacks, then-President Bush, with the support of Congress, passed the Homeland Security Act in 2002, creating a Cabinet-level Department of Homeland Security (“DHS”).<sup>73</sup> As part of this restructuring, the CBP, Immigration and Customs Enforcement (“ICE”), and U.S. Citizenship and Immigration Services (“USCIS”) were all consolidated under DHS leadership.<sup>74</sup> The events of September 11, 2001 led to heightened immigration controls by: “(i) incarcerat[ing] and prosecut[ing] those foreign nationals in the United States who are suspected of being terrorists or who may have ties to terrorist groups; (ii) strengthen[ing] controls at border crossings and other ports of entry; and (iii) implement[ing] computerized systems to track the status of foreign nationals in the United States.”<sup>75</sup> Additionally, the Patriot Act formalized the sharing of criminal record data between the Federal Bureau of Investigation, DHS, and the United States Department of State (“DOS”), and established new inadmissibility grounds for noncitizens who belong to or advocate for designated terrorist organizations.<sup>76</sup> Like many of the policies and laws emanating from the War on Drugs, post-9/11 developments to immigration law further institutionalized the apocryphal link between immigrants and crime.<sup>77</sup> Contrary to the unfortunate criminalization of migration, the “bulk of empirical studies conducted over the past century have found that immigrants are typically underrepresented in criminal statistics[;]”<sup>78</sup> thus, the national security rationale for immigration control is likely misguided.<sup>79</sup>

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<sup>72</sup> *Post-9/11*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/post-911> (last updated Dec. 4, 2019).

<sup>73</sup> *Creation of the Department of Homeland Security*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/creation-department-homeland-security> (last updated May 8, 2023).

<sup>74</sup> *Department Organizational Chart*, U.S. DEP’T HOMELAND SEC. (Nov. 9, 2023), [https://www.dhs.gov/sites/default/files/2022-12/22\\_1216\\_dhs\\_public-organization-chart.pdf](https://www.dhs.gov/sites/default/files/2022-12/22_1216_dhs_public-organization-chart.pdf). DHS’s current mission statement reads: “With honor and integrity, we will safeguard the American people, our homeland, and our values.” *Mission*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/mission> (last updated Feb. 26, 2023).

<sup>75</sup> Lawrence M. Lebowitz & Ira L. Podheiser, *A Summary of the Changes in Immigration Policies and Practices After the Terrorist Attacks of September 11, 2001: The USA Patriot Act and Other Measures*, 63 U. PITT. L. REV. 873, 874 (2002).

<sup>76</sup> *Id.* at 875-81.

<sup>77</sup> See generally DANIEL E. MARTINEZ & RUBÉN G. RUMBAUT, *THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES* (2015).

<sup>78</sup> RAMIRO MARTINEZ, JR. & MATTHEW T. LEE, *On Immigration and Crime, in THE NATURE OF CRIME: CONTINUITY AND CHANGE* 485 (Gary LaFree ed., 2000).

<sup>79</sup> Furthermore, the “only publicly-known foreign terrorists that used clandestine border crossings . . . came from the north [Canadian border], not the south.” Chris Rudolph, *National Security and Immigration in the United States After 9/11* 29 (Ctr. for Compar. Immigr. Stud., U.C., San Diego, Working Paper No. 157, 2007). Moreover, “there have been no reports of al Qaeda operatives apprehended

*A. Federal Immigration Law*

The United States Constitution does not expressly grant the federal government authority to control immigration, but historical practice, as well as certain other enumerated powers, have been cited as evidence of the Founders' intention to grant the federal government exclusive control over immigration.<sup>80</sup> Enumerated powers related to immigration include the ability of Congress to "establish an uniform Rule of Naturalization,"<sup>81</sup> Congress' authority to regulate commerce with foreign nations under the Commerce Clause,<sup>82</sup> and the power of Congress to declare war.<sup>83</sup> In addition, implied powers, including the Foreign Affairs Power and the federal government's inherent power as a sovereign nation, create structural justifications for the establishment of uniform immigration laws.<sup>84</sup>

For much of its early history, Congress largely allowed open immigration into the United States "to attract labor and capital to this developing nation."<sup>85</sup> This influx of largely low-skilled laborers was critical to the development of the United States and early westward expansion.<sup>86</sup> The first significant congressional statute to restrict immigration followed the rise of anti-Chinese sentiment and labor challenges, for which many Americans blamed immigrants from the Eastern Hemisphere.<sup>87</sup> Congress responded by passing the Chinese Exclusion Act of 1882, which suspended entry of all Chinese laborers into the United States for ten years and prevented any "State court or court of the United States [to] admit Chinese to citizenship[.]"<sup>88</sup>

Although much federal immigration law has been established by congressional statutes, the executive branch plays a lead role in setting

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attempting to cross the U.S.-Mexico border," despite DHS testimony suggesting the presence of such a threat. *Id.* at 27.

<sup>80</sup> See DAVID WEISSBRODT & LAURA DANIELSON, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL* ch. 2 (5th ed. 2005).

<sup>81</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>82</sup> *Id.* cl. 3.

<sup>83</sup> *Id.* cl. 11.

<sup>84</sup> T. ALEXANDER ALENIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON, JULIET P. STUMPF & PRATHEEPAN GULASEKARAM, *IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY* 29 (9th ed. 2021).

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.* at 3.

<sup>87</sup> *First Arrivals, First Reactions*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/First-Arrivals> (last visited Feb. 21, 2024). See also *Chinese Exclusion Act (1882)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/chinese-exclusion-act> (last reviewed Jan. 17, 2023).

<sup>88</sup> *Chinese Exclusion Act (1882)*, *supra* note 87. The Act was repealed in 1924. *Id.*

immigration policy.<sup>89</sup> Indeed, much of the recent immigration policy has been implemented by presidents through Executive Orders and administrative actions.<sup>90</sup> During his first days in office, for instance, former President Donald Trump announced a series of executive orders aimed at limiting both legal and unauthorized immigration into the United States,<sup>91</sup> the most notable being “the Muslim Ban,”<sup>92</sup> which was modified and upheld by the Supreme Court in *Trump v. Hawaii*.<sup>93</sup>

Under the plenary power doctrine, the federal government has nearly unabridged authority to control immigration into the United States.<sup>94</sup> The Supreme Court’s immigration jurisprudence has routinely indicated a reluctance to strictly scrutinize government action in this space.<sup>95</sup> This can be seen in late nineteenth century Supreme Court precedent that centered on a series of claims brought by Chinese immigrants following the passage of the Chinese Exclusion Acts, which limited the Court’s role in adjudicating claims surrounding the removal and exclusion of noncitizens.<sup>96</sup> In *Chae Chan Ping v. United States*, Justice Field, writing for the majority, held that “if [the] legislative department considers the presence of foreigners of a different race to be dangerous to its peace and security, its determination is conclusive upon the judiciary.”<sup>97</sup> Although judicial acquiescence to the legislature in matters of immigration seems to be at odds with the principle

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<sup>89</sup> See generally Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

<sup>90</sup> *Id.* at 524.

<sup>91</sup> Indeed, former President Trump unilaterally made over four hundred changes to federal immigration policy and enforcement between 2017 and 2020. See SARAH PIERCE & JESSICA BOLTER, *DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY* (2020).

<sup>92</sup> Exec. Order No. 13769, 82 C.F.R. § 8977 (2017).

<sup>93</sup> *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Four years later, on his first day in office, President Joseph R. Biden revoked this executive order, replacing it with his own order pledging to end the “discriminatory bans to entry” established by Trump-era executive orders. Proclamation No. 10141, 86 C.F.R. § 7005 (2021).

<sup>94</sup> Plenary power is defined as: “[c]omplete power over a particular area with no limitations.” *Plenary Power*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/plenary\\_power](https://www.law.cornell.edu/wex/plenary_power) (last visited Dec. 27, 2023). Moreover, border security and immigration has historically been deemed the exclusive responsibility of the federal government, rather than individual states. See Devan Cole, *Supreme Court Allows Biden Administration to Remove Razor Wire on US-Mexico Border in 5-4 Vote*, CNN (Jan. 22, 2024, 8:40 PM), <https://www.cnn.com/2024/01/22/politics/supreme-court-texas-razor-wire/index.html>.

<sup>95</sup> “To date there have been no successful challenges to federal legislation that refuses admission to classes of non-citizens or removes resident aliens. Federal immigration power thus appears limitless. Indeed, the Supreme Court has stated: ‘[O]ver no conceivable subject is the legislative power of Congress more complete.’” WEISSBRODT & DANIELSON, *supra* note 80, at 69 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972)).

<sup>96</sup> See generally David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015).

<sup>97</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

of judicial review established in *Marbury v. Madison*,<sup>98</sup> the plenary power doctrine's application to immigration law was firmly established in *Kleindienst v. Mandel*, in which the Court held that the government's decision to prevent entry of noncitizens is acceptable as long as the executive branch advances a "facially legitimate and bona fide reason" for their decision.<sup>99</sup> This holding remains the standard for courts adjudicating claims regarding the government's exclusion of noncitizens seeking entry to the United States.<sup>100</sup>

Following the passage of the Immigration and Nationality Act of 1965 ("INA"), the national origins quota system<sup>101</sup> established by the Immigration Act of 1924 was replaced with a preference system that prioritized close relatives of U.S. citizens or legal permanent residents and highly skilled workers.<sup>102</sup> The INA also expressly prohibited employment discrimination on the basis of nationality or citizenship status.<sup>103</sup> The INA—although later subjected to significant modifications<sup>104</sup>—established the fundamental framework of federal immigration law still in use today.<sup>105</sup>

The INA includes provisions relating to the deportation of noncitizens unlawfully present in the United States, the exclusion of noncitizens attempting to enter the United States, naturalization and the conferral of citizenship, asylum and other forms of humanitarian immigration relief, and the authority of federal agents tasked with enforcing immigration laws, among others.<sup>106</sup> Chapter 12, Part VIII of Title 8 of the U.S. Code<sup>107</sup> provides

<sup>98</sup> *Marbury v. Madison*, 5 U.S. 137 (1803). Enabling "federal courts to declare legislative and executive acts unconstitutional." *Marbury v. Madison: Primary Documents in American History*, LIB. CONG., <https://guides.loc.gov/marbury-v-madison> (last visited Feb. 21, 2024).

<sup>99</sup> *Kleindienst*, 408 U.S. 770.

<sup>100</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2402 (2018).

<sup>101</sup> "The quota provided immigration visas to two percent of the total number of people of each nationality in the United States [and] completely excluded immigrants from Asia." *The Immigration Act of 1924 (The Johnson-Reed Act)*, *supra* note 46.

<sup>102</sup> 8 U.S.C. §§ 1101-1537.

<sup>103</sup> § 1324b.

<sup>104</sup> *See, e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (establishing the H-1B visa program); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (increasing funding to border security and granting broad removal authority to DHS agents); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-576 (codified as 8 U.S.C. § 1182(a)(9)(B)(i)) (establishing three and ten year bars to admission for noncitizens unlawfully present in the United States for more than one-hundred eighty days and over one year); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (requiring higher levels of personal identification following 9/11).

<sup>105</sup> ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON, STUMPF & GULASEKARAM, *supra* note 84, at 69.

<sup>106</sup> *See* §§ 1227, 1182, 1427, 1158 (asylum), 1522 (authorization for programs for domestic resettlement of and assistance to refugees), 1103 (powers and duties of the Secretary, the Under Secretary, and the Attorney General), 1357 (powers of immigration officers and employees).

<sup>107</sup> *See* §§ 1321-1330.

a list of criminally punishable offenses relating to unauthorized immigration, including section 1324, Bringing in and Harboring Certain Aliens, which imposes criminal penalties on individuals, including U.S. citizens, who assist in shielding noncitizens from the reach of immigration authorities.<sup>108</sup> The Anti-Harboring statutes provide the following punishable offenses: “(1)(A) Any person who . . . (iv) *encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.*”<sup>109</sup> Subparagraph (B) lists potential criminal penalties for violations of the Anti-Harboring statutes, including special charges for those offenses committed “for the purpose of commercial advantage or private financial gain.”<sup>110</sup>

In *United States v. Hansen*, the defendant, Helaman Hansen, was charged under 8 U.S.C. § 1324(a)(1)(A)(iv) after falsely claiming that he could help “undocumented immigrants become U.S. citizens through [a fraudulent] adult adoption” program.<sup>111</sup> A jury found that Hansen was guilty of “twelve counts of mail fraud, three counts of wire fraud, and two counts of encouraging or inducing unlawful immigration for private financial gain” after he admitted that the adult adoption program was fabricated.<sup>112</sup> The defendant moved to dismiss the two charges of “encouraging or inducing victims to overstay their visas” because he argued that 8 U.S.C. § 1324(a)(1)(A)(iv) was “facially overbroad, void for vagueness, and unconstitutional as applied to him.”<sup>113</sup> Here, the Ninth Circuit agreed with Hansen’s argument that 8 U.S.C. § 1324(a)(1)(A)(iv) is facially overbroad, declining to reach his other constitutional claims.<sup>114</sup> In reaching this conclusion, the Ninth Circuit relied on the overbreadth framework established by the Supreme Court in *United States v. Stevens*.<sup>115</sup> The court stated:

There are two situations in which a facial overbreadth challenge can succeed: (1) when a party establishes that there is “no set of circumstances under which [the statute] would be valid or that the statute lacks any plainly legitimate sweep;” and (2) where “a substantial number of [the statute’s] applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”<sup>116</sup>

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<sup>108</sup> § 1324.

<sup>109</sup> § 1324(a)(1)(A)(iv) (emphasis added).

<sup>110</sup> § 1324(a)(1)(B)(i).

<sup>111</sup> *United States v. Hansen*, 25 F.4th 1103, 1105 (9th Cir. 2022).

<sup>112</sup> *Id.* at 1106.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (citing *United States v. Stevens*, 559 U.S. 460, 472-73 (2010)).

Beginning with statutory interpretation, in addressing the defendant’s constitutional arguments, the Government argued that subsection (iv) is only a “narrow prohibition on speech integral to criminal conduct, specifically solicitation and aiding and abetting.”<sup>117</sup> First, the Ninth Circuit acknowledged that 8 U.S.C. §§ 1324(a)(1)(A)(i)-(iii) criminalized specific actions including “‘bring[ing],’ ‘transport[ing],’ ‘mov[ing],’ ‘conceal[ing],’ ‘harbor[ing],’ or ‘shield[ing] from detection[.]’” whereas subsection (iv)’s prohibition on encouraging or inducing unauthorized immigration “encompasses both speech and actions.”<sup>118</sup> Additionally, the Ninth Circuit concluded that because §1324(a)(1)(A)(v)(II) already included “an aiding and abetting provision[.]” the Government’s argument that subsection (iv) only applied to a narrow category of speech that was “integral to criminal conduct, specifically solicitation and aiding and abetting” was “not supported by the statutory text.”<sup>119</sup> The court stated that the inclusion of a separate aiding and abetting provision “impl[ied] that Congress intended for the provisions to have different meanings.”<sup>120</sup> Ultimately, the court interpreted subsection (iv) “as prohibiting someone from (1) inspiring, helping, persuading, or influencing, (2) through speech or conduct, (3) one or more specified aliens (4) to come to or reside in the United States in violation of civil or criminal law.”<sup>121</sup>

The Ninth Circuit then questioned if subsection (iv) had a plainly legitimate sweep in relation to traditionally protected speech under the First Amendment, noting that as a threshold matter, “[t]he government may restrict speech ‘in a few limited areas,’ including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.”<sup>122</sup> Regarding subsection (iv), the Ninth Circuit held that this provision “covers a substantial amount of protected speech[.]” including such general statements as “I encourage you to reside in the United States[.]” or:

[E]ncouraging an undocumented immigrant to take shelter during a natural disaster, advising an undocumented immigrant about available social services, telling a tourist that she is unlikely to face serious consequences if she overstays her tourist visa, or providing certain legal advice to undocumented immigrants.<sup>123</sup>

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<sup>117</sup> *Id.* at 1107.

<sup>118</sup> *Id.* at 1108.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (citing *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

<sup>121</sup> *Id.* at 1109.

<sup>122</sup> *Id.* (citing *United States v. Stevens*, 559 U.S. 460 (2010)).

<sup>123</sup> *Id.* at 1110.



The court pointed out that these statements are not just hypothetically applicable to the plain language of the statute; rather, subsection (iv) has actually been enforced in cases where individuals gave “[unauthorized noncitizens] advice to remain in the United States while their status is disputed[,]” including prosecution of “a government employee under subsection (iv) for ‘advis[ing her undocumented] cleaning lady generally about immigration law practices and consequences.’”<sup>124</sup> In conclusion, the Ninth Circuit returned to the precedent established in *United States v. Stevens* and rejected the Government’s limited enforcement argument, citing that courts “would not uphold an unconstitutional statute merely because the government promised to use it responsibly.”<sup>125</sup>

The Government ultimately appealed the Ninth Circuit’s decision in *United States v. Hansen*, and the Supreme Court granted certiorari on December 9, 2022.<sup>126</sup> The Court, in a seven-to-two decision, rejected Hansen’s arguments, holding that the statute satisfied the overbreadth doctrine established in *United States v. Williams*.<sup>127</sup> Writing for the majority, Justice Barrett equated the language “encourages or induces” with the more narrow criminal law definition of “aiding and abetting,” thus avoiding the constitutional overbreadth issue.<sup>128</sup> In sum, the majority concluded that the statute in question “reaches no further than the purposeful solicitation and facilitation of specific acts known to violate federal law. So understood, the statute does not ‘prohibi[t] a substantial amount of protected speech’ relative to its ‘plainly legitimate sweep.’”<sup>129</sup> In dissent, Justice Jackson, joined by Justice Sotomayor, noted that a previous version of the statute had specifically included language referring to criminal solicitation and assistance, terminology which was expressly removed in 1952, which tends to indicate that restricting the current “encourage and induce” language with

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<sup>124</sup> *Id.* at 1111. *See also* *United States v. Ndiaye*, 434 F.3d 1270 (11th Cir. 2006) (enforcing subsection (iv) against an individual who helped noncitizens obtain fraudulent Social Security numbers); *United States v. Yoshida*, 303 F.3d 1145 (9th Cir. 2002) (enforcing subsection (iv) against an individual who escorted noncitizens with fraudulent travel documents through customs); *United States v. Castillo-Felix*, 539 F.2d 9 (9th Cir. 1976) (enforcing subsection (iv) against an individual who forged counterfeit alien registration receipt cards for Mexican nationals).

<sup>125</sup> *Hansen*, 25 F.4th 1111.

<sup>126</sup> At the time certiorari was granted there was an ongoing circuit split regarding the constitutionality of 8 U.S.C. § 1324(a)(1)(A)(iv), with the Ninth and Tenth Circuits holding that the statute was an overbreadth infringement on First Amendment protections to freedom of expression, despite the Fourth and Fifth Circuits previously holding that the statute was sufficiently definite to be constitutionally enforceable. *See* *United States v. Hernandez-Calvillo*, 39 F.4th 1297 (10th Cir. 2022); *United States v. Anderton*, 901 F.3d 278 (5th Cir. 2018); *United States v. Tracy*, 456 F. App’x 267 (4th Cir. 2011).

<sup>127</sup> *United States v. Hansen*, 599 U.S. 762 (2023). The author of this Note attended the oral arguments for this case at the Supreme Court on March 27, 2023. In addition to citing the majority’s written opinion, the author includes some of his personal observations from the oral arguments.

<sup>128</sup> *Id.* at 772-74.

<sup>129</sup> *Id.* at 781.

criminal law's traditional understanding of solicitation and assistance, or aiding and abetting, is inconsistent with the law's statutory history.<sup>130</sup>

Despite the Court's insistence on a narrow reading of the statute's enforceability, this holding serves as another blow to humanitarian workers, good Samaritans, and rights defenders, making it clear that the federal government can and will enforce criminal laws on individuals providing basic aid and humanity to those at the border.

### *B. International Human Rights*

In addition to federal immigration law, international human rights law imposes minimum standards regarding the treatment of refugees, asylum-seekers, and migrants.<sup>131</sup> Along with the Constitution, and "Laws of the United States[,] . . . all Treaties made . . . shall be the supreme Law of the Land."<sup>132</sup> The United States is a party to a number of human rights treaties and multilateral agreements which relate to immigration, asylum, refugees, and the movement of individuals more broadly.<sup>133</sup> In addition to extensive treaty obligations, generally governed by the Vienna Convention on the Law of Treaties,<sup>134</sup> human rights obligations can be imputed on states via *jus cogens* norms or established customary international law.<sup>135</sup>

The ability to seek asylum, or sanctuary, in a country other than your own has roots in ancient law and practice.<sup>136</sup> Ancient Hebrew "Cities of

<sup>130</sup> *Id.* at 799.

<sup>131</sup> *International Standards Governing Migration Policy*, UNITED NATIONS OFF. HIGH COMM'R HUM. RTS., <https://www.ohchr.org/en/migration/international-standards-governing-migration-policy> (last visited Nov. 19, 2023).

<sup>132</sup> U.S. CONST. art. VI, cl. 2. Under Article II, Section 2 of the United States Constitution, the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]" U.S. CONST. art II, § 2, cl. 2.

<sup>133</sup> G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees (Dec. 16, 1966); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); G.A. Res. 2106 (XX), *supra* note 13; *UNHCR Summary Position on the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, UNITED NATIONS HIGH COMM'R FOR REFUGEES (Dec. 11, 2000), <https://www.unhcr.org/us/publications/unhcr-summary-position-protocol-against-smuggling-migrants-land-sea-and-air-and> [hereinafter *UNHCR Summary Position*]; G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984); G.A. Res. A/RES/57/199, Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 18, 2002).

<sup>134</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

<sup>135</sup> *Jus cogens* is defined as "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted. A peremptory norm can be modified only by a later norm that has the same character." *Jus Cogens*, BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>136</sup> *See generally* LINDA RABBEN, *SANCTUARY AND ASYLUM: A SOCIAL AND POLITICAL HISTORY* (2016).

Refuge” provided sanctuary to religious refugees,<sup>137</sup> and later medieval developments, including the Council of Orleans in 511, which recognized churches as safe havens for criminals and fugitives.<sup>138</sup> Currently, the right to asylum is defined in the Universal Declaration of Human Rights and codified in the International Covenant on Civil and Political Rights (“ICCPR”).<sup>139</sup> Moreover, the customary international law principle of non-refoulement—codified in treaties including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Refugee Convention—obligates states to provide protection to asylum-seekers who are likely to be subjected to torture if returned to their country of origin.<sup>140</sup> In the immigration context, asylum procedures are required to be implemented with the least discriminatory effect available.<sup>141</sup>

Regardless of legal status, all immigrants have recognized human rights that must be respected.<sup>142</sup> As a baseline, state parties to the ICCPR, including the United States,<sup>143</sup> are required to respect the fact that “every human being has the inherent right to life.”<sup>144</sup> The ICCPR expressly prohibits state parties from derogating from their obligation “to respect and to ensure” an individual’s right to life, which indicates that the right to life has been accepted as customary international law and is binding on state parties.<sup>145</sup> Finally, the provisions of the ICCPR, including the right to life, apply to “all

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<sup>137</sup> Jayme R. Reaves, *Cities of Refuge: An Exploration of Sanctuary and Restorative Culture in the Hebrew Bible*, 36 *STUD. CHRISTIAN ETHICS* 23-31 (2023).

<sup>138</sup> Although it has been argued that these protections were likely motivated by the ecclesiastical desire to have criminals repent for their sins, rather than humanitarian concerns, it is valuable to acknowledge the ancient historical grounds of asylum. *See generally* Jan Hallebeek, *Church Asylum in Late Antiquity: Concession by the Emperor or Competence of the Church?*, 49 *RECHTSHISTORISCHE REEKS VAN HET GERARD NOODT INSTITUUT* 163 (2005) (available at: <https://core.ac.uk/download/pdf/15451089.pdf>).

<sup>139</sup> G.A. Res. 39/46, *supra* note 133, art. 14, ¶ 1. “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>140</sup> 8 C.F.R. § 208.18 (2020).

<sup>141</sup> Indeed, under Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, “Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists[.]” G.A. Res. 2106 (XX), *supra* note 13, art. 2(c).

<sup>142</sup> EVA BREMS, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (2001); U.S. CITIZENSHIP & IMMIGR. SERVS., *RAIO DIRECTORATE-OFFICER TRAINING: SOURCES OF AUTHORITY TRAINING MODULE* (2019).

<sup>143</sup> The United States ratified the ICCPR with a reservation to Article 6.5, which prohibits state parties from engaging in juvenile death penalties. *See* AMNESTY INT’L, *THE EXCLUSION OF CHILD OFFENDERS FROM THE DEATH PENALTY UNDER GENERAL INTERNATIONAL LAW* 2 (2003).

<sup>144</sup> G.A. Res. 2200A (XXI), *supra* note 133, art. 6, ¶ 1.

<sup>145</sup> G.A. Res. 2200A (XXI), *supra* note 133, art. 4.1, art. 5.2; *see also* United Nations Hum. Rts. Comm., *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter *General Comment 31*].

individuals in its territory and subject to [a state party's] jurisdiction[,]”<sup>146</sup> which has been interpreted to include those physically present in a country's borders, as well as those “within the power or effective control of that State Party, even if not situated within the territory of the State Party.”<sup>147</sup> In this view, the principles of the right to life would apply both to asylum-seekers and migrants physically present within the borders of the United States, as well as asylum-seekers who are awaiting legal decisions in Mexico.<sup>148</sup>

## II. PROBLEM

The militarization of the border and the deliberate funneling of asylum-seekers and migrants into inhospitable regions of the border makes the attainment of immigration relief more difficult.<sup>149</sup> Hardline approaches to combating irregular migration implicate multiple human rights obligations and have done little to slow the number of individuals seeking entry into the United States.<sup>150</sup> Thus, the challenge of immigration enforcement is twofold: (1) harsher immigration policies result in a greater number of deaths and potential violations of human rights; and (2) traditional immigration policies are ineffective at reducing the rate of asylum-seekers and migrants seeking entry into the United States.

As irregular immigration to the Southwest border continues to surge, government agencies and lawmakers struggle to find solutions.<sup>151</sup> According to CBP's November 2022 operational update:

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<sup>146</sup> International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 85, art. 2.1 [hereinafter ICCPR].

<sup>147</sup> *General Comment 31*, *supra* note 145.

<sup>148</sup> Jonathan Blazer & Katie Hoepfner, *Five Things to Know About the Right to Seek Asylum*, ACLU (Sept. 29, 2022), <https://www.aclu.org/news/immigrants-rights/five-things-to-know-about-the-right-to-seek-asylum>; *Refugees, Asylum Seekers, and Migrants*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants> (last visited Feb. 22, 2024).

<sup>149</sup> URREA, *supra* note 61, at 19 (“Death by sunlight, hyperthermia, was the main culprit. But [noncitizens] drowned, froze, committed suicide, were murdered, were hit by trains and trucks, were bitten by rattlesnakes, had heart attacks.”). *See also* RGV Sector Border Patrol, *supra* note 61.

<sup>150</sup> For example, “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” G.A. Res. 39/46, *supra* note 133, art. 3 ¶ 1. Also, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” G.A. Res. 217 (III) A, *supra* note 139, art. 14 ¶ 1. *See also* Douglas S. Massey, Jorge Durand, & Karen A. Pren, *Why Border Enforcement Backfired*, 121 AM. J. SOCIO. 1557 (2016).

<sup>151</sup> *See generally* Memorandum from Alejandro N. Mayorkas, Sec’y Homeland Sec. to Interested Parties on DHS Plan for Southwest Border Security and Preparedness (Apr. 26, 2022) (on file with author) [hereinafter DHS Plan]; *see also* Zachary B. Wolf, *No Immigration ‘Fix’ and Congress Isn’t Really Trying*, CNN (Dec. 20, 2022, 8:21 PM), <https://www.cnn.com/2022/12/20/politics/immigration-title-42-what-matters/index.html>.

DHS has been executing a comprehensive and deliberate strategy to secure our borders and build a safe, orderly, and humane immigration system. The strategy is based on six pillars: surging resources; increasing efficiency to reduce strain on the border; employing an aggressive consequence regime; bolstering the capacity of NGOs and partner with state and local partners; going after cartels and smugglers; and working with our regional partners.<sup>152</sup>

Despite these efforts, DHS leadership has been quick to acknowledge their limitations at the border, concluding that “[Border Enforcement agencies] are operating within a fundamentally broken immigration system[,]” that “was not built to manage the current levels and types of migratory flows that we are experiencing[.]”<sup>153</sup> In April of 2022, CBP was encountering “over 7,800 migrants per day across the Southwest Border[,]” compared to the average of one-thousand-six hundred per day prior to the COVID-19 pandemic.<sup>154</sup>

Since the policy of “prevention through deterrence” was implemented in 1994, “the number of border-crossing deaths increased and by 2005 had more than doubled.”<sup>155</sup> It is important to note that not all unauthorized entrants are single adult males as the media often portrays; according to the 2022 CBP data, approximately twenty-two percent of apprehensions were family units and over one-hundred-fifty thousand were unaccompanied minors.<sup>156</sup> In 2019, family units represented the majority (fifty-six percent) of noncitizens apprehended at or near the border.<sup>157</sup> In recent years, the demographics of noncitizens crossing the border has also shifted to include more females and an increasing number of asylum-seekers from countries other than Mexico.<sup>158</sup> Women and children face particular dangers when

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<sup>152</sup> *CBP Releases November 2022 Monthly Operational Update*, U.S. CUSTOMS & BORDER PROT. (Dec. 23, 2022), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-november-2022-monthly-operational-update>.

<sup>153</sup> DHS Plan, *supra* note 151, at 3.

<sup>154</sup> *Id.* at 6.

<sup>155</sup> See U.S. GOV'T ACCT. OFF., GAO-06-770, *ILLEGAL IMMIGRATION: BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995; BORDER PATROL'S EFFORTS TO PREVENT DEATHS HAVE NOT BEEN FULLY EVALUATED* (2006). See also Tess Herdman, *How the CBP's "Prevention Through Deterrence" Policy Contributes to Migrant Deaths at the U.S./Mexico Border*, LONDON SCH. ECON. & POL. SCI. (Aug. 10, 2023), <https://blogs.lse.ac.uk/humanrights/2023/08/10/how-the-cbps-prevention-through-deterrence-policy-contributes-to-migrant-deaths-at-the-u-s-mexico-border>.

<sup>156</sup> *Nationwide Encounters*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/nationwide-encounters> (last modified Feb. 13, 2024) (under FY tab select and apply “2022”). Of the 2,766,582 CBP encounters in 2022, 614,023 were family units. *Id.*

<sup>157</sup> John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. CTR. (Mar. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump>.

<sup>158</sup> *CBP Releases Operational Fiscal Year 2021 Statistics*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-operational-fiscal-year-2021-statistics> (last modified Jan. 3, 2022).

crossing the border, including abuse and sexual exploitation at the hands of smugglers, criminal organizations, and law enforcement officials.<sup>159</sup>

Some areas of the border have become so accustomed to migrant deaths that they have established uniform procedures of record keeping and the identification of human remains.<sup>160</sup> Nonetheless, the identification of human remains is a significant challenge,<sup>161</sup> and the number of reported migrant deaths is likely twice as high as officially reported figures suggest.<sup>162</sup> This inconsistency prevents policymakers from understanding the full extent of the crisis at the border and the human cost of policies like “prevention through deterrence.”<sup>163</sup>

In addition to issues surrounding transparency and reporting of migrant deaths, this Note argues that the federal government’s approach to border enforcement is decidedly ineffective. The number of new asylum claims being made is steadily increasing, threatening to further overwhelm the immigration court system; the backlog of asylum claims has increased year over year since 2012, and “now totals 787,882.”<sup>164</sup> On average, asylum-seekers wait over one-thousand-five hundred days from the time they file their asylum claim to when their immigration court hearing is scheduled.<sup>165</sup> Various actions, including the Migrant Protection Protocols and summary expulsions of asylum-seekers under Title 42 of the U.S. Health Code, have further restricted access to immigration relief.<sup>166</sup>

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<sup>159</sup> Aaron Barnard-Luce, *Migrants in Mexico: Invisible Victims of Abuse*, AMNESTY INT’L, <https://www.amnestyusa.org/updates/migrants-in-mexico-invisible-victims-of-abuse> (last visited Dec. 27, 2023); Steve Inskip, *The Rarely Told Stories of Sexual Assault Against Female Migrants*, NPR (Mar. 23, 2014, 5:00 PM), <https://www.npr.org/2014/03/23/293449153/the-rarely-told-stories-of-sexual-assault-against-female-migrants>; URREA, *supra* note 61, at 17.

<sup>160</sup> In Pima County, Arizona, these death records include coroner’s reports, police enforcement notes, personal effects, and pictures of the deceased, sometimes referring to the departed as “Juan” or “Juana Doe.” In cases of Mexican nationals who can be readily identified, the Mexican consulate pays to fly their caskets back to their home. In cases where remains cannot be identified, bodies are “interred in the potter’s field at the Ft. Lowell cemetery in Tucson.” URREA, *supra* note 61, at 33–38.

<sup>161</sup> See generally JASON DE LEÓN, *THE LAND OF OPEN GRAVES: LIVING AND DYING ON THE MIGRANT TRAIL* (Robert Borofsky, Philippe Bourgois, Paul Farmer, Alex Hinton, Carolyn Nordstrom, Nancy Scheper-Hughes & Naomi Schneider eds., 2015). To determine how long it would take for a body to decompose in the Arizona desert, anthropologist, Jason De León, conducted an experiment in the Sonoran Desert using pig carcasses. Vultures had turned some of the pigs into skeletons within twenty-four hours. De León noted that vultures can turn a body into a skeleton in about five hours. See generally *id.*

<sup>162</sup> CBP SHOULD IMPROVE DATA COLLECTION, REPORTING, AND EVALUATION, *supra* note 24.

<sup>163</sup> *Id.*

<sup>164</sup> TRAC IMMIGR., *A SOBER ASSESSMENT OF THE GROWING U.S. ASYLUM BACKLOG* (2022). This figure was current as of the first two months of Fiscal Year 2023.

<sup>165</sup> *Id.*

<sup>166</sup> See generally Sarah A. Blue, Jennifer A. Devine, Matthew P. Ruiz, Kathryn McDaniel, Alisa R. Hartsell, Christopher J. Pierce, Makayla Johnson, Allison K. Tinglov, Mei Yang, Xiu Wu, Sara Moya,

Under President Biden’s leadership, the DOJ issued a proposed rule that will introduce “a rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel.”<sup>167</sup> Yet requiring asylum-seekers to apply for relief in transit countries ignores the particular dangers and procedural hurdles that exist in many of the countries that asylum-seekers travel through on their way to the United States.<sup>168</sup>

When governments take hardline approaches to influxes of asylum-seekers and migrants, they risk violating international law.<sup>169</sup> Specifically, governments are required not to “expel or return (‘refouler’)” refugees to countries where they face persecution based on protected grounds.<sup>170</sup> Additionally, governments should be encouraged to maintain asylum pathways and other forms of humanitarian relief to ensure that individuals are given an adequate opportunity to pursue their claims. By respecting international human rights law and customary law, the United States can ensure that policies at the border align with their treaty obligations and help develop human rights practices for the betterment of millions of individuals around the world.

If the current rate of border apprehensions and unauthorized entries are any indication, strong-armed policies at the border are ineffective at limiting the number of noncitizens entering the country without inspection. As such,

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Elle Cross & Carol Anne Starnes, *Im/Mobility at the US–Mexico Border During the COVID-19 Pandemic*, 10 SOC. SCI. 47 (2021).

<sup>167</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 31314-01 (May 16, 2023) (to be codified at 8 C.F.R. pts. 208, 1003, 1208) [hereinafter *Circumvention of Lawful Pathways*].

<sup>168</sup> See, e.g., *US: Biden ‘Asylum Ban’ Endangers Lives at the Border: New Policy Features Failed Deterrence Measures*, HUM. RTS. WATCH (May 11, 2023, 7:55 PM), <https://www.hrw.org/news/2023/05/11/us-biden-asylum-ban-endangers-lives-border>; David Agren, *Migrant Caravan Families Face Illness, Exhaustion and Danger*, GUARDIAN (Nov. 2, 2018), <https://www.theguardian.com/world/2018/nov/01/migrant-caravan-mexico-journey-illness-exhaustion-danger>.

<sup>169</sup> G.A. Res. 2198 (XXI), *supra* note 133; G.A. Res. 2200A (XXI), *supra* note 133; G.A. Res. 2106 (XX), *supra* note 13; UNHCR *Summary Position*, *supra* note 133; G.A. Res. 39/46, *supra* note 133; G.A. Res. A/RES/57/199, *supra* note 133.

<sup>170</sup> G.A. Res. 2198 (XXI), *supra* note 133, art. 33 (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”). “Under international human rights law, the principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. This principle applies to all migrants at all times, irrespective of migration status.” UNITED NATIONS OFF. HIGH COMM’R FOR HUM. RTS., *THE PRINCIPLE OF NON-REFOULEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW* (available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>) [hereinafter *NON-REFOULEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW*].

it is time that policymakers in the United States develop transformative policies and procedures that will help alleviate the influx of individuals seeking relief at the border.

### III. PROPOSALS

Currently, just over thirty-two million people have been registered as refugees under the protection of the UN mandate.<sup>171</sup> A significant gap remains between those in need of protection and those actually resettled in third party host countries.<sup>172</sup> In 2022, the UNHCR reported that just over 53,000 refugees were formally resettled through the agency, representing far less than one percent of the world's refugee population.<sup>173</sup> In addition to a relatively small number of individuals formally transferred through UN sponsored resettlement programs, millions of others are initially seeking asylum in neighboring countries.<sup>174</sup>

This section discusses proposed solutions to the border crisis, with a focus on encouraging greater compliance with international law and the promotion of human dignity for immigrant populations. Because of the differences between humanitarian and economic migrants, the specific solutions proposed will be organized in relation to the respective group to which they relate.

#### A. Application of Human Rights Standards

Human rights are universal.<sup>175</sup> They do not need to be earned; they are granted by virtue of being a human being.<sup>176</sup> Certain universally applicable standards apply to all individuals regardless of whether they are refugees,

<sup>171</sup> MID-YEAR TRENDS 2022, *supra* note 9.

<sup>172</sup> Press Release, United Nations High Comm'r for Refugees, Gap Between Refugee Resettlement Needs and Opportunities Widens (June 25, 2018) (available at: <https://www.unhcr.org/news/news-releases/gap-between-refugee-resettlement-needs-and-opportunities-widens>).

<sup>173</sup> *Resettlement Data*, UNITED NATIONS HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/us/what-we-do/build-better-futures/long-term-solutions/resettlement/resettlement-data> (last visited Feb. 22, 2024); *Refugees, Asylum Seekers, and Migrants*, *supra* note 148.

<sup>174</sup> *Refugee Statistics*, UNITED NATIONS HIGH COMM'R FOR REFUGEES, <https://www.unrefugees.org/refugee-facts/statistics/#:~:text=Global%20Trends%20At%20a%20Glance&text=35.3%20million%20refugees,5.4%20million%20asylum%20seekers> (last visited Feb. 22, 2024).

<sup>175</sup> BREMS, *supra* note 142; U.S. CITIZENSHIP & IMMIGR. SERVS., RAIIO DIRECTORATE-OFFICER TRAINING: INTERNATIONAL HUMAN RIGHTS LAW TRAINING MODULE (2019) [hereinafter INTERNATIONAL HUMAN RIGHTS LAW TRAINING MODULE].

<sup>176</sup> INTERNATIONAL HUMAN RIGHTS LAW TRAINING MODULE, *supra* note 175, at 9; *see also* NANCY FLOWERS, MARCIA BERNBAUM, KRISTI RUDELIUS-PALMER & JOEL TOLMAN, THE HUMAN RIGHTS EDUCATION HANDBOOK (2000).



asylum-seekers, or another kind of migrant.<sup>177</sup> As previously mentioned, the right to life and the right to asylum are fundamental principles of international human rights law that cannot be derogated from.<sup>178</sup> To ensure that these obligations are being met, this Note argues that the United States must limit the human cost<sup>179</sup> of strict border control and enforcement to protect noncitizens' physical well-being and to preserve their right to claim asylum. For example, the international community is increasingly recognizing that the right to life includes the right to food and subsistence.<sup>180</sup> Therefore, United States border enforcement agencies should end the policy of destroying water and food supplies left for asylum seekers and migrants in the desert.<sup>181</sup> The journey across the border is inherently dangerous and the arbitrary destruction of life-saving resources is an unnecessary and overly harsh form of deterrence.<sup>182</sup> Other practices employed at the border, including "pushbacks," where border agents physically return migrants to neighboring states, have resulted in countless deaths and infringe on an individual's freedom of movement and bodily autonomy.<sup>183</sup>

In addition to implementing a human rights framework, immigration policies should be guided by transparency to maintain clear compliance with international obligations. Reports on CBP operations, especially in relation to the number of migrant deaths at the border, continue to be insufficiently collected and shared with decision makers and the public.<sup>184</sup> Incomplete data relating to deaths at the border and the challenges associated with identifying migrant remains prevent families from getting closure regarding the status of their loved ones.<sup>185</sup> Proper recordkeeping and regular reporting are

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<sup>177</sup> NON-REFOULEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 170.

<sup>178</sup> ICCPR, *supra* note 146, art. 4.2, 6.1; G.A. Res. 39/46, *supra* note 133, art. 14 ¶ 1; G.A. Res. 217 (III) A, *supra* note 139, art. 14 ¶ 1 ("Everyone has the right to seek and to enjoy in other countries asylum from persecution."); 8 C.F.R. § 208.18.

<sup>179</sup> This Note uses "human cost" to refer to the increase in the death of noncitizens at the border.

<sup>180</sup> See G.A. Res. 217 (III) A, *supra* note 139, art. 25 ¶ 1; International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 U.N.T.S. 3, art. 11 [hereinafter ICESCR].

<sup>181</sup> See G.A. Res. 217 (III) A, *supra* note 139, art. 25 ¶ 1; ICESCR, *supra* note 180, art. 11.

<sup>182</sup> For example, humanitarian workers with the non-profit Border Kindness, who leave water along popular migration routes in the Arizona desert, routinely find these water bottles slashed or destroyed. Jasmine Garsd, *Desperate Migrants are Choosing to Cross the Border Through Dangerous U.S. Desert*, NPR (May 3, 2023, 5:03 AM), <https://www.npr.org/2023/05/03/1169010633/desperate-migrants-are-choosing-to-cross-the-border-through-dangerous-u-s-desert>.

<sup>183</sup> Laurel Wamsley, *Nearly 2,000 Migrants Have Died Crossing the Mediterranean This Year. Here's Why*, NPR (June 28, 2023, 5:01 AM), <https://www.npr.org/2023/06/28/1184581187/migrant-deaths-mediterranean-crossing>.

<sup>184</sup> CBP SHOULD IMPROVE DATA COLLECTION, REPORTING, AND EVALUATION, *supra* note 24.

<sup>185</sup> Alexis Okeowo, *The Crisis of Missing Migrants*, NEW YORKER (Jan. 9, 2023), <https://www.newyorker.com/magazine/2023/01/16/the-crisis-of-missing-migrants>.

requirements of UN membership<sup>186</sup> and are vital to understanding the scope and nature of migration at the U.S.-Mexico border.

In 2022, approximately 1.5 million asylum claims were pending in the United States.<sup>187</sup> Over the same period, the percentage of asylum claims granted was roughly forty percent.<sup>188</sup> Additionally, in 2022, the United States formally resettled 25,465 refugees, only twenty percent of the total ceiling of one-hundred-twenty-five thousand.<sup>189</sup> The United States has also extended limited forms of humanitarian relief through the use of parole<sup>190</sup> or Temporary Protected Status (“TPS”).<sup>191</sup> This Note proposes that the United States expand the use of legal forms of humanitarian relief to meet the notable increase of immigrants in need of protection worldwide. At a minimum, the United States is obligated to maintain administrative pathways to asylum and other forms of humanitarian relief to ensure that they are not in violation of the principle of non-refoulement.<sup>192</sup> Moreover, policymakers would benefit

<sup>186</sup> See generally Cosette D. Creamer & Beth A. Simmons, *The Proof Is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 AM. J. INT’L L. 1 (2020).

<sup>187</sup> A SOBER ASSESSMENT OF THE GROWING U.S. ASYLUM BACKLOG, *supra* note 164; *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2018-2023*, TRAC IMMIGR. (Oct. 19, 2023), <https://trac.syr.edu/immigration/reports/judgereports>.

<sup>188</sup> *Asylum Decisions*, TRAC IMMIGR., <https://trac.syr.edu/phptools/immigration/asylum> (last visited Feb. 22, 2024) (select “by Fiscal Year” and “Percent” then “All” for Immigration Court, “All” for Represented, and “Asylum Granted” for Decision).

<sup>189</sup> U.S. DEP’T STATE, BUREAU OF POPULATION, REFUGEES, AND MIGRATION, CUMULATIVE SUMMARY OF REFUGEE ADMISSIONS (2023) (last visited Jan. 27, 2024) [hereinafter CUMULATIVE SUMMARY OF REFUGEE ADMISSIONS] (download the excel spreadsheet and select tab “2022” then scroll to the bottom of the table for “Grand Totals”). This number does not include the Ukrainians and Afghans granted humanitarian parole.

<sup>190</sup> 8 C.F.R. § 212.5 (2022).

<sup>191</sup> 8 U.S.C. § 1254a; see, e.g., *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> (last reviewed/updated Feb. 8, 2024). TPS procedures allow “[t]he Secretary of Homeland Security [to] designate a foreign country for TPS due to conditions in the country that temporarily prevent the country’s nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately.” *Id.* As of July 1, 2022, TPS status has been extended to include nationals of Afghanistan, Burma (Myanmar), Cameroon, El Salvador, Ethiopia, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, Ukraine, Venezuela, Yemen. *Id.*

<sup>192</sup> 8 U.S.C. § 1158(a)(1):

Any [noncitizen] who is physically present in the United States or who arrives in the United States whether or not at a designated port of arrival and including a[n] [noncitizen] who is brought to the United States after having been interdicted in international or United States waters), irrespective of such [noncitizen’s] status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

*Id.*; 8 U.S.C. § 1225(b)(1)(A)(ii):

[A] [noncitizen] who is arriving in the United States . . . [and subject to expedited removal] and the [noncitizen] indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer the [noncitizen] for an interview by an asylum officer under subparagraph (B).

from the exploration of new procedures to expedite humanitarian relief, including the creation of peacetime humanitarian corridors to facilitate the movement of the world's most vulnerable refugees and asylum-seekers.<sup>193</sup> As explored later in this section, humanitarian corridors could be established abroad and serve as preliminary processing centers for asylum seekers prior to their departure, protecting them from the perils of a journey to the U.S.-Mexico border.<sup>194</sup>

### B. *The Establishment of More Humane Asylum Procedures*

Although countries are not required to affirmatively approve asylum in all cases, if a credible claim is made under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United States is mandated not to refoule<sup>195</sup> or return that applicant to a location where there are grounds for believing that the applicant will be subjected to torture or other forms of cruel treatment or punishment.<sup>196</sup> In order to ensure that the United States is not violating the customary international law principle of non-refoulement, a case-by-case adjudication, which takes “into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights,” is required.<sup>197</sup> Although it has been argued that there is no specific right to “receive or be granted asylum” and “no State is under any obligation to admit asylum seekers into their territories[,]” once an individual is in the jurisdiction of a State, statutory and treaty schemes, including non-refoulement, impose requirements on state parties not to refoule asylum seekers with valid claims.<sup>198</sup> Accordingly, it would be impossible to

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*Id.*; see also, G.A. Res. 2198 (XXI), *supra* note 133, art. 33 (“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

<sup>193</sup> For example, in 2015, “the European Council adopted a European Resettlement Scheme providing legal and safe pathways to enter the EU[.]” See Pedro Gois & Giulia Falchi, *The Third Way. Humanitarian Corridors in Peacetime as a (Local) Civil Society Response to a EU’s Common Failure*, 25 REVISTA INTERDISCIPLINAR DA MOBILIDADE HUMANA 59 (2017).

<sup>194</sup> *How Humanitarian Corridors Work to Help People in Conflict Zones*, INT’L COMM. RED CROSS (June 3, 2022), <https://www.icrc.org/en/document/how-humanitarian-corridors-work>.

<sup>195</sup> “Under international human rights law, the principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. This principle applies to all migrants at all times, irrespective of migration status.” NON-REFOULEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 170.

<sup>196</sup> G.A. Res. 39/46, *supra* note 133; G.A. Res. A/RES/57/199, *supra* note 133; C.F.R. § 208.18 (2021) (implementing the Convention Against Torture).

<sup>197</sup> G.A. Res. 39/46, *supra* note 133, art. 3 ¶ 2.

<sup>198</sup> For an excellent summary of international law’s treatment of asylum, see Timothy E. Lynch, *Refugees, Refoulement, and Freedom of Movement: Asylum Seekers’ Right to Admission and Territorial Asylum*, 36 GEO. IMMIGR. L.J. 73 (2021).

determine if an individual asylum applicant has a credible fear of persecution or torture<sup>199</sup> without some form of initial adjudication on the merits of their specific claim.<sup>200</sup> Indeed, “the United States requires that all U.S. government officials adjudicating asylum or refugee cases under section 207 or section 208 of the [INA] receive special training in international human rights law.”<sup>201</sup>

Despite President Biden’s proposed “asylum ban,” which would require asylum-seekers to apply in transit countries or at designated U.S. ports of entry,<sup>202</sup> the availability of asylum procedures upon reaching the U.S. border is established under section 208 of the INA.<sup>203</sup> Policies at the border, including metering, which limits the “number of asylum seekers who [can be] processed each day at designated ports of entry along the U.S. southern border”<sup>204</sup> cannot be reconciled with recent efforts to penalize asylum-seekers who enter the country without inspection.<sup>205</sup> If the United States requires asylum claims to be processed only at ports of entry, then it should

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<sup>199</sup> *Questions and Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening> (last reviewed/updated Sept. 12, 2023). A credible fear of persecution is met when there is: “a ‘significant possibility’ that you . . . have been persecuted or have a well-founded fear of persecution” on account of a protected ground. A credible fear of torture is met when there is “a ‘significant possibility’ that . . . it is more likely than not that you would be subject to torture if returned to your country.” *Id.* These determinations are critical because if an applicant is “found to have a credible fear of persecution or torture, [that applicant] may seek asylum before an asylum officer with USCIS or an Immigration Judge[.]” *Id.*

<sup>200</sup> “As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.” *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, UNITED NATIONS HIGH COMM’R FOR REFUGEES (Jan. 26, 2007). Indeed, one wonders how could a country be in compliance with the principle of non-refoulement without first determining if a person will actually be subjected to torture?

<sup>201</sup> INTERNATIONAL HUMAN RIGHTS LAW TRAINING MODULE, *supra* note 175, at 13.

<sup>202</sup> Circumvention of Lawful Pathways, *supra* note 167.

<sup>203</sup> 8 U.S.C. § 1158(a)(1):

Any [noncitizen] who is physically present in the United States or who arrives in the United States whether or not at a designated port of arrival and including a[n] [noncitizen] who is brought to the United States after having been interdicted in international or United States waters), irrespective of such [noncitizen’s] status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

*Id.*

<sup>204</sup> HILLEL R. SMITH, CONG. RSCH. SERV., LSB10295, THE DEPARTMENT OF HOMELAND SECURITY’S “METERING” POLICY: LEGAL ISSUES (2023) (available at: <https://crsreports.congress.gov/product/pdf/LSB/LSB10295>); *see also*, *Al Otro Lado Class Action Notice of Preliminary Injunction*, U.S. CUSTOMS & IMMIGR. SERVS., [https://www.uscis.gov/sites/default/files/document/notices/Al\\_Otro\\_Lado\\_class\\_action\\_notice.pdf](https://www.uscis.gov/sites/default/files/document/notices/Al_Otro_Lado_class_action_notice.pdf) (last visited Dec. 27, 2023); *see also* AM. IMMIGR. COUNCIL, RISING BORDER ENCOUNTERS IN 2021: AN OVERVIEW AND ANALYSIS (2022).

<sup>205</sup> Circumvention of Lawful Pathways, *supra* note 167.

also increase the capacity of officials to conduct credible fear assessments and officially end metering and other policies that unduly delay asylum adjudications. This would help ensure that asylum-seekers are given adequate hearings on the merits of their claims and would enable the government to address an overwhelming backlog of asylum applications.

### C. Increase in Refugee Resettlement Efforts

Refugee resettlement, also known as third-party resettlement, is a program by which host countries grant permanent legal status to refugees or asylees, often with an opportunity to become citizens.<sup>206</sup> The UNHCR, or a designated NGO in some cases, locates potential refugees abroad to determine eligibility for resettlement and refers the case to a final host country.<sup>207</sup> Access to resettlement under the “U.S. Refugee Admissions Program (USRAP) is limited to [cases] of special humanitarian concern as required by Section 207 of the [INA].”<sup>208</sup> Specifically, in order to qualify for resettlement, a refugee must fall within one the four priority categories established by the U.S. Refugee Admissions Program (“USRAP”).<sup>209</sup>

Since the passage of the Refugee Act of 1980, the United States has formally resettled a total of just over three million refugees.<sup>210</sup> Currently, the UNHCR estimates that “more than two million refugees are now in need of protection through third-country resettlement.”<sup>211</sup> Despite the growing need for durable solutions<sup>212</sup> to the displacement of refugees and other at-risk

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<sup>206</sup> *Resettlement*, UNITED NATIONS OFF. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/us/what-we-do/build-better-futures/long-term-solutions/resettlement> (last visited Dec. 27, 2023).

<sup>207</sup> *Id.*; see also *Refugee Status Determination*, *supra* note 38.

<sup>208</sup> UNITED NATIONS OFF. HIGH COMM’R FOR REFUGEES, OVERVIEW OF UNHCR AND CONCEPTS OF INTERNATIONAL PROTECTION 32 (2019).

<sup>209</sup> *About Refugee Admissions*, U.S. DEP’T STATE, <https://www.state.gov/refugee-admissions/about> (last visited Dec. 27, 2023). Currently priorities are listed as follows:

Priority 1: Individual cases referred by designated entities, by virtue of their circumstances and apparent need for resettlement[;] Priority 2: Groups of special concern designated by the Department of State as having access to the program by virtue of their circumstances and apparent need for resettlement[;] Priority 3: Individual cases granted access for purposes of reunification with family members already in the United States[;] Priority 4: Individual cases who have been referred by private sponsors in the United States, and who receive post-arrival support and services from those sponsors.

*Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Durable Solutions*, U.S. DEP’T STATE, <https://www.state.gov/other-policy-issues/durable-solutions> (last visited Dec. 27, 2023); UNITED NATIONS HIGH COMM’R FOR REFUGEES, FINDING DURABLE SOLUTIONS FOR REFUGEES (2022).

populations, UNHCR only formally resettled a global total 114,242 refugees in 2022.<sup>213</sup>

The president, with consultation from Congress, determines the annual ceiling for refugee resettlement to the United States.<sup>214</sup> USRAP, which is defined as “an interagency effort involving a number of governmental and non-governmental partners both overseas and in the United States[,]” is responsible for facilitating the resettlement of refugees in the United States.<sup>215</sup> In addition, the Office of Refugee Resettlement (“ORR”), located within the U.S. Department of Health and Human Services, provides critical discretionary funding to non-profit and public service providers.<sup>216</sup> Local refugee resettlement agencies receive per capita funding from the DOS, which is currently set at \$2,425 per refugee.<sup>217</sup>

During his first days in office, former President Trump issued an executive order titled “Protecting the Nation from Foreign Terrorist Entry into the United States,” which linked refugee admissions to national security threats and suspended the Refugee Resettlement Program for one-hundred-twenty days.<sup>218</sup> Under the Trump administration, refugee resettlement reached a nadir period,<sup>219</sup> with resettlement figures down from a high of eighty-five thousand in 2016, to fifty thousand in 2017, which was further reduced to forty-five thousand in 2018, thirty thousand in 2019, and a record low of eighteen thousand in 2020.<sup>220</sup> Given the reliance of refugee resettlement agencies on per capita resettlement funding, when resettlement

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<sup>213</sup> *Refugee Data Finder*, UNITED NATIONS HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/refugee-statistics/download/?url=sH5pnE> (last visited Jan. 27, 2024) (select “Solutions” on left hand column).

<sup>214</sup> 8 U.S.C. § 1157; *see also* Presidential Determination on Refugee Admissions for Fiscal Year 2023, 87 Fed. Reg. 60547 (Oct. 6, 2022).

<sup>215</sup> Agencies and organizations involved in USRAP include DHS, DOS, ORR, UNHCR, and the International Organization for Migration (“IOM”), among others. *The United States Refugee Admissions Program (USRAP) Consultation and Worldwide Processing Priorities*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/usrap> (last updated Dec. 5, 2023); *U.S. Refugee Admissions Program Priority 2 Designation for Afghan Nationals*, U.S. DEP’T STATE, <https://www.state.gov/u-s-refugee-admissions-program-priority-2-designation-for-afghan-nationals> (last visited Dec. 27, 2023).

<sup>216</sup> *About*, OFF. REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/about> (current as of Mar. 11, 2021).

<sup>217</sup> *Reception and Placement*, U.S. DEP’T STATE, <https://www.state.gov/refugee-admissions/reception-and-placement> (last visited Jan. 28, 2023).

<sup>218</sup> Exec. Order No. 13769, 82 C.F.R. § 8977 (2017).

<sup>219</sup> *See, e.g.*, Chris Moody, *Clarkston, Ga., Known for Welcoming Refugees, Feels Strain from Influx of Afghans*, WASH. POST (Nov. 23, 2021, 12:00 PM), [https://www.washingtonpost.com/national/clarkston-ga-a-city-known-for-welcoming-refugees-feeling-strain-from-influx-of-afghans/2021/11/23/4d8710c8-3dc7-11ec-8ee9-4f14a26749d1\\_story.html](https://www.washingtonpost.com/national/clarkston-ga-a-city-known-for-welcoming-refugees-feeling-strain-from-influx-of-afghans/2021/11/23/4d8710c8-3dc7-11ec-8ee9-4f14a26749d1_story.html).

<sup>220</sup> *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/us-refugee-resettlement> (last visited Dec. 27, 2023).

figures exponentially declined, many agencies “cut staff . . . [or] made the tough call to shutter entire local offices, dramatically reducing their capacity to accept new arrivals and provide services for the resettled population.”<sup>221</sup>

Although President Biden increased the refugee resettlement ceiling to sixty-two-thousand-five hundred in 2021 and further increased it to a high of one-hundred-twenty-five thousand in 2022, 2023, and 2024,<sup>222</sup> the actual number of resettlements taking place lags significantly behind, due in large part to structural changes made by former President Trump and as a result of the COVID-19 pandemic.<sup>223</sup> Despite a one-hundred-twenty-five thousand ceiling for refugee admissions set in both 2022 and 2023, just over eighty-five thousand were resettled in the United States over the last two years.<sup>224</sup>

In an effort to close the resettlement gap and increase the capacity of the United States to host refugees, the federal government initiated Welcome Corps in 2023,<sup>225</sup> which allows private individuals, families, and community groups to register to receive a family in need of resettlement.<sup>226</sup> The hosts, or sponsors, will support refugee families from their point of arrival in the United States through at least their first ninety days in the country.<sup>227</sup> The State Department describes this initiative as “the boldest innovation in refugee resettlement in four decades[.]” which reflects “Americans’ generosity of spirit by creating a durable program for Americans in communities across the country to privately sponsor refugees from around the world.”<sup>228</sup> In its first year, Welcome Corps sought to “mobilize 10,000 Americans to step forward as private sponsors and offer a welcoming hand to at least 5,000 refugees.”<sup>229</sup>

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<sup>221</sup> Silva Mathema & Sofia Carratala, *Rebuilding the U.S. Refugee Program for the 21st Century*, CTR. FOR AM. PROGRESS (Oct. 26, 2020), <https://www.americanprogress.org/article/rebuilding-u-s-refugee-program-21st-century>.

<sup>222</sup> *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present*, *supra* note 220.

<sup>223</sup> The cutbacks made during the Trump Administration had disastrous effects for the government agencies and non-profit organizations responsible for resettling refugees. In addition to staffing shortages at the Bureau of Population, Refugees, and Migration, USCIS, and non-profit resettlement agencies, who relied significantly on resettlement funds for their operations, were forced to reduce staff or close indefinitely. These structural changes continue to hamper the capacity of the federal government and non-profit organizations to resettle refugees. *See generally* Robbie Gramer, *Biden’s Refugee Envoy Looks to Reform Damaged System*, FOREIGN POL’Y, <https://foreignpolicy.com/2022/05/10/biden-refugee-asylum-immigration-trump-state-department> (last updated May 11, 2022).

<sup>224</sup> *See* CUMULATIVE SUMMARY OF REFUGEE ADMISSIONS, *supra* note 189.

<sup>225</sup> *Sponsorship is the Ultimate Act of Welcoming, and Anyone Can Do it - Including You*, WELCOME CORPS, <https://welcomecorps.org/get-started> (last visited Feb. 22, 2024).

<sup>226</sup> *Fact Sheet - Launch of Welcome Corps- Private Sponsorship of Refugees*, U.S. DEP’T STATE (Jan. 19, 2023), <https://www.state.gov/launch-of-the-welcome-corps-private-sponsorship-of-refugees-2>.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

Welcome Corps, and other forms of flexible refugee resettlement procedures, is a positive step towards reaching the agreed upon refugee resettlement ceiling of one-hundred-twenty-five thousand for 2023 and 2024.<sup>230</sup> However, much work remains to be done to ensure that the United States maintains its capacity to resettle new arrivals. Without solidifying a baseline resettlement ceiling, government agencies and non-profit support organizations will be unable to establish long-term budgetary and staffing strategies.<sup>231</sup>

Across the United States, refugee resettlement and the strategic influx of new populations have served as impetuses for the revitalization of urban areas.<sup>232</sup> In 2022, New York State resettled just over one-thousand-seven hundred refugees, ninety-one percent of which were resettled in upstate New York,<sup>233</sup> due in part to the lower cost of living<sup>234</sup> as well as the family reunification process which prioritizes placing new arrivals with immediate family members.<sup>235</sup> The revitalizing effect of refugee resettlement is perhaps most apparent in post-industrial Rust Belt<sup>236</sup> cities, which have experienced decades of population decline.<sup>237</sup> In Buffalo, New York, the closure of many of the region's steel plants and the construction of urban highways and the corresponding rise of suburbanization in the mid-twentieth century led to a mass migration of urbanites outside of city limits.<sup>238</sup> In 1950, Buffalo had a

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<sup>230</sup> *The Welcome Corps Celebrates First Year of New Service Opportunity for Americans to Privately Sponsor Refugees*, WELCOME CORPS (Jan. 19, 2024), <https://welcomecorps.org/the-welcome-corps-celebrates-first-year-of-new-service-opportunity-for-americans-to-privately-sponsor-refugees>.

<sup>231</sup> Moody, *supra* note 219.

<sup>232</sup> Silvia M. Radulescu, *Embracing Refugees: A Revival Solution for Shrinking American Cities*, 36 GEO. IMMIGR. L.J. 775 (2022).

<sup>233</sup> N.Y.S. OFF. TEMP. & DISABILITY ASSISTANCE, POPULATION DATA FOR NEW YORK STATE FFY 2022 (2022).

<sup>234</sup> Alexa Sarci, *The Sanctuary City of Albany*, N.Y.U. ARTHUR L. CARTER JOURNALISM INST., <https://projects.newsdoc.org/newyorkmigrants/beyond-nyc/#the-sanctuary-city-of-albany> (last accessed Jan. 27, 2024).

<sup>235</sup> *U.S. Family Reunification*, UNITED NATIONS HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/us/what-we-do/resettlement-united-states/u-s-family-reunification> (last visited Feb. 22, 2024). In effect, this means that upstate cities with significant immigrant populations are more likely to host new arrivals.

<sup>236</sup> The Rust Belt referring to a “geographic region of the United States that was long the country’s manufacturing, steelmaking, and coal-producing heartland but that underwent dramatic industrial decline that resulted in widespread unemployment, increased poverty, decay, and population loss.” Jeff Wallenfeldt, *Rust Belt*, BRITANNICA, <https://www.britannica.com/place/Rust-Belt> (last updated Jan. 14, 2024).

<sup>237</sup> Yolande Pottie-Sherman, *Austerity Urbanism and the Promise of Immigrant- and Refugee-Centered Urban Revitalization in the U.S. Rust Belt*, 39 URB. GEOGRAPHY 438 (2017); Emily Anne Shrider, *Can Immigrants Save the Rust Belt? Struggling Cities, Immigration, and Revitalization* (2017) (Ph.D. dissertation, The Ohio State University) (available at: [https://etd.ohiolink.edu/acprod/odb\\_etd/ws/send\\_file/send?accession=osu1503171981515011&disposition=inline](https://etd.ohiolink.edu/acprod/odb_etd/ws/send_file/send?accession=osu1503171981515011&disposition=inline)).

<sup>238</sup> ANNA BLATTO, *A CITY DIVIDED: A BRIEF HISTORY OF SEGREGATION IN BUFFALO* (2018).



population of approximately five-hundred-eighty thousand.<sup>239</sup> By 2010, the population was a little over two-hundred-sixty thousand.<sup>240</sup> In part due to the injection of over sixteen thousand refugees, the population of Buffalo rose in the 2020 census for the first time since 1950.<sup>241</sup>

In addition to contributing to population growth, refugees make important cultural and economic contributions to the communities where they are resettled.<sup>242</sup> Qualitatively, when given the opportunity to plant their roots, refugees open businesses,<sup>243</sup> buy homes vacated by suburbanites,<sup>244</sup> and enroll their children in public schools.<sup>245</sup> These contributions result in more diverse and vibrant communities, reflecting a multicultural ideal of American life.<sup>246</sup> Moreover, economically, refugees are a net benefit to the government; indeed, refugees resettled between the ages of “18-45 pay on average \$21,000 more in taxes to all levels of government than they receive in benefits over a 20 year period.”<sup>247</sup>

By bolstering the Refugee Resettlement Program, the federal government would benefit greatly from the positive effects on population growth, the economy, and a diverse and rich national culture. In relation to the crisis at the border, refugee resettlement is a proven tool available for the government to offset the influx of noncitizens seeking asylum and other humanitarian relief at the Southern border.

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<sup>239</sup> *Buffalo, New York Population*, WORLD POPULATION REV., <https://worldpopulationreview.com/us-cities/buffalo-ny-population> (last visited Feb. 22, 2024).

<sup>240</sup> *Id.*

<sup>241</sup> Matthew Korfhage, *After Decades of Decline, Buffalo Boasts a ‘Refugee Renaissance.’ Can It Last?*, DEMOCRAT & CHRON., <https://www.democratandchronicle.com/in-depth/news/2022/01/10/buffalo-ny-refugees-resettlement-gentrification/8766544002> (last updated Mar. 28, 2023 11:56AM). See also Douglas Sitler, *Immigrants, Refugees Drive Population Growth, Improve Quality of Life in Buffalo, UB Expert Says*, UB NOW (Sept. 28, 2021), <https://www.buffalo.edu/ubnow/stories/2021/09/kim-immigrants-refugees.html>.

<sup>242</sup> *What are the Economic Benefits of Refugees?*, GLOBAL REFUGE (Mar. 24, 2022), <https://www.lirs.org/economic-benefits-refugees>.

<sup>243</sup> Rakshitha Arni Ravishankar, *Refugee Entrepreneurs ‘Keep Business Alive’ in Upstate New York*, UPI (Aug. 8, 2017, 9:32 AM), [https://www.upi.com/Top\\_News/US/2017/08/08/Refugee-entrepreneurs-keep-business-alive-in-upstate-New-York/5411502198507](https://www.upi.com/Top_News/US/2017/08/08/Refugee-entrepreneurs-keep-business-alive-in-upstate-New-York/5411502198507).

<sup>244</sup> Susan Hartman, *How Refugees Transformed a Dying Rust Belt Town*, N.Y. TIMES (June 3, 2022), <https://www.nytimes.com/interactive/2022/06/03/realestate/utica-burma-refugees.html>.

<sup>245</sup> See generally Daniel B. Weddle, *An American Tune: Refugee Children in U.S. Public Schools*, 27 KAN. J.L. & PUB. POL’Y 434 (2018).

<sup>246</sup> See generally *Promoting Welcoming and Inclusive Societies*, UNITED NATIONS HIGH COMM’R FOR REFUGEES, INTEGRATION HANDBOOK, <https://unhcr.org/handbooks/ih/welcoming-inclusive-societies/promoting-welcoming-and-inclusive-societies> (last visited Dec. 19, 2023).

<sup>247</sup> William N. Evans & Daniel Fitzgerald, *The Economic and Social Outcomes of Refugees in the United States: Evidence from the ACS* (Nat’l Bureau of Econ. Rsch., Working Paper No. 23498, 2017).

*D. The Formation of Peacetime Humanitarian Corridors*

This Note proposes that, to implement a more robust refugee resettlement program, the United States should explore alternative forms of refugee status determinations to increase the capacity and speed at which resettlements can take place. One potential solution to the resettlement gap is the establishment of peacetime humanitarian corridors. Traditionally, humanitarian corridors are “defined as a type of temporary demilitarized zone intended to allow the safe transit of humanitarian aid in, and/or refugees out of a crisis region.”<sup>248</sup> In practice, peacetime humanitarian corridors would establish secure pathways to the United States from transit countries, where asylum-seekers and/or refugees could theoretically be prescreened and interviewed for eligibility by UNHCR or NGOs and referred to DHS.<sup>249</sup> Once refugee status has been granted, established humanitarian corridors would expedite the movement of refugees from transit countries to their final host countries.<sup>250</sup> If implemented in the United States, humanitarian corridors could be used to save the lives of the most vulnerable refugees and asylum-seekers, including those with disabilities, pregnant women, and children.<sup>251</sup>

In Italy, pilot peacetime humanitarian corridor programs have been established by various religious organizations and civil society actors in collaboration with the Italian government.<sup>252</sup> In 2015, the Italian Ministries of Foreign Affairs signed the Protocol of Agreement for the establishment of Humanitarian Corridors, which enabled religious entities and NGOs to directly provide for the resettlement of refugees and asylum-seekers.<sup>253</sup> Migration routes from North Africa to Europe across the Mediterranean Sea “are lengthy, costly and psychologically devastating. Along the way, people may be abused and exploited by organized crime networks and local

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<sup>248</sup> Gois & Falchi, *supra* note 193:

The main reason for its implementation is to stop the journey of death and the exploitation of human traffickers who make money out of the lives of these people by providing a legal gateway to safely reach Europe, grant the beneficiaries a humanitarian visa and support them during the integration process into the Italian society. Their first consideration is directed to people who have more difficulty to undertake the journey, this is the reason why HC focus primarily on the most vulnerable candidates.

*Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Humanitarian Corridors in Europe*, SANT’EGIDIO, <https://www.santegidio.org/pageID/34176/langID/en/Humanitarian-corridors-in-Europe.html> (last visited Nov. 19, 2023).

<sup>253</sup> Gois & Falchi, *supra* note 193; Maurizio Ambrosini & Ilaria Schnyder von Wartensee, *Actions Speak Louder Than Claims: Humanitarian Corridors, Civil Society and Asylum Policies*, 48 J. ETHNIC & MIGRATION STUD. 3965 (2022); UNICORE - *University Corridors for Refugees*, SAPIENZA U. DI ROMA, <https://www.uniroma1.it/en/pagina/unicore-university-corridors-refugees> (last visited Nov. 19, 2023).

population. Migrants may be placed in squalid prisons, locked up and tortured until they are forced to embark on precarious journeys on expensive rubber boats.”<sup>254</sup> Therefore, by granting travel protections and humanitarian visas to asylum-seekers and refugees before they disembark, established humanitarian corridors prevent unnecessary suffering and limit the amount of people who die at sea.<sup>255</sup> Italy’s program is structured as follows:

Organizations are in charge of providing for volunteers on site, who take direct contact with refugees in relevant countries. They prepare a list of potential beneficiaries to be forwarded to the Italian consular authorities who, following the supervision by the Home Office, will issue Humanitarian Visas with Limited Territorial Validity, therefore valid only in Italy. Once they arrive in Italy—legally and safely—refugees can apply for asylum.<sup>256</sup>

Between February 2016 and January 2022, 4,342 people were successfully resettled in Europe through the humanitarian corridor system.<sup>257</sup> Additionally, these humanitarian corridors “are totally self-financed by the associations promoting them[;]” thus, they impose no additional burdens on the Italian government and may actually ease the pressure of immigration influxes.<sup>258</sup>

Another potential solution to the overcrowding of asylum-seekers at the border would be enabling United States consulates and embassies abroad to adjudicate asylum applications themselves. This form of asylum, often called diplomatic or extraterritorial asylum, is rare and often disputed.<sup>259</sup> Some legal scholars go as far as to argue that States have a legal obligation to protect valid asylum-seekers presenting at their embassies abroad.<sup>260</sup> Regardless of whether international law imposes obligations in this context,

<sup>254</sup> Gois & Falchi, *supra* note 193 (citing, Charles Heller and Chris Jones, *Eurosur: Saving Lives or Reinforcing Deadly Borders?*, STATEWATCH (Feb. 1, 2014), <https://www.statewatch.org/statewatch-database/eurosur-saving-lives-or-reinforcing-deadly-borders-by-charles-heller-and-chris-jones>).

<sup>255</sup> *Id.*

<sup>256</sup> *Humanitarian Corridors*, SANT’EGIDIO, <https://www.santegidio.org/pageID/30112/langID/en/Humanitarian-Corridors.html> (last visited Feb. 22, 2024).

<sup>257</sup> SANT’EGIDIO, HUMANITARIAN CORRIDORS IN FIGURES (2022) [hereinafter HUMANITARIAN CORRIDORS IN FIGURES].

<sup>258</sup> *Id.*

<sup>259</sup> For example, during the Hungarian Revolution against the Soviet Union in 1956, the State Department instructed Hungarian embassy personnel to “extend every courtesy should the Cardinal request asylum.” *Cardinal Mindszenty*, U.S. EMBASSY HUNG., <https://hu.usembassy.gov/embassy/budapest/embassy-history/cardinal-mindszenty> (last visited Nov. 19, 2023). The Cardinal did just that and lived at the embassy for fifteen years. *Id.*

<sup>260</sup> See generally Kate Ogg, *Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates*, 33 REFUGEE SURV. Q. 81 (2014); Susan Raufer, *In-Country Processing of Refugees*, 9 GEO. IMMIGR. L.J. 233 (1995).

the practical benefits of enabling consular processing of asylum claims could help reduce the burden placed on U.S.-based immigration authorities.<sup>261</sup>

This Note proposes that humanitarian corridors should be considered as a solution to the previously discussed crisis at the U.S.-Mexico border. Although President Biden's proposed "asylum ban" discredits asylum and human rights law, one of the purported rationales of this "ban" is to limit the number of individuals initially filing for asylum in the United States, which would reduce the substantial backlog of asylum claims currently in courts.<sup>262</sup> In this way, humanitarian corridors would actually resolve some of the burden on the federal government and immigration courts by granting designated NGOs and governmental partners the primary ability to consider asylum and humanitarian applications abroad.<sup>263</sup> More importantly, if humanitarian corridors were established to facilitate the movement of the most vulnerable asylum-seekers to the United States, the number of deaths at the border could be reduced.<sup>264</sup>

Interestingly, the Biden administration has recently created processing centers, staffed by United States immigration officials, in Colombia and Costa Rica, with additional centers planned in Guatemala.<sup>265</sup> Known as the safe mobility initiative, this program was designed to help qualified individuals seek refugee status, family reunification, or parole abroad, thereby alleviating them from making the perilous journey to the border on foot.<sup>266</sup> Yet the effectiveness of this program remains to be seen; asylum claims are still required to be made at the United States border and the capacity to process claims remains far behind demand.<sup>267</sup>

Instead of criminalizing humanitarian work, the U.S. federal government should invest in closer partnerships with NGOs and humanitarian groups to meet the needs of the at-risk populations. Closer

<sup>261</sup> Shalini B. Ray, *Optimal Asylum*, 46 VAND. J. TRANSNAT'L L. 1215 (2021). Moreover, U.S. Department of State personnel based abroad are already equipped to adjudicate nonimmigrant and immigrant visas. See *Consular Processing*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing> (last reviewed/updated July 20, 2023).

<sup>262</sup> Circumvention of Lawful Pathways, *supra* note 167.

<sup>263</sup> HUMANITARIAN CORRIDORS IN FIGURES, *supra* note 262.

<sup>264</sup> See, e.g., URREA, *supra* note 61, at 20 ("All the [CBP] agents seem to agree that the worst deaths are the young women and the children. Pregnant women with dying fetuses within them are not uncommon; young mothers have been found with infants attached to their breasts, still trying to nurse.").

<sup>265</sup> Genevieve Glatsky & Zolan Kanno-Youngs, *Biden Plan Seeks to Keep Migrants Away from the Border. Will it Work?*, N.Y. TIMES (Sept. 21, 2023), <https://www.nytimes.com/2023/09/21/world/americas/border-migrants-biden-plan.html>.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* Between June and September 2023, "the program [] put about 3,600 migrants out of roughly 40,000 applicants on a path to be allowed into the United States[.]" *Id.* The application portal in Colombia was forced to temporarily close after it received "more than 5,000 applications in the first 12 hours." *Id.*

working partnerships with humanitarian actors would result in greater assurances of human rights, more efficient asylum procedures, and more accurate reporting on migrant deaths and the conditions at the border.<sup>268</sup>

## CONCLUSION

The criminalization of asylum and humanitarian work is by no means a uniquely American trend; other countries similarly faced with immigration influxes have elected to investigate and, at times, penalize humanitarian workers.<sup>269</sup> In the Mediterranean, for example, many refugees are forced to make the journey across the sea in precarious boats, rafts and floats.<sup>270</sup> The International Organization of Migration, a UN agency, reported that over twenty-five thousand migrants have been reported missing in the Mediterranean since 2014.<sup>271</sup> The Greek island of Lesbos, which is located approximately fifteen kilometers from Turkey, is considered a migration hotspot for Middle Eastern and North African refugees, asylum-seekers, and migrants.<sup>272</sup> Since 2015, nearly one million people in need of protection have traveled through Lesbos seeking asylum on European shores.<sup>273</sup> The island of eighty-thousand people became overwhelmed, prompting multiple NGOs to spring into action, providing a host of services including medical aid, boat rescue, psychiatric support, and educational services.<sup>274</sup>

Sarah Mardini and her sister, Yusra, traveled to Lesbos as refugees fleeing the Syrian Civil War in 2015.<sup>275</sup> During their journey across the Aegean Sea from Turkey, their boat capsized, and Sarah and her sister, who were Olympic swimmers for Syria, pulled the boat to Greek shores, saving the lives of over fifteen refugees.<sup>276</sup> After being resettled in Germany, Sarah routinely returned to Lesbos as a volunteer to support those making the

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<sup>268</sup> DHS leadership has already indicated that greater cooperation with NGOs is necessary. *See* DHS Plan, *supra* note 151, at 3.

<sup>269</sup> Eugenio Cusumano & Matteo Villa, *From “Angels” to “Vice Smugglers”: The Criminalization of Sea Rescue NGOs in Italy*, 27 *EURO. J. CRIM. POL’Y & RSCH.* 23 (2020).

<sup>270</sup> Wamsley, *supra* note 183.

<sup>271</sup> *Migration Within the Mediterranean*, MISSING MIGRANTS PROJECT, <https://missingmigrants.iom.int/region/mediterranean> (last visited Feb. 24, 2024).

<sup>272</sup> *Asylum Seekers’ Hell in a Greek ‘Hotspot’*, HUM. RTS. WATCH (Nov. 30, 2017, 4:28 PM), <https://www.hrw.org/news/2017/11/30/asylum-seekers-hell-greek-hotspot>.

<sup>273</sup> Nancy Dent, *I’ve Seen What’s Happening on Lesbos and It’s Shameful*, INT’L RESCUE COMM. (Mar. 13, 2020), <https://www.rescue.org/article/ive-seen-whats-happening-lesbos-and-its-shameful>.

<sup>274</sup> *The Hotspot Approach in Greece and Italy*, THINK TANK EUR. PARL. (Dec. 10, 2023), [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2023\)754569](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)754569).

<sup>275</sup> Richard Pérez-Peña, *She Was Called a Hero for Helping Fellow Refugees. Doing So Got Her Arrested.*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/world/europe/greece-migrant-aid-arrests.html>.

<sup>276</sup> Alex Dackevych, *Sarah Mardini: ‘I am Not a People Smuggler’*, BBC (Dec. 12, 2018), <https://www.bbc.com/news/av/world-europe-46535372>.

journey after her.<sup>277</sup> Volunteering for a Greek NGO called Emergency Response Centre International, Sarah provided interpretation and basic aid to migrants arriving on the shores of Lesbos.<sup>278</sup> However, in 2018, Greek authorities arrested Sarah and her co-workers, German national, Seán Binder, and Greek national, Nassos Karakitsos, on charges of espionage and human smuggling.<sup>279</sup> They were held in pretrial detention in Athens for 107 days.<sup>280</sup> Initially, these humanitarians faced up to “25 years in prison for helping and defending the rights of refugees” and providing basic humanitarian aid to refugees seeking asylum.<sup>281</sup> The criminal charges filed against Sarahardini sent a signal that the Greek government was taking a hardline approach to humanitarian work, especially search and rescue operations in the Aegean Sea.<sup>282</sup> The UN warned that a “[g]uilty verdict for migrant rights defenders could mean more deaths at sea.”<sup>283</sup> After substantial international pressure, the court in Lesbos ultimately dismissed the charges on procedural grounds.<sup>284</sup>

The militarization of the U.S.-Mexico border and the criminalization of migration prevents access to asylum procedures recognized under domestic and international law.<sup>285</sup> Criminal penalties imposed on humanitarian aid

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<sup>277</sup> Niki Kitsantonis, *Greece to Put Aid Workers Who Helped Migrants on Trial on Espionage Charges*, N.Y. TIMES (Nov. 17, 2021), <https://www.nytimes.com/2021/11/17/world/europe/greece-migrants-aid-workers-espionage.html>.

<sup>278</sup> Sarahardini, *How I Was Arrested for Handing Out Blankets to Refugees*, TEDXLONDON (2019), <https://tedxlondon.com/topic/politics/how-i-was-arrested-for-handing-out-blankets-to-refugees-sarahardini-tedxlondonwomen>.

<sup>279</sup> Alex W. Palmer, *They Came to Help Migrants. Now, Europe Has Turned on Them.*, N.Y. TIMES, <https://www.nytimes.com/2022/03/02/magazine/greece-migration-ngos.html> (last updated June 15, 2023).

<sup>280</sup> *Id.*

<sup>281</sup> Helena Smith, *Syrian Aid Worker Who Swam Refugees to Safety Freed from Greek Jail*, GUARDIAN (Dec. 5, 2018), <https://www.theguardian.com/world/2018/dec/05/syrian-aid-worker-sarahardini-refugees-freed-greece>.

<sup>282</sup> *Greece: Criminalization of Humanitarian Support to Migrants and Refugees Must End*, INT’L COMM’N JURISTS (Oct. 1, 2023), <https://www.icj.org/greece-criminalization-of-humanitarian-support-to-migrants-and-refugees-must-end>.

<sup>283</sup> Press Release, United Nations Hum. Rts. Off. High Comm’r, *Greece: Guilty Verdict for Migrant Rights Defenders Could Mean More Deaths at Sea – UN Expert* (Nov. 18, 2021) (available at: [https://www.ohchr.org/en/press-releases/2022/01/greece-guilty-verdict-migrant-rights-defenders-could-mean-more-deaths-sea-un#:~:text=GENEVA%20\(18%20November%202021\)%20%2D,into%20'death%20sentences'%20for%20countless](https://www.ohchr.org/en/press-releases/2022/01/greece-guilty-verdict-migrant-rights-defenders-could-mean-more-deaths-sea-un#:~:text=GENEVA%20(18%20November%202021)%20%2D,into%20'death%20sentences'%20for%20countless)).

<sup>284</sup> Chico Harlan & Elinda Labropoulou, *Greek Court Rejects Charges Against Aid Workers, Including Sarahardini of ‘The Swimmers’*, WASH. POST (Jan. 13, 2023, 1:36 PM), <https://www.washingtonpost.com/world/2023/01/13/greek-court-rejects-charges-against-aid-workers-including-sarahardini-swimmers>. Although this ruling had preserved the ability of the prosecution to refile, additional charges were not filed as the statute of limitations expired in February 2023. *Id.*

<sup>285</sup> NON-REFOULEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 170; G.A. Res. 39/46, *supra* note 133, art. 3 ¶ 2.

workers further contribute to an increasingly dangerous border crossing and possibly lead to more migrant deaths.<sup>286</sup> Rather than penalizing asylum-seekers and the NGOs or humanitarian workers that provide services to them, the United States should create more humane immigration procedures by investing in their capacity to resettle more refugees and asylum-seekers through the use of humanitarian corridors and an expanded refugee resettlement program.

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<sup>286</sup> Maria Lorena Cook, *Humanitarian Aid Is Never a Crime: Humanitarianism and Illegality in Migrant Advocacy*, 45 LAW & SOC'Y REV. 561, 572-76 (2011).