

## Border Patrol: Sexual violence and impunity at the US-México border

For decades, researchers, activists, journalists, and immigrants' rights organizations have documented the violence at the symbolic and geopolitical border between the United States and Mexico, and its specific impacts on Latinxs.<sup>1</sup> We will examine how a segment of the population – Latinx migrant women and lesbian, gay, bisexual, and transgender (LGBT) people – considered surplus, of no value, and, consequently, disposable, are policed through certain tactics of war (sexual assault and violence) that are rendered permissible and used repeatedly, without legal consequence.

We understand sexual violence<sup>2</sup> as a tool of many forms of institutional violence, and so implicates a State and social order that generate the conditions in which sexual violence persists. We will examine some of these State contexts, such as economic policy and the discourse of national security, employed against the aspects of identity embodied by Latinx migrant women and LGBT persons to establish domination at the southern border, and through which the State and broader hegemonic<sup>3</sup> order asserts and defends itself.

### I. A “state of emergency” at the southern border

In 2015, James Tomscheck, former Chief of Internal Affairs at Customs and Border Protection, confirmed to CBS News that “between 2012 and 2014, he found there was a ‘spike’ of more than 35 sexual misconduct cases against agents, a rate he says was significantly higher than other law enforcement agencies.”<sup>4</sup> CBS News found that between 2009 and 2015, “at least 21 customs or border patrol agents have been indicted or pleaded guilty to sexual offenses — both on and off duty — ranging from sexual assault, to possession of child pornography and child molestation. Five agents were arrested in the past year” and of them, Tomscheck noted, “I believe they were persons who had likely offended before but their acts have gone undetected.”<sup>5</sup>

**Comment [a1]:** One of the things that caught my attention was the small numbers – only five arrests in one year? And Border Patrol acknowledges 285 complaints or allegations of sexual assault (not even actual incidents) since 2009 - in contrast to the fact CBP leadership is sounding an alarm about high rates, violence, and repeat offenders.

<sup>1</sup> We use the “x” to denote all genders, including those that do not conform or ascribe to a male/female binary.

<sup>2</sup> We understand sexual violence as the continuum of sexualized behavior and attitudes used to exert patterns of abusive power and control over another person or group of people. We recognize definitions of “sexual” as personal, cultural, and subjective; for the purposes of this paper, we include criminal-legal definitions that include interpersonal acts such as nonconsensual sexual acts (completed or attempted) and degrading or demeaning attitudes, beliefs, and practices based on sexuality. Similarly, we understand gender-based violence to include both sexual violence and abusive power and control over another person or group based on perceived, actual, or nonconforming gender (examples in the source literature for this article include kicking a pregnant woman in the abdomen and denying hormone therapy to transgender women detainees).

<sup>3</sup> We understand hegemony as the ability of certain nations and groups of people to exercise control from a dominant position that allows them to establish and/or impose a particular way of knowing, being, and acting. Those who hold the power are able to attain the support and consent of others without pressure due to the acceptance of the norms as commonsense. So, for example, current hegemonic practices of gender-based violence circumscribe what rights look like and the legitimate actions and parameters of justice, including the existence of a robust civil society sector (which permits advocacy and nonprofits). Issues like gender-based violence and other forms of violence and oppression are necessary to create a particular world – they establish and enforce power, define justice and the terms of resistance, and legitimize the State.

<sup>4</sup> Werner, A. & Strickler, L. (4 May 2015). [“Disturbing” sex abuse within agency that patrols US border, says former top official.](#) *CBS News*.

<sup>5</sup> *Ibid.*

Customs and Border Protection (CBP) was created in 2002 as part of the US Department of Homeland Security (DHS). DHS replaced Immigration and Naturalization Services and received a much broader mandate, centered on national security and law enforcement, and a correspondingly massive budget. Border Patrol, located within CBP, has as its mission “to detect and prevent the illegal entry of aliens into the United States.”<sup>6</sup> Then-DHS Secretary Chertoff’s strategy was to move from regulating migration to militarization – “Fight back. This was the US border, and the US would win.”<sup>7</sup> Increased violence was viewed as “progress securing the border.”<sup>8</sup>

In November 2007, CBP noted via internal agency memo an increase in the number of employee arrests. Between 2005 and 2012, nearly one CBP officer was arrested per day for misconduct (2170 reported) on charges such as domestic violence or driving under the influence. Richard Skinner, then-DHS inspector general, stated, “We were getting more and more complaints, but our biggest concern was that there was a culture as to not report allegations to us. Out in the field, there was a culture to keep things to themselves.”<sup>9</sup>

As Border Patrol grew, its use of sexual violence increased and became part of the arsenal and culture of the agency. In 2010, after a \$600 million increase to border control and a corresponding increase in the number of Border Patrol agents, journalists noted a “surge” in sexual misconduct and assault cases against them.<sup>10</sup> By 2011, with nearly 21,000 Border Patrol agents and 21,650 customs enforcement officers at US ports of entry, CBP was the largest law enforcement agency in the US.

No More Deaths/No Más Muertes documents abuses endured by people in the custody of US immigration authorities. From 2006 to 2011, after interviews detailing more than 30,000 incidents, No More Deaths stated, “The abuses individuals report [including sexual violence] have remained alarmingly consistent for years [...] By this point, the overwhelming weight of the corroborated evidence should eliminate any doubt that Border Patrol abuse is widespread. Still the Border Patrol’s consistent response has been flat denial, and calls for reform have been denied.”<sup>11</sup> According to No More Deaths, several other organizations, including the Women’s Refugee Commission and Florence Immigrant and Refugee Rights Project, have documented similar patterns of abuse by Border Patrol. “Many Border Patrol practices violate the agency’s own existing guidelines, international repatriation agreements, and basic standards of human rights and dignity; some plainly meet the definition of torture under international law.”<sup>12</sup>

### **Rape as a weapon of war and “militarized border rape”**

<sup>6</sup> US Customs and Border Protection (n.d.). [Border Patrol overview: Mission](#). US Department of Homeland Security.

<sup>7</sup> Graff, G.M. (2014). [The green monster](#). *Politico Magazine*.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Khimm, S. (9 September 2010). [Border patrol charged with sexual abuse, assault, and torture](#). *Mother Jones*.

<sup>11</sup> No More Deaths/No Más Muertes (2011). [A culture of cruelty: Abuse and impunity in short-term US Border Patrol custody](#). Tucson, AZ: Author.

<sup>12</sup> No More Deaths/No Más Muertes (2012). [Issues and themes 2012](#). Tucson, AZ: Author.

**Comment [a2]:** NOT FOR INSTITUTE - Though not tied to SV concerns – note that the CBP Integrity Advisory Panel (2016) identifies the violence and misidentifies the root cause. (“Besides integrity and use of force issues, arrests for misuse of alcohol and for spousal abuse are serious concerns that impact CBP, both in terms of employee availability and integrity and fitness to perform law enforcement duties. Yet CBP currently has no provisions as part of the discipline process to require alcohol and drug monitoring, to mandate anger management training, suspend use of official government vehicles, implement a last chance agreement and the like. All of these are best practices within police departments and law enforcement organizations.” (p. 21))

**Comment [a3]:** By this time, journalists who followed Border Patrol noted a “surge” in sexual misconduct and assault cases against them.

**Comment [a4]:** To be clear, what these organizations are describing is a culture of violence and abuse with impunity.

**Comment [a5]:** Let’s take a closer look at the environment in which Border Patrol operates, and therefore the environment in which it uses sexual violence.

Citing feminist scholar Cynthia Enloe,<sup>13</sup> Falcón defines multiple forms of militarized rape: “‘recreational rape’ as the alleged outcome of not supplying male soldiers with ‘adequately accessible’ militarized prostitution; ‘national security rape’ as an instrument for bolstering a nervous state; and ‘systematic mass rape’ as an instrument of open warfare.”<sup>14</sup> Three conditions indicate its use at the US-México border, “‘A regime is preoccupied with national security; a majority of civilians believe that security is best understood as a military problem; national security policy making is left to a largely masculinized policy elite; and the police and military apparatuses are male-dominated.’”<sup>15</sup>

The federal government legitimized these conditions when, in the 1990s, the federal government expanded the definition of national security to include “‘domestic political concerns and perceived threats to culture, social stability, environmental degradation, and population growth.’ During this time, immigrants and refugees became top national security issues”<sup>16</sup> and women were subject to additional, specifically gendered, forms of violence. “Many women who cross the border report that rape was the ‘price’ of not being apprehended, deported, or of having their confiscated documents returned. This price is unique to border regions [...],”<sup>17</sup> given the power of the border to enact exclusion and exploitation.

Expanding upon the link between militarized rape and rape perpetrated by Border Patrol agents, Falcón explains, “[...] militarized border rape [...] can be categorized as a form of ‘national security rape’ for two reasons: first, the absence of legal documents positions undocumented women as ‘illegal’ and as having committed a crime. Thus, law-abiding citizens need ‘protection’ from these criminals; the existence of undocumented women causes national insecurity, and they are so criminalized that their bodily integrity does not matter to the state. Second, national security rape privileges certain interests; [...] seen as legitimate because they are protecting their property, land, and families.”<sup>18</sup>

**Comment [a6]:** Feminist scholars studying militarized rape define “national security rape” as an instrument to bolster a nervous state.

But militarized rape and other forms of sexual violence that take place at the border are generally overlooked as such because the US is not formally at war with México. Yet conditions would indicate otherwise – “[...] cooperating military and civilian units and the adoption of a militaristic identity in border patrolling efforts. Furthermore, the stance of the US government on immigration suggests that the United States views itself in some form of war with undocumented migrants. Calls to ‘shut down’ the border, or to build an entire wall along the two-thousand mile border, are frequently reported in the news and supported by members of Congress as a way to ‘protect’ the United States.”<sup>19</sup>

Feminist scholars and international human rights organizations note that during war, women are disproportionately affected: “[United Nations] monitors have documented the

<sup>13</sup> Enloe, C. (2000). *Maneuvering: The International Politics of Militarizing Women's Lives*. Berkeley, California: University of California Press.

<sup>14</sup> Falcón, S. (2006). “National security” and the violation of women: Militarized border rape at the US-México border. In *Color of Violence: The Incite! Anthology* (119-129). Cambridge, MA: South End Press.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

systematic rape of women during war, and have categorized rape as a war crime, a weapon of war, and a form of torture. War-like conditions at the border reinforce a climate in which rape and the systematic degradation of women are fundamental strategies.”<sup>20</sup> Note that the UN Convention against Torture, which the US ratified in 1994, states “governments are responsible not only for acts of torture committed by government officials, but also those committed with their acquiescence.”<sup>21</sup>

### ***Border Patrol: A culture of violence and impunity***

Institutional violence is “formally or truly embedded in the institutions and is accepted, or at least tolerated, with the complicity of the people. [...] formally, in the case of a positive and expressed acknowledgement of [the] violence – for example, [...] in the formal establishment of repressive secret police corps. True violence occurs when, despite there being no formal acknowledgement, or even in the case of express prohibition, the [institution] cohabits with institutionalized violence.”<sup>22</sup> The value of these distinctions is that the State can simultaneously publicly denounce and buttress the violence.

#### *Institutional protections*

Theoretically, at least, migrants who cross Border Patrol and Immigration and Customs Enforcement (ICE, the immigration law enforcement agency within DHS) enjoy some protections. For example, the US Constitution and federal law mandate specific protections for people in custody, including immigration detainees:

- The Eighth Amendment prohibits cruel and unusual punishment, interpreted to include deliberate indifference by prison officials to the rape and sexual assault of prisoners. The Fifth Amendment’s protections for individuals in legal proceedings mean that immigration detainees are also protected.
- Federal courts established that privacy protections in the Fourth Amendment protect against sexual harassment. Male guards are prohibited from strip-searching female prisoners, conducting intrusive pat-downs, or engaging in inappropriate visual surveillance.
- Federal law criminalizes sexual assault of federal prisoners and detainees, and any sexual contact with detainees by guards in federal facilities.

Federal law also includes the Violence Against Women Act, which promises some survivors the legal and material recourse to create lives without violence. Yet this promise has not been extended to those who, while present in the US and even within its custody in detention centers, experience sexual violence victimization at the hands of State authorities. But the victimization of migrants in immigration enforcement custody reveals the extent of the inequality and injustice against migrants via a system that guarantees security for some while providing that violence is a constant for others, and the need for profound transformation of our legal

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<sup>20</sup> Ibid.

<sup>21</sup> Human Rights Watch (2010). [Detained and at risk: Sexual abuse and harassment in United States immigration detention](#). New York: Author.

<sup>22</sup> Rubio C., M. & Rupesinghe, K. (1994). *The Culture of Violence*. United Nations University Press.

framework with respect to the full protection of migrant survivors' rights, without using their immigration status as pretext to deny due protections.

**Comment [a7]:** We won't have time to get into this during this session, but it's also a question of how immigration has been criminalized in the last twenty years. We'll touch on this during the roundtable.

There are also federal laws specific to criminal and immigration detention. Most recently, the Department of Justice (DOJ) stated in its Final Rule that the Prison Rape Elimination Act (PREA) "applies to all correctional facilities including prisons, jails, juvenile facilities, military and Indian country facilities, and U.S. Department of Homeland Security (DHS) immigration detention facilities. However, DOJ concluded that each federal agency responsible for incarcerating or detaining individuals 'is accountable for, and has statutory authority to regulate, the operations of its own facilities and, therefore, is best positioned to determine how to implement the Federal laws and rules that govern its own operations, the conduct of its own employees, and the safety of persons in its custody.'"<sup>23</sup>

#### *Lack of accountability*

Organizations including the American Civil Liberties Union, Human Rights Watch, Just Detention, and No More Deaths have documented the gaps and flaws in the sexual violence prevention, reporting, and investigation within DHS and Border Patrol. Some problems arise from lack of implementation of existing standards and policies; others from structures and practices that protect a reality of sexual violence with impunity. For example:

- "Among the offices tasked with Border Patrol oversight are the [DHS] Office of the Inspector General, the DHS Office for Civil Rights and Civil Liberties (CRCL), [CBP] Internal Affairs, and [ICE] Office of Professional Responsibility. Government records show these component agencies repeatedly delegating investigatory responsibility to the local Border Patrol stations from which these abuse complaints originate, eliminating any semblance of independent agency oversight. These offices also systematically de-prioritize all but the most egregious civil rights complaints, resulting in cursory investigations and virtual impunity [...]."<sup>24</sup>
- Border Patrol oversight agencies downplay the extent of abuse by electing not to disclose the numbers of complaints received, only the numbers of complaints accepted for investigation.
- The CBP complaint process gives Border Patrol responsibility for both receiving and investigating reports of sexual abuse, which constitutes a clear conflict of interest.
- Border Patrol's decentralization, and the significant authority and discretion relegated to sector chiefs, promotes profound disconnect among sectors and between sectors and headquarters, and undermines oversight.
- Border Patrol agents do not record vehicle stops that do not result in arrest, "a practice that both enables and conceals abuse."<sup>25</sup>
- The investigative process is individually oriented, in that it requires victims to report abuse, provide personally identifying information, name the perpetrator(s), and provide information to which they may not have access or feel safe disclosing. No More Deaths reports it has

**Comment [a8]:** This important in light of the number of news stories about women who have been picked up by Border Patrol and victimized. See, for example, the case of Esteban Manzanares.

<sup>23</sup> US Commission on Civil Rights (2015). [With liberty and justice for all: The state of civil rights at immigration detention facilities](#). Washington, DC: Author.

<sup>24</sup> American Civil Liberties Union (2015). [Record of abuse: Lawlessness and impunity in Border Patrol's interior enforcement operations](#). Phoenix, AZ: American Civil Liberties Union of Arizona.

<sup>25</sup> Ibid.

attempted to file complaints based on compilations of many migrants' reports of the same patterns of abuse, but has received little to no response or follow-up to date.

"It is clear that standards alone are insufficient. Independent oversight, with clear complaint procedures and meaningful enforcement mechanisms, as well as a shift in CBP's institutional culture, must accompany written policy."<sup>26</sup> Last year, the US Commission on Civil Rights observed, "While it is clear that federal agencies provide written policies mandating zero tolerance for all forms of sexual abuse and harassment, it is less obvious whether DHS implements these policies or if these policies simply serve as platitudes."<sup>27</sup> A number of immigrant and human rights groups have issued recommendations to address DHS and ICE violence and abuse. Although not specific to Border Patrol's use of sexual violence, some are highly relevant, such as to "Ensure that all reports of sexual assault of people in immigration detention are thoroughly investigated. Investigations should include an independent inquiry into the actions or failures to act by all ICE employees, facility staff, and contractors responsible for that facility."<sup>28</sup> See, for example:

- [With liberty and justice for all: The state of civil rights at immigration detention facilities](#) (US Commission on Civil Rights, 2015)
- [Record of abuse: Lawlessness and impunity in Border Patrol's interior enforcement operations](#) (American Civil Liberties Union, 2015)
- [A culture of cruelty: Abuse and impunity in short-term US Border Patrol custody](#) (No More Deaths/No Más Muertes, 2011)
- [Detained and at risk: Sexual abuse and harassment in United States immigration detention](#) (Human Rights Watch, 2010)

More broadly, survivors of sexual violence lack adequate avenues to report, information about rules governing staff conduct, and legal representation, all of which likely inhibit their abilities to report abuse and seek redress.<sup>29</sup> And the means to report is just the beginning, for "If they decide to prosecute, women who have been sexually assaulted in the US-México border region confront not only the individual, but directly challenge several powerful institutions – the [DHS], the US government, the US legal system. And even in more 'fair courts,' proving rape is

**Comment [a9]:** [Historial de abuso: ilegalidad e impunidad en las operaciones internas de aplicación de la ley por Patrulla Fronteriza](#)

**Comment [a10]:** [Una cultura de crueldad: Abuso e impunidad bajo la custodia a corto plazo de la Patrulla Fronteriza de EE. UU.](#)

**Comment [a11]:** [Detenidas y en riesgo: Abusos sexuales y acoso en los centros de detención de inmigrantes de Estados Unidos](#)

<sup>26</sup> No More Deaths/No Más Muertes (2011). [A culture of cruelty: Abuse and impunity in short-term US Border Patrol custody](#).

<sup>27</sup> US Commission on Civil Rights (2015). [With liberty and justice for all: The state of civil rights at immigration detention facilities](#).

<sup>28</sup> Human Rights Watch (2016). [Do you see how much I'm suffering here? Abuse against transgender women in US immigration detention](#). New York: Author.

<sup>29</sup> Rape and sexual assault are the most under-reported crimes (National Sexual Violence Resource Center, 2015). The reasons include stigma; fear of retribution; re-victimization and re-traumatization in the reporting, investigation, and prosecution processes; and lack of accountability for those who commit sexual violence. Moreover, in a culture that protects perpetrators by accusing survivors of "asking for it," lying, or being mistaken, crazy, or desperate, survivors are not likely to disclose the violence, especially absent the opportunity for any real recourse. Immigrant survivors' concerns may include involvement with criminal and immigration law enforcement and bringing attention to their community or culture of origin. Finally, because the issue is minimized at large, State perpetrators of sexual violence against migrants often tell them that if they disclose the abuse, they will be deported when they come to the attention of law enforcement, notwithstanding legislation intended to grant immigrant victims of crime perpetrated in the US authorized residence, at least temporarily. Consequently, advocacy-based sexual violence response systems, including community-based advocates and law enforcement, acknowledge that available victimization statistics still represent an undercount.

extremely difficult. Undocumented women are further disadvantaged because of unfamiliarity with the US judicial process and language or communication barriers.”<sup>30</sup>

The base premise is that the detainee survivor must speak out against the same authority that seeks their deportation, in order to change the institution. In the long run, this permits DHS to continue deflect attention and responsibility to the individual detainee survivor, to insist that sexual violence is an aberration, and to ignore identifying it as one of institutional culture. Failures in the system are pegged to detainee “failures,” e.g., not reporting, reporting incorrectly, or insufficient proof. For example, a 2013 report by the US Government and Accountability Office (GAO) on sexual abuse in detention facilities noted that victim reporting depends on the accessibility and safety of the reporting mechanisms and must include the option of reporting confidentially to an outside entity. ICE reporting mechanisms include a headquarters hotline, which the DHS Office of the Inspector General (OIG) reports is not staffed with a live operator (callers must leave a voice mail message). The system holds 135 messages, after which callers cannot leave messages. According to OIG officials, staff are to empty the mail box every day, but “during staffing shortages, the mailbox may remain full.”<sup>31</sup> “Problems” with this system as identified by DHS include that detainees may not leave sufficient information on the message (e.g., their names or the name of the facility) to take action. Border Patrol makes reporting even more difficult: “DHS, CBP, and Border Patrol have not adopted a consistent, uniform process for filing complaints”<sup>32</sup> and made a Spanish-language online complaint form available only toward the end of 2015.

No More Deaths links these practices to establishing and protecting a culture of violence and impunity: “[...] the abuse, neglect, and dehumanization of migrants is part of the institutional culture of the Border Patrol, reinforced by an absence of meaningful accountability mechanisms. This systemic abuse must be confronted aggressively at the institutional level, not denied or dismissed as a series of aberrational incidents attributable to a few rogue agents. Until then we can expect this culture of cruelty to continue to deprive individuals in Border Patrol custody of their most fundamental rights.”<sup>33</sup>

Instead, DHS, in addition to denying the use of sexual violence and the practice of blaming detainee survivors for unsubstantiated and unfounded allegations, also minimizes the violence. In 2012, then-DHS Secretary Janet Napolitano ordered CBP to change its definition of “corruption” to downplay the extent of the problems. The agency differentiates between “mission-compromising corruption” (bribery, narcotics or human smuggling) and “non-mission-compromising corruption” (a lesser category that includes employees’ sexual assault of detainees), and reports only “mission-compromising” problems to Congress. The distinction wipes nearly a third of “corruption” cases from the statistics, and renders sexual violence an anomaly (corruption, by definition, is that which goes against the grain) and also invisible

<sup>30</sup> Falcón, S. (2006). “National security” and the violation of women: Militarized border rape at the US-México border.

<sup>31</sup> US Government Accountability Office (November 2013). [Immigration detention: Additional actions could strengthen DHS efforts to address sexual abuse](#) [GAO-14-38].

<sup>32</sup> American Civil Liberties Union (2015). [Record of abuse: Lawlessness and impunity in Border Patrol’s interior enforcement operations](#).

<sup>33</sup> No More Deaths/No Más Muertes (2011). [A culture of cruelty: Abuse and impunity in short-term US Border Patrol custody](#).

(unreported), permissible (not subject to external censure), and less important (contrasted to bribery and smuggling).

This kind of system is designed to protect the institution and not the survivor – there is little incentive, and many disincentives, to report. It is not surprising, therefore, that Border Patrol acknowledges just 285 complaints or allegations of sexual abuse since 2009. We do not know how many complaints were made because, as stated above, DHS chooses to disclose only the number of complaints accepted for investigation. Of equal concern, there is reason to believe that in cases investigated, CBP rarely takes action against its agents. An analysis by the American Immigration Council indicates, “Among cases in which a formal decision was issued, 97 percent resulted in ‘No Action Taken.’”<sup>34</sup>

In March 2015, CBP adopted a zero-tolerance policy, which it claims means “all allegations of sexual abuse/assault against detainees are immediately reported to executives, the offices at DHS that oversee civil rights, and the Inspector General,” and “employees who violate the prohibition [...] will be referred for investigation and potential prosecution, as appropriate.”<sup>35</sup> Although necessary, this is a minimum response that continues to posit the violence as an individual act and the responsibility of the survivor to correct, and institutions as neutral and disconnected from each other.

One year later, the CBP Integrity Advisory Panel, an independent task force established to investigate CBP’s system for disciplining abusive or corrupt Border Patrol agents, concluded, “The CBP discipline system is broken.”<sup>36</sup> Evidence includes that it takes an average of more than a year and a half to investigate serious misconduct, which the task force determined to be “far too long [...] and] undermines the deterrence goals of discipline.”<sup>37</sup> This report makes 39 recommendations in addition to 14 made in an interim report issued in 2015 by the same panel.

Shawn Moran, a representative from the Border Patrol union, cedes that investigations of agents should be resolved more quickly, but disputes or outright repudiates many other recommendations. For example, Moran claims the CBP commissioner should not be given power to fire or suspend agents without pay (currently, agents may keep their jobs while under investigation) because it might silence critics. Nor should agents who use force frequently be singled out for scrutiny, because it might “further demoralize agents and create a disincentive to agents to go out there and do their job.”<sup>38</sup>

The panel’s review of CBP relationship with and accountability to “stakeholders,” which include nongovernmental organizations (NGOs), is mixed. “In multiple meetings of the Panel with NGOs over the past year, at both the headquarters and sector level, these civilian groups favorably noted improved engagement at the CBP headquarters level, especially complimenting Commissioner Kerlikowske. However, the NGOs did not see consistency in CBP outreach and partnership at the field or sector level of CBP’s Border Patrol. The NGOs cite a number of

<sup>34</sup> Martínez, D. E., Cantor, G., & Ewing, W.A. (2014). [No action taken: Lack of CBP accountability in responding to complaints of abuse](#). Washington, DC: American Immigration Council.

<sup>35</sup> Graff, G.M. (2014). [The green monster](#).

<sup>36</sup> Homeland Security Advisory Council (15 March 2016). [Final report of the CBP Integrity Advisory Panel](#).

<sup>37</sup> Ibid.

<sup>38</sup> Bennett, B. (2016, March 14). [Report finds little progress at curbing Border Patrol abuses](#). LA Times.



specific policy concerns but their overarching complaint is their perception that there is a CBP Border Patrol culture that operates with an arrogance and impunity in their dealings with civilians. In some respects, the NGO cultural concerns derive from alleged acts of misconduct, many dating back years.<sup>39</sup> The applicability of any findings to anti-sexual violence organizations is difficult to assess, at least in the report, given that the nature of CBP engagement does not specifically address, and arguably can mask, agents' ongoing use of sexual violence. "For example, sector leadership of CBP's Border Patrol has established citizen academies to educate civilian leaders about the Border Patrol and its training and challenges, has actively reached out to ranchers to share intelligence, and has used social media effectively to educate the public and school age children about various CBP Border Patrol programs. [...] And, many staff level employees have quietly demonstrated their compassion by voluntarily contributing their personal funds and shopping to ensure that detainees have essential supplies."<sup>40</sup>

## II. Identity-based violence and border control

In this section, we will examine some identity markers – gender and race – that render Latinx migrants vulnerable to both interpersonal and institutional violence (we will look at class in the following section).

### *Sexism*

Between 23,000 and 25,000 immigrants are detained every night in low-security facilities along the southern border. The measures in place to deter immigration, such as border control and detention, have created the conditions that permit sexual violence against many migrants and detainees. The inequity and abuse of power that exist at the southern border quickly manifest, where the actions of one group, in this case, immigration authorities, are perceived as a legitimate tool to guarantee the security, liberty, and democracy enjoyed by members of the State; and others as illegitimate and criminal, in this case, Latinx women and LGBT migrants, whose crime is attempting to enter the country without permission. Ultimately, the State engages efficient, effective means of gender-based oppression, hidden and justified under the premise of control and security.

We use analyses of gender and gender-based violence developed by LGBT activists and theorists that posit people who are (or are perceived to be) different, transgressive, and reject or otherwise live at the fringes of or outside normative male/masculine, heterosexual bodies and identities are subject to violence and oppression. LGBT people live in presumptively oppositional and socially disadvantaged statuses not only to the idealized, privileged heterosexual man, but also to the heterosexual woman.

The lack of information about Border Patrol treatment of LGBT people is likely because sexual violence against LGBT people is often ignored or minimized, and not because it does not happen. We know, for example, that in ICE detention centers, "[...] nonheterosexual detainees

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<sup>39</sup> Homeland Security Advisory Council (15 March 2016). [Final report of the CBP Integrity Advisory Panel](#).

<sup>40</sup> Ibid.

experience sexual assault at up to ten times the rate of heterosexual men.”<sup>41</sup> One in three transgender detainees will be sexually abused within a year of custody; as a result, “[...] transgender individuals were victims in 20% of substantiated reports of sexual assault and abuse between October 2009 and March 2013,”<sup>42</sup> although they comprise just .3 percent of the adult US population and an even smaller proportion (one of every 500, or .2 percent) of detainees.

The National Immigrant Justice Center documented ICE’s practice of “[...] hous[ing] transgender individuals according to their birth gender or hold[ing] them in solitary confinement, rather than releasing them on alternatives to detention or housing them with others of their same gender identity.”<sup>43</sup> Additional forms of gender-based violence include sexual harassment of gay men (“Detainees at Eloy were told to ‘walk like a man, not a gay man,’ ‘act male,’ and ‘use your male voice’ by guards”) and denial of transgender detainees’ hormone therapy for up to four months.<sup>44</sup>

A practice of continually examining and pressing against analyses of gender and sexual violence permits us to recognize different forms and perpetrators, and more of the persons and communities who are victimized. For example, immigration control measures along the US side of the border exacerbate migrants’ marginalization, and we see that Latinxs who live in border towns cannot access reproductive and sexual health services or sexual assault forensic medical exams, for reasons including fear of crossing a border checkpoint or encountering a roving CBP patrol (C. Kaiser, personal communication, 24 July 2015).

The State extends its efforts to control the feminine “other” even in country of origin; for example, immigration law grants citizenship at birth to children of US citizen mothers, and citizenship to children of US fathers only if the birth is legitimated by the time the child is 18 years old. The rationale assumes: (1) the woman’s body, and the processes of pregnancy and birthing, are proxy for the nation; (2) male sexual irresponsibility; and (3) mothers hold primary responsibility for children, absolving US citizen men of responsibility to their foreign-born pregnancy partners and children.

Transnational theories of feminism posit this is representative of a “contemporary version of colonial sexual plundering,” for it permits US citizen men sexual irresponsibility while absolving the State of accountability for their children. In addition, “[...] noncitizen women therefore risk reproducing culturally strange values within their foreign-born children, threatening national self-identity. This cultural peril is reinterpreted as geographical, evident not only in fears that undocumented women will cross territorial boundaries without authorization

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<sup>41</sup> Federal Information & News Dispatch, Inc. (23 June 2015). [Reps Honda, Grijalva urge DHS to protect LGBT immigrants from sexual assault](#) [press release].

<sup>42</sup> Human Rights Campaign (30 January 2015). [Written statement of David Stacy, Government Affairs Director, Human Rights Campaign on the “State of civil rights at immigration detention facilities” for the US Civil Rights Commission.](#)

<sup>43</sup> US Commission on Civil Rights (2015). [With liberty and justice for all: The state of civil rights at immigration detention facilities.](#)

<sup>44</sup> Ibid.

and reproduce a generation of ethnically strange citizens, but that their foreign-born illegitimate children will breach the boundaries of the nation [...].”<sup>45</sup>

*The power to name the problem*

Immigrant rights’ advocates and public officials routinely render sexual violence against migrants invisible through undercounting, diluting, and ignoring the issue. For example, a 2011 report by No More Deaths subcategorizes sexual assault as a form of physical abuse, and describes clear forms of sexual abuse under the guise of other forms of violence and aggression (e.g., threats to “leave women alone with a group of men they do not know” is identified as a form of psychological abuse and “sexual epithets” are identified as verbal abuse) but fails to identify these abuses as also sexual in nature.<sup>46</sup>

A 2015 report by the US Commission on Civil Rights acknowledges data from the National Immigrant Justice Center that CBP and ICE employees abused children in their custody. Of 124 detained, unaccompanied migrant children, 85 percent reported their holding cells were excessively cold; 37 percent did not get enough food; 25 percent were not given or offered water; and 49 percent were not allowed to call their families or consulate, or to speak to an attorney. The report cites “numerous affidavits” detailing these experiences, including:

M.V. is a 16-year-old boy who was apprehended near McAllen, Texas. While in CBP custody, M.V. was taken to a room where officials insulted M.V. and accused him of lying about his age. One official accused M.V. of possessing false documents, and threatened that if M.V. did not tell the truth about his age, he would “become the wife” of a male detainee. That official left the room, leaving M.V. alone with a male CBP official. That official directed M.V. to remove all of his clothes. M.V. remained undressed for approximately 15 minutes while the male official patted him down. The male official continued to interrogate M.V. about his age and laughed at M.V. while he was undressed. After the strip search, M.V. was directed to another waiting room where a third official told M.V. he would “pay” for being a liar. When M.V. was transferred to ORR custody, CBP officials handcuffed him in three-point restraints. M.V. was transported with other children who shared that they had also been strip-searched and questioned about their age.<sup>47</sup>

The report fails to identify the sexualized threats, humiliation, and strip-searches as sexual violence.

Excluding sexual assault and sexual violence renders it and its survivors invisible, permits it to continue, and reinforces official positions and policies – including that of Border Patrol that there are only 285 valid allegations of sexual violence since 2009 – on the issue. The lack of data likely emboldened Peter Kirsanow, a member of the US Commission on Civil Rights, to minimize the issue and the need for real change, “Certainly DHS should continue to

**Comment [a12]:** DHS is not alone in minimizing sexual violence.

**Comment [a13]:** It goes on, but my guess is that you already identified several instances and forms of sexual violence against MV.

**Comment [a14]:** Other forms of sexual violence escaping most reports –

The National Immigrant Justice Center documented ICE’s practice of “[...] hous[ing] transgender individuals according to their birth gender or hold[ing] them in solitary confinement, rather than releasing them on alternatives to detention or housing them with others of their same gender identity.” Additional forms of gender-based violence include sexual harassment of gay men (“Detainees at Eloy were told to ‘walk like a man, not a gay man,’ ‘act male,’ and ‘use your male voice’ by guards”) and denial of transgender detainees’ hormone therapy for up to four months.

Latinxs who live in border towns cannot access reproductive and sexual health services or sexual assault forensic medical exams, for reasons including fear of crossing a border checkpoint or encountering a roving CBP patrol

<sup>45</sup> Oliviero, K.E. (2013). The immigration state of emergency: Racializing and gendering national vulnerability in twenty-first-century citizenship and deportation regimes. *Feminist Formations*, 25(2), 1-29.

<sup>46</sup> No More Deaths/No Más Muertes (2011). [A culture of cruelty: Abuse and impunity in short-term US Border Patrol custody.](#)

<sup>47</sup> US Commission on Civil Rights (2015). [With liberty and justice for all: The state of civil rights at immigration detention facilities.](#)

work to prevent sexual assault and abuse and punish it when it occurs, but there is no evidence of an epidemic of sexual abuse in immigration detention facilities.”<sup>48</sup>

Consequently, the bulk of our attention is gendered and incomplete, directed at violence and abuse experienced or prioritized by men, which has also shaped what we historically think of as human and civil rights.<sup>49</sup> Women are included insofar as they experience these same forms of violence and abuse; LGBT persons almost not at all. The implication is that sexual violence is trivial and, moreover, does not happen to men or LGBT persons.

We propose that the dearth of data about sexual violence by Border Patrol is another manifestation of sexism, as defined above – by State institutions that shield individual perpetrators, deny the systemic nature of the abuse, and fail to provide recourse to survivors; by policymakers who condone this system and create the conditions under which it exists; and by researchers and others documenting and advocating to end Border Patrol violence. We propose also that anti-sexual violence response systems serve hegemonic norms, as well, through strategies that deny or minimize anti-immigrant policies and practices, law enforcement cultures of violence and impunity, and increasing criminalization and militarization deployed against poor people of color; all of which obscure and perpetuate State sexual abuse of Latinx migrants.

### Racism

The hegemonic racist narrative casts violence against the “other” as self-defense. While “Latino” is defined as ethnicity and not race, the lived realities of Latinxs in the US mark us as clearly non-white and foreign. Arrocha describes a dual “logic” to this narrative, “Mexican and Latino migrants are perceived as representing a double threat; they are ‘criminal aliens’ that jeopardize public safety as well as ‘invaders’ who in the minds of many American pundits, including highly reputed intellectuals, cannot assimilate to the perceived core values of America and thus actually threatened their existence and, *inter alia*, that of the nation-state.”<sup>50</sup>

Anti-immigrant racism exists within a larger narrative that implicates all people of color in the US. Given the changes precipitated by the Civil Rights movement during the last half of the 20<sup>th</sup> century, the US quickly sought a race-neutral defense of hegemonic norms. Criminal law emerged as the principle vehicle by which to control and subjugate people of color, including via the “war on drugs.” Because traffickers were opening routes across the Mexican border, immigrants and traffickers “[...] became indistinguishable and both were ‘enemies’ of a sort.

<sup>48</sup> Ibid

<sup>49</sup> For example, although cruelty and torture have been recognized as war crimes (defined as grave breaches of the Geneva Conventions and other international laws and customs) since 1863, it was not until 1993 that rape was acknowledged as the same. Although the International Criminal Court defines torture as inflicting “severe physical or mental pain or suffering” for purposes that include punishment, intimidation, coercion, or discrimination; it is precisely because sexual violence was not only excluded from this definition, but also even “tacitly accepted as unavoidable and ‘one of the legitimate spoils of war’” (United Nations, 2016), that rape had to be addressed as a singular issue, for a gender-neutral approach is insufficient to dismantle gender-based violence. Confronted with the mass rapes of women in the former Yugoslavia, in 1993 the UN Security Council declared rape to be “a crime against humanity, alongside other crimes such as torture and extermination, when committed in armed conflict and directed against a civilian population.”

<sup>50</sup> Arrocha, W. (2013). Criminalization of the undocumented worker and labor: Increasing fear and exploitability within the Latino community. *Journal of Intercultural Disciplines*, 13, 107-126.

**Comment [a15]:** A question for you – how do we find survivors, introduce ourselves to them, what kinds of supports can we offer at present? What kinds of responses and systems do we want to build, and what do we need to get there? E.g., re: direct services, there are trauma supports specific to survivors of rape as a weapon of war, violence by State actors (police, soldiers, etc.). Re: systems advocacy, implementation of PREA, to include offering confidential services in short- and long-term immigration detention.

**Comment [a16]:** CONC - I also want to be clear that we all have responsibility for this, too. We live within a larger national ethos that needs Border Patrol to exist, and to exist as it does at present. So in the roundtable next on the agenda, we'll talk the ideology of different systems, like criminal justice, national security, and economic policy, that feed Border Patrol. Because I also believe that once we see this big picture, it's even easier to see the work that can be done, often with different civil society sectors like immigrants' and human rights organizations, and where we each fit into it. That's a more intimate conversation, one which I hope will invite us to reflect on our individual, organizational, and collective stances, ranging from how we use our vote, to the silences we keep, to all the ways it is possible to imagine real change toward equity and peace for every person.

**Comment [a17]:** By state institutions that deny the systemic nature of the abuse and the extent to which it happens, and shield individual perpetrators; by legislators who create and condone this system; and by human and immigrants' rights systems' minimization of sexual violence.

**Comment [a18]:** To be clear, Martha and I operate from a specific belief system, here: one, which is central to anti-sexual violence work, that everyone has the right to safety; two, that people have the right to migrate for lots of different reasons; and three, that in the case of Latinx migration into the US, the US is responsible for many of the conditions in Latin America that push people to migrate, and so we have responsibility to be accountable (and fix) those policies, beliefs, and practices.

Some policymakers described unauthorized immigration as an ‘invasion.’ This narrative claimed that the border was ‘out of control’ [...] By 1990, drugs had become so intertwined with concerns about cross-border movement that President George H.W. Bush described the border as ‘the front lines of the war on drugs.’<sup>51</sup>

Immigration law followed suit. The Immigration Act of 1965 ended quotas based on country of origin and established a system in which all countries are permitted the same number of visas. But it “[...] made no allowance for the unique relationship between the United States and México—the historical reliance on low-skill Mexican labor by numerous industries in the United States, a pattern of formal governmental and nongovernmental recruitment of Mexican workers, geographic proximity, personal relationships that spread across borders, and the ease with which generations of Mexicans had moved from one country to the other [...] By framing its formal equality regarding the number of people from a given country who could lawfully immigrate each year as a gesture of fairness, immigration law pinned the onus of unauthorized immigration on the migrants themselves.”<sup>52</sup>

Adult immigrants present in the US as citizens or lawful permanent residents also find “legal status” to be tenuous. For example, immigrants with a criminal conviction may now be deported (see “Criminal justice,” below), and legislators enacted “severe immigration restriction, surveillance, and racial profiling legislation in six states between 2010 and 2012 [...]. Such legislation encourages the violation of immigrants’ and minorities’ civil liberties [...].”<sup>53</sup> Although the Supreme Court struck down some of these laws because they encroach on federal authority over immigration matters, federal law supports the base purposes of these efforts. “The ensuing deportation regime categorized, de facto, all migrants as potential criminals [...]. The persistence of severe anti-immigrant laws shows how seemingly extreme state-of-emergency discourses position some ethnic groups as forever strange, despite their longstanding residency or citizenship ties.”<sup>54</sup>

### III. Institutionally-based violence and border control

While CBP denies reports of sexual violence by Border Patrol agents and issues “zero tolerance” policies and standards, the State enacts national policies that *require militarization of the southern border and CBP violence and impunity, thus establishing the heightened conditions for the sexual victimization of Latinx migrants*. “[...] the problems endemic to short-term detention occur in a much broader context including the failure to reject the international trade and economic policies that compel migration, to abandon a border strategy designed to endanger innocent peoples’ lives, and to enact meaningful immigration reform. Any serious effort to address the systemic abuses in this report must take into account these broader issues as well.”<sup>55</sup> This section briefly examines some of the systems implicated.

<sup>51</sup> Cuauhtémoc, C. & Hernández, G. (2013). Creating crimmigration. *Brigham Young University Law Review*, 1457-1515.

<sup>52</sup> Ibid.

<sup>53</sup> Oliviero, K.E. (2013). The immigration state of emergency: Racializing and gendering national vulnerability in twenty-first-century citizenship and deportation regimes.

<sup>54</sup> Ibid.

<sup>55</sup> No More Deaths/No Más Muertes (2011). [A culture of cruelty: Abuse and impunity in short-term US Border Patrol custody](#).

## *Economic policy*

US policies of globalization and neoliberalism require new markets abroad for its subsidized and inexpensive goods, and cheap and unregulated labor overseas to increase production and profits. The North American Free Trade Agreement (NAFTA), “[...] wreaked havoc on local farmers by flooding México with heavily subsidized U.S. agricultural products. Unable to sell their products, millions were left with little alternative to migrating north. Rather than addressing the role it has played in the political and economic root causes of migration, the U.S. has opted for border militarization – the policy framework in which Border Patrol abuse now occurs.”<sup>56</sup> NAFTA also permits US corporations to establish *maquiladoras* in México – plants that import parts and components, assemble them into final products, and export them for sales. Some of the advantages to US corporations include low wage rates in Mexico, proximity to a large, higher-wage market in the US, and taxes only on the labor and raw material purchased in México. In broad terms – the State requires relative wealth inside its borders to maintain a production advantage and purchase its corporations’ goods, and relative poverty abroad to furnish low-wage labor needed to produce those goods. Wages for foreign labor are too low, however, to offset the displacement of agricultural and other workers by subsidized foods and goods or their cheaper prices, and so people migrate.

NAFTA took effect in 1994, and marked a significant and lasting change to US-México immigration policy. Border Patrol provides “essential support for a treaty that, viewed broadly, clearly set out to internationalize the mobility of goods, capital, and services, while restricting the mobility of low-cost labor [...] no effort will ever really be made to stop the [...] Border Patrol, despite the human rights abuses it has been charged with. Instead, the [Border Patrol] operates with a kind of *carte blanche* to police the border. It’s almost as if it were doing its part to assure a global economy by disciplining the Mexican worker to stay home to fulfill the NAFTA investor’s expectations [...]”<sup>57</sup> More broadly, “[t]he ‘Southwest Border Strategy’ [...] increased border enforcement personnel and infrastructure in order to shift undocumented migration from densely populated urban settings into harsh desert and mountain terrain. The goal was to ‘deter’ undocumented migration by increasing the physical risks and financial costs of trying to enter the U.S. This policy was developed in particular to address the wave of migration correctly predicted to accompany [...] NAFTA].”<sup>58</sup>

But “deterrence” has created a dynamic in which Border Patrol agents routinely neglect the human rights and basic survival needs of immigrants. “While the Border Patrol frequently encounters migrants with life-threatening symptoms resulting from exposure to extreme desert conditions, they often deny aid or subject migrants to additional abuses by Border Patrol agents. Given that Border Patrol is charged with implementing a policy intentionally designed to maximize the risk to migrants’ lives, it should not be entirely surprising when agents fail to respect basic human rights.”<sup>59</sup> Rather, it begs the question if neglect and abuse are not implicitly

<sup>56</sup> Ibid.

<sup>57</sup> Arriola, E.R. (2000). [Voices from the barbed wires of despair: Women in the maquiladoras, Latina critical legal theory, and gender at the US-México border](#). *DePaul Law Review*, 49(3), 729-815.

<sup>58</sup> No More Deaths/No Más Muertes (2011). [A culture of cruelty: Abuse and impunity in short-term US Border Patrol custody](#).

<sup>59</sup> Ibid.

part of the border strategy, reinforced by a lack of meaningful accountability mechanisms and “[...] its continued insistence, in spite of overwhelming evidence to the contrary, that misconduct does not occur [...] which] further encourages abusive, traumatizing tactics by agents.”<sup>60</sup>

### *Criminal justice*

Until recently, immigration law remained separate from criminal law and the penal system. Criminal law focused on offenses against property and people; immigration law, a form of civil law, focused on determining who was authorized to be in the US.

Beginning in the 1980s, however, Congress, supported by multiple presidential administrations, steadily increased the types of criminal conduct that could result in deportation. The Anti-Drug Abuse Act of 1988 provided for deportation for conviction of an aggravated felony. At the time, only murder, illicit trafficking in firearms, and drug trafficking were considered aggravated felonies; today, the aggravated felony definition spans twenty-one subsections, including money laundering, gambling, transportation related to prostitution, human smuggling, certain passport fraud convictions, perjury, and failure to appear for a judicial proceeding. Congress also decreased options for relief from removal and began to codify the use of criminal law to punish violations of immigration law; for example, in 1994, criminal court judges received the power to order deportation as part of the sentencing process.<sup>61</sup>

In 2005, DHS implemented Operation Streamline in Arizona, New Mexico, and Texas. “In other states, deportation cases are handled as violations of administrative code; under ‘Operation Streamline,’ unauthorized immigrants are treated as criminals and the act of illegally crossing the border as a federal crime. [...] they face immediate deportation or receive sentences ranging from 30 days to six months, served in federal prisons, county jails and private detention centers.”<sup>62</sup> It is “[...] a zero-tolerance enforcement policy designed to criminally prosecute every undocumented migrant apprehended in certain areas under two federal statutes which prohibit entry into the United States without inspection and [re-]entry after deportation.”<sup>63</sup> It is not, however, a neutral policy – given that many people targeted by Operation Streamline are economically disadvantaged Latinx migrants, immigration policy effectively criminalizes poverty, Latinx, and people of color.

Moreover, protections afforded to litigants in criminal cases are routinely denied to immigrants. “In deviating from traditional criminal practice, these proceedings seem to ‘borrow’ lesser procedural protections from [civil] immigration courts, which are not subject to the panoply of constitutional limitations on the government’s power to punish [...]”<sup>64</sup> For example, people suspected of violating immigration laws are not provided legal representation; however, neither are immigrants suspected of violating criminal laws or the two federal immigration

**Comment [a19]:** For those of you interested in the finer points of immigration law – this means you can be undocumented but not subject to criminal prosecution if, for example, you overstay a visa.

<sup>60</sup> Ibid.

<sup>61</sup> Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224(a), 108 Stat. 4305, 4322 (amending INA § 242A, 8 U.S.C. § 1252a) (recodified at INA § 238(c)(1), 8 U.S.C. § 1228(c)(a)).

<sup>62</sup> Donahoe, J. & Piccini, S. (2015). Crossing the border. *Georgetown Magazine*, 47(1). Washington, DC: Georgetown University.

<sup>63</sup> No More Deaths/No Más Muertes (2012). *Issues and themes 2012*.

<sup>64</sup> Cuahtémoc, C. & Hernández, G. (2013). Creating crimmigration.

statutes now criminalized along the southern border, although required under the Sixth Amendment for criminal prosecutions.

Rather than disentangling immigration and criminal law or seeking to increase protections for those caught in both systems, the US government exploits the gaps and inconsistencies between them. Border Patrol and other immigration law enforcement generate the flood of criminal “litigants,” thus bolstering ongoing criminalization and the courts’ apparent inability to provide protections to people. Immigration law violations have filled the federal criminal docket; courts are currently permitted to adjudicate multiple criminal immigration cases at the same time, so that “as many as 100 defendants appear at the same time before a judge.”<sup>65</sup> “Due to the *en masse* nature of the proceedings, meeting with counsel, arraignment, plea and sentencing are condensed into the space of a few hours, depriving defendants of due process and effective assistance of counsel. Furthermore, defendants are virtually compelled to accept a guilty plea to avoid prolonged detention periods and the criminal conviction and removal order that result from a guilty plea may make it impossible for a defendant to later regularize their status in the United States.”<sup>66</sup>

#### *Privatization of the border*

Criminalization of immigration has led to mass incarceration of non-citizens, “a boon for the private prison industry which has reaped millions of dollars through imprisoning Operation Streamline defendants.”<sup>67</sup> “Human rights groups [...] worry about the creation of a ‘detention-industrial complex’ with a momentum of its own. [...] In the United States – with almost 400,000 annual detentions in 2010, up from 280,000 in 2005 – private companies now control nearly half of all detention beds.”<sup>68</sup> The outsourcing of detainee “housing” has created, in turn, a commercial enterprise very much interested in developing and protecting a massive, profitable detention infrastructure, one which needs detainees, which immigration law enforcement provides. In terms of class analysis, the State seeks to create a pool of low-wage workers across just across the southern border, criminalizes those who migrate to join its relatively higher potential for economic security and growth, and profits from the pool of criminalized migrants caught within its borders.

Immigration detention blurs or erases distinctions between immigration and criminal law, abrogating individuals’ rights in service of State and commercial interests. The US Commission on Civil Rights notes, “About half of all detained immigrants do not have a criminal record; they are torture survivors, victims of human trafficking, asylum seekers, or families with small children. Yet, the ICE detention system continues to be modeled after the punitive criminal detention system, which contradicts the civil and non-punitive nature of the immigration detention system.”<sup>69</sup> Nearly half (48 percent) of detainees are kept in various facilities that also house inmates or federal prisoners, either together or separately from immigration detainees, and in three facilities operated by the Federal Bureau of Prisons to house immigration detainees.

<sup>65</sup> Cuauhtémoc, C. & Hernández, G. (2013). Creating crimmigration.

<sup>66</sup> No More Deaths/No Más Muertes (2012). [Issues and themes 2012](#).

<sup>67</sup> Ibid.

<sup>68</sup> Bernstein, N. (28 September 2011). [Companies use immigration crackdown to turn a profit](#). *The New York Times*.

<sup>69</sup> US Commission on Civil Rights (2015). [With liberty and justice for all: The state of civil rights at immigration detention facilities](#).



## National security

Since the September 11 attacks, “immigration has been situated within a national security framework to justify [...] racial profiling, warrantless surveillance, and indefinite detention”<sup>70</sup> in which unauthorized immigration is equated with terrorism, and national security a matter of tightly controlling the borders. “In the past decade, the USA PATRIOT Act (2001), the Enhanced Border Security and Visa Entry Reform Program (2002), the Intelligence Reform and Terrorism Prevention Act (2004), and the REAL ID Act (2005), all worked to toughen standards for identification, detention, and prosecution of immigrants and potential security threats. [...] federal administration officials us[ed] the powers of immigration enforcement (especially the power of detention) for counterterrorism. This drive toward ferreting out internal threats only strengthened the apparatus and appropriations for immigration enforcement.”<sup>71</sup> As immigration control becomes a part and priority of multiple systems, and as the corresponding laws and policies increase in number and harshness, Border Patrol is perceived as more important and its “abuses are more likely to be perceived as consistent with or justified by anti-immigrant sentiment. At the same time, harsh enforcement measures will inevitably cause more immigrants to come into contact with abusive and unaccountable Border Patrol agents.”<sup>72</sup>

## Militarization

For over one hundred years, the Posse Comitatus Act (1879) prohibited the use of military force for civilian policing. In 1982, however, the Reagan administration nullified the statute through the Department of Defense (DOD) Authorization Act in order to apply any force available to its “war on drugs.” From this point onward, militarization of law enforcement was a federal government prerogative and proceeded nearly unchecked.

Again, legislation in related but distinct systems – immigration control and economic policy – “[...] only further entrenched the military-like character of policing the border. For example, the Illegal Immigration and Immigrant Responsibility Act of 1996 [...] placed a heavy focus on border security, interior enforcement, enforcement against smuggling, deportation and exclusion, and public assistance. It authorized the hiring of 1,000 Border Patrol agents and 300 support staff. It authorized construction of a fourteen mile triple fence, established penalties for high-speed flight [defined as any speed over the speed limit], and it expanded the program of fingerprinting of illegal and criminal aliens. [...] It increased investigatory staff and made it possible for local, state, and federal agencies to inform INS about an individual's legal status. It permits wiretapping, prosecutions under [the Racketeer Influenced and Corrupt Organizations Act], and the hiring of additional attorneys to prosecute alien smugglers. It bars re-entry by illegal aliens for five years, and of course, it bars all illegal aliens from receiving any form of

**Comment [a20]:** Again – please remember that many people of Mexican origin have deep roots in the SW US and also that many Latinx migrate for work and security, which the US has undermined in many Latin American countries. Equating immigration with terrorism is a selective and privileged perspective, one that ignores our histories, interdependence, and dependence on violence to

**Comment [a21]:** The money that goes into national security is money that is not invested in services and supports for survivors, or in social change and accountability within our “security” forces.

<sup>70</sup> No More Deaths/No Más Muertes (2011). [A culture of cruelty: Abuse and impunity in short-term US Border Patrol custody.](#)

<sup>71</sup> Menjivar, C. & Abrego, L. (2012). [Legal violence in the lives of immigrants.](#) Washington, DC: Center for American Progress.

<sup>72</sup> Ibid.

public assistance, except for emergency medical relief, disaster relief, and school lunches. The message is quite clear to Mexicans – stay out of this country.”<sup>73</sup>

But that which converts the southern border region into a war zone is the use of force as the only response and the belief that the world is unsafe which, in turn, guides all actions in the region. Citing Timothy Dunn,<sup>74</sup> Arriola describes a pattern of militarization associated with the US military doctrine of low-intensity conflict (LIC): “Described as a ‘war for all seasons,’ the LIC doctrine, [...] has three principal concerns designed either to counter revolutionary activities or to bring about social control in a destabilized country: (1) internal (rather than external) defense of a nation; (2) an emphasis on controlling targeted civilian populations; and (3) the assumption of the military with nonmilitary or police functions and vice-versa (the police assume military functions).”<sup>75</sup> Falcón locates the current use of LIC as an *internal* strategy to literally combat immigration across the southern border by Mexican and Central American nationals: “[...] these aspects of LIC doctrine have been actualized in the border region, indicating that a form of ‘war’ exists there. And in every war, in every military conflict, rapes occur because sexual assault is in the arsenal of military strategies; it is a weapon of war, used to dominate women and psychologically debilitate people viewed as the ‘enemy.’”<sup>76</sup>

**Comment [a22]:** For those of you curious about how and when local police started using military-grade weapons and tactics and getting involved in issues of national security:

For over one hundred years, the Posse Comitatus Act (1879) prohibited the use of military force for civilian policing. In 1982, however, the Reagan administration nullified the statute through the Department of Defense (DOD) Authorization Act in order to apply any force available to its “war on drugs.” From this point onward, militarization of law enforcement was a federal government prerogative and proceeded nearly unchecked.

**Comment [a23]:** CONC – Points of movement strategy:

- Train human rights observers on prioritization and interviewing SV survivors
- We need to document (and probably build in survivor-specific safeguards re: undocumented status, State abuse, etc.)
- Reform immigration detention and prison systems, e.g., enforce PREA; reform DHS system regarding SV and other abuses perpetrated by agents.
- How courageous are we in our intersectional work, e.g., where do we stand on comprehensive immigration reform?
- Observatorio – documentation and reporting only, i.e., no training, TA, services, base-building or prioritization of funder mandates; generally, reports translate to policy advocacy in conjunction with activists; very human rights frame (can go into broad idea of what that is and how more established in Latin America)

<sup>73</sup> Arriola, E.R. (2000). [Voices from the barbed wires of despair: Women in the maquiladoras, Latina critical legal theory, and gender at the US-México border.](#)

<sup>74</sup> Dunn, T.J. (1996). *The militarization of the US-México border, 1978-1992: Low-intensity conflict doctrine comes home.* Austin, TX: University of Texas Press.

<sup>75</sup> Arriola, E.R. (2000). [Voices from the barbed wires of despair: Women in the maquiladoras, Latina critical legal theory, and gender at the US-México border.](#)

<sup>76</sup> Falcón, S. (2006). “National security” and the violation of women: Militarized border rape at the US-México border.