

Immigration, Government Terror, and the Rule of Law

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ABSTRACT: This Response uses Stella Elias’s Law as a Tool of Terror as a jumping-off point to elaborate on the relationship between the rule of law and the notion of terror. It describes a conception of terror as a kind of relational fear rooted in arbitrary power and which amplifies that power and expands its scope. Understood in this way, terror can be seen as a particular danger of inadequately constrained executive law enforcement authority. Elias’s elucidation of the terrorizing function of immigration enforcement can serve as a key case study of the need, when evaluating the scope and dangers of executive power in a constitutional democracy, to look not just at the explicit scope of that power but also at the penumbra created by the capacity of that power to intimidate people away from making use of their formal legal entitlements.

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I. INTRODUCTION: TOWARD A UNIFIED CONCEPT OF TERROR

In *Law as a Tool of Terror*,¹ Stella Burch Elias uses the Trump administration's record of immigration enforcement abuses to draw out a kind of sick irony at the heart of the Department of Homeland Security ("DHS"): While its supposed mission and the immediate motivation for its creation was to combat terror in its more familiar international non-state form (i.e., al-Qaeda and the like), its actual practice is to *inflict* terror on vulnerable migrant communities within the United States. Elias describes how the Trump administration's ruthless and ever-changing immigration policies subjected migrants to constant fear and uncertainty,² how the structure of both substantive American immigration law and the enforcement institutions within DHS have facilitated that terror,³ and how reforms to both are needed to prevent a recurrence of Trump-style immigration terror.⁴ That core initial framing of *Law as a Tool of Terror* both draws on and draws out the conceptual continuity between the kind of terror inflicted by people like Osama bin Laden and the kind inflicted by people like Donald Trump—a continuity that might be nonobvious but which, I shall argue in this Response, is entirely apt.⁵

To first satisfy a certain academic formality: There's little—indeed, nothing—that a non-immigration specialist such as myself can come up with to criticize Elias's incisive article. The professional norm of this sort of Response requires at least some effort at critique, but the best I can do is suggest that the terrorizing character of immigration law extends to well before the creation of the Department of Homeland Security. As I have recently argued, the American immigration regime descends from both slavery and the forced resettlement of Native Americans and shares the fundamentally arbitrary and lawless—and thus terrorizing—character of those two great perversions of American legality.⁶ But such a criticism is obviously unfair, as a scholar is entitled to focus on the present-day impacts of current policies and institutional structures. At any rate, those two sentences may nonetheless serve to fulfill the aforementioned professional norm, permitting me to guiltlessly devote the rest of this Response to amplification

1. See Stella Burch Elias, *Law as a Tool of Terror*, 107 IOWA L. REV. 1 (2021).

2. See *id.* at 7–8.

3. See *id.* at 11–17.

4. See *id.* at 53–60.

5. It is worth noting that the question of the relationship between terrorism of the Osama kind and state-inflicted terrorism has been a matter of some debate in fields such as political science, sociology, and critical terrorism studies. See, e.g., Doug Stokes, *Ideas and Avocados: Ontologising Critical Terrorism Studies*, 23 INT'L RELS. 85, 87 (2009); Richard Jackson, *The Core Commitments of Critical Terrorism Studies*, 6 EUR. POL. SCI. 244, 247–48 (2007); Ruth Blakeley, *Bringing the State Back into Terrorism Studies*, 6 EUR. POL. SCI. 228, 228–30 (2007); Lee Jarvis & Michael Lister, *State Terrorism Research and Critical Terrorism Studies: An Assessment*, 7 CRITICAL STUD. ON TERRORISM 43, 43–44 (2014).

6. PAUL GOWDER, *THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION* 134–69 (Lorne Neudorf & Gabrielle Appleby eds., 2021).

rather than critique. I will use Elias's analysis of immigration law and policy⁷ as a tool to bootstrap into a broader theoretical account of official terror—what it is, how it works, and why it is objectionable.

We have fairly straightforward intuitive access to answers to these questions: It seems hard (at least for me) to deny that, for example, a system of official menace in which naturalized Americans may suddenly find themselves stripped of their citizenship for minor, maybe years-ago, omissions on their applications, ought to trouble us.⁸ It is intuitively plausible to describe the troubling features of that policy shift in terms of “terror”—Elias aptly points out that the policy change struck fear into the hearts of millions of naturalized citizens who were not actually at risk of denaturalization, simply because of the way it communicated to them that their previously presumptively secure citizenship was, in fact, insecure.⁹ Identical points hold with respect to the threatened removal of (and inconsistent messaging about) Deferred Action for Childhood Arrivals (“DACA”)¹⁰ and changes to the public charge rule,¹¹ which seem to capture the core of the notion of terror which I wish to elucidate.¹²

The undersigned has previously argued that the concept of terror plays a central role in our understanding of the meaning and moral worth of the political and legal ideal known as “the rule of law.”¹³ This theoretical importance suggests that Elias's article can be put to use beyond its intended purposes, in a kind of two-way conceptual synthesis: filling out the theory of terror by drawing on the ways in which Elias illustrates terror using immigration policy, as well as filling out Elias's critique of immigration policy by connecting it to a broader account of what terror is and why it is wrong. It is that task which I will begin to carry out here.

II. TWO KEY PROPERTIES OF TERROR

It seems to me that the terror which Elias describes has two important properties which distinguish it from other negative consequences of public policy, and which ground its moral importance: (a) uncertainty, and (b) relationality. I'll elucidate each in turn.

7. See generally Elias, *supra* note 1 (arguing that while the DHS's mission was to combat terror, it has actually inflicted terror).

8. *Id.* at 50–53.

9. *Id.* at 53.

10. *Id.* at 42–47.

11. *Id.* at 47–50.

12. See *infra* Section III.B.

13. PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 20–22 (2016); Paul Gowder, *The Rule of Law and Equality*, 32 L. & PHIL. 565, 594–98 (2013).

A. *TERROR MAGNIFIES POWER THROUGH UNCERTAINTY AND INSECURITY*

First, uncertainty. The conventional epistemology of the international realpolitik “terrorism” sort of terror, captured in the definitions Elias quotes,¹⁴ involves a kind of “it could happen to me too” penumbra extending from the actual victims of a given terrorist attack to those who are relevantly similar. Consider the shattering of American confidence that followed the 9/11 attacks, when we all learned at once that the United States is not immune from international terrorism. We all felt a sense of danger, even though the actual number of people killed in the attacks was a tiny fraction of the American population. The attack unsettled a kind of secure background assumption of American life and didn’t replace it with anything—we went from (falsely) “knowing” that hijackers and suicide bombers and the like weren’t something to worry about in the United States, to realizing that they were, but having no idea where such menaces might strike next. That prior “knowledge” was ripped from us suddenly like a bolt from heaven, vividly reinforcing that none of us knew who would be next.¹⁵

It’s no coincidence that we conventionally understand terrorism in the international realpolitik sense to be a tool of relatively weak combatants.¹⁶ For this sort of uncertainty magnifies the power of its wielder far beyond its actual capacity. Osama bin Laden hardly had the ability to do real damage to the United States without psychological assistance. But the sudden uncertainty with which we were all struck led us into rash and self-destructive responses ranging from the Patriot Act to the ruinous invasion of Iraq,¹⁷ and thereby arguably did a substantial amount of work to achieve bin Laden’s strategic goals. An example of this includes destabilizing the Middle East enough to permit the rise of organizations like ISIS, and damaging American democracy and civic solidarity through internal paranoia and the development of repressive agencies like the DHS.¹⁸

In a well-organized legal community, such uncertainty and insecurity in the domestic context are precisely what the rule of law is conventionally understood to prevent.¹⁹ Thus, a core requirement of the rule of law (on mainstream accounts) is that the sorts of power which it controls (with the

14. Elias, *supra* note 1, at 4–5.

15. See generally Randall D. Marshall et al., *The Psychology of Ongoing Threat: Relative Risk Appraisal, The September 11 Attacks, and Terrorism-Related Fears*, 62 AM. PSYCH. 304 (2007) (attributing symptoms of post-traumatic stress disorder in Americans after 9/11 to sudden experience of drastically elevated but uncertain risk).

16. Gordon H. McCormick, *Terrorist Decision Making*, 6 ANN. REV. POL. SCI. 473, 483 (2003).

17. See, e.g., Hal Brands & Peter Feaver, *Was the Rise of ISIS Inevitable?*, 59 SURVIVAL 7, 14–16 (2017) (describing the causal role of 9/11 in the invasion of Iraq, as well as the causal role of the invasion of Iraq in the rise of ISIS).

18. See John Mueller, *Simplicity and Spook: Terrorism and the Dynamics of Threat Exaggeration*, 6 INT’L STUD. PERSPS. 208, 222 (2005) (quoting bin Laden gloating about American overreaction to terrorism).

19. See discussion in GOWDER, *supra* note 13, at 63–70.

power of governments at the core) must only be used to harm an individual pursuant to preexisting, public law.²⁰

Elias shows us that the immigration policies of the Trump administration have—even though they were authorized by existing immigration law—nonetheless undermined this fundamental goal of the rule of law.²¹ In describing shifting and unstable policy that led to migrants being persistently uncertain about what they could safely do—from apply for public benefits to remain in the United States itself under the authority of DACA—she shows that many migrants simply couldn't know what conduct, if any, would make them safe from federal law enforcement.²²

In the context of immigration, the terrorizing aspect of uncertainty is doubtless exacerbated to the extent it applies to distinctively vulnerable groups of immigrants who may lack economic resources and linguistic ability. Under such circumstances, we might predict that migrants subject to terrorizing government action are likely to be particularly uncertain about their personal risk under it; moreover, to the extent some groups of migrants such as refugees are likely to be disposed by prior experience to fear and mistrust government officials, they may be more vulnerable to such uncertainty.²³ Elias gives us an example of the consequences of this: After Trump amended regulations filling out the meaning of the public charge ground of inadmissibility to endanger migrants who made use of public benefits such as section 8 housing assistance and Medicaid, some refugees quit public benefits programs—and even committed suicide out of despair at their perceived impending visa denials or removals.²⁴ However, it turns out that the refugees in question likely were not subject to the public charge rule at all: Congress excluded refugees from that ground of inadmissibility.²⁵ Since the refugees lacked the resources to know that, the Trump public charge rule could effectively deny them benefits or get rid of the refugees altogether (in a far more permanent way than deportation) regardless of the actual law.

20. See, e.g., *id.* at 12–18.

21. See Elias, *supra* note 1, at 11–17.

22. See *id.* at 43–50.

23. See generally Muireann Ní Raghallaigh, *The Causes of Mistrust Amongst Asylum Seekers and Refugees: Insights from Research with Unaccompanied Asylum-Seeking Minors Living in the Republic of Ireland*, 27 J. REFUGEE STUD. 82 (2014) (describing literature on mistrust among refugees).

24. See Elias, *supra* note 1, at 6, n.20 (citing Rania Awaad, *We're Seeing Confusion, Despair and Even Suicide After Trump Rule on Aid to Immigrants*, USA TODAY (Mar. 17, 2020, 3:26 PM), <https://www.usatoday.com/story/opinion/2020/03/17/trump-public-aid-rule-risks-immigrants-mental-health-column/4905563002> [<https://perma.cc/5X95-AF25>]; Inadmissibility on Public Charge Grounds, 84 FED. REG. 41, 292 (Aug. 14, 2019) (codified at 8 C.F.R. pts. 103, 212–14, 245, 248) (rulemaking expanding public charge inadmissibility ground).

25. 8 U.S.C. § 1157(c)(3) (2020).

B. TERROR IS RELATIONAL

A second key character of terror is that it both alters and relies upon social relationships in distinctive ways. It establishes hierarchical relationships rooted in the interpersonal fear it generates and it leverages and undermines existing social relationships among and around its victims.

1. Creating Hierarchical Relationships

A key feature of terror that distinguishes it from ordinary fear is that terrorizing behavior puts one in fear *of another agent*.²⁶ In ordinary speech, we don't describe, for example, natural disasters as terrorizing. They might be scary—as a native Californian, I certainly experience *fear* when the midwestern tornado sirens start—but I don't experience *terror*.

Again, like Elias, we can borrow our conceptual apparatus from the al-Qaeda sort of terror to fill out some intuition about this. The sort of damage that 9/11 did to the American national consciousness isn't just an increased sense of physical danger; if the probability of destructive tornados increased marginally, the United States wouldn't have been driven by hysteria into a war, pervasive bias against Muslims, and the like. Rather, fear was induced of a specific group of people, and the long-term damage was done primarily by the overreaction that the United States indulged in to protect itself from those feared others.

Analogous uses of terror are characteristic of authoritarian regimes which aim to induce subordination in their victims. Thus, the Bolsheviks in Russia carried out the infamous "Red Terror"²⁷ not just to destroy their opponents, but also to intimidate them and ensure their subordination to the new regime. Leon Trotsky said the following in its defense:

The problem of revolution, as of war, consists in breaking the will of the foe, forcing him to capitulate and to accept the conditions of the conqueror. The will, of course, is a fact of the psychical world, but in contradistinction to a meeting, a dispute, or a congress, the revolution carries out its object by means of the employment of material resources—though to a less degree than war. The bourgeoisie itself conquered power by means of revolts, and consolidated it by the civil war. In the peaceful period, it retains power by means of a system of repression. As long as class society, founded on the most deep-rooted antagonisms, continues to exist, repression remains a necessary means of breaking the will of the opposing side.²⁸

A few pages later in the same essay:

26. See Gowder, *supra* note 13, at 594–96 (describing the relational character of terror for the purpose of rule of law analysis).

27. See *infra* note 28.

28. Leon Trotsky, *A Defense of the 'Red Terror'*, in *TERRORISM: THE PHILOSOPHICAL ISSUES* 31, 36 (Igor Primoratz ed., 2004).

But terror can be very efficient against a reactionary class which does not want to leave the scene of operations. Intimidation is a powerful weapon of policy, both internationally and internally. War, like revolution, is founded upon intimidation. A victorious war, generally speaking, destroys only an insignificant part of the conquered army, intimidating the remainder and breaking their will. The revolution works in the same way: it kills individuals, and intimidates thousands. In this sense, the Red Terror is not distinguishable from the armed insurrection, the direct continuation of which it represents.²⁹

In other words, the aim of the Red Terror was to coerce a mass population through intimidation, and to establish the wielders of terror as people to be feared and obeyed.

Another canonical example of this sort of terror is lynching in the Jim Crow era.³⁰ As scholars have recognized, many of these lynchings were carried out in a shock and awe fashion, for expressive purposes—what Garland called “public torture lynchings.”³¹ The objective of these lynchings was to alter the social relationship between the races—as the great Black journalist and activist Ida B. Wells-Barnett explained: “The real purpose of these savage demonstrations is to teach the Negro that in the South he has no rights that the law will enforce.”³² In other words, by vividly illustrating the absence of legal protections, lynching subjected every Black person to arbitrary hierarchical and racialized authority.

Neorepublican political philosophers have captured this relational consequence of terror in their concept of “domination.” When a person is subject to the unconstrained power of interference by another—which is in essence what Elias describes as the experience of immigrants who have no reliable way to predict whether or not the government can or will subject them or their loved ones to detention or deportation³³—they are forced to shape their lives under the threat of power. This kind of domination tends to lead to subordination. In leading neorepublican philosopher Philip Pettit’s words:

In the long republican tradition, living under the thumb of others, being exposed to their arbitrary power of interference in one’s life, was the very epitome of unfreedom. It was to live at the mercy of those others, dependent on their grace and favour, and thus inclined, in servile fashion, to keep them sweet, whether by the

29. *Id.* at 40.

30. *See infra* note 31.

31. David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 L. & SOC’Y REV. 793, 793 (2005).

32. IDA B. WELLS-BARNETT, *LYNCH LAW IN GEORGIA* 1 (1899). On the relational character of racialized killings in the era of lynchings and in today, *see* Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1114–22 (2017).

33. *See* Elias, *supra* note 1, at 4–9.

caution of self-censorship or by the fawning and toadying associated with self-ingratiation. Freedom, in contrast to such subjection and servility, was presented as a condition in which one could walk tall and look others in the eye, knowing that one could not be pushed around with impunity³⁴

Note how these concepts track with Elias's account of Trump-era immigration terror. For example, she describes how the pervasiveness of sudden random raids forced immigrants to live in fear of any contact with government—or in some cases even of going out in public at all.³⁵

In addition to a general fear of government authority and of other persons in public as a whole—which if we believe the literature on terror just described, likely induced both avoidance and servility—it is likely that a number of particular relationships of domination were created, both domestically and abroad, to the extent that the sudden unreliability of immigration law exacerbated particular vulnerabilities—vulnerabilities to other human beings, that is, potential domination—experienced by immigrants. For example, we have reason to believe that the terror inflicted in the United States spilled over into subjecting people to terror in other countries in several ways. First, the abandonment of longstanding rules permitting victims of gender-based violence to claim asylum on the basis of oppression for their membership in a “particular social group” almost certainly subjected countless women to increased domination by men, by taking away one key avenue of escape for victims of such violence.³⁶ Second, asylum-seekers turned away at the border under the so-called “migrant protection protocols” (a.k.a. the “remain in Mexico” policy) were subjected to all kinds of domination and terror-associated crimes, such as rape and extortion by criminals whom they could no longer escape.³⁷

American immigration law has inflicted this kind of relational terror on its victims since long before the Trump era. Consider that undocumented and even documented (but nonetheless scared and vulnerable) workers are often subjected to a wide variety of labor abuses (i.e., domination by employers) because of their lack of legal protection.³⁸

A particularly vivid example of the vulnerability to relational terror and domination inflicted in our immigration law is evident in *United States v.*

34. Philip Pettit, *The Tree of Liberty: Republicanism: American, French, and Irish*, 1 FIELD DAY REV. 29, 30 (2005).

35. See Elias, *supra* note 1, at 16–17 n.88.

36. See *id.* at 24–27.

37. *Id.* at 32–36.

38. See, e.g., ANNETTE BERNHARDT ET. AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 4–5, 15 (2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf> [<http://perma.cc/L6AB-L6R6>] (noting disproportionate representation of the undocumented among low-wage workers); Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 461–62 (2011) (integrating immigration status into a theory of coercive workplace relationships).

Alzanki.³⁹ This case resulted in a criminal conviction for enslaving a Sri Lankan domestic worker.⁴⁰ Actually, the Alzankis leveraged the arbitrary power of two countries over their victim: She had first worked for the defendants in Kuwait, where she was told “that she would be subject to arrest and physical abuse by the Kuwaiti police should she venture outside[.]”⁴¹ and then she was taken to the United States—presumably involuntarily—where she was told “that the American police, as well as the neighbors, would shoot undocumented aliens who ventured out alone.”⁴² Using her knowledge that she was in the country illegally, as well as uncertainty about how oppressive the American legal system is, the Alzankis could inflict extraordinary and horrifying abuses on her:

During the four months she remained in the apartment, Gedara [the victim] was assaulted twice. On one occasion, when Gedara asked that the volume be turned down on the television while she was trying to sleep, appellant grabbed and threw her bod[y] against the wall. On another occasion, Abair Alzanki slapped Gedara and spat in her face when she failed to turn off a monitor.

The Alzankis deliberately risked Gedara’s health by compelling her to work fifteen hours a day at hard, repetitive tasks. She was required to clean the apartment on a constant basis with caustic and noxious chemicals, without the benefit of respiratory protection, and her requests for rubber gloves were refused. Later, after the noxious fumes caused Gedara to faint, fall, and injure her ribs, the Alzankis withheld medical treatment. They also refused to let Gedara have dental treatment for an abscessed tooth.

Finally, though affluent, the Alzankis denied Gedara adequate food, which resulted in serious symptoms of malnourishment, including [an] enlarged abdomen, massive hair loss, and cessation of menstrual cycles. She was provided with only two housecoats to wear and allowed to sleep and sit only on the floor. Once, after Gedara accidentally broke a humidifier, the Alzankis threatened to withhold all her wages.

In addition to the physical abuse and inhumane treatment, Gedara was threatened—on almost a daily basis—with deportation, death or serious harm should she disobey the Alzankis’ orders. On numerous occasions, the Alzankis threatened to deport her to Kuwait, and not allow her to return to Sri Lanka. Appellant threatened to kill her if the Alzankis’ newborn child—suffering from spina bifida—were to

39. See *United States v. Alzanki*, 54 F.3d 994, 999 (1st Cir. 1995)

40. *Id.*

41. *Id.*

42. *Id.*

die while appellant was away in New York. The climate of fear was enhanced by Gedara's witnessing one incident involving Talal Alzanki's physical abuse of Abair, and by learning from Abair that he had struck Abair again shortly thereafter. On another occasion, Abair Alzanki threatened to sew up Gedara's mouth with a needle and thread, and throw her into the ocean.⁴³

The court specifically relied on Gedara's immigration status to meet the requisite elements of the crime of involuntary servitude.⁴⁴ It's somewhat unclear from the First Circuit's opinion what that immigration status was: At the beginning, we are told that she was subjected to threats of police violence based on "undocumented" status,⁴⁵ but later on, the court notes that she was in fact vulnerable—and for that reason subject to an alternative to enslavement on the level of "imprisonment or worse" as required to meet an element of the crime—because "the reasonableness of her fear of deportation was substantiated by the undisputed evidence that she would become deportable immediately upon loss of her 'B-1' visa status, which allowed her lawfully to remain in the United States only while in the employ of the Alzankis."⁴⁶ In other words, the neo-feudal character of the work visa empowered her enslavers to threaten to deport her to even harsher conditions in Kuwait.⁴⁷

It might be objected that the degree of fear experienced by the victim in the *Alzanki* case is extreme—after all, she was deliberately *prevented* from communicating with anyone who might tell her that the American authorities weren't about to shoot her for being undocumented.⁴⁸ However, there is evidence that even non-enslaved immigrants are highly uncertain about the extent of arbitrary power to which they are subject.⁴⁹

43. *Id.*

44. *See id.* at 1004–05.

45. *Id.* at 999.

46. *Id.* at 1004–05.

47. *See generally* Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923 (2007) (discussing the coercive character of those visa programs).

48. *See Alzanki*, 54 F.3d at 999.

49. For example, Ryo found in that many immigration detainees studied did not know why they were in removal proceedings. Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1034–36 (2017). Arbona et al. found that, while undocumented immigrants were more fearful, documented Latino immigrants also experienced significant fears of deportation leading them to constrain their life activities—which I read as suggesting that actual risk of deportation is hard to know, but that the power of immigration authorities is just perceived as arbitrary (and this study was conducted long before Trump got into office). Consuelo Arbona et al., *Acculturative Stress Among Documented and Undocumented Latino Immigrants in the United States*, 32 HISP. J. BEHAV. SCIS. 362, 372 (2010). According to the study's authors, "among documented immigrants the activities of walking in the street, requesting help from government agencies, and applying for a driver's license elicited the highest levels of fear of deportation." *Id.* at 378. Moreover, knowing more about how American immigration law works seems, at least in some circumstances, to be associated with a greater degree of distrust for it: Ryo has found that describing the pervasiveness of immigration detention was associated with an

Moreover, while Gedara was told that she'd be shot if she left the site of her enslavement, her actual fears seem somewhat more realistic: In a footnote, the court recounts that she thought the Kuwait police would “catch us and hit [us] and put into jail,” if discovered outside, and then notes “that she believed that the American police would treat her much the same way were she to venture outside the Alzanki apartment.”⁵⁰ Is that so wrong? After all, immigrants awaiting their deportation hearings in the United States are frequently subject to lengthy periods of detention under harsh conditions.⁵¹

Illustrating the connection between immigration and the vulnerability to extreme domination by employers, the court in *Alzanki* notes that “[m]ost peonage and involuntary servitude cases in recent years have involved migrant agricultural workers.”⁵² Indeed, threats of deportation appear in numerous other recent cases involving the gross abuse of workers. Consider just a few examples:

- In an unpaid wages and anti-trafficking lawsuit out of Georgia, the court recounts that: “Defendant threatened Plaintiffs with deportation on multiple occasions. He told Plaintiffs that if they left his employment, he would report them to immigration services, and they would be deported. He also told them that if they were deported, they would never be allowed to enter the United States again through a work visa.”⁵³
- The Tenth Circuit upheld a forced labor conviction based on coercion that centered on threatening to revoke migrant nurses’ H1-B visas and subject them to deportation.⁵⁴
- In the District of Columbia, a lawsuit against an enslaver proceeded based on threats ironically recorded by the FBI to use against the defendant, that “[t]hey will take you right now to board a night plane for your return. Okay? I can make a phone call to the FBI, they will bring you your passport on Monday. Monday night you will board a plane because your visa would have been cancelled. Choose.”⁵⁵
- The Seventh Circuit upheld a conviction for enslaving a domestic worker who “was told repeatedly by the adult

increasing likelihood among Mexican survey respondents to describe the American immigration as procedurally unfair (though not a lower likelihood of actually migrating to the United States). Emily Ryo, *The Unintended Consequences of US Immigration Enforcement Policies*, 118 PNAS 1, 5–6 (2021).

50. *Alzanki*, 54 F.3d at 1004, n.9 (alteration in original).

51. See Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN’S L.J. 55, 74–77 (2014); Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. L. & SOC. SCI. 97, 104–05, 107 (2019).

52. *Alzanki*, 54 F.3d at 1000, n.3 (citing other examples).

53. *Arreguin v. Sanchez*, 398 F. Supp. 3d 1314, 1320 (S.D. Ga. 2019).

54. *United States v. Kalu*, 791 F.3d 1194, 1197–99 (10th Cir. 2015).

55. *Kiwanuka v. Bakilana*, 844 F. Supp. 2d 107, 115 (D.D.C. 2012).

[defendants] and their children that if anyone discovered her she could be arrested, imprisoned, and deported, and she would not be able to send any more money back to her family. Fear of that consequence kept her from breaking any of the rules or appearing outside the house.”⁵⁶

- The Second Circuit reversed the dismissal of a forced labor lawsuit on the basis of an extended course of immigration deception and coercion. The defendant told the plaintiff “that he had applied to change [plaintiff’s] H2-B status to B1/B2,” and “promised that he would ensure that [plaintiff] could lawfully remain in the country, and asked [plaintiff] in return to promise not to look for other employment.”⁵⁷ Accordingly, he was threatened with having “[d]efendants . . . cancel or withdraw his immigration sponsorship,” but it actually turned out that there was no visa (at least for a while) and plaintiff “had been unlawfully working and staying in the country for some time.”⁵⁸

I could go on and on—the examples seem endless. However, the point should be clear: Even when Donald Trump isn’t making matters worse, immigration law is both arcane and brutal. The combination of those features makes it appear to those whom immigration law targets that it can strike at random or be the tool of the powerful and privileged (like rich enslavers of domestic workers) to punish those who disobey. The vulnerability of even documented immigrants who participate in things like guest worker programs makes them particularly vulnerable to terror and domination. Thus, immigration law empowers both the government and numerous private persons to establish hierarchical and abusive relationships over noncitizens.

2. Concentric Circles of Relational Terror

A second way in which terror is relational is that it leverages the relationships between its immediate and distant victims to expand its impact. This is closely related, but not identical to, its uncertainty property. That is, the penumbra that terror creates due to the uncertainty as to whom the terrorist will strike next is defined by the relationship(s) between the immediate victims and others.

One relevant kind of relationship is similarity. In the presence of uncertainty as to the precise intentions and capabilities of the terrorizer, the more similar a person is to someone who has been subject to arbitrary power, the more likely it is that they will have strong reason to fear this power themselves. We see this in the way that both documented and undocumented Latinos fear arbitrary immigration enforcement.⁵⁹ Latinos know that they, and people like them, are targets of arbitrary immigration power in the

56. *United States v. Calimlim*, 538 F.3d 706, 709 (7th Cir. 2008).

57. *Adia v. Grandeur Mgmt., Inc.*, 933 F.3d 89, 91 (2d Cir. 2019).

58. *Id.* at 91–92 (alteration in original).

59. *Arbona et al.*, *supra* note 49, at 372, 378.

United States.⁶⁰ This is much like the way Americans knew that they, and people like them, were the targets of al-Qaeda during the 9/11 time period.

Other relevant kinds of relationships include various sorts of affinity. The extension of terror across family relationships is particularly evident in immigration enforcement, as family members of undocumented or other vulnerable immigrants are subject to terror both because of their affection toward likely victims and because of their dependence on those victims. The most vivid example of this characteristic of terror in Trump's immigration regime is the notorious family separation policy.⁶¹ In effect, this policy used the natural motivation of parents to care for their children as a weapon against them.⁶² Trump quite explicitly explained that a goal of the family separation policy was to intimidate parents out of migrating.⁶³

Another relevant kind of relationship is simple proximity and connection, even through state institutions themselves. It is important to highlight a part of Elias's elucidation of the irony of the DHS's move from agency to fight terror to agency inflicting terror: the Trump administration's sudden deployment of DHS special forces units in Portland to illegally attack Black Lives Matter protestors.⁶⁴ As Elias points out, while American commentators who had not previously focused on immigration were shocked by this development, immigration scholars and advocates were not.⁶⁵ I would submit that part of the reason that immigration experts could have foreseen these abuses is because citizens and immigrants share vulnerability to the jurisdiction of lawless federal agencies.

As I have argued elsewhere, the creation of agencies with a nominally limited jurisdiction, but an internal culture of arbitrary power and brutality, is an inherently dangerous strategy for a liberal democratic state, for the personnel and procedures of such agencies become available for ruthless political leaders (such as Trump) to deploy outside their ordinary bounds.⁶⁶ This is a familiar phenomenon associated with both the moral corruption of individuals and the political corruption of organizations. Thus, David Luban famously raised an objection to the use of torture even in extreme "ticking time bomb" scenarios in liberal democracies on the grounds that doing so requires training and employing torturers: It turns out that when you do so,

60. *Id.*

61. Elias, *supra* note 1, at 36.

62. *See id.* at 37.

63. *Id.*

64. *Id.* at 3, 61–62.

65. *Id.* at 61.

66. Paul Gowder, *What Things Undermine the Rule of Law? Ongoing Lessons from American Legal Decay*, in *RULE OF LAW: CASES, STRATEGIES AND INTERPRETATIONS* 43, 43–49 (Barbara Faedda ed., 2021); GOWDER, *supra* note 6 at 163–64.

they and their paymasters tend to chomp at the bit to get to do some torture.⁶⁷ Similarly, Thomas Jefferson (hypocritically) argued that slavery corrupts the moral character of enslavers by accustoming them to the violent use of arbitrary power.⁶⁸ Because we've created and empowered a "law enforcement" agency with no real mechanisms of accountability or culture of lawfulness, every American now has reason to fear that Portland could happen again: All it takes is a presidential whim to turn the mission of the Border Patrol from chasing down a stigmatized foreign outgroup to attacking American citizens on their own streets.⁶⁹

The twisted irony of this relational impact of terror is that in the interim, it breaks the more immediate victims' relationships with social support, and hence, the capacity to draw on solidarity not only to protect those victims but the community at large. As Elias points out, immigration law was used "to isolate and terrorize immigrant communities."⁷⁰ While the bulk of her article is about the "terrorize" piece,⁷¹ I would suggest that the "isolate" portion is also worthy of particular attention. To appeal to law is to appeal to the external social world in order to call upon its collective defense against an oppressor.⁷² By rendering immigrants fearful of interacting with the government or even appearing in public, and by threatening family and other ties, the system of terror Elias describes⁷³ undermines the social connections necessary for such defense. In effect, such terror compromises the social and legal identity of the terrorized—a point to which I shall now turn.

III. WHAT'S WRONG WITH TERROR?

Although this Response began by suggesting that the intuitive wrongfulness of terror ought to be clear to most readers, a defender of the immigration regime has some potential opportunities to resist that intuition. This section fills out the inconsistency between terror as Elias describes it in immigration enforcement and the ideal of the rule of law by raising and addressing two objections relating to, first, the deterrence function of law enforcement, and second, the scope of the president's law enforcement discretion. In doing so, it sets a foundation for more general conclusions about the relationship between terrorizing executive law enforcement power and the rule of law.

67. David Luban, *Liberalism, Torture and the Ticking Bomb*, 91 VA. L. REV. 1425, 1445–52 (2005).

68. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 172–74 (1787).

69. See *supra* note 62 and accompanying text.

70. Elias, *supra* note 1, at 1.

71. See generally *id.* (focusing on the use of immigration law to intimidate, coerce, and terrorize).

72. See GOWDER, *supra* note 13, at 97–119 for a discussion on the role of collective action in the rule of law.

73. See Elias, *supra* note 1, at 11–16.

A. *MUST MIGRANTS WEAR WOLVES' HEADS?*

One objection that might be raised to the whole enterprise of describing immigration enforcement in terms of terror is that lawbreakers *ought* to fear the state, at least to some degree. Presumably we don't think that, for example, bank robbers have a legitimate ground for complaint in view of the fact that they're obliged to avoid the police. Trump-allied immigration hawks do their best to draw on this intuition, and on the idea that what Elias calls terror is merely "deterrence." For example, the Kobach article that Elias cites as representing the explicitly terrorizing policy of the Trump administration does not say "our goal is to cause immigrants to live in terror."⁷⁴ Instead, the article analogizes the policies it proposes to highway traffic enforcement, where the deterrent effect of a slightly higher probability of getting a ticket encourages all drivers not to speed.⁷⁵ While there is no sharp line between permissible deterrence and objectionable terror, we can draw on the key properties of terror noted above, as well as the normative principle of proportionality,⁷⁶ as tools to help sort out where cases like the immigration policies of the Trump administration fall.

Begin with what I take to be the uncontroversial observation that lawbreakers are entitled to safely call upon the assistance of the government under many circumstances. Returning to Kobach's traffic enforcement example, I take it as uncontroversial that we would object to speeding enforcement providing that anyone who had ever driven above the speed limit should live in fear of calling the police to protect themselves against domestic violence, of filing lawsuits against employers who steal their wages, or of applying for statutorily entitled public benefits necessary to survive, even in the name of "deterrence."

To illustrate the wrongfulness of this kind of excessively harsh "law enforcement," consider Ferguson, Missouri.⁷⁷ One of the most glaring examples of the way that the infamously extractive law enforcement apparatus of that town terrorized its residents was by enforcing penny-ante regulations to the point that ordinary people were denied critical public services.⁷⁸ For example, the Department of Justice discovered cases where domestic violence victims were arrested when they called the police on their abusers—for failing

74. See *id.* at 15, n.81 (citing Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMPAR. & INT'L L. 155, 156 (2007)).

75. Kobach, *supra* note 74, at 156.

76. See generally Juan Cianciardo, *The Principle of Proportionality: The Challenges of Human Rights*, 3 J. CIV. L. STUD. 177 (2010) (describing principle of proportionality in human rights law).

77. This town ultimately became notorious as the setting for the police killing of Michael Brown.

78. See CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 81 (2015), www.justice.gov/sites/default/files/opa/press-releases/attachment/s/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/2Y52-KRYg>].

to pay for city “occupancy permits” for those abusers.⁷⁹ One of the victims of this practice expressed the fear and mistrust this behavior induced: After being punished for trying to protect herself from domestic violence, “she hated the Ferguson Police Department and will never call again, even if she is being killed.”⁸⁰ Effectively stripping someone of their right to be protected from domestic violence as a penalty for not paying some obscure city tax manifestly falls on the “terror” rather than the “deterrence” side of the line.

At the limit, a terrorized individual is subject to the ancient and discredited punishment of outlawry. In its harshest form, a person outlawed would literally be removed from all protection of the law, such that any third person could wrong them, even to the point of murder, without culpability.⁸¹ The ancient English legal treatise *Fleta* put the matter vividly: “The outlaw and the waived woman bear wolves’ heads, which may be cut off by any man with impunity, and deservedly, for they ought to perish without law who refuse to live according to the law.”⁸²

While not so harsh as this classical form of outlawry, the *de facto* condemnation of a person to a state where they cannot seek out even basic protections against violence or other forms of interpersonal oppression belongs in the same family. Remarkably, the conditions that immigrants face resemble the institutions of old outlawry in other respects as well. Even U.S. citizen immigrants are subject to the sudden risk of denaturalization,⁸³ refugees are subject to uncertainty over the application of public charge rules,⁸⁴ and those who share ethnic or racial identities with large populations of migrants are subject to constant scrutiny amounting to a presumption of undocumented status.⁸⁵ This presumptive degraded status, requiring one to keep their papers on hand in order to be free from arbitrary power, was also a feature of English outlawry.⁸⁶

79. *Id.*

80. *Id.*

81. See, e.g., DEMOSTHENES, PHILIPPIC 3, DEM. 9.44 (J.H. Vince, trans., Harvard Univ. Press 1930) (c. 341 B.C.E.) (describing condition of outlawry which exempts killer of outlaw from Athenian murder laws). For a further discussion of Athenian outlawry, see Maria S. Youni, *Outlawry in Classical Athens: Nothing to do with Atimia*, in SYMPOSION 2017: VORTRÄGE ZUR GRIECHISCHEN UND HELLENISTISCHEN RECHTSGESCHICHTE 137, 137–56 (Gerhard Thür, Uri Yiftach, & Rachel Zelnick-Abramovitz eds., 2018).

82. FLETA, reprinted in 72 PUBL’NS SELDEN SOC’Y 70 (H.G. Richardson & G.O. Sayles, trans., 1953). On the status of *Fleta*, see 1 WILLIAM BLACKSTONE, COMMENTARIES *72 (listing *Fleta* as one of the authoritative treatises on English law).

83. Elias, *supra* note 1, at 50–53.

84. *Id.* at 47–50.

85. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) (permitting race to be used as a factor in determining Border Patrol stops).

86. FLETA, *supra* note 82, at 75 (“And those who are inlawed needs must always carry these charters [of pardon] with them wherever they go, lest any who do not know that they have received the grace of pardon [by the King] should slay them as outlaws.”). Compare also the status of presumptively enslaved imposed on Black Americans even in the North under the Fugitive Slave Acts, who were subject to the constant potential of enslavement due to being

Observe how the principle of proportionality fills out the objection to terror as outlawry. We might not worry as much that a serial killer or an international terrorist was afraid to contact the police or seek services from the state (although we still might shy away from inflicting outright outlawry even on such a person out of concern for the way that permitting such private violence might undermine the stability of the legal system as a whole), but our reaction to such penalties applied against *speeders* would be very different.⁸⁷ In Athens, outlawry was an extraordinary decree used only against immediate threats to the security of the demos, such as tyrants and traitors.⁸⁸

Further observe how the relational character of terror fits into these objections. While it is certainly troublesome that migrants and other victims of terror might be deterred from doing things like applying for income support benefits to which they are legally entitled, the far more objectionable feature is the way that terror makes them vulnerable to domination by third parties by making them afraid to do things like seek out the protection of the law from abuses by employers and other private persons.⁸⁹ Our existing immigration law recognizes the wrongfulness of this kind of subjection: In the Violence Against Women Act, Congress established a “self-petition” process to obtain legal status for victims of domestic violence—in part in order to prevent immigration consequences from deterring victims from leaving their abusive partners and/or reporting the crimes, and hence free them from the domination of those who could otherwise use their status as an additional method of relationship control.⁹⁰

The other side of the relational character of terror—the way in which its efficacy depends on leveraging relationships between primary and secondary victims—also features into its wrongfulness as illustrated by Elias’s description of Trump administration policies. The most egregious example is the policy of family separation and detention.⁹¹ As Elias describes, this policy subjected children to severe danger and trauma, and was justified by administration officials on so-called “deterrence” grounds.⁹² To the extent those officials self-

subject to kangaroo court proceedings in which those accused of being escaped slaves lacked the right to put on a serious defense. GOWDER, *supra* note 6, at 54–59, 63–64.

87. I take it that even a reader who thinks that unauthorized immigration is a serious offense would be willing to agree that it’s more analogous to speeding than to mass murder—I really have nothing to say to a reader who disagrees with that.

88. Youni, *supra* note 81, at 151. To be fair, England applied it rather more broadly, i.e., to bail-jumpers. See *Green v. United States*, 356 U.S. 165, 170–71 (1958) (describing outlawry as “drastic” and “severe” relative to more ordinary forms of criminal punishment).

89. See *supra* notes 35–58 and accompanying text.

90. 8 U.S.C. § 1154 (2018). See generally Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U.J. GENDER SOC. POL’Y & L. 95 (2002) (describing rationale and content of VAWA immigration provisions).

91. Elias, *supra* note 1, at 36–39.

92. *Id.*

consciously intended to inflict such harms on the children (who obviously lack their own agency in the migration process) in order to deter their parents, they leverage the family relationships of their victims, and the fear of parents for their children's safety, in order to prevent them from migrating, including from claiming legal entitlements such as asylum. This terrorizing strategy is more customary for dictators and drug lords than for allegedly liberal democratic governments.⁹³ Indeed, the U.S. Constitution specifically prohibits corruption of blood as a punishment for treason—but not, evidently, for unauthorized entry.⁹⁴

B. OVERBREADTH, DISCRETION, AND TERROR

Another objection that Trump's defenders might raise to Elias's argument (and to mine) is that his policies were merely correcting the underenforcement of immigration law by prior administrations. If DACA was an "exercise of prosecutorial discretion," as the Obama administration claimed,⁹⁵ then Trump's halting efforts to roll it back and enforce existing laws more fully might also be cast as an exercise of prosecutorial discretion.⁹⁶ Similarly, enforcement of the so-called crime of unauthorized entry and the abandonment of Obama-era deportation priorities could be interpreted as merely enforcing existing law.⁹⁷

While that may be true, it merely shifts the critique of the terrorizing policies to a critique of the overly broad law that enables them. Again, a comparison to Ferguson—or to a wide variety of U.S. cities under so-called "broken windows" policies—is apt. In such cities, members of subordinated communities are subject to police action at will just because legislatures have made perfectly ordinary behavior into a crime, such as being out on the street or having a roommate without paying an obscure tax.⁹⁸ We rightly condemn

93. See, e.g., Paul Mooney & David Lague, *The Price of Dissent: Holding the Fate of Families in its Hands, China Controls Refugees Abroad*, REUTERS (Dec. 30, 2015, 3:41 PM), <https://www.reuters.com/investigates/special-report/china-ughur> [<https://perma.cc/DLY2-KK5A>] ("There is a price to pay for activism, especially for the highest-profile Uighur leaders. And the cost often falls on their families back in Xinjiang. Some relatives are jailed or beaten. Others are prevented from ever reuniting with their exiled children or siblings."); Conor Gallagher, *Drug Debts: First Come Bullets in the Post. Then the Family Home is Firebombed*, IRISH TIMES (Feb. 9, 2019), <https://www.irishtimes.com/news/crime-and-law/drug-debts-first-come-bullets-in-the-post-then-the-family-home-is-firebombed-1.3784369> [<https://perma.cc/5FHQ-NLGA>] (describing intimidation of families of people in debt to drug dealers).

94. U.S. CONST. art. III, § 3, cl. 2. Although the United States does have rather an odd habit of punishing treason more lightly than other crimes. Cf. GOWDER, *supra* note 6, at 67–68, 68, n.17 (observing that the lands of Confederate enslavers were not seized after the Civil War in part due to Lincoln's compunctions about the Treason's Clause prohibition of "Forfeiture except during the Life of the Person attainted," but that we routinely seize the property even of innocent owners whose assets are used, e.g. by their children, in drug crimes).

95. *Texas v. United States*, 809 F.3d 134, 147 (5th Cir. 2015).

96. See Elias, *supra* note 1, at 42–47.

97. See *id.* at 14–16, 40–42.

98. See *supra* notes 77–79 and accompanying text; see also GOWDER, *supra* note 6, at 114–19; Paul Gowder, *Resisting the Rule of Men*, 62 ST. LOUIS U. L.J. 333, 341–43 (2018).

such regimes because of the way they facilitate arbitrary power through excessive enforcement discretion.

“Broken windows” policies illustrate that even if the basic principle of *nullum crimen sine lege* is followed—that is, even if the government doesn’t punish anyone except pursuant to law⁹⁹—if the laws are radically overbroad to the point that they license the punishment of extremely common behavior consistent with social norms, then officials have the power to engage in campaigns of terror. That’s how “disturbing the peace” and “loitering” work in broken-windows cities: They empower officials to terrorize Black and Brown communities in virtue of the simple fact that the police can cook up some excuse to cite or arrest almost anyone with whom they come into contact.¹⁰⁰

Now, back to immigration. There is apparently such a mismatch between immigration law and society that there are millions of scofflaws—apparently some 11 million undocumented immigrants.¹⁰¹ Obviously, the U.S. Government doesn’t have the resources to round up 11 million people (not to even consider what would happen to the labor market if it tried). Yet the offense those people allegedly commit is so severe that the legal system claims that the appropriate penalty is deportation or imprisonment¹⁰² (not Kobach’s frivolous comparison to speeding tickets).¹⁰³ So there are 11 million people walking around—plus heaven-knows-how-many millions more with uncertain immigration statuses, work visas dependent on the whim of some boss, a history of receiving public benefits that the president might decide was too expensive, and so forth—who could at any time have extreme punishments inflicted on them if they happen to cross a federal official or someone who knows how to summon a federal official. How can such laws *not* confer a vast amount of arbitrary and terrorizing power?¹⁰⁴

The undersigned has recently published an extensive critique of the American immigration system from the standpoint of the rule of law.¹⁰⁵ That

99. See generally Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 STATUTE L. REV. 41 (2005) (describing the principle).

100. See GOWDER, *supra* note 6, at 114–19.

101. Elias, *supra* note 1, at 61.

102. See 8 U.S.C. § 1227 (2020) (discussing grounds for deportation); see also 8 U.S.C. § 1325 (2020) (discussing imprisonment as a consequence of improper entry into America by noncitizens).

103. See Kobach, *supra* note 74, at 156; see also *supra* note 75 and accompanying text.

104. And what in particular should we think of Trump’s seemingly toying with DACA recipients, see Elias, *supra* note 1, at 46–47,—and of an underlying legal regime under which a person brought to the United States as a child—and hence who has not even a shred of moral blame for their undocumented state—and who has established a life for themselves as a responsible and productive member of American society—is nonetheless subject to the threat of deportation at the stroke of a presidential pen? Or, given the character of the presidency we recently escaped, perhaps deportation by tweet is now on the table?

105. GOWDER, *supra* note 6, at 134–69.

critique focuses on the ways in which the immigration system defies conventional assumptions of the classical American conception of how the rule of law is to be protected, for example, by denying migrants access to fair hearings in front of neutral judges,¹⁰⁶ or by creating an army of so-called law enforcement officials who are socialized to violate the legal and basic human rights of those over whom they exercise authority.¹⁰⁷ However, the discussion thus far suggests that Elias's description of the terrorizing character of the immigration regime, or at least the implementation of that regime under Trump administration policies,¹⁰⁸ adds a new dimension to this critique.

It is notable, considering the foregoing discussion, that the most terrorizing elements of the Trump immigration regime, as described by Elias, are focused on enforcement discretion.¹⁰⁹ The denaturalization task force and the changes to DACA clearly fall within that category. The modification to the public charge rule (to the extent it represents an executive decision about how aggressively to interpret enforcement authority) arguably does so as well. Consider as another example the abandonment of longstanding enforcement priorities focused on undocumented migrants who had committed crimes, as well as other particularly problematic individuals.¹¹⁰ It seems to me that the heart of the terrorizing character of those policies is in their exploitation of the space under existing law to punish behavior within ordinary social norms. In Elias's words, "law-abiding, long-term"¹¹¹ residents of the United States (documented and undocumented) who "lived quietly and unremarkably"¹¹²—that is, who were embedded in the ordinary social world of the United States and generally behaved according to prevailing social norms—were suddenly put in danger.

Even though Biden has withdrawn at least some of the terrorizing Trump policies,¹¹³ the *mere fact* that Trump implemented those policies as an act of pure executive diktat, and Biden could withdraw them likewise, is terrorizing. As Elias aptly points out: "[A] future administration could once again change tack and reinstate the Trump-era initiatives."¹¹⁴ It just takes one election—one more paroxysm of xenophobic demagoguery like we experienced in 2016. Having experienced those policies once, migrants have a strong reason to live in fear of their recurrence, and hence are subject to continuing terror even after presidential policy changes.

106. *Id.* at 151–57; *see also* Paul Gowder, Book Review, 31 L. & POL. BOOK REV. 12, 19, 26–27, 30–32 (2021) (reviewing CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020)), <http://www.lpbr.net/2021/01/law-and-leviathan-an-redeeming.html> [<https://perma.cc/RQ5Z-A32D>].

107. GOWDER, *supra* note 6, at 162–65; *see also* Gowder, *supra* note 66, at 46–47.

108. *See generally* Elias, *supra* note 1 (describing Trump Administration immigration policies).

109. *Id.* at 14–15.

110. *Id.* at 14.

111. *Id.*

112. *Id.*

113. *Id.* at 54–57.

114. *Id.* at 57.

For those reasons, Elias is clearly right that legislative action to fully regularize the status of DACA recipients and others who have built established and law-abiding lives in the United States is a necessary remedy to terror,¹¹⁵ and, I would add, is urged upon us by the moral value of the rule of law. Political scientists and constitutional theorists have long noticed that a core function of constitutions is to limit the stakes of politics.¹¹⁶ However, from the standpoint of terror, the notion can be extended and abstracted. I submit that rights-entrenchment in general lowers the terrorizing potential of politics. In other words, the more effort it takes misguided or malicious officials to do serious harm to a person's fundamental interests in violation of their preexisting legal rights, or to change those legal rights in order to authorize that harm, the more security an individual can experience in those rights, and the less susceptible they are to terror. While constitutionalizing some right is the most secure protection against terror, even memorializing some protection in statute is an improvement, from the standpoint of terror, relative to leaving it in the hands of the executive alone. This is so because a statutory protection at least requires a number of elections in order to set it aside, as opposed to just one.¹¹⁷ This explains part of the resistance in the Anglo-American rule of law tradition to excessive *executive* discretion in particular.¹¹⁸ It should be clear by now that we must rein in the unbounded capacity of a malicious executive to use the vast discretion conferred by immigration law.

115. *Id.* at 60–61.

116. See e.g., William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.* 1279, 1281–83 (2005) (advocating for the judiciary to play a more cautious political role in order to facilitate the Constitution's democratic ideals); Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability In America's First Century*, 29 *J.L. ECON. & ORG.* 278, 279 (2013) (claiming that "all successful constitutions lower the stakes of politics").

117. In our current immigration politics, such entrenchment as we've seen may run the other direction. In the waning days of the Trump administration, we saw the astonishing spectacle of an outgoing executive signing agreements with the ICE union as well as with the State of Texas seemingly with the aim of giving these interested third parties a veto over Biden's changes to preexisting immigration enforcement policies. Zolan Kanno-Youngs & Charlie Savage, *Trump Official's Last-Day Deal With ICE Union Ties Biden's Hands*, *N.Y. TIMES* (Mar. 18, 2021), <https://www.nytimes.com/2021/02/01/us/politics/cuccinelli-biden-ice.html> [<https://perma.cc/L7YF-CG9G>].

118. See discussion in GOWDER, *supra* note 6, at 108–09. Incidentally, reflecting on Elias's insight here leads me to revise an earlier claim of mine. In a review of a book on administrative law, I noted that libertarian critics of administrative law such as Richard Epstein have objected to the capacity of executive officials to use administration to manipulate policy, but suggested that the problem with executive manipulation of policy sounds more in the normative ideal of democracy than the rule of law. Gowder, *supra* note 106, at 26. After considering Elias's points about the vulnerability of immigrants to policy reversals by subsequent administrations, that claim seems to me to have been mistaken: excessive executive policy flexibility has the capacity to undermine the security of individual legal interests in terrorizing ways that, for that reason, are objectionable from the standpoint of the rule of law as well as from that of democracy.

IV. CONCLUSION: TERROR EATS AWAY AT THE EDGES OF LAW

By establishing hierarchical relationships of power and undermining the capacity of individuals to seek basic legal rights, terror can be a tool to carry out a broader campaign of lawlessness.¹¹⁹ In this context, it is necessary to note a particularly egregious instance of Trump administration terror that Elias did not discuss: the warping of the “provisional waiver process” by which spouses of U.S. citizens could apply for permission to remain in the country as a tool for arrest.¹²⁰ As Jawetz aptly describes it, this “bait and switch” turns a federal policy encapsulated in a regulation carrying the force of law into a “trap.”¹²¹ The spouse of a U.S. citizen has reason to fear that they’ll be arrested and deported as punishment for following a legally established procedure to request relief from being arrested and deported. (Kafka would be in awe.) This generates the practical consequence that Trump could attempt to repeal the provisional waiver regulation without going through the ordinary rulemaking process, simply by changing enforcement priorities—effectively conducting an end run around the Administrative Procedure Act. Similarly, changes to the public charge rule¹²² amounted to a kind of *de facto* amendment of the underlying law: By intimidating immigrants so much that they didn’t dare apply for benefits even when they could do so safely, the Trump regime managed to *de facto* deny those benefits to them without any legal authority whatsoever, and with no due process of any kind for the victims.

Law as a Tool of Terror ultimately makes its greatest contribution as an element of a broader critique of executive power. Rather than merely focusing on the acts that executives are directly authorized to carry out *de jure*—whom the president may have arrested, and for what, for example—a fuller estimation of the extent to which any executive authority poses a threat to rule of law values must attend to the penumbra of those powers. If coercion is authorized only against a specific group of people in a relatively narrow set of situations, but that coercion creates a penumbra of terror, an executive can use that capacity to effectively inflict the state’s violence on a much broader population and for much broader reasons. Even though the category “undocumented immigrant” is relatively narrow, the broad discretion granted the U.S. President within the scope of that category has, Elias teaches us, permitted Trump to exercise arbitrary power over much broader groups of people, including documented immigrants, Latinos, and even the U.S. population in general.¹²³ It has permitted Trump to make *de facto* amendments to a wide variety of areas of law, and abolish a wide variety of

119. See Elias, *supra* note 1, at 5–6.

120. Tom Jawetz, *Bait and Switch: How the Trump Administration Is Trying to Deport Spouses of U.S. Citizens*, CTR. FOR AM. PROGRESS (Feb. 18, 2020), <https://www.americanprogress.org/article/bait-switch-trump-administration-trying-deport-spouses-u-s-citizens> [<https://perma.cc/JG34-96LW>].

121. *Id.*

122. See Elias, *supra* note 1, at 47–50.

123. *Id.*

underlying legal rights (just like the Ferguson police) simply by making people too scared of arbitrary enforcement to take advantage of them. That state of affairs should be intolerable to anyone who values the ideal of government under law.