

# Tragedy Unremarked: Empty Spots in Human Connection and Law

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John Carlos Frey, [Sand and Blood: America's Stealth War on the Mexico Border](#) (2019).

In *Sand and Blood: America's Stealth War on the Mexico Border*, [John Carlos Frey](#) shows the reader a story about life, death, and a void in the reach of law to human need. Frey tells of a government-orchestrated disaster, shocking but unseen, that has been under way at the Southern border for decades. As a journalist of Mexican origin and paternally derived [U.S. citizenship](#), Frey delivers a vivid and partly personal account of the human tragedy purposefully and soundlessly inflicted on poor Hispanic arrivals—a tragedy that should sear a vivid image of horror into our collective memory. For many years, Americans have known of the grudging welcome extended to our Southern neighbors but little of the corresponding human consequences. The result has been a void in both cultural awareness and legal doctrine. Over time, a public theater of immigration control, balancing the needs of politicians, business interests, and law enforcement, has shunted aspiring immigrants into a dystopia, planned by bureaucrats but given effect and form by human desperation, avarice, and menace.

Pursuing the human drama in the void, Frey paid smugglers working in Mexico for the Sinaloa cartel to take him on a trip through the Mexican desert to the U.S. border. He depicts a brutal ride in a van packed with men, without seating. The cartel business model Frey experienced responds to a market opening created by a blank place in our American conception of legal order (P. 103.) The cartels run “sophisticated operation[s] capable of monitoring U.S. law enforcement activity to ensure that migrants crossed the border successfully.” (P. 108.) Frey’s guide, as they neared the border, used “binoculars, what appeared to be a satellite phone, and a cell phone...[for] communicating with someone who knew the whereabouts of Border Patrol agents on the U.S. side.” Frey endured a gun in his face by a cartel member charged with assuring he had not captured images of cartel members. “If they had [found images], I’m sure they would’ve killed me on the spot.” The cartel members are unemotional about their business, in contrast to those [border patrol agents who have adopted emotional views of the quarry](#). The exception in the business model pitting emotional border agents against pure business logic is the expectable corruption—agents who take bribes to look away as guides move migrants into the U.S. (P. 104.) Everyone—almost everyone—gets a little something from the unwritten rules.

Frey provides a historical review of policymaking over time: from a few early Border Patrol agents on horseback to the grander visions of politicians who realize advantage in treating Mexicans and Central Americans as invaders, with labels classifying them as criminals. The border militarization began in earnest in the 1980s with walls constructed where casual gatherings of Americans and Mexicans once picnicked. (P. 20.) Frey provides a chilling narrative of a plan wrapped in a deadly abstraction: to use death as a tool of immigration control. The creative labeling of laws helps support a war footing. [President Trump](#) has supplemented rally rhetoric about invaders with the [Victims of Immigration Crime Engagement Office](#), a program with “objectives” that “seem to conflate immigrants and criminals.” (P. 180.) As such, Frey concludes that the border has become “for all intents and purposes, a war zone.” (P. 195.)

In this context, Frey gives a history lesson about humanity moving through a physical space that courts cannot situate in the doctrines of sovereign states. Many of the deaths and other violations occur on

U.S. soil. Even here, we find a [liminal](#) state defined as “situated at a sensory threshold: barely perceptible or capable of eliciting a response.”

As Frey describes the transition to an infrastructure of militarization—one gradually brought about by presidents starting with [Bill Clinton](#) and proceeding to Trump—he arrives in a descriptive cul-de-sac containing the void of law. In a world where federal control over immigration is constitutionally dubious and a national security military rationale spreads into that liminal space at the border, Frey finds and narrates the non-place in the constitutional order.

In 2010 and in 2012, U.S. border agents shot across a border, both times aimlessly killing a Mexican child on the Mexican side of a line drawn by artifice and not nature. The space, physical and conceptual, containing the lifeless bodies of Mexican children does not support connection or clarity. Law is a presence in the [scribblings of courts and lawyers](#), but human reality on the ground disappears into legal briefs, trial court opinions, panel and *en banc* opinions, [Supreme Court](#) remands, and oral argument at the Court with justices fretting about “possible foreign policy implications” of allowing relief for a cross-border shooting.

In the liminal spaces around the border where immigrants contend, defenseless, with hostile U.S. border agents and mercenary coyotes, and spaces outside schools and courts where [ICE](#) agents snatch parents, also defenseless, from children, or [children die to police violence held justified](#), both law and human connection are fragile. The stories of tragedies lost to law or common feeling pose an issue of empty spaces, barren spots in which it is ordinary to die or be seized by state power or criminal forces. These geographies lie outside the care of human feeling or the reach of comprehensibility to law.

Using his well-honed journalism skills and his personal narrative, Frey seeks to remedy the gap in general understanding and legal sight. He describes an enchanted spot on the border where he once played hide-and-seek as a prank on Border Patrol agents. (P. 2.) Notably, the [2012 incident in “ambosNogales”](#) occurred after children were pranking agents guarding the line. No one is laughing today, and few outside ambosNogales weep. Uncertain of its domain, law hesitates.

After a theater of immigration control in the 1980s and 1990s sought to balance the interests of defense contractors and of businesses requiring cheap labor, Frey noticed a change. The border became the scene of a life-and-death exercise in a war against the poor. Toleration for the antics of kids diminished, while application of “the machinery of war” and “Death as Deterrent” techniques increased. A law called the [Secure Fence Act](#), and programs with names like [Operation Gatekeeper](#), drove migrants away from safe passage and into death traps in the desert and in the [All-American Canal](#)—a watery grave that became “the deadliest body of water in the country.” (P. 84.)

Deaths began to accrue long ago, as the border was fortified with a deadly intention to “raise the cost” of passage to those in search of safety, work, and family. Cost means death from dehydration or drowning. The bodies go into potters’ fields—marked “unidentified”—or simply disappear. There is no personal witness or official record of the human toll. “Poor Joshua” does not become “Poor José.” No exclamation observed sorrow. No shared cultural moment of American shock at anticipated welcome thwarted by death.

Within our constitutional framing for incorporating knowledge within the legal order, is there a basis for revelation in case law of events that lack cultural salience inside the nation? What of law as a discourse in which the void of empathy might be addressed? Frey, a journalist but not a lawyer, combines legal terms with journalism to highlight the void:

U.S. policy at the border also seems to have bypassed the Constitution. It is a zone where

inspections can happen to anyone without probable cause and use of force can go unchecked without repercussion. Immigrants both legal and undocumented have been stripped of civil liberties, and the violations continue—to the point of the removal of children from their parents or even death. (P. 8.)

Frey is well suited to help us sound the shock of the reporter's witness to this welcome-turned-disaster. He provides a narrative of the convergence of cultural racism and constitutional precepts supporting the enactment, and repetition by an unlettered president, of a repeated human catastrophe at the Southern border. The denial of welcome takes forms other than death, but the destruction of human expectation, wrapped in law, cruelty, and purported superior caste is a shock when translated by a skilled narrator.

Due process, under the [Fourteenth Amendment](#), constrains state power when brought to bear on U.S. citizens and also constrains what states may do to "persons." But in the liminal spaces in which citizenship and personhood confront a sovereign's line in the sand, the constitutional niceties yield to a brute force delivered by human agents often immersed in a culture of race-themed hostility, backed by claims to sovereign might and to the "rule of law" as a commitment to our liberal order. In the liberal order, justices fret about the legal "line" they feel sworn to hold firm. How can there be a line—a thing imaginary—that leaves room on the side of justice just this once, but not again or not much? In [Hernandez I](#), Justice [Breyer](#) tried in dissent to rub away a different line, the one in the sand: the place of death for the child is a *limitrophe*, an area created by "engineer's 'imaginary line,' perhaps thousands of miles long, but having 'no width.'" It also, he tells us, is a *voisinage*, a place of "cooperation and good neighborliness"—of law and human connection. Yet Frey has taken us to an empty space of sand and blood, given a shape by lines pitiless in law and on earth.

Legal scholarship presents an un-narrated depiction of a legal void: Where is the constitutional authority to restrict immigration? [Ilya Somin](#) has [surveyed](#) the absence of a textual basis and the weakness of other arguments to fill the constitutional gap. Original meaning provides no help. At the founding, the U.S. needed a population, and there was no attempt to stop immigration [until racism emerged](#) with the [Chinese Exclusion Act of 1882](#). Even today, an absence of legal perception and narrated human response exists at the Southern border. The missing text constructs a moral absence, which leaves the constitutional order afflicted with fill-ins, such as the disorder of nativism and the logic of warfare. The morally barren charter for welcome—or not—even reaches inside our borders with federal enactment of terroristic raids by Immigration and Customs Enforcement agents.

This conceptual void is occupied by lawlessness and thuggery masquerading as law and order. The void is the basis for a slow-moving, intentional, and unheralded destruction of humanity in transit. Under the [Equal Protection doctrine](#), an intention to harm a group out of hostility to the group [constitutes wrongful discrimination](#). But the status of persons who die outside U.S. territory, even if the agent of death acts on U.S. soil, occupies an occluded spot in constitutional law, a [brain teaser for justices](#) for whom legal abstraction obscures all paths to simple justice.

Where we find a constitutional empty space, we find the language of security, i.e., warfare. The ["invasion" word is familiar](#), but its loud and repeated broadcast by the "Commander in Chief" of a security state is new. The word appears to have conscripted a citizen soldier whose language and [violence in an El Paso Walmart](#) adopted the concept of war. The void is occupied by a militarization of borderline and domestic policing, with both becoming a liminal space either outside any comprehensible claims of humanity within law, or, in [an argument advocating for humanity and law](#), "a liminal zone of shared control with constantly traversing populations, and therefore wholly unlike purely foreign territory." The legal void extends to [American citizens re-entering the U.S. in an airport located on U.S. soil](#) but conceptually somewhere else. Nature abhors a vacuum, and in the void of humanity and legal

order, the cartels have entered. (Pp. 111-15.)

Frey's book confronts us with difficult and urgent questions. For all, citizen and noncitizen, might liminality swallow all our shared humanity? Where will be the spaces that law will hesitate to enter? Where are the lines in the sand, in our humanity, in law's reach?

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