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All the Border's a Stage: Humanitarian Aid as Expressive Dissent Protected by the First Amendment

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ABSTRACT

Decades of stringent immigration enforcement along the Southwest border between United States and Mexico have pushed migrants into perilous desert corridors. In the last two decades, over 7,000 migrants have died in border regions, out of public view. In response to this humanitarian crisis, activists from organizations such as No More Deaths trek deep into the treacherous desert, seeking to expand migrant access to water, to document and honor the human remains of those who did not survive the journey, and to influence public opinion about border enforcement policies. No More Deaths' *speech acts*, directed at the heart of the deadly areas where migration has been pushed, aim not only to save lives but to *convey the message* that all lives—including those of unauthorized migrants—are worth saving. The Trump Administration has escalated repressive tactics intended to silence these forms of border-policy dissent. Some federal land managers now blacklist No More Deaths, preemptively denying requests for access permits. Meanwhile, the U.S. Attorney's office has aggressively prosecuted members for humanitarian activities. Because the context around No More Deaths' expressive work puts it within the First Amendment, however, government attempts to restrict or punish it demand constitutional scrutiny. At the least, government actors—including land managers implementing permit schemes, prosecutors considering criminal charges, and judges overseeing such prosecutions—should give much more weight to the free speech concerns raised by citizen dissenters' humanitarian activities in the borderlands.

**All the Border's a Stage:
Humanitarian Aid as Expressive Dissent Protected by the First Amendment**

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Jason A. Cade¹

INTRODUCTION

On June 25, 2019, Oscar Martinez Ramirez and his 23-month-old daughter Valeria perished in a failed attempt to swim across the Rio Grande to enter the United States (Ahmed 2019). Earlier that day they were turned away from the international bridge at Matamoros, where they had hoped to seek asylum after traveling 1,000 miles from their home in El Salvador. The widely-disseminated photograph of their lifeless bodies lying face down on the muddy riverbank, the toddler's tiny head tucked inside her father's shirt, is forever seared into the memories of many Americans.

Deaths such as these are neither new nor rare—just increasingly visible. Decades of ever more stringent immigration enforcement along the Southwest border between United States and Mexico have pushed migrants into perilous desert corridors. In the remote, deadly stretches beyond Ajo, Arizona, for example, intrepid hikers regularly encounter the bones and belongings of border-crossers who perished on journeys of almost 80 miles. In the last two decades, over 7,000 migrants have died in border regions, mostly out of public view. With anti-immigrant rhetoric growing louder, and enforcement measures growing harsher, the pressure on migrants to risk their lives in the desert has only increased.

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In response to this humanitarian crisis, activists from organizations such as No More Deaths (NMD) trek deep into the treacherous desert, seeking to expand migrant access to water and medical aid, to document and honor the human remains of those who did not survive the journey, and, ultimately, to exert influence on public opinion about border enforcement policies. In this Essay, I examine this activity and argue that the actions engaged in by members of NMD transcend the private, humanitarian efforts of good Samaritans. Their conduct, and the extensive messaging around it, is in fact deeply expressive. In a pointed and meaningful way, they act as citizen dissenters, engaging in a form of open protest at the precise location where their government is pursuing policies that they condemn and desire to change. In particular, the group seeks to convey the messages that no human should be denied life-saving aid, that local and global consciousness should be raised about the suffering caused by militarization of the border, and that immigration policies must become more humane. By exposing the otherwise unseen consequences of the nation's immigration policies, these activists challenge widespread outlooks about government rhetoric and enforcement practices.

The threat such messages of dissent pose to the status quo is not lost on the federal government. Indeed, the government has replied often, and at times forcefully. For years, NMD has been locked in battle with the Border Patrol, whose agents sometimes systematically destroy the water jugs left by volunteers along the migration routes. In turn, NMD publishes scathing reports and videos documenting government abuses (see, e.g., No More Deaths, n.d.d), scrawls messages ("Water is Life!") to agents on the jugs it replaces, and continues its grueling marches into the borderlands for both instrumental and symbolic reasons.

Under the Trump Administration, repressive tactics intended to silence these forms of border-policy protest have rapidly escalated. Some federal land managers now blacklist anyone believed to be a member of NMD, preemptively denying their requests for access permits. Meanwhile, the Arizona U.S. Attorney's office has aggressively prosecuted members of the organization for humanitarian activities. Early in 2019, four volunteers were convicted of operating a motor vehicle in a wilderness area, entering a national wildlife refuge without a permit, and abandoning property (i.e., federal littering) (Phillips 2019). Four more members faced similar charges that were eventually dropped in exchange for hefty civil fines. Activist Scott Warren faced charges of felony harboring and conspiracy to harbor unauthorized noncitizens, with a possible twenty years in prison if convicted. In June 2019, a deadlocked jury was unable to reach a verdict in his trial. Federal prosecutors retried Warren on two of the charges in November 2019, and this time the jury fully acquitted him (Ingram 2019).

This Essay investigates the expressive nature of the humanitarian workers' activities, explaining their political significance and constitutional value. NMD's *speech acts* in the desert, directed at the heart of the deadly areas where migration has been pushed, aim not only to save lives but to *convey the message* that all lives—including those of unauthorized migrants—are worth saving. The volunteers with NMD (and similar organizations) use the privilege of their citizenship to speak to multiple audiences, including everyday Americans who might otherwise remain unaware of the deadly consequences of U.S. enforcement policies. In a tangible way, NMD's dissenting conduct propels a counternarrative that furthers critical democratic engagement with immigration policy.

The U.S. Supreme Court has held that when the context surrounding an activity would lead a reasonable person to perceive the conduct as conveying some sort of message, First Amendment Free Speech Clause protections attach. As I hope to show, the context around NMD's conduct meets that standard. The complexities of doctrine are legion, and this Essay only begins the project of outlining the relevant considerations. Even so, one clear take-away of even this preliminary review is that government actors—including federal land managers implementing permit schemes, U.S. Attorneys considering criminal charges, and judges overseeing such prosecutions—should give much more weight to the free speech concerns raised by citizen dissenters' humanitarian activities in the borderlands.

The Essay unfolds as follows. Part I summarizes how government border strategies over the last twenty-five years have channeled migrants into dangerous and difficult crossing points, raising the tide of deaths far from public view. To keep these enforcement policies entrenched, despite the lethal consequences, government officials trade on a siege narrative. Harsh tactics, and the anti-immigrant rhetoric employed to support them, have only increased under the Trump administration. Part II then turns to the citizens who register opposition through expressive humanitarian work in the border areas, focusing in particular on NMD. Their work is both instrumental and symbolic, ultimately serving to construct a powerful counter valence to official policy and rhetoric. Part III then explains that NMD's expressive work has an important constitutional dimension, in that the government's attempts to suppress it may violate free speech rights protected by the First Amendment. While full exploration of this theme will await further work, I conclude by suggesting ways that federal officials might better facilitate the free speech rights of citizen dissenters engaging in humanitarian activity.

I. The Government's Border Strategy and Siege Narrative

A. Twenty-five years of prevention-through-deterrence policy

Donald Trump transformed anxiety over the southern border of the United States into the keystone of his successful campaign for President. Tapping into a rising sense of both nationalism and vulnerability—and, at times, appealing even to bald racism—Trump stoked crowds into frenzied chants to “Build that Wall!” Several years into the Trump Administration, this intense focus on immigration retrenchment has yet to wane. The Trump agenda has included highly discriminatory travel bans (see, e.g., Cover, 2019; Family, 2019), cruel family separation policies (Jacobs, 2019), indiscriminate deportations (Cade, 2018 p.435, 464-67), administrative barriers to legal immigration (Wagtendonk, 2019; Chen & New, 2019), and continued insistence on the need for a Southern border wall (Trump, 2019). The asserted justification for each measure is the need to “regain control” of security—and national identity—through the construction of legal and physical barriers to entry.

Although much of the Trump Administration's anti-immigrant agenda is surely to the political right of mainstream America,² the focus on the border as a site for motivating outrage and generating support for restrictive measures is neither new nor limited to a single political party. The current wave of anti-immigrant backlash started to crest in the early 1990s, with government officials along the political spectrum trading on fears of an out-of-control border long before President Trump took office (Andreas, 2009).

² The Pew Research Center, for example, reported in August 2019 that 72% of Americans believe undocumented immigrants should be allowed to stay in the U.S. legally if certain conditions are met (Pew Research, 2019).

Indeed, “prevention through deterrence,” the reigning border enforcement strategy, now dates back twenty-five years (Border Patrol, 1994). The federal government strategically pumped massive resources into manpower, fencing, and surveillance measures at the most prevalent entry points, forcing unauthorized migrants into more treacherous areas, removed from public view (Maril, 2011). The increased difficulty and expense of crossing, however, did not ultimately deter migrants from making the attempt (Andreas, 2009). Apprehensions—long considered a proxy for measuring primary migration flows at the southern border—began to increase in Arizona and New Mexico, even as they dropped in El Paso and San Diego. Although diverted, migrants continued to cross, despite the elevated peril and cost.

By conservative estimates, over 7,000 migrants have lost their lives in these desert stretches since 2000, by which time the prevention-through-deterrence enforcement strategy had taken firm hold (Devereaux, 2019). As Mary Fan (2008, p.702-03) soberly observed, “The raised cost that the strategy levied for unauthorized migration turned out to be denominated in life. . . . Soaring death rates and unabated migrant traffic showed that people were paying the ultimate price rather than being deterred.” Thousands of adults, families, and children, seeking a better future, have instead perished by drowning, dehydration, or exhaustion, as they surrender to the desert’s relentless climate.

Rising death rates, however, have failed to precipitate meaningful reform. Instead, officials have doubled down on their efforts to exploit public anxiety about an uncontrolled border in order to justify massive resource allocations, disregarding the ever-growing migrant body count in the desert. The current administration has fashioned anti-immigrant speech and policy into a centerpiece of its political platform. President Trump has referred to noncitizens

arriving at the border as “Mexican rapists,” “stone cold criminals,” “infestations,” carriers of disease, and “animals” (see, e.g., Ross, 2016; Jansen & Gomez, 2018; Stracqualursi, 2018; Walker, 2018; BBC News, 2018). The Boston Globe reported that in less than a year Trump employed “invasion,” or some variant, in this context at least thirty-three times (Greenberg & Prignano, 2019). Similar inflammatory rhetoric, suggesting the United States is besieged by large numbers of criminals or subhuman undesirables, has become common fare among other public officials as well (see, e.g., Sessions, 2018; Nielsen, 2018). In reality, border apprehensions are well under the historic highs of two decades ago, and those detained in 2019 mostly consisted of families or unaccompanied children presenting themselves to border officials at the first opportunity in hopes of receiving asylum (Meissner & Gelatt, 2019).

From all appearances, the Trump Administration does not care whether apprehensions are up or down, nor is it sensitive to the severity of the challenges faced by migrants who arrive at ports of entry on the Southern border. Significant political gains follow from keeping the American public focused on the border as an existential threat. Daniel Morales (2013, p.69) has observed that “the fact of declining unlawful entries does not enter political or legal consciousness. . . . The problem is that the apprehensions do not mitigate the threat—they only confirm the rightness of being threatened. In this way, enforcement does little but stoke demand for more border apprehensions.” Government officials engineer, and then exploit, the public’s thirst for regained control of the border. They do this to win elections, justify massive border expenditures, and counteract public outrage over intensely cruel deterrence policies like family separation and extended detention. The “misery strategy,” as a New York Times editorial (2007) once labeled the government’s cost-raising approach to the deterrence of unauthorized

migration, lives on, and with sharper teeth than ever. Today, we have kids in cages (Thompson, 2019; Dickerson, 2019).

B. The Instrumentality of the Siege Narrative

For years, Customs and Border Patrol (CBP) leadership and other government actors have endeavored to persuade citizens that militarization and fortification are needed measures for addressing unlawful immigration (Gulasekaram, 2012, p.158). The Trump Administration has amplified these entreaties. President Trump himself has whipped public anxiety—not just about security, but also about cultural change—to a fever pitch. The siege narrative serves multiple purposes.

First, the image of invaders at the border generates public support for massive fiscal appropriations. Immigration enforcement agencies receive vastly more dollars than any federal law enforcement agency (Meissner & Gelatt, 2019, p.3). Congress allocated \$24 billion in fiscal year 2018 to CBP, Immigration and Customs Enforcement, and the Office of Biometric and Identity Management, an amount that totals 34% more than appropriations for all other federal criminal law enforcement agencies combined (id.). CBP takes the lion's share of this allocation, to the tune of \$16.3 billion in FY2018 for border security efforts (id., p.4), which it uses to prop up decades-old strategies designed to divert migrants to the most dangerous—but least visible—crossing points.

Second, U.S. citizens are bombarded with rhetoric and imagery that ostensibly justifies (or even demands) the government's harsh defensive measures. Family separation and detention, enhanced militarization, and wall-construction are cloaked in the guise of necessity, positioning the government as a savior guarding American citizens against foreign invaders. In

the “Latino threat narrative,” as described by Leo Chavez (2008, p.2), noncitizen migrants from Latin America become “part of an invading force from south of the border” that threatens to “destroy[] the American way of life.”

Hiding the death and suffering of human beings who, as result of official policy, seek safety or work through perilous border entries is a key part of this project. The reason is simple: many citizens might see border policy in a different light if they knew more about the human costs, and citizen outrage can be a critical component in the process of policy change. As anthropologist Jason De Leon (2015, p.4) has explained, the “goal is to render invisible the innumerable consequences this sociopolitical phenomenon has for the lives and bodies of undocumented people.” It works far better, for the government’s purposes, if the deaths of those who perish seeking safety or work are hidden from public view. These entrenched structural forces distort the citizenry’s views of migrants at the border and, consequently, their assessment of the appropriate response (Morales, 2013, p. 65-66).

Finally, the siege narrative, along with the border policies it has naturalized, communicates messages to noncitizens. On the “political stage” that is the U.S. / Mexico border (Andreas, 2009, p. 9), migrants seeking entry come to recognize that their aspirations, their family integrity, and even their lives, are expendable. The desert itself is weaponized, vividly and irrevocably conveying the power exercised by the state over migrant bodies (McGuire & Van Dyke, 2019, p.58; Reineke, 2019, p.148). In Robin Reineke’s words (2019, p.148), “what the deployment of the desert as a weapon actually accomplishes is not to prevent or deter undocumented border crossings, but rather to make such crossings more terrifying and more destructive to migrants than ever before.” When thousands of bodies of migrants are left to

wither and decay in the desert, it marks them and others of their community as “threatening outsiders who are essentially subhuman” (Reineke, 2019, p.150).

In sum, the United States government has proven remarkably adept at marshaling political and financial support for costly and cruel border measures while skillfully hiding the human costs of those policies. But the government is not the only speaker engaged in expressive activity in the region. As the next Part discusses, borderlands are a place of contested imagery, where citizen dissenter groups also participate in story-building work to influence public understanding and assessment of the border, communicating a starkly different set of messages to the government, citizens, and migrants.

II. Citizen Dissent and Construction of Counternarrative at the Border

Although the U.S. government’s policy of funneling migrants into remote deserts has been tremendously successful in hiding the human costs of migration over the last two decades, local activists and humanitarian workers along the border, and particularly in Arizona, have long been shocked by the rising tide of deaths so close to their communities. Notably, Tuscan was the birthplace of the 1980s Sanctuary Movement, a faith-based network that provided legal screening and basic assistance to Central American refugees whose asylum claims were not receiving fair consideration by government officials (Bezdek, 1995, p.928-31). Many of the old activists from that movement, along with a new generation of concerned community members, were galvanized by a desire both to mitigate and to expose the surge in border deaths. A variety of secular and faith-based humanitarian groups have emerged in the region, diverse in some ways but unified by a shared commitment to providing life-saving aid to distressed migrants (Campbell, 2012, p.107-11).

NMD arose as part of this movement. Founded in March 2004 at the Multi-Faith Border Conference, the organization's stated mission is "to end death and suffering in the Mexico–US borderlands through civil initiative: people of conscience working openly and in community to uphold fundamental human rights" (No More Deaths, n.d.a). Although some NMD's participants have engaged in humanitarian and political activism for decades, the group also includes many young members, including one of its charismatic leaders, Scott Warren. With members willing and physically able to undertake arduous treks into the Sonoran Desert, the group has built a reputation for both expanding life-saving access to water and other aid in the most deadly border regions and casting light on the fatal consequences of enforcement policies through body-count mapping, photographs, videos and other forms of counter-storytelling.

A. The Expressive Value of Citizen Dissent at the Border

Organizations such as NMD condemn border enforcement measures that result in harsh suffering or death. Building on the long history of American abolitionists and civil rights activists, those who engage in this border-area work believe that to ignore or accommodate these U.S. immigration policies is tantamount to condoning them. In the view of NMD, individual human beings should not forfeit their lives simply because they seek safety or employment through irregular migration.

A key feature that distinguishes NMD from similar humanitarian groups is the political messaging that runs through all of its work. The group provides humanitarian aid not solely to save lives, but also to convey messages, including its members' belief that citizens have "*the right to provide humanitarian assistance*" to migrants in distress (No More Deaths, n.d.a). Among NMD's explicit tenets and goals, as listed on its website, are the following: "Witnessing and

responding,” “Consciousness raising,” “Global movement building,” and “Encouraging humane immigration policy” (No More Deaths, n.d.a). The organization’s Faith-Based Principles for Immigration Reform urge the government to adopt more humane policies. Specifically, NMD believes that “These tragic and unnecessary deaths must stop. The border blockade strategy has militarized the U.S.-Mexico border, which drives migrants into remote desert regions yet has failed to stem the flow of immigrants into the United States” (No More Deaths, n.d.b). Thus, in parallel fashion with the government, NMD’s activities in the borderlands further both instrumental and expressive goals. Indeed, acts of compassion in this area take on meaning precisely because they stand in such stark contrast with the “powerful and dominant forces of violence and erasure they contest.” (Reineke, 2019, p.151).

NMD’s distribution of water, food, and other aid always does double-duty in the service of a larger policy agenda. The organization’s newsletters, website, and policy statements trumpet the values that lie behind its activities. They also register, in no uncertain terms, the organization’s dissenting view of official government policy. The groups’ publications emphasize the theme of resistance, through the provision of humanitarian aid, to the border enforcement policies that put migrant lives in danger.³

³ The group’s many public statements evincing desire to shift cultural understandings of migrants’ plight and the role of the government in perpetuating death in the desert include the following: “Until the deaths in the desert end, No More Deaths/No Mas Muertes volunteers will walk the migrant trails and give aid to those we meet and those we never see” (Gaffney, 2015). “The light that must continue to shine is active nonviolent resistance to an increasingly oppressive border policy that imperils and terrorizes millions of migrants and immigrants” (No More Deaths, 2017a). “It is the duty of humanitarian aid groups to publicly . . . expose the Border Patrol policies that cause the deaths and disappearances of migrants crossing the U.S.-Mexico border” (Dinsmore, 2016).

Even the minute details of the humanitarian dissenters' borderland activities are often imbued with deeper meaning. For example, take this account of Scott Warren's conduct when he encounters the remains of deceased migrants, as reported by Ryan Devereaux (2019b):

Scott Warren has a checklist he goes through every time he finds a body in the desert. The earthly components are straightforward. Log the GPS coordinates. Take photographs and notes. Scour the brush for more bones. . . . But for Warren, the process doesn't end there. Warren believes that these moments merit an acknowledgement of humanity. And so, after years of recoveries, the 36-year-old has developed a modest ritual for the grim encounters. He goes quiet, lowers himself to the earth, collects the dirt around him, and then lets the soil pour through his fingers. The point, Warren says, is to take a moment to reflect or, as he puts it, "hold space."

Warren's ritual transcends the physical acts of walking in the desert, setting out water jugs, and mapping the locations of the deceased. His solemn conduct, when face to face with the human cost of border policies, communicates. When it is observed by or relayed to others, it is an act that "speaks"—to himself, to perpetrators of those policies, to families of the deceased, and to any observer—more effectively than mere words might. It communicates the deepest of feelings, no less than well-recognized religious ceremonies. It expresses grief and a powerful sense of loss, no less than the flying of a flag at half-mast.

Importantly, compassionate treatment of the dead by humanitarian workers in the desert stands in stark contrast to the message conveyed by the state's neglect of those same migrant bodies. Mistreatment of the dead—including failing to properly care for their remains—is a form of violence, especially when it occurs on a collective scale (Reineke, 2019, p.150-55). Because this kind of violence is symbolic, it can lead to more violence and social unrest. Moreover, such violence, writes De Leon (2015, p.71) is "easily outsourced to animals, nature, or technology." Thus, when civilians engage in discovering, honoring, and recovering the remains of deceased

migrants that state policy leaves uncared-for, such actions communicate messages of dissent and work to shift cultural thinking about the value of such lives.

Indeed, in many contexts, the simple act of sharing water itself takes on expressive qualities. Water frequently appears in the Bible as a synonym for salvation, while baptism rituals are thought to symbolically bestow new life on the recipient (Cooper, 1978). Indeed, the expressive aspects of water and its distribution date back to the origins of the earliest life on Earth.

NMD's provision of water to migrants in the desert parallels this transformative, life-giving imagery. The group views water jugs not just as means of rescue, but as a symbol of the sanctity of life. The sharing of water also signals the right of citizens to provide aid to those in distress. In one video produced by NMD and released on the popular video-sharing site YouTube, which shows CBP destroying water jugs and other supplies left by volunteers in the desert, an activist scrawls "Water is Life" on one of the replacement containers (No More Deaths, 2013). Unmistakably, Border Patrol agents and other government officials are an intended audience for these communications of NMD's beliefs about human dignity and survival, a point driven home by the inscription. Indeed, the author of the message comments in the video that those who intentionally destroy the water are "murderers." By speaking directly, through the water jug inscription, to the perpetrators of policies that the group opposes, and by further sharing that "speech" in a public video with multiple audiences, the expressive content of sharing water is made manifest.⁴

⁴ The symbolism of water at the border is also reflected in the physical memorial created by the family of two migrants who died of thirst in 2019 while attempting to cross the desert. A relative of the deceased explained that "The water is for my sister and my nephew. That they never lack for a drink again." (McDonnell, 2019).

In these contexts, sharing water is symbolic of a distinct American tradition—one of generosity, community, opportunity, and shared struggle. Additionally, the particular circumstances in which NMD attempts to share water communicates the group's belief that the right to save lives is important enough to risk physical difficulty and injury, as well as fines and even jail time.

Sharing sustenance, ceremonially documenting the deceased, exposing border violence, and witnessing Border Patrol abuses, are all acts that send messages. The expression of concern, community, and conscience that NMD intends to convey through the act of sharing water in the desert challenges other citizens' expectations for militarized border policy and toleration of its consequences. Through their acts of kindness, defiance, and risk, the activists in NMD generate thought and debate among U.S. citizens more broadly.

Indeed, there are many audiences for this kind of messaging, both in the United States and abroad. In particular, the humanitarian work communicates to migrants and their families the idea that not all citizens of the United States see their lives as expendable and unworthy of preservation. Meanwhile, U.S. students who partake in NMD's popular alternative-Spring Break program soon grasp the wider symbolic import of the volunteer's humanitarian efforts. One of the organization's newsletters explains that "students come to understand, especially now as anti-immigrant/migrant sentiment permeates our society, how important it is to participate in justice work and to stand in solidarity with people who are victimized by our oppressive and deadly institutional practices." (No More Deaths, 2016).

NMD's work also pushes back against the stock stories generated by the government in order to justify current enforcement policies and to suppress or normalize the violent

consequences of these policies. While these narratives did not originate with the current administration, President Trump has propagated them with renewed vigor. Migrants at the southern border are referred to as “Druggies, drug dealers, rapists and killers” (realDonaldTrump, 2015), terrorists (Trump, 2019), and “Mexico’s worst people” (Devereux, 2019b). Although these tropes may resonate most deeply with nationalists and the President’s far-right base (Iftikhar, 2019), the rhetoric encourages all Americans to think about border policy in ways that dehumanize migrants and justify cruel treatment or even death. In this narrative, migrants are either the invading enemy—requiring violent and severe measures to defend against—or they are subhuman hordes (Cade, 2018, p.480). Either way, they constitute an existential threat to be drastically reduced, if not fully eliminated.

NMD and other humanitarian workers in the desert challenge these narratives, confronting their audiences with new stories. These counter-stories bring the invisible to light. They exchange faceless statistics for individual bodies, bones, and crosses. Observers let other citizens know, for example, that after migrants die in the desert, they first lose their fingers and faces as vultures, coyotes, and insects descend upon them (Devereux, 2019b). Observers let us know what happens when migrants experiencing hyperthermia “begin to cook from the inside, accelerating decomposition after death,” becoming unrecognizable after just a single “summer day in the desert” (Reineke, 2019, p.152-52). These kinds of witnessed, visceral descriptions provide far more powerful tools of persuasion than does a generic, detached statement to the effect that border policies push migrants into dangerous terrain.

NMD and similar groups thus disrupt the government’s imagery, by humanizing migrants—both living and deceased—and calling attention to the human costs and abuses of

border policies through their own expressive counter-activity. In this way, the citizen volunteers in groups like NMD follow through on their felt obligation to push back against the desire for protection and exclusivity that dominates current debate.

Arguably, that counter-narrative would be ineffective without expressive action. Indeed, there may be no other means by which the volunteers can persuasively communicate this message but on the same stage in which border officials orchestrate their own dramaturgical roles and goals. "The speech of reason" simply cannot overcome "autocratic exclusion and the stunning amount of force deployed to vindicate it." (Morales, 2017, p.761). Put differently, citizen dissenters can only hope to re-script the theater of the border that is created by both government actors and migrant crossers through their own dramatic participation.

The efficacy of NMD's expressive activity is also contingent on the location in which it occurs. The borderlands are "content correlated," meaning that the specific attributes of the desert region where unauthorized migration is channeled are critical aspects of the expression that occurs there. (Zick, 2006b, p.588, 618). As First Amendment scholar Timothy Zick (2006b, p.621) has argued, "places are not given but made." Rules, norms, and social processes, Zick (2006b, p.621-22) continues, transform "raw material of undifferentiated space" into expressive place. Unsurprisingly, those in society with the most power, such as government managers, exercise control over the appropriate uses of a space, and thereby have an outsized role in establishing its expressive content. Government officials construct places to reify their power and justify their preferences. In this way, "place manifests power," which can then be used to suppress agitators or particular viewpoints that threaten the status quo. (Zick, 2006b, p.623). Seen in this light, there is no other means by which organizations like NMD might effectively

challenge and transform the government's construction of messaging about unauthorized migration in desert regions except through the creation of new experiences, practices, and memories through regular use of that same setting.

When it comes to changing minds, there is no substitute for the value of experience. As Richard Delgado explained, stories can be more effective than litigation in producing lasting change because they are capable of inflicting permanent damage to a stock story or dominant narrative (1989, p.2429). Counter-stories that are forged through actual experience force the audience to confront the dominant narrative and reevaluate it in light of the new world view presented. Accordingly, counter-stories, when effective, are deeply registered and constructive. "It is through this process that we can overcome ethnocentrism and the unthinking conviction that our way of seeing the world is the only one—that the way things are is inevitable, natural, just, and best—when it is, for some, full of pain, exclusion, and both petty and major tyranny." (Delgado, 1989, p.2439).

In undertaking their arduous border-region treks, leaving out water jugs, and mapping the remains of the deceased, NMD volunteers allow us to begin to understand the meaning of a place we have never been. These kinds of personal, eye-witness accounts are critical modes of resistance and dissent (Lindo, 2018, p.797-98). The stories told by NMD help one grasp the actual reality of the border crossing experience—and the consequences of severe deterrence policies—rather the imagined distant abstraction that would otherwise prevail. We thus gain popular or democratic knowledge from their experiences and expression of those experiences (Lindo, 2018, p.798-800). Through defiance of land managers, border patrol, and federal prosecutors with the goal of saving lives and promoting *the right* to save lives, NMD contests the status quo and

disrupts other citizens' complacency with current border policies. Their stories challenge dominant stories and ideologies. Even just learning about the organization's work in border regions begins to transform the social construction of those regions and their expressive aspects. By galvanizing awareness of, and support for, their project, the humanitarian activists materialize alternative accounts of how humans can or should treat each other. In these ways, they "build consensus . . . and deeper, more vital ethics." (Delgado, 1989, p.2414).

One should note that citizen activists in groups like NMD do not hold a monopoly on the construction of counter-stories in the borderlands. Militiamen and other anti-immigrant restrictionists also engage in a project of story-telling in the region, a point I will return to later. Noncitizens—especially the migrants themselves—also have something to say about the merits of current border enforcement policy. Their stories differ significantly from the stock narrative told within the United States, in viewpoint, content, and tone, and would therefore offer an important contribution to public discussion. But at the same time, it is indisputable that their views are given little weight, on account of their outsider status (Song, 2019, p.53-73; Morales, 2013, p.49). NMD, as a collection of citizen dissenters, thus helps give voice to the silenced—or, at least discounted—voices of migrant outsiders.

Importantly, the group's activists are making and telling stories not only on behalf of the migrants they seek to keep alive, but also on behalf of themselves. This matters, because the volunteers working at the border are also a kind of outsider group, despite their privileged citizenship status. Their values and perspectives differ from the government, and likely from many citizens within the United States. Indeed, this non-mainstream viewpoint is part of the reason their activities have led to substantial government suppression and prosecution. At the

same time, the stories they tell through their activities, reports, and videos help distribute and normalize their outsider perspective, ultimately benefiting both teller and listener (Lindo, 2018, p.797-98). The fact that NMD's activities in this context have multiple messages and multiple audiences only serves to emphasize their significance. Indeed, expressive conduct, like any other form of communication, will often mean different things for the speaker and the audience, but that does not cheapen its value.

To be sure, NMD recognizes that its mission faces overwhelming opposition from the government, and likely a substantial portion of the public. And this is all the truer since the Arizona U.S. Attorney's office began the recent spate of aggressive prosecutions, as I discuss further below. But, for present purposes, the fact that the activists face real risk and opposition as they attempt to provide life-saving aid also reinforces the expressive quality of their conduct, demonstrating in tangible ways the firmness of their conviction that current actions by Border Patrol and other officials are wrong. At the least, NMD exposes the abuses and human consequences of federal policy in this area.

Although knowing their actions to be partly symbolic, activists forge ahead because they believe it to be their right and duty as concerned citizens to protest abusive government policies. If the government is unable or unwilling to live up to the United States' humanitarian values, as NMD believes, conscientious citizens must help implement those ideals, even at risk of criminal prosecution and other costs. Their work therefore can push society towards a more humane conception of immigration enforcement, and, ideally, reshape prevailing norms (Cade, 2018, p.496).

III. Government Suppression of NMD's Expressive Conduct Raises Constitutional Concerns

A. Government Suppression of Citizen Dissenters

NMD's activities have long positioned it in an antagonistic relationship with Border Patrol and other federal officials. In recent years, these conflicts have reached a boiling point. As the organization characterizes it, federal policy has led land managers "away from productive collaboration with humanitarian aid groups and toward a racist national administration that puts pressure on all government agencies to uphold a white supremacist agenda" (No More Deaths, n.d.f). While this language is inflammatory, support can be found for the contention that federal officials are uninterested in a collaborative relationship with members of NMD and desire to suppress their dissenting activities in a variety of ways.

In 2017, for example, land managers hatched a coordinated plan with other federal agencies to directly target humanitarian activities undertaken by NMD (Devereux, 2019a, p.6). The core of the scheme was to change the permitting rules such that any visitors onto Cabeza Prieta (which contains the Ajo corridor now regularly used for unauthorized migration) would first be required to acknowledge that it was unlawful to "abandon" personal property in that area. The specified examples of personal items not to be left behind included water containers, food, blankets, and medical supplies (Devereux, 2019b).

Federal land managers' private communications (obtained through discovery in court proceedings) revealed that a primary motivation behind this abrupt policy change was not to combat littering in a fragile ecosystem, but rather to address internal frustration that humanitarian activists' aid efforts "can help energize folks to hike another day or two," and "thus continue their journey." (Devereux, 2019a, p.8). Outrage over the fact that NMD's attempts to preserve human life might help facilitate irregular migration led at least one federal official to

preemptively deny permits to anyone suspected of being affiliated with the organization. Sidney Sloane, a manager of the Cabeza Prieta Wildlife Refuge, testified in criminal prosecutions of the targeted activists that he had “a number of ways” to detect whether a permit-seeker was working with NMD. In essence, any person triggering his suspicions, however unsubstantiated, was placed on a no-permit blacklist, which was routinely shared with other federal managers. (Devereux, 2019a, p.8-10, 12).⁵ Notably, no individuals other than suspected NMD volunteers were ever preemptively banned from the refuge (Devereux, 2019b).

Tensions between humanitarian activists and CBP have become particularly fraught. January 17, 2018, was a particularly fateful day in this escalating conflict. On that date, NMD published footage exposing the CBP’s destruction of thousands of gallons of water that activists had left for migrants in the scorching desert (No More Deaths, 2018a). The government quickly decided to come “punching back” (Devereux, 2019b). That morning, Scott Warren had traveled to “The Barn”—a humble structure outside of Ajo and just 40 miles from the border—to wait for a student group. The Barn, which serves as a focal point for the organization’s humanitarian efforts, is a gathering point for students and volunteers who come to learn about the harsh reality of the borderlands for migrants. Additionally, migrants who trek through the desert sometimes find temporary aid there. As it turned out, two Central American migrants recently had taken brief refuge. Having learned of their presence, a caravan of Border Patrol agents suddenly rolled up after confirming Warren’s arrival. They stormed the structure with firearms drawn and arrested Warren and the two migrants. A grand jury subsequently indicted the activist on two

⁵ Although one federal official reminded Sloane that it was unlawful to pre-emptively ban individuals from the permitting process, Sloane was apparently undeterred. (Devereux, 2019a, p.12).

counts of harboring and one count of conspiracy to harbor unauthorized noncitizens (Devereux, 2019b). Warren and eight other NMD volunteers were also charged with additional minor offenses for violating access rules and leaving water jugs out for migrants in a National Wildlife Range.

Some humanitarian workers saw the crackdown coming. In the early days of the Trump Administration, then-Attorney General Jeff Sessions flew to Ambos Nogales, Arizona where he warned that federal prosecutors would prioritize criminal proceedings against anyone providing aid to unauthorized noncitizens (Sessions III, 2018; Devereux, 2019b). Activists in the area who heard his speech believed he was directly threatening them. Nevertheless, many carried on in the face of this government intimidation, continuing to register their opposition to border policies through the provision of life-saving aid.

The defendants' primary defense strategy in the criminal proceedings was to admit the conduct but assert the protection of the Religious Freedom Restoration Act (RFRA) (Devereux, 2019a). NMD is an official ministry of the Unitarian Universalist Church of Tucson, and its members attest that their faith compels them to assist other human beings in distress. Nevertheless, Magistrate Judge Bernardo Velasco, who was overseeing the Arizona trials, concluded that the RFRA did not support dismissal of any of the charges. Four defendants were found guilty on the misdemeanor counts. The other four indictments were dismissed by prosecutors early in 2019, in exchange for payment of hefty civil fines (Ludden, 2019).

Scott Warren's first case went to trial in May 2019. Ultimately, the jury was unable to reach a verdict on any of the felony counts, resulting in a mistrial (Shuham, 2019). Federal prosecutors retried Warren on two of the counts in November 2019. This time, Warren was fully

acquitted (Brean, 2019). In a separate bench trial, U.S. District Court Judge Raner C. Collins found him guilty of unauthorized operation of a motor vehicle in federal lands, but acquitted him of the federal littering charges on religious liberty grounds.

Unmistakably, the prosecutions, and related attempts to suppress the volunteers, function as an official rejection of the citizenry's humanitarian impulses, or at least those impulses that challenge accepted narratives around border policy. Indeed, the U.S. Attorney for Arizona who prosecuted Warren warned after the loss that his office would continue to aggressively prosecute those who provide aid to migrants even if "they're doing it out of what I would say (is a) misguided sense of social justice." (Brean, 2019). Legal prohibitions and punishments always express the state's perception of threat, as well as its desire for obedience (Garland, 1990). In Joseph Gusfield's (1981, p.159,181) formulation, the "public drama of law provides the expectations and perceptions of what is normal and acclaimed and what is deviant and condemned." At the border, the government's strength as expressed through an aggressive security program has tended to be politically popular, though this seems to be less true recently with respect to some of the Trump administration's more extreme measures, making any dissenting activity that gains traction all the more threatening.

The humanitarian work undertaken by Warren and other dissenters challenges the dominant social order and the legitimacy of government force employed to sustain it. The federal prosecutions thus are designed to destroy or mitigate that threat. More specifically, when the government prosecutes citizen dissenters who attempt to provide aid to migrants or to make visible those who perish in the desert, it seeks to suppress the counternarrative that migrants are fully human and worthy of our care and compassion (Reineke, 2019, p.154).

These dissent-quashing prosecutions are no isolated occurrence. Distaste for dissent, as a broader milieu in America at this moment, is reflected in and to some extent seeded by President Trump's rhetoric and policies. From the top of the administration on down, the "unmistakable message," as Timothy Zick (2018, p.1444) has written, "is that even minor acts of civil disobedience will be met with severe punishment." Of particular relevance, federal prosecutions of persons suspected of helping noncitizens, including through provision of water or other humanitarian aid, have increased by 30% since 2015 (Matalon, 2019). In fiscal 2018, there were 4,532 such prosecutions (Id.). The U.S. Attorney for Arizona has made clear that his agency's failure to achieve a conviction of Warren (twice) will not deter continued aggressive prosecutions of humanitarian workers (Brean, 2019). Unambiguously, the federal government hopes to suppress and intimidate further humanitarian dissent with the full weight of the law.

Meanwhile, the government affords wide latitude to both privateers traveling to the region to construct unofficial border walls and vigilante nationalists rounding up migrants at gun point (see, e.g., Nathan & Rozensky, 2019; Romero, 2019). Indeed, the efforts of such groups are often welcomed and celebrated by the Trump administration and its close allies, and their leaders enjoy a loud platform from which to defend and promote their restrictionist activities (see, e.g., Hancock, 2019; Schreckinger, 2019). NMD's viewpoint, as expressed through its own border region activities, thus provides a valuable counter-narrative, despite—and because of—the federal government's attempts to suppress it through intimidation, restriction, and prosecution.

Warren's acquittal on the harboring charges has expressive significance too, of course. In light of the fact that Warren took the stand and admitted to the conduct charged by the government, the acquittal signifies that twelve jurors directly rejected the claim that his

humanitarian work should be punished as a crime. In this sense, the outcome represented a nullification of the U.S. Attorney's decision to bring the full hammer of the law down upon the activist (McAdams, 2009, p. 552). Indeed, the jury's message to prosecutors about overreach in this context was clear, though it may fall on deaf ears.

B. Humanitarian Aid as Protected Speech

The previous sections of this Article offered a thick description of the expressive significance of NMD's humanitarian work on the border and of the government's suppression of that conduct. In this final part, I will begin to outline some of the constitutional concerns raised by that analysis. Specifically, because the activists' work conveys broader meaning, its suppression through permitting schemes and criminal prosecution should trigger scrutiny under the First Amendment's Free Speech Clause. A full exploration of the issues raised by application of the First Amendment in this context is beyond the scope of the space remaining in this Essay. Indeed, here I focus my attention on the threshold consideration for First Amendment analysis; namely, why at least some of NMD's humanitarian activities should be classified as "speech." Even this initial review, however, demonstrates that there are significant issues to be weighed by federal officials.

The Supreme Court has long held that "the Constitution looks beyond written or spoken words as mediums of expression." (Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 1995). The autonomy and self-determination values protected by the First Amendment, Robert Post (2011, p.____) has written, "extend[] not merely to the speech of persons but also to the actions of persons." Over the years, the Court has found a variety of expressive conduct to warrant constitutional protection, including cross burning (Virginia v. Black, 2003), flag burning

(Texas v. Johnson, 1989), parading (Nat'l Socialist Party v. Vill. of Skokie, 1977), and much more (see, e.g., Schacht v. United States, 1970; Am. Booksellers Ass'n, Inc. v. Hudnut, 1986).

To be sure, not all conduct is sufficiently expressive to warrant First Amendment coverage. As an initial matter, the actor must have some “intent to convey a particularized message” through the action (Spence v. Washington, 1974). Additionally, a reasonable observer must necessarily interpret the activity as conveying “*some sort of message*” (Holloman ex rel. Holloman v. Harland, 2004). For conduct to be sufficiently expressive, however, the observer need not “infer a *specific* message” (Holloman ex rel. Holloman v. Harland, 2004). As the Supreme Court (Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 1995) has opined, “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.”

Does sharing food, water, or other aid to distressed migrants in the desert, or caring for the remains of those who have perished in its harsh climate, qualify as forms of political or expressive messaging within the meaning of the First Amendment? A combination of factors suggests that in this particular context, at least, such activities do. Relevant factors include, but are not limited to, the following: (1) the tremendous *public concern*, particularly in the border lands, about the deaths of unauthorized migrants in the region; (2) the historical *symbolism* of sharing sustenance with those in need and of honoring and caring for those who have died; (3) the expressive—and contested—significance of the *place* where the citizen dissenters carry out their humanitarian activities; and (4) the *sharing* of these activities and experiences with wider

audiences through videos, reports, newsletters, media articles, and other first-hand accounts, along with direct *messaging* to government agents about the activists' right to provide humanitarian aid, such as through inscriptions on water jugs left in the desert refuges.

A 2018 case from the Eleventh Circuit Court of Appeals helps explain the relevance of each factor. In *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, the Court relied on the First Amendment to find unconstitutional a government ordinance prohibiting a nonprofit from sharing food at no cost with homeless persons in a public park. The Court's ultimate conclusion was that the organization Fort Lauderdale Food Not Bombs (FLFNB) engaged in "peaceful direct action" warranting constitutional protection when distributing food to the homeless in a public park in downtown Fort Lauderdale. Much of the Court's analysis in *Fort Lauderdale Food Not Bombs* is relevant to the constitutional status of NMD's activities.

As the Eleventh Circuit emphasized, the context of activity helps determine its expressive content. "History may have been quite different had the Boston Tea Party been viewed as mere dislike for a certain brew and not a political protest against the taxation of the American colonies without representation." (*Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 2018, p.1241). Indeed, the simple act of presence in a particular place can be expressive (Smolla, 1992, p.26; Emerson, 1970, p.293). "Context separates the physical act of walking from the expressive conduct associated with a picket line or a parade." (*Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 2018, p.1241). In a parade, those who march are "making some sort of collective point, not just to each other but to bystanders along the way." (Hurley, 1995, p.568). Similarly, a "sit-in" to protest a segregated library conveys meaning even though the act of sitting typically lacks expression (*Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 2018, p.1241).

Context explains why nude dancing may receive constitutional protection although nudity itself is not inherently expressive (*City of Erie v. Pap's A.M.*, 2000). As explained below, the Court determined that the relevant contextual factors placed FLFNB's activities on the expressive side of the line for First Amendment purposes.

The first contextual factor relates to the public interest in the particular issue. In *Fort Lauderdale Food Not Bombs*, the Court found that the food-sharing activities were related to "an issue of concern in the community," namely, "the treatment of the City's homeless population." (*Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 2018, p.1242). Elected officials previously had held a public workshop to address concerns about homelessness. The local news had covered the City's homeless population. This local discussion, the Court opined, "provides background for FLFNB's events," and thereby "adds to the likelihood that the reasonable observer would understand that FLFNB's food sharing sought to convey some message." (Id.).

Similarly, the consequences of border policies are issues of particular concern for local communities in southern Arizona and elsewhere along the U.S. / Mexico border. Increasingly, residents throughout the United States are also concerned about border policy and migrants. Borderland activities of various sorts, undertaken by both government and private actors, have long been points of contention and debate. The idea of the border wall itself is highly contentious, representing moral resolve and sovereignty to some, or, to others, a destructive waste of resources. As we have seen, the prevention through deterrence strategy has been costly, in terms of resources expended, the loss of human life, and the rising consternation felt by local residents in border communities.

A second contextual factor from the Eleventh Circuit case is of particular importance in drawing analogies to NMD's work in the border regions. As the Court observed, "it matters that FLFNB uses the sharing of food as the means for conveying its message, for the history of a particular symbol or type of conduct is instructive in determining whether the reasonable observer may infer some message when viewing it." (*Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 2018, p.1243). The Court continued: "the significance of sharing meals with others dates back millennia. The Bible recounts that Jesus shared meals with tax collectors and sinners to demonstrate that they were not outcasts in his eyes. In 1621, Pilgrims and Native Americans celebrated the harvest by sharing the First Thanksgiving in Plymouth." (Id.)

The historical importance of sharing sustenance, including with those that many in society would deem to be outcasts also helps contextualize NMD's conduct as expressive activity. NMD unambiguously undertakes its life-saving activities in the service of broader goals and messages. The activists provide water and other aid to those in distress, not solely to save individual lives, but also to make the collective points that all lives are worth saving and that, as fellow humans, our society has both an obligation and a right to help those less fortunate, regardless of immigration status. *Fort Lauderdale Food Not Bombs* thus provides strong precedent for the recognition that much of NMD's work has deep symbolic value.

The location of FLFNB's conduct was also relevant to the constitutional analysis in that case. In general, government-owned parks tend to be considered public forums for First Amendment purposes (see, e.g., *Berger v. City of Seattle*, 2009). Importantly, though, the Eleventh Circuit did not rest its analysis on that fact alone. Rather, what the Court found especially significant was the fact that the site chosen by FLFNB for its expressive activity was

“known in the community as a location where the homeless tend to congregate” and was a longstanding place of “battleground over the City’s attempts to reduce the visibility of homelessness.” (*Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 2018, p.1238). As the Court of Appeals noted, “[a]lthough the choice of location alone is not dispositive, it is nevertheless an important factor in the ‘factual context and environment’” to be considered. (*Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 2018, p.1243).

Can federal borderlands also be considered part of the First Amendment’s “expressive topography” (Zick, 2006a, p.439)? Although federally owned, with an opportunity for public access through a permitting scheme, desert preserves would not likely be deemed traditional public forums. Nevertheless, it is indisputable that the particularity of a place can be critical to the content and impact of speakers’ expression. The place in which speech or speech acts occur “profoundly impacts expressive message, persuasive efficacy, participation, and symbolic meaning.” (Zick, 2006a, p.439). By engaging in humanizing acts of compassion in the same terrain that federal officials have weaponized against migrants, NMD’s activities engage in a contest over the place’s expressive meaning itself. The complex messaging of their actions would lose their force if engaged in far from the borderland desert. Thus, as in the Eleventh Circuit case, location helps imbue the activists’ work with expressive meaning.

The fourth and final contextual factor to highlight here concerns the audiences of the expressive activities. As the Eleventh Circuit noted, FLFNB’s events are not closed, such that anyone present can partake in sharing meals together. The organization also sets up tables and banners. The visibility of FLFNB’s activities, such that others might witness and reflect on their import in the context of government policies that affect the homeless, contributed to the Court’s

conclusion that “FLFNB’s food sharing events are more than a picnic in the park.” (*Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 2018, p.1242).

While NMD’s parallel humanitarian work occurs in far more isolated locations, much of it takes place in the open, on government lands. Though remote, the dissenters’ gestures are visible to each other, CBP, migrants, students, and any others present in the area. More importantly, however, through publication of their videos, reports, and newsletters, as well as through media attention on their conduct and the government’s responses to it, the activists’ expression disseminates to a wider public, including other citizens throughout the United States. Finally, to a lesser but still relevant extent, the activists sometimes scrawl literal messages on the containers they sets out, directly underscoring the implied expressive message to their audiences that “water is life.” These various means of transmission have increased public awareness of the consequences of border policy for migrants and the work of activists who express opposition to those policies in the desert regions where migrants are channeled. As did FLFNB in the Eleventh Circuit case, NMD has made efforts to galvanize public attention on the issues.

Considering all the contextual factors present in *Fort Lauderdale Food Not Bombs*, the Eleventh Circuit determined that FLFNB’s food sharing conveyed a political message, rather than solely constituting an act of charity. Rather, the organization’s work promotes alternative ideas about poverty and the need for humanitarian distribution of resources. Consequently, the Court held that the City’s application of an ordinance to restrict their food-sharing activities violated the constitution.

In light of this closely related precedent, and the guideposts set forth by the U.S. Supreme Court, NMD’s humanitarian work appears to constitute expressive activity covered by the First

Amendment. A reasonable observer would infer an intent to express ideas through action. Indeed, a reasonable observer would likely understand the activity as expressing concern and care for migrants (and perhaps all humans), and opposition to the federal immigration policies that have created a humanitarian crisis in the border regions, although that level of specificity is unnecessary for purposes of recognizing the activity as constitutionally-covered speech.

Recognizing NMD's humanitarian work as expressive activity promotes values that the First Amendment is intended to safeguard. A primary purpose of the First Amendment is the protection of speech that is unpopular, controversial, or disruptive of the status quo (Shiffrin, 1999, p.10). The Court has opined that speech "may indeed serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." (Terminiello v. City of Chicago, 1949). Dominant groups employ stock stories in order to construct a reality that justifies their privileged (and typically oppressive) position. (Delgado, 1989, p. 2437). In the context of border enforcement, the official rationalizing narrative is that Americans are simply doing what is necessary to protect against invaders and criminals. It is an innocence-preserving narrative in the face of significant suffering. The humanitarian volunteers' aid efforts comprise a critique of this position (Fan, 2008, p.720). They challenge dominant beliefs by unearthing and constructing knowledge that would otherwise be ignored or remain unknown. In this sense, recognizing at least some of the dissenters' humanitarian work as protected speech would further the classic First Amendment value of "promoting diversity of ideas" in public debate (Magarian, 2017, p.xvii).

The First Amendment's protections for speech are also intended to promote individual autonomy and self-definition. Our diverse society cannot always reach a public consensus about

controversial issues; as a result, people with clashing ideas must find ways to co-exist. “The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours.” (Cohen v. California, 1971, p. 24). Thus, free speech is important not just for the pursuit of truth, or as a check on problematic government policy, but because self-expression is a means to more personal objectives such as self-development and moral independence (see, e.g., Sunstein, 1993, p.129-30; Richards, 1999, p.21-28). Professor Magarian (2017, p.xvii) refers to this as the “participation value” of the First Amendment. In Edwin Baker’s (1989, p.5) formulation of this concept, the First Amendment protects “an arena of individual liberty.” Others have described it as a constitutional guarantee of freedom of conscience.

Regardless of how it is characterized, the point is that allowing individuals to engage in self-expressive conduct without unconstitutional government restriction protects our freedom to define ourselves in a diverse society, which in turn promotes social stability. (Emerson, 1963, p.4-5). From this perspective, citizens may undertake humanitarian activities in the desert in order to define themselves in the public sphere as opposed to various government policies, as much as to hope to change policy or sway public opinion. (Baker, 1989, p.53).

This last point provides an opportunity to address potential concerns that the foregoing analysis would also support First Amendment protection for any actions taken pursuant to a set of values, including expressive activities that are repressive or violent, such as the roving militia who round up migrants at gun point or citizens who help construct private border walls. As an initial matter, one must concede that even violent acts in certain contexts undoubtedly can be expressive. The terrorist attacks on the World Trade Center on September 11 were highly

expressive, and no doubt were designed to communicate various messages to various audiences. And yet, such acts would not warrant constitutional protection.

Why do violent acts or unduly coercive speech (or speech acts) fail to receive constitutional protection? The answer has to do with the impact of such speech on others, who have their own individual rights to autonomy and participation in a free society. (Baker, 1989, p.51-73). The First Amendment has always incorporated this kind of balancing of interests. Not all forms of communication are protected by law, even those that are pure speech. Pursuant to long-established doctrine, for example, even mere words that incite violence constitute unprotected speech. It follows, then, that violence itself must be unprotected. Thus, to the extent that the militiamen's expressive activity in the border becomes violent, threatens to impede the bodily autonomy of others, or unduly restrains their capacity to engage in self-development or social participation, that activity would remain unprotected by the Constitution. On the other hand, non-violent, non-coercive expressive activity, even if repressive, may well warrant First Amendment analysis when the context demands it. Complications remain, of course, but the point is that recognizing humanitarian activity in this very particular context as expressive speech covered by the First Amendment does not mean that all expressive conduct, humanitarian or otherwise, must receive constitutional protection.

Because NMD's humanitarian activity is expressive conduct within the ambit of the First Amendment, the government's attempts to restrain or punish it at least demands constitutional analysis. Freedom of speech, after all, is a fundamental right (*Gitlow v. New York*, 1925). Furthermore, these free speech concerns may also combine with, and thereby amplify, the

activists' religious liberty claims (Coenen, 2017, p.1596-99). In the space that remains, I scan the primary considerations, though their full resolution must await further work.

The first set of issues concerns the permitting restrictions that managers use to prevent activists from undertaking their humanitarian work (or to punish them for having already done so). The limitations on access, like the requirement that park visitors not "abandon" personal property such as water jugs, directly collide with NMD activists' desire to make water available to distressed migrants in remote locations. Generally speaking, permitting requirements that limit or prevent speech (or speech acts) must overcome a presumption against constitutionality. (Kellum, 2008, p.392; *Berger v. City of Seattle*, 2009, p.1037). Prior restraint in the First Amendment context is an expansive term, "encompassing any attempt by a public official (including both administrative and judicial orders) to prevent speech in advance of its actual expression." (Tusk, 2003, p.1226).

Furthermore, the permitting scheme has been implemented in a way that suggests viewpoint discrimination. Suspected NMD volunteers apparently were blacklisted on the basis of political disagreement with their activities. If no other permit seekers were preemptively denied access, the government's conduct suggests hostility against particular viewpoints or speakers. This way of administering the permits had a chilling effect on expression—in particular, the humanitarian critique of border policy—which in turn negatively constrains various audiences' ability to observe, process, and react to that expression. This warrants close scrutiny.

If challenged in court, the legitimacy of the state's rationale for the restrictions—as well as evidence of its actual motivations—would be weighed against the strength of the free speech interests at stake (see, e.g., Zick, 2018a, p.1441-42; *United States v. O'Brien*, 1968). To be sure,

the general permitting system that impacts NMD's activities might well be deemed facially reasonable by a Court, since many entrants would not be engaging in expressive activity and there are legitimate safety concerns in the desert. Nevertheless, the expressive concerns on NMD's side of the ledger are substantial. Indeed, there may be no other way that NMD can effectively communicate its messages except through the sharing of water in the precise locations where the policies that it opposes result in human suffering and death. The powerful message of dissent embodied in the activists' work might well lose all of its expressive content if it could not occur in the border regions (Crocker, 2007, p.2588).

Managers have a responsibility to maintain safety in the border regions, but they should take care not to impose severe penalties or prior restraints that go beyond maintenance of the ecosystem or safety and instead suppress expressive humanitarian conduct or that discriminate on the basis of viewpoint. Indeed, some scholars argue that proper government adherence to the First Amendment requires not only the avoidance of improper restriction but active facilitation of diverse voices (see, e.g., Magarian, 2017, p. 1452; Zick, 2018b, p.241). There are certainly means by which a less restrictive approach could be taken. The permitting scheme could be revised, for example, such that it allows volunteers to continue with life-saving aid without prior restraint or civil punishment. Alternatively, the government could maintain restrictions on littering but work out alternative ways for NMD to effectively protest. For example, if activists agree to timely collection of used water jugs, they have not actually "abandoned" personal property.

The criminal prosecutions for providing water and other aid to unlawfully present migrants also raise First Amendment concerns. Because NMD's humanitarian work is expressive

activity covered by the constitution, courts and other federal officials must be more mindful of the consequences of prosecutions that suppress that activity. Criminal penalties imposed on the basis of First Amendment activity are less tolerable than civil sanctions, suggesting the possibility the applicable penal statutes be given narrow readings, or, if that is not possible, be found unconstitutional as applied to the activists in this context (Coenen, 2017).

CONCLUSION

As this Essay has shown, NMD disrupts the government's control of the narrative by humanizing migrants, both living and deceased, and calling attention to the costs and abuses of border policies through their own expressive activity. The activists hope to improve migration discourse and achieve desired legal reforms. But even if that does not occur, they seek to define themselves by publicly registering their opposition to unjust government policies. From the government's perspective, these citizen dissenters are disruptive hecklers at a play, changing the nature of the drama as it unfolds. The humanitarian narrative therefore must be silenced and erased; if the story of the dead disappears, so do the dead and those sympathetic to their plight.

The government must do better to honor the First Amendment, or, if they will not, courts must hold them accountable. Consensus about border policies is not possible, of course, but peaceful co-existence in a diverse society depends in part on allowing disparate viewpoints to emerge, including those that challenge the status quo. Land managers should take the free speech concerns seriously in revising or implementing permit schemes, endeavoring to avoid viewpoint restriction or prior restraint of protected activity. Federal prosecutors should take the First Amendment considerations more seriously when considering criminal charges, as should judges overseeing prosecutions that go forward.

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