

## RHETORIC AND THE CREATION OF HYSTERIA

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*“When you have fifteen thousand people marching up. . .how do you stop these people? ‘You shoot them’ [crowd member shouts] [chuckling, Trump responds:] “[O]nly in the panhandle can you get away with that thing.”*

U.S. President Donald Trump

*“When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re not sending you. They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists.”*

U.S. President Donald Trump

*“The scum of the world is arriving in Brazil, as if we didn’t have enough problems to solve.”*

Brazilian President Jair Bolsonaro

*“With respect to Senegalese, Haitians, Iranians, Bolivians and Syrians, [w]e cannot continue to allow criminals to keep choosing Argentina as a place to commit offenses.”*

Argentine President Mauricio Macri

*“We will coordinate all the institutions that operate on the border: the army, the navy, the air force, Border Security and the General Migration Directorate, so that Dominican law is respected on the border.”*

Dominican President Danilo Medina

*“Many of the criminal gangs in Chile, like those that clone credit cards, are foreigners.”*

Chilean President Sebastián Piñera

### INTRODUCTION

The narrative is “us versus them”: rightful U.S. citizens versus the invading masses. These contrasting depictions have been a national obsession since the election of Donald Trump in 2016 and his unrelenting verbal war against

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immigrants. Trump began his presidential bid by targeting Mexican immigrants, and upon taking office, he made rhetoric concerning tough immigration policies a purported top priority for his administration. Trump used this sort of theater to create nationalistic fervor amongst U.S. citizens and to vilify the so-called invasion at our borders. Indeed, Trump's "us versus them" anti-immigrant political rhetoric likely won him the 2016 presidential election. Thus, this sort of rhetoric can serve as a powerful, if not dangerous, tool. Anthropologist Leo Chavez defines political rhetoric as speech and images "that often rely on emotion-laden messages to 'accuse, denounce and actually harm people. They can also flatter, promote, and benefit those same people.'"<sup>1</sup> "Political rhetoric as part of the social and cultural environment can [thus create] strong emotions."<sup>2</sup> President Trump took full advantage of political rhetoric while stoking fear by referring to Mexican immigrants as drug dealers, criminals, and rapists,<sup>3</sup> and he garnered an almost cult-like following from his supporters.

But former-President Trump was not alone. Across the hemisphere, nationalist leaders have taken a hardline stance on immigration, some even before Trump did. A hemispheric "wall" of rejection is being built to keep the immigrant "other" away. Immigration has accordingly become the civil rights issue of our time, and it has also become the easiest means for domestic politicians to find scapegoats when facing troubling economic and political times. Indeed, in the midst of Special Prosecutor Mueller's investigation, President Trump played the xenophobic "get out of trouble" card and morphed the focus of public and media discourse away from presidential corruption and possible impeachment to the purported impending wave of immigrants at our border. After failing to achieve his 2016 presidential campaign promise of having Mexico pay for his southern border wall and Congress' refusal to fund the 20+ billion-dollar effort, the President declared a national emergency, thereby purportedly empowering him to circumvent the traditional law-making process and giving him unilateral power to fund his pet political project.<sup>4</sup> This drastic

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<sup>1</sup> Leo R. Chavez et al., *Words Hurt: Political Rhetoric, Emotions/Affect, and Psychological Well-Being Among Mexican-Origin Youth*, 228 SOC. SCI. & MED. 240, 241 (2019).

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

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

<sup>4</sup> Olivia Paschal, *Read President Trump's Speech Declaring a National*

measure has been largely limited to issues pertaining to war or natural disaster historically,<sup>5</sup> and President Trump himself admitted the issue was not an emergency in the very same speech he declared the national emergency.<sup>6</sup>

Nevertheless, President Trump's declaration of a national emergency in order to build his border wall was widely seen as an effort to appease his political base and live up to his 2016 campaign promise. It also successfully redirected the national media and the public discourse to the immigrant threat instead of pending impeachment investigations. What Trump is accused of doing is far from new. Professor Griselda Pollock recently observed that Hanna Arendt, in her iconic book, "The Origins of Totalitarianism,"<sup>7</sup> refers to the creation of ideas that reach beyond "national, political, and ethnic elements."<sup>8</sup> In doing so, the politician, or as Arendt describes, the one seeking to become a dictator, uses the frustrations and the feelings of a loss of power by the masses to form a powerful bond against the target of the politician's ire.<sup>9</sup> In the creation of such a pan movement, "[t]here is a single explanation for everything, and before the single explanation, everything else falls away."<sup>10</sup> In the case of Trump, the fervor associated with "Make America Great Again" and "Build the Wall" are vivid current examples of Arendt's explanation. As Griselda Pollock aptly described, Arendt gave us

a portrait of how you produce these isolated people, who then become susceptible to pan ideologies, which give them a place in something [or a sense of belonging to something bigger than what they are individually]. But the place they have is ultimately sacrificial; they don't count for anything;

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*Emergency*, ATLANTIC (Feb. 15, 2019), <https://www.theatlantic.com/politics/archive/2019/02/trumps-declaration-national-emergency-full-text/582928/> [https://perma.cc/ANR4-QXKQ].

<sup>5</sup> Philip Bump, *Declaring a National Emergency to Build a Border Wall is Out of Step with History — and Unpopular*, WASH. POST (Feb. 14, 2019, 4:32 PM), [https://www.washingtonpost.com/politics/2019/02/14/declaring-national-emergency-build-border-wall-is-out-step-with-history-unpopular/?utm\\_term=.8924d31b7997](https://www.washingtonpost.com/politics/2019/02/14/declaring-national-emergency-build-border-wall-is-out-step-with-history-unpopular/?utm_term=.8924d31b7997) [https://perma.cc/X2B5-CHUR].

<sup>6</sup> See Paschal, *supra* note 4.

<sup>7</sup> Zoe Williams, *Totalitarianism in the Age of Trump: Lessons from Hannah Arendt*, GUARDIAN (Feb. 1, 2017, 1:27 PM), <https://www.theguardian.com/us-news/2017/feb/01/totalitarianism-in-age-donald-trump-lessons-from-hannah-arendt-protests> [https://perma.cc/R7D7-6XDT].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

all that counts is the big idea.<sup>11</sup>

The anti-immigrant tenor of the debate leading to the need for a wall, the frustrations relating to it, and its resulting political opportunism are not limited to the United States. Throughout the Western Hemisphere and Europe, political leaders are using similar rhetoric of the immigrant “other” in order to rally the base, deflect criticism, and distract public opinion. This article examines this political phenomenon in the twenty-first century by comparatively evaluating the cases of the United States, the Dominican Republic, Argentina, Brazil, and Chile—five democratic nations in the Western Hemisphere in which immigration became a major issue and immigrants are routinely scapegoated by those in power. In doing so, this article answers the following questions. First, why has immigration become a major campaign and policy issue in these countries since the turn of the century? Second, how and why have these nation-states responded to the perceived ills of immigration by enacting laws and policies designed to curb it and deal with existing immigrants? Third, how have populist politicians exploited xenophobia for political gain and—in doing so—have fueled ultra-nationalism across the hemisphere? And fourth, what has been the role of the United States (as the region’s hegemon) in promoting and/or abetting these anti-immigration policies?

These cases “are classic studies in relative deprivation: the shared sense that the nation and its people were doing great at some point in the past, but are now being brought down and prevented from achieving greatness by conspiring outside forces—immigrants.”<sup>12</sup> Fear of immigrants, apparent “loss of . . . historical privilege,” and an impeding demographic “tipping point” fuel their grievances, and conservative political leaders in each country are benefiting from these developments.<sup>13</sup> “This [work] highlights the policies, legislation, and discourses that have targeted immigrants and

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

<sup>12</sup> Ediberto Román & Ernesto Sagás, *Trump and Caribbean Xenophobia: The United States and the Dominican Republic*, 46 RUTGERS L. REC. 103, 106 (2018-2019), [https://lawrecord.com/files/46\\_Rutgers\\_L\\_Rec\\_103.pdf](https://lawrecord.com/files/46_Rutgers_L_Rec_103.pdf) [<https://perma.cc/5USZ-XF8V>] (authors explain how populist politicians call upon a sense of nostalgia to remind listeners of better days of the past—ones with far less diversity); see also TED GURR, *WHY MEN REBEL* (1970) (observing strong reactions to loss of privilege and how powerful reminders of such loss can become to the listener).

<sup>13</sup> Román & Sagás, *supra* note 12, at 106.

their children, and [there seems to be a] cross-pollination of ideas among xenophobic political movements across the Global North.”<sup>14</sup> While we address in a fair amount of detail the restrictions in countries in this Hemisphere—including Argentina, Brazil, and Chile—we provide slightly more emphasis “on the United States and the Dominican Republic for two reasons. First, the United States plays a major role in influencing politics and society throughout . . . the Caribbean” and “[South] America.”<sup>15</sup> And second, the Dominican Republic serves as a good case study of what happens when these policies are taken to a radical extreme. “We conclude that these ideological and legal developments do not bode well for” the politics of the United States, the Dominican Republic, Argentina, Brazil or Chile as “countries with strong immigrant past[s] and where the achievement of human rights for all has come at a steep cost” in lives.<sup>16</sup> These cases nevertheless

point to a popul[ar] desire . . . to revert to the policies of the past, where human beings were judged by the color of their skin and/or their national origin, leading to thousands of . . . others being systematically denied basic human and political rights by the state and suffering . . . discrimination at the hands of mainstream society.<sup>17</sup>

### **The Hemispheric Creation of Otherness**

Similar legal-cultural-political narratives or forms of rhetoric are at play in our five case studies (the United States, the Dominican Republic, Argentina, Brazil, and Chile), with nationalist politicians following a common script. First, opportunistic politicians will exploit xenophobia for political purposes and fan the flames of nationalism in a call to reassert control of the immigration issue. Once in office, these leaders will enact hardline policies designed to ostracize immigrants and their descendants, strip them of their civil rights, and place them in a position where they can be easily exploited. In essence, a figurative discursive “wall” fuels an enforcement “wall” of laws and policies—and sometimes, even actual walls. Immigrants and their descendants are scapegoated, intimidated, exploited, detained, deported, and in all cases dehumanized. All these measures, sometimes of a

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 108.

<sup>17</sup> *Id.*

semi-authoritarian nature, are justified by appealing to the people's fear of immigrants, of losing status, and of facing an uncertain future both individually and as a nation. Thus, state-sponsored xenophobia becomes a powerful political tool in which the end—saving the nation from the immigrant hordes—justifies the draconian means. Us versus them.

The most important consequence in each of these cases must be highlighted. Despite the above state-sponsored anti-immigrant bluster, the xenophobic rhetoric provides a critical political advantage: in each of these countries these xenophobic efforts seem to be nothing short of political pressure relief valves: 1) to create nationalistic fervor amongst the populous by targeting vulnerable immigrant communities; 2) achieved with little more heated rhetoric coupled with fairly moderate deportation measures to appease the populous; and finally, 3) such efforts provide these politicians with reusable explanations that can be implemented to avoid addressing legitimate issues within the polity. In addition, these ploys have another intended consequence: they are effective in reminding the undocumented of their place in society. Thus, the so-called legitimate populous are relieved the government is “doing something” about the so-called “threat,” and the subjects of the threat are reminded of their vulnerable position and arguably further terrorized into believing someone may be coming for them virtually at any minute. As a result, politicians scapegoat and demonize immigrant communities, and at the same time ease tensions and fears of their country's populations by giving the appearance of crackdowns and eventual mass deportations of the immigrant threat. These leaders also, without virtually anyone realizing it, purposefully mediate the extent of deportations—effectively making the overall numbers of deportations appear to be much greater than they are, thereby making the total numbers of deportations actually insignificant because of the vital economic roles of the undocumented in each country. This phenomenon creates a permanent subject to blame for the country's ills, gives the appearance of a dedicated leadership creating policies to address the problem, and further silences a shadow segment of society. It ultimately and figuratively ousts the immigrant threat by engaging in overtly xenophobic proclamations, coupled with widely publicized anti-immigrant measures, such as threats of immigrant roundups and deportations (also known as raids), and the passage of anti-immigrant laws and policies purportedly aimed at

deporting and refusing the entry of immigrants. However, the overall numbers of the immigrant sectors of society remain largely unchanged. In the end, governmental leaders have easy targets to blame for virtually any societal ills, and these targets can be reused as politically needed. Furthermore, the subjects of the attacks—the immigrant communities in each country—remain in fear and are thus unlikely to ever demand reform or inclusion, and the populous in each land have a target to blame for any of their ills (i.e., poor jobs or low wages), because “immigrants are stealing your jobs.” Added to this political benefit, political opportunists can use virtually any newsworthy event involving immigrants to blame them for the country’s plight, often diverting attention from the true cause of the problem or other political woes. The political leaders thus have something much like the classic Monopoly game’s “get out of jail free” card, but these political pressure relief valves are reusable at the discretion of the political leader.<sup>18</sup>

The realities are that deporting all “unwanted” immigrants in any of these countries is simply not feasible. None of these nations have the resources to carry out such draconian policies. Besides, it would simply be counterproductive from an economic perspective to oust vital cheap labor subdivisions of crucial private economic sectors (e.g., agriculture, construction, and the service economy). This phenomenon arises as a result of each of these nations’ heavy reliance on undocumented workers, legal immigrants, and their second- and third-generation descendants, coupled with vestiges of animus of a racialized past. In spite of hyperbolic and hyped-up pronouncements about “building walls” to stop immigrants from coming in and “deporting all” those that are already in the country, no leader in these countries has actually implemented a policy of mass deportation aimed to eliminate all immigrants. In fact, none of these countries have attempted to pursue anything even close to such extremist policies. For sure, deportations have been stepped up (at times even surpassing previous levels), but mass deportations of the scale that conservative politicians promised, and their political

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<sup>18</sup> See Ted Hessen & Chris Kahn, *Trump Pushes Anti-Immigrant Message Even as Coronavirus Dominates Campaign*, REUTERS (Aug. 14 2020), <https://www.reuters.com/article/us-usa-election-immigration-insight/trump-pushes-anti-immigrant-message-even-as-coronavirus-dominates-campaign-idUSKCN25A18W> [<https://perma.cc/7Q9U-ZLH8>] (explaining that the Trump administration has prioritized anti-immigrant rhetoric and anti-immigrant policies over addressing existing issues related to the coronavirus pandemic).

base hoped for, have not taken place. Rather, the strategy of choice has been to use attrition tactics to induce voluntary self-deportations while maintaining a permanent underclass that would serve as cheap labor and could be easily blamed for any economic or other wrongs in the country. And at the same time, immigrants serve as a sort of political pressure release valve, because what remains is the ever-present possibility of eventual mass deportation should the government need to do so, or at least say so (consequently leaving room for future scapegoating, and at the same time forcing immigrants to exist with the permanent threat of ultimate deportation). In the end, it is not a political strategy to deport immigrants per se, but to render them “deportable.”

### **The U.S. Case**

#### ***The Attack on Undocumented Immigrants***

It should come as no surprise that with Donald Trump winning the presidency, his administration would follow his promise to target and attack immigrants. Indeed, many view Trump’s official 2016 presidential campaign slogan of “Make America Great Again” to be nothing short of code for a promise to reinvigorate and reestablish this country’s white racist past.<sup>19</sup> Indeed, early in 2018, the *New York Times* reported a primary goal of the Trump administration was to “make America white again, and Democrats are too afraid to speak that truth.”<sup>20</sup> This xenophobic administrative emphasis not only led Trump to victory, with many whites frustrated and threatened by changing U.S. demographics as highlighted by the election of Barack Obama, but the anti-immigrant focus also served Trump with a useful diversion to the many investigations and allegations of wrongdoing associated with his administration.<sup>21</sup> In addition to his informal campaign slogan of “Build the Wall,” Trump promised ramped up deportation of undocumented immigrants. “In light of his repeated attacks . . . , many . . . expect[ed] large-scale immigration enforcement and [Immigration and Customs

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<sup>19</sup> See, e.g., Steve Phillips, *Trump Wants to Make America White Again*, N.Y. TIMES, (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/opinion/trump-wants-to-make-america-white-again.html> [<https://perma.cc/UK9F-8JC2>].

<sup>20</sup> *Id.*

<sup>21</sup> See Ediberto Román et al., *Collusion, Obstruction of Justice, and Impeachment*, 45 J. LEGIS. 9, 11 (2018).



Enforcement (ICE)] raids.”<sup>22</sup>

Among [his] other [proposed] immigration enforcement measures, Trump . . . championed: . . . [(1)] mass removal of “criminal aliens,” while identifying Mexican immigrants [themselves] as a group of criminals; [(2)] ending President Obama’s allegedly unconstitutional deferred action program; and [(3)] subjecting Muslim noncitizens to “extreme vetting” when seeking admission into the United States.<sup>23</sup>

Indeed, President Trump pledged to deport “2 to 3 million undocumented immigrants.”<sup>24</sup> And his advisors promised “more vigorous immigration enforcement activities.”<sup>25</sup> While the deportation of millions of immigrants has not come close to occurring, what actually occurred is that Trump ushered in an era of terror against immigrants, including his sadistic policy of Family Separation. He created an environment of utter fear and hate, one where all immigrants were made to feel under threat, but in the end, he never came close to achieving his promise of mass deportation. Perhaps the promise alone was enough for his base? His policies unquestionably resulted in horrendous acts against immigrants and their families.

### **Family Separation**

Any rational observer would likely conclude that of all of Trump’s anti-immigrant efforts, his Zero Tolerance policy that led to the Family Separation tragedy was his most horrific and unforgiving act.<sup>26</sup> Journalist Rachel Maddow characterized the detention of children as the offense “where multiple Trump officials are most likely to spend eternity in cosmic penance

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<sup>22</sup> See Román & Sagás, *supra* note 12, at 108; Ray Sanchez, *After ICE Arrests, Fear Spreads Among Undocumented Immigrants*, CNN (Feb. 12, 2017, 7:10 AM), <http://www.cnn.com/2017/02/11/politics/immigration-roundups-community-fear/index.html> [<https://perma.cc/NH83-6HP7>].

<sup>23</sup> Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 628 (2017).

<sup>24</sup> Amy B. Wang, *Donald Trump Plans to Immediately Deport 2 Million to 3 Million Undocumented Immigrants*, WASH. POST (Nov. 14, 2016, 12:18 PM), [https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-de-port-2-to-3-million-undocumented-immigrants/?utm\\_term=.7b4567313da0](https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-de-port-2-to-3-million-undocumented-immigrants/?utm_term=.7b4567313da0) [<https://perma.cc/NBW4-66UZ>].

<sup>25</sup> Seung Min Kim & Ted Hesson, *Trump Just Getting Started with Immigration Raids*, POLITICO (Feb. 13, 2017, 6:19 PM), <http://www.politico.com/story/2017/02/trump-immigration-raids-234970> [<https://perma.cc/9SZV-HMHP>].

<sup>26</sup> See Román & Sagás, *supra* note 12, at 111.

and damnation.”<sup>27</sup> In fact, the lead author here penned an op-ed calling Family Separation Trump’s “most abominable act.”<sup>28</sup>

Almost immediately upon taking office, the Trump Administration began its efforts to target immigrants. On January 25, 2017, President Trump signed Executive Order 13767, which ordered (i) the constructing of a southern border wall, (ii) the expediting of immigration procedures and determinations, and (iii) the commencement of steps to increase border security and immigration law enforcement.<sup>29</sup> On February 20, 2017, the Secretary of Homeland Security John Kelly drafted an immigration policy on border security for senior Department of Homeland Security (DHS) officials.<sup>30</sup> The Secretary’s memorandum approved the hiring of thousands of additional immigration/border enforcement agents and officers, declared DHS would “no longer . . . exempt classes or categories of removable aliens from potential enforcement,” and would no longer recognize state law privacy protections for those who were neither U.S. citizens nor lawful residents.<sup>31</sup> Then, perhaps as a means to float the idea in order to gauge any reaction, Secretary Kelly informed CNN’s Wolf Blitzer in an interview on March 6, 2017 that DHS was considering separating families at the border as a deterrent to illegal immigration.<sup>32</sup>

Implementation of this goal, however, was delayed. The administration’s focus through 2017 and the first part of 2018

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<sup>27</sup> Ediberto Román & Joshua Killingworth, *Never Forget Family Separation, Trump’s Most Abominable Act*, ORLANDO SUN SENTINEL (July 12, 2020), <https://www.orlandosentinel.com/opinion/guest-commentary/os-op-child-separation-horrific-abuse-20200712-fbou7jzqrrbxfm3u3o36tg5psa-story.html> [https://perma.cc/F3H5-EZZC].

<sup>28</sup> *Id.*

<sup>29</sup> Exec. Order No. 13767, 82 Fed. Reg. 8,793 (Jan. 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-border-securityimmigration-enforcement-improvements/> [https://perma.cc/LH6U-NEZV].

<sup>30</sup> Memorandum from Secretary John Kelly to Senior Department of Homeland Security (DHS) Officials (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-toServe-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-toServe-the-National-Interest.pdf) [https://perma.cc/5UWR-H5DP].

<sup>31</sup> *Id.*

<sup>32</sup> The Situation Room (@CNNSitRoom), TWITTER (Mar. 6, 2017, 2:24 PM) (“DHS Secretary says he’s considering separating immigr[r]ant children from their parents to deter illegal immigration”), <https://twitter.com/CNNSitRoom/status/838877868453064704> [https://perma.cc/6MMR-8S5F].

was apparently redirected to another controversial and legally challenged major national security/immigration policy: the Muslim or Travel Ban. Eventually, the administration redirected its attention to the southern border.<sup>33</sup> Secretary Kelly's 2017 memorandum's goals largely remained in limbo during this period. Things changed dramatically in the early summer of 2018. In May 2018, Attorney General Jeff Sessions declared the U.S. would take a stricter stance on illegal crossings at the U.S.-Mexico border. Under his new Zero Tolerance policy, parents and children were to be separated upon being detained, instead of the prior practice of keeping them together in detention centers.<sup>34</sup> "If you are smuggling a child then we will prosecute you, and that child will be separated from you as required by law," Sessions stated at an event in Scottsdale, Arizona.<sup>35</sup> "If you don't like that, then don't smuggle children over our border."<sup>36</sup>

Under this program, nearly 2000 children were separated in the first two months.<sup>37</sup> These children "[we]re placed in a facility run by the Office of Refugee Resettlement within the Department of Health and Human Services that was actually a converted Walmart."<sup>38</sup>

Children as young as toddlers were held in "tender age" shelters in South Texas.<sup>39</sup> One of the makeshift facilities was previously a warehouse.<sup>40</sup>

An NPR exposé in late July [2018] reported on the ill-fated efforts by the Trump Administration to justify the program before an inquiry by Congress. High-ranking officials from five different agencies that were involved in the family separation program were called to testify before the Senate Judiciary Committee.<sup>41</sup>

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<sup>33</sup> Carrie F. Cordero, Heidi Li Feldman & Chimène Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 432 (2020).

<sup>34</sup> Maya Rhodon, *Here Are the Facts About President Trump's Family Separation Policy*, TIME (June 20, 2018), <http://time.com/5314769/family-separation-policy-donald-trump/> [<https://perma.cc/GS2X-J9XZ>].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Joel Rose, *Lawmakers Question Trump Officials On Family Separation Policy*, NPR (July 31, 2018), <https://www.npr.org/2018/07/31/634396006/lawmakers-question-trump->

One official defended these procedures as simply following the law. In fact, ICE and the Justice Department officials defiantly refused to admit to any mistakes in their practices in detaining children.<sup>42</sup> Congressional leaders such as Sen. Dick Durbin (D-Illinois) did not take kindly to the excuses and refusal to admit wrongdoing by the Trump Administration officials:

. . . “The family separation policy is more than a bureaucratic lapse in judgment,” Durbin said. “It is and was a cruel policy inconsistent with values of this nation. Someone, someone in this administration has to accept responsibility.” Durbin called for Homeland Security Secretary Kirstjen Nielsen to step down over her role in carrying out the policy but Nielsen shows no signs of quitting. She was hundreds of miles away Tuesday at a cybersecurity conference in New York City.

By executive order, the Trump administration purportedly ended separating migrant families in June 2018. Then a federal judge in California ordered the administration to reunite more than 2,500 children who were separated from their parents. “We ought to be disturbed. And I’m disturbed by these allegations,” said [Judiciary C]ommittee chairman [Sen.] Charles Grassley [(R-Iowa)]. Grassley says he understands why the Trump administration took a “zero tolerance” stance against illegal border-crossers. “However, like many well-intentioned policies, there were unintended consequences,” Grassley said.

Those consequences were that parents were separated from their children when they were sent to federal detention, while the children were sent to shelters. The solution, according to Grassley and other Republicans, is for Congress to change the law so that immigrant families can be detained together.

Republicans and the Trump administration also denied reports that migrant children and families [we]re being mistreated. Sen. John Cornyn [(R-Texas)] said he [had] toured some shelters near the border.<sup>43</sup>

Scholars have argued that the Trump administration’s detention of children under the Family Separation policy

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officials-on-family-separation-policy [https://perma.cc/Z76E-B6RV].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

violated both domestic and international law,<sup>44</sup> including the so-called 1987 Flores lawsuit Agreement.<sup>45</sup> The Flores Agreement set forth “a nationwide policy for the detention, release, and treatment of minors” in the custody of the federal government.<sup>46</sup> The Flores Agreement provided the INS “will transfer a minor from a placement under this paragraph . . . (i) within three (3) days, if the minor was apprehended in an INS district in which a licensed program is located and has space available; or (ii) within five (5) days in all other cases . . .”<sup>47</sup>

Decades later, under the current Family Separation controversy, Federal Judge Sabraw of the Southern District of California in 2018 ordered the Trump administration to reunify migrant families separated at the border.<sup>48</sup> Judge Sabraw’s order provided a series of family reunification deadlines: children ages zero to five had to be reunited within fourteen days of the order, and children over the age of five within thirty days.<sup>49</sup> The court emphasized that “the Government has an affirmative obligation to track and promptly reunify these family members.”<sup>50</sup> The failures of the government’s efforts to track and account for and find the separated families quickly came to light.

Shockingly, despite separating thousands of asylum-seeking and migrant families, no one in the government knew where the families were located.<sup>51</sup> While federal “databases had categories for ‘family units,’ and

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<sup>44</sup> See generally, Jonathan Todres & Daniela Villamizar Fink, *The Trauma of Trump’s Family Separation and Child Detention Actions: A Children’s Rights Perspective*, 95 WASH. L. REV. 378 (2020) (discussing how the Trump Administration’s family separation policy contradicts treaties that the United States has ratified, such as the Convention of the Rights of the Child).

<sup>45</sup> See *Flores v. Reno*, No. 2:85-CV-04544-RJK(Px), slip op. (C.D. Cal. Jan. 17, 1997) (Stipulated Agreement) [https://cliniclegal.org/sites/default/files/attachments/flores\\_v.\\_reno\\_settlement\\_agreement\\_1.pdf](https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf) [<https://perma.cc/LS9K-ZXN2>].

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Ms. L. v. U.S. Immigration and Customs Enf’t*, 310 F.Supp. 3d 1133 (S.D. Cal. June 26, 2018) (No. 18-CV00428 DMS (MDD)).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See Nick Miroff, Amy Goldstein & Maria Sacchetti, ‘Deleted’ Families: What Went Wrong with Trump’s Family-Separation Effort, WASH. POST (July 28, 2018), [https://www.washingtonpost.com/local/social-issues/deleted-families-what-went-wrong-with-trumps-family-separation-effort/2018/07/28/54bcdcc6-90cb-11e8-8322-b5482bf5e0f5\\_story.html?utm\\_term=.cd20816214a9](https://www.washingtonpost.com/local/social-issues/deleted-families-what-went-wrong-with-trumps-family-separation-effort/2018/07/28/54bcdcc6-90cb-11e8-8322-b5482bf5e0f5_story.html?utm_term=.cd20816214a9) [<https://perma.cc/9K9J-DDWM>].

‘unaccompanied alien children’ [that] arrive[d] without parents,” no federal government agency had information concerning the whereabouts of “more than 2,600 children who had been taken from their families and placed in government shelters.”<sup>52</sup> “Caseworkers and government health officials had to [review individual] files of all the nearly 12,000 migrant children in HHS custody [in an effort to determine] which ones had arrived with parents, where the adults were jailed,” and then they had to determine how to reunite these families.<sup>53</sup>

Despite the order from Judge Sabraw, the deadline to reunite these children with their families passed, in large part due to the ineptitude and callousness of the Family Separation policy and those responsible for enforcing it. Upon learning of these atrocious administrative failures, Judge Sabraw admonished the government for the harsh effects of the policy, and “for [the government’s] lack of preparation and coordination.”<sup>54</sup> The Judge stated, “[t]here were three agencies, and each was like its own stovepipe. Each had its own boss, and they did not communicate.”<sup>55</sup> Judge Sabraw further criticized the government, finding “[w]hat was lost in the process was the family.”<sup>56</sup> No one evidently knew where these children were, without question; the detained parents did not know where they were, and these innocent children didn’t know where the parents were.<sup>57</sup> Despite these harsh but true observations, the Trump officials stunningly pledged both ignorance and the classic Nuremburg defense of just following then legal orders.<sup>58</sup> According to the government,

the separations [were] a powerful tool to deter illegal border crossings, [but the government] did not anticipate the . . . backlash from separating thousands of families [in order to punish] the parents for crossing the border illegally. . . . The government did not view the families as a discrete group or devise a special plan to reunite them, until [Judge] Sabraw ordered that it be done.<sup>59</sup>

The Trump administration has been rightly scorched and

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52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

condemned for what the world deems a horrific human rights violation, and has indeed been characterized as engaging in torture.<sup>60</sup> (As of late 2018, hundreds of immigrant children remained separated from their parents.<sup>61</sup>) Once again, the Zero Tolerance policy did not lead to mass deportations or massive halts to entry, but it served as a means for the domestic populous to believe something forceful was being done with respect to the impending immigrant threat; and more importantly, it also served as a horrific and unspeakable means to terrorize immigrant and potential immigrant communities living in or seeking to enter the United States. This is especially so when one considers the well-publicized deaths of immigrant children in the custody of U.S. Border Patrol authorities.<sup>62</sup>

Indeed, as the lead author here recently penned,

[w]hen our school children are taught of the wrongs of Japanese internment, and the Native American Americanization movement (where children were separated as well), some may believe such wrongs occurred in a less-enlightened era. We will likely tell ourselves we are far more advanced today. Yet, imagine seeking asylum with your child at the border, and witnessing her ripped from your arms? Imagine not knowing where she is? Imagine learning your child was abused, or died? This is not a Stephen King horror film — it's Trump's America.<sup>63</sup>

### ***The Promised Mass Deportations***

From the onset of his campaign, President Trump promised a tough stance on immigration. Indeed, as mentioned previously, he promised mass deportations.<sup>64</sup> Four years later, these mass deportations did not occur, but what did occur were fairly isolated, but well-publicized immigrant

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<sup>60</sup> See USA: Policy of Separating Children from Parents is Nothing Short of Torture, AMNESTY INT'L (June 18, 2018, 5:53 PM), <https://www.amnesty.org/en/latest/news/2018/06/usa-family-separation-torture/> [https://perma.cc/Y8UM-DLLA].

<sup>61</sup> See Tal Copan, *Hundreds of Immigrant Kids Remain Separated from Parents*, CNN (Aug. 30, 2018, 9:47 PM), <https://www.cnn.com/2018/08/30/politics/family-separations-hundreds-children-separated/index.html> [https://perma.cc/UV4X-A62L].

<sup>62</sup> See Nomaan Merchant, *Deaths of 2 Children Raise Doubts About Border Agency's Ability to Care for Thousands of Minors*, CHI. TRIB. (Dec. 26, 2018, 5:44 PM), <https://www.chicagotribune.com/news/nationworld/ct-children-die-border-patrol-custody-20181226-story.html> [https://perma.cc/W75S-LFWD].

<sup>63</sup> See Román & Killingworth, *supra* note 27.

<sup>64</sup> *Id.*

raids and deportations. What unquestionably did not occur—and what the public is not aware of—is that there was never anything close to the purported deportation of “millions and millions”<sup>65</sup> of undocumented immigrants. For instance, “in the first week of February 2017,” not millions, but hundreds of immigration arrests “marked the first large-scale raid under the Trump administration—and the crackdown was, by all indications, just the start of much more to come.”<sup>66</sup> The emphasis on raids as a tool of enforcement, and perhaps more importantly as a means to pacify the base of the anti-immigrant political right, continued as evidenced by one weekend in 2018 where “[ICE officials] arrested more than 150 individuals in northern California during a three-day immigration enforcement operation.”<sup>67</sup> The Trump administration also received criticism for recently “conduct[ing] dozens of” fairly small “immigration raids at 7-Eleven stores across the country.”<sup>68</sup> Acting ICE Director Thomas Homan said the raids were meant to “send a strong message to U.S. businesses that hire and employ an illegal workforce.”<sup>69</sup> Homan further stated “[b]usinesses that hire illegal workers are a pull factor for illegal immigration and we are working hard to remove this magnet. ICE will continue its efforts to protect jobs for American workers by eliminating unfair competitive advantages for companies that exploit illegal immigration . . . .”<sup>70</sup> After these raids and similar efforts, leading immigration scholar Bill Hing coined this period as the Trump ICE age.<sup>71</sup> What is fascinating, however, is the

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<sup>65</sup> See Wang, *supra* note 24.

<sup>66</sup> See Kim & Hesson, *supra* note 25.

<sup>67</sup> See Román & Sagás, *supra* note 12, at 109; Camila DeChalius, *ICE Arrests 150 Individuals During Immigration Raid in San Francisco*, CONG. Q. (Mar. 1, 2018),

[https://content.next.westlaw.com/Document/11e81b0d41da311e89bf099c0ee06c731/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default](https://content.next.westlaw.com/Document/11e81b0d41da311e89bf099c0ee06c731/View/FullText.html?contextData=(sc.Default)&transitionType=Default) [<https://perma.cc/X4NA-BLXL>].

<sup>68</sup> Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 255 (2018); Camila DeChalius, *Two Democrats Demand Answers on ICE Raids in California*, CONG. Q. (Jan. 22, 2018), [https://www.westlaw.com/Document/11d0fa293ffca11e79bf099c0ee06c731/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cb1t1.0](https://www.westlaw.com/Document/11d0fa293ffca11e79bf099c0ee06c731/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cb1t1.0) [<https://perma.cc/97RG-J3A4>].

<sup>69</sup> DeChalius, *supra* note 68.

<sup>70</sup> *Id.*

<sup>71</sup> See Hing, *supra* note 68, at 225.



realization that the deportation of millions was actually nowhere in sight.

### **287(g) Agreements**

In addition to the ramp up of fairly isolated ICE raids, the Trump administration increased use of former DHS Secretary John F. Kelly's first enforcement memo that pushed for a focus on greater reliance on 287(g) agreements.<sup>72</sup> These agreements essentially<sup>73</sup> "deputize[d] local law enforcement officers . . . as federal immigration agents."<sup>74</sup> These local officers are authorized to "interview, arrest, and detain any person who may be in violation of immigration laws" depending on the terms of the agreement.<sup>75</sup> By the summer of 2017, the Trump Administration substantially increased the number of agreements President Obama had implemented, including "eighteen new agreements in . . . Texas alone."<sup>76</sup> The newly deputized officers would engage in a large range of federal immigration enforcement functions, such as interviewing individuals to determine immigration status, accessing DHS databases, issuing ICE detainers to hold individuals for ICE, bringing charges to initiate deportation proceedings, and making recommendations on detention and bond amounts. In essence, the state or local officer becomes a federal employee.<sup>77</sup>

The 287(g) agreements have been harshly criticized because of their adverse civil rights consequences: . . . "a recurring concern is that state and local law enforcement officers empowered to enforce immigration laws have engaged and will continue to engage in racial profiling targeting

<sup>72</sup> See Amanda Sakuma, *Donald Trump's Plan to Outsource Immigration Enforcement to Local Cops*, ATLANTIC (Feb. 18, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trump-immigration-enforcement/517071/> [<https://perma.cc/T43J-PXWM>].

<sup>73</sup> See Kevin Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 643 (2017).

<sup>74</sup> Sakuma, *supra* note 72.

<sup>75</sup> *Id.*

<sup>76</sup> See Huyen Pham, *287(g) Agreements in the Trump Era*, WASH. & LEE L. REV. 1253, 1253-54; Amy Goodman, *Obama Admin Expands Law Enforcement Program 287(g), Criticized for Targeting Immigrants and Increasing Racial Profiling*, DEMOCRACY NOW (July 29, 2009), [https://www.democracynow.org/2009/7/29/obama\\_admin\\_expands\\_law\\_enforcement\\_program](https://www.democracynow.org/2009/7/29/obama_admin_expands_law_enforcement_program) [<https://perma.cc/3T9S-5FCW>].

<sup>77</sup> *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL (Aug. 23, 2019), <https://www.americanimmigrationcouncil.org/research/287g-program-immigration> [<https://perma.cc/G8X5-J6SU>].

Latinos.”<sup>78</sup> “Unfortunately,” as Bill Hing recently observed, “local enforcement under 287(g) agreements resulted in abuse—most notably racial profiling. Perhaps the most infamous example was the 287(g) [attacks against immigrant communities by] Sheriff Joe Arpaio of Maricopa County, Arizona, who touted himself as ‘America’s toughest sheriff.’”<sup>79</sup>

What is perhaps the most interesting aspect of the 287(g) agreements was their unintended, or perhaps intended, goal: not to assist in mass roundups or collecting of names of those to be deported, but to widely publicize the use of state and local police to serve as an arm of federal immigration enforcement. As scholars like Bill Hing recognize, these efforts are widely publicized and lead to widespread belief in impending racial profiling. The increased use of 287(g) agreements is well known in immigrant communities; they do not result in significant increases in arrests and deportations, but certainly leave the affected immigrant communities with knowledge of the local support of immigration crackdowns. This in turn leaves the immigrant communities in a state of siege, realizing not only federal officials, such as ICE officers, are threats, but all local and state officials serve in a similar threatening function—a frightening example of state-sponsored xenophobia.

### **Secure Communities**

Another tool to invoke fear, which also leads the populace to believe drastic changes in immigrant populations are forthcoming, is the promise to increase the use of secure communities. By an executive order of January 25, 2017, the

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<sup>78</sup> Jennifer M. Chacón, *A Diversion of Attention? Immigrant Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1617 (2010) (analyzing various programs that have increased the cooperation between federal, state, and local governments in immigration enforcement); see also Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2016) (to a similar effect); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011) (reviewing issues that arise with respect to state, local, and federal cooperation in immigration enforcement); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1388-91 (2006) (summarizing various types of state and local laws that limit cooperation with federal immigration enforcement authorities).

<sup>79</sup> See Hing, *supra* note 68, at 281 (citing Joe Sterling, *Joe Arpaio, Once America’s Toughest Sheriff, to Go on Trial*, CNN (June 26, 2017), <http://www.cnn.com/2017/06/26/us/arapaio-trial/index.html> [<https://perma.cc/TW3B-77V9>]).

Trump Administration revived the controversial “Secure Communities” program started and ended during the Obama Administration.<sup>80</sup> This program required local authorities to share fingerprints and other arrest data in an effort to aid in the apprehension of removable immigrants.<sup>81</sup> After an arrest by local authorities, local authorities were instructed to send fingerprints to the FBI.<sup>82</sup> The FBI would in turn share the fingerprints with ICE, and ICE would then review the prints in order to determine if the arrested person was subject to deportation, even if said person had yet to be convicted.<sup>83</sup> The overwhelming number of persons removed during the Obama administration under Secure Communities were noncriminal or low-level offenders.<sup>84</sup>

As Professor Hing observed,

DHS took the strict position on Secure Communities that it could access all fingerprints submitted to the FBI by local law enforcement officials even without the permission of state and local officials. In fact, Secure Communities casts a wide net and scoops up the fingerprints of everyone not born in the United States, whether or not they pose a criminal risk. For example, an abused woman in San Francisco worked up the courage to call police, but she was arrested as well because the police saw a “red mark” on the alleged abuser’s cheek. The charges against her were dropped, but her fingerprints [had already been] forwarded to ICE under the Secure Communities program . . . . [As a result,] she faced deportation.<sup>85</sup>

“Thus, the Secure Communities program represents,” as Professor Bill Hing aptly observes, “a[n] . . . immigration enforcement effort [on steroids with the] roping in [of] state and local law enforcement [on immigration matters].”<sup>86</sup> “As

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<sup>80</sup> See Hing, *supra* note 68, at 290.

<sup>81</sup> *Id.* (citing Tal Kopan & Catherine E. Shoichet, *Key Points in Trump’s Immigration Executive Orders*, CNN (Jan. 26, 2017), <http://www.cnn.com/2017/01/25/politics/donald-trump-immigration-executive-orders/index.html> [<https://perma.cc/WF78-K9ZD>]).

<sup>82</sup> See Hing, *supra* note 68, at 290 (citing Elise Foley, *Obama Faces Growing Rebellion Against the Secure Communities Deportation Program*, HUFFINGTON POST (Apr. 24, 2014), [https://www.huffingtonpost.com/2014/04/24/secure-communities\\_n\\_5182876.html](https://www.huffingtonpost.com/2014/04/24/secure-communities_n_5182876.html) [<https://perma.cc/7VT3-PJ25>]).

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

<sup>84</sup> See Hing, *supra* note 68, at 290 (quoting Bill Ong Hing, *Ethics, Morality and Disruption of U.S. Immigration Laws*, 73 KAN. L. REV. 981, 990-91 (2015)).

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

<sup>86</sup> See Hing, *supra* note 68, at 290; See generally Jennifer M. Chacón, *The*

Professor Jennifer Chacón [similarly observed about] the Obama administration’s operation of the program:

From a federal perspective, the advantage of Secure Communities is that it expands federal enforcement capacity by processing information about local arrest without bestowing the increased enforcement powers on sub-federal agents required by the 287(g) program. At least in theory, if not in practice, discriminatory power concerning enforcement is shifted back to the federal government. The first appropriations for the program were authorized in December 2007 [during the Bush Administration]. Currently, the program is operating in more than 3,000 jurisdictions across the country, including all jurisdictions along the United States-Mexico border.<sup>87</sup>

According to ICE’s website, “more than 43,300 convicted criminal aliens have been removed as a result of Secure Communities” through the second quarter of 2017.<sup>88</sup> The site nonetheless failed to identify how many noncriminal aliens were removed under the revival of Secure Communities.<sup>89</sup>

Unquestionably, the removal of over 43,000 criminal aliens appears to be in most instances a prudent and significant measure, and thus the program is achieving legitimate goals of immigration enforcement. However, as with the other measures mentioned above, they have not led to mass deportations. They have nonetheless achieved a legitimate goal, perhaps unlike the measures discussed above. However, one illegitimate consequence of this measure is to further frighten undocumented communities into believing there are round-ups and active investigations by authorities seeking to deport the undocumented.<sup>90</sup>

### ***Asylum Impediments***

“In addition to the increased use of ICE raids and [heavier reliance on] 287(g) agreements, the Trump [A]dministration” effectively limited who may enter the country by “[making] it more difficult for incoming asylum seekers to establish [the]

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*Transformation of Immigration Federalism*, 21 WM. & MARY BILL OF RTS. J. 577, 603 (2012).

<sup>87</sup> See Hing, *supra* note 68, at 290-91.

<sup>88</sup> *Id.* at 291 (quoting *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF’T (last updated Jan. 3, 2018), <https://www.ice.gov/secure-communities> [<https://perma.cc/8W6W-63L7>]).

<sup>89</sup> See Hing, *supra* note 68, at 291.

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

'credible fear' of persecution [for the purposes of obtaining] political asylum."<sup>91</sup> A dramatic increase in migration to the U.S. by unaccompanied children began in early 2014.<sup>92</sup> As a result, the "United States Citizenship and Immigration Services ('USCIS'), whose asylum office handles asylum cases, revised its [policies on] asylum applicants"<sup>93</sup> seeking to demonstrate a "credible-fear screening standard" in order to obtain asylum.

The language and tone [of the policy changed and the new policy] instructed asylum officers to impose a burden on applicants that surpassed the well-founded fear asylum standard, [which was] established by the Supreme Court in *INS v. Cardoza-Fonseca*. . . . [I]n fact, the actual standard should be more deferential.<sup>94</sup>

As a result of this new emphasis the number of asylum seekers was expected to decline considerably.<sup>95</sup>

Under pre-Trump standards,

if an asylum officer has reasonable doubt about a person's credibility, they should likely find credible fear and allow an immigration judge to hear the question at a full hearing. [The] new guidance issued by the Trump Administration remove[d] previous deferential language,<sup>96</sup> specifically pertaining to] [a]ssessing "demeanor, candor, and responsiveness" to determine credibility also changed. Previous versions recognized that cultural factors, such as language and native trauma, could affect demeanor. The Trump Administration's revisions downplay these factors in assessing credibility, so that asylum officers can cast doubt

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<sup>91</sup> See Román & Sagás, *supra* note 12, at 110 (citing Tal Kopan, *Trump Admin Quietly Made Asylum More Difficult in the US*, CNN (Mar. 8, 2017, 11:29 AM), <http://www.cnn.com/2017/03/08/politics/trump-immigration-crackdown-asylum/index.html> [<https://perma.cc/237K-SWUF>]).

<sup>92</sup> See Hing, *supra* note 68, at 282.

<sup>93</sup> *Id.*; See, generally, US CITIZENSHIP & IMMIGR. SERV'S, ASYLUM DIV. OFF. TRAINING COURSE: CREDIBLE FEAR 1 (Feb. 28, 2014), <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf> [<https://perma.cc/U3AL-8MAZ>] (outlining revised standards for establishing credible fear to be used by Asylum Division Officers); *USCIS Amends Credible Fear Lesson Plans*, CATHOLIC LEGAL IMMIGR. NETWORK (last visited Jan. 18, 2017), <https://cliniclegal.org/resources/uscis-amends-credible-fear-lesson-plans> [<https://perma.cc/QUJ9-PAVS>].

<sup>94</sup> Hing, *supra* note 68, at 282-83.

<sup>95</sup> *Id.*

<sup>96</sup> Tal Kopan, *Trump Admin Quietly Made Asylum More Difficult in the US*, CNN (Mar. 8, 2017), <http://www.cnn.com/2017/03/08/politics/trump-immigration-crackdown-asylum/index.html> [<https://perma.cc/4XLM-GNDJ>].

on the credibility of a person who is suffering from stress.<sup>97</sup>

Once again, the result of such efforts is to make the U.S. a less welcoming place for undocumented immigrants, but to also to remind current undocumented immigrants of their precarious position within society, notwithstanding the fact that domestic economic forces continue to create a demand for such immigrants.<sup>98</sup>

### ***Attacks on U.S. Citizens***

#### Denaturalization

Like this country's previous attacks during the middle of the twentieth century, Trump's ire was not limited to immigrants. The Trump's administration's xenophobia also focused on U.S. citizens that were formerly immigrants. Indeed, the Trump administration, in its anti-immigrant fervor, even went after newly recognized citizens as part of efforts to denaturalize immigrants that were recently naturalized as U.S. citizens. The U.S. Citizenship and Immigration Services, the federal agency responsible for citizenship applications, announced a program push, known as Operation Janus, which focused on identifying and revoking the citizenship of individuals who obtained such citizenship fraudulently.<sup>99</sup> The goal of Operation Janus was to denaturalize those who were suspected of lying or otherwise engaging in identity fraud during citizenship applications. At first blush, the focus of this effort—to uncover and deter fraud—seemed prudent, especially when one considers the statements of USCIS Director L. Francis Cissna: “We finally have a process in place to get to the bottom of all these bad cases and start denaturalizing people who should not have been naturalized in the first place. . . . What we're looking at, when you boil it all down, is potentially a few thousand cases.”<sup>100</sup> The apparent basis for the initiative stemmed from

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<sup>97</sup> Hing, *supra* note 68, at 282-83.

<sup>98</sup> See EDIBERTO ROMÁN, *THOSE DAMNED IMMIGRANTS: AMERICAS HYSTERIA OVER LATIN AMERICAN IMMIGRATION* (2013).

<sup>99</sup> See Amy Taxin, *U.S. Launches Bid to Find Citizenship Cheaters*, AP NEWS (Jun. 11, 2018), <https://apnews.com/1da389a535684a5f9d0da74081c242f3https://apnews.com/1da389a535684a5f9d0da74081c242f3> [https://perma.cc/ND2M-GFJL]; Masood Farivar, *Indian National First to Lose Citizenship Under “Operation Janus,”* VOA NEWS (Jan. 9, 2018, 4:40 PM), <https://voanews.com/usa/indian-national-first-lose-us-citizenship-under-operation-janus> [https://perma.cc/24BH-VCP9].

<sup>100</sup> See Taxin, *supra* note 99.

a 2016 Department of Homeland Security audit finding 858 cases of immigrants mistakenly granted citizenship.<sup>101</sup>

In light of what may be understandable skepticism associated with the motivations behind Operation Janus, an examination of the history of domestic revocations of citizenship as well as the number of cases creating the incentive for the programmatic emphasis would be reasonable. The statistical basis for a governmental effort that—by its own account—will cost over \$207 million and will require the hiring of more than 300 new Homeland Security Investigation agents and scores of support staff leads to one simple conclusion: the Janus Push was unwarranted.<sup>102</sup> Indeed, as noted by Ben Herzog,

[s]tripping away citizenship and all the rights that come with it is usually associated with despotic and totalitarian regimes . . . . In contrast to totalitarian regimes that tend to denaturalize their opposition and have few legal barriers against this action, I expected that the constitutional-democratic political institutions in the United States would have positioned it as the least likely state to strip away citizenship.<sup>103</sup>

Indeed, revocation of citizenship in this country has typically only occurred in the rarest of cases, such as those involving war criminals, child rapists, and terrorist funders. During the first half of the twentieth century, the U.S. government denaturalized citizens “suspected of Communist sympathies or fighting in foreign wars.”<sup>104</sup> However, in “a landmark . . . decision in 1967, *Afroyim v. Rusk*,”<sup>105</sup> the United States Supreme Court “put an end to the practice.” According to Professor Amanda Frost, “[t]he court made it clear that denaturalization was limited.”<sup>106</sup> Indeed, in *Maslenjak v.*

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<sup>101</sup> See Farivar, *supra* note 99.

<sup>102</sup> See Adiel Kaplan, *Miami Grandma Targeted as U.S. Takes Aim at Naturalized Immigrants with Prior Offenses*, MIAMI HERALD (July 9, 2018, 8:35 AM), <https://www.miamiherald.com/news/local/immigration/article214173489.html> [https://perma.cc/7JW5-RS7F].

<sup>103</sup> BEN HERZOG, REVOKING CITIZENSHIP 2, 5 (2015).

<sup>104</sup> Denise Simon, *Jeff Sessions' DoJ and Operation Janus*, FOUNDERS CODE (Jan. 10, 2018), <https://founderscode.com/jeff-sessions-doj-operation-janus/> [https://perma.cc/GS98-B99N].

<sup>105</sup> *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

<sup>106</sup> Farivar, *supra* note 99.

*United States*,<sup>107</sup> the U.S. Supreme Court “barr[ed] the government from denaturalizing citizens for making ‘non-material’ false statements on their citizenship applications.”<sup>108</sup>

However, the natural and inevitable retort to the attacks on Operation Janus is that the program does not address the historical means for revoking citizenship—Janus targets cases where citizenship was granted due to fraudulent acts by the applicant. Thus, Janus merely addressed a fundamental requirement of all legal arrangements and contracts: that they not be entered by fraud. Accordingly, advocates of Janus would likely dismiss criticisms as unwarranted because the initiative will thwart a national crime (and fraud) threat. Examining the known data, and the basis for spending the hundreds of millions of dollars on this effort, Janus strongly suggests, in its present form, a huge waste of money. From 1990 to 2017, for instance, throughout the U.S. only 305 denaturalization cases were pursued, an average of 11 per year.<sup>109</sup> Thus, according to its own data, the federal government redirected over \$200 million dollars of the U.S. Immigration and Customs Enforcement (ICE) budget to address 11 cases per year. And even with the renewed emphasis on the issue, “the Justice Department filed 25 civil denaturalization cases . . . according to a department spokesman.”<sup>110</sup> The DHS “coordinated with multiple DHS components to form a working group to address the problem of aliens from special interest countries receiving immigration benefits after changing their identities and concealing their final deportation orders.”<sup>111</sup>

Michael Bars, a USCIS spokesperson, observed, “[n]obody who obtained US citizenship by deliberately assuming a false identity will be surprised to learn they are being referred to the

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<sup>107</sup> See also Alexander J. Segal & Eliza Grinberg, *Maslenjak v. United States: False Statement Must be Material In Order to Lead to Denaturalization*, MYATTORNEYUSA, <http://myattorneyusa.com/maslenjak-v-united-states-false-statement-must-be-material-in-order-to-lead-to-denaturalization> [https://perma.cc/5KAP-A6KX].

<sup>108</sup> Farivar, *supra* note 99.

<sup>109</sup> See Taxin, *supra* note 99.

<sup>110</sup> See Simon, *supra* note 104.

<sup>111</sup> *Id.*



Justice Department for removal proceedings.<sup>112</sup> . . . USCIS screens for deliberate acts of fraud relating to the use of false identities.<sup>113</sup> Fears of identity fraud stem from a Homeland Security Inspector General report which found that 858 immigrants who were granted citizenship had been deported under a different name.<sup>114</sup> The U.S. Justice Department found blame with the practice of not fingerprinting all immigrants and locking them into an identification system.<sup>115</sup> “During the Obama administration, Immigration and Customs Enforcement worked to plug over 300,000 fingerprints into the system for later use when reviewing the application of citizens.”<sup>116</sup> CNN reported that “2,500 cases [were] highlighted for review, some of which [were] directed to the Justice Department for further inspection.”<sup>117</sup> “What we’re looking at, when you boil it all down, is potentially a few thousand cases.”<sup>118</sup> “Ur Jaddou, former chief counsel for the USCIS, was not nearly as optimistic about the possibilities.<sup>119</sup> The Trump administration approached the citizenship issue with a ‘troubling’ amount of excitement, she [said], which could indicate an ulterior motive.”<sup>120</sup>

Once again, despite the fanfare and bluster of a crackdown, even at optimum levels, Operation Janus and related activities had a fairly small impact in terms of real numbers at thwarting immigration. What they did was to ideally identify some that committed fraud and should be deported. But perhaps an intended consequence will be to

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<sup>112</sup> Nicole Rojas, *New USCIS Office Aims to Strip U.S. Citizenship from Naturalized Americans For Lying On Application*, NEWSWEEK (June 13, 2018), <https://www.newsweek.com/new-uscis-office-aims-strip-us-citizenship-naturalized-americans-lying-975484> [<https://perma.cc/Y8VR-6ECM>].

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

<sup>114</sup> U.S. DEPT OF HOMELAND, SEC., OFFICE OF THE INSPECTOR, GEN., OIG-16-130, POTENTIALLY INELIGIBLE INDIVIDUALS HAVE BEEN GRANTED U.S. CITIZENSHIP BECAUSE OF INCOMPLETE FINGERPRINT RECORDS 2 (Sept. 8, 2016), <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-130-Sep16.pdf> [<https://perma.cc/GXR3-2UGQ>].

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

<sup>116</sup> Alexa Lisitza, *Trump Administration Continues Attack On Immigrants With Increased Efforts To Denaturalize*, CNN (July 6, 2018), <https://blavity.com/trump-administration-continues-attack-on-immigrants-with-increased-efforts-to-denaturalize-us-citizens?category1=politics&subCat=news> [<https://perma.cc/RES7-AEKA>].

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

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

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

<sup>120</sup> *Id.*

remind even recently naturalized U.S. citizens that their status may become subject to question. Such a possibility unquestionably may have a chilling effect for not only recently naturalized citizens; it may also have an impact on all others considering becoming citizens.

Inexplicable Denial of Passports to Hispanic U.S. Citizens

In the summer of 2018, the *Washington Post* reported on “a dramatic shift in both passport issuance and immigration enforcement” at the Texas-Mexico border.<sup>121</sup>

In some cases, passport applicants with official U.S. birth certificates were being jailed in immigration detention centers and entered into deportation proceedings. In others, they were stuck in Mexico, their passports suddenly revoked when they tried to reenter the United States. . . . [T]he Trump administration [thus increased efforts] to reduce both legal and illegal immigration, [and] the government’s treatment of passport applicants in South Texas [evidently] shows how U.S. citizens are increasingly being swept up by immigration enforcement agencies. . . . After the publication of the *Washington Post* report on Aug. 29, the State Department challenged the findings and issued data on Aug. 31 suggesting passport denials were at the lowest level in years.<sup>122</sup>

Congressman Joaquin Castro (D-Texas) said the government’s policy, reported by *The Washington Post* . . . , is part of a systemic anti-Hispanic bias that has guided the [Trump] administration’s anti-immigration policy and suggested they would propose legislation to address the policy. “This represents an unacceptable targeting of people based on their ethnic heritage. It violates the Constitution. It should be investigated by Congress in both chambers, and we should take action to stop it as soon as possible through legislation if necessary,” said [Castro].<sup>123</sup>

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<sup>121</sup> Kevin Sieff, *U.S. is Denying Passports to Americans Along the Border, Throwing Their Citizenship into Question*, WASH. POST. (Sept. 13, 2018), [https://www.washingtonpost.com/world/the\\_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5\\_story.html?utm\\_term=.4b7acbfd3232](https://www.washingtonpost.com/world/the_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5_story.html?utm_term=.4b7acbfd3232) [https://perma.cc/TG2S-LYHU].

<sup>122</sup> *Id.*

<sup>123</sup> Kevin Seiff, *Democrats Call for Investigation into Reports of US Citizens Being Denied Passports over Alleged Birth Certificate Fraud*, INDEPENDENT (Sept. 2, 2018), <https://www.independent.co.uk/news/world/americas/us-immigration-passports-denied-citizens-south-texas-state-department->

According to a subsequent report, it was suggested “[h]undreds, perhaps thousands of people with birth certificates showing they were born in south Texas [were] denied passports – or they’re having them revoked.”<sup>124</sup> According to this report, the citizenship status of this group, which were often of Hispanic descent, was “challenged because the State Department doesn’t believe they were really born in the U.S.”<sup>125</sup> Similarly, *The Hill* reported, “The Trump administration is reportedly accusing hundreds of Hispanics living along the U.S.-Mexico border of having fraudulent birth certificates, stripping some of their passports and throwing their citizenship into question.”<sup>126</sup>

Thus, time and time again we see in the recent U.S. context, the claim by this country’s leaders, especially from the new anti-immigrant political right, to rid the country of the immigrant threat. To even make “America Great Again.” Yet, while these are draconian measures, and even indefensible when one considers the family separation measure, in the end these measures affect hundreds if not thousands of individuals, but they do not live up to the pledge to deport “millions of millions,” as Trump promised to do upon his rise to the presidency. Instead, what is left is nothing short of further oppression, manipulation, subordination, and a permanent silencing of a country’s underclass without any real possibility of changing their circumstances to anything coming close to full or meaningful incorporation into society. Perhaps the most significant aspect of this exploitation is that state-sponsored xenophobic measures have the effect of silencing and chilling reform efforts. Indeed, not long before President Trump’s election, immigrant youth in the United States, also known as “Dreamers,” became central participants, and indeed public figures, in national immigration debates.<sup>127</sup> After the reemergence of the

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a8520961.html [https://perma.cc/XT49-5VCH].

<sup>124</sup> Rhonda Fanning, *Thousands Of U.S. Citizens in South Texas Have Been Denied Passports*, TEX. STANDARD (Aug. 30, 2018), <https://www.texasstandard.org/stories/thousands-of-u-s-citizens-in-south-texas-have-been-denied-passports/> [https://perma.cc/Q22F-AB38].

<sup>125</sup> *Id.*

<sup>126</sup> Megan Keller, *US Cracking Down on Citizenship for Hundreds of Hispanics Along Border: Report*, HILL (Aug. 29, 2018 6:44 PM), <https://thehill.com/business-a-lobbying/404274-us-increasingly-denying-passports-to-people-suspected-of-having> [https://perma.cc/58EY-4QG9].

<sup>127</sup> *See, e.g.*, President Barack Obama, Remarks by the President in

xenophobes under Trump, immigrant advocates are certainly still active, but their impact and visibility is largely dormant in national debates and related media attention. Indeed, led by the activism of Dreamers, it appeared as if the passage of some immigration reform, with the eventual granting of pathways to citizenship for Dreamers and others, seemed inevitable. Afterwards, a noteworthy consequence of the Trump administration's anti-immigrant measure is that one hears plenty about "building the wall," but very little about what conservatives have coined as "amnesty for the undocumented."

"The Trump administration's attack on immigrants is far from new in this country. Indeed, [this country] has a long history of attacking immigrants;"<sup>128</sup> a history of welcoming Mexican immigrants "when economic conditions necessitated it, but . . . reject[ing them] when domestic economic conditions or national security matters created an environment of fear and/or cynicism with respect to immigrants. . . . [O]ur domestic narratives concerning immigra[nts] changed," and often did so quickly, and "immigrants became unwelcomed and were considered to be threats [in our land]."<sup>129</sup>

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Immigration Townhall—Miami, FL at Florida International University (Feb. 25, 2015), transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2015/02/25/remarks-president-immigration-town-hall-miami-fl> [perma.cc/2HPP-YBAB]; President Barack Obama, Remarks by President at Univision Townhall at Bell Multicultural High School (Mar. 28, 2011), transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall> [https://perma.cc/7UBC-TPE2]; Office of the White House Press Secretary, Remarks by President at Univision Townhall, available at <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall> [https://perma.cc/6LKH-3BTZ].

<sup>128</sup> See generally, LAWRENCE H. FUCHS, *THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIL CULTURE* 57 (1990) (noting that during the period from 1880 to 1920, "native-born workers worried about the negative effect that immigrants would have on wages and working conditions"); JOHN HIGHAM, *SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA* 121 (Rev. ed. 1984) (1975) (revealing anti-Jewish sentiment existing in America at least as far back as the 1840s); JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* 9 (1955) (asserting "the xenophobia of the 1850s included anxiety over the threat of immigrant radicals to American institutions") <https://hdl.handle.net/2027/heb.00398> [https://perma.cc/F4AE-SZYS]; BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY: 1850-1990* 21 (1993) (contending Chinese miners on the West Coast "encountered fierce racial animosity in the 1840's"); KEVIN R. JOHNSON, *THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS* 13 (2004) (exposing the "long history" in the United States of poor treatment of racial minorities, especially noncitizen minorities).

<sup>129</sup> See Román & Sagás, *supra* note 12, at 112-13.

The accounts here serve to demonstrate how . . . then-current negative narratives . . . shaped policies that were quite damning on the immigrant community, often leading to policies that included attempts [at] closing the border, as well as mass exodus campaigns such as the infamous Operation Wetback of the 1950s. Yet, these policies, no matter how draconian, did not address undocumented immigration, particularly when certain sectors of the economy, such as agriculture, were still desirous of immigrants.<sup>130</sup>

Somewhat related to the need to highlight the fact that the current assaults are far from new, the accounts set forth in the subsequent pages demonstrate that the tried-and-true approach of demonizing and scapegoating the immigrant community has historically proven to be ineffective. Thus, our nation needs to learn from past practices and not merely repeat ineffective measures at addressing the issue.<sup>131</sup> One needs to appreciate what is now occurring with respect to Latinx undocumented workers reflects over a century-long saga of the United States welcoming immigrants in times of economic boom, but quickly and easily, for that matter, demonizing them and undertaking efforts to immediately remove them during times of economic strike or other periods of economic insecurities, such as times of war. Indeed, historians have documented “a long history of inviting undocumented workers from [South and Central America] when market needs call for cheap labor.<sup>132</sup> Such invitations “[we]re inevitably followed by domestic efforts to oust [these individuals] once the formerly valuable workers are deemed unnecessary due to a perceived decline in demand for such labor, or when unrelated events lead to isolationist sentiments in the country.”<sup>133</sup> During the late nineteenth century and throughout the twentieth century[,] there were several periods of government sponsored efforts to promote Latinx “worker immigration, only to be

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<sup>130</sup> See *Id.* at 113.

<sup>131</sup> See generally GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996) (explaining how the Constitution relates to immigration law and aliens in general). This work also noted that in the late 1800s, “[e]ven the criteria for the deportation of alien residents from the United States received no constitutional scrutiny from the courts;” See Román & Sagás, *supra* note 12, at 113.

<sup>132</sup> See Román & Sagás, *supra* note 12, at 113; See Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (1994) (identifying the typical abuses against such workers, including unpaid wages and poor working conditions).

<sup>133</sup> Román & Sagás, *supra* note 12, at 113.

followed by harsh governmental undertakings aimed [at] deport[ing] the very same worker groups when the economy changed or perceived crises provoked mass hysteria.”<sup>134</sup>

Asian immigrants in particular experienced times when they were initially welcomed or invited to meet the country’s agricultural demands or build this land’s infrastructure or industries.<sup>135</sup> Subsequently these same once-valued workers were all-too-often seen as unneeded and even a threat, and efforts were made to deport them, frequently after not being paid the[ir] promised wages.<sup>136</sup>

Perhaps the most insidious example of the revolving door for immigrants of color arose in the late 1800s, when federal, state, and local governments initially invited and welcomed Chinese immigrant workers, but then later sought to exclude and deport them. The change in attitude toward Chinese workers led to Congress’s passage of the Chinese exclusion laws,<sup>137</sup> which sought to halt all forms of Chinese immigration.<sup>138</sup> Ultimately, the United States Supreme Court, citing national sovereignty-related concerns, refused to overturn these xenophobic laws. In the two leading decisions

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<sup>134</sup> This country’s historical treatment of Latinx workers from South and Central America reminds this Author of the Clash song “Should I Stay or Should I Go,” with a slight twist. Instead of questioning whether anyone should stay or go, this country has repeatedly begged immigrant workers to “please stay” only to be followed shortly thereafter with a scream of, “now go!” THE CLASH, *Should I Stay or Should I Go?*, on COMBAT ROCK (Epic Records 1982).

<sup>135</sup> See RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 111 (1989) (chronicling the passage of anti-Chinese legislation in the 19th century).

<sup>136</sup> *Id.* at 116-17 (describing the battle Chinese miners faced in living on the wages they earned after having to pay for the necessities of life in the United States as well as the “foreign miner’s tax”). Interestingly, the 1879 constitution of the State of California stated: “The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the state, and the legislature shall discourage their immigration by all the means within its power. Asiatic coolieism is a form of human slavery, and is forever prohibited in this state, and all contracts for coolie labor shall be void.” CAL. CONST., Art. XIX, §4 (repealed 1952).

<sup>137</sup> As I and other authors have noted, during the period of anti-Asian immigrant efforts, the U.S. Supreme Court decided the infamous Dred Scott Case (Scott v. Sanford, 60 U.S. 393 (1856)), which similarly concluded that African Americans were excluded from eligibility for citizenship. 60 U.S. at 406; see also Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 576 (2006) (describing the Supreme Court’s endorsement of “unequal treatment and inferior status of various groups that should have been considered citizens”).

<sup>138</sup> Román, *supra* note 137, at 602.

on the matter, *Fong Yue Ting v. United States*<sup>139</sup> and *Chae Chan Ping v. United States*, the notorious *Chinese Exclusion Case*, the Court refused to overturn the exclusionary efforts.<sup>140</sup> The Chinese Exclusion decision actually referred to the “obnoxious Chinese,” concluding “[t]he power of exclusion of foreigners . . . [is] an incident of sovereignty belonging to the government of the United States, as . . . part of . . . [its] sovereign powers delegated by the Constitution. . . .”<sup>141</sup> In *Fong Yue Ting*, the Court not only supported these types of exclusions, it recognized an absolute power of the federal government over immigration “[t]he right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”<sup>142</sup>

Congress eventually extended their exclusionary laws to other Asians. For instance, the “Gentleman’s Agreement” between the United States and Japan in 1907 and 1908 “greatly restricted immigration from Japan.”<sup>143</sup> The Immigration Act of 1917 expanded Chinese exclusion to prohibit immigration from the “Asiatic barred zone,”<sup>144</sup> which also included the entire Middle East.<sup>145</sup> In fact, the 1924 Immigration Act established the infamous discriminatory national origin quota system and allowed for the exclusion of noncitizens ineligible for citizenship, significantly affecting Asians who were prohibited from naturalizing.<sup>146</sup> The Immigration Act of 1924 had the effect of imposing strict national origin quotas on southern and eastern Europeans

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<sup>139</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893).

<sup>140</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

<sup>141</sup> *Id.* at 609; see also HING, *supra* note 128, at 25 (noting the Court’s refusal in the Chinese Exclusion Case of 1889 to overturn the Scott Act).

<sup>142</sup> *Fong Yue Ting*, 149 U.S. at 707.

<sup>143</sup> ROMÁN, *supra* note 98, at 114.

<sup>144</sup> Act of Feb. 5, 1917, ch.29, §3, 39 Stat. 874, 875-76 (repealed 1952); see also HING, *supra* note 128, at 32 (stating that the Act extended the Chinese exclusion laws to all other Asians).

<sup>145</sup> See Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 14 n.83 (1998) (explaining that the Asiatic barred zone “include[d] the East Indies, western China, French Indochina, Siam, Burma, India, Bhutan, Nepal, eastern Afghanistan, Turkestan, the Kirghiz Steppe, and the southeastern portion of the Arabian Peninsula”).

<sup>146</sup> Immigration Act of 1924, ch.190, §11(d), 43 Stat. 153, 159 (repealed 1952). For numeric quotes established by the Act, see *Who Was Shut Out?: Immigration Quotas 1925-1927*, HISTORY MATTERS, <http://historymatters.gmu.edu/d/5078> [<https://perma.cc/JF6W-RY7Z>] (last visited Sept. 5, 2008).

because of the belief that those immigrants were racially inferior. Scholars have argued that, through the quota system, Congress sought to restore the racial demographics of the United States as of 1890, a time prior to the significant migration “of southern and eastern European immigrants.”<sup>147</sup> The Immigration Act of 1924 also established the National Origins System, which restricted annual immigration from foreign countries to 2% of the country’s population living in the United States, as determined by the 1890 Census.<sup>148</sup> Because most of the foreign-born immigrants in the United States at the time were from northern or western Europe, the Immigration Act of 1924 “reinforced patterns of white immigration and staved off immigration from other areas, including Asia, Latin America, and Africa.”<sup>149</sup> As a result, until the 1960s, roughly two-thirds of all legal immigrants to the United States were from Europe and Canada.<sup>150</sup>

In the context of naturalization, the United States similarly created a naturalization prerequisite which required that all applicants, in order to be eligible, had to be “white.”<sup>151</sup> For instance, in *United States v. Thind*, the Supreme Court held that an immigrant from India was not white and therefore ineligible for naturalization.<sup>152</sup> Likewise, in *Ozawa v. United States*, a Japanese immigrant was deemed nonwhite, and, therefore, could not naturalize.<sup>153</sup>

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<sup>147</sup> Kevin Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1128 (1998).

<sup>148</sup> See U.S. DEPT OF HEALTH & HUMAN SERVS., MENTAL HEALTH: CULTURE, RACE, AND ETHNICITY—A SUPPLEMENT TO MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL ch. 2 (2001) (describing the impact of the National Origins System on U.S. demographics).

<sup>149</sup> *Id.* at 41.

<sup>150</sup> *Id.* The Immigration Act of 1965 allowed annual immigration of 20,000 individuals from each country in the Eastern Hemisphere, with preferences to individuals in certain occupations. The Act also provided for family unification by providing a preference to people with relatives in the United States. Following the passage of the Act of 1965, the percentage of immigrants from Europe fell from 68% in the 1950s to 12% in the 1980s.

<sup>151</sup> See generally IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (discussing the origin and history of the “white persons” naturalization restriction).

<sup>152</sup> *United States v. Thind*, 261 U.S. 204, 214-15 (1923) (“As so understood and used, whatever may be the speculations of the ethnologist, [the words ‘free white persons’ do] not include the body of people to whom the appellee belongs.”).

<sup>153</sup> *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (“The applicant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side.”);



As mentioned above, this measure, like others undertaken by the Trump administration, served the goal of making a clear statement that immigrants and their families are under threat. While no clear evidence is available that family separation has chilled immigration flows, and given domestic economic demand for labor, it is questionable whether it will have any impact on immigration. Indeed, internal memos from the U.S. Department of Homeland Security (DHS) illustrate that the Trump administration's Family Separation policy has not had this intended effect.<sup>154</sup> A new analysis of data from a longer period of time illustrates that family detention has not acted as a deterrent either and has not lowered immigration rates.<sup>155</sup>

Thus, once again, it appears the Trump administration passed an anti-immigrant measure that, in addition to causing widespread and international condemnation, has inevitably stoked the fires of fear in immigrant communities. This horrific policy once again served as a useful tool to menace undocumented immigrant families not only at the border, but also within the United States. It serves to reason that, if undocumented parents are aware that families are being rounded up and separated at the border, given the increased use of raids, 287(g), and other measures, it is only natural to believe undocumented parents would too believe their families are in jeopardy. How likely would it had been for Dreamers to have mass protests or be center stage as they were in immigration debates during the Obama administration under Trump's siege environment?<sup>156</sup> The words of this Dreamer likely reflect the views of many in the same position:

Dreamers like me have been living in a state of high anxiety.

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Ediberto Román, *The Alien Invasion?* 43 HOUSTON L. REV. 841 (2008) (observing the vagaries of race in nationalization determinations).

<sup>154</sup> Tom Wong, *Do Family Separation and Detention Deter Immigration*, CTR. FOR AM. PROGRESS (July 24, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/> [https://perma.cc/S99A-MDNL].

<sup>155</sup> Tal Kopan, *Exclusive: Trump Admin Thought Family Separations Would Deter Immigrants. They Haven't*, CNN, (June 18, 2018), <https://www.cnn.com/2018/06/18/politics/family-separation-deterrence-dhs/index.html> [https://perma.cc/8NKR-NFNC].

<sup>156</sup> Sandra Sanchez, *This Dreamer Ditched her Summer Plans to Become a Border Angel Instead*, COSMOPOLITAN (June 27, 2018), <https://www.cosmopolitan.com/politics/a21945610/dreamer-traveled-help-border/> [https://perma.cc/SRU4-Q8EG] (note, the Dreamer that is the subject of the article has quasi-legal status under DACA).

One day, we hear Congress plans to vote on a Dream Act and provide us a clear path to citizenship. The next day, the vote is called off. One day we hear DACA protections will be held hostage for funding for a border wall. Next we are told we have to wait until after the midterms.<sup>157</sup>

Such sentiments are far different than the welcoming environment during the Obama presidency and the creation of the DACA program.

### **The Dominican Case**

The Dominican Republic has had a contentious relationship with its Haitian immigrants and Dominican citizens of Haitian descent. Haitian immigrants and their descendants born in the Dominican Republic were historically the source of cheap labor for the Dominican economy (e.g., agriculture, construction, and the informal service sector), much like Mexican immigrants have been the backbone of the U.S. economy. Consequently, much like in the U.S. with respect to undocumented immigrants, Haitians are commonly targets of tropes directed at immigrants. For right-wing Dominican intellectuals, Haitian immigrants represent a silent invasion that is destroying the nation. This sinister plan attributed to Haitian immigrants mirrors the U.S. right-wing trope of Mexican immigrants bent on a Reconquista (reconquering) of former Mexican territory lost during the U.S.-Mexico War (1846-1848). In both the U.S. and the Dominican republic, the same tactics and anti-immigrant policies are evident: a governmental and popular narrative of the presence of a “foreign” community made up of immigrants and their descendants has been interpreted as something more nefarious than just labor migration.<sup>158</sup> In the Dominican case, the authorities have confronted the perceived “Haitian threat” by putting in place laws and policies designed to strip Haitians and their descendants of their rights, turn them into a permanent underclass, and punish those that dare to stand up for their rights.<sup>159</sup>

Much like in the United States, these efforts have demonized immigrant communities, provided a pressure relief

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<sup>157</sup> Carla Lilliana Espinosa, *I Nearly Lost My Job Because of Trump’s Turn on DACA, Dreamers Can’t Keep Living in Limbo*, USA TODAY (Sept. 27, 2018), <https://www.usatoday.com/story/opinion/voices/2018/09/17/daca-dreamers-plea-trump-congress-we-need-immigration-reform-column/1288912002/> [https://perma.cc/LJ6A-ZCVE].

<sup>158</sup> *Id.*

<sup>159</sup> See Román and Sagas, *supra* note 12, at 115.

valve for the political leadership, and silenced the vulnerable immigrant community.

### **Anti-Immigrant Rhetoric**

In the Dominican Republic, national identity has been defined historically vis-à-vis Haiti, its neighbor to the west in the island of Hispaniola, rather than in relation to Spain (its former colonial master). Generations of intellectuals, particularly during the dictatorship of Gen. Rafael L. Trujillo (1930–1961), promoted a reactionary brand of Dominican nationalism that relied on the rejection of Haiti and things Haitian (i.e., *antihaitianismo* ideology) at its core.<sup>160</sup> Trujillo's intellectuals sought to portray the Dominican Republic as a country under attack by its more populated neighbor.<sup>161</sup> Under Trujillo's helm, *antihaitianismo* became a state-promoted ideology that was imposed on thousands of Dominicans using the state propaganda organs. According to *antihaitianismo* ideology, Dominican culture is intrinsically Hispanic, Catholic, and lies within the Western canon, whereas Haiti's culture is rooted in African, animist, and non-Western influences. Trujillo's intellectuals also sought to portray Dominicans as white (or at least light-skinned) or racially mixed (*indios*, with a Hispanic culture) under attack from Haiti's Black masses and their anti-white racism.<sup>162</sup> From the perspective of Trujillo's ideologues, Dominicans have been historically threatened by an alien culture (more than any other nation in the Americas). What is now the Dominican Republic was occupied by Haiti in 1822, until Dominicans won their independence in 1844 and then had to fight almost constantly over the course of the next two decades to secure it. Moreover, after the development of the sugar industry in the Dominican Republic in the early 20th century, thousands of Haitian laborers crossed the border to work as field hands—a “silent invasion”—of Dominican territory, according to this reactionary view. For Trujillo and his intellectuals, the relationship of Haiti and the Dominican Republic is one of conflict, with Haiti trying to expand its territory and resources and Dominicans trying to hold it back. For Dominicans, Haitian aggression has been a constant in the country's history.

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<sup>160</sup> ERNESTO SAGÁS, RACE AND POLITICS IN THE DOMINICAN REPUBLIC 44 (2000).

<sup>161</sup> *Id.* at 47–55.

<sup>162</sup> *Id.* at 66–67.

*Antihaitianismo* did not disappear after Trujillo's death. It has been revived when politically expedient, such as during the 1994 and 1996 elections, when the main opposition candidate (Black politician José F. Peña Gómez) was accused of being a Haitian agent.<sup>163</sup> Since the 1960s, challenges to *antihaitianismo* ideology have emerged among a new generation of intellectuals, but its ripple effects still permeate Dominican culture, where anti-Haitian tropes are commonplace. More recently, Dominican nationalist intellectuals have moved away from old-fashioned biological arguments regarding race and instead promote culture-based arguments in their writings.<sup>164</sup> In doing so, they mirror U.S. and European arguments about Western culture being under siege by hordes of immigrants from non-Western countries that will undermine their host nations until Western culture is diluted to the point of being irrevocably lost. In spite of the largely cultural arguments of this new *antihaitianismo*, at its heart, it confronts what is mainly a racial issue: Haitian immigrants are Black, whereas Dominicans are imagined as something else. Haitian immigrants, stereotyped as poor laborers, are also blamed for the myriad woes of poor Dominicans (such as unemployment). Finally, these nationalist intellectuals see the struggle between the Dominican Republic and Haiti as part of a larger struggle between civilization and barbarism—a struggle dating back to Spanish colonization of the New World.<sup>165</sup>

### **Anti-Immigrant Policies and Legislation**

Historically, the use of unofficial discriminatory practices by Dominican authorities has turned Haitians into an

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<sup>163</sup> *Id.* at 95.

<sup>164</sup> *Id.* at 69–73.

<sup>165</sup> *See generally* MANUEL NÚÑEZ, *EL OCASO DE LA NACIÓN DOMINICANA* (1990). Núñez's book also represents a major turn in Dominican nationalist thought. Whereas in the past (mid-twentieth century) Dominican anti-Haitian writers focused on the two countries' distinct racial composition—loosely portraying Haiti as a Black nation, and the Dominican Republic as a white/mulatto/*indio* nation—Núñez utilizes instead “post-racial” arguments that revolve around cultural and socioeconomic differences between the two countries. His discourse reminds us of Samuel Huntington, the respected U.S. political scientist from Harvard, who published *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004), a similar call to action for Americans to stop Mexican migration, lest it destroy the nation from the inside. From this perspective, some sectors of Dominican society do share cultural elements with others staunch defenders of the Western canon. Unfortunately, it happens to be a belief in the West's innate cultural superiority, a disdain for “foreign” non-Western elements, and a fear over corrupting alien influences that would ultimately undermine and destroy Western civilization.

underclass in Dominican society. These practices commonly included not issuing birth certificates to the children of Haitian immigrants born in the Dominican Republic. Though the Dominican Constitution granted citizenship to those born on Dominican soil (at least until 2010), Haitian immigrants had a hard time when trying to register their children's birth. Some Dominican-born children of Haitian immigrants were able to get their birth certificates, and eventually, their identification cards as they reached adulthood, but it was usually a constant struggle for the recognition of their rights whenever they had to face corrupt and unscrupulous government officials.

The beginning of the 21st century brought about three major changes to the legal status of the children of Haitian migrants. First, immigration Law 285-04 closed the "in transit" provision of the Dominican Constitution (seen as a legal loophole being abused by immigrants) by clarifying that temporary workers (e.g., Haitian immigrant workers) were non-residents (and thus "in transit") regardless of how much time they had spent living and working in the Dominican Republic.<sup>166</sup> The new immigration law impacted thousands of Haitian immigrants and made their shaky legal status even more tenuous. It is commonplace for Haitians to be detained and deported by the Dominican authorities with little regard for the rule of law. The rights of Haitians in the Dominican Republic do not mean much in practice, and a number of situations (e.g., an argument with your boss or a random encounter with a police officer), can get a Haitian individual deported.<sup>167</sup> Law 285-04 did not spark massive deportations of Haitian migrants, but it set a legal precedent for more changes to come and a major overhaul of Dominican conceptions of citizenship.

Second, the 2010 Dominican Constitution rewrote the language of the "in transit" clause to specify that the children of those "in transit or that reside illegally in Dominican territory" were not citizens of the Dominican Republic.<sup>168</sup> This redefinition of Dominican citizenship meant that after 2010 children born to unauthorized Haitian migrants would not be entitled to Dominican citizenship under the previous *jus soli*

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<sup>166</sup> Ley General de Migración, No. 285-04, GACETA OFICIAL 10291 art. 5-47 (2010) (Dom. Rep.).

<sup>167</sup> Constitución de la República Dominicana 2010, GACETA OFICIAL 10561 art. 1-102 (Dom. Rep.).

<sup>168</sup> *Id.*

provisions of the Dominican constitution.<sup>169</sup> After the implementation of the new constitution, only the children of Dominican citizens or legal residents were entitled to *jus soli* citizenship. As a result, thousands of children of Haitian migrants born in the Dominican Republic since 2010 are now effectively stateless because their parents cannot produce legal documents. Technically, these children could claim the citizenship of their (Haitian) parents, but even that is a difficult endeavor for poor immigrants. These Haitian Dominican children would then be relegated to requesting the citizenship of a country they were not born in, that they are not familiar with, and that does not necessarily see them as their own. These Haitian Dominican children are essentially stateless, caught in a legal limbo between their country of birth that does not recognize them as citizens and their parents' homeland that really does not care about them.

And third, a 2013 decision by the Dominican Constitutional Tribunal went even further, retroactively stripping thousands of Haitian Dominicans of their citizenship as far back as 1929.<sup>170</sup> As per the Court's controversial ruling, the children of undocumented migrants were never meant to be Dominican citizens, even if they had been issued a Dominican birth certificate. It had all been a decades-long series of mistakes that the Court now fixed with a pen stroke. This radical ruling left approximately 200,000 individuals stateless in their own country when issued,<sup>171</sup> and retroactively stripped several generations of Haitian Dominicans (dead and alive) of the Dominican citizenship that they had always held.<sup>172</sup>

One of the more interesting aspects of these measures is that despite the denationalization efforts, and the resulting state of fear within the immigrant community, the threats of mass roundups and deportations never materialized. Some may blame international pressure or condemnation, but such pressure failed to stop the measures from being passed. What

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<sup>169</sup> *Id.*

<sup>170</sup> Sentencia TC/0168/13, Tribunal Constitucional de la República Dominicana (2013), <https://www.tribunalconstitucional.gob.do/consultas/secretar%C3%ADa/sentencias/tc016813/> [<https://perma.cc/E3GS-CXTQ>].

*Dominican Republic Urged Not to Deport Stateless Dominicans*, UNHCR (June 15, 2015), <https://www.unhcr.org/en-us/news/latest/2015/6/5584221a6/dominican-republic-urged-deport-stateless-dominicans.html> [<https://perma.cc/YR6R-3WYL>].<sup>171</sup>

<sup>172</sup> *Id.*

is far more likely the result, as in the United States, is that political leaders and other elites have been able through these measures to silence and subordinate immigrant communities, and in doing so, reminded the immigration community of their inferior status, leaving a vulnerable group even more vulnerable and no chance of reform for immigrants in such an environment anytime in the near future.

### **The Argentinian Case**

As mentioned above, the force of the anti-immigrant wave in the hemisphere is not limited to the Caribbean. Indeed, several countries in South America, including Peru, Chile, and Brazil, face challenging times for immigrant communities in those countries. But perhaps one of the most telling examples of a recent drastic change in the treatment of immigrants is that of the case of Argentina. On the same day (January 27, 2017) that President Trump issued an executive order, ostensibly based on national security grounds, prohibiting entry to the U.S. of certain nationals from certain identified countries (the so-called Travel or Muslim Ban),<sup>173</sup> Argentina adopted a restrictive immigration law, called the decree 70/2017 (hereinafter “the Decree”), also ostensibly based upon fighting a domestic criminal threat. Perhaps stemming from happenstance, but on the same day, both countries undertook measures to harden their immigration laws in similar ways by focusing on admissibility and removal of foreigners.<sup>174</sup>

In December of 2015, a conservative leader took power in Argentina: President Mauricio Macri (2015–2019).<sup>175</sup> Over a short period of time thereafter, the media in Argentina seemed to be taking a decidedly negative take on immigrants, often portraying them as violent and involved in drug-related

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<sup>173</sup> Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec., 82 Fed. Reg. 8977 (Jan. 27, 2017).

<sup>174</sup> For an overview of decree 70/2017, see *Committee on Migrant Workers Raises Concerns About Expedited Expulsions in Dialogue with Argentina*, UNHCR (Sept. 3, 2019), <https://www.ohchr.org/en/press-releases/2019/09/committee-migrant-workers-raises-concerns-about-expedited-expulsions> [<https://perma.cc/4MRN-EG3A>]. See also Gabriel Calero, *Argentinian Anti-Immigrant Reform* (working paper on file with Author); Mónica Farias, *Old Buddies and Same Old Stories: Argentina and US Relations in the Trump Era*, 16 J. LAT. AM. GEOGRAPHY 176, 176-179 (June 2017).

<sup>175</sup> Simon Romero & Daniel Politi, *Argentina's Trump-Like Immigration Order Rattles South America*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/world/americas/argentinas-trump-like-immigration-order-rattles-south-america.html> [<https://perma.cc/64HZ-P8U6>].

crimes.<sup>176</sup> On December 24, 2016, the nation's attention was captured when an Argentine teenager was killed by a Peruvian teenager.<sup>177</sup> After this episode, Argentina's Interior Minister, Patricia Bullrich, blamed Peruvian immigrants for a host of wrongs: "Peruvian nationals come here and end up killing each other over control of drugs . . ."<sup>178</sup> Just months before, in August 2016, "the National Directorate of Migration and the Ministry of Security announced plans for a detention cent[er] for irregular migrants."<sup>179</sup> According to many, this plan for the creation of a detention center was "in breach of current immigration laws and the rights to liberty and freedom of movement, as well as protection from arbitrary arrest and detention."<sup>180</sup> Following the anti-immigrant rhetoric coming from certain circles in the government and negative media coverage, President Macri passed the Decree, alleging an urgent and emergency need to amend the country's immigration act, which of course was implemented without congressional approval.<sup>181</sup> The decree amended several aspects of Argentina's immigration law. Perhaps the most consequential ones were the changes to Article 29, which provides the grounds for the inadmissibility and removal of immigrants.<sup>182</sup> The change in Article 29 made the commission of crime" a ground for inadmissibility and removal.<sup>183</sup> These measures have subsequently been condemned by human rights groups such as Amnesty International.<sup>184</sup>

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<sup>176</sup> *E.g.*, Patricia Bullrich, *Acá Vienen Ciudadanos Peruanos Y Paraguayos Y Se Terminan Matando Por El Control De La Droga*, LA NACION (Jan. 24, 2017), <https://www.lanacion.com.ar/politica/patricia-bullrich-aca-vienen-ciudadanos-peruanos-y-paraguayos-y-se-terminan-matando-por-el-control-de-la-droga-nid1978531/> [<https://perma.cc/34FP-89DV>].

<sup>177</sup> *Cayó El Asesino de Brian: Tiene 15 Años Y Sus Padres Lo Habían Ayudado A Escapar*, CLARIN (Dec. 30, 2016), [https://www.clarin.com/policiales/cayo-asesino-brian-15-anos-padres-ayudado-escapar\\_0\\_rkCb-X7re.html](https://www.clarin.com/policiales/cayo-asesino-brian-15-anos-padres-ayudado-escapar_0_rkCb-X7re.html) [<https://perma.cc/4V39-B38S>].

<sup>178</sup> Bullrich, *supra* note 176.

<sup>179</sup> AMNESTY INT'L, ARGENTINA: REGRESSIVE HUMAN RIGHTS POLICIES 7 (November 2017) <https://www.amnesty.org/en/documents/amr13/6772/2017/en/> [<https://perma.cc/AE45-LZQK>].

<sup>180</sup> *Id.*

<sup>181</sup> Decreto 70/2017, Modifying Law No. 25.871, Jan. 27, 2017, [33555] B.O. 1 (Arg.).

<sup>182</sup> *Id.* at art. 29.

<sup>183</sup> *Id.*

<sup>184</sup> AMNESTY INT'L, ALGUNAS CONSIDERACIONES SOBRE LA MODIFICACIÓN DE LA LEY DE MIGRACIONES (DECRETO DE NECESIDAD Y URGENCIA 70/2017) (2017),



When first passed in 2004, Law on Migration No. 25.871 was viewed as among the most progressive and welcoming immigration laws in South America. As an Amnesty International report observed, the law

guarantee[d] key human rights, [including] affirm[ing] the right to migrate and guarantee[ing] access to health, education, justice, and social welfare for all residents, regardless of their immigration status. However, in January 2017, the law was reformed through the Necessity and Urgency Decree No 70/2017, which introduced barriers to the admission of migrants and their permission to stay, accelerated expulsion procedures, removed the family unit as a requirement for avoiding expulsion, and restricted access to Argentine nationality. . . . [T]he Decree has reduced the issue of migration to a debate about national security, which associates migrants with criminals. The government . . . justified the reform alleging that crime rates have increased because of migrants, especially drug-related crimes. However, the number of migrants implicated in crime in Argentina is not significant: less than 6% of the prison population are foreigners. Moreover, according to official data, of the total number of persons arrested for drug-related offences in the country, 83% are Argentine and only 17% are foreigners, which corresponds to a total of 1,426 foreigners, or 0.06% of the total migrant population in Argentina.<sup>185</sup>

Prior to Argentina passing the Decree, the country had been an exemplar for a humanitarian-based system of immigration.<sup>186</sup> However, towards the end of 2016, not unlike the hateful narrative against immigrants that has been part of the American psyche for well over a century, hostile opinions and narratives concerning immigrants in Argentina captured the public's attention.<sup>187</sup> Under the pretext of what was a crime wave, the president of Argentina, among several harsh anti-immigrant measures, changed the basis for inadmissibility and removal to include any prior conviction of "any type of

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<https://amnistia.org.ar/wp-content/uploads/delightful-downloads/2017/02/Migraciones-QyA-1.pdf> [<https://perma.cc/4ATB-5E9M>].

<sup>185</sup> AMNESTY INT'L, *supra* note 179, at 5.

<sup>186</sup> See Luis Alejandro Guasti, *El control de convencionalidad de la política migratoria a la luz de la última modificación de la ley 25.871*, *El Derecho Año LV*, No 14.271 1, 1-5, (2017).

<sup>187</sup> *Id.*

crime.”<sup>188</sup>

In the preamble to the Argentinian decree, the government asserted that there existed “crimes of public knowledge” committed by criminal organizations where the state had difficulty in deporting foreign nationals linked to said organizations because then existing Argentine laws made appeals procedures so time-consuming.<sup>189</sup> The decree’s preamble, which provides its justifications, also makes several questionable assertions concerning high and dramatically growing incarceration rates of immigrants.<sup>190</sup> The crime rate statistics and other related justifications in the preamble were subsequently disproven by several NGOs,<sup>191</sup> and by a federal court of appeals in Argentina.<sup>192</sup> In the end, as in the other countries examined in the region, a statistically small criminal matter involving an immigrant, stoked by the fires of fear and xenophobia, led to dramatic changes in policy, to the demonization of immigrants in Argentina, and to the passage of restrictive laws and policies, which at best, were based on a questionable statistical basis. These actions nevertheless led to the silencing and deportation of a vulnerable group.

One left-leaning publication observed, President Macri returned “immigration policy to what it was during the days of the Videla dictatorship (1976–1983).”<sup>193</sup> The article continues, “The Videla junta was a regime of mass repression of the Argentine working class and youth, responsible for the death and disappearance of some 30,000 workers, leftists, trade union militants and students.”<sup>194</sup>

In another Amnesty International report focusing on Argentina’s immigration changes, the authors observed that

<sup>188</sup> *Id.*

<sup>189</sup> Law No. 25.871, Jan. 27, 2017, B.O. 1 (Arg.).

<sup>190</sup> *Id.*

<sup>191</sup> Comisión Argentina para los Refugiados y Migrantes, *Comunicado de CAREF en repudio al Decreto 70/2017* (Feb. 1, 2017), <https://iglesiametodista.org.ar/comunicado-de-caref-en-repudio-al-decreto-702017/> [<https://perma.cc/manage/create?folder=7635>].

<sup>192</sup> Sol Amaya, *Inmigrantes y delito: qué dicen las cifras*, LA NACION (Jan. 31, 2017, 8:41PM), <https://www.lanacion.com.ar/sociedad/inmigrantes-y-delito-que-dicen-las-cifras-nid1980510> [<https://perma.cc/UF2E-H8MC>].

<sup>193</sup> Rafael Azul, *Argentina: Macri’s Immigration Decree Brings Back the Politics of the Videla Dictatorship*, WORLD SOCIALIST WEB SITE (Feb. 9, 2017), <https://www.wsws.org/en/articles/2017/02/09/arge-f09.html> [<https://perma.cc/G5GC-JRGC>].

<sup>194</sup> *Id.*

the Decree “created regressive policies that introduced impediments to admission and the residence of migrants in the country; accelerated expulsion procedures by limiting individuals’ right to defense; eliminated the family unit as a condition to avoid expulsion; and restricted access to the Argentine nationality.”<sup>195</sup> The report further finds that

[u]nlike the legitimacy [found] by the [country’s previous] Migration Act, which covered a broad debate and had a large consensus at local and global levels, the use of necessity and urgency in [the Decree led to a very] different result. [The Decree also] restricted human rights contained in the Constitution and bypassed parliamentary discussion.<sup>196</sup>

The drafters of the Amnesty International report condemned the country, concluding:

The hardening of laws via the decree is not how the country should generate a change that should be debated in the Congress of the nation. The modification proposed by the government is inscribed in the framework of rhetoric and political on security that reduced the phenomenon of migration to a debate on national security, and that conflated the migrant with a criminal. Linking crime with migration encourages and feeds xenophobia, discrimination and violence against migrants.<sup>197</sup>

This Amnesty International report also found it “striking that these policies were developed while the Ministry of Foreign Affairs and the political declaration presented at the Punta Cana summit of CELAC (Community of Latin American and Caribbean States) on January 25, 2017, shared a different regional commitment.”<sup>198</sup> As one newspaper in the region observed, “Argentinian President Macri’s crackdown on immigrants, echoing Trump, ignites a fierce national debate and raises diplomatic tensions with Bolivia.”<sup>199</sup> The author further highlights the comparative Trump-Macri similarities on immigration, observing:

A recently-elected president—a billionaire and former

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<sup>195</sup> Amnesty Int’l, *2017 Human Rights Agenda for Argentina* (2017), <https://docslib.org/doc/2983841/2017-human-rights-agenda-for-argentina> [<https://perma.cc/3U94-8WHM>].

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Emily Achtenberg, *Argentina’s Immigration Crackdown Rattles Bolivia*, N. AM. CONG. ON LAT. AM. (Mar. 14, 2017), <https://nacla.org/blog/2017/03/14/argentina%27s-immigration-crackdown-rattles-bolivia> [<https://perma.cc/EE3R-MM2E>].

real estate magnate—issues a controversial order cracking down on migrants who seek to enter the country and making it easier to deport foreign nationals. Congressional allies call for a border wall and a special immigration police force.

This isn't Trump's America, but Argentina, where President Mauricio Macri's recent immigration decree has ignited a fierce national debate and raised regional diplomatic tensions—especially with neighboring Bolivia, which has one of the largest immigrant populations in Argentina.<sup>200</sup>

Once again, this time in Argentina, the immigrant threat—Bolivian and Peruvian immigrants—are scapegoated to pass an anti-immigrant agenda for the Argentine government. These measures in turn, much like in the United States, stoke nationalistic fervor and provide the country's leaders great short-term appeal with the masses that too often are more than willing to blame the immigrant Other for their problems. The Argentine government rides the wave of goodwill stemming from the often-unfounded fear created by blaming ills—here a statistically baseless crime wave. In the end, as in the United States, there have been no drastic changes in the overall numbers of immigrants—in other words, the fear of mass deportation was once again nothing but a savvy political ploy and threat.

To add to the anti-immigrant tenor of the Argentinian environment, “the deportation process [in the country was] modified to bypass the courts, circumvent due process rights, and expedite the timeframe for removal. A special detention center [was] established in Buenos Aires where accused migrants will be held in custody, pending deportation.”<sup>201</sup> Much like similar demands in the United States and the Dominican Republic, a “new [Argentine] National Border Commission” was created to “crack down on entry by suspected criminals.”<sup>202</sup> And as in both the United States and the Dominican Republic, “[t]he [70/2017] decree has unleashed a wave of xenophobia against Bolivian immigrants in Argentina.”<sup>203</sup> “Since its promulgation,” much like the ICE raids in the United States, “numerous raids have been carried

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200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

out in immigrant neighborhoods and at bus terminals in Buenos Aires.”<sup>204</sup> And much like the intended consequences in both the United States and the Dominican Republic, the government’s measures have served their intended purposes—to keep the vulnerable immigrant communities in the shadows and in a permanent state of fear without any real chance at changing their respective lots in life. Indeed, in Argentina, “[i]mmigrants have been held for 12 hours [or more] while their backgrounds are investigated, striking fear into communities where Bolivian families have lived, in many cases, for decades.”<sup>205</sup>

Argentine Vice President Gabriela Michetti defended the changes [to the] law and distanced the move from U.S. President Donald Trump’s action on refugees and migrants. “You have to make a distinction between measures that have to do with security,” she told a local radio station. “Argentina is an open country, that will always be in favor of diversity.”<sup>206</sup>

### **The Chilean Case**

The South American nation of Chile is, by most accounts, a success story. Chile has the strongest, most stable economy of the continent. The country has ample natural resources for its population, and the Chilean economy has been lifting people out of poverty for decades. Chile has also had a fairly welcoming attitude towards immigrants. Historically, neighboring Peruvians, Bolivians, and Argentinians crossed the border into Chile, providing cheap labor for an expanding economy. But as Chile’s economic stature grew within the region, the nature of its migratory flows changed. At the turn of the century, Afro-Caribbean migrants from the Dominican Republic—and later Haitians and Cubans—began flowing into Chile. These immigrants benefitted from Chile’s liberal visa regime, which allowed most travelers from the region to fly to Chile, pay for a tourist visa upon arrival, and stay up to 90 days.<sup>207</sup> As with the other countries examined here,

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Argentina Changes Immigration Law to Limit Entry and Ease Deportations*, REUTERS (Jan. 20, 2017), <https://www.reuters.com/article/us-argentina-immigration/argentina-changes-immigration-law-to-limit-entry-ease-deportation-idUSKBN15E1V3> [<https://perma.cc/E5R5-3NE8>].

<sup>207</sup> Alidad Vassigh, *In Prosperous Chile, Immigration Policy Smacks of Racism*,

circumstances changed during the early part of this century. Deteriorating economic conditions in the Dominican Republic and Haiti, combined with increased immigration enforcement in the United States after 9/11, convinced many Dominicans and Haitians to make the long trip to Chile, obtain temporary work permits, and seek fortune in its booming economy.<sup>208</sup>

The sudden influx of thousands of Black and Mulatto Dominicans, as well as Creole-speaking Black Haitians in the last decade, has upended this view of a racially-homogenous nation.<sup>209</sup> Add to that the election of right-wing President Sebastián Piñera (2018–2022), who campaigned on a “tough on crime, tough on illegal immigration” platform,<sup>210</sup> and we have the makings of a rising wave of xenophobia and anti-Black, anti-immigrant prejudices in a country that prided itself on being exempt from racial discord.

Chile is also a fairly racially homogenous nation (with a small minority of Indigenous Mapuche) that prides itself in its European roots. The migration of workers from Peru, Bolivia, and Argentina never caused much alarm, as these workers would come and go (or be deported as needed), and the absolute numbers were not that big. However, things began changing in this century—and more specifically, in the last decade—with the arrival of Afro-Caribbean migrants. First, these migrants were dark-skinned Blacks and Mulattos that

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AMÉRICA ECONOMÍA (May 1, 2018), <https://www.worldcrunch.com/culture-society/in-prosperous-chile-immigration-policy-smacks-of-racism> [https://perma.cc/UHM5-5EXH].

<sup>208</sup> CATERINE GALAZ, GABRIELA RUBILAR & CLAUDIA SILVA, *Migración dominicana en Chile*, DEPARTAMENTO DE EXTRANJERÍA Y MIGRACIÓN, MIGRACIÓN DOMINICANA EN CHILE 2, 11 (2016), [https://www.researchgate.net/publication/311921861\\_Migracion\\_Dominicana\\_en\\_Chile](https://www.researchgate.net/publication/311921861_Migracion_Dominicana_en_Chile) [https://perma.cc/C6F8-H5WC]; Macerena Fernández, *Haitianos en Chile: una gran cuna gran comunidad de migrantes que busca una oportunidad*, EL DEFINIDO (Aug. 29, 2016), <https://www.eldefinido.cl/actualidad/pais/7338/Haitianos-en-Chile-una-gran-comunidad-de-migrantes-que-busca-una-oportunidad/> [https://perma.cc/2US4-LBJK].

<sup>209</sup> *El extraño espejo del chileno: se ven "más blancos y menos sucios" y a los inmigrantes como 'desaseados,'* ELM STRADOR (Jan. 18, 2018), <https://www.elmostrador.cl/noticias/pais/2018/01/18/el-extrano-espejo-del-chileno-se-ven-mas-blancos-y-menos-sucios-y-a-los-imigrantes-como-desaseados/> [https://perma.cc/M3E8-76EW].

<sup>210</sup> Camilo Carreño, *Piñera: 'Muchas de las bandas de delincuentes en Chile son de extranjeros,'* LA TERCERA, November 29, 2016, <https://www.latercera.com/noticia/pinera-muchas-las-bandas-delincuentes-chile-extranjeros/> [https://perma.cc/728Q-YSGA].

came from cultural backgrounds different to those of Chileans; and in that case of Haitians, most did not speak Spanish. As such, these immigrants stood out and were racialized in ways in which previous waves of immigrants were not.<sup>211</sup> As the Chilean saying goes: “We’re not racists because there are no Blacks here.”<sup>212</sup> Chile, like most Latin American nations, has a heavy cultural baggage of race and ethnic-based prejudice; one which was historically expressed towards Indigenous peoples. With the arrival of Afro-Caribbean migrants, however, a new layer of anti-Black prejudice was added.<sup>213</sup> And second, the population of Afro-Caribbean migrants grew quickly in a very short time. Before 2000, there were few Black immigrants in Chile, but that changed quickly in the last decade. As Black immigrant bodies became more noticeable in the streets of Santiago, and Afro-Caribbean immigrants concentrated in certain working-class neighborhoods, old racial tropes were revived, and new ones were imported.<sup>214</sup> By 2016, Chile’s foreign-born population numbered 478,000 (about 3% of its population), and the number of Haitians surged after Haiti’s major earthquake in 2010. An estimated 100,000 Haitians now reside in Chile, and Afro-Caribbean immigrants are routinely accused of stealing jobs from Chileans, of being lazy, of contributing to crime, and of even harboring infectious diseases (including HIV/AIDS).<sup>215</sup>

The response of the Sebastián Piñera administration was mixed. Piñera, a conservative businessman, had previously served a term as president of Chile (2010–2014), and was elected for a second term in December 2017. Piñera’s discourse bears strong resemblance to conservative, anti-immigrant discourses in the United States and Europe. He decried Chile’s lax immigration laws and border controls, portraying them as obsolete and in need of urgent modernization. While praising traditional European immigrant groups as contributing to the growth of Chile, he raised concerns about an increase in crime (supposedly)

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<sup>211</sup> See GALAZ, RUBILAR & SILVA, *supra* note 208, at 17.

<sup>212</sup> See Vassigh, *supra* note 207.

<sup>213</sup> Estrella Gutiérrez, *Chile, un oasis para los haitianos que comienza a secarse*, RELIEF WEB (April 27, 2018), <https://reliefweb.int/report/chile/chile-un-oasis-para-los-haitianos-que-comienza-secarse> [https://perma.cc/R2WB-C79T].

<sup>214</sup> GALAZ, RUBILAR & SILVA, *supra* note 208, at 17.

<sup>215</sup> See Gutiérrez, *supra* note 213.

caused by more recent immigrants (without naming nationalities).<sup>216</sup> After April 16, 2018, Haitians were no longer allowed to travel to Chile without first securing a visa (valid for 30 days) at the Chilean Consulate in Port-au-Prince, effectively curtailing new Haitian migration to Chile.<sup>217</sup> Dominicans had been subjected to the same requirement previously during Piñera's first term in office. Moreover, individuals on tourist visas are no longer able to acquire work permits—and eventually seek permanent residency—in Chile.<sup>218</sup> At the same time, Piñera supported an immigration system designed to attract skilled immigrants: immigrants with postgraduate degrees from the top 200 universities in the world are granted a twelve-month work permit, with the possibility of applying for permanent residency in the country.<sup>219</sup> These changes mirror (sans the bombastic rhetoric) Trump's preference for immigrants from developed nations over those from “shithole countries.”<sup>220</sup> Moreover, Piñera made one-year renewable visas available for Venezuelans, but not for Haitians or Dominicans, thus further defining immigration policy along ideological lines.<sup>221</sup>

Chile is on the way towards accomplishing what Trump

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<sup>216</sup> *Id.*

<sup>217</sup> *Migrating to Chile Gets Tougher for Haitians*, SANTIAGO TIMES (Apr. 10, 2018), <https://santiagotimes.cl/2018/04/10/migrating-to-chile-get-tougher-for-haitians-and-venezuelans/> [https://perma.cc/J7LC-UQUX].

<sup>218</sup> *Id.*; Diego Acosta, Marcia Vera-Espinoza & Leiza Brumat, *The New Chilean Government and Its Shifting Attitudes on Migration Governance*, MIGRATION POLY CENTRE BLOG (May 3, 2018), <https://blogs.eui.eu/migrationpolicycentre/new-chilean-government-shifting-attitudes-migration-governance/> [https://perma.cc/85SB-JKLV].

<sup>219</sup> *Migrating to Chile Gets Tougher for Haitians*, *supra* note 217.

<sup>220</sup> Haiti was among the “shithole” countries lambasted by Trump. See Julie Hirschfeld Davis, Sheryl Gay Stolberg & Thomas Kaplan, *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html> [https://perma.cc/PE6V-UC3U].

<sup>221</sup> Piñera was a harsh critic of Venezuela's leftist government, and Chile has received thousands of Venezuelan refugees since President Nicolás Maduro assumed office. Bieito Rubido, *Sebastián Piñera: «La dictadura corruptaEl presidente de Maduro tiene los días contados», la República de Chile espera que EE.UU. y China zanjen en la cumbre del G-20 su guerra comercial, que afecta de modo especial a su país, una economía abierta que seguirá este año liderando el crecimiento en América Latina*, ABC INTERNACIONAL (June 22, 2019), [https://www.abc.es/internacional/abci-sebastian-pinera-dictadura-corrupta-maduro-tiene-dias-contados-201906222104\\_noticia.html?ref=https%3A%2F%2Fwww.google.com%2F](https://www.abc.es/internacional/abci-sebastian-pinera-dictadura-corrupta-maduro-tiene-dias-contados-201906222104_noticia.html?ref=https%3A%2F%2Fwww.google.com%2F) [https://perma.cc/S2JF-EAH2].



has dreamed of—a nation with fewer immigrants of color from shithole countries, but more skilled immigrants from “white” countries. It is still unclear if Chile’s new president, Gabriel Boric, who is under intense pressure to regularize immigration, will drastically modify the policies of his predecessor.

### **The Brazilian Case**

President Jair Bolsonaro has rejected international condemnation and calls for reform with respect to immigration. Specifically, he announced that his government would no longer follow the United Nations migration accord, the Global Compact for Safe, Orderly and Regular Migration.<sup>222</sup> Despite his bluster, Bolsonaro’s recent position was not expected to have any immediate effects because the compact he referred to did not have any legally binding effect on the more than 160 signatory nations.<sup>223</sup> His statements nevertheless seemed to have ushered in a wave of anti-immigrant sentiments, not only in Brazil, but throughout the hemisphere. Indeed, it signals that Latin America’s largest nation, which had had a long history of welcoming foreigners, seems to now be preparing itself to adopt a harder line on immigration. Perhaps as another example, Bolsonaro recently tweeted, “Brazil has a sovereign right to decide whether or not it accepts migrants . . . . Anyone who comes here must be subject to our laws and customs and must sing our national anthem and respect our culture.”<sup>224</sup> In fact, Bolsonaro’s behavior is part of a worldwide trend, and is merely the latest opposition to the non-binding agreement, which has drawn protest across the world. Indeed, “[n]early thirty countries, including the United States, refused to sign the pact in December [2019]”.<sup>225</sup>

In defending his position, Bolsonaro declared, “Defense of national sovereignty was one of our campaign’s banners and it will be a priority of our government. . . . The Brazilians and immigrants who live here will be safer under rules that we

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<sup>222</sup> Ernesto Londoño, *Far Right President Jair Bolsonaro Pulls Brazil from United Nations Pact Designed to Protect Migrants*, INDEPENDENT (Jan. 10, 2019), <https://www.independent.co.uk/news/world/americas/jair-bolsonaro-brazil-migration-accord-united-nations-venezuela-refugee-crisis-a8721461.html> [https://perma.cc/2SNY-5UTS].

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Francesca Paris, *Brazilian President Bolsonaro Withdraws from U.N. Compact on Migration*, NPR (Jan. 19, 2019), <https://www.npr.org/2019/01/09/683634412/brazilian-president-bolsonaro-withdraws-from-u-n-compact-on-migration> [https://perma.cc/9LMK-92JH].

ourselves make, without external pressure.”<sup>226</sup>

While it is premature to conclude what Brazil’s stance will be with respect to state-sponsored xenophobia, Bolsonaro’s rejection of an international migration accord as one of his administration’s first acts, alongside his past behavior, certainly suggests an anti-immigrant view.

### **The Role of the United States and Europe**

Rising xenophobia in the United States and Europe parallels and feeds into ultra-nationalist discourses elsewhere. Conversely, the latest anti-immigrant policies in other countries in the region likewise give hope to right-wing groups in the Global North and serve as laboratories for change that the latter would like to see implemented in its own countries. In the case of the Dominican Republic, elites there have historically relied on Western ideologies,<sup>227</sup> which they have adapted to realities on the ground, though nowadays local events in the Dominican Republic are becoming global news thanks to the information revolution and a large Dominican—as well as Haitian—diaspora. In this respect, ideological currents, which used to be a one-way flow from the Global North to the Dominican Republic, are making the rounds around the Global South and reverberating back to their countries of origin. This democratization of information—unfortunately—has also served to globalize fearmongering and the loathing of immigrants.<sup>228</sup>

Much like in Trump’s world of obsessions with “build[ing] the Wall,” in the Dominican Republic, the obsession is similarly with the protection of the Haitian-Dominican border. The border between Haiti and the Dominican Republic is about 240 miles long, and it goes over mountainous, remote terrain, with a few settlements along its length. The current border line is the result of the 1929 border treaty (modified in 1935–1936), the first formal treaty to establish a fixed border between the two independent nations that share the island of Hispaniola.<sup>229</sup> For most of its life, the Haitian-Dominican border has been an abstraction, comprised of old cement markers that dotted isolated rural areas and a shallow river

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<sup>226</sup> *Id.*

<sup>227</sup> SAGÁS, *supra* note 160, at 44–55.

<sup>228</sup> Barbara Perry & Patrik Olsson, *Cyberhate: The Globalization of Hate*, 18 INFO. & COMM’N TECH. L., 185 (2009).

<sup>229</sup> EDWARD PAULINO, *DIVIDING HISPANIOLA: THE DOMINICAN REPUBLIC’S BORDER CAMPAIGN AGAINST HAITI, 1930-1961* 13–35 (2016).

(the Masacre River, at its northern terminus), which people crossed back and forth as they pleased. Even for Dominicans concerned about the presence of Haitians in Dominican territory, the border itself rarely figured in their discourse as a security element. For Dominican nationalists, the border—and the borderlands—is the beginning of the nation. As such, their concerns have been mostly about the demographic character of the borderlands, rather than about the security of the border itself.<sup>230</sup> The 1937 massacre carried out by Trujillo was a Machiavellian effort in that direction: an ethnic cleansing of the borderlands, followed by the promotion of settlement there by Dominican families with the support of the state.<sup>231</sup> Even more recently, when Dominican nationalists talk about their border concerns, it usually is about the Haitianization of the borderlands, not about securing the border line. The Haitian-Dominican border is considered (i.e., imagined) as too remote, too wild, too hard to secure. Besides a few Dominican military posts that send out patrols periodically, the border is not considered a barrier to potential Haitian migrants. Migrants, smugglers, lost cattle, and many others cross this porous line on a daily basis without much fanfare or consequences.

This old status quo is changing. Since 9/11, the United States, as part of its global war on terror, is seeking to reinforce international borders. This strategy goes beyond the borders of the United States to include the borders of friendly nations or countries under U.S. military occupation (e.g., Iraq and Afghanistan). The goal is to prevent potential migrants from even getting close to the U.S. borders by stopping them abroad. The European Union is also following suit in the face of recent waves of refugees from the Middle East, who are being prevented from reaching Western Europe through the use of border controls in Greece and the Balkans. This new strategy “is the manifestation of a new vision of global geopolitics in which human beings in need are to be corralled, their free movement criminalized, and their labor exploited.”<sup>232</sup> Since at least 2008, the United States has been promoting “strong

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<sup>230</sup> *Id.* at 84–115.

<sup>231</sup> *Id.*

<sup>232</sup> Todd Miller, *Wait—What Are US Border Patrol Agents Doing in the Dominican Republic?*, THE NATION (Nov. 19, 2013), <https://www.thenation.com/article/archive/wait-what-are-us-border-patrol-agents-doing-dominican-republic/> [<https://perma.cc/2SM2-ESMK>].

borders” in the Dominican Republic by training a new Specialized Land Border Security Corps (CESFRONT, for its acronym in Spanish), made of former Dominican military units assigned to the Haitian-Dominican border.<sup>233</sup> CESFRONT’s units are familiar with the terrain and equipped with high-tech CCTV equipment to monitor high traffic areas. In addition, with the help of the United States, new military installations have been built on the border, replacing dilapidated buildings that dated back to the times of Trujillo and Balaguer.<sup>234</sup> The U.S. military and U.S. Border Patrol have also lent a hand in training the new CESFRONT.<sup>235</sup> These investments in training, technology, and infrastructure represent a significant departure for the Dominican government, which has historically neglected the border itself, and they are in lockstep with new U.S. security priorities and its promotion of strong borders. Haitians are to be contained, not only for the sake of the Dominican Republic, but also for the sake of its neo-imperial backers, particularly after Haiti’s massive earthquake in 2010 (which sparked a refugee crisis), and recent epidemic bouts of cholera, malaria, and the Zika virus.<sup>236</sup>

Meanwhile, deportations of Haitian migrants continue unabated, as well as scores of Haitians that voluntarily leave Dominican territory out of fear of being deported and losing everything they own in the process. According to the International Organization for Migration, between June 2015 and late 2017, 229,885 individuals of Haitian descent have crossed into Haiti—a major challenge and destabilizing factor for a weak, poor state.<sup>237</sup> The naturalization plan offered by the Dominican authorities after the infamous 2013 court decision has only naturalized a handful of individuals.<sup>238</sup> The

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<sup>233</sup> *Id.*

<sup>234</sup> See Cesfront, *Avance Cesfront*, YOUTUBE (Mar. 26, 2013), <https://www.youtube.com/watch?v=hbr0XFKxvpl> [<https://perma.cc/L6X5-QCS3>].

<sup>235</sup> Miller, *supra* note 232.

<sup>236</sup> Marty Goodman, *Haitians Face Expulsion from the U.S. and the Dominican Republic*, SOCIALIST ACTION, <https://socialistaction.org/2018/08/21/haitians-face-expulsion-from-the-u-s-and-the-dominican-republic/> [<https://perma.cc/7RVJ-QB9S>].

<sup>237</sup> *IOM Opens a Second Border Resource Center (BRC) in Belladère*, INT’L ORG. FOR MIGRATION <https://haiti.iom.int/news/iom-opens-second-border-resource-center-brc-belladere> [<https://perma.cc/GL57-TY33>] (last visited Nov. 23, 2019).

<sup>238</sup> AMNESTY INT’L, ‘WITHOUT PAPERS, I AM NO ONE’ STATELESS PEOPLE IN THE DOMINICAN REPUBLIC 6 (2015), <https://www.amnesty.org/download/Documents/AMR2727552015ENGLISH.P>

plan's implementation has been riddled by delays, lack of interest and resources on the part of the Dominican authorities, and fear and distrust among those affected by the 2013 decision, who now bear the burden of having to prove that they are, indeed, citizens of the nation in which they were born. Currently, hundreds of thousands of Haitians and Haitian Dominicans lack documents to prove their residency (in the case of the former) or citizenship (in the case of the latter), and live in the shadows of Dominican society, unable to get papers and in constant fear of deportation.<sup>239</sup>

In Argentina, notwithstanding the recent proposal by a congressman for a border wall, the border obsession is less clear, but similarly takes from Trump's rhetoric an obsession with immigration and security. It is here where Argentina has to dance on a fine line as it tries to portray itself as a welcoming country, and at the same time passing measures that restrict immigrants and making it far easier to deport them.<sup>240</sup>

"Just like Trump's government, Argentine President Mauricio Macri is criminalizing immigration through executive orders that modify national laws and international commitments," said Argentine activist Adolfo Pérez Esquivel, winner of the 1980 Nobel Peace Prize for his defense of human rights during Argentina's "dirty war."<sup>241</sup> "Avoiding lawmakers, they are committing a clear violation of human rights in the name of security, when security problems can and should be solved respecting our constitution and increasing our rights, not reducing them," he said.<sup>242</sup>

Indeed, in describing Argentina's new immigration stance, it is far from unusual for the press to describe the Argentine law as "a Trump-like policy," as *The New York Times* recently observed with its headline: "Argentina's Trump-Like Immigration Order Rattles South America."<sup>243</sup> As one immigrant interviewed observed, "A decree like this scares people. It came out just after what Trump did, a coincidence

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DF [<https://perma.cc/8JDH-U7740>].

<sup>239</sup> *Id.* at 24.

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

<sup>241</sup> *Argentina Toughens Immigration Laws, Speeds Up Deportations*, ASSOCIATED PRESS (Jan. 31, 2017), <https://apnews.com/article/1e0a6d313ea846bab3fa941de0b515e9> [<https://perma.cc/H8FC-D6T8>].

<sup>242</sup> *Id.*

<sup>243</sup> Romero & Politi, *supra* note 175.

that seems very strange to me.”<sup>244</sup> Indeed, Argentine President Macri evidently took a page from the Trump playbook, “echo[ing] . . . Trump’s ‘America First’ theme, making it clear that his ‘first concern’ should be ‘caring for Argentines, caring for ourselves.”<sup>245</sup> And, as with sections of the United States, Macri’s stance found a welcoming home in conservative circles. Indeed, “opinion polls in Argentina showed widespread support for limiting immigration, with some circles arguing the new decree does not go far enough.”<sup>246</sup> In fact, a wall to be built on the border with Bolivia.”<sup>247</sup> Even everyday citizens showed support for these measures: “Claudio Suárez, 65, a worker at a bakery in Buenos Aires, called the immigration curbs ‘fantastic.’”<sup>248</sup> And much like the racist and xenophobic tenor of much of the United States’ recent anti-immigrant rhetoric, similar views are not hard to find in Argentina: “Nobody wants scum to come in from other countries. Many foreigners come here because health services and education are free. The law should be even stronger.”<sup>249</sup>

In the case of Chile, Piñera borrowed from Trump’s playbook and successfully used fear and loathing of new immigrants as a campaign theme, effectively linking immigration to criminality. Though Piñera did not engage in Trump’s harsh language, his subtle dog-whistling appealed to a conservative, right-wing base that sees Chile as being undermined by immigrants that—unlike the white, European immigrants of the past—look very different.<sup>250</sup> Much like other nations, Chile is experiencing growing pains as its booming economy pushes the country into First World status, thus making Chile into a preferred destination for poor immigrants from the Global South.<sup>251</sup> Previously geographically isolated, this new, globalized, “wealthy” Chile has to contend with demographic changes that rattle conservatives who see Chile as an European enclave in the New World.<sup>252</sup> And right-wing politicians have realized that there is value in playing the racial

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

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

<sup>250</sup> Carreño, *supra* note 210.

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

<sup>252</sup> See *El extraño espejo del chileno: se ven "más blancos y menos sucios" y a los inmigrantes como 'desaseados,' supra* note 209.

card in Chilean electoral politics; a trump card (pun intended) that had not been available before—that is, until the arrival of dark-skinned, racialized, Afro-Caribbean immigrants.

### **Unwelcomed Immigrants**

Even though the United States, the Dominican Republic, Argentina, Chile, and Brazil are very different countries in terms of their history, size, and level of economic development, the administrations of U.S. President Donald Trump, Dominican President Danilo Medina, Argentinian President Marcelino Macri, Chilean President Sebastián Piñera, and Brazilian President Jair Bolsonaro shared one thing in common: the expansion of a previously existing hostile climate towards immigrants. These five administrations took office in the midst of a rising wave of xenophobic nationalism. In the case of Medina, the Dominican Republic had just modified its constitution (in 2010) in order to limit citizenship to those born of Dominican parents (or legal residents), and his administration offered a timid response to an international community shocked by the 2013 court decision. Medina sought a safe political middle ground by supporting the rule of law (and thus the court decision), while offering hope for a mediated solution.<sup>253</sup> In the case of the United States, an emboldened Donald Trump was elected into office by a wave of xenophobia on the heels of the election of the country's first African American president (Barack Obama), and with the support of older, white, blue-collar voters from key states in the upper Midwest (in spite of losing the popular vote). His isolationist, "America First" message centered around the vision of a bygone era, in which white males exercised unchecked privilege without concerns about racialized Others. In other words, an America where everyone knew "their place."<sup>254</sup> Likewise, Medina (and other nationalist leaders) called for placing Dominicans first in an imagined world where "their country" was under assault by foreign Others (including Dominicans of Haitian ancestry).<sup>255</sup> In the Macri situation, his

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<sup>253</sup> See AMNESTY INT'L, *supra* note 238.

<sup>254</sup> Janet E. Helms, *An Election to Save White Heterosexual Male Privilege*, B.C., [https://www.bc.edu/content/dam/files/schools/lsoe\\_sites/isprc/pdf/Election%20to%20Save%20WHMP.pdf](https://www.bc.edu/content/dam/files/schools/lsoe_sites/isprc/pdf/Election%20to%20Save%20WHMP.pdf) [<https://perma.cc/FS4F-F46E>].

<sup>255</sup> Vinicio A. Castillo Semán, *¿Una "Natural" Invasión?*, LISTIN DIARIO (Jan. 5, 2015), <https://listindiario.com/puntos-de-vista/2015/01/05/351405/una->

government used isolated criminal attacks, and arguably only one actual incident, to unleash pent-up anti-immigrant fervor and pass harsh immigration policy by executive fiat.<sup>256</sup> In the case of Piñera, he rode a wave of xenophobic anxiety into reelection in 2017.<sup>257</sup> Bolsonaro has been outspoken about Cuban doctors working in Brazil (eventually expelling them) and the immigration of Venezuelans fleeing the Maduro regime.

Once in office, these five administrations pursued similar policies in dealing with unwanted immigrants: open calls for mass deportation, widespread attrition policies, and selective deportations. However, deporting all unwanted immigrants in these countries is simply not feasible. Indeed, none of these countries have the resources to carry out such a draconian policy, nor the economic interest in doing so, as crucial economic sectors (e.g., agriculture, construction, and the service economy) rely heavily on undocumented workers, legal immigrants, and their second- and third-generation children. Despite hyped-up pronouncements about building walls to stop immigrants from coming in and deporting all those that are already in the country, neither Trump, Medina, Macri, Piñera, nor Bolsonaro (have) pursued such extremist policies. For sure, deportations have been stepped up (surpassing previous levels), but mass deportations of the scale that their political base hoped for have not taken place. Rather, Trump, Medina, Macri, Piñera, and Bolsonaro's strategy of choice was to use attrition tactics to induce voluntary self-deportations. In the United States, the Trump administration cut back programs for undocumented immigrants (e.g., DACA), banned refugees from certain countries, reduced the number of refugees admitted into the United States on a yearly basis, separated refugee children from their parents, and threw bureaucratic monkey wrenches into the immigration system to make it harder for undocumented immigrants to get their green cards, and for permanent residents to naturalize as U.S. citizens. For example, new guidelines were issued for U.S. immigration authorities to take into consideration whether a prospective permanent resident or potential U.S. citizen has

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natural-invasion [<https://perma.cc/AN89-8N5W>].

<sup>256</sup> Romero & Politi, *supra* note 175.

<sup>257</sup> See Carreño, *supra* note 210.



been, is, or could become a “public charge.”<sup>258</sup> As result, immigrants were removing themselves from federal welfare rosters, avoiding state-issued assistance, and even endangering their children by taking them out of public programs that promote their health and welfare.<sup>259</sup> These Machiavellian attrition tactics are cheap, popular among the base, and save money in the long run. They have caused some immigrants to go home, others not to come to the United States after all (even if their lives are at risk), and generalized fear and apprehension about their future among those that remain in the country.<sup>260</sup>

In the Dominican Republic, the 2013 court decision and the government’s response had the same effect. First, the decision stripped Haitian Dominicans of their citizenship, sparking widespread legal chaos among thousands of former citizens who now found themselves stateless in their own country. Then, the government came up with cumbersome naturalization plan that made the re-acquisition of Dominican citizenship quite difficult for those with papers, and practically impossible for those without them. At the same time, the Dominican government stepped up selective deportations, which triggered mass voluntary self-deportations. Many Haitians and Haitian Dominicans, unable to legalize their status, uncertain about their future prospects, and fearing the loss of all their belongings if they were to be arrested and summarily deported, opted to pack and leave.<sup>261</sup> Nowadays, the Haitian-Dominican border is dotted with refugee camps inhabited by thousands of individuals for whom there is no future in Haiti, an impoverish country that they are unfamiliar with, or had never lived in at all. As in the U.S. case, the

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<sup>258</sup> *Final Rule on Public Charge Ground of Inadmissibility*, U.S. CITIZENSHIP & IMMIGR. SERV. (last updated Feb. 17, 2022), <https://www.uscis.gov/legal-resources/final-rule-public-charge-ground-inadmissibility> [<https://perma.cc/6NCM-26XD>].

<sup>259</sup> Hamutal Bernstein, Dulce Gonzalez, Michael Karpman & Stephen Zuckerman, *With Public Charge Rule Looming, One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, URBAN INSTIT. (May 21, 2019), <https://www.urban.org/urban-wire/public-charge-rule-looming-one-seven-adults-immigrant-families-reported-avoiding-public-benefit-programs-2018> [<https://perma.cc/GW6X-M8K5>].

<sup>260</sup> Sarah Holder, *How Rule Changes About Public Benefits Could Affect Immigrants*, BLOOMBERG (Aug. 13, 2019), <https://www.citylab.com/equity/2019/08/public-charge-rule-legal-immigration-welfare-services-dhs/595987/> [<https://perma.cc/WXQ5-MGHZ>].

<sup>261</sup> See AMNESTY INT’L, *supra* note 238.

Medina administration did not have the resources to deport unwanted Haitians and Haitian Dominicans and preferred to sow fear in them in the hope that many of them would just leave the country on their own.

In the U.S., the Dominican Republic, Argentina, Chile, and Brazil, being an unwanted immigrant is much harder than it was a decade before. It is a life filled with uncertainty, hardship, and constant fear of arrest and deportation. We argue that this new status quo is part and parcel of a new policy designed to arrest and deport some immigrants, scare others into moving out, and keep the rest living in fear in the shadows of society. After all, these countries' economies depend on cheap immigrant labor and getting rid of all immigrants would backfire. Thus, the emphasis is not on deportations (though deportations are still a valuable enforcement tool), but on "deportability": the maintenance of a vulnerable quasi-legal status by which unwanted immigrants do not get a legal foothold in their host country, do not get to legalize their presence, are subject to labor (and other forms of) exploitation, and, whenever the state decides to get rid of them, can be easily deported. Racialized immigrant Others in the United States, the Dominican Republic, Argentina, Chile, and Brazil live with a deportability sword of Damocles hanging over their heads—exploited, unwanted, and in fear.

The other side of the coin behind the inhumane treatment of unwanted immigrants and racialized Others (which even includes some citizens) in the United States, the Dominican Republic, Argentina, and Chile are the political elites that promote such policies as a part of nationalist, xenophobic agendas. Paradoxically, these elites stoke the flames of nationalism at the same time that they—and their political allies—benefit from the cheap labor and other economic contributions of immigrants. They espouse mass deportations and the building of walls but more often than not are satisfied with keeping the right number of immigrants living in the shadows of society, where they can be deported if need be. While this strategy has been used in the past by political elites in these countries, a new twist to it has been the recent emboldening of previously passive, professedly aggrieved nativist masses. In decades past, the nativist masses felt comfortable enough in their privilege to defer to the elites the handling of socio-cultural, identity issues. Radical, racist anti-immigrant discourses remained mostly confined to the fringes of society. However, the past three decades have witnessed the

rapid diversification of these societies. In the United States, people of color, immigrants, and women have ascended and moved into spaces in the workplace, politics, and other social sectors previously monopolized by white males. In a more diversified America, economically-vulnerable blue-collar workers began lamenting the loss of “their country”—a euphemism with hints of white male privilege.<sup>262</sup> When many of their jobs went elsewhere, they held on to their last shreds of privilege: whiteness (particularly when wielded against immigrants and people of color). Likewise, in the Dominican Republic, major economic changes and globalization transformed the economy, wrecking the livelihoods of hundreds of thousands of Dominicans who slid into poverty and decided to emigrate to the Global North. At the same time, Haitians and Haitian Dominicans moved into labor sectors formerly occupied by these Dominicans, dramatically increasing the visibility of immigrants and their children. As in the United States, these changes sparked a nationalist, xenophobic backlash. Fear and loathing of immigrants, scapegoating, name-calling, and outright racism became commonplace in the Dominican Republic starting in the 1990s.<sup>263</sup> Nowadays, xenophobic social movements, aided by social media, are pushing an anti-immigrant, nationalist agenda that few Dominican politicians dare to contradict—lest they be called traitors to the Motherland. In Argentina, efforts at blaming Bolivian immigrants in Argentina prompted a quick and angry response from Bolivian President Evo Morales, whose country sends more immigrants to Argentina than anywhere else in the world. “These discriminatory policies that condemn migration and blame it for crime, drug- and people-trafficking, [and] terrorism . . . are a shameful regression in the face of the rights conquered through the struggle of our peoples,” Morales charged. “Brother Latin American presidents, let us be a great homeland; let us not follow the migratory policies of the north.”<sup>264</sup>

“Of the estimated 1.3 million Bolivians living in Argentina,” in 2017, “only 273—or less than .02%—are incarcerated criminals.”<sup>265</sup>

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<sup>262</sup> See Helms, *supra* note 254.

<sup>263</sup> SAGÁS, *supra* note 160, at 95–116.

<sup>264</sup> Emily Achtenberg, *Argentina’s Immigration Crackdown Rattles Bolivia*, NACLA (March 17, 2017), <https://nacla.org/blog/2017/03/14/argentina%27s-immigration-crackdown-rattles-bolivia> [<https://perma.cc/CDT3-E7KC>].

<sup>265</sup> *Id.*

## CONCLUSION

The ugly underside of this new status quo is that it has become “ok” to hate immigrants and racialized Others. In the United States, the “it’s ok to be white” discourse has normalized racist, xenophobic behavior. What used to be subtle dog-whistle calls to voters are increasingly becoming open calls to stop the transformation of “our country.” In the Dominican Republic, political leaders wear their nationalism on their sleeves, and openly declare themselves the saviors of the Motherland. Perhaps former White House advisor and ideologue Steve Bannon put it best when he told a French National Front Party crowd: “Let them call you racists. Let them call you xenophobes. Let them call you nativists. Wear it as a badge of honor.”<sup>266</sup> Bannon’s very direct message resonated well in both the United States and the Dominican Republic, where a shifting political tide and the normalization of nationalist xenophobia granted legitimacy and a national forum to ideas, beliefs, and behaviors that used to be on the fringes of society.

Not all is lost, however. These anti-immigrant policies and discourses have sparked a pushback from previously dormant progressive sectors of society, who now are mobilizing for action. Thus, the state-sponsored xenophobic opportunism has not come without significant reaction or resistance, as the term is coined in the United States. Indeed, in the United States, the election of Donald Trump and the coming out of the woodwork of ideas and characters thought to have been long confined to the dustbin of history made hundreds of thousands realize that vigilance and active political involvement was not a leisure choice. Moderates, liberals, progressives, women, people of color, immigrants, and even moderate conservatives rejected the undermining of long-enshrined ideals of equality and the pursuit of the American Dream. In the Dominican Republic, popular organizations, progressive intellectuals and journalists, and in particular, the second and third generations of the Dominican and Haitian diasporas have come to the aid of Haitians and Haitian Dominicans. In the face of government passivity and the complicity of the political opposition, the diaspora has taken upon itself the task of exposing the exploitation of Haitian migrants and their Dominican-born

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<sup>266</sup> Eli Watkins, *Bannon: ‘Let Them Call You Racists’*, CNN (Mar. 11, 2018), <https://www.cnn.com/2018/03/10/politics/steve-bannon-national-front/index.html> [<https://perma.cc/7LWV-EF2E>].

descendants and shaming the Dominican government into action. In Argentina, progressive leaders, including a Nobel Prize winner Adolfo Pérez Esquivel, continue to condemn the Argentine immigration policy, highlighting its inconsistency with the country's primary immigration law. Likewise, in Chile writers and academics are beginning to challenge revitalizations of racist pasts and a new, liberal president, Gabriel Boric, is now in office.

It is the goal of these authors, in the tradition of scores of progressive scholars over several decades, to expose wrongs in an effort to bring light to darkness, which will slowly influence others on the ground in these respective countries to continue to challenge baseless hate, and eventually ideally will lead to change in public policy and laws, and hopefully will lead to change in each country's respective collective psyche. While change will come from those with considerably more power and influence than the two writers that have penned this work possess, as is the case in scores of examples in world history, we hope and remain resolute that with the voice of a few, we will expose wrongs, which in turn will lead to systemic change for a better world.