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Virus as Foreign Invader: U.S. Voters & the Immigration Debate

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Virus as Foreign Invader: U.S. Voters & the Immigration Debate

REBECCA SHARPLESS*

Nativist sentiments against classes of immigrants have existed since colonial times. But views about immigration and immigrants drive U.S. electoral politics now more than ever, accounting for a significant number of voters who crossed party lines in the 2016 presidential election. The COVID-19 pandemic has the potential to harden deeply-held beliefs about outsider threats and further entrench the polarization of public views on immigration. During his campaigns and term in office, President Trump popularized nativism, breaking from the received wisdom of the Republican party. Casting the virus as a foreign invader, he built on fears of the contagion to alter immigration policy in fundamental ways, including shutting down the border and eviscerating asylum protections. Nativism has allowed President Trump and his supporters to harmonize their contradictory beliefs that, on the one hand, anti-virus public health measures do not require strong collective action within the country, but, on the other, they justify extreme restrictions against immigrants. Over the long term, changing demographics and an increasingly positive view of immigrants and immigration signal that the country is on a trajectory to a more open society. In the short term, however, the Biden administration must contend with the surge of nativism stoked by President Trump and exacerbated by the COVID-19 pandemic.

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INTRODUCTION

U.S. electoral politics embodies a seeming contradiction when it comes to immigration. On the one hand, support for a more open immigration policy is at an all-time high within both major parties.¹ On the other, restrictionist views on immigration may have pushed Donald Trump to victory over Hillary Clinton, accounting for some of the largely white voters who switched parties to vote for President Trump in 2016.² For a critical minority of voters, views about immigration appear to drive their votes.³ With immigration continuing to take center stage in U.S. partisan politics, it remains to be seen the extent to which the global COVID-19 pandemic will exacerbate the already highly polarized debate about immigration policy. This Article argues that the U.S. response to the COVID-19 threat could harden views about immigration and immigrants. Time will tell whether the nation's experience during the pandemic will have an

¹ See *infra* notes 60-64 and accompanying discussions.

² Based on a review of three studies, the Center for Politics estimated that between 6.7 and 9.2 million people who voted for President Obama also voted for President Trump. Geoffrey Skelley, *Just How Many Obama 2012-Trump 2016 Voters Were There?*, CTR. FOR POL. (June 1, 2017), <http://centerforpolitics.org/crystalball/articles/just-how-many-obama-2012-trump-2016-voters-were-there/>. The study conducted by the Cooperative Congressional Election Study (“CCES”) found that about 6.7 million people who voted for President Trump in 2016 also voted for President Obama in 2012. *Id.*; see also Sean McElwee et al., Opinion, *The Missing Obama Millions*, N.Y. TIMES (Mar. 10, 2018), <https://nyti.ms/2Gdurxm> (analyzing demographics of CCES data that recorded those who voted for President Obama in 2012 and those who did not vote in 2016); Sabrina Tavernise & Robert Gebeloff, *They Voted for Obama, Then Went for Trump. Can Democrats Win Them Back?*, N.Y. TIMES (May 4, 2018), <https://nyti.ms/2KBdsH1> (estimating that 9% of voters who supported President Obama in 2012 voted for President Trump in 2016).

³ See *infra* notes 20-23 and accompanying text.

enduring restrictionist effect on how immigration plays into upcoming elections.

President Trump placed immigration restrictionism at the heart of his presidential campaign and his presidency. His speeches were rife with anti-immigrant rhetoric and policy proposals.⁴ The White House's website listed immigration as one of four topics on its home page, sharing top billing with the economy, national security, and the budget.⁵ The immigration landing page featured uniformed men from Customs and Border Protection, conveying the President's emphasis on immigration enforcement.⁶ The page projected President Trump's "America first" view of the world⁷ and his promises to build a border wall, step up deportations, and replace the family-based immigration with one that emphasizes professional skills.⁸ The messaging invoked "safety" as a concern, as well as the "assimilat[ion]" of immigrants.⁹

The Trump administration used executive power to alter the immigration rules in fundamental ways. Immigration authorities separated young children from their parents' arms and detained them.¹⁰ The President disrupted international travel and family reunification overnight through his travel bans directed at Muslim majority

⁴ See, e.g., President Donald J. Trump, Speech on Immigration (Jan. 8, 2019), in *Full Transcripts: Trump's Speech on Immigration and the Democratic Response*, N.Y. TIMES (Jan. 8, 2019), <https://nyti.ms/2RCDTCT> (calling for Congress to fund a physical barrier and claiming that immigrants have a negative impact on U.S. society).

⁵ WHITE HOUSE, <https://www.whitehouse.gov> [<https://web.archive.org/web/20210119032726/https://www.whitehouse.gov/>] (last visited Jan. 19, 2021).

⁶ *Immigration*, WHITE HOUSE, <https://www.whitehouse.gov/issues/immigration/> [<https://web.archive.org/web/20210113230731/https://www.whitehouse.gov/issues/immigration/>] (last visited Jan. 13, 2021).

⁷ See *America First Foreign Policy*, WHITE HOUSE, <https://www.whitehouse.gov/america-first-foreign-policy> [<https://web.archive.org/web/20170224011956/https://www.whitehouse.gov/america-first-foreign-policy>].

⁸ *Immigration*, *supra* note 6.

⁹ *Id.*

¹⁰ Julie Hirschfeld Davis & Michael D. Shear, *How Trump Came to Enforce a Practice of Separating Migrant Families*, N.Y. TIMES (Jun. 16, 2018), <https://nyti.ms/2JSUGdB>.

nations, prompting mass protests.¹¹ He all but shut down asylum claims at the southern border by making applicants wait in Mexico for their court hearings and automatically denying asylum to anyone who traveled through Mexico to reach the border.¹² His administration promulgated sweeping new regulations that restrict access to asylum.¹³ Less in the headlines were administrative moves that overturned longstanding agency precedent through action by the Attorney General, diminished the independence of the immigration court, and withdrew discretion to release detained immigrants.¹⁴ Advocates have tracked no less than 1,037 changes to immigration law and policy during President Trump's time in office.¹⁵

President Trump's choice to highlight immigration broke from the received wisdom of the Republican Party, which warned that immigration could divide the party and alienate swing voters.¹⁶ Mitt Romney's 2012 bid for the presidency, for example, focused on the

¹¹ Emanuella Grinberg & Madison Park, *2nd Day of Protests Over Trump's Immigration Policies*, CNN (Jan. 30, 2017, 1:42 AM), <https://www.cnn.com/2017/01/29/politics/us-immigration-protests/index.html> (discussing mass protests following President Trump's "Muslim ban" executive order).

¹² Fatma Marouf, *Immigration Challenges of the Past Decade and Future Reforms*, 73 SMU L. REV. F. 87, 98 (2020); *Policies Affecting Asylum Seekers at the Border: The Migrant Protection Protocols, Prompt Asylum Claim Review, Humanitarian Asylum Review Process, Metering, Asylum Transit Ban, and How they Interact*, AM. IMMIGR. COUNCIL (Jan. 29, 2020), <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border>.

¹³ See, e.g., Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (Dec. 11, 2020); Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67202 (Oct. 21, 2020); Asylum Application, Interview, and Employment Authorization for Applicants, 85 FR 38532 (Aug. 25, 2020); Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 85 FR 37502 (Aug. 21, 2020).

¹⁴ See Marouf, *supra* note 12, at 88–98.

¹⁵ IMMIGR. POL'Y TRACKING PROJECT, <https://www.immpolicytracking.org> (tracking all Trump administration immigration policy changes since 2017, including 55 presidential orders) (last visited Jan. 13, 2020).

¹⁶ See Chris McGreal, *Trump's Anti-Immigrant Rhetoric Could Lose Republicans the 2016 Election*, GUARDIAN (Sept. 14, 2015), <https://www.theguardian.com/us-news/2015/sep/14/donald-trump-anti-immigrant-2016-election-republican-loss>.

economy and health care.¹⁷ He pitched himself as a moderate Republican with an eye to amassing broad support.¹⁸ In contrast, President Trump tapped into primal fears about outsiders as part of his campaign strategy.¹⁹ Studies show that people voted for President Trump in 2016 if they held the general belief that immigrants pose a security risk.²⁰ In particular, white voters who held these beliefs were more likely to have crossed party lines to vote for President Trump.²¹ Immigration issues around cultural identity drove these voters, even if it meant crossing party lines and ignoring economic and safety net policies more favored by Democrats.²² Theorists

¹⁷ Philip Rucker, *Mitt Romney Announces 2012 Presidential Bid*, WASH. POST (June 2, 2011), https://www.washingtonpost.com/politics/mitt-romney-announces-2012-presidential-bid/2011/06/02/AG05iJHH_story.html.

¹⁸ Jeffrey H. Birnbaum, Opinion, *Romney's Moderate Appeal*, WASH. TIMES (May 30, 2012), <https://www.washingtontimes.com/news/2012/may/30/romneys-moderate-appeal/>.

¹⁹ Molly Ball, *Donald Trump and the Politics of Fear*, THE ATLANTIC (Sept. 2, 2016) <https://www.theatlantic.com/politics/archive/2016/09/donald-trump-and-the-politics-of-fear/498116/>.

²⁰ Joshua D. Wright & Victoria M. Esses, *It's Security, Stupid! Voters' Perceptions of Immigrants as a Security Risk Predicted Support for Donald Trump in the 2016 US Presidential Election*, 49 J. APPLIED SOC. PSYCH. 36, 41 (2018); James G. Gimpel, *Immigration Policy Opinion and the 2016 Presidential Vote*, CTR. FOR IMMIGR. STUD. (Dec. 4, 2017), <https://cis.org/Report/Immigration-Policy-Opinion-and-2016-Presidential-Vote>; John Sides, *Race, Religion, and Immigration in 2016*, VOTER STUDY GRP. (June 2017), <https://www.voterstudygroup.org/publication/race-religion-immigration-2016>.

²¹ See Tess Eyrich, *What Was Behind 'Voting Switch' in the 2016 Election?*, UC RIVERSIDE NEWS (Jul. 23, 2019), <https://news.ucr.edu/articles/2019/07/23/what-was-behind-vote-switching-2016-election>; Daniel Cox et al., *Beyond Economics: Fears of Cultural Displacement Pushed the White Working Class to Trump*, PRRI (May 9, 2017), <https://www.prii.org/research/white-working-class-attitudes-economy-trade-immigration-election-donald-trump/>; see also Steve Tobocman & John Austin, *How Democrats Can Turn Immigration into Trump's Kryptonite*, POLITICO MAG. (Oct. 20, 2019), <https://www.politico.com/magazine/story/2019/10/20/trump-democrats-immigration-2020-229863> ("To the extent that voters feel strongly about immigration, it is culture and American identity that drive the debate on those issues, not policy. Numerous polling and academic analyses of the Trump victory confirm that it was primarily cultural anxiety that drove many white voters to Trump . . .").

²² See Wright & Esses, *supra* note 20 (describing a study that found that voters who supported President Obama in 2012 and later voted for President Trump in 2016 were more strongly motivated by specific immigration and racial attitudes

writing in the years leading up to the 2016 election correctly predicted that immigration would be a wedge issue that would push a segment of Democrats into the Republican Party.²³

Immigration is sure to remain front and center in American politics for years to come. The extreme immigration policies promulgated by the Trump administration provoked a heated debate²⁴ that will likely continue beyond President Biden's inauguration. As the voting demographics continue to tilt toward the more diverse and cosmopolitan,²⁵ the gulf between the left and right grows,²⁶ promising to make immigration even more of a lightning rod than in the past.

The COVID-19 global pandemic has added another dimension to the politics of immigration. The pandemic, like all major public health threats, has instilled fear.²⁷ This fear includes an anxiety about the virus being spread by people crossing boundaries, be they national, regional, or state.²⁸ It comes as no surprise that the threat

than economic policy); Cox et al., *supra* note 21 (analyzing findings that indicate that immigration and culture were more salient issues than economy in the 2016 election).

²³ See, e.g., Zoltan Hajnal & Michael U. Rivera, *Immigration, Latinos, and White Partisan Politics: The New Democratic Defection*, 58 AM. J. POL. SCI. 773, 782 (2014) (“[F]eelings about immigrants do appear to be leading to some very real changes in partisanship.”).

²⁴ See, e.g., Claire Hansen, *Democrats Blast Trump's Immigration Policies at Debate*, U.S. NEWS (Dec. 19, 2019), <https://www.usnews.com/news/elections/articles/2019-12-19/democrats-blast-trumps-immigration-policies-at-debate> (explaining President Trump's polarizing stance on immigration).

²⁵ See Anthony Cilluffo & Richard Fry, *Early look at the 2020 electorate*, PEW RSCH. CTR. (Jan. 30, 2020), <https://www.pewsocialtrends.org/essay/an-early-look-at-the-2020-electorate/>.

²⁶ See *Wide Gender Gap, Growing Educational Divide in Voters' Party Identification*, PEW RSCH. CTR. (Mar. 20, 2018) <https://www.pewresearch.org/politics/2018/03/20/1-trends-in-party-affiliation-among-demographic-groups/> (reporting growing partisan orientation in certain demographics).

²⁷ See Diane Cole, *Why Scapegoating Is a Typical Human Response to a Pandemic*, KUOW.ORG (Aug. 29 2020, 4:00 AM), <https://www.kuow.org/stories/why-scapegoating-is-a-typical-human-response-to-a-pandemic>.

²⁸ See *id.*; see also Tara Wu, *The Long History of Blaming Immigrants in Times of Sicknes*, SMITHSONIAN MAG. (Oct. 19, 2020), <https://www.smithsonianmag.com/smithsonian-institution/long-history-blaming-immigrants-times-sickness-180976053/> (discussing how negative narratives about race and immigration have promulgated medical myths and scapegoating).

of infectious disease has fostered fear of outsiders, or nativism, especially when the disease has, or is assumed to have, originated from abroad.²⁹ As the nation contends with the public health challenges posed by the spread of the virus—what President Trump dubbed the “invisible enemy”³⁰—it must also guard against the impulse to close society more permanently.

This Article illustrates the link between reactions to major public health threats and nativism and demonstrates how the Trump administration exploited, rather than defused, the tendency toward restrictionism during the COVID-19 pandemic. Part I provides a brief history of how the American public has viewed immigrants and immigration from the colonial period to the present. Part II recounts the historical and psychological evidence that infectious disease pandemics foster inter-group conflict and scapegoating of vulnerable and discriminated against groups. Part III argues that the COVID-19 pandemic has triggered restrictionist tendencies in the United States, which were stoked by the Trump administration. Part IV looks forward, beyond the pandemic and the 2020 election.

I. IMMIGRATION IN THE PUBLIC EYE

One of the many constitutive histories of the United States is the shifting view of people arriving from abroad. Despite the country’s ethnic pluralism and historical emphasis on encouraging immigration, “in” and “out” groups have existed throughout U.S. history.³¹ Early immigrants who were not British and Protestant were met with ambivalence and anxiety over whether they would assimilate.³² Race and ethnicity-based attacks existed from the earliest of colonial days.³³ The need for laborers and the genocidal push to take over land occupied by Native Americans, however, kept federal borders open.³⁴

²⁹ See Wu, *supra* note 28; Cole, *supra* note 27.

³⁰ Jack Shafer, Opinion, *Behind Trump’s Strange ‘Invisible Enemy’ Rhetoric*, POLITICO MAG. (Apr. 9, 2020), <https://www.politico.com/news/magazine/2020/04/09/trump-coronavirus-invisible-enemy-177894>.

³¹ See KUNAL M. PARKER, MAKING FOREIGNERS 11–21 (2015).

³² See generally BILL ONG HING, DEFINING AMERICA 13–21 (2004).

³³ See *id.* at 11–12.

³⁴ HING, *supra* note 32, at 19–21.

With the increase in Irish immigration in the mid-19th century, nativism was on the rise.³⁵ This period was marked by religious fault lines and vitriolic branding of the Irish as intemperate and prone to criminality.³⁶ Post-Civil War society demanded new immigrants to construct railroads, mine coal and iron, and build industry.³⁷ As acceptance of the Irish grew, new waves of immigrants from Asia and eastern and southern Europe were scorned as racially inferior and unable to assimilate.³⁸ In 1875 and 1882, the first federal immigration exclusion laws were passed, directed at sex workers, people convicted of a crime, and Chinese immigrants.³⁹ Calls for mass restriction on immigration, however, could not displace the need for labor.⁴⁰ Borders remained largely open, and 1880 to 1924 marked the period of largescale immigration into the United States, with approximately 27 million people arriving on U.S. shores.⁴¹

World War I brought concern about the loyalty of the foreign-born, fueling restrictionism. A movement to ensure thorough assimilation of the newly immigrated gained momentum.⁴² In 1921, Congress passed the first national origin quotas legislation, seeking to limit new immigration proportionally to the ethnicities already in the country, with an exemption for immigrants from the Western

³⁵ *Id.* at 21.

³⁶ See NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 2 (1995); Thomas Nast, *St. Patrick's Day 1867/Th. Nast* (illustration), in 11 HARPER'S WKLY, Apr. 6, 1867, at 212.

³⁷ HING, *supra* note 32, at 21; Charles Hirschman & Elizabeth Mogford, *Immigration and the American Industrial Revolution from 1880 to 1920*, 38 SOC. SCI. RES. 903–06 (2009).

³⁸ Christopher Klein, *When America Despised the Irish: The 19th Century's Refugee Crisis*, HISTORY (Mar. 14, 2019), <https://www.history.com/news/when-america-despised-the-irish-the-19th-century-refugee-crisis>. See generally IGNATIEV, *supra* note 36, at 3, 148–76 (describing how Irish communities combated oppression through gaining political power).

³⁹ Patrick W. Thomas, Note, *The Recurring Native Response to Global Labor Migration*, 20 IND. J. GLOB. LEGAL STUD. 1393, 1394 n.2 (2013); Page Act, ch. 141, 18 Stat. 477 (1875) (repealed 1974); Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

⁴⁰ See HING, *supra* note 32, at 21.

⁴¹ See Howard Markel & Alexandra Minna Stern, *The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society*, 80 MILBANK Q. 757, 760 (2002).

⁴² See HING, *supra* note 32, at 62–63.

Hemisphere.⁴³ These quotas remained in place until their repeal in the Civil Rights era.⁴⁴ The Great Depression further reduced immigration, and emigration outpaced immigration by almost three-fold.⁴⁵ Restrictionism predominated during World War II, leading to the tragic exclusion of the victims of Nazi genocide.⁴⁶ The need for labor prompted the country to look south, to Mexico.⁴⁷ In the post-war period, as a reaction to WWII atrocities, attitudes toward immigration liberalized.⁴⁸ For a time, America embraced its identity as a safe haven for the oppressed.

The 1950s brought the Red Scare and, with it, a new wave of nativism.⁴⁹ The first comprehensive immigration legislation, the Immigration and Nationality Act of 1952, preserved the national origins quota system biased in favor of immigration from northern Europe.⁵⁰ However, in 1953, a Commission appointed by President Truman issued a report recommending elimination of the national quota system and adoption of a nondiscriminatory and open immigration policy.⁵¹ This effort was continued by President Kennedy,

⁴³ *Id.* at 68; Emergency Immigration Act, Pub. L. No. 67-5, 42 Stat. 5 (1921); Immigration Act of 1924, Pub. L. No. 68-139, § 12, 43 Stat. 153, 159–60.

⁴⁴ PETER H. SHUCK, ONE NATION UNDECIDED 119 (2017); Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered provisions of 8 U.S.C.) (amending Immigration and Nationality Act).

⁴⁵ SHUCK, *supra* note 44, at 119.

⁴⁶ David Nasaw, *America Denied Refugees After the End of World War II—Just as We Are Today*, TIME (Sept. 17, 2020), <https://time.com/5889460/american-history-war-on-immigrants/>; see also Irwin F. Gellman, *The “St. Louis” Tragedy*, 61 AM. JEWISH HIST. Q., 144, 146–49, 152–55 (1971).

⁴⁷ SHUCK, *supra* note 44, at 119.

⁴⁸ See *id.*; David M. Reimers, *Post-World War II Immigration to the United States: America’s Latest Newcomers*, 454 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 2 (1981).

⁴⁹ HING, *supra* note 32, at 73; see DANIEL KANSTROOM, DEPORTATION NATION 173–75 (2007).

⁵⁰ HING, *supra* note 32, at 76; see Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §§ 201–207 66 Stat. 163, 175–81 (1952).

⁵¹ See Edward M. Kennedy, *The Immigration Act of 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 137, 138 (1966).

who ushered in legislation that put an end to the national origins quota.⁵²

In 1980, the Refugee Act brought the United States into compliance with international human rights norms concerning the treatment of refugees—a legacy of World War II.⁵³ In 1986, under the Reagan administration, Congress passed legislative measures to reduce unauthorized immigration.⁵⁴ But at the same time, it enacted two broadscale amnesty programs that conferred lawful status on 2.7 million people.⁵⁵ To date, the United States has yet to re-experience the politics needed to pass such a comprehensive legalization program. By the 1990s, concerns about unauthorized immigration had grown.⁵⁶ In 1996, Congress and President Clinton enacted two major pieces of legislation that expanded the grounds of deportation and restricted defenses to deportation and jurisdiction in the federal courts.⁵⁷ The September 11 terrorist attacks prompted legislation to further broaden grounds for detention and deportation based on suspected terrorism.⁵⁸

⁵² *Id.* at 139. This legislation was ultimately passed into law in 1965 under President Johnson. *Id.* at 148; Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered provisions of 8 U.S.C.) (amending Immigration and Nationality Act).

⁵³ See CARL J. BON TEMPO, *AMERICANS AT THE GATE* 173–79 (2008); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

⁵⁴ BON TEMPO, *supra* note 53, at 185; see Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

⁵⁵ Pia M. Orrenius & Madeline Zavodny, *Do Amnesty Programs Reduce Undocumented Immigration? Evidence from IRCA*, 40 *DEMOGRAPHY* 437, 437–39 (2003) (discussing IRCA's Legally Authorized Workers program and Special Agricultural Worker's Program); see Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §201(a) 100 Stat. 3359, 3394–95 (codified as amended in scattered sections of 8 U.S.C.); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §302(a)(1) 100 Stat. 3359, 3417 (codified as amended in 8 U.S.C. § 1160).

⁵⁶ BON TEMPO, *supra* note 53, at 199.

⁵⁷ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 401–443, 110 Stat. 1214, 1258–73; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

⁵⁸ Robyn M. Rodriguez, *(Dis)unity and Diversity in Post-9/11 America*, 23 *SOC. F.* 379, 380–82 (2008); see *Uniting and Strengthening America by Providing*

The 21st century has been marked by legislative intransigence concerning immigration. Efforts to pass comprehensive immigration legislation failed in 2006 and 2007 due to partisan disagreement about the balance between legalizing the over 11 million undocumented population and law enforcement actions.⁵⁹ Since then, no substantial immigration legislation has succeeded in passing both the House and the Senate.

But despite the two-decades long stalemate on major immigration legislation, *Gallup* reported in 2019 that “Americans’ opinions on the impact immigration has on . . . society have shifted in a more positive direction over the past two decades.”⁶⁰ This favorable view of immigrants exceeds public opinion from before the sweeping amnesty legislation in the early 1980s during the Reagan administration.⁶¹ Almost two-thirds of poll responders today believe immigrants help the country “because of their hard work and talents,” while only about a quarter believe immigrants are a burden “because they take jobs, housing[,] and health care.”⁶² But while the overall positive view of immigrants has increased, the partisan divide has widened. The percentage of Democrats who say immigrants strengthen the country has increased from 32% in 1994 to 83%

Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT) of 2001, Pub. L. No. 107-56, §§ 401–508 115 Stat. 272, 342–68.

⁵⁹ Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 137 (2007). See generally RUTH ELLEN WASEM, CONG. RESEARCH SERV., R42980, BRIEF HISTORY OF COMPREHENSIVE IMMIGRATION REFORM EFFORTS IN THE 109TH AND 110TH CONGRESSES TO INFORM POLICY DISCUSSIONS IN THE 113TH CONGRESS 10–11, 17–26 (2013) (summarizing various immigration reform proposals in 109th and 110th Congresses).

⁶⁰ Jeffrey M. Jones, *New High in U.S. Say Immigration Most Important Problem*, GALLUP (Jun. 21, 2019), <https://news.gallup.com/poll/259103/new-high-say-immigration-important-problem.aspx>.

⁶¹ See Mariano Sana, *Americans’ Support for Immigration Is at Record Highs—but the Government Is out of Sync with Their Views*, CONVERSATION (Aug. 8, 2019, 2:50 PM) <https://theconversation.com/americans-support-for-immigration-is-at-record-highs-but-the-government-is-out-of-sync-with-their-views-121215> (discussing public opinion of immigration since the 1960’s).

⁶² Bradley Jones, *Majority of Americans Continue to Say Immigrants Strengthen the U.S.*, PEW RES. CTR. (Jan. 31, 2019), <https://www.pewresearch.org/fact-tank/2019/01/31/majority-of-americans-continue-to-say-immigrants-strengthen-the-u-s/>.

today, whereas Republicans are divided in attitudes about immigrants: 38% believe they strengthen the country, while 49% view them as a burden.⁶³ Overall, the percentage of Republicans who have a positive view of immigrants is up 8% since 1994.⁶⁴

Changing demographics may account for some of the softening of views on immigration. Of those eligible to vote, 10% are immigrants.⁶⁵ Almost a quarter of U.S. citizen children have parents who were born elsewhere.⁶⁶ In the 2020 election, people of color accounted for one third of the electorate.⁶⁷ Demographers predict that by 2044, white people will be in the minority.⁶⁸ The influx of young people into the electorate will also increase the number of voters with pro-immigrant views. A study has shown that 75% of millennials believe that immigrants strengthen our country, compared to 52% of baby boomers.⁶⁹

With (and perhaps because of) this change in demographics, the views of a minority of voters, largely white, have hardened. President Trump ran a successful campaign fueled by a cocktail of optimism (“Make America Great Again”), anti-intellectualism, and the

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Suzanne Gamboa, *A Record High: 1 in 10 Eligible American Voters Are Immigrants*, NBC NEWS (Feb. 26, 2020, 2:06 PM), <https://www.nbcnews.com/news/latino/record-high-1-10-eligible-american-voters-are-immigrants-n1142261/>.

⁶⁶ Nicole Acevedo, *1 in 4 Children Have Immigrant Parents. Are U.S. Policies Reflecting that Reality?*, NBC NEWS (Mar. 14, 2019, 2:18 AM), <https://www.nbcnews.com/news/latino/1-4-children-have-immigrant-parents-are-u-s-policies-n982786>.

⁶⁷ Anthony Cilluffo & Richard Fry, *An Early Look at the 2020 Electorate*, PEW RES. CTR. (Jan. 30, 2019), <https://www.pewsocialtrends.org/essay/an-early-look-at-the-2020-electorate/>.

⁶⁸ Sabrina Tavernise, *Why the Announcement of a Looming White Minority Makes Demographers Nervous*, N.Y. TIMES (Nov. 22, 2018), <https://www.nytimes.com/2018/11/22/us/white-americans-minority-population.html?auth=login-email&login=email>; see also Jens Manuel Krogstad, *Reflecting a Demographic Shift, 109 U.S. Counties Have Become Majority Nonwhite Since 2000*, PEW RES. CTR. (Aug. 21, 2019), <https://www.pewresearch.org/fact-tank/2019/08/21/u-s-counties-majority-nonwhite/> (explaining that between 2000 and 2018, 109 counties across twenty-two states shifted from majority white to majority nonwhite; by contrast, in that same time period, only two counties shifted from majority nonwhite to majority white).

⁶⁹ Jones, *supra* note 60.

stoking of nativist and racist fears. He built on the successes of the Tea Party, a reaction to the election of President Obama, identified with the rise of the young, urban, and diverse.⁷⁰ Anxieties about immigration propelled President Trump to victory in the 2016 election. Voters with deeply held restrictionist beliefs crossed party lines to support President Trump.⁷¹ These voters prioritized immigration restrictionism over traditionally Democratic issues, such as health care, safety net services, and the prioritization of consumers over corporations. Fears and anxieties relating to race and national identity lead to voting against economic interest. President Trump continued to make immigration a wedge issue during the 2020 election⁷² and its aftermath.⁷³

II. INFECTIOUS DISEASE AND XENOPHOBIA

Both history and psychology teach that the outbreak of infectious disease instills fear, which can lead to the stigmatization, aggression, and denigration of vulnerable groups and people

⁷⁰ Bryan T. Gervais & Irwin L. Morris, *How the Tea Party Paved the Way for Donald Trump*, WASH. POST. (Sept. 7, 2018, 6:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/07/how-the-tea-party-paved-the-way-for-donald-trump/>.

⁷¹ See Alexi McCammond, *Focus Group: Trump's Immigration Edge*, AXIOS (Jul. 15, 2019), <https://www.axios.com/donald-trump-immigration-policy-focus-group-reaction-6d153f37-1b39-4a19-ad5b-cfdaf48a2c0.html>; Gimpel, *supra* note 20.

⁷² See Rick Jervis, *"They Are So Well Taken Care Of: Trump Defends Separating Migrant Children from Parents*, USA Today (Oct. 23, 2020, 11:01 a.m. ET); Jeff Faux, *Trump Is Laying a Trap for Democrats on Immigration*, THE NATION (Apr. 2, 2019), <https://www.thenation.com/article/archive/trump-immigration-democrats-2020-election/>. *But see* Stanley B. Greenberg, Opinion, *Trump Backfire: Americans Increasingly Embrace 'Nation of Immigrants' History and Future*, USA TODAY (Oct. 11, 2019, 5:00 AM), <https://www.usatoday.com/story/opinion/2019/10/11/harsh-trump-policies-backfire-americans-support-immigration-column/3919502002/>.

⁷³ See, e.g., Stuart Anderson, *Final Trump Immigration Push Expected to Restrict H-1B Visas*, FORBES (Dec. 14, 2020, 12:24am EST); Anita Kumar, *Behind Trump's Final Push to Limit Immigration*, POLITICO (Nov. 30, 2020 04:30 AM EST), <https://www.politico.com/news/2020/11/30/trump-final-push-limit-immigration-438815>.

considered outsiders.⁷⁴ “Stigma, to be honest, is more dangerous than the virus itself,” observes Tedros Adhanom Ghebreyesus, the Director-General of the World Health Organization (the “WHO”).⁷⁵

History demonstrates that people blame epidemics on other nations and peoples.⁷⁶ Foreigners, prostitutes, Jews, and the poor were blamed for plague outbreaks.⁷⁷ Tuberculosis was labeled the “Jewish disease.”⁷⁸ Italians were viewed as responsible for polio, the Irish for cholera.⁷⁹ More recently, the SARS outbreak resulted in the stigmatization of U.S. Chinese communities, even though New York’s Chinatown had no reported cases.⁸⁰ The 2009 H1N1 pandemic was first detected in the United States⁸¹ but was called “Mexican swine

⁷⁴ See Yasmeen Serhan & Timothy McLaughlin, *The Other Problematic Outbreak*, THE ATLANTIC (Mar. 13, 2020), <https://www.theatlantic.com/international/archive/2020/03/coronavirus-covid19-xenophobia-racism/607816/>; see also Hannah Marcus, *What the Plague Can Teach Us About the Coronavirus*, N.Y. TIMES (Mar. 1, 2020), <https://www.nytimes.com/2020/03/01/opinion/coronavirus-italy.html?action=click&module=Opinion&pgtype=Homepage>.

⁷⁵ Serhan & McLaughlin, *supra* note 74.

⁷⁶ See Dorothy Nelkin & Sander L. Gilman, *Placing Blame for Devastating Disease*, 55 SOC. RES. 361, 363–67 (1988); see also PATRICIA J. FANNING, INFLUENZA AND INEQUALITY, 6 (2010) (immigrants from Ireland, France, Germany, Asia, Italy, Haiti, and Mexico were viewed as responsible for yellow fever, cholera, bubonic plague, polio, diphtheria, HIV/AIDS, and influenza).

⁷⁷ Charles Kenny, *Pandemics Close Borders—And Keep Them Closed*, POLITICO (Mar. 25, 2020, 4:30 AM), <https://www.politico.com/news/magazine/2020/03/25/trump-coronavirus-borders-history-plague-146788>.

⁷⁸ Mariano Martini et al., *The Intriguing Story of Jews’ Resistance to Tuberculosis, 1850-1920*, 21 ISR. MED. ASSOC. J. 222, 222 (2019).

⁷⁹ Kenny, *supra* note 77.

⁸⁰ Laura Eichelberger, *SARS and New York’s Chinatown: The Politics of Risk and Blame During an Epidemic of Fear*, 65 SOC. SCI. & MED. 1284, 1284–85 (2007) (discussing the SARS epidemic and the stigmatization of Asian communities, specifically New York’s Chinatown, even with a lack of reported cases); see also Roger Keil & Harris Ali, *Multiculturalism, Racism and Infectious Disease in the Global City: The Experience of the 2003 SARS Outbreak in Toronto*, 16 TOPIA: CAN. J. CULTURAL STUD. 23, 25–26 (2006) (discussing racialization of the SARS outbreak in Toronto and its role in revealing racism within the global city).

⁸¹ 2009 H1N1 Pandemic (H1N1pdm09 virus), CDC, <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> (last reviewed Jun. 11, 2019).

flu.”⁸² Africans were blamed for Ebola, as well as HIV/AIDs, together with Haitians.⁸³

Patricia J. Fanning describes this phenomenon as present in colonial America, “where by the late eighteenth century colonists had internalized the notion that the American continent was a virginal territory, free of corruption and disease,” such that “when illness struck, people looked elsewhere for a cause and found it in the immigrant population.”⁸⁴ What Fanning describes as “medicalized nativism” was all too present during the devastating 1918 influenza epidemic in the United States.⁸⁵ According to the Center for Disease Control, the epidemic was “the most severe pandemic in recent history.”⁸⁶ About 500 million people—one third of the world’s population at the time—became infected and estimates are that 21 to 100 million people died.⁸⁷ The virus claimed approximately 670,000 lives in the United States.⁸⁸ At the time, the U.S. population was less than a third of what it is today.⁸⁹

⁸² Trevor Hoppe, “Spanish Flu”: *When Infectious Disease Names Blur Origins and Stigmatize Those Infected*, 108 AM. J. PUB. HEALTH 1462, 1462 (2018); see also Michael McCauley et al., *The H1N1 Pandemic: Media Frames, Stigmatization and Coping*, 13 BMC PUB. HEALTH, no. 1116, Dec. 3, 2013, <https://bmcpubhealth.biomedcentral.com/articles/10.1186/1471-2458-13-1116> (discussing stigmatization of Latino community during H1N1 pandemic, studying psychological effects reporting on pandemic had on stigmatizers and stigmatized).

⁸³ Sarah Monson, *Ebola as African: American Media Discourses of Panic and Otherization*, AFR. TODAY, Spring 2017, at 3 (discussing how American media’s coverage of 2014 Ebola outbreak led to stigmatization of Africans living in the United States and individuals returning from West Africa); Nelkin & Gilman, *supra* note 76, at 364.

⁸⁴ FANNING, *supra* note 76, at 5 (citing ALAN KRAUT, SILENT TRAVELERS: GERMS, GENES, AND THE “IMMIGRANT MENACE” 3 (1994)).

⁸⁵ See *id.* at 6.

⁸⁶ *History of 1918 Flu Pandemic*, CDC (Mar. 11, 2018), <https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/1918-pandemic-history.html>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Mark Terry, *Compare: 1918 Spanish Influenza Pandemic Versus COVID-19*, BIOSPACE (Apr. 2, 2020), <https://www.biospace.com/article/compare-1918-spanish-influenza-pandemic-versus-covid-19/>.

Although the origin of the influenza virus is uncertain, evidence suggests that it started in Haskell County, Kansas.⁹⁰ However, the disease was commonly referred to as the “Spanish flu.”⁹¹ The spread of influenza, like other diseases before it, was largely blamed on recent immigrant populations from southern and eastern Europe, viewed as living in unsanitary conditions because they had not sufficiently assimilated.⁹² Poor immigrants endured inspections of their homes and monetary fines.⁹³ Those suspected of being ill were forced into the hospital, while middle and upper class sufferers received treatment in their homes.⁹⁴ The association of immigrants with influenza reinforced views that recent immigrants “were inferior and even dangerous.”⁹⁵

Psychological studies have documented the association of hardship with the scapegoating of outsiders.⁹⁶ In a preliminary study from the Czech Republic, researchers conducted a psychological experiment to measure hostility towards foreigners during the COVID-19 pandemic.⁹⁷ While the country was under lockdown, subjects

⁹⁰ John M. Barry, *The Site of Origin of the 1918 Influenza Pandemic and Its Public Health Implications*, 2 J. TRANSL. MED., Jan. 20, 2004, at 1.

⁹¹ Alan M. Kraut, *Immigration, Ethnicity, and the Pandemic*, 125 PUB. HEALTH REPS. (SUPPLEMENT 3) 123, 124 (2010); see ALFRED CROSBY, *AMERICA’S FORGOTTEN PANDEMIC: THE INFLUENZA OF 1918*, at 26 (2nd ed. 2003).

⁹² FANNING, *supra* note 76, at 100.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 101.

⁹⁶ See, e.g., Rafaela M. Dancygier & Michael J. Donnelly, *Sectoral Economies, Economic Contexts, and Attitudes Toward Immigration*, 75 J. POL. 17, 28 (2013) (study on the perception of immigrants during the 2008 financial crisis in Europe); Salvatore Coluccello & Lefteris Kretsos, *Irregular Migration, Xenophobia and the Economic Crisis in Greece*, in EURAFRICAN MIGRATION 895–96 (2015) (ebook) (analysis of rise of nativism in Greece during economic crisis in that country); Heejung S. Kim et al., *Fear of Ebola: The Influence of Collectivism on Xenophobic Threat Responses*, 27 PSYCH. SCI. 935, 942 (2016) (study of American response to Ebola outbreak); Jack Citrin et al., *Public Opinion Toward Immigration Reform: The Role of Economic Motivations*, 59 J. POL. 858, 876–77 (1997) (finding that economic downturn increases opposition to immigration).

⁹⁷ Vojtěch Bartoš et al., *Covid-19 Crisis Fuels Hostility Against Foreigners* 3 (IZA Inst. of Lab. Econ. Discussion Paper, Paper No. 13250, 2020), <https://www.iza.org/publications/dp/13250/covid-19-crisis-fuels-hostility-against-foreigners>.

were primed to think about the pandemic and then asked to increase or decrease allocations of money to different individuals, including Czechs, Europeans, Americans, Africans, and Asians.⁹⁸ Participants primed to think about COVID-19 increased discrimination against foreigners by 41%, compared to a control group.⁹⁹ The study concluded that “exogenously elevating salience of thoughts related to the [COVID-19] pandemic magnifies hostility and discrimination against foreigners.”¹⁰⁰ The study also found “evidence of domestic divisions in the Czech society, which are comparable in magnitude to nation-based divisions.”¹⁰¹ These results are consistent with other studies documenting hostility toward outgroups during pandemics and other times of economic or social stress.¹⁰²

Policy makers and campaign strategists must account for the nativist response to infectious disease outbreak. Public health concerns tend to slip into anti-outsider sentiment, threatening the breakdown of rule of law and morality. In Europe, for example, the COVID-19 pandemic has strained national and EU identities. The public health threat has prompted the political right to push for anti-immigrant policies and closed borders and to tether the outbreak to asylum seekers.¹⁰³

⁹⁸ *Id.* at 5.

⁹⁹ *Id.* at 7, 21.

¹⁰⁰ *Id.* at 1.

¹⁰¹ *Id.* at 9.

¹⁰² See *supra* note 96 and accompanying text.

¹⁰³ See Elizabeth Caruth, *Europe is Careening Toward a Crisis of Its Own Making: Immigration, Coronavirus, and the End of European Values*, AM. INST. FOR CONTEMP. GER. STUD. (Mar. 17, 2020), <https://www.aicgs.org/2020/03/europe-is-careening-toward-a-crisis-of-its-own-making-immigration-coronavirus-and-the-end-of-european-values/>; Luke Butterfly, *Locked Down and Cast Out: Europe's Migrants Navigate the Pandemic*, NATION (Apr. 15, 2020), <https://www.thenation.com/article/world/eu-migration-covid/>. The COVID-19 prompted the EU to close its borders for three months. Marc Santora, *In Europe, Travel Returns, but Not Confidence About What Comes Next*, N.Y. TIMES (Jun. 15, 2020), <https://www.nytimes.com/2020/06/15/world/europe/coronavirus-europe-borders-reopen.html>.

III. U.S. COVID-19 RESPONSE AND IMMIGRATION RESTRICTIONISM

In the United States, the Trump administration capitalized on the pandemic-induced climate of fear and uncertainty to advance its restrictionist immigration agenda.¹⁰⁴ As noted by Andrew Selee, director of the Migration Policy Institute in Washington, D.C., “[t]he border has always been a symbol in [the President’s] larger worldview about dangers coming from the outside.”¹⁰⁵ President Trump’s rhetoric around the virus invokes the image of a foreign invader with whom we are locked in battle. He talks of needing to “take our country back” from “the invisible enemy.”¹⁰⁶ His so-called liberation tweets also reflect the idea of invasion by a foreign force.¹⁰⁷

President Trump’s reactions and those of his followers simultaneously under and over-estimate the nature of the public health crisis. On the one hand, supporters of the Trump administration portray the threat posed by the virus as an overreaction fueled by liberal intellectuals and alarmist doctors.¹⁰⁸ On the other, the same constituency supports using the threat as justification for restrictionist immigration policies and aggressive policies against perceived

¹⁰⁴ Michael D. Shear & Maggie Haberman, *Trump’s Temporary Halt to Immigration Is Part of Broader Plan, Stephen Miller Says*, N.Y. TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/04/24/us/politics/coronavirus-trump-immigration-stephen-miller.html?action=click&module=RelatedLinks&pgtype=Article>.

¹⁰⁵ Arelis Hernández & Nick Miroff, *Facing Coronavirus Pandemic, Trump Suspends Immigration Laws and Showcases Vision for Locked-Down Border*, WASH. POST (Apr. 4, 2020), <https://www.msn.com/en-us/news/politics/facing-coronavirus-pandemic-trump-suspends-immigration-laws-and-showcases-vision-for-locked-down-border/ar-BB1297Zf>.

¹⁰⁶ *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, WHITE HOUSE (Apr. 23, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-31/>.

¹⁰⁷ Marcy McCord, *Trump’s ‘LIBERATE MICHIGAN!’ Tweets Incite Insurrection. That’s Illegal.*, WASH. POST (Apr. 17, 2020, 7:00 PM), <https://www.washingtonpost.com/outlook/2020/04/17/liberate-michigan-trump-constitution/>.

¹⁰⁸ Keith Kloor, *Inside the COVID-Denialist Internet Bubble*, POLITICO, (Mar. 22, 2020, 8:30PM), <https://www.politico.com/news/magazine/2020/03/22/inside-fringe-internet-coronavirus-bubble-142960>.

outsiders.¹⁰⁹ Under this logic, the virus poses no real threat to us except when outsiders might have it. When health policies interfere with our own lives and require collective action to keep people safe, the personal cost is concrete and felt deeply. But at the same time, we appear to have no qualm enforcing restrictions on others that we refuse to bear ourselves.

President Trump pointed to the virus as a reason for the southern border wall, the shutdown of asylum processing on the southern border, and a temporary ban on many forms of immigration to the United States.¹¹⁰ Through a series of proclamations, President Trump closed immigration and travel to the United States for entire categories of individuals.¹¹¹ He took these actions despite the lack of evidence that closing borders reduces the spread of disease.¹¹²

President Trump had all but eliminated the processing of asylum claims at the southern border. Prior to the virus, the Administration had already installed a “Remain in Mexico” policy that turns away people seeking asylum at the border, including children and families, making them wait in Mexico for months for a hearing.¹¹³ In the

¹⁰⁹ Shear & Haberman, *supra* note 104.

¹¹⁰ Joel Rose, *Americans Back Trump on Immigration—but Only to Stop COVID-19, Poll Finds*, NPR (Aug. 5, 2020, 5:00 AM), <https://www.npr.org/2020/08/05/898915843/americans-back-trump-on-immigration-but-only-to-stop-covid-19-poll-finds>.

¹¹¹ *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*, WHITE HOUSE (Apr. 22, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-immigrants-present-risk-u-s-labor-market-economic-recovery-following-covid-19-outbreak/>; Shear & Haberman, *supra* note 104; Michael D. Shear & Miriam Jordan, *Trump Suspends Visas Allowing Hundreds of Thousands of Foreigners to Work in the U.S.*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/06/22/us/politics/trump-h1b-work-visas.html>.

¹¹² See Kenny, *supra* note 77 (stating that closing borders is a dated strategy in countering disease and that a coordinated worldwide response would be more effective).

¹¹³ See Zolan Kanno-Youngs, *‘He Turned Purple’: U.S. Overlooks Ill Asylum Seekers*, N.Y. TIMES (Feb. 22, 2020), <https://www.nytimes.com/2020/02/22/us/politics/trump-asylum-remain-in-mexico.html>; Press Release, U.S. Dep’t of Homeland Sec., Statement by Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigrants (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic->

midst of the COVID-19 threat, he took a step further, shuttering the courts hearing the cases, placing applicants in indefinite limbo in dangerous conditions in Mexico.¹¹⁴ Thousands of people live in insecure housing conditions on the Mexican side of the border with no means of earning income.¹¹⁵ Assumed to have relatives north of the border, these asylum applicants are at risk of being kidnapped and held for ransom.¹¹⁶

On the U.S. side of the border, the Trump administration returned to harsh detention policies, including for children and families. It abandoned the Obama-era policy of exercising discretion when deciding whether to detain people, taking an across-the-board approach to detention.¹¹⁷ Even during the COVID-19 pandemic,

action-confront-illegal-immigration; Memorandum from Kirstjen M. Nielson, Secretary of Homeland Security, to L. Francis Cissna, Director U.S. Citizenship and Immigration Services, Kevin K. McAleenan, U.S. Customs and Border Protection, and Ronald D. Vitiello, Deputy Director and Senior Official Performing the Duties of Director U.S. Immigration and Customs Enforcement (Jan. 25, 2020) https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

¹¹⁴ Press Release, U.S. Dep't of Justice, Department of Justice and Department of Homeland Security Joint Statement on Rescheduling MPP Hearings (June 16, 2020), <https://www.justice.gov/opa/pr/department-justice-and-department-homeland-security-joint-statement-rescheduling-mpp-hearings> (“As a result of this ongoing review of conditions, and in conjunction with continued implementation of health officials’ COVID-19 guidance, DHS and DOJ are postponing both [Migrant Protection Protocols] hearings and in-person document service through, and including, July 17, 2020.”).

¹¹⁵ See Arelis Hernández & Kevin Sieff, *Trump’s ‘Remain in Mexico’ Program Dwindles as More Immigrants Are Flown to Guatemala or Are Quickly Deported*, WASH. POST (Feb. 20, 2020), https://www.washingtonpost.com/immigration/remain-in-mexico-deportation-asylum-guatemala/2020/02/20/9c29f53e-4eb7-11ea-9b5c-eac5b16dafa_story.html (describing 2,500 people in a Matamoros encampment).

¹¹⁶ See Miriam Jordan, *‘I’m Kidnapped’: A Father’s Nightmare on the Border*, N.Y. TIMES (Dec. 21, 2019), <https://www.nytimes.com/2019/12/21/us/border-migrants-kidnapping-mexico.html>; Daniella Silva, *Asylum-Seekers Forced to Wait in Tijuana Fear for Their Lives*, NBC NEWS (Mar. 27, 2019, 3:15 PM), <https://www.nbcnews.com/news/latino/asylum-seekers-forced-wait-tijuana-fear-their-lives-n988081>.

¹¹⁷ *Prosecutorial Discretion All but Dead as Immigration Remedy, Owing to Trump Order*, NOLO, <https://www.nolo.com/legal-encyclopedia/prosecutorial-discretion-all-but-dead-as-immigration-remedy-owing-to-trump-order.html> (last visited Dec. 18, 2020).

U.S. Immigration and Customs Enforcement has released few people, causing the virus to rage within the detention facilities and jails.¹¹⁸ Although the Trump administration's official policy of family separation has ended, its strict policy of detaining families persists.¹¹⁹ Under what advocates call "family separation 2.0," parents must choose whether to separate from their children by allowing them to be released to a sponsor or to keep their children with them in detention.¹²⁰

The virus also provided President Trump with the opportunity to further suspicion of foreigners through repeated associations of the public health threat with China, stating: "It came from China. They should've never let it escape. They should've never let it out."¹²¹ Anti-China Twitter feeds have proliferated: "#ChinaVirus," "#WuhanVirus," "#BlameChina," "#WuhanCoronaVirus," "#ChinaCoronaVirus," and "#Kungflu."¹²² Commentators have noted the

¹¹⁸ See Alisa Reznick, 'You Can Either Be a Survivor or Die': COVID-19 Cases Surge in ICE Detention, NPR (July 1, 2020, 9:17 AM ET), <https://www.npr.org/2020/07/01/871625210/you-can-either-be-a-survivor-or-die-covid-19-cases-surge-in-ice-detention>; *The Hidden Curve: Estimating the Spread of COVID-19 Among People in ICE Detention*, VERA INST. (June 2020), <https://www.vera.org/the-hidden-curve-covid-19-in-ice-detention>.

¹¹⁹ Nicole Narea, *The Trump Administration's Choice for Immigrant Families in Detention: Separate or Risk Covid-19*, VOX (July 29, 2020, 9:00 AM) <https://www.vox.com/policy-and-politics/2020/7/29/21340457/trump-family-separation-detention-ice-coronavirus>.

¹²⁰ Jasmine Aguilera, 'Family Separation 2.0.' Parents in ICE Detention Have to Decide Whether to Keep Their Children or Release Them to Sponsors, TIME (July 27, 2020, 12:08 PM), <https://time.com/5866659/ice-parents-children-detention-coronavirus-release/>.

¹²¹ Katie Rogers, *Trump Leans into False Virus Claims in Combative Fox News Interview*, N.Y. TIMES (July 20, 2020), <https://nyti.ms/32xNXln>; Kimmy Yam, *Trump Tweets About Coronavirus Using Term 'Chinese Virus'*, NBC NEWS (Mar. 16, 2020, 10:14 PM), <https://www.nbcnews.com/news/asian-america/trump-tweets-about-coronavirus-using-term-chinese-virus-n1161161>.

¹²² Marietta Vazquez, *Calling COVID-19 the "Wuhan Virus" or "China Virus" is Inaccurate and Xenophobic*, YALE SCH. MED. (Mar. 12, 2020), <https://medicine.yale.edu/news-article/23074/>; Xin Pei & Deval Mehta, *#Coronavirus or #Chinesevirus?!: Understanding the Negative Sentiment Reflected in Tweets with Racist Hashtags Across the Development of COVID-19*, arXiv:2005.08224, May 17, 2020, <https://arxiv.org/pdf/2005.08224.pdf>; Leonard Schild et al., "Go eat a bat, Chang!": An Early Look on the Emergence of Sinophobic Behavior on Web Communities in the Face of COVID-19, ARXIV, Apr. 8, 2020, at 11–13, <https://arxiv.org/pdf/2004.04046v1.pdf>.

danger-from-abroad subtext of the President's COVID-19 response rhetoric that fosters bias and violence against Asians and people of Asian descent.¹²³ President Trump blamed Mexico for a spike in the virus during the summer of 2020.¹²⁴

President Trump's association of particular people with the advent and spread of the virus ran contrary to the WHO's conscious decision to not link the virus with a place of origin—a decision that stemmed from prior experiences when the naming of diseases led to stigma.¹²⁵ The goal of avoiding names associated with places or people is “to minimize unnecessary negative impact of disease names on trade, travel, tourism or animal welfare, and avoid causing offence to any cultural, social, national, regional, professional or

¹²³ Craig Timberg & Allyson Chiu, *As the Coronavirus Spreads, So Does Online Racism Targeting Asians, New Research Shows*, WASH. POST (April 8, 2020, 5:01 PM), <https://www.washingtonpost.com/technology/2020/04/08/coronavirus-spreads-so-does-online-racism-targeting-asians-new-research-shows/>; Josh Margolin, *FBI Warns of Potential Surge in Hate Crimes Against Asian Americans Amid Coronavirus*, ABC NEWS (Mar. 27, 2020, 9:28 AM), <https://abcnews.go.com/US/fbi-warns-potential-surge-hate-crimes-asian-americans/story?id=69831920>; Caitlin Yoshiko Kandil, *Asian Americans Report over 650 Racist Acts over Last Week, New Data Says*, NBC NEWS (Mar. 26, 2020, 4:41 PM), <https://www.nbcnews.com/news/asian-america/asian-americans-report-nearly-500-racist-acts-over-last-week-n1169821>; Stacey Diane A. Litam, “Take Your Kung-Flu Back to Wuhan”: Counseling Asians, Asian Americans, and Pacific Islanders with Race-Based Trauma Related to COVID-19, 10 PROF. COUNS. 144, 145 (2020); see SAVVAS ZANNETTOU ET AL., NETWORK CONTAGION RES. INST., WEAPONIZED INFORMATION OUTBREAK, 1–2 (2020), <https://networkcontagion.us/reports/weaponized-information-outbreak-a-case-study-on-covid-19-bioweapon-myths-and-the-asian-conspiracy-meme/>.

¹²⁴ Jake Lahut, *Trump Is Reportedly Looking to Blame Mexico for New Coronavirus Spikes in the US*, BUS. INSIDER (June 12, 2020), <https://www.businessinsider.com/trump-looking-to-blame-mexico-for-new-coronavirus-covid-spikes-second-wave-2020-6>.

¹²⁵ Zaria Gorvett, *The Tricky Politics of Naming the New Coronavirus*, BBC (Feb. 16, 2020), <https://www.bbc.com/future/article/20200214-coronavirus-swine-flu-and-sars-how-viruses-get-their-names> (discussing how H1N1 was originally called the “swine flu” and the “Mexican virus,” offending Jewish, Muslim, and Mexican communities); Hoppe, *supra* note 82, at 1462–63 (discussing the harmful effects of naming diseases after places, people, and animals and giving examples such as San Francisco's imposition of a quarantine on its Chinatown, explicitly exempting non-Asians, during the bubonic plague outbreak in 1900 and the quarantining of Jewish immigrants during the 1892 cholera and typhus outbreaks).

ethnic groups.”¹²⁶ The Federal Bureau of Investigation has similarly expressed concern over an increase in hate crimes during the pandemic.¹²⁷ Crimes against people perceived as Asian or of Asian descent have increased with the advent of the virus in the United States.¹²⁸ During health crises in the past, scapegoated groups of all kinds, including the Jewish and Muslim communities, became targets.¹²⁹

The pandemic has exposed insider/outsider fault lines based on geography in the United States. Aggression predicated on regionalism has emerged.¹³⁰ Some have delineated between their own community, perceived as relatively safe, and the threat of outsiders

¹²⁶ World Health Organization [WHO] *World Health Organization Best Practices for the Naming of New Human Infectious Diseases*, at 1, WHO/HSE/FOS/15.1 (May 15, 2015), https://www.who.int/topics/infectious_diseases/naming-new-diseases/en/.

¹²⁷ Josh Campbell, *FBI Concerned About Potential for Hate Crimes During Coronavirus Pandemic*, CNN (Apr. 21, 2020, 4:48 PM), <https://www.cnn.com/2020/04/21/politics/fbi-hate-crimes-coronavirus/index.html> (“[The FBI] remains ‘concerned about the potential for hate crimes by individuals and groups targeting minority populations in the United States who they believe are responsible for the spread of the virus.’”).

¹²⁸ Matthew Ormseth, *Rise in Hate Incidents Toward Asian Americans During Coronavirus Crisis, Officials Say*, L.A. TIMES (May 13, 2020, 8:30 PM), <https://www.latimes.com/california/story/2020-05-13/hate-crimes-and-incidents-directed-at-asian-americans-rise-during-pandemic-county-commission-says> (documenting rise in hate crimes against Asian Americans); *Covid-19 Fueling Anti-Asian Racism and Xenophobia Worldwide*, HUM. RTS. WATCH (May 12, 2020, 3:19 PM), <https://www.hrw.org/news/2020/05/12/covid-19-fueling-anti-asian-racism-and-xenophobia-worldwide>; *Officials: Hate Crimes Against Asian Americans Spike in Wake of Coronavirus Pandemic*, CBS L.A. (May 13, 2020, 8:46 PM), <https://losangeles.cbslocal.com/2020/05/13/coronavirus-hate-crimes-spike-asian-americans/> (estimating 2,000 incidents of attacks, aggression, and racial slurs in the United States since start of pandemic).

¹²⁹ Lasse Morthorst, Opinion, *Scapegoating of Religious Minorities During Covid-19: Is History Repeating Itself?*, INST. DEV. STUD. (June 29, 2020), <https://www.ids.ac.uk/opinions/scapegoating-of-religious-minorities-during-covid-19-is-history-repeating-itself/>; see also Aaron Katersky & Ivan Pereira, *Couple Arrested for Hate Crime in Brooklyn, Allegedly Blaming Spread of Covid-19 on Jews: Police*, ABC NEWS (May 11, 2020, 12:31 PM), <https://abcnews.go.com/US/couple-arrested-hate-crime-brooklyn-allegedly-blaming-spread/story?id=70616958>.

¹³⁰ See Patricia Mazzei et al., *Governors Tell Outsiders From ‘Hot Zone’ to Stay Away as Virus Divides States*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/25/us/coronavirus-united-states.html>.

bringing in disease.¹³¹ Shocking reports of vigilante quarantines imposed on people perceived as from virus hotspots include a Maine community that felled a tree to block the driveway of people with New Jersey license plates.¹³² Similar incidents have taken place in Rhode Island, Hawaii, North Carolina, and Alaska.¹³³

The opportunity for promoting closed society policies created by the virus threat has not been lost on the political right. Steve Bannon has proclaimed a “new nationalism” born of the virus pandemic.¹³⁴ As described above, President Trump advanced restrictionist immigration policies under the guise of public health. His supporters will likely continue this tactic beyond his tenure in office, especially because it holds potential to distract the public from its disapproval of how the Trump administration managed the outbreak.¹³⁵

CONCLUSION: LOOKING FORWARD

As society navigates the fallout from the virus, it must be aware of the tendency to underestimate the actions we personally must take to stem the spread and the tendency to overestimate the threat posed by perceived outsiders. The virus exacerbates deeply held beliefs about outsider threats and hardens already entrenched lines on immigration. As we seek to understand White House policies in 2020, we must view President Trump’s actions not as motivated solely by a concern for public health but as taking advantage of the peoples’ fear and uncertainty to push forward a deeply restrictionist immigration agenda. As the Biden administration prepares to govern,

¹³¹ See *id.* (documenting divide between states caused by COVID-19 as governors’ executive orders limit entrance of out-of-state visitors into their respective states).

¹³² Aimee Ortiz, ‘Group of Local Vigilantes’ Try to Forcibly Quarantine Out-of-Towners, Officials Say, N.Y. TIMES (Mar. 29, 2020), <https://www.nytimes.com/2020/03/29/us/maine-coronavirus-quarantine-tree.html>.

¹³³ *Id.*

¹³⁴ Jill Colvin & Jonathan Lemire, *Trump’s Focus on His Base Complicates Path to Reelection*, FED. NEWS NETWORK (Apr. 27, 2020, 7:48 AM), <https://federalnewsnetwork.com/government-news/2020/04/trumps-focus-on-his-base-complicates-path-to-reelection/>.

¹³⁵ See *Trump Is Trying to Distract Us from His Coronavirus Failures — and People Aren’t Buying It*, AM.’S VOICE (April 23, 2020), <https://americasvoice.org/blog/divide-and-distract-responses/>.

especially in swing states, it must account for how voters feel about their sense of national and regional identity in the present moment.

The potent notion of virus as foreign invader threatens to upset life as we know it. As society reflects on the ways we are forever changed by the experience, it must guard against descent into mass nativism. What the future holds depends on whether one takes a short or long-term view. Given the steady change in voting demographics, it seems all but inevitable that U.S. society will demand a more open immigration policy. But the short-term is fraught by a surge of nativism, magnified by the stresses of the COVID-19 pandemic.