
Precious Cargo

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In an incident the local police chief described as a “horrific” human trafficking tragedy, thirty-nine people were found in and around the trailer in a [Walmart] parking lot off Interstate 35 in San Antonio, [Texas] about 150 miles from the [border]. Eight men were pronounced dead at the scene early Sunday morning . . . from heat exposure and asphyxiation . . . At least two of the occupants were school-age children. “All were victims of ruthless human smugglers indifferent to the well-being of their fragile cargo,” U.S. Atty. Richard L. Durbin Jr. said in a statement.

“Ruthless human smugglers blamed for deaths of 9 people left in a truck in 100-degree Texas heat,” LOS ANGELES TIMES, July 23, 2017, by Jennie Jarvie

Produce is war . . . At the corporate offices [of Driscoll’s Berries] . . . interactive maps mounted on the walls monitor every truck carrying Driscoll’s fruit in North America, some

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two hundred and fifty at any given time. An alarm goes off if a truck's temperature deviates from an accepted range, if a truck stops for too long (in Las Vegas, for instance), or if security is breached. A full load of strawberries is worth about fifty thousand dollars . . . The maps resemble battle plans, with armies of trucks fanning out across the continent.

"How Driscoll's Reinvented the Strawberry," THE NEW YORKER, August 21, 2017, by Dana Goodyear

Sometime between late Saturday night and early morning Sunday, July 23, 2017, in a Walmart parking lot in San Antonio, Texas, thirty-nine people were found in the back of a big rig truck that had become a mobile oven in the Texas heat. Ten people died either on the way or later at the hospital, and nearly thirty others were injured, including suffering brain damage.¹ Uncovering what happened before that morning has led to some inconsistent details. Some accounts say the people were discovered after someone who had escaped from the truck asked a Walmart employee for water late Saturday night. As the driver James Bradley tells it, he did not know that there were people in the back of the truck. He was heading to deliver what he believed was an empty truck to Brownsville from Laredo, Texas, even though that would be in the opposite direction of San Antonio. The driver stopped the truck to use the bathroom at Walmart, and heard noises in the trailer. According to his statement, when he opened the door, people fleeing the truck knocked him down and he then noticed "bodies just lying on the floor like meat."²

A few survivors told investigators their stories, filling in details that sometimes matched the driver's account: people had been loaded into the trailer at various points in or near Laredo, and as many as two hundred people had been packed into the truck at some point. Once the truck was on the road, many people began having trouble breathing because, as the driver later told investigators, the trailer's cooling system did not work. They banged on the trailer walls to try to get the driver's attention, but he did not stop. Temporarily, people

¹ Manny Fernandez, Richard Perez-Pena, & David Montgomery, *In San Antonio Smuggling Case, a Fatal Journey in a Packed and Sweltering Truck*, N.Y. TIMES (July 24, 2017), <https://www.nytimes.com/2017/07/24/us/san-antonio-truck-trafficking.html>.

² Kaja Whitehouse & Natalie O'Neill, *Driver Says Bodies in Truck Were Found on the Floor 'Like Meat,'* N.Y. POST (July 24, 2017, 1:47 PM), <https://nypost.com/2017/07/24/driver-says-bodies-in-truck-were-found-on-floor-like-meat/>.

found one small vent hole open, and took turns trying to breathe through it.³

While the San Antonio case ironically unfolded in a parking lot of Walmart — a symbol of global capitalism recognized around the world as readily as McDonald's golden arches or the Starbucks maiden — it could have happened anywhere, and it has. When this story made headlines, many other gruesome incidents that had preceded it were revived in the news, detailing the conditions and casualties of many similar tragic journeys before this. In one case, migrants crouched into a three-foot space above medical-supply boxes, just below the ceiling of a pitch-dark trailer.⁴

In another twelve-hour journey from New Mexico to Texas, about forty-five people packed in an unventilated trailer shared six gallons of water until they ran out, then filled the empty bottles with their own urine to drink in order to survive. The judge in that case noted that while the migrants suffered the grueling journey with no cooling unit in the trailer, the drivers enjoyed air-conditioning in the truck's cab.⁵ In another case, in May 2003, nineteen undocumented immigrants died in an overheated milk truck trailer where the cooling system had never been turned on and the temperature in the truck reached as high as 173 degrees traveling along South Texas highways towards Victoria.⁶ The passengers bloodied their hands clawing at the truck's insulation and trying to break out a taillight in order to get air and, possibly, alert drivers on the road.⁷ The truck was found abandoned near Victoria. According to court documents, the driver had told a checkpoint Border Patrol agent that the vehicle was empty and he was going to Houston to pick up produce. The agent allowed him through without inspection because the trailer's refrigeration unit was turned off.⁸

The fact that the Victoria case and others like it are not purely the result of unwitting errors but instead foiled, premeditated tactics that drivers use to try to evade inspection is even more disturbing and egregious. In one case, a truck driver smuggling seventy-three men,

³ Fernandez, Perez-Pena, & Montgomery, *supra* note 1.

⁴ Manny Fernandez, Nicholas Kulish, & Susan Anasagasti, *Big Rigs, a Human Smuggling Mainstay, Often Become Rolling Traps*, N.Y. TIMES (July 30, 2017), <https://www.nytimes.com/2017/07/30/us/truck-human-smuggling-immigrants.html>.

⁵ *Id.*

⁶ *Id.*; David Montgomery, Manny Fernandez, & Yonette Joseph, *Journey Fatal for 9 Migrants Found in Truck in a San Antonio Parking Lot*, N.Y. TIMES (July 23, 2017), <https://www.nytimes.com/2017/07/23/us/san-antonio-truck-walmart-trafficking.html>.

⁷ Montgomery, Fernandez, & Joseph, *supra* note 6.

⁸ *Id.*

women and children packed rotting watermelons into the trailer with them, in order to throw Border Patrol dogs off the scent of his human cargo. Some drivers temporarily turn the cooling system off in refrigerated trucks, just before reaching checkpoints, so they can claim the truck is empty, in hopes that inspectors will forego investigating the trailer contents.⁹ When drivers forget to turn the refrigeration back on, this is not simply an error, but the result of calculated risks that drivers routinely and purposefully take, often with fatal consequences.

I. THE VALUE OF MIGRANT LIVES

Barely a month after the San Antonio smuggling case made headlines, another story appeared in *New Yorker* magazine with the title “How Driscoll’s Reinvented the Strawberry.”¹⁰ It detailed how many years of research hours and dollars corporations like Driscoll’s have dedicated to cultivating “perfect” berries for the market of berry aficionados in North America and Asia, such as white strawberries prized by Japanese consumers. It also described the high-tech methods deployed to ensure delivery of these berries without any blemishes to their eager consumers. Taken together, these stories illustrate the “parallel lives” of product (in this case, produce) and worker. The methods employed to ensure safe delivery of a truck’s contents when the cargo is produce are strikingly different from those used to ship people. While shipments of strawberries are thoroughly safeguarded with state-of-the-art technology at every step, migrant workers, who ironically could well be the ones to plant, harvest or pack this precious cargo, are smuggled under very different conditions, with hazards abundant and few or no protections.

We could chalk up the difference in treatment to money, but perhaps it is really more a question of how or if migrants’ lives are valued at all. To reduce the question to a cold and crass calculation, we can look at the San Antonio case and see that the payoff is ostensibly pretty large for smuggling, albeit the drivers ultimately often get a small cut.¹¹ One passenger reported that he was prepared to

⁹ Fernandez, Kulish, & Anasagasti, *supra* note 4.

¹⁰ Dana Goodyear, *How Driscoll’s Reinvented the Strawberry*, *NEW YORKER* (Aug. 21, 2017), <https://www.newyorker.com/magazine/2017/08/21/how-driscolls-reinvented-the-strawberry>.

¹¹ See, e.g., Fernandez, Kulish, & Anasagasti, *supra* note 4 (“For the drivers, the risks are tremendous, but the rewards can be relatively meager. In the Victoria case, [the driver] made two transports of migrants in May 2003. For the first one, he drove 60 immigrants and was paid \$6,500, and for the second and deadly trip, he was paid \$7,500 for transporting 74 migrants.”).

pay \$5,500 at the end of the journey, once he had reached San Antonio safely.¹² If the accounts were accurate that at some point 200 people were transported on that truck, with each person paying the rate of \$5,500, then safe delivery of all passengers theoretically might have yielded 1.1 million dollars in total. Some reports estimate that smuggling migrants is an industry grossing seven billion dollars and employing millions of individuals as smugglers each year.¹³ Yet the value placed on the lives of migrant men, women and children was clearly far lower than that of a load of Driscoll's berries, valued at "only" 50,000 dollars, but shipped on tightly monitored, state-of-the-art refrigerated trucks.

Clearly this is not a matter of organizational or technical capacity, either. As one journalist observed, "The [San Antonio] case has cast a harsh light on a practice known for its cruelty. But it also showed that the big rig rolls on as a highly organized, often effective and remarkably enduring transportation option for the smuggling underworld."¹⁴ Stories about smuggling often make allusions to organized crime, bringing in references and implied links to drug trafficking, stash houses, etc., that in reality may have little to do with smuggling people in this way. For example, an article on the San Antonio case reported: "Even as President Trump has made it clear that he will not tolerate illegal immigration, the tragedy illustrated the extremes people will go to to sneak into the United States and opened a window into human smuggling at the border, a clandestine world of drug cartels, rafts, 'stash houses' and empty promises."¹⁵ Gabriella Sanchez, professor¹⁶ and author, addresses this notion as largely myth, based on over fifteen years of research as well as experience as a criminal investigator in Maricopa County in Arizona. She dispels misconceptions of smuggling and attempts to humanize smugglers as migration "facilitators" in her book, *Human Smuggling and Border Crossings* (2016).¹⁷ She portrays smuggling facilitators as often

¹² *Id.*

¹³ Sarah Pierce, *The Vital Difference Between Human Trafficking and Migrant Smuggling*, OPENDEMOCRACY (Nov. 12, 2014), <https://www.opendemocracy.net/beyondslavery/sarah-pierce/vital-difference-between-human-trafficking-and-migrant-smuggling>.

¹⁴ Fernandez, Kulish, & Anasagasti, *supra* note 4.

¹⁵ Fernandez, Perez-Pena & Montgomery, *supra* note 1.

¹⁶ Gabriella E. Sanchez is Assistant Professor of Security Studies and Associate Director for Research at the University of Texas at El Paso's National Security Studies Institute. *Faculty and Staff: Gabriella E. Sanchez*, NAT'L SEC. STUDY INST., <https://academics.utep.edu/Default.aspx?tabid=75696> (last visited July 6, 2018).

¹⁷ See also Gabriella Sanchez, *Migrants Participation in Smuggling: An Agency*

providing care and protection, and building community connections among migrants whom they help to make successful crossings.¹⁸

Sanchez reports from her interviews of smuggling facilitators of all ages and genders in Arizona that, in most cases, they were not members of organized crime, did not have prior histories of violence and there was “no evidence that they were engaging in any type of intimidation or coercion.”¹⁹ Sanchez comments on alleged connections between drug trafficking and migrant smuggling, suggesting that often migrants participate voluntarily in drug activities to help finance or further their journeys. Sanchez cautions readers that there is “very limited data on the issue” and we need to be careful not to over-generalize or overlook “migrants’ varied experiences during their journeys, nor the decisions that they make under stress or coercion.”²⁰ Sanchez reports that the largest costs in smuggling operations is “corruption — the fees paid to police and border agents” and concludes wryly: “To get migrants through segments of the border you do not need organized crime. You need an immigration agent.”²¹ Following Sanchez, I might ascribe the criminality of smuggling operations to the U.S. government, rather than to those typically identified as the villains in these cases. Thus, we could still call smuggling operations organized crime in a different sense, since they are criminal schemes made possible by explicit government policies and practices making migrants more vulnerable and available to becoming super-exploitable, disposable labor.

II. GOOD MIGRANTS, BAD POLICY

This chapter deals with these explicit policies and practices of the U.S. and other First World nations that govern, or “regulate”

Perspective, PROTECTION PROJECT J. OF HUM. RTS. & CIV. SOC’Y 125, 125-27 (2009). See generally GABRIELLA E. SANCHEZ, HUMAN SMUGGLING AND BORDER CROSSINGS (2016) [hereinafter HUMAN SMUGGLING].

¹⁸ See Lynn Stopher, *Review of Human Smuggling and Border Crossings*, 13 AMERIQUESTS (2017) (reviewing GABRIELLA E. SANCHEZ, HUMAN SMUGGLING AND BORDER CROSSINGS (2014)).

¹⁹ Stephanie Leutert, *Clearing Up Misconceptions on Cross-Border Migrant Smugglers: An Interview with Gabriela Sanchez*, LAWFARE (Feb. 16, 2017, 2:30 PM), <https://www.lawfareblog.com/clearing-misconceptions-cross-border-migrant-smugglers-interview-gabriella-sanchez>.

²⁰ *Id.*

²¹ Glenn Kessler, *Are Human-Smuggling Cartels at the U.S. Border Earning \$500 Million a Year?*, WASH. POST (May 21, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/05/21/are-human-smuggling-cartels-at-the-u-s-border-earning-500-million-a-year/?utm_term=.869cf8c9dad6.

migration, often with negative or harmful but not unintended consequences. I argue that the root causes of transnational migration are forces that drive people out of their home countries, such as neoliberal economic policies that create or exacerbate poverty and food insecurity, as well as foreign interventions that contribute to violence and human rights abuses, and environmental degradation and climate disasters. Through the combination of these forces, economic, political and climate refugees are created. Thus, I argue that the distinctions between so-called economic migrants and political refugees are false — or at best elusive and expedient.

In my book, *Disposable Domestics*, I offer a variation on the conventional wisdom or classic “push/pull” theory of immigration. Neoliberal economic policies such as structural adjustment and austerity programs make life so untenable for people in impoverished and indebted nations that people are forced to migrate in order to survive and support their families. These constitute the “push.” Once in the United States, other policies, including welfare, immigration, and labor laws, act in tandem with these neoliberal economic policies to capture migrants as a vulnerable, cheap, super-exploitable labor pool. These are the “pull,” which need to be understood as not simply an appeal or attraction to potential migrants, but sometimes an aggressive extraction of people from their homelands for their labor.²²

All of these forces that make it impossible for people to survive and support their families in their homelands essentially create or cause people to become economic, political and more frequently, climate refugees. Once they have migrated, they are then actively pulled and forced, not merely “drawn,” into low-wage and contingent labor roles via contract labor policies, as well as exclusionary immigration and welfare policies that foreclose other means of legal work and survival. Thus, the “delivery” of cheap migrant labor to employers does not begin with (or even necessarily involve) transportation via smuggling or otherwise, but begins much earlier with policies that drive people to migrate or become refugees in the first place.

In my forthcoming book, *Trafficking by Any Other Name*, I build on this analysis to examine how many U.S. government policies and actions encourage, facilitate or even themselves constitute forms of trafficking, such that they are rightfully called state-sponsored trafficking. These policies and practices enable employers to secure and abuse low-wage workers, and usually punish and ultimately

²² See generally GRACE CHANG, *DISPOSABLE DOMESTICS: IMMIGRANT WOMEN WORKERS IN THE GLOBAL ECONOMY* (2d ed. 2016).

dispose of them once their use has been exhausted, or they pose organized resistance. Thus, I argue that one real and central, albeit hidden agenda behind U.S. immigration and anti-trafficking policy and practice is to create, replenish and ultimately legitimize the existence of a labor force of super-exploitable workers. That labor force is comprised of disenfranchised people who are captured through denying them basic rights, benefits or protections, in order to identify them as “undeserving non-citizen criminals.” This creates a false dichotomy between “good” and “bad” immigrants in public sentiment, in the effort to garner support for otherwise untenable, inhumane public policy and to justify the creation and existence of the resulting legislated underclass.

In this scheme, the “good” immigrants are the “legal” guest workers — those who are super-exploitable, manageable, and easily disposable within the legal framework. They share these desirable traits with trafficking victims, who are also super-exploitable yet ultimately not as manageable or disposable — at least not through convenient, institutionalized “legal” channels. Thus, they remain in a grey area as victims who are sometimes categorized as good, innocent and helpless, and sometimes criminalized, whichever is most politically expedient. The unequivocally “bad” immigrants, then, are the undocumented (including smuggling victims) even though they are most likely victims of the very same neoliberal policies that force most migrants to leave their home countries, and make them vulnerable to trafficking through denying them either human rights or labor protections.²³ Yet they are, in the eyes of the state, the least manageable migrant workers and thus the least desirable and most vilified.

I emphasize that rarely do even “good” migrants (whether designated as “deserving” trafficking victims or “legal” guest workers) get benefits or protections promised under the law in practice. Their classification into these categories is important for political purposes, even though the distinctions are largely false. Indeed, I argue that many undocumented people could be viewed as trafficking victims, without the “innocence” expediently bestowed upon them by the receiving country’s laws or public sentiment. Similarly, they could be seen as imported guest workers, without the convenience to

²³ For example, structural adjustment policies imposed on indebted nations as preconditions for loans from the World Bank/International Monetary Fund destroy subsistence economies in many poor countries, compelling mass migration that is subsequently facilitated and capitalized on by both sending and receiving countries’ governments. See CHANG, *supra* note 22.

employers of state-sponsored temporary “legality” and the attendant removability.

In order to reinforce these false distinctions between “good,” legal guest workers or “innocent” trafficking victims, and “bad” undocumented immigrants unworthy of protections, the government must target the undocumented and present the pretense of trying to eliminate and remove them through highly visible raids. This charade is carried out even though undocumented workers yield tremendous benefits and profit to individual employers and capital, with little or no cost to the state. Unfortunately, the pretense is carried out not merely for the appearance of citizens’ tax dollars at work enforcing “law and order” through anti-immigrant measures. Rather, it is carried out because some lawmakers believe it presents the specter of the raid and deportation dragnet as a warning or reminder to all immigrant workers of just how vulnerable and disposable they are.²⁴

The ability to create these categories of “good” and “bad” immigrants allows the U.S. government and its citizenry to have their cake and eat it too. The government can keep expanding the neoliberal economic policies that essentially force people to migrate, as well as the guest worker policies that facilitate their importation and capture as super-exploitable, disposable workers. Yet it can still claim to be keeping the country safe from “dangerous, criminal immigrants” and protecting jobs, public benefits, and resources for “real Americans” through increasingly violent, draconian immigration enforcement laws and practices. This is why we repeatedly hear, in all of the bluster and bombast about “fixing” our immigration policies, that securing the border and saving jobs for Americans go hand in hand. In reality, using border enforcement, either in practice or as pretense or threat, goes hand in hand with securing low-wage workers for U.S. employers guilt-free.

Procuring labor for U.S. agribusiness and other industries has been codified throughout U.S. history via contract labor programs to allow for what I call the legalized trafficking of migrant workers.²⁵ While existing migrant and U.S. workers already present here could meet the

²⁴ See Grace Chang, *This Is What Trafficking Looks Like*, in *IMMIGRANT WOMEN WORKERS IN THE NEOLIBERAL AGE* 56 (Nilda Flores-Gonzalez et al. eds., 2013) (discussing the 2008 Postville raid); see also Grace Chang, *Women and Children First?*, *CTR. FOR MIGRANT ADVOC.* 22 (Sept. 18, 2012), <https://centerformigrantadvocacy.com/2012/09/18/women-and-children-first-by-grace-chang-published-in-race-talk-kirwan-institute-of-ohio-state-u/>; Interview with Grace Chang, *Against the Grain*, 94.1 KPFA (Sept. 9, 2013) (available at <https://kpfa.org/episode/95136/>).

²⁵ See CHANG, *DISPOSABLE DOMESTICS*, *supra* note 22; Chang, *Women and Children First?*, *supra* note 24.

need for workers in agriculture, for example, instead we see labor shortages created or exacerbated by immigration enforcement policies. Moreover, employers can fabricate and declare what I call artificial or “Trumped up” labor shortages in order to demand cheap labor through formal means such as guest worker policies.²⁶ Guest workers are guaranteed to be as exploitable and disposable as undocumented workers, but with the added advantage of explicit contract labor policies to procure, manage and remove them. In the case of H2A or guest workers in agriculture, it is precisely because of their “legal” designations under extremely unfavorable and limited terms that it is possible to use, abuse and return them with the full endorsement of the state. Similarly, in the case of undocumented workers, their identification as “criminal” allows for their vulnerability and disposability via deportation, also courtesy of the state.

III. VERITABLE VICTIMS OR DUBIOUS DISTINCTIONS

Thus, when events such as the San Antonio smuggling case happen, politicians rush to define the crime and exact its punishment, representing the state’s great interest in classifying migrants as innocent victims or perpetrators of smuggling or trafficking, undocumented migrants or “criminal aliens,” presumably acting of their own volition. Notably, in the *New York Times* account of the San Antonio incident at the beginning of this chapter, the author slips fluidly between the terms “trafficking” and “smugglers,” using them interchangeably. Indeed, the case of the ill-fated migrants who initially may have “agreed” to be transported to some destination in Texas, and ended up dead or severely injured and traumatized when they reached the Walmart parking lot in San Antonio, also illustrates well how elusive it may be to differentiate between “good” immigrants and “bad,” between victims and criminals. I suggest that these false distinctions are reinforced and perpetuated through the differential treatment of smuggling versus trafficking under the law, and that invoking these legal distinctions do not help, but merely complicate the issue further.

²⁶ See generally *Close to Slavery: Guest Worker Programs in the United States*, SOUTHERN POVERTY L. CTR. (Feb. 18, 2013), <https://www.splcenter.org/20130218/close-slavery-guestworker-programs-united-states> (discussing guest worker policies in the U.S. and how growers and other employers manufacture labor shortages in order to secure guest workers).

According to the United Nations definition,²⁷ smuggling of migrants is the “procurement for financial or other material benefit of illegal entry of a person into a State of which that person is not a national or resident.” It involves the “illegal,” “consensual” transportation of people across international borders, for financial or other benefit by the smuggler. In contrast, the U.N. defines human trafficking²⁸ as the recruitment, transportation, or harboring of people by means of threat, coercion, or fraud, for the purpose of exploitation, including sexual exploitation, forced labor, slavery, servitude, or the removal of organs.²⁹ Thus, one difference is that trafficking does not necessarily involve movement across borders, and in fact the UN estimates that forty-three percent of all human trafficking victims are exploited within their country of origin.³⁰

The U.S. Human Smuggling and Trafficking Center (“Center”) (an interagency project of the State Department, Department of Homeland Security and Justice Department) delineates the distinctions made in protocols, suggesting that smuggling is a “crime against a border,” transportation-based, requires border crossing and is *voluntary*.³¹ In contrast, the Center defines trafficking as a “crime against a person,” exploitation-based, with no movement required and *involuntary*.³² The legal difference largely hinges on a false, or at least confounding, dichotomy between consent and coercion that assumes these states of being are more unambiguous or static than they are. Smuggling and trafficking scenarios are both more likely to be situations in which conditions of consent and coercion may shift or are more fluid throughout the experience. For example, a migrant may originally consent to be transported, subsequently be abused or exploited, and

²⁷ *Migrant Smuggling*, UNITED NATIONS OFF. ON DRUGS & CRIME (2018), <https://www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html>.

²⁸ *Human Trafficking*, UNITED NATIONS OFF. ON DRUGS & CRIME (2018), <https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html>.

²⁹ Pierce, *supra* note 13.

³⁰ *Trafficking in Persons*, UNITED NATIONS OFF. ON DRUGS & CRIME (2018), <https://www.unodc.org/unodc/data-and-analysis/glotip.html>; UNITED NATIONS OFF. ON DRUGS & CRIME, GLOBAL REP. ON TRAFFICKING IN PERSONS 2016, at 41 (2016), https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf.

³¹ *Human Trafficking vs. Human Smuggling*, HUM. SMUGGLING & TRAFFICKING CTR. (June 15, 2016), https://ctip.defense.gov/Portals/12/Documents/HSTC_Human%20Trafficking%20vs.%20Human%20Smuggling%20Fact%20Sheet.pdf?ver=2016-07-14-145555-320 (detailing, in Table 1, the differences between human trafficking and human smuggling).

³² *Id.*

may wish to leave but then “choose” to cooperate for lack of options or as a strategic move for protection or damage control.

As Jacqueline Babha of Migration Policy Institute argues,

[T]he distinction between trafficking and smuggling is difficult to implement in practice. Rarely are there “pure” cases of one or the other . . . The available evidence suggests that most transported undocumented migrants consent in some way to an initial proposition to travel, but that, en route or on arrival in the destination country, circumstances frequently change . . . Second, the distinction depends on a flawed conception of human agency. It presupposes a hard and fast divide between two motivational states — consent and coercion . . . But the distinction between coercion and consent is complex . . . Does someone with a gun to their head consent to hand over their money when robbed? Most would say no. But does someone who sells his kidneys because his children are starving consent? Translated into the migration context, do persecution, destitution, and heartache from prolonged family separation constitute “guns” to the head?³³

Another observer, Sarah Pierce, of the Migration Policy Institute, acknowledges the ambiguity or fluidity of these scenarios, yet still insists on the differentiation:³⁴

One instance of migrant smuggling could turn into human trafficking and back into migrant smuggling as situations and demands from smugglers change . . . The legal distinction is even more important when you look at the rights and treatment of the victims of human trafficking. *Migrant smuggling, depending on how it is executed, can be a victimless crime.* In human trafficking there is always a victim. Thus confusing human trafficking with migrant smuggling could leave victims without necessary rehabilitation services and reparations . . . To conflate all migrant smuggling with human trafficking not only finds victims where there might not be any, but it also allows for unlawful or irregular migration to be

³³ Jacqueline Bhabha, *Trafficking, Smuggling, and Human Rights*, MIGRATION POL'Y INST. (Mar. 1, 2005), <https://www.migrationpolicy.org/article/trafficking-smuggling-and-human-rights/> (“Coercion is not simply brute physical force, or even mental domination, but includes ‘the abuse of a position of vulnerability.’ This can potentially encompass a very broad range of situations, since poverty, hunger, illness, lack of education, and displacement could all constitute a position of vulnerability.”).

³⁴ Pierce, *supra* note 13.

rhetorically subsumed under a crime which everyone agrees should be eradicated. This is perhaps the major problem — confusion can allow politicians to dodge politically contentious issues and fail to protect migrants, by hiding behind a “combat trafficking” stance.³⁵

I am reluctant to define smuggling as merely a crime “against a border” or a victimless crime, although I believe that Pierce’s aim is to reserve benefits for trafficking victims and ensure their rights as “true” victims. I caution that this overestimates benefits available to trafficking victims and the frequency with which they actually receive them. Perhaps Pierce is trying to “defend” or defuse smuggling in order to preserve one option that many undocumented people need to access for migration. I caution that just because it might be one of the few means that people have to enter the country (or because people purportedly “choose” it), does not mean we should defend it without question. Instead we need to examine why this may be the only “choice” people have in the first place, and open up better options — like de-criminalizing undocumented migration and people.

While I may never agree that smuggling is a “victimless” crime (even when it does not end in tragedy) or that smuggled migrants are not victims (even when they have consented to be smuggled), perhaps we can agree that it is not a crime without a perpetrator — or many. The perpetrators may encompass a myriad of actors, including government and society at large, beyond the truck drivers and smugglers.³⁶ That is, we must include as “drivers” the forces behind immigration itself, such as the authors of neoliberal economic policy and the architects of border enforcement. Writing for *Just Security*, Jay Shooster suggests that “the deaths are on all our hands” in smuggling cases. Yet more often people blame the victims or do not view them as victims at all.³⁷

³⁵ Pierce, *supra* note 13 (emphasis added).

³⁶ This perspective recognizes the analysis by Gabriella Sanchez discussed earlier, identifying many “smugglers” as facilitators, neither villains nor organized crime perpetrators, and often as providers of care and protection to the migrants whose cross-border journeys they facilitate. See HUMAN SMUGGLING, *supra* note 17.

³⁷ See John Ducoff, *Human Trafficking: Stop the Victim Blaming*, INQUIRER (Jan. 27, 2016, 4:00 AM), http://www.philly.com/philly/blogs/healthy_kids/Human-trafficking-Stop-the-victim-blaming-.html.

IV. "PAYING THE PRICE"

Responses to the San Antonio case from policy-makers and the public alike tell us a great deal. They tell us perhaps as much about the lack of information or ignorance of the American public as their lack of compassion — but these, I would like to believe, go hand in hand. Compounding the tragedy of the lives lost or irreparably damaged in the San Antonio case are the perverse ways that observers have tried to make sense of it. Many have added insult to injury, heaping blame on the victims and drawing the wrong lessons or “moral” to the story.

Even worse, some have tried to capitalize on the tragedy to make ill-conceived arguments in cold political plays for bad and inhumane policy. For example, Texas Lieutenant Governor Dan Patrick, a Republican and long-time foe of immigrants,³⁸ immediately seized the opportunity to use the San Antonio case to push for more border enforcement and promote a proposed Texas law banning sanctuary cities. Patrick lost no time to post comments on social media the same day the victims were found: “Sanctuary cities entice people to believe they can come to America and Texas and live outside the law. Sanctuary cities also enable human smugglers and cartels. Today, these people paid a terrible price and demonstrate why we need a secure border and legal immigration reform.”³⁹ Indeed, the migrant workers who were the victims in this case and others that preceded it did pay a terrible price, and were forced to pay, not for their own mistakes or misdeeds but those of others, including smugglers who took calculated risks with their lives.

Politicians’ sanctimonious statements aside, it must be understood that sanctuary cities do not attract or entice people to migrate via smugglers who would not otherwise be forced to take these risks. People risk everything and leave homelands and families to flee conditions that are untenable, whether as political, economic or climate refugees — often to come to a place that may hold little but the promise of escape from one form of suffering, only to find another. Moreover, the assertion by the gentleman from Texas that sanctuary cities enable human smugglers is predictably self-serving, but not self-evident. Sanctuary cities do not enable human smugglers; U.S. immigration and border enforcement policies do. Policies that cut off

³⁸ Patrick has described immigrants as “an illegal ‘invasion’ from Mexico who bring third world diseases to America.” Jay Shooster, *The San Antonio Smuggling Tragedy: Don’t Let Trump Hijack the Story*, JUST SECURITY (Aug. 2, 2017), <https://www.justsecurity.org/43791/san-antonio-smuggling-tragedy-trump-hijack-story/>.

³⁹ Fernandez, Perez-Pena, and Montgomery, *supra* note 1.

safer or legal means for people desperately trying to migrate only make these people more vulnerable to coercion and abuse, whether by traffickers or smugglers.⁴⁰

One border enforcement program launched in 1994, Operation Gatekeeper, amply illustrates how policies purportedly aimed at preventing border crossings are designed with the explicit intention of driving people to the outermost limits of that vulnerability. The goal of Operation Gatekeeper was to keep immigrants out, one way or another, with the protection of human rights or human life of little or no concern. This included building border fences, deploying more border patrol personnel and implementing military technology at common entry points.⁴¹ While ostensibly the policy was designed to “seal off the border” at points that were more easily monitored, many critics suggest that it was aimed deliberately and explicitly to re-direct migrants to more difficult and deadly terrain in the mountains and desert, where they would be subject to extreme cold, heat, and dehydration. As Doris Meissner, former chief of then-Immigration and Naturalization Service (“INS”), put it, “We did believe geography would be an ally.”⁴² This prediction bore out, as an ACLU human rights investigation of border deaths following this policy found that most could be attributed to exposure to freezing temperatures in the mountains and the heat of the desert in the Imperial Valley.⁴³

While the results are disturbing enough, the nature of this policy as a premeditated strategy of driving people to deadly terrain, with its predictable consequences, is reflected in a few “official” statements. Justin Akers Chacón and Mike Davis have assembled much of this

⁴⁰ Sanctuary cities also do not attract people who would not otherwise be running for their lives in one way or another. Again, U.S. policies foster those very conditions that force people to leave their home countries, and sometimes families, behind under some of the most dangerous circumstances. James North, *How the U.S.’s Foreign Policy Created an Immigrant Refugee Crisis on Its Own Southern Border*, NATION (July 9, 2014), <https://www.thenation.com/article/how-uss-foreign-policy-created-immigrant-refugee-crisis-its-own-southern-border/>.

⁴¹ For excellent discussions of Operation Gatekeeper, see generally JUSTIN AKERS CHACÓN & MIKE DAVIS, NO ONE IS ILLEGAL 206 (2006); PETER ANDREAS, BORDER GAMES: POLICING THE U.S.–MEXICO DIVIDE. (2000); JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE “ILLEGAL ALIEN” AND THE MAKING OF THE U.S.–MEXICO BOUNDARY (2002); Justin Akers, *Operation Gatekeeper: Militarizing the Boarder*, INT’L SOCIALIST REV. (June–July 2001), <http://www.isreview.org/issues/18/gatekeeper.shtml>; NEW WORLD BORDER (Peek Media 2001), <http://nnirr.org/drupal/new-world-border> (a documentary that addresses border issues between the U.S. and Mexico).

⁴² Akers, *supra* note 41; see also AKERS CHACÓN & DAVIS, *supra* note 41, at 206 (citing Debbie Nathan, *Border Geography and Vigilantes*, 34 NACLA 2, 5 (2000)).

⁴³ AKERS CHACÓN & DAVIS, *supra* note 41, at 206; Akers, *supra* note 41.

evidence in their chapter, aptly titled, “Militarizing the Border: Death Warrant for Migrant Workers.”⁴⁴ As Claudia Smith of California Rural Legal Assistance Foundation’s Border Project exposed in an op-ed, the architects of Operation Gatekeeper assumed that “most of the ‘influx’ would not be deterred by the ‘mortal dangers’ which came with the new routes.”⁴⁵ Moreover, the statement of an INS supervisor in 1996, as quoted in the San Diego Union-Tribune, two years after the outset of Operation Gatekeeper is neither coy nor covert: “Eventually, we’d like to see them all out in the desert.”⁴⁶ Taken together, the evidence suggests that the policy and practice instituted under Operation Gatekeeper explicitly relied on the assumption that migrants would either be discouraged from entering the country or die trying.⁴⁷

Almost a quarter-century after the deployment of border militarization via explicit policy under Operation Gatekeeper and amid Trump’s incessant calls for more border walls, history threatens to repeat itself with a vengeance. Guadalupe Correa-Cabrera, a fellow at the Washington-based research institute, the Wilson Center, observes that smuggling services have been in greater demand because crossing the border by other means is so difficult. Commenting on the San Antonio case, she said: “Events like this are an unintended consequence of enhanced border enforcement and security measures. Further enhancing border security puts migrants under greater risk and strengthens transnational human smuggling networks.”⁴⁸ While I agree with Correa-Cabrera’s observation here, I would like to put a finer point on it to argue that there is nothing unintended about these consequences. The history of policies like Operation Gatekeeper tells us that it is by design that “enhanced” — also known as militarized — borders will only serve to drive more people to take risky journeys, whether by crossing through more dangerous terrains by land or sea, or at the hands of smugglers using unsafe tactics. They also become likely prey for being trafficked, whether by “criminal” traffickers or through legalized trafficking schemes such as guest worker programs.

So while some opportunist politicians feign concern for smuggling victims to push their policies to “crack down” on smugglers and “beef up” border enforcement, these do little to protect migrants, nor are they actually intended to. Human Rights Watch argues that instead, such policies allow governments of destination countries to prioritize

⁴⁴ AKERS CHACÓN & DAVIS, *supra* note 41, at 206.

⁴⁵ Akers, *supra* note 41; *see also* AKERS CHACÓN & DAVIS, *supra* note 41, at 207.

⁴⁶ *See* AKERS CHACÓN & DAVIS, *supra* note 41, at 207.

⁴⁷ NEW WORLD BORDER, *supra* note 41.

⁴⁸ Montgomery, Fernandez, & Joseph, *supra* note 6.

law enforcement over the human rights of asylum seekers and to rationalize actions such as destroying boats as “humanitarian” acts aimed at saving lives when the real objective is to prevent people from migrating irregularly across these countries’ borders.⁴⁹ Human smuggling is made more viable and more dangerous *because* of militarized borders and other enforcement policies — not in spite of them. Militarized borders and anti-immigrant policies (including anti-sanctuary policies) do not deter human smuggling. Border enforcement policies broadly, and anti-smuggling measures specifically, are aimed at preventing people from migrating, not preventing harms to migrant people.⁵⁰ History tells us that these policies do not succeed in preventing people from trying to migrate — but instead drives them into increasingly vulnerable life conditions and forces them to use ever more treacherous means of migration.

“Jack Staton, acting assistant director of intelligence for ICE’s Homeland Security Investigations arm, called human smuggling ‘100 percent [a] crime against humanity . . . [and] victimizing people that are attempting to get a better life.’”⁵¹

In response, Jay Shooster of Just Security wrote:

If we are going to decry smuggling as a “crime against humanity” . . . we must recognize that an even bigger crime is the policy of forcibly excluding immigrants from our country in the first place Contrary to ICE’s propaganda, ‘victimizing people that are attempting to get a better life’ is a much better description of U.S. border policy than human smuggling.⁵²

⁴⁹ *Smuggling and Trafficking Human Beings: Questions and Answers*, HUM. RTS. WATCH (July 7, 2015, 12:01 AM), <https://www.hrw.org/news/2015/07/07/smuggling-and-trafficking-human-beings>.

⁵⁰ In a particularly malicious practice, Border Patrol agents dump water jugs left by human rights groups for migrants in the desert. See *Video Shows Border Agents Dumping Water Left for Migrants*, MSNBC (Jan. 23, 2018), <https://www.msnbc.com/all-in/watch/video-shows-border-agents-dumping-water-left-for-migrants-1144118339539>.

⁵¹ Maria Sacchetti et al., *After Deadly Smuggling Case, Officials Charge Truck Driver and Decry ‘Crime Against Humanity,’* WASH. POST (July 24, 2017), https://www.washingtonpost.com/national/after-deadly-smuggling-case-officials-charge-truck-driver-and-decry-crime-against-humanity/2017/07/24/3ea8ad50-7094-11e7-9eac-d56bd5568db8_story.html?noredirect=on&utm_term=.efe2fea18fa0.

⁵² Jay Shooster, *The San Antonio Smuggling Tragedy: Don’t Let Trump Hijack the Story*, JUST SECURITY (Aug. 2, 2017), <https://www.justsecurity.org/43791/san-antonio-smuggling-tragedy-trump-hijack-story/>.

V. CRIMINAL PROFITS, CRIMINAL JUSTICE

In a statement issued the day after the San Antonio smuggling victims were discovered, Thomas Homan, acting director of ICE, said:

To maximize their criminal profits, these human smugglers crammed more than 100 people into a tractor-trailer in the stifling Texas summer heat. Our ICE agents and officers . . . will pursue these smugglers and bring them to justice.⁵³

While I appreciate Homan's distinction here between what he calls "criminal profits" versus, I suppose, ordinary profits derived through "routine" human suffering under capitalism, I am more interested in understanding what he means by "justice" in this context. When smuggling cases such as these come to light, the drivers at the end of the road are often the ones charged and convicted, but it is not only these drivers, the middlemen, that we should condemn here. In fact, they are often paid relatively poorly, in the context of the highly profitable trade they support through hauling their human "cargo." Employers are the hidden but ubiquitous perpetrators, whether they hire the particular migrant workers who have been smuggled by pre-arrangement, or vulnerable undocumented migrant workers in general. To be clear, I call them the real criminals — not because they are breaking the law to hire "illegal" workers, but because they profit from undocumented people's vulnerability in the most calculated ways. The employers who reap the biggest profits by deliberately hiring workers they know they can pay low wages, under the worst conditions, with few or no benefits, are not usually the ones held accountable in these cases.

The *New York Times* reported that the driver in the San Antonio case, James M. Bradley Jr., was initially charged "under a federal law against knowingly transporting people who are in the country illegally — a law that provides for an unlimited prison term or capital punishment, *if the crime results in a death.*"⁵⁴ This was a fair enough paraphrase of the charges listed under the "offense description" in the criminal complaint against Bradley.

It is notable that both the complaint and the *New York Times* account focused on the "crime" of illegal immigration or facilitating it, following the U.N. definition of smuggling: the "procurement for financial or other material benefit of illegal entry of a person into a

⁵³ Sacchetti et al., *supra* note 51.

⁵⁴ Fernandez, Perez-Pena, and Montgomery, *supra* note 1 (emphasis added).

State of which that person is not a national or resident.”⁵⁵ While the driver was ultimately convicted for “reckless endangerment” of the victims, it felt like an afterthought in the public discourse.

We must ask, why is the “crime” defined as the act of knowingly transporting people deemed “criminals” or “illegal” immigrants, instead of knowingly endangering human life? As we have seen, the U.S. government consistently endangers migrant people’s lives through explicit policies and practices that consciously and purposefully direct migrant people towards danger. Cases like San Antonio may appear to be haphazard, to be the result of the actions of individual smugglers, to be individual bad choices or even bad luck on the part of migrants. They need to appear that way in order to distract us from the draconian, inhumane policies and government violence and negligence that undergird them. The appearance of these tragedies as random events covers for the reality that they are the result of policies that make people vulnerable to danger by design.

Cases like San Antonio are not merely random accidents — in fact, we should view them not as accidents at all, but as predictable events that lawmakers and society condemn people to regularly. Yet if we applied the same science to ensuring the safety of migrant workers that is applied to cultivating, packing and shipping precious berries, to be delivered to consumers fresh and without a blemish, then these “accidents” might not happen (or when they did, they might be true accidents). For that to happen, we as a society would need to apply the same, or greater, value to the lives of migrant workers that we do to the products and services that they provide — most often, too often, at the cost of their own lives and health. It would also require an honest reckoning that immigration and border enforcement is not about protecting lives or securing borders but about procuring labor that is cheap and disposable — whether disposable by death or deportation.

We do not need to wait for the next “unforeseen tragedy” to demand humane policies that serve immigrant and human rights, instead of politicians’ anti-immigrant and inhumane agendas. Victims like those in the San Antonio case often only briefly make the news, even though an estimated 40,000 smuggled migrants have died since 2000, or about 2,857 people each year.⁵⁶ Headlines fade away quickly, if there

⁵⁵ *Id.*; Complaint, United States v. Bradley, No. SA:17-MJ-0832, (W.D. Tex. Jul. 24, 2017), <https://www.scribd.com/document/354593639/Bradley-Complaint>.

⁵⁶ International Organization for Migration, *IOM Releases New Data on Migrant Fatalities Worldwide: Almost 40,000 Since 2000*, IOM (Sept. 29, 2014, 10:45 AM), <https://www.iom.int/statements/iom-releases-new-data-migrant-fatalities-worldwide->

ever were any, and lost lives are written off as “collateral damage” or “unforeseen tragedies,” even though they are indeed more than collateral, and certainly are perfectly foreseeable. Often these would-be cautionary tales are resurrected when another tragedy occurs, and we are left to wonder why the last time did not teach us anything, why it was not the last.

VI. NO ONE LEAVES HOME UNLESS . . .

Smuggling is too often only seen as a “problem” or defined as a crime when something “goes wrong,” for example, resulting in the completely avoidable deaths of people, including children. But if people are routinely forced to leave home, both by circumstances beyond their control and by explicit policy designed to control them, then something has already gone terribly wrong in our society. In July of 2018, the *New York Times* ran an article detailing how “agents and smugglers go to ever greater lengths to outfox one another,” presenting photo after photo of the desperate measures people will take in order to be smuggled, including hiding inside of a car engine, a dashboard and, in one case, being sewn into the seat of a car.⁵⁷ I viewed these images and read many of the comments posted, including this one by John Smith: “Funny, these criminals pay drug gangs \$10,000 to smuggle themselves and their children across the U.S. border. Upon arriving they plead poverty. I say, ship them back immediately and bill their respective countries for their ‘stay’ in the U.S. America lives by the rule of law. If these foreigners ignore our laws they deserve to suffer whatever fate befalls them.”⁵⁸

Smith’s reaction of ill will, seemingly no compassion, and his assumption that people are feigning poverty or desperation, is unfortunately the norm in many of the responses of commenters on this article. Even more alarmingly, his comment seems to encapsulate perfectly the sentiment behind Trump’s “zero tolerance” policy and the sum total of its many antecedents. Beyond lack of compassion, it also demonstrates a profound lack of understanding about how and why migration “happens.” What drives people to take risks such as hiding in a tractor-trailer not designed for human passengers, on the

almost-40000-2000.

⁵⁷ Nicholas Kulish, *Border Patrol’s Last Line of Defense? It Isn’t at the Border*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/immigration-smuggling-border-patrol.html#commentsContainer>.

⁵⁸ *Id.*

chance that they will be delivered to “safety” in a nation whose laws and “citizens” are already hostile to them?

The Somali-British poet Warsan Shire captures those conditions best in her poem, “Home,” a passage of which I quote here:

no one leaves home unless
home is the mouth of a shark

you only run for the border
when you see the whole city
running as well

.....

you have to understand,
no one puts their children in a boat
unless the water is safer than the land.

who would choose to spend days
and nights in the stomach of a truck
unless the miles travelled
meant something more than journey⁵⁹

As I began writing this, a tragic drama was unfolding at “our” U.S. borders with caravans of families from Central America arriving to be turned away or to threats that parents and children would be torn from each other to be held in separate detention centers — threats that were soon revealed to have already been happening.⁶⁰ While the rationale given for policies separating children from parents at “interception” was “for the children’s protection,” this was disingenuous at best, and now well understood to be cover for the malicious policy that the Trump administration had proposed as early as December of 2017, would formally introduce in May of 2018, and finally attempt to distance itself from in June of 2018.⁶¹

⁵⁹ Warsan Shire, *Home*, SEEKERSHUB (Sept. 2, 2015), <http://seekershubs.org/blog/2015/09/home-warsan-shire>.

⁶⁰ Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html>.

⁶¹ Caitlin Dickerson & Ron Nixon, *Trump Administration Considers Separating Families to Combat Illegal Immigration*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/us/trump-immigrant-families-separate.html>; see Executive Order, *Affording Congress an Opportunity to Address Family Separation* (June 20, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>.

Initially, on April 20, 2018, Department of Homeland Security officials insisted that the practice of separating families at the border was for the children's benefit, not for deterrence purposes. One spokesman, Tyler Houlton, asserted: "As required by law, D.H.S. must protect the best interests of minor children crossing our borders, and occasionally this results in separating children from an adult they are traveling with if we cannot ascertain the parental relationship, or if we think the child is otherwise in danger."⁶² This statement came reluctantly, only after some answers to long-standing questions from advocates began to emerge. Data from the Office of Refugee Resettlement was reviewed and revealed by the *New York Times*, showing that more than 700 children had been removed from their parents since October of 2017, including more than 100 who were under the age of four years old.⁶³

Not long before this, however, Trump administration officials had been making bold declarations, unequivocally stating that they were putting such measures in place as deterrence. Indeed, in an earlier April 6, 2018 memo, Attorney General Jeff Sessions reiterated what he had stated in a memo a year prior, on April 11, 2017, entitled "Renewed Commitment to Criminal Immigration Enforcement," in which he had laid the groundwork for the new policy to all federal prosecutors.⁶⁴ In his April 6, 2018 memo, he directed each U.S. Attorney's Office along the Southwest Border to "adopt immediately a zero-tolerance policy." Sessions then "debuted" the policy on May 7, 2018, announcing in multiple public appearances that criminal prosecutions would be pursued for those "illegally" crossing the border and potential migrants faced the threat of jail sentences and the separation of children from their parents in the process.⁶⁵

"If you cross the Southwest border unlawfully, then we will prosecute you. It's that simple," Sessions said, announcing the new

⁶² Dickerson, *supra* note 60 (providing a quote from the spokesman for DHS statement).

⁶³ *Id.*

⁶⁴ Memorandum from U.S. Att'y Gen. Jeff Sessions to the Federal Prosecutors Along the Southwest Border (Apr. 6, 2018) (discussing the "Zero-Tolerance for Offenses" policy under 8 U.S.C. § 1325(a) (2018)).

⁶⁵ Jeff Sessions, U.S. Att'y Gen., Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018) (transcript of speech in San Diego, CA); Jeff Sessions, U.S. Att'y Gen., Remarks to the Association of State Criminal Investigative Agencies 2018 Spring Conference (May 7, 2018) (transcript of speech in Scottsdale, AZ); Jeff Sessions, U.S. Att'y Gen., Remarks to the Gatlinburg Law Enforcement Training Conference (May 8, 2018) (transcript of speech in Gatlinburg, TN).

policy that imposed potential criminal penalties on border crossers, in a departure from previous policy, which theoretically mandated only civil deportation proceedings. “Today we’re here to send a message to the world that we are not going to let the country be overwhelmed. People are not going to caravan or otherwise stampede our border,” Sessions said in statements in Arizona and California.⁶⁶ “If you are smuggling a child then we will prosecute you, and that child will be separated from you as required by law,” adding pointedly, “[i]f you don’t like that, then don’t smuggle children over our border.”⁶⁷ Here, Sessions invoked the twisted new logic and emerging law of the day: that parents bringing children with them across the border, or enlisting the services of others to bring children to join them once here, would be charged with the crime of smuggling.

Prior to the San Antonio incident in July of 2017, a veteran ICE agent had agreed to speak with a journalist on condition of anonymity, after becoming disillusioned with “the new order at ICE” under Trump.⁶⁸ He said: “We used to look at things through the totality of the circumstances when it came to a removal order — that’s out the window . . . It’s not just the person we’re removing. It’s their entire family. People say, ‘Well, they put themselves in this position because they came illegally.’ I totally understand that. But you have to remember that our job is not to judge. The problem is that now there are lots of people who feel free to feel contempt.”⁶⁹ The agent revealed a new ICE policy that would specifically target people who may have paid smugglers to bring family members or children into the country.⁷⁰ ICE would investigate and consider them as co-conspirators in smuggling, guilty of placing children “directly in harm’s way,” the agent said.⁷¹ While the policy was being touted as a measure to combat smuggling, the agent saw it as “just a pretext to increase arrests and eventually deport more people.”⁷² The agent also worried that the

⁶⁶ Miriam Jordan & Ron Nixon, *Trump Administration Threatens Jail and Separating Children from Parents for Those Who Illegally Cross Southwest Border*, N.Y. TIMES (May 7, 2018), <https://www.nytimes.com/2018/05/07/us/politics/homeland-security-prosecute-undocumented-immigrants.html>.

⁶⁷ *Id.*

⁶⁸ Jonathan Blitzer, *A Veteran ICE Agent, Disillusioned with the Trump Era, Speaks Out*, NEW YORKER (July 24, 2017), <https://www.newyorker.com/news/news-desk/a-veteran-ice-agent-disillusioned-with-the-trump-era-speaks-out>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

policy would cause new unaccompanied minors arriving here to be stuck in detention because parents would be afraid to pick them up.⁷³

Since that interview, the agent's concerns have borne out in ways that perhaps even the most hardened cynic could not have predicted. The possibility that separating migrant children and parents may have been in the works as an explicit deterrence policy long before the practice and policy were formally announced and implemented is no longer cause for speculation. Furthermore, the federal government's negligence has been exposed in its "care" of children who had crossed the border unaccompanied and been detained prior to the zero tolerance policy and family separations. At hearings before the Senate Permanent Subcommittee on Investigations on April 26, 2018, Steven Wagner, a Department of Health and Human Services official, admitted that approximately 1,500 of the unaccompanied minors released from its custody to be placed with sponsors had been "lost."⁷⁴ These children and youth, who had fled poverty and often drug cartels, gang violence and domestic abuse in Honduras, El Salvador and Guatemala, were no longer able to be located through DHHS's Office of Refugee and Resettlement's tracking efforts.⁷⁵ The *New York Times* reported that this "rais[ed] concerns they could end up in the hands of human traffickers or be used as laborers by people posing as relatives."⁷⁶ Yet these concerns had already come to pass and become reality for a few groups of migrant youth, and documented two years prior to the DHHS/ORR admission in 2018 of losing track of children in its custody.⁷⁷

In fact, in 2016, the same Senate Permanent Subcommittee on Investigations ("PSI") produced a damning report that two years earlier, in 2014, seven minors had been released by DHHS/ORR to

⁷³ *Id.*

⁷⁴ Ron Nixon, *Federal Agencies Lost Track of Nearly 1,500 Migrant Children Placed with Sponsors*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/26/us/politics/migrant-children-missing.html>; see Homeland Security and Governmental Affairs: Investigations, *An Oversight Hearing to Examine Dep't of Health and Human Servs. and Dep't of Homeland Sec. Efforts to Protect Unaccompanied Alien Children From Trafficking and Abuse*, CSPAN (Apr. 26, 2018) (statement of Steven Wagner, Acting Assistant Secretary, Administration for Children and Families, U.S. Department of Health and Human Services), <https://www.c-span.org/video/?444379-1/homeland-security-governmental-affairs-investigations>.

⁷⁵ Nixon, *supra* note 74.

⁷⁶ *Id.*

⁷⁷ PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFF., 115TH CONG., PROTECTING UNACCOMPANIED ALIEN CHILDREN FROM TRAFFICKING AND OTHER ABUSES: THE ROLE OF THE OFFICE OF REFUGEE RESETTLEMENT 1-3 (2016).

human traffickers and forced to work on egg farms in and around Marion, Ohio. The youth were forced to work six or seven days a week, twelve hours per day, under threat of harm or even death to them or their families.⁷⁸ Two days prior to the April 26, 2018 Senate PSI hearings, PBS Frontline aired a program, “Trafficked in America,” reporting on how these youth had been picked up from the ORR detention centers by traffickers posing as relatives of the children.⁷⁹ Beyond the Marion case, the Senate PSI report had identified thirteen other cases of “UACs” (unaccompanied alien children) trafficked after placement by ORR, and fifteen more cases with “serious trafficking indicators.”⁸⁰ The timing of the public announcement of the “lost” children alongside the revival of the “old news” of the Marion case four years prior has raised questions about whether this news was deployed strategically to garner public support for increased surveillance and control of migrant children, youth and parents.⁸¹

It is important to note that all of these migrant youth and children — those who had arrived unaccompanied and been trafficked in the Marion case in 2014, those whom DHHS/ORR had discovered losing track of between October and December of 2017, and those separated from their parents and rendered “unaccompanied” in the spring of 2018 under “zero tolerance” policies — are distinct groups, but they share the singular condition of extreme vulnerability at the hands of both violent forces in their homelands and the U.S. government’s cruelty and negligence. This vulnerability bears no end in sight for the migrant youth and children who will undoubtedly follow in their paths.

These stories may tug on our heartstrings, but it is my hope that instead they provide enough grist to vindicate the best conspiracy theorists among us. Perhaps they even offer enough evidence to convince the greatest skeptics that border policies ultimately serve ill purposes that are more about labor and social control than about protection of borders or migrant people. In other words, our border policies align all too well with the goals of capturing the most vulnerable and super-exploitable labor pool, including the most young and innocent migrant people arriving at our gates.

⁷⁸ Superseding Indictment ¶¶ 59, 63, 69, 72, 77, 92 at 11-17, *United States v. Castillo-Serrano*, No. 15-cr-0024, ECF No. 28 (N.D. Ohio July 1, 2015).

⁷⁹ *Frontline: Trafficked in America*, PBS (Apr. 24, 2018), <http://www.pbs.org/video/trafficked-in-america-pppgmt/>.

⁸⁰ PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, *supra* note 77.

⁸¹ See Grace Chang, *TRAFFICKING BY ANY OTHER NAME* (The New Press, forthcoming).

I generally try to refrain from using the designation of “innocence,” just as those who have criticized the Dreamer narrative ask us not to use their touted “innocence” as a condemnation of their parents, facilitating their criminalization.⁸² Indeed, the rhetoric invoked to defend DACA while it has been under threat of rescission has been unmistakably mercenary. In the suit filed by the University of California, the language clearly reads as a shareholders’ call for the protection of their financial investments and employees, rather than an ethical plea for the protection of the safety and well-being of young, “innocent” members of our communities and society.⁸³

Even this “defense” of DACA was fraught with bad rhetoric and compromising rationale, framing DACA youth as “assets,” “capital” and “investments” in these explicit terms:

Over the past five years, DACA recipients have structured their lives — and the University has made significant investments — on the government’s express assurances that if they self-identified, registered with federal law enforcement agencies, and passed an extensive background investigation, they would be shielded from deportation and allowed to work in the United States for renewable two-year periods The University and all of its students will lose the contributions of valued colleagues and employees. The University also will lose intellectual capital and productivity, as DACA recipients are deprived of the work authorizations needed to serve in the professional roles in which both they and the University have so heavily invested.⁸⁴

Some cynics and critics (as opposed to opponents) have challenged the value of DACA on other grounds, arguing from its initiation that it just offers a work permit, not a path to citizenship. Extending on this, one could say that it serves merely as yet another tool to capture a contingent labor force of young, educated workers, trained with the proper work ethic already to fit into their appropriate role in the social hierarchy. Such critics have also criticized and distanced themselves from the label and narrative of “Dreamers” because they are unwilling

⁸² GRACE CHANG, *DISPOSABLE DOMESTICS: IMMIGRANT WOMEN WORKERS IN THE GLOBAL ECONOMY* XXIV-v (Haymarket Books 2016) (2000).

⁸³ See Complaint for Declaratory & Injunctive Relief, Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec., No. 3:17-cv-05211 (N.D. Cal. Sept. 8, 2017).

⁸⁴ *Id.* at 2.

to sacrifice their parents, who have made so many sacrifices for them, for this piece — or these crumbs — of the “American pie.”⁸⁵

VII. LAW AND BORDER

Finally, for the intractable public, those who subscribe to “law and order,” who remain un-swayed by this analysis and remain unmoved by any human rights arguments, I offer the scholarship of Douglas Massey, a professor of sociology at Princeton’s Woodrow Wilson School of Public and International Affairs, and Jorge Castaneda, a professor of politics and Latin American and Caribbean Studies at New York University.

Massey has found that border militarization has had little effect on Mexicans migrating “illegally,” but instead has reduced the likelihood that they return to Mexico. Massey reports that from 1986 to 2010, the U.S. Border Patrol increased in size from 3,700 to 21,000 officers and its annual budget rose from \$151 million to \$3.7 billion.⁸⁶ Massey reports,

The goal of course, was to prevent undocumented migrants from entering the United States, but it didn’t succeed. In fact, it backfired It increased the costs and risks of unauthorized border crossing quite dramatically and diverted migrants away from relatively safe crossing points in San Diego and El Paso into dangerous new routes through the Arizona desert. In response, migrants quite rationally began to avoid border crossing, not by staying in Mexico but by remaining in the United States With no effect on undocumented entries but a pronounced negative effect on return moves, the massive increase in border enforcement actually increased the net inflow of undocumented migrants.⁸⁷

In other words, the “enhanced” border tripled the average cost of getting across the border illegally, so Mexicans became more likely to stay in the United States after crossing. In the 1980s, about half of all undocumented Mexicans returned home within a year after entering,

⁸⁵ See Kitzia Esteva-Martinez, *Defend DACA and Beyond — Continuing to Organize and Dream Transformatively*, CAUSA JUSTA JUST CAUSE, <https://cjjc.org/mediapress/will-continue-organize-strategize-dream-big/> (last visited July 19, 2018).

⁸⁶ David Hopper, *Douglas Massey, Princeton University — U.S. Border Patrol Policy*, ACAD. MINUTE (June 21, 2016), <https://academicminute.org/2016/06/douglas-massey-princeton-university-us-border-patrol-policy/>.

⁸⁷ *Id.*

but by 2000 the return migration rate was only twenty-five percent.⁸⁸ In a 2006 op-ed, “The Wall That Keeps Illegal Workers In,” Massey concludes, “The only thing we have to show for two decades of border militarization is a larger undocumented population than we would otherwise have, a rising number of Mexicans dying while trying to cross, and a growing burden on taxpayers for enforcement that is counterproductive.”⁸⁹ So, the irony is that the expanded border patrol and border militarization measures are actually keeping immigrants and other “undesirables” locked into the United States, instead of out.

In another editorial called “Do-It-Yourself Immigration Reform,” Castaneda and Massey also report:

There are many reasons illegal (sic) Mexican migration has flattened out. The costs and risks have risen. Demand for labor in the United States has fallen. Growth in Mexico’s labor force has slowed. Yes, the undocumented population in the United States is still about 11.5 million people, about 60 percent of whom are from Mexico, according to the federal Office of Immigration Statistics. But the number is not growing. In fact, data from the Mexican Migration Project, a binational effort by demographers and other researchers, indicates that the rate of undocumented emigration is nearing zero. It peaked at about 55 of every 1,000 Mexican men in 1999; by 2010 it had fallen to 9 per 1,000, a rate not seen since the 1960s.⁹⁰

Finally, Castaneda and Massey point to a simultaneous phenomenon of more migration and subsequent naturalization of immigrant families, suggesting: “The large number of family migrants is an unintended, even ironic, consequence of actions taken by Congress

⁸⁸ Douglass S. Massey, *The Wall That Keeps Illegal Workers In*, N.Y. TIMES (Apr. 4, 2006), <https://www.nytimes.com/2006/04/04/opinion/the-wall-that-keeps-illegal-workers-in.html>.

⁸⁹ *Id.*

⁹⁰ Jorge G. Castaneda & Douglass S. Massey, *Do-It-Yourself Immigration Reform*, N.Y. TIMES (June 1, 2012), <https://www.nytimes.com/2012/06/02/opinion/do-it-yourself-immigration-reform.html>. These numbers are widely corroborated, despite Trump administration officials, such as Jeff Sessions, insisting that we are “dealing with a massive influx of illegal aliens across our Southwest border.” Jordan & Nixon, *supra* note 66. For example, Seth Stodder, former Assistant Secretary of Homeland Security under Obama and former policy director for Customs and Border Protection under Bush, states: “We are not facing a ‘massive influx’ of undocumented migrants coming across the U.S.–Mexico border.” *Id.* “In fact, the opposite is true — undocumented migrant crossings are at historic lows.” *Id.* In fiscal year 2017, the Border Patrol apprehended 303,916 people compared to 408,870 in fiscal 2016, 331,333 in 2015 and 479,371 in fiscal 2014. *Id.*

and successive administrations to make life miserable for immigrants regardless of legal status,” such as California’s Proposition 187, Arizona’s 2010 S.B. 1070, and copy-cat legislation in other states. “In response, many Mexican permanent residents made an unexpected choice: Rather than leave the United States because they felt unwelcome, they became citizens — a practice known as ‘defensive naturalization.’ In the decade before 1996, an average of 29,000 Mexicans were naturalized each year; since 1996, the average has been 125,000 per year, yielding two million new citizens who could then bring in close relatives.”⁹¹ Massey added in a 2016 lecture,

As migrants stayed longer and longer north of the border, they increasingly sent for their spouses and children. In effect, U.S. taxpayers spent \$35 billion between 1986 and 2010 to transform what had been a circular flow of male workers going to three states into a settled population of families living in 50 states while doubling the rate of undocumented population growth. This fact explains why 11 million undocumented migrants live in the U.S. today.⁹²

I celebrate these findings as rather ironic and poetic justice, and as perhaps the only true “unintended” consequence of U.S. border enforcement policy for the last quarter century or more. I relish reporting them to my students who are immigrants and the children of immigrants, who are documented and undocumented, “DACAmended” or under threat of becoming “unDACAmended.” What we are seeing is a force of young people, perhaps once transplanted and now “home-grown,” who are building families and communities and, most importantly, an immigrant rights movement dedicated to protecting these families and communities. Whether through channels of “compliance” such as naturalization (when available) or through the outright defiance of the “Undocumented and Unafraid” generation, they are indeed here to stay, as they proudly proclaim, and they are fearless.

When the DACA rescission was first announced, Kitzia Esteva-Martinez, a former student of mine and formerly undocumented (now DACAmended) organizer and Co-Community Rights Director with the organization *Causa Justa/Just Cause*, wrote:⁹³

⁹¹ Castaneda & Massey, *supra* note 90.

⁹² Hopper, *supra* note 86.

⁹³ Kitzia Esteva-Martinez, *supra* note 85 (Kitzia is undocuqueer and identifies as a “Visionary-not-Dreamer”).

As immigrants who have been involved in the fight for our rights and dignity we know DACA was never the dream, it was always a temporary fix. The state created DACA as a concession — because so many of us were standing up, because people were becoming unafraid and taking on bold tactics to confront our marginalization. DACA was a victory of the movement, and after that victory we became stronger and built a strong movement of community defense, strategic resistance and vision. We will continue to say “not one more.” We will continue to build transformative solidarity with all the communities under attack in this administration DACA was never enough, but we, our families are enough, we’ve had enough. It has been time; all of us or none of us! See you on the streets.