

Criminalization and the Politics of Migration in Brazil

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Abstract

In May 2017, the government of Brazil enacted a new immigration law, replacing a statute introduced in 1980 during the country's military dictatorship with progressive legislation that advances human rights principles and adopts innovative approaches to migration management. One of the most notable features of the new law is its explicit rejection of the criminalization of migration, and its promotion of efforts to regularize undocumented migrants. Although the law itself is new, the values embedded in the law reflect recent trends in Brazilian immigration policy, which has embraced legalization, and has generally resisted the use of criminal law to punish unauthorized migration. Indeed, in Brazil, an initial unlawful entry does not carry criminal consequences, and at the level of society, public discourse and policy debates display minimal concern regarding this act. This posture is especially intriguing, given Brazil's otherwise aggressive focus on criminality and incarceration.

This paper seeks to understand the circumstances that have led to this non-embrace of the criminalization of migration, and in particular, the scarce use of criminal law tools to punish and deter unlawful entry and related acts. The paper explores how a combination of historical factors, present-day conditions, and political forces have largely suppressed practices that dominate in the United States and in parts of Europe. Contemporary Brazilian immigration policies have generally adopted norms of forgiveness and integration—values buoyed by broader

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geopolitical interests that the Brazilian government has pursued in recent times. Additional factors unique to Brazil undergird the current approach, including Brazil's history of immigration, current migration flows, and criminal justice priorities. The paper concludes with some cautionary notes, suggesting that the disavowal of criminalization in Brazil may be ephemeral in Brazil's volatile political climate, and may mask other conditions that create structural vulnerability for noncitizens in the country.

I. INTRODUCTION

The world today is experiencing unprecedented levels of global migration, with tens of millions of persons living outside of their country of nationality or displaced from their homes.¹ A number of factors have contributed to these migration flows, including entrenched, violent conflicts, varying forms of persecution, climate change, economic and food insecurity, and efforts at family reunification. In recent times, some migrant-receiving countries—including the United States and some countries in Europe—have sought to enhance immigration enforcement, expel unauthorized individuals, and curb the entry of certain noncitizens.² Among the key narratives informing this trend are concerns about criminality among migrants,³ and the related concern that migrants—particularly those from certain countries or of certain religious or ethnic backgrounds—pose a threat to national security.⁴ In some jurisdictions—most notably the United States—these narratives build upon a decades-long trend towards criminalizing migrants, as reflected in a range of well-established practices.⁵

Scholars have explored whether restrictiveness in migration policy is a growing and inexorable trend, particularly in an age of global terrorism and the retrenchment of nationalism. While opinions on this question are mixed,⁶ there is consensus regarding the growing criminalization of irregular migrants, including the

¹ UNHCR, *Figures at a Glance*, <http://www.unhcr.org/en-us/figures-at-a-glance.html>.

² See, e.g., Joanna Parkin, *The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research*, CEPS PAPER IN LIBERTY & SECURITY No. 61 (Oct. 2013), at 7–8 (describing restrictive measures introduced in Europe).

³ See, e.g., Rebecca Sharpless, “Immigrants Are Not Criminals”: *Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 701–02 (2016).

⁴ Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1850–57 (2007).

⁵ CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 9–15 (2015).

⁶ See generally Hein de Haas et al., *Growing Restrictiveness or Changing Selection? The Nature and Evolution of Migration Policies*, INT’L MIGRATION REV. (2016) (arguing that although there appears to be a global trend towards more restrictive migration policies, a closer examination of 45 countries reveals a mixed picture).

codification and prosecution of illegal entry and related offenses in the United States and Europe.⁷ There has been comparatively less study, however, regarding the criminalization of migration in the Global South.⁸ This scholarly attention is critical, given that some of these countries shoulder a disproportionate burden of the global migration flows.⁹ Additionally, as more countries in Latin America, Africa, and Asia embrace their role as migrant-receiving countries, their policies and practices merit scrutiny, both for their own sake and as possible counter-examples to what is occurring in the United States and Europe.¹⁰

This article examines laws and policies relating to unlawful entry and related criminal offenses in one such country: Brazil. Brazil has an extensive history of receiving international migrants, and continues to receive economic migrants and refugees from across the globe.¹¹ Brazil is also a country where race and class divisions are deeply embedded in societal structures, and where concerns regarding criminality in society are heightened and have led to a burgeoning prison population.¹² In other words, on paper, Brazil seems to be fertile ground for embracing criminal-immigration intersections. As this article explores, however, the criminalization and prosecution of immigration-related offenses—in particular, unlawful entry—simply has not taken root in Brazil. In fact, the contrary is arguably true, as exemplified by the passage of a new immigration law in May 2017, which explicitly embraces the “non-criminalization of migration” as a principle of Brazilian immigration policy.¹³

⁷ *Id.* at 25 (“Irregular migrants are the only category for which policies have almost consistently moved into a more restrictive direction over the entire post-WWII period.”).

⁸ See, e.g., Anugerah Rizki Akbari, *Explaining Crimmigration in Indonesia: A Discourse of the Fight Against People Smuggling, Irregular Migration Control, and Symbolic Criminalization*, 3 *INDONESIA L. REV.* 276, 279 (2015) (“discussion concerning [crimmigration in places outside the U.S. and Europe] remains dark”).

⁹ UNHCR, *supra* note 1 (noting that the “top hosting countries” for displaced persons are Turkey, Pakistan, Lebanon, Iran, Uganda, and Ethiopia).

¹⁰ Although not specifically focused on criminalization, some scholars have begun to draw distinctions between migration policies in South America, as compared to the U.S. and Europe. See generally Diego Acosta Arcarazo & Luisa Feline Freier, *Turning the Immigration Policy Paradox Upside Down? Populist Liberalism and Discursive Gaps in South America*, 43 *INT’L MIGRATION REV.* 659 (2014).

¹¹ JEFFREY LESSER, *IMMIGRATION, ETHNICITY, AND NATIONAL IDENTITY IN BRAZIL, 1808 TO THE PRESENT* (2013) (describing historical migration flows into Brazil); Neide Lopes Patarra, *Migrações Internacionais de e para o Brasil Contemporâneo: Volumes, Fluxos, Significados e Políticas*, 19 *SÃO PAULO EM PERSPECTIVA* 23, 27–31 (2005) (describing more recent migration trends).

¹² Andreia Verdélio, *Com 726 mil presos, Brasil tem terceira maior população carcerária do mundo*, EBC AGÊNCIA BRASIL (Aug. 12, 2017), <http://agenciabrasil.ebc.com.br/geral/noticia/2017-12/populacao-carceraria-do-brasil-sobe-de-622202-para-726712-pessoas> (noting that Brazil now has the third largest prison population in the world, behind the United States and China).

¹³ Lei No. 13,445 de 24 de Maio de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 25.5.2017.

The remainder of this article proceeds as follows. In Part II, I briefly sketch how concern about undocumented migration, and the prosecution of unlawful entry, has grown in the United States and elsewhere. I then describe the landscape of laws and practices in Brazil relating to such criminal offenses, noting the conspicuous absence of a provision that criminalizes unlawful entry without other aggravating factors, and the infrequent use of comparable provisions in the Brazilian criminal code. In Part III, I suggest different ways to understand Brazil's seeming rejection of the criminalization of migration, examining historical, demographic, political, and other factors. I conclude in Part IV with some observations and reflections about the normative significance of these policies at the global level, along with some cautionary notes about the possible impermanence of Brazil's current approach.

II. CRIMINALIZING UNLAWFUL ENTRY: THEORY AND COMPARATIVE PRACTICES

The criminalization of migration is a complex phenomenon that takes many different forms across diverse jurisdictions. The most common manifestations include: (1) the criminalization of unlawful entry and/or other migration-related acts, such as unlawful re-entry, assisting others to enter unlawfully, or harboring; (2) the imposition of immigration-related consequences (such as deportation) for criminal conviction or even arrests; (3) the contemporary phenomenon of immigration detention, including practices that are nominally "civil detention" but are indistinguishable from criminal incarceration; and (4) the blurring of lines between the functions of local police and immigration officers, including the delegation of immigration-related functions to local police.¹⁴ This article focuses primarily on the first of these, and highlights some competing theoretical approaches, along with distinct laws and policies adopted in the United States, Europe, and Brazil. As described more fully below, in the context of increased global scrutiny of irregular migration, Brazil has charted a unique course by favoring regularization and safe migration over criminalization. To provide relevant context, other criminal-immigration intersections in Brazil are also briefly described below.

A. *Theoretical Considerations*

In a world that remains defined by nation-states, and thus national borders and immigration control, there are two primary approaches to unlawful entry: to treat it as an administrative violation, with a corresponding immigration law sanction, or to criminalize the act, and therefore possibly jail or fine violators.

If one separates out the current political context, it is difficult to argue that the act of crossing a border should intrinsically be treated as a crime. Most unauthorized migration is either forced migration, economic migration, or some combination thereof, which suggests that most border-crossers would not have the intent to

¹⁴ GARCÍA HERNÁNDEZ, *supra* note 5.

perpetrate violence or other kinds of harm upon the United States. This begs the question of whether criminal law, which at its core is designed to address socially undesirable behavior, should be used to regulate the movement of persons across national boundaries.¹⁵ The use of criminal law sanctions is especially notable given the economic and situational precarity of many individuals who choose to enter other countries without authorization. Indeed, one could reasonably argue that most of these individuals would have sought a legitimate visa to enter their destination country, if they had the means of doing so and they qualified under an existing visa category.¹⁶ Finally, criminalization of unlawful entry seems to run counter to the longer arc of globalization, which is causing the world to become increasingly interdependent economically, and is leading to frequent movements across borders.¹⁷

Yet basic tenets of criminology explain how an act such as unlawful entry can be converted into a crime, simply by establishing a rule, enforcing the law, and imposing a penalty. The decision to treat a particular act as a crime is often based on societal consensus, but it can also reflect the will of a politically powerful subset of the population, which seeks to exert or maintain control over others.¹⁸ As Ben Bowling observed, “What is important is who feels harmed by the act and the power of those defining the act as criminal in comparison with those against whom the rule is enforced.”¹⁹ This is not to suggest that border control is without justification, as the entry of noncitizens can certainly carry economic, social, and even security-related consequences. From a regulatory perspective, however, the question is whether the imposition of a criminal penalty is needed to accomplish specific state objectives, or whether an administrative sanction or even no sanction would suffice. In answering this question, one must disentangle distinct state objectives relating to migrants, which at times coincide, but can also coexist in tension.²⁰

¹⁵ Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 379 (2006).

¹⁶ Daniel Martinez & Jeremy Slack, *What Part of “Illegal” Don’t You Understand? The Social Consequences of Criminalizing Unauthorized Mexican Migrants in the United States*, 22 SOC. & LEGAL STUD. 535, 546.

¹⁷ Ben Bowling, *Border Work, Criminology, and the Crimmigration Control Industry*, in *THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION* 292, 293 (Katja Franko Aas & Mary Bosworth eds., 2013).

¹⁸ EDWIN H. SUTHERLAND ET AL., *PRINCIPLES OF CRIMINOLOGY* 35–38 (1992).

¹⁹ Bowling, *supra* note 17, at 292.

²⁰ In his book chapter on migration control in Spain, José Ángel Brandariz García illustrates this precise dynamic, contrasting the rhetoric of criminal expulsion with the country’s need for migrant labor. José Ángel Brandariz García, *The Control of Irregular Migrants and the Criminal Law of the Enemy*, in *SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR* 255 (Maria João Guia, Maartje Van Der Woude & Joanne Van Der Leun eds., 2013). *See also* Maria João Guia, *Crimmigration, Securitisation, and the Criminal Law of the Crimmigrant*, in *SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR* 18 (Maria João Guia, Maartje Van Der Woude & Joanne

While nations have the sovereign authority to control their own borders, the imposition of criminal penalties for an irregular entry leads to various adverse consequences. First, it attaches a stigma to migrants and the act of migration itself, suggesting that noncitizens pose a kind of danger that must be deterred with the imposition of a criminal punishment.²¹ Indeed, as criminal law ostensibly operates to protect society from acts that are considered dangerous and/or socially undesirable,²² the prosecution and incarceration of migrants for the mere act of crossing a border imbues the undocumented population with presumed criminality and moral unworthiness.²³ Additionally, the possibility of a criminal sanction leads to greater marginalization of undocumented persons, in part due to fear of having contact with law enforcement. This may lead irregular migrants to avoid seeking help, even if they themselves are victims of crime.²⁴ Along these lines, this type of criminalization may lead migrants to gravitate to underground economies and networks, fueling more worrisome forms of criminal activity.²⁵ Furthermore, noncitizens who are burdened with a criminal conviction for a migration-related act face significant difficulties in seeking lawful status (including permanent residence) at some point in the future.²⁶

The criminalization of unlawful entry has significant adverse consequences for racial minorities, and reinforces deeply entrenched racial hierarchies. Given that most of the persons who are charged with illegal entry are persons of color,²⁷ the criminalization of the act reifies race-based stereotypes of criminality and dangerousness. César Cuauhtémoc García Hernández and Yolanda Vázquez have explored how the history of crimmigration and its present-day iterations in the

Van Der Leun eds., 2013) (noting the “bipolarity in the way the immigrant is perceived . . . on the one hand, as a necessary tool for the renovation and sustainability of the State and, on the other hand, as a potential enemy whose presence requires a preventive reinforcement of security measures . . .”).

²¹ César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (2013); cf. Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 SOC. RACE & ETHNICITY 82, 92–93 (2016) (describing how contact with the criminal justice system transforms Latino immigrants as “criminal aliens”).

²² Stumpf, *supra* note 15, at 379.

²³ Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 288 (2017) (arguing that the “earned citizenship” frame requires noncitizens to prove their moral worth, and to overcome the “original sin” of their initial immigration transgression).

²⁴ Carmen Lussi, *Políticas públicas e desigualdades na migração e refúgio*, 26 PSICOLOGIA USP 136, 140 (2015).

²⁵ Martinez & Slack, *supra* note 16, at 540.

²⁶ *Id.*

²⁷ See, e.g., HUMAN RIGHTS WATCH, *TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF US BORDER PROSECUTIONS* (2013) (“88 percent of defendants convicted of immigration offenses in 2012 were Hispanic . . .”).

United States are shaped by animus towards racial minorities, disguised as objective legal norms.²⁸ Even in the absence of explicit animus on the part of individual actors, the practices of the criminal-immigration system may be guided by implicit bias or structural racism that leads certain groups to be disproportionately affected.²⁹ Indeed, in the current political moment, racial difference, combined with economic vulnerability, make undocumented racial minorities easy targets for government officials who wish to demonstrate that they are “tough” on immigration.³⁰

B. Policies in Comparative Perspective

Some countries treat unauthorized entry as a crime, situating it within a suite of offenses that includes illegal reentry, the smuggling of migrants, or otherwise aiding and abetting an unlawful entry.³¹ In the United States, illegal entry first became a crime in 1929.³² Initially, the misdemeanor of unlawful entry was punishable by a year in prison and/or a fine of \$1,000, and a subsequent unlawful entry could be prosecuted as a felony.³³ In the present day, U.S. law continues to treat an initial illegal entry, or “improper entry by [an] alien” as a misdemeanor.³⁴ The U.S. Code separately criminalizes “reentry of removed aliens,” imposing heightened penalties upon persons who re-enter (or seek to do so) after being previously removed.³⁵ To be sure, entry without authorization is not *always* treated as a crime under U.S. law, since immigration officers may simply charge the individual with an administrative violation of immigration law and commence removal proceedings,³⁶ without referring the matter to federal prosecutors. Europe has largely followed the U.S.

²⁸ See generally García Hernández, *supra* note 21; Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L. J. 599 (2015).

²⁹ Doris Marie Provine & Roxanne Lynn Doty, *The Criminalization of Immigrants as a Racial Project*, 27 J. CONTEMPORARY CRIM. JUSTICE 261, 266 (2011).

³⁰ *Id.*

³¹ Lussi, *supra* note 24, at 140.

³² Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 299 (2010).

³³ Stephen E. Gunkel & Ana-María González Wahl, *Unauthorized Migrants and the (Il)Logic of “Crime Control”: A Human Rights Perspective on the US Federal and Local State Immigration Policies*, 6 SOC. COMPASS 26, 28 (2012).

³⁴ 8 U.S.C. § 1325 (2012).

³⁵ 8 U.S.C. § 1326 (2012).

³⁶ Specifically, the noncitizen could be charged as inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i) as being present without admission or parole, and thus subject to removal proceedings.

model, with at least 17 of the European Union member states treating irregular border crossings or irregular stays as a criminal offense.³⁷

In recent years, however, the United States has (ignominiously) distinguished itself with its aggressive pursuit of federal prosecutions of immigration-related crimes.³⁸ A coordinated campaign among federal prosecutors and immigration agents—named Operation Streamline—has led to robust prosecutions for unlawful entry in key border areas.³⁹ In Fiscal Year 2013, for example, close to 50,000 Border Patrol apprehensions were referred for prosecution pursuant to Operation Streamline.⁴⁰ In Fiscal Year 2016, 68,314 defendants were prosecuted for immigration crimes before federal judges, representing 43 percent of all persons prosecuted in that year for federal criminal offenses.⁴¹ These practices have faced significant criticism, even from federal judges who are required to impose jail sentences on migrants who violate these laws, but who question the overall efficacy of the initiative.⁴²

Brazilian law, by contrast, does not treat an initial unlawful entry as a criminal offense, but rather classifies the act as an administrative violation that can lead to deportation from the country.⁴³ This approach is somewhat surprising, given the circumstances that gave rise to earlier legislation in the country. The statute that preceded the 2017 *Lei de Migração* (Migration Law), the *Estatuto do Estrangeiro* (Foreigner's Statute) was introduced in 1980, during Brazil's military dictatorship.⁴⁴ The law imposed significant restrictions on foreigners, placing them in a position of

³⁷ Parkin, *supra* note 2, at 7.

³⁸ Jennifer Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 139–40 (2009); García Hernández, *supra* note 21, at 1472–73.

³⁹ See, e.g., U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL, STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING (2015).

⁴⁰ *Id.* at 6.

⁴¹ *Immigration Continues Lead Role in Federal Convictions*, CRIMMIGRATION (Mar. 28, 2017), <http://cimmigration.com/2017/03/28/immigration-continues-lead-role-in-federal-criminal-prosecutions/>.

⁴² JOANNA LYDGATE, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 4–7 (2010), https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.

⁴³ Christian Gomes Bezerra dos Santos, *A Criminalização da Imigração Irregular e os Direitos Humanos, Os Casos Específicos de Brasil e Itália*, 9 REVISTA DA FARN 101, 107 (2010). Notably, proposed changes to the Brazilian criminal code would add various other immigration-related crimes. Projeto de Lei do Senado no. 236, de 2012 (Novo Código Penal), arts. 452–57. These proposals have been pending in the Brazilian Congress for several years, and have not gained political traction. Moreover, aspects of the new immigration law—including the provision that rejects criminalization—would legally undermine any efforts to impose a criminal penalty for unlawful entry.

⁴⁴ Marcia Anita Sprandel, *Migração e Crime: A Lei 6.815 de 1980*, 12 REVISTA INTERDISCIPLINARIA DA MOBILIDADE HUMANA 145 (2015).

inequality on issues of fundamental human rights.⁴⁵ That law, by its very terms, viewed immigration law as an instrument of national security, and sought to prevent the entry of potentially subversive elements into Brazilian society.⁴⁶ In other words, the law strongly implied that foreigners were a potential threat to domestic security.⁴⁷ For that reason, the law prohibited noncitizens from engaging in political activity in Brazil, including low-level actions such as attending demonstrations.⁴⁸

Despite the context of its enactment, the 1980 law avoided criminalizing unlawful entry, as practiced by the United States. Over the years, however, Brazil *has* incorporated provisions that criminalize certain migration-related acts. For example, Brazilian law imposes criminal penalties on individuals who assist others to enter unlawfully, and imposes a penalty on individuals who seek to re-enter the country surreptitiously after expulsion from Brazil.⁴⁹ The principal immigration-related crimes in Brazil are presented in the table below.

Table: Immigration-Related Crimes in Brazilian Law		
Code Provision	Crime	Penalty
Article 338, Criminal Code	Re-entry into the national territory of a foreigner who had been expelled	Imprisonment from 1–4 years, with the possibility of a subsequent expulsion after the sentence has been served
Article 309, Criminal Code	Use by a foreigner of a false name in order to enter or remain in the national territory; attribution of a false	Imprisonment from 1–3 years, plus a fine; Imprisonment from 1–4 years, plus a fine

⁴⁵ Luiz Orenco Figueredo & João Henrique Zanelatto, *Legislação e políticas públicas voltadas à imigração no Brasil*, 8 PASSAGENS: REVISTA INTERNACIONAL DE HISTÓRIA POLÍTICA E CULTURA JURÍDICA 252, 262 (2016).

⁴⁶ *Id.* at 147; Márcio Adriano Anselmo, *Crimigração: A criminalização do estrangeiro no Brasil e seus efeitos*, 50 REVISTA DE INFORMAÇÃO LEGISLATIVA 143, 148 (2013).

⁴⁷ Camila Lissa Asano & Pétalla Brandão Timo, *A nova Lei de Migração no Brasil e os direitos humanos*, HEINRICH BÖLL STIFTUNG BRASIL (Apr. 17, 2017), <https://br.boell.org/pt-br/2017/04/17/nova-lei-de-migracao-no-brasil-e-os-direitos-humanos>. Along these lines, the 1980 law limited the ability of foreigners to affiliate with unions and to participate in public demonstrations. *Id.* See also Mateus de Oliveira Fornasier & Maiquel Angelo Dezordi Wermuth, *Autoritarismo Versus Redemocratização: Do Imigrante No Brasil*, 15 REVISTA JURÍDICA CESUMAR 399, 405 (2015).

⁴⁸ Lei no. 6,815 de 1980 (Estatuto do Estrangeiro), Art. 106, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 21.8.1980.

⁴⁹ Gomes Bezerra dos Santos, *supra* note 43, at 106.

	characteristic to a foreigner in order to promote his or her entry into the national territory	
Article 232A, Criminal Code (introduced by 2017 law)	Promote, by any means, with the goal of obtaining an economic benefit, the illegal entry of a foreigner into the national territory or of a Brazilian national into a foreign country, or the departure of a foreigner from the national territory in order to illegally enter a foreign country	Imprisonment from 2–5 years, plus a fine, with aggravating factors that can enhance a sentence
Article 125, Law 6815 of 1980 (Estatuto do Estrangeiro) (recently repealed, with passage in 2017 of Lei de Migração)	Smuggle or harbor foreigners; make a false declaration in the process of visa processing, registration, alteration of settlements, naturalization, or when obtaining a passport for foreigners, laissez-passer, or, when required, exit visa; violations of other restrictions on the conduct of foreigners, including engagement in political activity	Imprisonment from 1–5 years and, if the offender is a foreigner, expulsion

Under Brazilian law, the *Polícia Federal* (Federal Police) has jurisdiction to investigate these crimes and to refer them for prosecution before the federal courts.⁵⁰ On paper, these offenses appear to mirror similar offenses that exist under U.S. law. A critical distinction, however, is the negligible numbers of prosecutions under Brazilian law. During a recent five-year period, there were only 129 total police *investigations* for violations of Criminal Code Article 309, and 109 investigations

⁵⁰ Anselmo, *supra* note 46, at 151.

of possible violations of Article 308.⁵¹ To put this figure in context, in a year when nearly 6 million foreigners entered Brazil, fewer than 100 individuals were even investigated for using a false name or attempting to re-enter after expulsion.⁵² And to provide additional context for the scope of immigration enforcement operations in Brazil, in 2017 Brazil expelled just 375 noncitizens due to criminal convictions.⁵³ In 2016, the Federal Police effectuated only 79 expulsions, along with 147 deportations and 143 repatriations.⁵⁴

Brazil's already limited appetite for the prosecution of immigration-related crimes was nearly extinguished in May 2017, when the 1980 law was repealed and a new immigration law was enacted. An immediate difference is noticeable in the title, which replaces the more alienating "*Estatuto do Estrangeiro*" (Foreigner's Statute) with the more neutral "*Lei de Migração*" (Migration Law).⁵⁵ A critical provision of the new law is Article 3, which articulates principles that guide Brazil's migration policy, including the "non-criminalization of migration."⁵⁶ Consistent with this value, the new law requires administrative authorities to notify irregular migrants about the possibility of regularizing, and specifies that authorities must permit 60 days for irregular migrants to do so.⁵⁷ In practice, this requires the government to create conditions or mechanisms that would allow migrants to obtain documents, instead of reflexively insisting on immigration documentation and punishing those who lack them.⁵⁸ The new law also repealed Article 125 of the 1980

⁵¹ *Id.*

⁵² *Id.* at 150.

⁵³ Renata Mariz, *Brasil determinou expulsão de 375 estrangeiros em 2017*, O GLOBO (Jan. 21, 2018), <https://oglobo.globo.com/brasil/brasil-determinou-expulsao-de-375-estrangeiros-em-2017-22311551>.

⁵⁴ POLÍCIA FEDERAL, UNIDADE PRESTADORA DE CONTAS, RELATÓRIO DE GESTÃO DO EXERCÍCIO DE 2016 (2017). Under Brazilian law, *deportação* (deportation) applies to persons who enter or remain in irregular status; *repatriação* (repatriation) is similar to deportation, but is typically effectuated at a port of entry; and *expulsão* (expulsion) applies to persons who commit crimes. Gomes Bezerra dos Santos, *supra* note 43, at 108.

⁵⁵ Lei No. 13.445, de 24 de maio de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 25.5.2017; see also Natália Araújo, *Avanços e desafios da nova Lei de Migração*, CARTA CAPITAL (April 27, 2017), <https://www.cartacapital.com.br/blogs/blog-do-grri/avancos-e-desafios-da-nova-lei-de-migracao>.

⁵⁶ Lei No. 13.445, de 24 de Maio de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 25.5.2017. Other notable principles in this article include "repudiation and provision of xenophobia, racism, and any other form of discrimination," "humanitarian protection," "guarantee of the right to family reunification," "equality of treatment and opportunity for the migrant and their relatives," "equal access for the migrant to services, programs, and social benefits, public goods, education, holistic public legal representation, work, housing, banking services, and social security," and "repudiation of practices of collective expulsion or deportation." *Id.*

⁵⁷ Lei No. 13.445, de 24 de Maio de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 25.5.2017.

⁵⁸ Araújo, *supra* note 55.

law, which imposed criminal penalties for a range of immigration-related conduct, including smuggling or harboring foreigners, and making a false statement in various immigration-related processes.⁵⁹ In its stead, the 2017 law introduced Article 232A to the Brazilian Criminal Code, a more general provision relating to the promotion of illegal entry for economic benefit.⁶⁰ In these various regards, the new immigration law in Brazil stands in stark contrast to the policies in other countries, which have prioritized criminalization and deportation, as opposed to regularization.⁶¹

C. Other Criminal-Immigration Intersections in Brazil

Although the focus of this article is on Brazil's treatment of unlawful entry, some discussion of other criminal-immigration intersections provides context for understanding the relevant legal and policy landscape.

Brazilian law does allow an expulsion process to commence if a non-citizen commits a crime of sufficient gravity. Unlike the United States, which has established a dizzying matrix of criminal removal categories, Brazilian law remains somewhat vague regarding the types of crimes that can lead to expulsion, simply noting that the "seriousness and the possibility of resocialization into the national territory" is the relevant consideration.⁶² Additionally, even if a noncitizen has a criminal conviction, Brazilian law forbids expulsion if the noncitizen has a spouse residing in Brazil, a dependent child who is a Brazilian national, or if the noncitizen arrived in Brazil before the age of 12 and has resided in the country since that time.⁶³ The law also provides discretionary protection for noncitizens who are at least 70 years of age, and who have lived in the country for more than 10 years.⁶⁴ These provisions reveal that Brazilian law is more forgiving than its U.S. analog.

Additionally, unlike in the United States, noncitizens who serve time in custody are not funneled automatically into the immigration removal system.⁶⁵ Nor is there

⁵⁹ Lei No. 6.815, de 19 de Agosto de 1980, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] DE 21.8.1980.

⁶⁰ Lei No. 13.445, de 24 de Maio de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 25.5.2017.

⁶¹ Diego Acosta, *Brazil's New Migration Law: A Huge Step Forward for Migrant Rights Protection*, MIGRATION POLICY CENTRE (Dec. 9, 2016), <http://www.migrationpolicycentre.eu/migprosp/2016/12/09/brazils-new-migration-law-a-huge-step-forward-for-migrant-rights-protection/>.

⁶² Lei No. 13.445, de 24 de Maio de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 25.5.2017.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Paula Adamo Ideota, *Condenados estrangeiros vivem limbo no Brasil ao sair da prisão*, BBC BRASIL (May 13, 2015), http://www.bbc.com/portuguese/noticias/2015/05/150507_presos_estrangeiros_limbo_pai (describing how noncitizens find themselves in limbo status after serving criminal sentences).

a comprehensive effort to track down noncitizens with past convictions that could potentially lead to expulsion. Although some number of these noncitizens are ultimately expelled from the country, many are simply released from criminal custody after serving their sentence.⁶⁶ This dynamic is telling, since a singular law enforcement agency—the Federal Police—handles both routine criminal investigations and also the enforcement of federal immigration laws. Thus far, however, the Federal Police have not prioritized immigration enforcement as part of their functions.⁶⁷

Immigration detention is a theoretical possibility, but does not exist in practice in any systematic way. Under Brazilian law, the Federal Police may detain an individual in order to effectuate their removal from Brazil.⁶⁸ In reality, very few immigrants are detained by the Federal Police, and there are no detention centers exclusively for immigrants, such as those that exist in the U.S. and other countries.⁶⁹ On the contrary, when noncitizens are detained by the Federal Police in order to effectuate a return to their country of origin, they are typically held in *ad hoc* spaces at the airport.⁷⁰ While immigration detention is nearly nonexistent, as described more fully below, Brazil *has* embraced incarceration in its criminal justice system, as reflected in a large and growing prison population.⁷¹

Finally, because many law enforcement functions are concentrated in the Federal Police, the concerns about “blurring of the lines” between distinct law enforcement entities are not prominent in Brazil. Moreover, there are no initiatives to delegate immigration functions to local authorities or law enforcement agencies. One might argue, however, that the multiple functions handled by the Federal Police (including immigration matters) could undermine trust with the public, particularly those who are not Brazilian citizens. As noted above, however, the Federal Police engages in minimal immigration enforcement.

⁶⁶ Mariz, *supra* note 53.

⁶⁷ It is possible that the Federal Police could shift its priorities towards migration control, if resources and incentives are allocated. *See infra* Section III.E. By way of example from another jurisdiction, local policing in support of the “War on Drugs” in the U.S. was incentivized by civil forfeiture statutes, which presented potential financial benefits for law enforcement agencies. *See* Michael J. Duffy, *A Drug War Funded with Drug Money: The Federal Civil Forfeiture Statute and Federalism*, 34 SUFFOLK U. L. REV. 511 (2001). Thanks to César Cuauhtémoc García Hernández for suggesting this example.

⁶⁸ Gomes Bezerra dos Santos, *supra* note 43, at 107–08.

⁶⁹ Daniel Chiaretti, *Breve análise da detenção migratória no Brasil*, JUSBRASIL (Apr. 5, 2018), <https://portal-justificando.jusbrasil.com.br/noticias/249950387/breve-analise-da-detencao-migratoria-no-brasil>.

⁷⁰ Asano & Timo, *supra* note 47.

⁷¹ *See Brazil’s Prison Population Increased 74 Percent in Seven Years*, UNITED NATIONS DEVELOPMENT PROGRAMME (June 5, 2015), <http://www.latinamerica.undp.org/content/rblac/en/home/presscenter/articles/2015/06/05/poblaci-n-carcelaria-de-brasil-aument-un-74-en-siete-a-os.html>.

Overall, a review of these criminal-immigration intersections in Brazil presents a fairly benign picture. While federal authorities have the capacity to criminalize migrants, they have done so infrequently. Moreover, the new immigration law seems to signal a clear departure from criminalization. As with any new legislation, however, it remains to be seen exactly how the new, progressive norms will be interpreted, both by the Executive Branch (which issued implementing regulations for the law in late 2017)⁷² and by the Federal Police, who are charged with various immigration-related functions.

III. THE NON-CRIMINALIZATION OF MIGRATION IN BRAZIL: UNPACKING ITS ORIGINS

On the surface, the criminal-immigration policies in Brazil appear to represent a significant departure from practices in the U.S. and in parts of Europe. In particular, the explicit rejection of the criminalization of migrants is a counterpoint to the burgeoning “cimmigration” nexus elsewhere. Additionally, the lackluster enforcement of immigration laws is notable, when compared to the growing enforcement budgets in other countries. Advocates for the human rights of migrants might be inclined to commend Brazil for its seemingly humanitarian approach. A closer examination reveals a more complex picture, and suggests that a range of factors (themselves multi-layered) may have contributed to the current set of policies.

A. *Geopolitical Considerations*

Brazil’s current approach to the criminalization of migration can be explained, in part, through an examination of the country’s broader geopolitical objectives. The relatively beneficent approach to migration control helps position Brazil as a distinctive and independent global voice, and a leader among countries in the Global South and in South America in particular. Moreover, the explicit embrace of the human rights of migrants allows Brazil to elevate its profile within the United Nations system, and to advocate effectively for the large number of Brazilian émigrés residing in North America, Europe, and parts of Latin America. As both a migrant-sending and migrant-receiving country, under recent presidents Brazil has sought to adopt policies consistent with its own expectations for how Brazilian nationals should be treated overseas.

Migration-related policies are often shaped by foreign relations objectives, whether that goal is to forge stronger ties or to discredit adversaries, or to achieve some other strategic, political, or ideological objective vis-à-vis other countries.⁷³

⁷² Decreto No. 9.199, de 20 de Novembro de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 21.11.2017.

⁷³ This dynamic is especially visible in the context of refugee claims, and the signals that are sent to the refugee’s country of origin when a receiving country offers humanitarian protection to a

In some cases, the receiving country's objective is to modify or repair its own reputation, thereby strengthening its position within the international community.⁷⁴

Brazil's non-embrace of criminalization can be understood, in part, through this lens. In addition to the new immigration law with its progressive norms, Brazil has adopted other progressive measures in recent years relating to the humanitarian protection of migrants. Most notably, Brazil has issued special humanitarian visas to Haitians who wish to migrate to Brazil, and also to persons affected by the conflict in Syria.⁷⁵ Unlike other migrant-receiving countries, which have sought to block or disincentivize refugee flows, Brazil has adopted a more flexible approach that promotes regular entry. This allows Brazil to position itself as a regional and global leader on issues of migration,⁷⁶ and to strengthen its credentials relating to human rights and humanitarian protection.⁷⁷

The progressive posture has allowed Brazil to stake a contrary position on a key global issue, and to launch critiques, when it so desires, against wealthier countries. For example, in 2009, during the presidency of Luis Inácio Lula da Silva ("Lula"), Brazil offered an amnesty to tens of thousands of undocumented persons in the country.⁷⁸ On the same day that the amnesty was announced, Lula asked his Ministry of Justice to raise the issue before the G8, "[in order] to show the leaders of those large economies Brazil's disagreement with the policies of the rich with respect to immigrants. . . . Work and dignity for the immigrant is the response that Brazil gives to the intolerance of the wealthy countries."⁷⁹ Through these discourses, Brazil has implicitly sought to advance a distinct position on migration for the Global South, and to serve as the leader for that counter-position. During Lula's

migrant. Roberto Rodolfo Georg Uebel, *O redirecionamento da política externa brasileira para imigrantes e refugiados: o caso da imigração haitiana no início do século XXI*, 4 ESTUDOS INTERNACIONAIS 27, 29 (2016).

⁷⁴ *Id.*

⁷⁵ Conselho Nacional de Migração, Resolução Normativa n. 97/2012; Comitê Nacional de Refugiados, Resolução Normativa n. 17/2013.

⁷⁶ As one pair of scholars has observed, Brazil's embrace of more permissive immigration policies reflects a competition, with Argentina in particular, for "ideological 'post-neoliberal' regional leadership." Diego Acosta Arcarazo & Andrew Geddes, *Transnational Diffusion or Different Models? Regional Approaches to Migration Governance in the European Union and Mercosur*, 16 EUR. J. MIGRATION & L. 19, 39 (2014).

⁷⁷ See MARIANA CARVALHO DE ÁVILA NEGRI, *O BRASIL E A CRISE DOS REFUGIADOS NO MUNDO: ESTAMOS PREPARADOS?* (2017).

⁷⁸ ROSITA MILESI & WILLIAM CESAR DE ANDRADE, *MIGRAÇÕES INTERNACIONAIS NO BRASIL: REALIDADE E DESAFIOS CONTEMPORÂNEOS* 6 (2010).

⁷⁹ Rossana Rocha Reis, *A Política do Brasil para as Migrações Internacionais*, 33 CONTEXTO INTERNACIONAL 47, 62–63 (2011) (quoting *Lula sanciona lei que anistia estrangeiros em situação ilegal*, O ESTADO DE S. PAULO (July 2, 2009), <http://politica.estadao.com.br/noticias/geral,lula-sanciona-lei-que-anistia-estrangeiros-em-situacao-ilegal,396948>).

presidency, Brazil also created a Special Secretariat for Human Rights, linked to the Office of the President, and continued to strengthen its internal human rights infrastructure.⁸⁰ In 2009, Brazil signed the International Convention on the Rights of Migrant Workers and their Families, and in the course of ratifying the instrument, the Minister of External Relations noted the context of “increasingly severe entry restrictions” and the corresponding need to strengthen efforts to protect the human rights of migrants.⁸¹

This leadership on human rights issues is an important predicate for Brazil’s ascension as a global power. Brazil has long been on the cusp of being a major political force; the country has one of the largest economies in the world, consistently ranking among the top ten in terms of gross domestic product.⁸² Already a member of the BRICS alliance (comprised of Brazil, Russia, India, China, and South Africa), Brazil has the potential to be an even more influential global player.⁸³ Additionally, its warmer embrace of migrants from other countries allows Brazil to strengthen connections with other regions of the world, particularly South-South relationships. The openings provided by a more flexible immigration policy may also generate longer-term economic and political benefits for Brazil.⁸⁴

Furthermore, by embracing a more inclusive approach to migration—one informed by human rights principles—Brazil may be seen as an emerging leader within the community of nations, and can position itself for seats on prestigious United Nations bodies, including the Security Council. This distinctive approach to migration also helps lift Brazil’s reputation in the Inter-American System. In the weeks after the passage of the new immigration law, the Inter-American Commission on Human Rights issued a press release praising the new measure, describing it as “modern legislation consistent with the principles of [Brazil’s] Federal Constitution” and noting the measures that facilitate the regularization of migrants.⁸⁵ The communication also includes a quote from Luis Ernesto Vargas Silva, a member of the Commission and its rapporteur on the rights of migrants, who

⁸⁰ Cf. Rodrigo Stumpf Gonzalez, *A Política de Promoção aos Direitos Humanos no Governo Lula*, 4 REVISTA DEBATES 107 (2010) (describing various developments linked to the Secretariat).

⁸¹ Rocha Reis, *supra* note 79, at 63–64.

⁸² See, e.g., *Gross Domestic Product 2016*, WORLD BANK GROUP (Dec. 15, 2017), <https://databank.worldbank.org/data/download/GDP.pdf> (showing that Brazil ranked 9th in the world in 2016, with a GDP of nearly \$1.8 trillion USD).

⁸³ Acosta, *supra* note 61.

⁸⁴ Georg Uebel, *supra* note 73, at 34.

⁸⁵ *Comissão Interamericano aponta avanços na nova Lei de Migração brasileira*, AGÊNCIA BRASIL (June 16, 2017), <http://agenciabrasil.ebc.com.br/internacional/noticia/2017-06/comissao-interamericana-aponta-avancos-na-nova-lei-de-migracao>.

congratulated Brazil for its “important advance for the protection of migrant persons”⁸⁶

To be sure, the Presidency of Michel Temer has generated uncertainty about the trajectory of Brazil’s foreign policy. Although the Temer administration has emphasized its embrace of “universal themes” such as peace and security,⁸⁷ others have criticized Temer’s foreign policy as regressive, citing a move away from South-South relationships and a lost opportunity to help mediate the conflict in Venezuela.⁸⁸ In the specific area of human rights, perspectives similarly diverge.⁸⁹ With respect to migration, the Temer government has been tested by the arrival of thousands of Venezuelans refugees. Notwithstanding internal political pressures and resource challenges, the Temer administration has publicly stated that it will not close its doors to the Venezuelans.⁹⁰ In this regard, the current government has reaffirmed the importance of humanitarian migration policies.

Apart from managing these arriving migrants, Brazil is also justifiably concerned about protecting its nationals overseas. Recent estimates suggest that there are approximately 3 million Brazilian nationals who are residing outside of the country.⁹¹ Beginning in the 1990s, these overseas Brazilians began to organize and demand support from the state, which no doubt was cognizant of their economic and

⁸⁶ *Id.*

⁸⁷ *Temer: política externa brasileira abrange temas universais*, PRESIDÊNCIA DA REPÚBLICA (Sept. 19, 2017), <http://www2.planalto.gov.br/acompanhe-planalto/noticias/2017/09/temer-politica-externa-brasileira-abrange-temas-universais> (last modified Feb. 26, 2018).

⁸⁸ Gilberto M.A. Rodrigues, *Brazil’s Foreign Policy: A Regressive Path?*, AM. U. CTR. LATIN AM. & LATINO STUD. BLOG (Sept. 6, 2017), <https://aulablog.net/2017/09/06/brazils-foreign-policy-a-regressive-path/>.

⁸⁹ *Compare* Aloysio Nunes Ferreira, *Brazil’s Foreign Policy is “Back in the Game”*, AMERICAS QUARTERLY (Apr. 17, 2017), <http://www.americasquarterly.org/content/brazils-foreign-policy-back-game> (essay penned by Brazil’s foreign minister, reaffirming the importance of human rights) *with* César Muñoz, *Brazil’s Disappointing Human Rights Policies*, HUMAN RIGHTS WATCH (May 4, 2017), <https://www.hrw.org/news/2017/05/04/brazils-disappointing-human-rights-policies> (describing lapses in Brazil’s human rights record).

⁹⁰ Samy Adghirni & Simone Preissler Iglesias, *Brazil Won’t Build a Wall to Stem Tide of Venezuelan Refugees*, BLOOMBERG (Feb. 16, 2018, 4:00 AM), <https://www.bloomberg.com/news/articles/2018-02-16/brazil-won-t-build-a-wall-to-stem-tide-of-venezuelan-refugees>.

⁹¹ According to 2016 estimates prepared by Brazil’s Ministry of Foreign Affairs, the total number of Brazilians overseas is just over 3 million, with approximately 1.4 million of these persons residing in the United States. Ministério das Relações Exteriores, *Brasileiros no mundo, Estimativas populacionais das comunidades*, <http://www.brasileirosnomundo.itamaraty.gov.br/a-comunidade/estimativas-populacionais-das-comunidades/Estimativas%20RCN%202015%20-%20Atualizado.pdf> (table updated Nov. 29, 2016). Back in 2008, Brazil’s foreign affairs ministry estimated the total number to be between 2,059,623 and 3,735,826 persons. Rossana Rocha Reis, *A Política do Brasil para as Migrações Internacionais*, 33 CONTEXTO INTERNACIONAL 47, 48 (2011). See also MILESI & ANDRADE, *supra* note 78, at 7.

electoral power.⁹² This ultimately led to the creation of an infrastructure within the Brazilian government to attend to matters relating to émigrés.⁹³ Scholars have argued that Brazil's adoption of more liberal immigration policies can be explained by this large Brazilian emigrant population residing in the United States and in Europe.⁹⁴ One of the primary complaints registered by Brazilians overseas is the lack of documentation.⁹⁵ Some of these migrants have experienced harsh immigration enforcement tactics and criminalization in foreign countries; for example, between 2002 and 2008, more than 37,000 Brazilians were deported back to Brazil, primarily from the United States.⁹⁶ As noted above, the Brazilian government has criticized wealthier countries' treatment of migrants. Given its concern regarding the experiences of Brazilian emigrants, it would be hypocritical for Brazil to adopt the same oppressive practices.⁹⁷ Therefore, by rejecting criminalization, Brazil is in a stronger position to criticize the practices of other countries and to safeguard the well-being of its nationals overseas.⁹⁸

B. *The Size and Scope of Migration Flows to Brazil*

One factor that necessarily shapes a country's migration-related policies are the nature and size of its incoming migrant flows. Brazil does receive a significant number of foreigners each year: in 2016, the Federal Police recorded the entry of nearly 5.9 million noncitizens.⁹⁹ Compared to the United States and some countries in Europe, however, the relative presence of migrants is smaller. Brazil's overall population is approximately 206 million persons, and it is estimated that there are about 1.2 million migrants in the country—less than 1% of the population.¹⁰⁰

⁹² Rocha Reis, *supra* note 79, at 50–51. Brazilians living overseas may vote only for the President and Vice-President of Brazil. Tribunal Superior Eleitoral, *Eleitor no exterior*, http://www.tse.jus.br/eleitor/copy_of_servicos/eleitor-no-exterior/votacao-no-exterior.

⁹³ Rocha Reis, *supra* note 79, at 52–53.

⁹⁴ Cf. Arcarazo & Freier, *supra* note 10, at 11.

⁹⁵ MILESI & ANDRADE, *supra* note 78, at 8 (citing Roberto Marinucci, *Clientes ou membros? Participação de emigrantes brasileiros em grupos organizados*, in *TRAJETÓRIAS INTERROMPIDAS: CIDADÃOS BRASILEIROS DEPORTADOS E NÃO ADMITIDOS* 103 (Marinucci, Farias & Santin eds., 2009)).

⁹⁶ MILESI & ANDRADE, *supra* note 78, at 10.

⁹⁷ Arcarazo & Freier, *supra* note 10, at 13.

⁹⁸ Luisa Feline Freier & Diego Acosta Arcarazo, *South America's Moves to Liberalize Irregular Migration Are in Stark Contrast to the Punitive and Fatal Policies of the U.S. and Europe*, LSE US CENTRE (June 17, 2015), <http://bit.ly/1JVf2jw>.

⁹⁹ Polícia Federal, *supra* note 54.

¹⁰⁰ Asano & Timo, *supra* note 47. It is unclear whether this figure includes foreign-born persons who ultimately obtained Brazilian citizenship. Assuming that's the case, the number of noncitizens currently residing in Brazil may actually be lower. One source from 2011 estimated the foreign-born population to be in the range of 600,000 to 1 million persons. Rocha Reis, *supra* note 79, at 59. See

Moreover, although economic growth in Brazil made it attractive for migrants several years ago, recent challenges have diminished Brazil's appeal as a destination for labor migration.¹⁰¹ Brazil *has* experienced an uptick in refugee flows, and in recent years, received approximately 30,000 asylum applications per year; prior to 2011, the country received only about 1,000 asylum applications annually.¹⁰² Compare this to the United States, where well over 100,000 asylum applications are docketed each year.¹⁰³

Additionally, while estimates regarding the undocumented population in Brazil are unreliable, one study from 2010 estimated that population to be in the range of around 200,000 persons.¹⁰⁴ A 2008 source quoted an official government estimate of 180,000, and contrasted that figure to a 600,000 estimate provided by an advocacy organization.¹⁰⁵ Given the aforementioned economic downturn, it is likely that the current undocumented population in Brazil is closer to the lower end of that range.

Policy makers in the United States face a much larger unauthorized population, in the range of 11–14 million persons. To be sure, restrictive migration policies do not necessarily correlate with larger (or specific) numbers of foreigners, given the complex historical and sociological factors—including questions of race—that shape responses to migrants.¹⁰⁶ Nevertheless, it is interesting to contemplate whether criminalization of migration could surface in Brazil, should significantly increased migration flows introduce changes or exert other pressures on the

also João Paulo Charleaux, *Como o Brasil lida com a imigração venezuelana*, NEXO (Feb. 27, 2018), <https://www.nexojornal.com.br/expresso/2018/02/14/Como-o-Brasil-lida-com-a-imigração-venezuelana> (asserting that regular and irregular migrants constitute one percent of the Brazilian population).

¹⁰¹ Kevin G. Hall, *Brazil, Once a Haven, Now a Dead End for Many Haitians*, MIAMI HERALD (Sept. 24, 2016, 8:34 AM), <http://www.miamiherald.com/news/nation-world/world/americas/haiti/article103920161.html> (last updated Sept. 27, 2016, 10:37 AM); Lucia Maria M. Bógus & Maria Lucia Alves Fabiano, *O Brasil como destino das migrações internacionais recentes: novas relações, possibilidades e desafios*, 18 PONTO E VÍRGULA 126, 130 (2015).

¹⁰² Ministério da Justiça, Comitê Nacional para os Refugiados, *Sistema de refúgio brasileiro: Desafios e perspectivas* (2016).

¹⁰³ In 2016, for example, the Department of Homeland Security received an estimated 115,399 affirmative asylum applications. NADWA MOSSAAD & RYAN BAUGH, OFFICE OF IMMIGRATION STATISTICS, REFUGEES & ASYLEES: 2016 7 (2018), https://www.dhs.gov/sites/default/files/publications/Refugees_Asytees_2016_0.pdf. In the same year, Immigration Judges within the Executive Office for Immigration Review decided 22,312 cases. *Asylum Representation Rates have Fallen Amid Rising Denial Rates*, TRAC IMMIGRATION (Nov. 28, 2017), <http://trac.syr.edu/immigration/reports/491/>.

¹⁰⁴ MILESI & ANDRADE, *supra* note 78, at 5.

¹⁰⁵ Márcia Carmo, *Brasil tem 600 mil imigrantes ilegais, diz entidade*, BBC BRASIL (Mar. 27, 2008), https://www.bbc.com/portuguese/reporterbbc/story/2008/03/080320_imigracaobrasililegais.shtml.

¹⁰⁶ See, e.g., García Hernández, *supra* note 21, at 1485–92.

country.¹⁰⁷ Alternatively, one could argue that an *ex ante* set of conditions, objectives, or values relating to international migration (including those described in this article) could mitigate or prevent such tensions. Brazil is poised to be a perfect case study, because it is likely to face growing migrant streams in the future, and has just recently chosen to reject the criminalization of migrants.

Although the overall presence of migrants is smaller compared to other countries, the incoming international migration flows are nevertheless significant and visible in large cities, where migrants tend to be concentrated. São Paulo and surrounding areas have attracted migrants from across the globe, and other cities and towns, particularly those near borders or ports of entry, have become host to significant numbers of foreigners.¹⁰⁸ In urban centers, there are ongoing conversations about services for migrant communities and best practices for integration.¹⁰⁹ Large cities, especially São Paulo, also wield immense political and legislative influence, which would suggest that serious grievances about migration could be addressed through law reform, including the imposition of criminal penalties for irregular migration. Legislators from urban areas generally supported the new law, and have not advocated for this approach—perhaps because the migration flows have not triggered significant public concern. In fact, the legislator who formally introduced the new law was Aloysio Nunes Ferreira,¹¹⁰ an influential senator from São Paulo who Temer appointed to serve as Minister of Foreign Affairs.¹¹¹

¹⁰⁷ Aryadne Bittencourt et al., *Migração como Crime, Êxodo Como Liberdade*, 12 REVISTA INTERDISCIPLINARIA DA MOVILIDADE HUMANA 235, 241 (2015) (posing this question in the Brazilian context).

¹⁰⁸ According to a 2014 study, the three most popular states of destination for international migrants arriving in Brazil are São Paulo, Paraná, and Minas Gerais. Leda Maria Oliveira Rodrigues et al., *Imigração recente e educação, o caso do Estado de São Paulo e sua metrópole*, at p. 6 (2014 working paper), http://www.abep.org.br/~abeporgb/abep.info/files/trabalhos/trabalho_completo/TC-1-5-765-677.pdf.

¹⁰⁹ Nações Unidas no Brasil (ONUBR), *Prefeitura de SP apresenta políticas de inclusão e integração de migrantes e refugiados* (Apr. 28, 2017), <https://nacoesunidas.org/prefeitura-de-sp-apresenta-politicas-de-inclusao-e-integracao-de-migrantes-e-refugiados/> (describing local immigrant integration efforts in São Paulo).

¹¹⁰ Rodrigo Baptista & Isabela Vilar, *Projeto da nova Lei de Migração segue para sanção presidencial*, SENADO NOTÍCIAS (Apr. 18, 2018), <https://www12.senado.leg.br/noticias/materias/2017/04/18/projeto-da-nova-lei-de-migracao-segue-para-sancao-presidencial>.

¹¹¹ *Temer Chooses Aloysio Nunes Ferreira as New Brazilian Foreign Minister*, BRAZILGOVNEWS, PRESIDENCY OF THE REPUBLIC OF BRAZIL (March 2, 2017), <http://www.brazilgovnews.gov.br/news/2017/03/temer-chooses-alloysio-nunes-ferreira-as-new-brazilian-foreign-minister/>.

C. *A History of Flexible and Integrative Policies, Informed by Civil Society*

Brazil's current approach to irregular migration is likely conditioned by a legacy of migration-related policies in the country's history, which evidence a flexible and integrative approach to migration management. A key piece of this history is the country's relatively frequent embrace of legalization initiatives. Since 1980, the Brazilian government has approved four separate laws that allow for the "regularization" of undocumented migrants in the country. These "amnesties" were conferred in 1981, 1988, 1998, and 2009.¹¹² In the aggregate, they allowed for the regularization of nearly 150,000 migrants.¹¹³ According to observers, a range of factors affected participation in these processes, including lack of confidence or trust on the part of the migrants, as well as bureaucratic hurdles such as required paperwork and deadlines.¹¹⁴

Another factor that explains the more flexible approach to irregular migration is Brazil's engagement with its regional neighbors in coordinating migration policies.¹¹⁵ One of the longer-term objectives of these partnerships is the right to free circulation for migrants within the region.¹¹⁶ Under the terms of the 2002 Mercosur Residence Agreement, which went into effect in 2009, nationals of Mercosur Member States (Argentina, Brazil, Paraguay, Uruguay, and soon Bolivia)¹¹⁷ and Associate Member States (Chile, Colombia, Ecuador, Guyana, Peru, and Suriname) are permitted to reside and work in another member state for a period of two years, provided they can establish their citizenship and demonstrate a clean criminal record.¹¹⁸ After two years, the permit holder may seek lawful permanent residence in the host country.¹¹⁹ Brazil also may have been influenced by similar pieces of progressive migration legislation that were enacted in Argentina (2004)

¹¹² MILESI & ANDRADE, *supra* note 78, at 5–6. *See also* Lei No. 6,964 de 9 de Dezembro de 1981, Lei No. 7,685 de 2 de Dezembro de 1988, Lei No. 9,675/98, regulamentada pelo Decreto no. 2771/98, and Lei No. 11,961/2009.

¹¹³ MILESI & ANDRADE, *supra* note 78, at 5–6.

¹¹⁴ *Id.* at 6. Additionally, for the 2009 amnesty, the ability of some foreigners to regularize through the Mercosur Agreement may have likewise affected participation. *Id.* at 7.

¹¹⁵ Rocha Reis, *supra* note 79, at 57.

¹¹⁶ *Id.*

¹¹⁷ Venezuela was suspended indefinitely from Mercosur in 2017. *See Decisión sobre la Suspensión de la República Bolivariana de Venezuela en el Mercosur en Aplicación del Protocolo de Ushuaia sobre Compromiso Democrático en el Mercosur* (Aug. 5, 2017), <https://betaweb.mercosur.int/documento/decision-sobre-la-suspension-de-venezuela-en-el-mercotur/>.

¹¹⁸ Diego Acosta, *Free Movement in South America: The Emergence of an Alternative Model?*, MIGRATION POLICY INSTITUTE (Aug. 23, 2016), <https://www.migrationpolicy.org/article/free-movement-south-america-emergence-alternative-model>.

¹¹⁹ *Id.*; Rocha Reis, *supra* note 79, at 57.

and Ecuador (2008).¹²⁰ Although both of these measures encountered significant challenges,¹²¹ they are emblematic of a consistent regional effort to stake out a more accommodating approach to migration. This flexibility involving regional migrants likely shapes the government's posture towards unlawful entry, since the Mercosur Agreement provides yet another pathway to regularization.

This more flexible and integrative posture towards migrants is also explained, in part, through the active engagement of civil society actors in immigration policy discussions and decision-making. For example, Brazil's National Council on Immigration has representatives from civil society,¹²² as does its National Committee on Refugees, which makes decisions on refugee claims.¹²³ In the lead-up to the passage of the new immigration law, key civil society organizations advocated before both the Brazilian government and international bodies, emphasizing the human right to migrate.¹²⁴ Along with representatives of government agencies, these civil society organizations participated in conversations regarding themes for the new law and possible provisions to include. Over many years, the Brazilian government has allowed these entities to have a meaningful role in migration-related decision making. The migrant-friendly values they advocate have unquestionably shaped the recent trajectory of Brazilian immigration policy.

D. *Historical Considerations, National Identity, and Race*

As mentioned, the 1980 law positioned noncitizens as potentially subversive elements within Brazilian society. In a way, that law ran counter to a deep historical current: Brazil's self-conception as a country of immigrants.¹²⁵ Throughout the nineteenth and twentieth centuries, Brazil received waves of migrants, largely from Europe (including Germany, Italy, and Poland), Asia (particularly Japan and Korea),

¹²⁰ Feline Freier & Acosta Arcarazo, *supra* note 98.

¹²¹ The process of drafting implementing regulations for the Argentine law was significantly delayed, and ultimately the law did not take priority within the government. *La ley migratoria de Kirchner es de avanzada, pero no se cumple*, LA POLÍTICA ONLINE (Nov. 12, 2010), <http://www.lapoliticaonline.com/nota/48807/>.

¹²² Ministério do Trabalho, Conselho Nacional de Imigração, *Ata, Reunião Ordinária do Conselho* (Nov. 4, 2016) (minutes documenting the participation of civil society organizations in a meeting of the council).

¹²³ Ministerio de Relaciones Exteriores, *Los Refugiados y el CONARE*, <http://www.itamaraty.gov.br/es/politica-externa/paz-e-seguranca-internacionais/6287-los-refugiados-y-el-conare> (noting the participation of NGOs, including the Instituto de Migraciones y Derechos Humanos and Cáritas on the Committee).

¹²⁴ Asano & Timo, *supra* note 47.

¹²⁵ Rocha Reis, *supra* note 79, at 47.

and other parts of Latin America.¹²⁶ The Brazilian government affirmatively welcomed (and even recruited) many of these groups of migrants, for different purposes. For example, Brazil sought out migrants to settle more rural areas of its territory, and needed a labor force after the end of slavery in the late 19th century. In the post-independence history of Brazil, immigrants have been hailed for “improving an imperfect nation” through their presence and contributions.¹²⁷ Over the years, this self-conception of a nation *improved by* immigrants has remained strong, and arguably shapes immigration policy decisions and the nation’s level of tolerance to immigrants.¹²⁸ Indeed, even persons not born abroad often embrace their ancestral heritage.¹²⁹

Perhaps the most relevant historical factor, however, is the 1980 migration law, which explicitly linked migration and national security. As noted above, this foundational immigration law emerged during Brazil’s military dictatorship, and sought to undercut potentially subversive influences on Brazil. Since emerging from this military dictatorship, Brazil has made efforts (seen in various aspects of its legal system) to counter the legacy of the military dictatorship by explicitly embracing human rights norms.¹³⁰ Although some governmental institutions have been slow to change, many within government and civil society are committed to the project of constructing a society guided by human rights norms. This impulse—of eliminating the remnants of the military dictatorship—is embedded in progressive law reform efforts in Brazil.¹³¹ A perfect example is the new immigration law, which was framed as a way to undo another legacy of the military dictatorship. As one pair of observers has noted, the establishment of a new legal framework will allow Brazil to repay the historical debt occasioned by the more restrictive 1980 law.¹³² In an effort to promote more inclusive governance, law reform efforts now also include voices from civil society; as noted above, these representatives have also had a

¹²⁶ MILESI & ANDRADE, *supra* note 78, at 4–5 (noting that between 1836 and 1968, the largest numbers of migrants to Brazil came from Portugal, Italy, Spain, Germany, Japan, and Russia).

¹²⁷ LESSER, *supra* note 11, at 2.

¹²⁸ Agnieszka Zogata-Kusz, *Theoretical Perspectives on Immigration Policy and Politics*, 1 CONTEMPORARY EUROPEAN STUDIES 5, 8 (2012).

¹²⁹ LESSER, *supra* note 11, at 2–3.

¹³⁰ The 1998 Constitution of Brazil placed international law, including international human rights norms, on equal footing with domestic law. *Constituição da República Federativa do Brasil de 1988*, http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

¹³¹ Rafael Lamera Giesta Cabral, *Reforma das Instituições para a Democracia e o Legado Autoritário: A Branda Justiça de Transição no Brasil*, 22 REVISTA DIREITOS FUNDAMENTAIS & DEMOCRACIA 84, 89 (2017) (“the reform of institutions for democracy [is] key to understanding the Brazilian phenomenon”).

¹³² Deisy Ventura & Rossana Rocha Reis, *Criação de lei de migrações é dívida histórica do Brasil*, CARTA CAPITAL (Aug. 21, 2014), <https://www.cartacapital.com.br/sociedade/divida-historica-uma-lei-de-migracoes-para-o-brasil-9419.html>.

moderating influence on criminalization tendencies, by reinforcing the importance of human rights.

To be sure, Brazil's self-conception as an immigrant nation is deeply informed by questions of race and class. In the 19th century, the Brazilian government affirmatively recruited European migrants in order to "whiten" society given the large numbers of slaves who had recently been emancipated.¹³³ Even among Asian migrants, Japanese migrants were welcomed, whereas Chinese migrants were turned away due to racialized and class-based conceptions of inferiority.¹³⁴ Although Brazil received migrants from the Middle East throughout the 20th century, and some experienced discrimination,¹³⁵ many have assimilated within Brazil's racial hierarchy as "white." (For example, Brazil's embattled president, Michel Temer, is the son of Lebanese immigrants who immigrated to Brazil in 1925).¹³⁶

International migration flows to Brazil are undergoing a demographic shift, such that many of the present-day migrants hail from the Global South, including Haiti, Senegal, the Congo, Bolivia, and other countries.¹³⁷ This stands in contrast to Brazilian policies from the early twentieth century, which effectively denied entry to Black migrants, including Black Americans.¹³⁸ The current migration pathway between Haiti and Brazil is particularly strong, and can be traced to Brazil's contribution to the UN effort in Haiti after the 2010 earthquake.¹³⁹ This led to stronger ties between the two countries and growing migration flows. Eventually, Brazil's National Council on Immigration issued resolutions, authorizing the issuance of "humanitarian visas" for Haitian nationals, and regularizing those

¹³³ Maria Cristina Dadalto, *Imigração e permanência do sonho*, 7 *MATRIZES* 249, 261 (2013) (describing government efforts to recruit European migrants, and thereby satisfy labor needs and also whiten the population); Luiz Orencio Figueredo & João Henrique Zanelatto, *Legislação e políticas públicas voltadas à imigração no Brasil*, 8 *PASSAGENS: REVISTA INTERNACIONAL DE HISTÓRIA POLÍTICA E CULTURA JURÍDICA* 252, 256 (2016) (noting attempts to incentivize migration from Europe in the aftermath of the abolition of slavery); DAVID SCOTT FITZGERALD & DAVID COOK-MARTÍN, *CULLING THE MASSES: THE DEMOCRATIC ORIGINS OF RACIST IMMIGRATION POLICY IN THE AMERICAS* 266–67 (2014) (noting that European immigrants were thought to have the work ethic and skills lacking among Brazilian natives).

¹³⁴ LESSER, *supra* note 11, at 46–53, 150–75; FITZGERALD & COOK-MARTÍN, *supra* note 133, at 267–68.

¹³⁵ LESSER, *supra* note 11, at 116–50.

¹³⁶ *Biografia, Michel Temer, Presidente da República*, PLANALTO—PRESIDÊNCIA DA REPÚBLICA, <http://www2.planalto.gov.br/acompanhe-planalto>.

¹³⁷ Bógus & Fabiano, *supra* note 101, at 130.

¹³⁸ FITZGERALD & COOK-MARTÍN, *supra* note 133, at 274–76.

¹³⁹ Brazil was a leading player in the United Nations Stabilization Mission in Haiti (MINUSTAH). Many argue that Brazil's presence in Haiti led to the opening of a migration pathway between the two countries. See, e.g., Antônio Tadeu Ribeiro de Oliveira, *Migrações internacionais e políticas migratórias no Brasil*, 1 *CADERNOS OBMIGRA* 252, 258 (2015).

Haitians who had entered the country surreptitiously.¹⁴⁰ As of 2016, approximately 80,000 Haitian nationals were residing in Brazil,¹⁴¹ though a significant number have left in recent years, seeking opportunities elsewhere.

Brazil has an immensely complex history of race relations, but the subordination of Black Brazilians has been a consistent thread in Brazilian history.¹⁴² As these migration flows from the Global South persist, and as Black migrants continue to arrive in the country, they may test Brazil's immigrant-friendly identity and its apparent tolerance of irregular migration. Stated differently: is Brazil truly welcoming of *all* migrants, or does it want only migrants of a particular color or socioeconomic class? Migrants from Africa and even some from other parts of Latin America have experienced prejudice, discrimination, and exploitative working conditions, and have been the target of anti-immigrant public protests.¹⁴³ Some of these migrants have limited professional qualifications and difficulty with the language, making them even more susceptible to mistreatment.¹⁴⁴ Black migrants in Brazil have even suffered physical assaults (including shootings) motivated by xenophobia.¹⁴⁵

The experience of these migrants of color in the coming years will shed light on the outer bounds of Brazil's immigrant-friendly identity. Should the Brazilian

¹⁴⁰ Conselho Nacional de Migração, Resolução Normativa n. 97/2012.

¹⁴¹ *Governo prorroga visto humanitário para haitianos*, GOVERNO DO BRASIL (Sept. 14, 2016), <http://www.brasil.gov.br/cidadania-e-justica/2016/09/governo-prorroga-visto-humanitario-para-haitianos>.

¹⁴² Alexandre Emboaba Da Costa, *Confounding Anti-Racism: Mixture, Racial Democracy, and Post-racial Politics in Brazil*, 42 *CRITICAL SOC.* 495, 495–97 (2014) (noting the persistence of antiblackness, and cataloging various state-sanctioned racial restrictions); Sales Augusto dos Santos, *Who is Black in Brazil?*, 33 *LATIN AM. PERSPECTIVES* 30, 31–33 (2006) (describing the Brazilian government's very delayed acknowledgment of racial discrimination in the country).

¹⁴³ Rocha Reis, *supra* note 79, at 65; Gabi Di Bella & Gui Christ, '*Quando cheguei, descobri o que era ser negra*': como africanos veem o preconceito no Brasil, *BBC BRASIL*, (Nov. 20, 2016), <https://www.bbc.com/portuguese/brasil-38034668> (describing various forms of prejudice experienced by African migrants in Brazil); Aline Diniz, *Imigrantes haitianos sofrem com xenofobia no trabalho*, *O TEMPO* (Dec. 12, 2016), <https://www.otempo.com.br/cidades/imigrantes-haitianos-sofrem-com-xenofobia-no-trabalho-1.1410725> (citing a study of approximately 5,000 Haitian immigrants in the area of Belo Horizonte, in which 60 percent of the men interviewed and 100 percent of the women reported xenophobia or other forms of discrimination on the job).

¹⁴⁴ Bógus & Fabiano, *supra* note 101, at 131.

¹⁴⁵ *Haitian Immigrants Victims of Xenophobic Attacks in Brazil*, *TELESUR* (Aug. 9, 2015), <https://www.telesurtv.net/english/news/Haitian-Immigrants-Victims-of-Xenophobic-Attacks-in-Brazil-20150809-0002.html> (reporting that seven Haitian immigrants were seriously injured in gun attacks motivated by anti-immigrant animus).

state wish to limit the entry of certain migrants of color—or exert control over those already in the country—criminalization may resurface as a possibility.¹⁴⁶

E. Criminal Justice Priorities in Brazil

Another way to understand Brazil's non-embrace of migrant criminalization is to examine the country's criminal justice system itself. Violence and public security are top priorities, and law enforcement resources are directed at curbing that epidemic. Although noncitizens have been the subject of criminal prosecutions, the vast majority of them entered the criminal justice system through the drug trade. To the extent there are concerns about immigrant criminality in Brazil, they appear to be linked to the role that noncitizens play in transporting narcotics.

In recent decades, Brazil has struggled with the growing influence of criminal organizations, particularly in large urban centers such as São Paulo, Rio de Janeiro, Belo Horizonte, and Recife. Crime consistently ranks as the most pressing public concern.¹⁴⁷ Fear of crime is omnipresent, leading to public support for harsh, sometimes illegal responses.¹⁴⁸

Societal violence, one of the principal sequelae of this criminal activity, is now seen as a significant public health challenge for Brazil—one that produces physical injuries, psychological harm, and diminished quality of life.¹⁴⁹ Brazil's epidemic of violence has also resulted in staggering economic costs, in the form of “expenditure on police, prisons, private security, public health, and loss of human capital [as well as] personal loss from robbery and theft”¹⁵⁰ These deeply entrenched concerns about public violence and insecurity within communities have led to heightened criminal penalties, robust law enforcement efforts and therefore a growing prison population in nearly all Brazilian states.¹⁵¹ Official statistics from summer 2016 revealed that Brazil had more than 726,000 prisoners, which corresponds to nearly

¹⁴⁶ As noted above, scholars have documented how crimmigration emerged in the United States in part due to racial animus, and to perpetuate subordination. García Hernández, *supra* note 21, at 1485.

¹⁴⁷ See, e.g., Layla Medina, *Indefinite Detention, Deadly Conditions: How Brazil's Notorious Criminal Justice System Violates the International Covenant on Civil and Political Rights*, 31 AM. U. INT'L L. REV. 593, 599 (2016).

¹⁴⁸ INTERNATIONAL BAR ASSOCIATION, ONE IN FIVE: THE CRISIS IN BRAZIL'S PRISONS AND CRIMINAL JUSTICE SYSTEM 33 (2010).

¹⁴⁹ Joseph Murray et al., *Crime and Violence in Brazil: Systematic Review of Time Trends, Prevalence Rates and Risk Factors*, 18 AGGRESSION & VIOLENT BEHAV. 471, 472 (2013).

¹⁵⁰ *Id.*

¹⁵¹ See United Nations Development Programme, *Brazil's Prison Population Increased 74 Percent in Seven Years*, UNDP (June 5, 2015), <http://www.latinamerica.undp.org/content/rblac/en/home/presscenter/articles/2015/06/05/poblaci-n-carcelaria-de-brasil-aument-un-74-en-siete-a-os.html>.

353 prisoners for every 100,000 persons.¹⁵² This means that Brazil has the third largest prison population in the world, behind the United States and China. Perhaps unsurprisingly, Brazil's robust crime-fighting efforts have disproportionately affected poor communities of color, particularly Afro-descendants. More than half of Brazil's prison population is comprised of young adults between the ages of 18 and 29, and 64 percent of prisoners are black.¹⁵³ The size of this prison population and the disproportionate impact on underprivileged minorities is yet another reason why Brazil's non-punitive approach to irregular migration is so surprising.

That said, some number of migrants do end up in Brazil's increasingly punitive criminal justice system. According to recent statistics, approximately 3,200 foreigners are housed in the Brazilian prison system, representing less than 1 percent of the overall prison population in Brazil.¹⁵⁴ The overwhelming majority of these persons have been convicted of drug-related offenses.¹⁵⁵ According to the Federal Public Defender's office, approximately 90 percent of these prisoners are drug "mules," typically persons who had transported illegal drugs.¹⁵⁶ Many of these prisoners were likely sentenced pursuant to the 2006 *Lei de Drogas*, which enhanced penalties for drug trafficking, increasing sentences to five to fifteen years.¹⁵⁷ In this context, some migrants are impacted by policies of criminalization, though not necessarily because of their immigration status. Although there are also some

¹⁵² Andreia Verdélio, *Com 726 mil presos, Brasil tem terceira maior população carcerária do mundo*, EBC AGÊNCIA BRASIL (Aug. 12, 2017), <http://agenciabrasil.ebc.com.br/geral/noticia/2017-12/populacao-carceraria-do-brasil-sobe-de-622202-para-726712-pessoas>.

¹⁵³ *Id.*

¹⁵⁴ Vitor Gonçalves Machado & Pedro Machado Ribeiro Neto, *Presos Estrangeiros no Brasil e o Problema da Seletividade Penal*, DERECHO Y CAMBIO SOCIAL (2014). See also Alana Gandra, *Mais de 90% dos presos estrangeiros no Brasil cumprem pena por tráfico de drogas*, JUSBRASIL (June 7, 2012), <https://agencia-brasil.jusbrasil.com.br/noticias/3174597/mais-de-90-dos-presos-estrangeiros-no-brasil-cumprem-pena-por-trafico-de-drogas>. A significant factor contributing to this large prison population is the increasing use of pre-trial detention in Brazil. Elizabeth Leeds, *The Brazilian Prison System: Challenges and Prospects for Reform*, WASHINGTON OFFICE ON LATIN AMERICA (Nov. 22, 2016), <https://www.wola.org/analysis/brazilian-prison-system-challenges-prospects-reform/>.

¹⁵⁵ ANA LUISA ZAGO DE MORAES, *CRIMIGRAÇÃO: A RELAÇÃO ENTRE POLÍTICA MIGRATÓRIA E POLÍTICA CRIMINAL NO BRASIL* 238–39 (2015).

¹⁵⁶ *Id.* A separate report examined the profiles of 1,165 prisoners at a foreigners-only jail in the area of São Paulo, and found that the majority of those incarcerated were from Nigeria, and that drug trafficking accounted for approximately 72 percent of the convictions. Caio Gomes Silveira et al., *Única prisão para estrangeiros no Brasil reúne 86 nacionalidades e ensina português*, GLOBO.COM (Apr. 11, 2017), <https://g1.globo.com/sao-paulo/itapetininga-regiao/noticia/unica-prisao-para-estrangeiros-no-brasil-reune-86-nacionalidades-e-ensina-portugues.ghtml>. Immigration-related offenses was not even listed as a category of crimes that had led to incarceration, and thus it appears that none of the individuals at that facility were being held for such a crime. *Id.*

¹⁵⁷ Lei No. 11.343 de 23 de Agosto de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.8.2006.

reports of cases where Federal Police officers have targeted migrants for selective policing, these reports tend to be episodic in nature.¹⁵⁸

Although immigrants in Brazil have been linked to drug trafficking, there is not widespread preoccupation about their dangerousness to the community, nor is there urgency regarding removing these individuals once they have served their sentence. Indeed, some of these prisoners—particularly those who had been granted parole before the official end of their sentence—find themselves in a legal limbo, lacking legal status, but waiting (sometimes years) for the formal expulsion process to run its course.¹⁵⁹ In general, discourses relating to public security in Brazil do not foreground threats posed by foreigners.¹⁶⁰ This stands in contrast to the experience in other countries, where growing societal preoccupation about criminality has coincided with concerns regarding specific migrant groups.¹⁶¹

External observers might offer another reason for the existing criminal justice priorities in Brazil: the country, unlike the United States and some in Europe, has not yet experienced a major foreign terrorist event.¹⁶² Such an event might pierce the public consciousness, linking migration policy with national security, and thereby result in more aggressive border control and criminalization. This line of thinking, while logical, ignores the historical and present-day circumstances of Brazil.¹⁶³ First, concerns about international terrorism *have* weighed heavily in recent years, as Brazil has hosted two major international sporting events: the World Cup (2014) and the Summer Olympic Games (2016). For both of these events, Brazil prepared for the possibility of terrorist activity.¹⁶⁴ Although both events

¹⁵⁸ Bógus & Fabiano, *supra* note 101, at 126.

¹⁵⁹ Ideota, *supra* note 65.

¹⁶⁰ Notably, in the 2017 Annual Report of the Brazilian Forum on Public Security (a national non-profit organization), there is no mention of migrants or foreigners. *See generally* FÓRUM BRASILEIRO DE SEGURANÇA PÚBLICA, ANUÁRIO BRASILEIRO DE SEGURANÇA PÚBLICA 2017 (2017). There is a very broad body of journalistic work and scholarly literature about causes of crime in Brazil. These authors tend to emphasize the role of economic inequality, organized crime, and government corruption. *See, e.g.*, Chris Feliciano Arnold, *Brazil has Become a Gangland*, FOREIGN POLICY (June 6, 2016), <https://foreignpolicy.com/2017/06/06/brazil-has-become-a-gangland-prison-riot/>.

¹⁶¹ *See, e.g.*, Maartje A. H. van der Woude et al., *Crimmigration in the Netherlands*, 39 L. & SOC. INQUIRY 560, 564–65 (2014) (linking changing discourses on crime with sentiments towards youth of Moroccan origin).

¹⁶² Jorge Mascarenhas Lasmar, *A legislação brasileira de combate e prevenção do terrorismo quatorze anos após 11 de Setembro: limites, falhas e reflexões para o futuro*, 23 REVISTA DE SOCIOLOGIA E POLÍTICA 47, 48 (2015).

¹⁶³ Additionally, in the United States, the politics of criminalizing immigrants emerged well before the 9/11 terrorist attacks, suggesting that the two need not co-occur.

¹⁶⁴ Simon Romero & Michael S. Schmidt, *As ISIS Posts in Portuguese, U.S. and Brazil Bolster Olympics Security*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/02/world/americas/rio-de-janeiro-olympics-terrorism-brazil.html>.

occurred without incident, the Brazilian state—and its society—has felt the weight of a *possible* terrorist incident, such that in 2016 the Brazilian Congress passed a new law to prevent and combat terrorism.¹⁶⁵

Moreover, concerns about terrorist activity and religious extremism do feature in Brazilian political discourse. Conservative media outlets have reported on Federal Police investigations of Brazilian nationals suspected of connections to extremist groups.¹⁶⁶ Additionally, in recent years, as the country has contemplated changes to its criminal and immigration laws, groups within Brazilian society have warned of the dangers posed by foreigners, including the possible influence of Islamic extremism. Although such views are not widespread, Brazilian society has been forced to engage with these questions, at least on some level.¹⁶⁷ In other words, Brazilian government officials have contemplated the possibility of terrorist attacks, but have not opted for repressive immigration controls as a counter-terrorism tool.

Finally, as a practical matter, immigration-related functions are just a sliver of the broad mandate of the Federal Police.¹⁶⁸ Some observers have suggested that the agency simply does not have the capacity to properly handle immigration matters, given their focus on drug and wildlife trafficking, smuggling, and white-collar crime.¹⁶⁹ High-level Federal Police officials have even suggested that the agency be relieved of administrative policing functions, including those relating to migration.¹⁷⁰ Along these lines, in recent years, the Federal Police has subcontracted immigration screening functions at airports to a third party, prompting criticism from observers about lack of training and oversight of workers.¹⁷¹ The resources of the Federal Police are indeed limited, and would be inefficiently allocated in patrolling the country's 15,000 kilometers of borders, given all of the other demands on the

¹⁶⁵ Lei No. 13.260, de 16 de Março de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.3.2016.

¹⁶⁶ Reinaldo Azevedo, *Estado Islâmico: Risco de ataque terrorista no Brasil nunca foi tão grande, alerta Abin*, VEJA (June 8, 2016), <https://veja.abril.com.br/blog/reinaldo/estado-islamico-risco-de-ataque-terrorista-no-brasil-nunca-foi-tao-grande-alerta-abin/>; see also Lasmar, *supra* note 162, at 49–51.

¹⁶⁷ See Lasmar, *supra* note 162, at 49–51.

¹⁶⁸ Márcio Chaer & Maurício Cardoso, “*Polícia Federal não pode ser eficiente com tantas atribuições*,” CONJUR (Oct. 19, 2014), <https://www.conjur.com.br/2014-out-19/entrevista-robotroncon-filho-superintendente-policia-federal-sp> (interview with Roberto Troncon Filho, then-superintendent of the Federal Police for São Paulo).

¹⁶⁹ Isabel Alberti de Moraes et al., *A Imigração Haitiana para o Brasil: Causas e Desafios*, 4 CONJUNTURA AUSTRAL 95, 109 (2013).

¹⁷⁰ *Id.*

¹⁷¹ RICARDO BECHARO ELABRAS, CONTROLE DE IMIGRAÇÃO AEROPORTUÁRIA NO BRASIL E SUAS REPERCUSSÕES (2015); Claudio Dantas Sequeira, *Polícia Federal S/A*, ISTOÉ (Jan. 21, 2016), https://istoe.com.br/138194_POLICIA+FEDERAL+S+A/.

agency.¹⁷² Additionally, the agency has experienced budget reductions in recent years, as the Brazilian government as a whole struggles through a fiscal crisis.¹⁷³

IV. THE FUTURE OF CRIMINAL-IMMIGRATION INTERSECTIONS IN BRAZIL

Demographic, historical, geopolitical, and policy considerations have likely shaped, to varying degrees, the current policies in Brazil relating to the criminalization of migrants. The immigrant-friendly policies of the Brazilian state are commendable, but may shield other concerns, and may ultimately prove to be ephemeral. Other analytical lenses suggest that while migration itself is not criminalized, the Brazilian state has generated hardships for migrants, through both acts and omissions. Furthermore, conditions in the future may change the trajectory of Brazil's migration policy.

One immediate concern is the volatile political climate in Brazil in the aftermath of the 2018 Presidential election. As of this writing, Jair Bolsonaro, often described as a Trump-like figure, is poised to assume the presidency after prevailing in the October 2018 election.¹⁷⁴ Bolsonaro was one of the few Senators to openly criticize the new Migration Law, tweeting in April 2017 that the legislation "could bring chaos to Brazil."¹⁷⁵ Migration policy under a Bolsonaro presidency would likely shift, but the nature and scope of any change remains quite uncertain. Although a repeal of the May 2017 law would require an act of Congress, the new administration could simply choose not to fully implement the law.

A related concern is the persistence of the migration flows from Venezuela, which have contributed to conflicts in border areas, and ongoing discussions about Brazil's international obligations. In August 2018, after an alleged scuffle between a local merchant and some Venezuelans, a group of residents in the state of Roraima attacked and set fire to migrant encampments, driving more than 1,000 Venezuelans back across the border.¹⁷⁶ On the whole, the Brazilian public generally favors the protection of Venezuelans, but not overwhelmingly so: a recent public opinion poll revealed that 45 percent of Brazilians oppose closing the borders, 30 percent favor

¹⁷² *Id.*; Gomes Bezerra dos Santos, *supra* note 43, at 105.

¹⁷³ *Polícia Federal tem segundo menor orçamento em 10 anos*, DOM TOTAL (Oct 7, 2017), <http://domtotal.com/noticia/1169952/2017/07/policia-federal-tem-segundo-menor-orcamento-em-10-anos/> (in 2017 the Federal Police had the second lowest budget allocation in ten years).

¹⁷⁴ Ernesto Londoño & Shasta Darlington, *Jair Bolsonaro Wins Brazil's Presidency, in a Shift to the Far Right*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/world/americas/jair-bolsonaro-brazil-election.html>.

¹⁷⁵ Jair Bolsonaro (@jairbolsonaro), Twitter (April 15, 2017, 4:57am), <https://twitter.com/jairbolsonaro/status/853215750617780224>.

¹⁷⁶ *Venezuela Crisis: Brazil Deploys Troops After Migrant Attack*, BBC NEWS (Aug. 20, 2018), <https://www.bbc.com/news/world-latin-america-45242786>.

the move, and 25 percent have no opinion.¹⁷⁷ Bolsonaro has called for the creation of refugee camps in border areas, emphasizing that Brazil cannot be an open-borders country.¹⁷⁸ The shifting political winds in Brazil, in combination with the increasing strain of the Venezuela crisis, may shape Brazil's migration policies in unpredictable ways.

Another area for concern is the growing influence of the private prison industry in Brazil. Historically, prisons in Brazil have been government-run, but recent events—including a spate of prison riots—have raised questions about the government's ability to effectively manage the prison system. And indeed, a handful of Brazilian states have entered into contracts with private prison companies.¹⁷⁹ As the United States' experience clearly demonstrates, the need to maintain revenues for private prison corporations contributes to efforts to further criminalize migrants.¹⁸⁰ Indeed, it is telling that the vast majority of individuals who are prosecuted under Operation Streamline are incarcerated in private detention facilities.¹⁸¹ Should private prisons continue to grow in number and influence in Brazil, there may be a spillover effect on immigration policy and criminalization. This trend is worthy of continued monitoring.

Moreover, although Brazil may have chosen to reject the explicit rhetoric of criminalization, the state is arguably deploying other approaches to exert control over migrants. These devices also limit the ability of migrants to enjoy productive, autonomous lives. Even in the absence of direct physical control, the state can assert its power in indirect ways. This lens of analysis allows us to see the quintessential criminal-immigration intersections as part of a broader continuum of state practices.¹⁸²

Notwithstanding the promising language in the new law, and the generally low enforcement of immigration-related crimes, law enforcement activities in Brazil *have* come under some scrutiny. During the Ebola epidemic, reports surfaced of African migrants in Brazil experiencing abusive treatment and discrimination by law

¹⁷⁷ Raphael Tsavkko Garcia, *Brazil's Closed-Door Policy*, FOREIGN POLICY (Sept. 28, 2018, 1:10 PM), <https://foreignpolicy.com/2018/09/28/brazils-closed-door-policy-venezuela-refugee/>.

¹⁷⁸ *Bolsonaro sugiere crear campos de refugiados para venezolanos*, EL COMERCIO (Aug. 24, 2018, 9:48 PM), <https://elcomercio.pe/mundo/latinoamerica/brasil-jair-bolsonaro-sugiere-crear-campos-refugiados-venezolanos-venezuela-noticia-550369>.

¹⁷⁹ Elizabeth Leeds, *The Brazilian Prison System: Challenges and Prospects for Reform*, WASHINGTON OFFICE ON LATIN AMERICA (Nov. 22, 2016), <https://www.wola.org/analysis/brazilian-prison-system-challenges-prospects-reform>.

¹⁸⁰ Daniel Martinez & Jeremy Slack, *What Part of "Illegal" Don't You Understand? The Social Consequences of Criminalizing Unauthorized Mexican Migrants in the United States*, 22 Soc. & Legal Stud. 535, 538 (2013).

¹⁸¹ *Id.* at 544.

¹⁸² Aryadne Bittencourt Waldely et al., *Migração como Crime, Exodo Como Liberdade*, 12 REVISTA INTERDISCIPLINARIA DA MOVILIDADE HUMANA 235, 242 (2015).

enforcement.¹⁸³ Another example comes from 2016, after Venezuelan migrants crossed the border into Brazil seeking refuge, and began to cluster in the northern Brazilian state of Roraima. In late 2016, in an incident that garnered significant public attention, federal police officers nearly deported approximately 450 of these Venezuelans, including individuals who had presented formal refugee claims.¹⁸⁴ Fortunately, intervention by the Brazilian courts prevented these deportations from taking place.¹⁸⁵ Along these lines, observers have also criticized the treatment of asylum-seekers who arrive at Guarulhos International Airport in São Paulo, including the fact that they are sometimes detained in an *ad hoc* fashion for indefinite periods of time.¹⁸⁶ The aforementioned prosecution of drug mules is another way that the state exerts control over noncitizens.¹⁸⁷

Another way in which noncitizens in Brazil experience mistreatment is arguably through the perpetuation of their economic vulnerability. As noted above in the context of Haitians, in recent years, the National Council of Immigration in Brazil has issued resolutions that have regularized thousands of migrants who were residing in Brazil without formal legal status. The Council is a unique body, housed within the Executive Branch, but comprised of representatives of different federal ministries, as well as members of civil society (including non-profits and unions).¹⁸⁸ The very language of the Council resolutions reveal that they passed on the heels of strong lobbying from employers and industries that had hired these immigrant workers.¹⁸⁹ These businesses argued that their industries depended on the migrant workforce. Therefore, the justification for their regularization of status was to allow them to continue supporting these industries.¹⁹⁰ Although the newly acquired immigration status did not require employment with a specific company, in practice, many of these migrants may find themselves depending on employers to navigate complex immigration process or for different types of social support.

Ironically, the Brazilian state has also enhanced the vulnerability of the migrants through negligence of their post-arrival needs. One of the most consistent

¹⁸³ *Id.* at 241.

¹⁸⁴ Asano & Timo, *supra* note 47.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Waldely et al., *supra* note 182, at 242.

¹⁸⁸ Acosta Arcarazo & Feline Freier, *supra* note 10, at 18.

¹⁸⁹ Resolução Normativa CNIg Nº 99 de 12/12/2012, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 19.12.2012 (noting the issuance of visas to foreigners with workplace links in Brazil).

¹⁹⁰ *Id.* Along these lines, it is possible for labor market needs to have a tempering effect on exclusionary, crime-based migration policies, as evidenced by the experience in Spain. José Ángel Brandariz García, *The Control of Irregular Migrants and the Criminal Law of the Enemy*, in SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR 255 (Maia João Guia, Maartje Van Der Woude & Joanne Van Der Leun eds., 2013).

critiques of Brazilian migration policy is the lack of efforts by the federal government to assist migrants with access to services and with their general integration into Brazilian society.¹⁹¹ In other words, while Brazil has adopted welcoming immigration policies, it has failed to pair those policies with the infrastructure needed to support the arriving migrants.¹⁹² By failing to provide these support services, the Brazilian state has placed migrants in circumstances of extreme precarity, rendering them vulnerable to exploitation and preventing them from living full and independent lives.

Along these lines, although Brazil has championed human rights principles in public fora and through its progressive new immigration law, observers have emphasized the “contrast between Brazil’s formal commitment to liberal democratic norms and the violation of the basic rights of so many of its citizens.”¹⁹³ In other words, while the government may embrace progressive principles through its rhetoric and written legislation, the reality on the ground suggests contrary behavior, or at a minimum, that the progressive norms have not trickled down to the level of public officials who actually implement the law.¹⁹⁴

Even accounting for these complexities, Brazil is at a unique historical moment, with a recent history of inclusive immigration policies, now punctuated by a new immigration law. Developments in the coming months and years will determine whether the policy of embracing migration (and rejecting criminalization of migration) is illusory, or whether it represents a permanent normative shift in country-level migration policy. Several factors will help determine the integrity of this position, including the following: (1) whether Brazil chooses to develop a solid infrastructure for immigrant integration, to buttress its welcoming rhetoric; (2) whether the new policies embraced by Brazil are adopted by other countries, particularly in South America; (3) whether support for this approach will remain strong after the 2018 election, or whether a Bolsonaro presidency will stall or even reverse the progressive turn in Brazilian migration policy; (4) whether significantly elevated migrant flows, including a steady stream of arrivals from Venezuela, along

¹⁹¹ Asano & Timo, *supra* note 47 (describing difficulties that migrants face relating to obtaining documentation, discrimination, and social integration).

¹⁹² Bógus & Fabiano, *supra* note 101, at 135 (“[A]lthough Brazil is internationally recognized as a welcoming country, due to its ability to provide shelter to different cultures, refugees encounter many difficulties in integrating into Brazilian society.”).

¹⁹³ INTERNATIONAL BAR ASSOCIATION, *ONE IN FIVE: THE CRISIS IN BRAZIL’S PRISONS AND CRIMINAL JUSTICE SYSTEM* 21 (2010). FitzGerald & Cook-Martín make similar observations about Brazilian immigration policy in the nineteenth and twentieth centuries, and observe how the country embraced its reputation as a “racial democracy” while seeking to exclude various groups of undesirable migrants. *See generally* FITZGERALD & COOK-MARTÍN, *supra* note 133.

¹⁹⁴ INTERNATIONAL BAR ASSOCIATION, *ONE IN FIVE: THE CRISIS IN BRAZIL’S PRISONS AND CRIMINAL JUSTICE SYSTEM* 27 (2010) (“Successive Brazilian governments have a long history of implementing reforms at the formal level, while maintaining policies, practices and institutions that rested on a denial of basic rights.”).

with other poor migrants of diverse backgrounds, will generate heightened tensions about migrants and their impact on Brazilian society; (5) whether pathologies in its criminal justice system will undermine the benevolent posture towards receiving migrants; and (6) whether relevant government actors, particularly the Federal Police, embrace these norms.

Ultimately, many of these factors could be explored and addressed through a cohesive migration policy that is developed at the government level, in collaboration with local entities and also foreign powers. To its credit, Brazil has contemplated such a dialogue, and describes the contours for future policy development in its May 2017 law.¹⁹⁵ Additionally, in November 2017, the Brazilian government issued implementing regulations for the law.¹⁹⁶ While the regulations are extensive, observers have criticized specific provisions for their inconsistency with the letter and spirit of the law.¹⁹⁷ Discussions regarding the law's implementation, including the regulations, will undoubtedly continue in the months and years to come.

For Brazil's policies to persist, its government and society must be able to resist the narrative that equates foreigners with dangerousness and criminality, and continue to advance one that views the reception of migrants as a basic obligation of states. Unique historical and positional factors in Brazil may indeed allow Brazil to retain its relatively benevolent posture towards immigrants. And if this approach succeeds, over time, it may emerge as a lasting and effective counterpoint in global discourses regarding migration.

¹⁹⁵ Lei No. 13,445 de 24 de Maio de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 25.5.2017.

¹⁹⁶ Decreto No. 9.199, de 20 de Novembro de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 21.11.2017.

¹⁹⁷ André de Carvalho Ramos et al., *Regulamento da nova Lei de Migração é contra legem e praeter legem*, CONSULTOR JURÍDICO (Nov. 23, 2017), <https://www.conjur.com.br/2017-nov-23/opiniao-regulamento-lei-migracao-praeter-legem>; Rodrigo Borges Delfim, *Lei de Migração entra em vigor, mas regulamentação ameaça avanços*, MIGRAMUNDO (Nov. 21, 2017), <http://migramundo.com/lei-de-migracao-entra-em-vigor-mas-regulamentacao-ameaca-avancos/>.