BORDERS AND BRIDGES:

MIGRATION IN THE 21ST CENTURY

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About

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. The *CJLPP* is also proud to spearhead the Intercollegiate Law Journal project. Together, we intend to build a community of students passionately engaged in learning and debate about the critical issues of our time!

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Executive Board

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Foreword — Borders and Bridges: Migration in the 21st Century

Isaac Cui (PO '20)
Editor-in-Chief

The abbé Raynal and his compatriots, writing nearly two-and-a-half centuries ago, observed that Americans, "[s]till more estranged . . . by worship, by manners, and probably by their feelings, . . . harbor seeds of dissension that may one day prove the ruin and total overthrow of the colonies."[1] For, they asked rhetorically, "[c]an any means be conceived of subjecting to one same rule people who not understand each other; who speak seventeen or eighteen different languages, and who preserve from times immemorial, customs and superstitions, to which they are more attached than to their existence?"[2] These Enlightenment Frenchmen were cautious about the pluralistic society of the new American state. They saw a society lacking traditional features that would promote cohesion — shared language, religion, or history — and they forecasted tumult.

Raynal's political theory has, at least in some ways, borne out in empirical data. Consider, for example, political scientists Marisa Abrajano and Zoltan Hajnal's finding that perceptions of immigration to the United States have pushed native-born white Americans to support a "less generous, more indignant politics that seeks to punish immigrants as well as limit the social services and public goods available to them."[3] That backlash, they show, is not limited to immigration policies, but rather, is mixed into a story of race and partisanship. The negative connotations of immigration are largely linked to an imagination of Latinx immigration, whereas Asian American immigration does not spur the same kinds of racial anxieties among white Americans.[4] But when white Americans equate immigration with Latinx immigration — and, to be sure, they often do so[5] — those Americans begin to identify more strongly with the Republican Party, a party that has increasingly supported restrictionist immigration policies[6] surrounded by an ideology that favors a pure nation-state to a pluralist, cosmopolitan society.[7] Abrajano and Hajnal tell a remarkable story of how individual anxieties can cause changes in partisan identification that then translate into macropolitical trends — a story that seems all the more incisive when one remembers that they published their book before the meteoric rise of Donald Trump to the presidency of the United States.[8]

Juxtaposing President Trump's election with Raynal's political theory suggests that some of the core questions of how to organize collective life in a plural society are enduring. Insofar as politics concerns the articulation of collective identities upon which to base coalitional action,[9] then migration will naturally induce a reactionary politics that privileges a native-born "us" against the incoming foreign "other." Axes of difference — whether racial, ethnic, religious, or any other — will likely be invoked in the politics of who should, and who should not, be allowed to enter. And under conditions of economic

1 4 Guillaume Thomas Raynal, A Philosophical and Political History of the Settlements and Trade of Europeans in the East and Wesr Indies 423 (J.O. Justamond trans., 1788). The *Histoire des deux Indes*, as it was known in its original French, is now understood to be a "collaborative enterprise," written by many others in addition to the abbé Raynal himself. Peter Jimack & Jenny Mander, *Reuniting the World: The Pacific in Raynal's* Histoire des deux Indes, 41 Eighteenth-Century Stud. 189, 189 (2008).

2 8 Raynal, *supra* note 1, at 34.

3 Marisa Abrajano & Zoltan L. Hajnal, White Backlash: Immigration, Race, and American Politics 202 (2015).

4 *See, e.g., id.* at 152 ("Whites react extremely differently to Latino context than they do to Asian American context. Asian Americans, it appears, may be more of a model minority and ally, whereas Latinos seem to be a real threat that whites counter with more restrictive and more punitive policy making."); *id*. at 196–97 (discussing different effects on white Americans' support for welfare and regressive taxation based on Asian American, Latinx, and black context).

5 *Id*. at 207.

6 *Id*. at 85.

7 *See generally* Adam Serwer, *Conservatives Have a White-Nationalism Problem*, Atlantic (Aug. 6, 2019), https://www.theatlantic.com/ideas/archive/2019/08/trump-white-nationalism/595555/ (last visited Feb. 10, 2020).

8 To be sure, substantial debate exists over the role that racial resentment played in President Trump's election. Suffice it to say that even if racial resentment was not the only cause, it was certainly an important one. *See, e.g.,* Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-Immigrant Sentiments*, 51 PS: Pol. Sci. & Pol. 528 (2018); Caroline J. Tolbert, David P. Redlawsk & Kellen J. Gracey, *Racial Attitudes and Emotional Responses to the 2016 Republican Candidates,* 28 J. Elections, Pub. Op. & Parties 245 (2018); Jon Green & Sean McElwee, *The Differential Effects of Economic Conditions and Racial Attitudes in the Election of Donald Trump*, 17 Persp. on Pol. 358 (2019); John Sides, Michael Tesler & Lynn Vavreck, *Hunting Where the Ducks Are: Activating Support for Donald Trump in the 2016 Republican Primary*, 28 J. Elections, Pub. Op. & Parties 135 (2018).

9 *See* Chantal Mouffe, The Return of the Political 50 (1993) ("One of the crucial questions at stake is the creation of a collective identity, a 'we.' In the question 'What shall we do?', the 'we' is not given but rather constitutes a problem. Since in political discourse there is always disagreement about the possible courses of action, the identity of the 'we' that is going to be created through a specific form of collective action might indeed be seen as the central question.").

inequality,[10] technological change,[11] and regional stagnation,[12] one might expect a politics explicitly grounded in preserving a certain "us" against "them."[13] Though I write in the American context, these dynamics of course also exist elsewhere, whether in Britain's decision to leave the European Union, the rising popularity of far-right parties across Europe,[14] or the 2019 Citizenship Amendment Act in India.[15]

These observations reflect age-old difficulties regarding the effects of migration. Many of the patterns we see in the 21st century, thus, may not be novel. But, of course, humanity is also in uncharted territory as it confronts impending and catastrophic climate change.[16] Both global and local institutions will face unprecedented challenges, whether in the form of direct environmental shocks or the concomitant mass displacement of people. Whether and how our institutions will adapt to these new realities is a critical question confronting policymakers and scholars today.

There are some who want to create congruence between the nation and the state,[17] to reify and secure our borders — both literal but also cultural — against an "invasion" of migrants.[18] But there is also a different path, one in which our collective response is a politics of inclusion that recognizes the inevitability of migration under conditions of climactic change and social instability and that is open to those "huddled masses yearning to breathe free[.]"[19] A nation, as political scientist Benedict Anderson understood it, is an "imagined community," where membership is essentially arbitrary except insofar as it is mutually recognized.[20] Far from being physical reality, nationhood is defined through the act of imagination; nations are conjured by articulating who "we" are. Migration could be a challenge to the imagined community. But it might also push people to reimagine the bounds of their community — to move from who "we" are to who "we" ought to be. By no means, then, are we doomed to a world of ethno-nationalist backlash due to increasing migration. Nor, however, are we assured the cosmopolitan, liberal world that well-meaning intellectuals in the 1990s envisioned to be the end of history. It the messy business of politics to decide which path we choose.

Given the importance of migration, the *Claremont Journal of Law and Public Policy*'s Executive Board decided to devote our journal's first symposium to the topic. Print Edition Editor Katya Pollock (PO '21) took the lead in preparing this edition, Volume 7, Number 3. Our symposium writers spent Fall 2019 and their 2019–20 winter breaks writing under her guidance, and we are proud to present four pieces analyzing the dynamics of migration in the 21st century.

Staff writer Haley Parsley (PO '21) takes a historical view of immigration policy in the United States and shows the relationship between immigration, race, and disability through case studies of 19th century Ellis Island, the 20th century Braceros migrant-worker program, and the Trump Administration's current policies regarding migrant detention.[21] Her essay was awarded the Byron Cohen Award for excellence in writing and research.

Staff writer Clare Burgess (CMC '20) similarly looks to history to illuminate contemporary political conflicts, specifically over "sanctuary cities" — cities that, in some capacity, refuse to enforce federal immigration law.[22] Though the fight over sanctuary cities is salient today, Clare shows that the doctrinal issues have deep roots that can be traced back to debates over the Fugitive Slave Clause of the Constitution[23] and its role in the Constitution's federalist structure.
While Clare and Haley look to the past to explain the pres-

10 *See, e.g.,* Taylor Telford, *Income Inequality in America Is the Highest It's Been Since Census Bureau Started Tracking It, Data Shows*, Wash. Post (Sept. 26, 2019, 12:57 PM), https://www.washingtonpost.com/business/2019/09/26/income-inequality-america-highest-its-been-since-census-started-tracking-it-data-show/ (last visited Feb. 9, 2020).
11 *See, e.g.,* Harry J. Holzer, *The Robots Are Coming. Let's Help the Middle Class Get Ready.,* Brookings Inst. (Dec. 13, 2018), https://www.brookings.edu/blog/up-front/2018/12/13/the-robots-are-coming-lets-help-the-middle-class-get-ready/ (last visited Feb. 9, 2020).
12 *See* Sabrina Tavernise, *Frozen in Place: Americans Are Moving at the Lowest Rate on Record*, N.Y. Times (Nov. 20, 2019), https://www.nytimes.com/2019/11/20/us/american-workers-moving-states-.html (last visited Feb. 9, 2020) ("Decades ago, less wealthy parts of the country tended to be the ones that attracted the most new residents, because lower rents and wages there drew in businesses, and people were more likely to move to where jobs were. But the economy is now less flexible, with prosperity clustered in larger cities and with businesses and people moving less.").
13 William A. Galston, *The Populist Challenge to Liberal Democracy*, 29 J. Democracy 5, 13–17 (2018).
14 *Id*. at 6–7 (documenting examples across Western-style liberal democracies).
15 *See, e.g.,* Kai Schultz, *Modi Defends Indian Citizenship Law Amid Violent Protests*, N.Y. Times (Dec. 22, 2019), https://www.nytimes.com/2019/12/22/world/asia/modi-india-citizenship-law.html (last visited Feb. 9, 2020).
16 *See, e.g.,* Seven Mufson et al., *2°C: Beyond the Limit: Extreme Climate Change Has Arrived in America*, Wash. Post (Aug. 13, 2019), https://www.washingtonpost.com/graphics/2019/national/climate-environment/climate-change-america/?itid=lk_interstitial_manual_8 (last visited Feb. 9, 2020) (noting that warming over two degrees Celsius will result in "virtually all the world's coral reefs" dying, "massive sea level rise," and cascading warming due to melting of Arctic sea ice, in addition to exacerbating forest fires and floods).
17 Ernest Gellner, Nations and Nationalism 1 (2d ed. 2009) (defining nationalism as a principle "which holds that the political and the national unit should be congruent").
18 *See generally* Ben Zimmer, *Where Does Trump's 'Invasion' Rhetoric Come From?*, Atlantic (Aug. 6, 2019), https://www.theatlantic.com/entertainment/archive/2019/08/trump-immigrant-invasion-language-origins/595579/ (last visited Feb. 10, 2020).
19 Emma Lazarus, *The New Colossus* (1883).
20 *See generally* Benedict Anderson, Imagined Communities 6 (1991).
21 *See infra* p. 6.
22 *See infra* p. 13.
23 U.S. Const. art. IV, § 2, cl. 3 ("No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

ent, staff writer Ethan Widlansky (PO '22) dives into the unprecedented, writing a forceful analysis of catastrophic climate change.[24] He discusses impending waves of mass migration and demonstrates that our current politics is woefully inadequate to deal with these challenges.

Finally, contributor and newly-joined staff writer Priscilla Jin (PO '23) looks to international law regarding refugees.[25] She shows that current law fails to adequately protect migrants. In response, she advances a novel policy proposal to apportion refugee quotas among states, along with an enforcement mechanism that would penalize states for failing to meet their quotas.

The quality of and diverse perspectives in these four pieces reflect the virtues of our journal: how our writers are empowered to explore their own personal interests while also being united in a shared commitment to academic rigor in analyzing pressing legal and policy issues. I am incredibly proud of all of our writers and Katya for producing such a wonderful product.

I would be amiss, of course, not to mention all of the other people who collectively make the journal the wonderful organization it is. Our new Chief Operating Officer, Bryce Wachtell (PO '21) has begun the semester with a running start, efficiently learning the ropes and organizing the journal's first social within the first few weeks of school. Business Director Ali Kapadia (PO '20) has continued to lead a team of incredibly dedicated and effective Project Managers: Adeena Liang (PO '23), Katyla Solomon (SCR '23), Yutong Niu (PO '23), and Gabrielle Henig (PO '22). Together, they hosted workshops for dozens of young leaders who were visiting Pomona's campus in partnership with the Draper Center, and they helped organize the physical symposium accompanying this edition. Our Print Edition Editors — Talia Bromberg (SCR '20), Scott Shepetin (PO '21), Ciara Chow (PO '22), Calla Li (PO '22), and Frankie Konner (PZ '21) — have begun working with their new writers to prepare Volume 7, Number 4, and Volume 8, Number 1. Though I am sad that Digital Content Editor Alex Simard (PO '22) will be taking a step down from the journal for this semester, I am excited to welcome Izzy Davis (PO '22) as our new Digital Content Editor and to welcome back Chris Tan (PZ '21) as our other Digital Content Editor. Webmaster Aden Siebel (PO '21) has continued to work to revamp our website. (Both Chris and Aden have graciously decided to continue working with the journal despite being off campus this semester.) Interview Editor Lauren Rodriguez (PO '22) has already begun setting up exciting interviews, and Campus Policy Editor Alison Jue (SCR '20), similarly, is lining up fascinating pieces that will be published online. Our new Copy Editor, Isabelle Blaha (PO '22) has provided invaluable support in preparing this edition, and she has very quickly learned the rules of the *Bluebook*, which is itself an incredible feat. Sofia Muñoz (SCR '22), our wonderful design editor, has specially designed the symposium's cover, in addition to her usual work in preparing the print edition. Finally, of course, our staff writers and digital content writers are the backbone of our organization, and their hard work and dedication inspire me.

The *Claremont Journal of Law and Public Policy* receives tremendous support from our faculty advisor, Professor Amanda Hollis-Brusky, and from the Director of Claremont McKenna College's Salvatori Center, Professor George Thomas. We are funded by the Claremont Colleges' student governments as well as the Salvatori Center. We accept submissions on a rolling basis; for information on how to submit, as well as our latest publications, please refer to our website, 5clpp.com, or our Facebook page, facebook.com/claremontlawjournal/.

I hope you find this symposium informative and thought-provoking.

Sincerely,
Isaac Cui
Editor-in-Chief

24 *See infra* p. 18.
25 *See infra* p. 24.

The Production of Race and Disability in America's Immigration Policies

Haley Parsley (PO '21)
Staff Writer

I. Introduction

In early October 2019, a *New York Times* story described President Donald Trump's frustration with the slow process his administration has made in quelling illegal migration at the Mexican border. The article recounted a number of ideas which President Trump proposed to his aides to discourage migrants — such as creating a trench stocked with alligators, constructing an electrified border wall, and shooting migrants in the legs — "to slow them down."[1] Targeting migrants for debilitating injury in order to deter immigration is an idea repugnant to many Americans. However, this practice is in fact deeply rooted in American immigration policy, from its first development at Ellis Island to today's migrant detention centers.

This paper argues that U.S. immigration policy uses policies that promote the production of disability and debility as a tactic to discourage migration to the United States, especially migration of racialized populations from Mexico and Central America. I trace the origins of immigration policy in the United States, in which disability and race become co-constitutive. Additionally, I examine two pivotal time periods in American immigration history: the 1940s Bracero Program and the contemporary internment of disabled immigrants[2] within migrant detention centers. I have selected these events because they are particularly useful for understanding the United States' approach to disability and immigration; however, these are certainly not the only examples of policies that had and continue to have an exclusionary and deleterious impact on potential and actual migrants with disabilities. In fact, as I argue below, U.S. immigration policy has always been informed by a fear — and hatred — of disability.

This article borrows heavily from disability studies and particularly employs the "social" model of disability, which was developed within that discipline.[3] This model proposes that disability is a social construct: individuals considered to be disabled are only so because they live in an ableist world which is not adapted for their needs. Within this model, disability is located in the world around us, rather than in a body which would otherwise be deemed imperfect. For example, a person who uses a wheelchair might be able to get around just fine, until she encounters a flight of stairs. Historical models of disability presume that a person's inability to climb stairs is the result of a bodily flaw. However, the social model recognizes that she is not disabled by her body, but rather by the lack of a ramp or elevator. It is important to acknowledge that many disability scholars have critiqued the social model, arguing that it minimizes the challenges of inhabiting a disabled body, which may not be entirely societally produced.[4] I find the social model to be a useful and powerful political tool due to its ability to help able-bodied people understand the construction of disability, even as I agree that it does not capture the full experience of disability. I use this model not to argue that disability exists only in society, but rather to identify the ways in which past and current immigration policy often exacerbates or facilitates the presence of or potential for disability and debility.

I borrow the term "debility" from the theorist Jasbir Puar to describe disabling policies and acts carried out against immigrant populations by the American government that limit immigrants' capacity to flourish.[5] The ideas of disability and debility often overlap, but I use "debility" to call attention to the ongoing and purposeful process of debilitation, as well as its perpetrator. As Puar writes in *The Right to Maim*, debility "comprehends those bodies that are sustained in a perpetual state of debilitation precisely through foreclosing the social, cultural, and political translation to disability."[6]

II. The Origins of Immigration Policy and Disability

In the early days of the sovereign United States, immigration was largely unregulated and encouraged, especially when from

1 Michael D. Shear & Julie Hirshfield Davis, *Shoot Migrants' Legs, Build Alligator Moat: Behind Trump's Ideas for Border*, N.Y. Times (Oct. 1, 2019), https://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html (last visited Feb. 3, 2020).

2 The language that we use to name people with disabilities is a matter of debate in the disability studies community. Here I refer to "disabled migrants," rather than "migrants with disabilities." The former is an example of identity-first language, developed with those who identify with a more recent school of thought that disability, as an identity category, should be foregrounded. The latter is an example of person-first language, from a school of thought developed in the 1970s which believed that someone with a disability is "a person first, then *secondly* someone who just happened to have a disability." Lennard J. Davis, Beginning With Disability: A Primer 7 (Lennard J. Davis ed., 2017). I use both terms interchangeably throughout this work, as a nod to both sides of the debate.

3 *See generally id*. at 8.

4 *Id*.

5 Jasbir Puar, The Right to Maim, at xiv (2017)

6 *See generally id.*

European countries. Such immigration was seen as beneficial to the economy of the new nation. In 1791, Alexander Hamilton wrote of immigrants:

> Whoever inspects, with a careful eye, the composition of our towns will be made sensible to what an extent this resource may be relied upon. This exhibits a large proportion of ingenious and valuable workmen, in different arts and trades, who, by expatriating from Europe, have improved their own condition, and added to the industry and wealth of the United States.[7]

Through most of the nineteenth century, the United States continued this open-door policy, with most related legislation "designed to *encourage* immigration."[8] However, as the twentieth century neared, the tide began to turn against immigration, largely due to two factors. First, American laborers resented immigrant workers for their helping to depress wages by working for less.[9] Second, as poor, unskilled workers streamed into the United States and attempted to survive off of increasingly low wages, state institutions such as "poorhouses, asylums, hospitals, and jails"[10] became overextended. These developments led to the first immigration policies in the United States, which sought to limit the arrival of certain individuals.

Immigration policies enacted in the late 1800s and early 1900s are often divided into two "phases" by historians: selective and restrictive.[11] Restrictive policies, more frequently enacted in the 1920s, limited immigration through national quotas consisting of "2 per centum of the number of foreign-born individuals of such nationality resident in continental United States as determined by the . . . census of 1890,"[12] limiting immigration by non-European populations.[13] Selective policies "weeded out" immigrants with certain undesirable characteristics, such as illness, disability, or having a low level of education.[14] As Baynton notes in *Defectives in the Land*, tightened immigration policies accompanied the flourishing of the American eugenics movement and, with it, ideas of crafting the perfect citizen and maintaining a "pure" national body.[15]

The Immigration Act of 1882 is considered the first selective immigration policy, and it marked the advent of what is known as the "public charge" rule, a policy which exists to this day and which stipulates that no person "likely to become a public charge" may immigrate to the United States.[16] The Immigration Act of 1882 provided that any "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge"[17] would not be permitted to land on American soil. Later policies would expand the clause to restrict those "*likely* to become a public charge"[18] and later to include those with a "mental or physical defect being of a nature which may affect the ability of such alien to earn a living," such as epileptics, those who had committed crimes of "moral turpitude," imbeciles, feeble-minded persons, pathological liars, and those with "mental or physical defect," among others, to the classes of excluded immigrants.[19] With the introduction of the public charge rule, immigration became legally bound to ability. One had to be seen as capable — physically and mentally — to be welcomed into America.

Ellis Island, the famed immigrant inspection station in New York Harbor, opened in 1892.[20] The operations of the center were deeply informed by eugenics, and immigration officers busied themselves with attempting to discern disability, of any form, by observing immigrants as they arrived at and moved throughout the island. As Victor Safford, a medical doctor and Ellis Island officer, wrote, "A man's posture, a movement of his head or the appearance of his ears . . . may disclose more than could be detected by puttering around a man's chest with a stethoscope for a week . . . ."[21] Safford also claimed that "it is no more difficult a task to detect poorly built or broken down human beings than to recognize a cheap or defective auto-mobile."[22] Here, the public charge clause gained new meaning as officials increasingly began mapping mental and physical "defects" onto racialized bodies. These officials, influenced by the eugenics movement, believed that an immigrant's race determined not only their mental capacity but also their physical ability. An entry describing the difference between Northern and Southern Italians from the *Dictionary of Races or Peoples*, a volume produced by Congressman William Dillingham for the United States Immigration Commission, claims that Southern Italians are descended from "the Berbers of northern Africa," and that "there may be some traces of an infusion of African blood in this stock in certain communities of Sicily and Sardinia . . . ." Later, the guide discusses the emotional differences between Northerners and Southerners: "the South Italian [is] excitable, impulsive, highly imaginative, impracticable; as an individualist having little adaptability to highly organized so-

7 Alexander Hamilton, Report on the Subject of Manufacturers (1791).
8 Kitty Calavita, Inside the State: The Bracero Program, Immigration, and the INS 4 (1992).
9 *Id*. at 5.
10 *Id*. at 6.
11 *E.g.*, Douglas C. Baynton, Defectives in the Land: Disability and Immigration in the Age of Eugenics 17 (2016).
12 Immigration Act of 1924, § 11(a), Pub. L. No. 68-139, 43 Stat. 153 (1924).
13 As a notable exception to this rule, the Chinese Exclusion Act was passed earlier, in 1882. *See* Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882).
14 Baynton, *supra* note 11, at 18.
15 *Id*. at 12.
16 Immigration Act of 1882, § 2, Pub. L. No. 47-376, 22 Stat. 214.
17 *Id*.
18 Immigration Act of 1891, § 1, Pub. L. No. 51-551, 26 Stat. 1084 (1891).
19 Immigration Act of 1907, § 2, Pub. L. No. 59-96, 34 Stat. 898 (1907). *See also* Baynton, *supra* note 11, at 18.
20 Barry Moreno, Encyclopedia of Ellis Island, at xiii (2004).
21 Quoted in Jay Dolmage, *Disabled Upon Arrival: The Rhetorical Construction of Disability and Race at Ellis Island, in* The Disability Studies Reader 5, 43, 47 (Lennard Davis ed., 2016).
22 *Id*. at 48

ciety. The North Italian, on the other hand, is pictured as cool, deliberate, patient, practical, and as capable of great progress in the political and social organization of modern society."[23] Southern Italy's association with Africa or "African Blood" marked its inhabitants as both physically and morally flawed, both "short in stature" and unfit for "highly organized society."[24] Through the logic of eugenics, in which racial origin becomes representative of intelligence and ability, disability and race become not quite synonymous but rather mutually imbricated in immigration policy. Through this lens, racialized bodies were seen as inherently disabled in some way, and disabled bodies became racialized through an imagined tracing of racial history.

III. Production of Debility: The Bracero Program

World War II created a significant labor shortage in the United States, as sixteen million young American men were drafted or enlisted to be shipped abroad.[25] This labor shortage was addressed, in part, by a surge of young women joining the industrial labor force. What is less widely known, however, is the role that Mexican laborers played in the maintenance of the agricultural industry during the war. The presence of these laborers was facilitated by the Bracero Program.[26] Inaugurated in 1942, the program was the result of a bilateral agreement between Mexico and the United States which allowed Mexican laborers — after careful vetting by American officials — to migrate temporarily to the United States as agricultural guest workers. The program was extended through 1963, although revisions and significant changes to the program's administration were made nearly every other year of its existence.[27]

The vetting process for migrant workers was strenuous. Potential laborers were subject to a multi-level screening process which involved medical examination in villages across Mexico,[28] travel by train or bus to the U.S.-Mexico border,[29] further inspection at the border for calloused hands (an indication of a "hard working man"[30]), and a second, more invasive round of physical screening, involving x-rays and blood testing.[31] Doctors looked for signs of disease and disability, as well as "signs that braceros had the wherewithal and physical ability that agricultural work required."[32] Workers were systematically cleaned, and their clothes laundered, in a process designed to prevent mites or bugs from entering the United States. As a part of this process, some workers were sprayed with DDT.[33]

This was not the first time that the United States had entered into a labor agreement with Mexico. During World War I and the 1920s, a large number of workers "were recruited and contracted in the Southwest by private employers."[34] However, when the Great Depression took hold in the United States, the need for foreign labor was greatly diminished and many Mexican workers were deported. As a result, Mexico was understandably reluctant to contract with the United States in order to create the Bracero Program. However, the financial incentives of the program, as well as a number of contractual agreements guaranteeing the fair treatment of Mexican workers, convinced the Mexican government of the program's benefits.[35]

These contractual agreements included, in part, the promise that "housing conditions, sanitary facilities and medical services, and occupational insurance were to be identical to those enjoyed by domestic agricultural laborers."[36] However, these agreements were rarely honored. First, domestic agricultural workers "enjoyed" no federal guarantee of medical services or occupational insurance.[37] Secondly, although safe housing conditions were required by law, enforcement of this policy was inconsistent. As described in a 1951 report by the President's Commission on Migratory Labor,

> Where housing is furnished to domestic migratory workers, its quality and condition is designed to reflect the social status of the migratory group the farmer expects to employ. In other words, employers anticipate that groups regarded as socially inferior will be less demanding in what they will accept. Thus, housing for Negros and Americans of Mexican ancestry is characteristically poorer than the housing offered to 'Okie' migrants.[38]

Workers were housed in structures ranging from "old shacks and barns to dorm-like buildings with beds."[39] One represen-

23 Daniel Folkmar & Elnora C. Folkmar, U.S. Immigr. Comm'n, Dictionary of Races of Peoples 82 (1910), https://babel.hathitrust.org/cgi/pt?id=uc1.b3425502&view=1up&seq=5.
24 *Id.*
25 U.S. Dep't of Veterans Aaffairs, America's Wars Fact Sheet (2017), https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf.
26 The term Bracero comes from a loose translation of the word "brazo," meaning arm. It can be loosely translated as "farm hand." Calavita, *supra* note 8, at 1.
27 U.S. Dep't of Labor & U.S. Dep't of Justice, Study of Population and Immigration Problems 32 (1963), https://catalog.hathitrust.org/Record/009871032.
28 Mary E. Mendoza, *La Tierra Pica/ The Soil Bites: Hazardous Environments and the Degeneration of Bracero Health, 1942-1962, in* Disability Studies and the Environmental Humanities: Toward an Eco-Crip Theory 474, 480 (Sarah Jaquette Ray & Jay Sibara eds., 2017).
29 *Id.* at 481.
30 *Id.* at 482.
31 *Id.*
32 *Id.* at 481.
33 *Id.* at 493.
34 U.S. Dep't of Labor & U.S. Dep't of Justice, *supra* note 27, at 27.
35 James F. Creagan, *Public Law 78: A Tangle of Domestic and International Relations*, 7 J. Inter-Am. Stud. 541, 542 (1965).
36 U.S. Dep't of Labor & U.S. Dep't of Justice, *supra* note 27, at 29.
37 Maria Elena Bickerton, Note, *Prospects for a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program*, 79 Tex. L. Rev. 895, 905 n.96 (2001).
38 President's Comm'n on Migratory Labor, Migratory Labor in American Agriculture 141 (1951), https://babel.hathitrust.org/cgi/pt?id=uc1.32106000897212&view=1up&seq=9.
39 Mendoza, *supra* note 28, at 483.

tative of the West Palm Beach County Department of Public Welfare described the conditions thusly:

> Most of them (i.e., the quarters provided by farm owners) do not have running water or adequate toilet facilities. The families are crowded into one or two rooms, and in many instances, we have found upon inspection, farm laborers living in quarters which in a good dairy country such as I come from, you wouldn't place your good-blooded cattle.[40]

The food provided by employers was generally of poor quality and lacked nutritional value. Workers survived on simple meals such as cornmeal and rice; one physician reported that in a survey of labor camps in Mathis, Texas, "8 out of every 10 adults had not eaten any meat in the last six months."[41]

In the fields, migrant workers did not fare much better than in the labor camps. Workers were frequently exposed to "extreme, unfamiliar weather, . . . dangerous equipment, and . . . pesticide-treated plants and dirt . . . ."[42] Workers also faced blatant racism, exemplified by their treatment in relation to the "cortito," or short-handled hoe. This tool was preferred by employers because it allowed for greater precision, but the use of the cortito required laborers to spend hours stooped over in the heat, as one laborer described, "ben[t] like staples.[43] Many employers perceived ability to work with the cortito as a genetically-given gift. Mendoza quotes a farm placement representative:

> I've seen Mexican nationals work stooping over for hours at a stretch, without straightening up. An Anglo simply couldn't take it. But it didn't seem to bother these boys a bit. Don't ask me what it is. Maybe it's because the Mexicans are a good deal shorter than Anglos — they're built closer to the ground.[44]

Given these conditions, illness, injury, and the outbreak of disease were frequent. A representative of the Michigan Department of Health "reported a tuberculosis rate of 19 per 1,000 among migratory agricultural workers in Saginaw County compared with less than 1 per 1,000 among 'normal' residents."[45] Cameron County, Texas, an area with high volume of migratory labor, reported "83 deaths per 1,000 births, 'one of the highest infant mortality rates in the country.'"[4647], In its 1951 report, the President's Commission on Migratory Labor concluded that "[t]uberculosis, infant mortality, maternal mortality, dysentery, enteritis, smallpox, typhoid . . . all are much more prevalent among migratory workers than among the general population."[48] Moreover, the commission went on to note that "[t]he conditions are worse than the statistics indicate" and that many migrants suffered from under-reported diseases as a result of diet deficiencies.[49]

There are few resources available that document the outcomes of Braceros who became permanently disabled as a result of their work in the United States. Certainly there was no legal obligation for either the government or employer to provide for disability insurance or benefits.[50] In fact, it was understood that one of the benefits of the Bracero Program was that these parties were not responsible for the well-being of workers beyond the few months during which they were employed. The President's Commission on Migratory Labor made this understanding explicit:

> The advantage of foreign contract workers (except Puerto Ricans) is that, with the end of the field requirements, they can be sent back whence they came. Unlike domestic migrants, they do not become a burden upon American communities. In their poverty and in their rootlessness, domestic migrants present as much of a social problem during the home base period as during crop operations.[51]

Further, the Commission found that

> [t]he basic dilemma faced by farm employers, particularly those with farm operations requiring seasonal hands in large numbers, is this: They want a labor supply which, on the one hand, is ready and willing to meet the short-term requirements and which, on the other hand, will not impose social and economic problems on them or on their community when the work is finished.[52]

Mendoza writes that families were often confused by the deaths of their loved ones in the United States, given the extensive physical testing they had undergone before their departure. A Sra. Garcia wrote to Mexico's Secretary of Labor, asking for monetary relief after learning that her husband had died of acute aoritis in the United States: "Upon being contracted as a Bracero under the number 724-16-3241, [he] was examined by the doctors . . . and they did not find any cardiac condition or anything else that would have affected his ability to become a Bracero."[53] However, Sr. Garcia suffered serious and ultimately fatal health problems, likely as a result of his treatment as a Bracero. Without monetary support from her husband, Sra. Garcia was left with little income to support her family.[54]

40 President's Comm'n on Migratory Labor, *supra* note 38, at 145.
41 *Id*. at 154.
42 Mendoza, *supra* note 28, at 488.
43 *Id*. at 491.
44 *Id*.
45 President's Comm'n on Migratory Labor, *supra* note 38, at 153.
46 *Id*.
47 In the latter half of the Bracero Program, it was increasingly common for wives and children to travel to the United States alongside a Bracero worker. *See* Douglas S. Massey and Zai Liang, *The Long-Term Consequences of a Temporary Worker Program: The US Bracero Experience*, 8 Population Res. & Pol'y Rev. 199, 203 (1989).
48 President's Comm'n on Migratory Labor, *supra* note 38, at 153.
49 *Id*.
50 Raymond H. Guest, *Exchange of Notes at México February 20 and 21, 1948, with Text of Agreement Signed February 17, 1948, reproduced in* 8 Treaties and Other International Agreements of the United States of America 1776-1949: Iraq- Muscat 1232 (Charles I. Beving ed., 1968), https://babel.hathitrust.org/cgi/pt?id=uva.x004399672&view=1up&seq=1254.
51 President's Comm'n on Migratory Labor, *supra* note 38, at 144.
52 *Id*. at 16.
53 Mendoza, *supra* note 28, at 489.
54 *Id*.

The Bracero Program demonstrates how U.S. immigration policy has managed debility and disability to suit the labor needs of the United States. Mexican migrants were recruited to the United States on the basis of their health and strength. However, their race marked their bodies as differently-abled from those of their white, "Anglo" counterparts, deeming them better suited to backbreaking work in the heat and, therefore, to debilitation, as workers suffered physical injury, respiratory illnesses, and other chronic health problems which prevented them from working. Employers in the United States faced no real consequences for the maltreatment and resulting injury of their workers — in fact, I argue that there actually was an incentive for employers to do so. Debilitation is a long process; workers who fall sick from tuberculosis or dysentery likely show up to work for as long as they are able, especially considering that they would otherwise go unpaid. These workers would be less physically capable, and perhaps they would be slower or need to take more frequent breaks. However, their presence in the United States necessitated, by law, that they be "physically able to perform [their] work."[55] If they were not able to do so, they could be deported to Mexico with no opportunity for recourse.

In this way, the United States was able to use disability and ability to answer the central challenge of immigration policy since the late 1800s: supplying an able force of workers willing to labor for cheap without bearing the inevitable burden of low-wage workers' health or wellbeing. Policies were created wherein worker health could be severely neglected, producing thousands of debilitated Mexican immigrants at no cost to the state.

IV. Contemporary Disability: Debilitation in *Fraihat v. ICE*

Although the practice of detaining illegal migrants has increased in both volume and media attention in the late 2010s, the detention of migrants found to have unlawfully immigrated to the United States is not a new practice. As early as the 1980s, Central American families fleeing violence were detained in federal detention facilities.[56] Today migrant detention is rapidly increasing, as rising numbers of children and families are detained. New policies have also led to the increased detention of migrants with disabilities, leading to gross human rights violations as most detention centers are ill-equipped to meet the needs of people with disabilities.

Throughout the 2000s, however, the U.S. Department of Homeland Security (DHS) enacted policies which sought to "avoid or mitigate the harms of immigration detention for people with disabilities."[57] Most notably, a 2014 memo advised that, whenever possible, U.S. Immigration and Customs Enforcement (ICE) field officers should avoid detaining mentally ill, disabled, or elderly people.[58] However, after the issuance of Presidential Executive Order 13,768 in 2017 and a subsequent DHS memo, all previous guidance allowing "prosecutorial discretion" for certain populations was rescinded.[59] As a result, a significant number of the people detained in immigrant detention centers across the country are disabled.[60] Additionally, because migrant detention centers are ill-equipped to provide adequate care for any person, but especially for a person with a disability, a number of detainees have developed disabilities, had their disability worsen, or sustained both physical and emotional injuries. Detainment conditions are likely to create or exacerbate conditions such as post-traumatic stress disorder (PTSD), depression, anxiety, and suicidal ideation, among others.[61] A 2019 report by the DHS Inspector General found, from 2015 to 2018, 14,003 instances of "deficiencies" at various facilities, which included "those that jeopardize the safety and rights of detainees, such as failing to notify ICE about sexual assaults and failing to forward allegations regarding misconduct of facility staff to ICE [administrators]."[62] A 2017 report prepared by independent experts from DHS's Office for Civil Rights and Civil Liberties found that "[i]t is more likely than

55 Guest, *supra* note 50, at 1232.

56 Ingrid Eagly, Steven Shafer & Jana Walley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Calif. L. Rev. 785, 796 (2018).

57 Aaron J. Fischer, Pilar Gonzalez & Richard Diaz, Disability Rts. Cal., There is No Safety Here: The Dangers for People with Mental Illness and Other Disabilities in Immigration Detention at Geo Group's Adelanto ICE Processing Center 11 (2019) https://www.immigrationresearch.org/system/files/There_Is_No_Safety_Here-min.pdf (last visited Feb. 3, 2020).

58 Memorandum from Jeh Charles Johnson, Sec'y of Dep't of Homeland Sec., on Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

59 Memorandum from John Kelly, Sec'y of Dep't of Homeland Sec., on Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017) https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf ending prosecutorial discretion for certain populations; Exec. Order No. 13,768 § 9(a), 82 Fed. Reg. 8799 (Jan. 25, 2017).

60 Although ICE does not provide demographic data on the number of detainees who are disabled, various reports have used mental health intake information from detention centers in order to generate estimates. About fifteen percent of detainees at Adelanto have mental health disabilities. *See* Fischer, Gonzalez & Diaz, *supra* note 57, at 12. In 2008, the number of non-citizens in immigration proceedings with a mental disability was fifteen percent, or fifty-seven thousand. Hum. Rts. Watch & ACLU, Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System 3 (2010), https://www.aclu.org/files/assets/usdeportation0710_0.pdf. Studies have also found that the experience of detention itself can cause clinically significant symptoms of mental health disorders such as PTSD, anxiety, and depression. *See* Allen S. Keller et al., *Mental Health of Detained Asylum Seekers*, 362 Lancet 1721 (2003).

61 Martha von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC Psychiatry 382 (2018).

62 Dep't of Homeland Sec. Off. of Inspector Gen., ICE does not Fully use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards 8 (2019) https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf.

not that the failure to hire an effective, qualified clinical leader led to the inadequate detainee medical care that contributed to medical injuries, including bone deformities and detainee deaths, and continues to pose a risk to the safety of other detainees at Adelanto."[63] A report by Disability Rights California described the disability services program at Adelanto as "fractured, *ad hoc*, and poorly managed." They found instances of assistive devices in disrepair and disorganized accommodation request and disability tracking systems, leading to confusion and improper care.[64]

These allegations have led to a class action lawsuit, *Fraihat v. ICE*, filed in August 2019 on behalf of fifteen individual plaintiffs with disabilities and two organizational plaintiffs. The complaint alleges that the treatment of detainees with disabilities violates Section 504 of the 1973 Rehabilitation Act as well as the Due Process Clause of the Fifth Amendment to the U.S. Constitution by failing to provide them with reasonable accommodations to their disabilities and by subjecting them to discriminatory "segregation practices" due to their disabilities, including "(1) confinement in conditions that are punitive, (2) exposure to a substantial risk of serious harm, and (3) inadequate procedural protections."[65]

Analyzing the United States' use of detention camps under the social model of disability, I argue that ICE's treatment of detainees with disabilities creates circumstances of disability by regularly and repeatedly failing to provide or permit use of assistive devices which allow them equal opportunity for mobility, communication, self-care, and mental stability required for an improved quality of life. One plaintiff, Raul Alcocer Chavez, is a deaf man detained at the Adelanto detention facility in San Bernardino County, California.[66] While in custody, Chavez did not have access to an American Sign Language (ASL) interpreter and, as a result, was unable to communicate with guards or his fellow detainees. Chavez is "disabled" not by his deafness but rather by his lack of access to an interpreter. Another plaintiff, Luis Manuel Rodriguez Delgadillo, was diagnosed with schizophrenia and bipolar disorder. While in ICE custody, his mental health has "noticeably declined" due to a shifting medication routine and lack of therapy. Again, Rodriguez Delgadillo's disability can be understood as produced by a system which is not able to properly provide the care that he needs.[67]

I also argue that ICE detention centers debilitate detainees through exposure to unsafe environments and inadequate care. Plaintiff Edilberto García Guerrero suffers "chronic pain in his neck and shoulder on the left side" as a result of an attack suffered while in ICE custody. García Guerrero suffered an injury to his right ankle while detained, after "falling down while his ankles were shackled."[68] Another plaintiff, Marco Montoya Amaya, has had, for over a year, a "tentative diagnosis of end-stage neurocysticercosis — a progressive, invasive, and severe brain parasite — for which he has received no treatment."[69] Plaintiff Faour Aballah Fraihat, the lead plaintiff in this case, lost vision in his left eye while in ICE detention. Although an off-site doctor recommended surgery, ICE refused to provide this treatment. Fraihat now suffers permanent vision loss, without possibility of medical repair. The disabilities that these plaintiffs live with were created through ICE abuse and negligence.[70]

With these immigration policies, the United States continues a pattern of employing the production of disability and debility in order to bar undesirable, racialized groups from entering the United States. Contemporary American immigration policy, with its emphasis on deterring non-European immigration, is heavily invested in the preservation of a white nation-state. Of people deported from the United States since 2002, 98.91% are citizens of non-European countries.[71] This investment bears direct lineage to Ellis Island policies that discouraged migration of racialized bodies, which were seen as defective, inferior, and supposedly not compatible with civilized society.[72] The racialization of these bodies causes them to be understood as already disabled.

We see here that, as in the case of the Braceros, racialization and disability are used to justify both maltreatment and lack of entry to the United States, in order to minimize the presence

63 Dep't of Homeland Sec. Office For Civil Rights and Civil Liberties, Correction Expert's Report on Adelanto Correctional Facility 25 (2017), https://www.documentcloud.org/documents/6278922-HQ-Part2-Copy.html.
64 Fischer, Gonzalez & Diaz, *supra* note 57, at 40, 43 & 44.
65 Complaint for Declaratory and Injunctive Relief for Violations of the Due Process Clause of the Fifth Amendment and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, *et. seq* ¶ 432, Fraihat v. U.S. Immigration & Customs Enf't, No. 19-cv-01546 (C.D. Cal. 2019) [hereinafter *Fraihat* Complaint].
66 Politically, classifying deaf people as "disabled" can be controversial — most of the deaf community does not identify with this classification, instead considering themselves members of a "linguistic minority." *See, e.g.,* Davis, *supra* note 2, at 5. Here, this categorization indicates that Mr. Chavez is qualified as an "individual with a disability" under 29 U.S.C. § 794(a), not as a normative judgment about whether he should be classified as "disabled."
67 *Fraihat* Complaint, *supra* note 65, ¶¶ 32–35 (Chavez), 70–74 (Rodriguez Delgadillo) .
68 *Id.* ¶¶ 62–63.
69 *Id.* ¶ 27.
70 *Id.* ¶¶ 22–26.
71 Data on deportation by country of origin since October 2002 taken from TRAC *Immigration*, https://trac.syr.edu/phptools/immigration/remove/ (last visited Jan. 26, 2020), calculated by author with "European Countries" including the United Kingdom, Poland, Russia, Romania, Albania, Ukraine, Italy, Germany, France, Portugal, Spain, Armenia, Hungary, Netherlands, Bulgaria, Yugoslavia, Ireland, Lithuania, Uzbekistan, Bosnia-Herzegovina, Georgia, Czech Republic, Moldova, Greece, Slovakia, Sweden, Latvia, Belarus, Estonia, Belgium, Serbia and Montenegro, Croatia, Austria, Denmark, Switzerland, Kosovo, Norway, Serbia, USSR, Finland, Montenegro, Iceland, Malta, Luxembourg, Monaco, and Liechtenstein.
72 *See supra* notes 15–24 and accompanying text.

of those bodies thought to create a financial burden on the state. If a migrant is not automatically barred from entering the United States by virtue of his country of origin or ability, he often becomes subject to a system of debilitation which leads to disability, whether physical or trauma-based as a result of detention. This newly attained disability provides further justification for that person's exclusion. Moreover, if a migrant is understood to be racialized, he is far more likely to be viewed as already disabled, inferior, or incompetent, creating justification for the maltreatment of migrants in detention centers and in the broader United States.

V. Conclusion

The ironic reality of disabled migrant detention is that, in all likelihood, the United States is creating greater financial burden for itself by mandating the detainment of migrants with disabilities. The current maintenance of facilities equipped to provide healthcare for detainees is costly.[73] If plaintiffs in *Fraihat v. ICE* are successful, ICE will be required to fund even costlier programs and treatments.[74]

Policies such as the public charge rule have the effect of deterring migrants from seeking preventive medical care.[75] In late January of 2020, the Supreme Court granted a stay to President Trump's alternation to DHS policy regarding "public charge" criteria while this rule is being challenged in lower courts.[76] Under the new definition, DHS considers a migrant's reliance on or receipt of benefits such as "the Supplemental Nutrition Assistance Program (SNAP), or food stamps; Medicaid; and housing vouchers and other housing subsidies" negatively against applicants — all programs which were not taken into account under previous guidelines.[77] The new rule also considers categories of "positive" and "negative" factors to determine whether one is likely to become a public charge, with a heavily weighted negative factor for an alien who is not a full-time student and is authorized to work, but is unable to demonstrate current employment, recent employment history, or a reasonable prospect of future employment.

Not all people with disabilities are unable to work and, in fact, many are able to independently support themselves. However, one's ability to work should not be the only determination of a person's value to society. This is especially true given that (1) disability is produced via societal constructs which are upheld by government legislation, (2) at least some of the disability that migrants experience is created through legally mandated systems of debilitation such as migrant detention centers (or the Bracero program), and (3) disability has a specific history of both being metered out onto and used to exclude racialized bodies. This paper shows that public charge policies are deeply tied to values that our contemporary society rightly would find abhorrent — ensuring the purity of the white nation state and determining human value by production capacity. We must repeal these policies in order to make the United States the land of opportunity which it professes to be.

73 At the start of 2018, the National Immigration Forum calculated that the federal government was set to spend $3.076 billion on custody operations in that fiscal year. *See* Lawrence Benson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply*, Nat'l Immigr. F., https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-mulitply/ (last visited Jan. 20, 2020, 6:58 AM).

74 In their prayer for relief, plaintiffs ask that defendants be ordered to: ensure access to specialty care and care for chronic conditions, ensure that detention facility staff and medical providers are trained to carry out their duties, ensure responses to medical emergencies, ensure reliable screening for medical or mental health conditions, ensure access to mental health treatment such as medication, therapy, and inpatient treatment, ensure access to reasonable accommodations and auxiliary aids, and to ensure that all detention facilities are fully accessible to people with disabilities, among other demands. *See Fraihat* Complaint, *supra* note 65, ¶ 657.

75 Hamutal Bernstein et al, Urb. Inst., One in Seven Adults In Immigrant Families Reported Avoiding Public Benefit Programs in 2018, at 2 (2019) https://www.urban.org/sites/default/files/publication/100270/one_in_seven_adults_in_immigrant_families_reported_avoiding_publi_7.pdf.

76 *See* Make the Road New York v. Cuccinelli, No. 19 Civ. 7993 (GBD), 2019 WL 5589072, at *1–2 (S.D.N.Y. Oct. 11, 2019) (granting preliminary injunction), *stay granted sub nom. by* Dept' of Homeland Sec. v. New York, No. 19A785, 2020 WL 413786 (U.S. Jan. 27, 2020).

77 Inadmissibility on Public Charge Grounds, 8 C.F.R. § 103, 212, 213, 214, 245, 248 (2019)

Sanctuary Cities and Personal Liberty Laws

Clare Burgess (CMC '20)
Staff Writer

I. Introduction

Sanctuary cities are cities with established policies to "limit cooperation with federal immigration authorities, such as failing to provide information about immigration status and limiting the length of immigration detainers."[1] The legality of sanctuary cities has been hotly debated by conservatives and liberals alike.

Sanctuary policies encompass a broad range of initiatives. Some localities focus on encouraging positive relationships between residents and local law enforcement, making the process of crime reporting accessible to all residents regardless of immigration status and giving the police force the freedom to allocate resources as they see fit.[2] Drawing more controversy, other cities refuse to notify federal immigration authorities when an undocumented immigrant is released from jail.[3]

Conflict over local, state, and federal immigration laws is not new. Between 1780 and 1859, several Northern states enacted personal liberty laws to protect former slaves and blacks from being legally kidnapped under the Fugitive Slave Act.[4] Similar to sanctuary cities, states passed laws that openly objected to the federal government's authority. Comparing personal liberty laws and sanctuary cities helps us understand the nuances and future of sanctuary cities because the two policies are similar in many ways. Firstly, advocates of both policies found the alternative to be "an affront to due process, states' rights and liberty of conscience."[5] Secondly, both policies deal with human rights and states' rights to legislate on those human rights.

I first provide a typology of sanctuary cities in the United States, present an overview of the legal questions surrounding sanctuary cities, and analyze the federal government's reaction to the implementation of sanctuary policies. Next, I delve into the history and demise of personal liberty laws and the connection to the current sanctuary city debate. I conclude by using the history of personal liberty laws to consider the future of sanctuary cities.

II. Types of Sanctuary Cities

There are three types of sanctuary cities: those with "don't enforce" policies, those with "don't ask" policies, and those with "don't tell" policies.[6] "Don't enforce" policies prohibit local police from assisting federal authorities.[7] In other words, some jurisdictions restrict their police force's involvement in federal immigration cases. Local and state law enforcement typically assist federal immigration authorities by arresting violators of federal immigration law; however, "don't enforce" sanctuary jurisdictions limit this relationship. Law enforcement agencies in San Francisco and Berkeley, California, for example, do not carry out federal arrests.[8]

"Don't ask" policies prohibit local police from inquiring about individuals' immigration statuses.[9] In these jurisdictions, police will not ask about a person's immigration status unless it is pertinent to an active investigation about illegal activity. For example, if a person is pulled over for speeding, the police officer will not ask about their immigration status, as it is not relevant to the driving infraction.[10] Cities such as Ann Arbor, Michigan and Philadelphia, Pennsylvania[11] have enacted "anti-profiling ordinances," which prohibit law enforcement officers from asking about a person's immigration status unless they are suspected of a crime.[12]

1 Ann Morse, Chesterfield Polkey, Lydia Deatherage & Veronica Ilbarra, *Sanctuary Policy FAQ*, Nat'l Conf. of State Legislatures, http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx (last visited Jan. 29, 2020).
2 Am. Immigr. Council, "Sanctuary" Policies: An Overview 1 (2017), https://www.americanimmigrationcouncil.org/research/sanctuary-policies-overview (last visited Feb. 2, 2020).
3 *Id*. at 1–2.
4 *See generally* H. Robert Baker, *Personal Liberty Laws*, Essential Civil War Curriculum, https://www.essentialcivilwarcurriculum.com/personal-liberty-laws.html (last visited January 29, 2020).
5 Sean Trainor, *What the Fugitive Slave Act Can Teach Us About Sanctuary Cities*, Time (Feb. 17, 2017), https://time.com/4659391/sanctuary-cities-fugitive-slave-act/.
6 Sarah Herman Peck, Cong. Res. Serv., R44795, "Sanctuary" Jurisdictions: Federal, State, and Local Policies and Related Litigation 11 (2019), https://fas.org/sgp/crs/homesec/R44795.pdf.
7 *Id*.
8 *See* S.F. Admin. Code § 12H.2(a); Berkeley Resolution No. 67,763-N.S. (Nov. 2016). *See generally Sanctuary City Ordinance*, City & County of S.F. Off. of Civic Engagement & Immigr. Aff., https://sfgov.org/oceia/sanctuary-city-ordinance-0 (last visited Jan. 30, 2020) (San Francisco's policy); Sanctuary, City of Berkeley Mayor's Off., https://www.cityofberkeley.info/Mayor/Home/Sanctuary_City.aspx (last visited Jan. 30, 2020) (Berkeley's policy).
9 Peck, *supra* note 6, at 11.
10 *Don't Ask, Do Tell: Local Law Enforcement Collaboration with ICE/CBP*, U. Wash. Ctr. For Hum. Rts (Sept. 25, 2017), https://jsis.washington.edu/humanrights/2017/09/25/dont-ask-do-tell/ (last visited Jan. 30, 2020)t
11 Stephanie Waters, *City of Philadelphia Action Guide: Immigration Policies*, City of Phila. (Jan. 8, 2018), https://www.phila.gov/2018-01-08-immigration-policies/ (last visited Jan. 30, 2020).
12 Jonathon Oosting, *Push to Ban 'Sanctuary Cities' in Michigan Faces*

"Don't tell" policies restrict information sharing about undocumented immigrants between local police and federal authorities.[13] For example, when an undocumented immigrant is released from jail in some sanctuary jurisdictions, the authorities do not report his release from jail to federal immigration authorities. Philadelphia, for example, will not share information regarding a person's immigration status with federal immigration authorities.[14]

III. The Foundations of the Legal Debate over Sanctuary Cities

Former U.S. Attorney General Jeff Sessions has argued that sanctuary city policies violate the Supremacy Clause in the Constitution.[15] The Supremacy Clause is a constitutional principle that declares that federal laws take precedent over local laws. In fact, in *Arizona v. United States*, the Supreme Court held that the federal government has "broad, undoubted power over the subject of immigration."[16] Some conservative thinkers argue that states and cities do not have the jurisdiction to even make laws regarding immigration.[17] However, only Congress can invalidate a state law with federal legislation. As of now, the federal government does not have legislation barring sanctuary policies or laws. Thus, there does not exist currently *direct* conflict between federal and state or local laws.

On the other hand, the Anti-Commandeering Doctrine prohibits the federal government from forcing state or local authorities from executing some functions on the federal government's behalf.[18] Although the federal government's laws supersede state law, federal authorities, according to the Anti-Commandeering Doctrine, cannot compel state or local authorities to arrest undocumented immigrants.

IV. Federal Actions in Response to Sanctuary Cities

Since taking office, President Trump has challenged the legality of sanctuary cities. In January of 2017, President Trump issued Executive Order 13,768, which declared sanctuary cities "[in] eligible to receive Federal grants, except as deemed necessary for law enforcement purposes."[19]

Since this executive order, there have been ten lawsuits against the administration for its anti-sanctuary city policies, including *County of Santa Clara v. Trump*,[20] *State of New York v. Department of Justice*,[21] and *City of Los Angeles v. Sessions*.[22] The City of San Francisco and the County of Santa Clara, as well as many of the other plaintiffs in these cases against the President, argue that President Trump's Executive Order violates the Tenth Amendment and the Anti-Commandeering Doctrine. Judge William Orrick III, a federal district judge in the Northern District of California, issued a nationwide injunction against the enforcement of the executive order.[23] This injunction has since been vacated by a three-judge panel at the appellate level in a two-to-one ruling.[24]

In addition to sanctuary localities suing the current administration, the U.S. Department of Justice has filed a lawsuit against California over its sanctuary city policies.[25] Former Attorney General Jeff Sessions cited the Supremacy Clause as justification for invalidating California's sanctuary policies.[26] When speaking about his lawsuit against California, Sessions explained that "federal agents must be able to do the job that Congress has directed them to do."[27]

Criticism from Immigrant Advocates, MLive (Sept. 30, 2015), https://www.mlive.com/lansing-news/2015/09/immigrant_advocates_blast_bill.html (last updated Jan. 20, 2019; last visited Feb. 2, 2020).

13 Peck, *supra* note 6, at 11.

14 Waters, *supra* note 12.

15 Tanvi Misra, *What the DOJ's Lawsuit Could Mean for 'Sanctuary' Laws*, City Lab (Mar. 7, 2018), https://www.citylab.com/equity/2018/03/what-the-dojs-lawsuit-could-mean-for-sanctuary-laws/554981/ (last visited Feb. 2, 2020).

16 Arizona v. United States, 567 U.S. 387, 394 (2012)

17 *See, e.g.,* Hans A. von Spakovsky, *Sanctuary Cities? That's a Constitutional 'Hell No'*, Heritage Found. (Apr. 18, 2017), https://www.heritage.org/immigration/commentary/sanctuary-cities-thats-constitutional-hell-no (last visited Feb. 2, 2020).

18 *See, e.g.,* New York v. United States, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require States to govern according to Congress' instructions."); Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directors requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty."); Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018) ("The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States.").

19 Exec. Order No. 13,768 § 9(a), 82 Fed. Reg. 8799 (Jan. 25, 2017) [hereinafter EO 13,768].

20 *See* 275 F. Supp. 3d 1196 (N.D. Cal. 2017), *aff'd in part, vacated in part, and remanded*, 897 F.3d 1225 (9th Cir. 2018).

21 *See* 343 F. Supp. 3d 213 (S.D.N.Y. 2018).

22 *See* 293 F. Supp. 3d 1087 (C.D. Cal. 2018).

23 San Francisco, 275 F. Supp. 3d at 1219 (ordering permanent injunction against Section 9(a) of the Executive Order).

24 *See* 897 F.3d at 1245 (vacating nationwide injunction and remanding to the district court "for a more searching inquiry into whether this case justifies the breadth of the injunction imposed").

25 Sam Levin, *Justice Department Sues California Over Its 'Sanctuary' Immigration Laws*, Guardian (Mar. 7, 2018, 2:39 AM), https://www.theguardian.com/us-news/2018/mar/06/california-sanctuary-cities-lawsuit-immigration-justice-department.

26 *See* Complaint, United States v. California, No. 2:18-cv-00490-JAM-KJN (E.D. Cal. Mar. 6, 2018); *Justice Department Files Preemption Lawsuit Against the State of California to Stop Interference with Federal Immigration Authorities*, U.S. Dep't of Justice (Mar. 7, 2018), https://www.justice.gov/opa/pr/justice-department-files-preemption-lawsuit-against-state-california-stop-interference. The Ninth Circuit affirmed the district court's denial of a preliminary injunction against the California laws except for one section of one of the laws in question. See 921 F.3d 865 (9th Cir. 2019), *petition for cert. filed.*

27 Jeff Sessions, Att'y Gen., Remarks at the 26th Annual Law Enforcement

Although the fight against sanctuary cities has been mainly undertaken by President Trump, the House of Representatives has passed two House bills (H.R. 3009[28] in 2015 and H.R. 3003[29] in 2017) to terminate federal funding for cities and communities that have sanctuary policies.[30] Neither bill was passed in the Senate.

Executive Order 13,768 was designed to "withhold funds from sanctuary jurisdictions, revive 287(g) immigration enforcement partnerships with the Department of Homeland Security (DHS), end the Priority Enforcement Program, and reinstitute 'Secure Communities.'"[31] The 287(g) immigration enforcement partnerships are alliances between state and local authorities and the U.S. Immigration and Customs Enforcement to deport undocumented immigrants.[32] The Priority Enforcement Program (PEP) was a program under President Obama from 2015 to 2017 that prioritized the deportation of violent undocumented immigrants. Priority was placed on undocumented persons who had "been convicted of an offense listed under the DHS civil immigration enforcement priorities, has intentionally participated in an organized criminal gang to further the illegal activity of the gang, or poses a danger to national security."[33] Despite ending President Obama's PEP, President Trump seeks to reinstitute "Secure Communities," which was ended by President Obama. The Secure Communities Program is extremely similar to the Priority Enforcement Program. However, the Secure Communities program does not limit itself to convicted individuals, nor does it have limitations on how long ICE can detain individuals.[34]

President Trump's Executive Order gives the Secretary of Homeland Security "the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction."[35] This means that even jurisdictions with uncodified sanctuary policies are threatened by the executive order.

Furthermore, the President's administration claimed that sanctuary cities violate 8 U.S.C. 1373, which dictates that neither state nor local authorities can prevent or restrict government employees from communicating with immigration authorities on the citizenship or immigration status of individuals.[36] However, sanctuary states and cities have argued that not communicating with immigration authorities on the release dates of undocumented citizens is not the same as not communicating with authorities on the citizenship status of individuals, thus, they are in compliance with the federal law.[37]

V. Personal Liberty Laws

A. History

The Fugitive Slave Act of 1793 required all states, including free states, to return escaped slaves to their owners.[38] In 1790, there were nearly 700,000 enslaved individuals, and by 1850, the slave population reached over 3.2 million.[39] The Fugitive Slave Act of 1793 codified a constitutional provision in Article IV, Section 2, Clause 3, which stated, "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[40] This act made way for the Fugitive Slave Act of 1850, which imposed crueler punishments for interfering in the capture of an alleged fugitive slave.[41] While the Fugitive Slave Act of 1793 ensured that slave catchers had to obtain a certificate of removal from a federal judge, these certificates were easily acquired for any black person, regardless of their

Legislative Day Hosted by the California Peace Officers' Association (Mar. 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-26th-annual-law-enforcement-legislative-day.

28 Enforce the Law for Sanctuary Cities Act, H.R. 3009, 144th Cong. (2015–2016). If passed, H.R. 3009 would have made states or localities ineligible for certain federal grants if it "(1) has in effect any law, policy, or procedure in contravention of subsection (a) or (b) of section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 . . . ; or (2) prohibits State or local law enforcement officials from gathering information regarding the citizenship or immigration status, lawful or unlawful, of any individual." *Id.* § 3(c).

29 No Sanctuary for Criminals Act, H.R. 3003, 115th Cong. (2017–2018). If passed, H.R. 3003 would have prohibited any "Federal, State, or local government entity" or any individual from "prohibit[ing] or in any way restrict[ing], a Federal, State, or local government entity, official, or other personnel from complying with the immigration laws . . . or from assisting or cooperating with Federal law enforcement entities, officials, or other personnel regarding the enforcement of these laws." *Id.* § 2(a). This bill would have jeopardized all "don't ask", "don't tell", and "don't enforce" jurisdictions' federal funding.

30 Morse, Polkey, Deatherage & Ilbarra, *supra* note 1.

31 *Id.*

32 *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. Immigr. & Customs Enf't, https://www.ice.gov/287g (last updated Oct. 4, 2019; last visited Feb. 2, 2020).

33 *Priority Enforcement Program*, U.S. Immigr. & Customs Enf't, https://www.ice.gov/pep#wcm-survey-target-id (last updated June 22, 2017; last visited Feb. 2, 2020).

34 César Cuauhtemoc Garcia Hernandez, *PEP vs. Secure Communities*, crImmigration (July 7, 2015), http://crimmigration.com/2015/07/07/pep-vs-secure-communities/ (last visited Feb. 2, 2020).

35 EO 13,768, *supra* note 19, § 9(a).

36 8 U.S.C. § 1373(a) (1996) ("[A] Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.").

37 Dara Lind, *Sanctuary Cities, Explained*, Vox (Mar. 8, 2018, 12:00 PM), https://www.vox.com/policy-and-politics/2018/3/8/17091984/sanctuary-cities-city-state-illegal-immigration-sessions (last visited Feb. 2, 2020).

38 Andrew Glass, *Congress Enacts First Fugitive Slave Law, Feb. 12, 1793*, Politico (Feb. 12, 2014, 12:03 AM), https://www.politico.com/story/2014/02/this-day-in-politics-congress-enacts-first-fugitive-slave-law-feb-12-1793-103375 (last visited Feb. 2, 2020).

39 Aaron O'Neill, *Black and Slave Population of the United States 1790-1880*, Statista (DEC. 9, 2019), https://www.statista.com/statistics/1010169/black-and-slave-population-us-1790-1880/ (last visited Jan. 30, 2020).

40 U.S. Const. art. IV, § 2, cl. 3.

41 *Fugitive Slave Acts*, History.Com (Dec. 2, 2009), https://www.history.com/topics/black-history/fugitive-slave-acts (last updated Sept. 12, 2018; last visited Feb. 2, 2020).

runaway status.[42] Northern abolitionists argued in favor of states' rights and sovereignty. They claimed that "a fundamental principle of state sovereignty was that states could define the status of its inhabitants and protect them in their liberty."[43] By 1839, at least nine Northern states, including Pennsylvania, Massachusetts, New York, Indiana, Connecticut, Ohio, Michigan, Maine, and Wisconsin, had enacted these "personal liberty laws."[44] Personal liberty laws established additional requirements and procedures for those seeking to capture a black person.[45] These requirements attempted to eliminate kidnappings and, at least, provide some process for those being kidnapped.

Southern slaveholders argued that personal liberty laws violated the Fugitive Slave Clause in the Constitution and the Fugitive Slave Act enacted by Congress in 1793.[46] In *Jack v. Martin*, Mary Martin, a Louisiana slaveholder, sued for the forceful return of her slave, Jack.[47] Jack argued that because his (and Martin's) residence was in New York, a free state with personal liberty laws, he was protected against the Fugitive Slave Act.[48] The New York Supreme Court not only determined that Martin was entitled to her slave's return in Louisiana, but that states had no right to legislate the rights of fugitive slaves; it was a power wholly vested in the federal government.[49] Thus, personal liberty laws were deemed unconstitutional.[50] The United States Supreme Court ruled similarly in *Prigg v. Pennsylvania* in 1842. In this case, Edward Prigg, a slavecatcher, crossed into Pennsylvania in order to kidnap Margaret Morgan and deliver her to Margaret Ashmore. However, Morgan had never lived as a slave; her parents were slaves owned by John Ashmore, but she and her parents were considered freed when Ashmore died. Prigg did obtain a warrant to seize Morgan and her three children under Pennsylvania's personal liberty law. However, Prigg moved Morgan and her three children from Pennsylvania to Maryland without a removal of certificate, which was required in Pennsylvania. This action incentivized a Pennsylvania grand jury to indict Prigg on kidnapping charges.[51] The majority decision condemned personal liberty laws as unconstitutional; however, the reasoning between justices differed. Justice Story, for the majority, wrote, similarly to the decision in *Jack v. Martin*, that laws regarding fugitive slaves were entirely given to the federal government.[52] Chief Justice Taney, on the other hand, concluded that states *may* pass laws regarding fugitive slaves, as long as the laws do not conflict with federal law or deprive slavecatchers of their rights.[53] Justice McLean argued that the form of personal liberty laws at the time was unconstitutional but that states could have anti-kidnapping statutes regarding fugitive slaves.[54]

These two cases affirmed the constitutionality of the Fugitive Slave Act, and thus, the states' inability to enact laws to protect black Americans from being kidnapped and sold into slavery. Justice Story, a prominent anti-slavery Justice,[55] authored the Court's opinion in *Prigg v. Pennsylvania* stating that "the owner of a slave is clothed with entire authority, in every State in the Union, to seize and recapture his slave whenever he can do it without any breach of the peace or any illegal violence."[56] While Justice Story made clear in his majority opinion that states cannot prevent the removal of fugitive slaves, he also explained that the Fugitive Slave Clause "does not point out any state functionaries, or any state action, to carry its provisions into effect. The States cannot, therefore, be compelled to enforce them, and it might well be deemed an unconstitutional exercise of the power of interpretation to insist that the States are bound to provide means to carry into effect the duties of the National Government, nowhere delegated or intrusted [sic] to them by the Constitution."[57]

B. The Connection to Sanctuary Cities

Although it's been 178 years since the decision in *Prigg v. Pennsylvania*, the United States faces similar federalism questions in the debate over sanctuary cities today. Like states with personal liberty laws, sanctuary cities or states have policies that oppose those of the federal government. However, one main difference between sanctuary city policies and personal liberty laws is that the Fugitive Slave Clause was recorded in the Constitution, whereas immigration statutes are not as explicit in the Constitution. Naturalization is only mentioned in the Constitution once in Article 1, Section 8, clause 4, which grants Congress the power "to establish an uniform Rule of Naturalization . . . ."[58]

Despite these actions, ten states and D.C. have established sanctuary policies, not to mention over 170 cities and counties. [59]This number does not include cities or counties with uncodified sanctuary policies, which are common.

42 Barbara Holden-Smith, *Lords of Lash, Loom, and Law*: Justice Story, Slavery, and* Prigg v. Pennsylvania, 78 Cornell L. Rev. 1086, 1087 (1992–1993).
43 Baker, *supra* note 4.
44 Norman L. Rosenberg, *Personal Liberty Laws and Sectional Crisis: 1850–1861*, 17 Civ. War Hist. 25 (1971).
45 Glass, *supra* note 38.
46 Baker, *supra* note 4.
47 *Jack v. Martin*, Hist. Soc'y of the N.Y. Cts., https://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-02/history-new-york-legal-eras-jack-martin.html (last visited Jan. 30, 2020).
48 *Id.*
49 Baker, *supra* note 4.
50 *Id.*
51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.*
55 Marc M. Arkin, '*Supreme Injustice' Review: The High Court and Slavery*, Wall St. J. (Jan. 18, 2019, 9:41 AM), https://www.wsj.com/articles/supreme-injustice-review-the-high-court-and-slavery-11547822488 (last visited Feb. 3, 2020).
56 Prigg v. Pennsylvania, 41 U.S. 539, 613 (1842).
57 *Id.* at 616–17.
58 U.S. Const. art. I, § 8, cl. 4
59 Bryan Griffith & Jessica M. Vaughan, *Map: Sanctuary Cities, Counties, and States*, Ctr. for Immigr. Stud., https://cis.org/Map-Sanctuary-Cities-Counties-and-States (last visited Apr. 16, 2019).

As Justice Story confirms in *Priggs v. Pennsylvania*, the police power of states cannot be infringed upon by the federal government as long as the regulations do not interfere with the rights derived from the Constitution.[60] Thus, states and cities cannot be forced to comply with federal officials regarding the status of any citizen. However, Congress does possess the power over federal funding, so the two House bills discouraging sanctuary policies are also constitutional in theory. I say "in theory" because the way that the restriction of funding is carried out could become unconstitutional by limiting excessive tangential funding, or being excessively coercive.[61] For example, District Judge Orrick granted a preliminary injunction against President Trump's Executive Order on the basis that "the Order has caused budget uncertainty by threatening to deprive the Counties of hundreds of millions of dollars in federal grants that support core services in their jurisdictions."[62] By threatening sanctuary cities' access to core services, the President's Executive Order not only faces the claim of limiting tangential funding, but also coercion.

VI. Conclusion

Both sanctuary cities and personal liberty laws concern the relationship between the federal government and state governments. Unlike personal liberty laws, sanctuary city policies are not in direct conflict with any *constitutional* provision. The Fugitive Slave Clause, which has now been repealed by the Thirteenth Amendment, reads, "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[63] Many states refused to abide by this constitutional mandate by creating personal liberty laws. Sanctuary cities, on the other hand, do not conflict directly with the Constitution. Thus, the verdict on sanctuary cities is less clear.

However, in Justice Story's opinion in *Prigg v. Pennsylvania*, he confirms the federal government's inability to coerce states to act on its behalf. This is further confirmed by the Anti-Commandeering Doctrine. Even if the government can successfully argue its right to regulate immigration, it cannot compel states to assist in implementing those regulations. As long as the states' sanctuary policies do not actively hinder federal investigation, they may protect undocumented immigrants in any way they see fit.

60 *See supra* note 57 and accompanying text.
61 Tangential funding is when Congress conditions funding for action that is not adequately correlated. The Supreme Court limited Congress' ability to excessively limit tangential funding in *NFIB v. Sebelius* because the Court considered it excessive, and thus, unconstitutionally coercive. *See generally* Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
62 County of Santa Clara v. Trump, 250 F. Supp. 3d 497, 508 (N.D. Cal. 2017).
63 U.S. Const. art IV, § 2, cl. 3

World, Wandering: Migration in the Age of Climate Catastrophe

Ethan Widlansky (PO '22)
Staff Writer

I. Introduction

As global warming brings our biosphere to a simmer, flora and fauna find themselves in increasingly alien landscapes. Accustomed to environmental variation, critters, fungi, and plants have developed all sorts of adaptive strategies like hibernation, estivation, and migration. Wood storks poop on their legs to cool themselves, and bees contract muscles in their thorax to warm themselves.[1] Bees and storks undergo these processes operating under the homeostatic assumption that all will eventually return to normal. This is perfectly valid and true, until it's not; the Anthropocene has seen warming "ten times faster than it did at the end of the last glaciation, and at the end of all those glaciations that preceded it."[2] As Elizabeth Kolbert points out in *The Sixth Extinction*, that means "organisms will have to migrate, or otherwise adapt, at least ten times more quickly."[3]

Permanent migration is a ten-times-fast last resort. Even trees — objects of metaphorical stability and immobility, located in extensive root systems and durable cellulose — observed by eminent ecologist Miles Silman in the Amazon have begun to migrate upslope for cooler climate in what's termed the Birnam Wood scenario.[4] Although I write from a *Homo sapiens* perspective, it's important to keep in mind that we are not the only creatures that find ourselves in an evolutionary quandary; we just happen to be the best at vocalizing our problems. Anthony Barnosky, a paleontologist at University of California-Berkeley warns: "[L]ook around you. Kill half of what you see. Or if you're feeling generous, just kill about a quarter of what you see. That's what we could be talking about."[5] It doesn't take a scientist to comprehend the scale of calamity: fires in California, flooding in the American Midwest, and storms of increasing severity along the eastern seaboard — all in just the continental United States. Beyond our borders, tropical typhoons, deluges, droughts, and fires plague the rest of the world. Melting of ice sheets in West Antarctica and Greenland could lead to more than two-meter sea-level rise in cities like New York and rising temperatures could make places like Abu Dhabi, Dubai, and Qatar uninhabitable by 2071.[6] Diminished habitable regions will leave a lot of people without a home. Like the wood storks and bees, we too need to find ways to adapt. And, increasingly, like trees in the Amazon, people are migrating. I explore where migration law, administered increasingly on a fragmented state-by-state basis, falls short in the face of global climate catastrophe and how to augment its wanting reach with resilience programs and by changing climate catastrophe communication regimes.

II. What's the Problem?

International migration law faces crises on two fronts: 1) climate catastrophe and the upheaval and strain implied therein, 2) inertia from unchanged institutional frameworks like the U.N. High Commissioner for Refugees (UNHCR) and the nation-state, and 3) insufficient enforcement mechanisms and countries derogating their responsibilities for migrants. In what the Clinton Administration saw as the twenty-first century's Long Telegram,[7] Robert Kaplan writes for *The Atlantic* in "The Coming Anarchy": "It is time to understand The Environment for what it is: the national-security issue of the early twenty-first century[,] . . . arousing the public and uniting interests left over from the Cold War."[8] Between 2008 and 2014, a total of 184.4 million people were displaced by sudden-onset disasters, averaging 26.4 million newly displaced people each year. Of these 26.4 million, 22.5 million were struck by weather- and climate-related sudden-onset hazards.[9] The world could see twenty-five million to one billion climate-motivated refugees in the world by 2050.[10]

These discrepancies in climate refugee projections come from confusion about what technically constitutes a climate-motivated migrant. Migration on its most fundamental level is about changing one's residence. Refugees are a subclass of migrants

1 Elizabeth Kolbert, The Sixth Extinction 161 (2014).
2 *Id.*
3 *Id.*
4 *Id.*
5 Quoted in *id.* at 166.
6 Amy Lieberman, *Where Will the Climate Refugees Go?*, Al Jazeera (Dec. 22, 2015), https://www.aljazeera.com/indepth/features/2015/11/climate-refugees-151125093146088.html (last visited Feb. 3, 2020).
7 Thomas Meaney, *If the God Shall Not Send Rain*, Lapham's Q., https://www.laphamsquarterly.org/climate/if-god-shall-not-send-rain (last visited Feb. 3, 2020).
8 Robert D. Kaplan, *The Coming Anarchy*, Atlantic (Feb. 1994), https://www.theatlantic.com/magazine/archive/1994/02/the-coming-anarchy/304670/ (last visited Feb. 3, 2020).
9 Nansen Initiative, Global Consultation Conference Report 8 (Oct. 2015), https://www.nanseninitiative.org/global-consultations/ (last visited Feb. 3, 2020).
10 Int'l Org. for Migration, IOM Outlook on Migration, Environment and Climate Change 38 (2014), https://publications.iom.int/system/files/pdf/mecc_outlook.pdf (last visited Feb. 3, 2020).

displaced by present, immediate, or threatened danger.[11,12] Would-be migrants often have more than a single reason to move; they might, for example, be influenced simultaneously by economic opportunities in destination countries and social unrest at home. Climate catastrophe complicates all of this further because it operates over a "range of time and spatial scales, from sudden onset events that cause localized pulses of distress migration to long-term shifts in climatic regimes that unfold over the course of decades or centuries to change the habitability of regions."[13] A bad season of severe drought, for example, can desiccate a farmer's harvest, but the farmer is "very unlikely to attribute the food shortage immediately to extreme weather caused by climate change."[14]

Neither national nor international law properly extends to climate refugees. Drafted in Geneva after WWII to contend with the throngs of war-ravaged Europeans, the Convention Relating to the Status of Refugees establishes, in the words of a UNHCR summary article, that "[s]tates are responsible for protecting the fundamental rights of their citizens" and, should they fail, "the international community steps in to ensure they are safe and protected."[15] The document, made durable by the 1967 protocol which removed the Convention's geographical and temporal limits, explains refugee status as immanently social, defining a refugee as:

> a person who is outside of his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail himself or herself of the protection of the country, or return there, for fear of persecution.[16]

Climate catastrophe, then, rings dissonant with the otherwise social tenor of refugee law: Mother Nature isn't a persecuting institution or stigma. Instead, climate catastrophe produces secondary social effects. As the Pentagon puts it dryly in its Quadrennial Defense Review Report, "climate change will contribute to food and water scarcity and may spur or exacerbate mass migration . . . ."[17] It is characterized as a "threat multiplier[]"[18] that aggravates other issues. These shortages may also, Robert Kaplan elaborates, "incite group conflicts."[19] So while changes in climate may be asocial, their impacts are most certainly not. The 1951 Convention also contains a "non-refoulement" clause, which, in effect, "prohibits the return of a refugee to a territory where his or her life or freedom is threatened . . . ."[20]

At this point, it sounds like there's an easy legal solution: stipulate that refugees can cite climate as reason enough for a move; flooding, droughts, and fires put people in peculiar danger from which the state can't always protect them. All is not, however, as it seems. The International Organization for Migration explains in a report, "the complexity of the phenomenon [climate migration] and diversity of individual situations makes legal codification, which must be guided by clear-cut categories, particularly difficult."[21] It's near-impossible to flatten a move to a single, environmental axis, intervened by several contextual factors like poverty, conflict, governance, and demographics. To characterize climate catastrophe as the only responsible, acting agent (obscured by its recognized social consequence) in legal migration represents a dangerous logical leapfrog (stimuli leads directly to response, bad weather leads directly to move). "Climate refugee" smacks of antiquated notions of climate determinism, which held that "cooler climates made for harder-working people, while warmer climates produced less industrious cultures and lifestyles, ignoring or downplaying social, economic, and political history and events like colonialism and slavery."[22] This lingering dogma makes it difficult to see refugees as whole people with diverse backgrounds and identities, newly eclipsed by climate catastrophe.

Faced with climate catastrophe, hermitic Western states trumpet their individual identity and stories — and expect refugees lining up outside their towering border walls to do the same. Didier Fassin, an eminent sociologist and scholar of migration, writes about changing refugee narratives in "The Precarious Truth of Asylum." Since the 1970s, refugee populations admitted into Western nations have increasingly made use of personal narratives: "genital mutilation, forced marriage, domestic violence, and homophobic abuse are . . . invoked by applicants" and "granted protection by officers and judges more easily than those who declare other causes of mistreatment."[23] A reflection of the shifting epistemic values in the West's legal and cultural machinery, refugee processing has changed at the applicants' expense: "[i]nstead of being entitled to asylum, the survivors [are] treated as obliged to public generosity."[24] Fassin observes refugees filtering into the ward of Western morality, where the stories of individuals are privileged over larger social machinations. Instead of falling back on legal convention in the UNHCR, the West is turning to its conscience. This case-by-case moral treatment deprives the First World of effective legal equipment to deal with mass migration. If nation-states remain the principal actors in addressing climate migration, we will not end up with a global solution for *global* climate

11 Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention]; *see also* U.N. High Comm'r for Refugees, the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (2011), https://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.htm.

12 Note that this is an extrapolation from legal convention; I will shortly discuss specifics and why climate catastrophe may not be compatible with the refugee framework.

13 Robert A. McLeman, Climate and Human Migration: Past Experiences, Future Challanges 14 (2013).

14 Lieberman, *supra* note 6.

15 U.N. High Comm'r for Refugees, *supra* note 11, at 2.

16 *Id*. at 3.

17 Quoted in Ryan Devereaux, *Climate Change, Migration, and Militarization in Arizona's Borderlands*, Intercept (Oct. 3, 2019, 8:00 AM), https://theintercept.com/2019/10/03/climate-change-migration-militarization-arizona/ (last visited Feb. 4, 2020).

18 U.S. Dept' of Def., Quadrennial Defense Review 2014, at 8 (2014), https://archive.defense.gov/pubs/2014_Quadrennial_Defense_Review.pdf.

19 Kaplan, *supra* note 8.

20 U.N. High Comm'r for Refugees, *supra* note 11, at 5.

21 Int'l Org. for Migration, *supra* note 10, at 27.

22 McLeman, *supra* note 13, at 8.

23 Didier Fassin, *The Precarious Truth of Asylum*, 25 Pub. Culture 39, 48–49 (2013).

24 *Id*. at 50.

catastrophe and migration — we will end up with a bunch of small, ineffectual, and identity-incompatible ones.

Climate migration demands an international solution, but it's been increasingly atomized to a country-by-country basis. As the UNHCR has a limited scope and budget, the Convention delegates primary responsibility of carrying out its text to nation-states. Many countries, however, construe this as mandate, oftentimes using "delegation" to void the Convention's call for humane treatment of refugees.[25] The United Nations Framework Convention on Climate Change, a treaty implemented in 1992 and later amended in 2015, has called for a "coordination facility" to "(a) Assist in developing arrangements for emergency relief; [and] (b) Assist in providing organized migration and planned relocation."[26] Said "coordination facility" has yet to materialize, leaving still more up to nation states in this slow-boil climate migration crisis.

We are living through the nation state's first stages of devolution. Kaplan depicts: "part of the globe is inhabited by Hegel's and Fukuyama's Last Man . . . . The other, larger, part is inhabited by Hobbes's First man . . . . The Last Man will be able to master [environmental stress]; the first man will not."[27] Growing networks of seventy border walls (compared to just fifteen when the Berlin Wall fell)[28] appear as fissures physical and ideological, snaking their way through this "purely Western notion . . . that until the twentieth century applied to countries covering only three percent of earth's land area."[29] Kaplan continues: "nor is the evidence compelling that the state as a governing ideal, can successfully transported to areas outside the industrialized world."[30] The idea of the "nation-state" acts like a wedge between the Global North and South:[31] As industrialized states retreat into themselves and take with them technologies, money, and know-how, they leave developing nations, already fated to bear unevenly the burden of climate change, to generate their own climate-management solutions and defend an international system that does not and has never worked for them. The nation state thus becomes a split image: its paradigm in the Global North and its nomadic antithesis in the South. By setting up this deep inequality — chasms between the haves and have nots of fungible goods, habitable spaces, and legal identity — we make a collective effort to endure climate catastrophe much more difficult.

Also in 2015, the U.N. created the Migration, Environment and Climate Change (MECC) Division of the International Organization of Migration (IOM) "to address the migration, environment and climate nexus."[32] The MECC has had its mission since 2007, when the U.N. directed IOM to problematize climate migration: prevent forced climate migration wherever possible, provide assistance and protection for transit during climate disaster, and seek out and improve durable adaptive and resilience strategies. The deputized group acts as a consultant for governments and non-governmental organizations alike, but its influence stops at borders and before direct intervention. Notably, the MECC sponsored the United Nations Global Compact on Migration which, while not binding, "could restrict the ability of future governments to set immigration and foreign policy, and to decide on which migrants are welcome and which aren't."[33] It is too early to tell, however, what kind of effect this new doctrine of best-practices will actually have on state migration policy, especially as we start to see the consequences of inaction in states like Ethiopia.

III. An Examination of Migration Patterns in Ethiopia

In this section, I look at a case study of post-disaster-pulse human migration in Ethiopia for larger implications: what economic, demographic, and geographic patterns emerge in Ethiopia that might have purchase on global climate migration? Selected by researchers Clark Gray and Valerie Mueller for its "deep poverty and long history of environmental, economic, and political shocks," Ethiopia has weathered some of the worst of what inclement weather has to offer without the institutional support to deal with it.[34] Before internal or international migration begins, however, many post-shock households in Ethiopia turn to risk-management strategies like asset accumulation, diversification of income sources, enmeshing in risk-sharing networks, and adoption of low-risk activities.[35] For example, households might reduce nonessential expenditures, ask friends and family for help (financial or otherwise), plant drought-resistant crops and sell livestock, delay marriage, or seek to access available food and work aid programs.[36] Large-scale shocks limit the practicality of local moves because peripheral areas were likely hit just as hard. Drought, for example, "can also increase the costs of migration by making farm labor more valuable in the origin area . . . [and] hinder marriage-related moves by reducing the availability of suitable marriage partners, inflating marriage costs such as dowries, and reducing access to the resources needed to finance a wedding."[37] Gray and Mueller found that "among men, labor-related movements and migration . . . more than doubled under severe drought,

25 See, for example, all the children in cages on the U.S.-Mexico border. *See generally* Clara Long, Written Testimony: "*Kids in Cages: Inhumane Treatment at the Border*", Hum. Rts. Watch (July 11, 2019, 8:00 AM), https://www.hrw.org/news/2019/07/11/written-testimony-kids-cages-inhumane-treatment-border (last visited Feb. 3, 2020).

26 Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft Agreement and Draft Decision on Workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action 39 (2015), https://unfccc.int/resource/docs/2015/adp2/eng/11infnot.pdf.

27 Kaplan, *supra* note 8.

28 Devereaux, *supra* note 18.

29 Kaplan, *supra* note 8.

30 *Id.*

31 Ever wonder why the Northern territories sit above Southern ones in maps? Privileged perspective.

32 *Migration, Environment and Climate Change (MECC) Division*, Int'l Org. for Migration, https://www.iom.int/migration-and-climate-change (last visited Feb. 3, 2020).

33 Derek Cheng, *NZ to Vote in Favour of UN Migration Compact*, NZ Herald (Dec. 19, 2018, 4:21 PM), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12179506 (last visited Feb. 3, 2020).

34 Clark Gray & Valerie Mueller, Drought and Population Mobility in Rural Ethiopia, 40 Wolrd Dev. 134, 136 (2012).

35 *Id.* at 135.

36 *Id.*

37 *Id.*

with total mobility reaching 10% of adult men per year."[38] Results for women, however, saw reduced mobility: "among women, a change from no drought to moderate drought reduces total mobility from 8.3% to 5.5%, short-distance mobility from 4.9% to 2.9%, and marriage mobility from 4.8% to 2.6%."[39] Gray and Mueller attribute this gender disparity to "decreased ability to finance wedding expenses and new household formation."[40]

Representative of the unpredictable interplay between social mores and a volatile climate, Ethiopia shows that the world may see social consequences we can't yet model. It also indicates that internal migration typically takes place before international migration — a true last resort. Gray and Mueller end their paper more confused than at the start: "these findings suggest a hybrid narrative of environmentally-induced migration that recognizes multiple dimensions of adaptation to climate change."[41] In other words: we don't know how all of this is going to go down, only that it will.

IV. Kiribati in Question

Third-world island nations like Kiribati are the climate migration bell-weathers of the world: they lack the resources, industrial capacity, climate-management technology, and fortunate geography of other states. As such, people living in such nations are more likely to pursue migration as an adaptation strategy to climate change. Kiribati encompasses three archipelagos spread out over a region about the size of India. The main island of South Tarawa has a population density that rivals that of Tokyo or Hong Kong.[42] Dependent on foreign aid and extremely vulnerable to changes in climate (some ninety-four percent of households in Kiribati were already affected by climate change in the last ten years[43]), Kiribati tasks its U.N. representatives with warning Western representatives about climate change and asking them for more money, both to little avail. The island chain has seasonal and skilled worker schemes in Australia and New Zealand and an additional education-related migration agreement with Fiji. New Zealand limits long-term migration access for Kiribati to seventy-five people per annum — but this quota, in conjunction with legal precedent, won't do much to forestall the cresting migrative wave and humanitarian crisis it will leave in its wake.

The first climate-motivated asylum case[44] was appealed to the highest magistrate in New Zealand.[45] Ioane Teitiota and his family, hailing from the outlying Kiribati atoll, beached in New Zealand, where the legal system was not able to untangle his not-so-uncommon lot: unemployment and poverty, made worse by a recent storm. The courts delivered him a denial of entrance and deportation.[46] Climate change "drastically impact[s] pressures to migrate."[47] By 2055, these trips will increase by an estimated thirty-five percent. More than seventy percent of households in Kiribati expressed that migration would be a "likely" outcome if sea level rise and flooding worsened.[48] Only a quarter of these households, however, have the resources to migrate: "without improved access to comprehensive risk management strategy that includes options for mobility, a significant proportion of people . . . could be 'trapped' by worsening environmental conditions."[49]

Kiribati's susceptibility adds another dimension to this legal issue: urgency. The law failed Teitota, and groups like the IOM, which conducted an admirable climate-motivated migration study on Kiribati and other archipelago nations, have picked up its slack. But IOM's efforts still aren't enough; Kiribati, like much of the developing world vulnerable to climate upheaval, needs international and coordinated on site work and preventative installations which don't see champions in the ever-fragmented nation state system.

V. Solutions?

Climate catastrophe and consequent migration are not storms to be weathered by lawyers alone. The common law adversarial system, which pits one story against another and seeks "truth" among their shards, will be challenged in ways we haven't seen before; we need to seek out all kinds of solutions to fill in when it falls up short.

Nevertheless, ivory tower legal efforts must remain one of many collaborative and diverse approaches to the climate migration issue. The law and its application to refugees and aid must change to reflect our *common* plight. The West must pivot from processing refugee cases, for example, as tests of moral perfectibility to hearing and admitting refugees on an inclusive, collaborative, and compassionate basis: "you and your family are in need and we can and should help." The studies, numbers, and projections furnished in this paper are admirable first steps, but they demand so much more than legal "conversation" in another research article: *someone* to do *something* tangible about climate-motivated migration.

On a fundamental level, climate catastrophe troubles the courts because it is an agent that cannot take responsibility or blame; I don't see "*Climate Catastrophe v. United States*" gracing the headlines anytime soon. Administered by a messy mosaic of nation states, refugee law doesn't see a panacea in a system that builds borders between what is different and that is hopelessly

38 *Id*. at 142.
39 *Id*.
40 *Id*.
41 *Id*. 134.
42 *The World Factbook: Kiribati*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/kr.html (last visited Feb. 3, 2020).
43 U.N. ESCAP, Climate Change and Migration in the Pacific: Links, Attitudes, and Future Scenarios in Nauru, Tuvalu, and Kiribati, http://i.unu.edu/media/ehs.unu.edu/news/11747/RZ_Pacific_EHS_ESCAP_151201.pdf (last visited Feb. 3, 2020).
44 A protection granted by nations to political refugees of other nations.
45 Tim McDonald, *The Man Who Would Be the First Climate Change Refugee*, BBC (Nov. 5, 2015), https://www.bbc.com/news/world-asia-34674374 (last visited Feb. 4, 2020).
46 Shabnam Dastgheib, *Kiribati Climate Change Refugee Told He Must Leave New Zealand*, Guardian (Sept. 22, 2015, 1:14 PM), https://www.theguardian.com/environment/2015/sep/22/kiribati-climate-change-refugee-told-he-must-leave-new-zealand (last visited Feb. 3, 2020).
47 U.N. ESCAP, *supra* note 43.
48 *Id*.
49 *Id*.

in search of some guilty party. I'm not saying that we shouldn't *try* to locate climate asylum and solutions in the law — in fact, we must if we want to preserve existing social regulatory systems which are being outpaced by social realities. I'm saying that we have to change the way we go about it and find complimentary or supplementary approaches outside of the law.

Organizations like the MECC and the Nansen initiative, a state-consulting process helmed by Switzerland and Norway, are pushing for global climate-migration-management solutions like land reclamation, renewable energy, and triage like the aforementioned U.N. coordination facility.[50]

In the way of someone doing something, Bangladesh is looking into new resilience strategies. The country is endangered by sea-level rise up to one meter by 2100 in its littoral region, displacing an estimated 31.5 million people.[51] Right now, "river erosion alone . . . leaves up to 200,000 people homeless each year."[52] Cross dams, designed abroad and deployed along rivers that feed into the Bay of Bengal, "catch sediment as it travels downstream . . . [so it] can build up into solid landmasses large enough to live on."[53] As a result, "the country has so far reclaimed over 1,000 square kilometers of land from the south sea of Noakhali."[54] While the dams may not be a long-term solution, the alluvial islands they confect may help mitigate interim instability, buy us a little time, and save a lot of lives. In a similar vein, nontoxic fire-retardant, tested for the first time just a month ago, sees a broad appeal from California to China.[55] Multi-state initiatives like the MECC and Nansen initiative and international treaties, like the Montreal Protocol which banned ozone-damaging CFCs, must meet new legal standards and resiliency strategies. Instead of taking action, however, the powers that be have cast climate catastrophe euphemisms (like the mild "climate change") that downplay its urgency and may actually put us in more danger.

VI. Messaging

To compel power to action, we need to learn how to talk back and be heard. Delivery is just as important as the message therein. Never was this clearer than when the statistics that ninety-seven percent of climate scientists agreed on the reality of climate change was published in 2012.[56] Motivated cognition, a phenomenon that takes place when people "opportunistically adj[ust] the weight they give to evidence based on what they are already committed to believing," however, took the wind out of the initiative; many more than three percent of people took these numbers and authority with their own logical schema.[57] I suggest looking at the problems of science communication from angles associative and empathetic as opposed to linear and logical.

Politicians often use conflict to stoke solutions for climate catastrophe, enfolding wartime fervor with issues like poverty ("War on Poverty") and drugs ("War on Drugs"). In this narrative, Climate becomes the antagonist to our protagonist — we rehash that hypothetical *Climate Catastrophe v. United States*. The simplistic dichotomy distracts from the issue people who use it are trying to animate: "spinning climate change as a security threat is likely to undermine, rather than strengthen, serious efforts to link climate change mitigation and adaptation to development efforts that reduce poverty and promote equity," said Betsy Hartman, professor Emerita of development studies at Hampshire College.[58] Susan Sontag, who coins the phrase "military metaphor" in her book *Illness and its Metaphors* explains: "War-making is one of the few activities that people are not supposed to view 'realistically'; that is, with an eye to expense and practical outcome . . . . Victims suggest innocence. And innocence, by the inexorable logic that governs all relational terms, suggests guilt."[59] Tree-hugging doves, with an eye towards not viewing climate catastrophe "realistically," think that they "need to reach across the aisle to combat climate change, and maybe the military is the institution to make that reach."[60] In "reaching," however, politicians also exonerate America — and humans more-generally — of its role in fomenting climate catastrophe. This victim-mentality leads to denial of any human wrongdoing because climate catastrophe is the enemy, not us! The armed forces take on climate as their enemy. Viewing climate change as a national security threat "warrants an inevitable militarized response in climate-driven conflict." Viewed as a "threat multiplier," climate catastrophe cast in the military metaphor makes the "threat . . . people from other countries, and the threatened . . . the U.S. and its military."[61] Military responses are not only measurably bad for the environment ("The U.S. military is the "largest institutional consumer of oil in the world," burning 85 million barrels of oil annually"[62]), but, as in any military conflict, they also

50 *See generally* The Nansen Initiative, *supra* note 9; *Migration, Environment and Climate Change (MECC) Division*, *supra* note 32.
51 Rafiqul Islam, *To Help Climate Migrants, Bangladesh Takes Back Land from the Sea*, Reuters (Sept. 9, 2015, 4:50 AM), https://www.reuters.com/article/us-bangladesh-clmate-land-idUSKCN0R90U220150909#QTgEvHmWvEXxy2q8.97 (last visited Feb. 3, 2020).
52 *Id.*
53 *Id.*
54 *Id.*
55 *Non-toxic Flame Retardant Enters Market, Study Suggests*, ScienceDaily (Sept. 28, 2017), https://www.sciencedaily.com/releases/2017/09/170928085147.htm.
56 *See generally* Abel Gustafson & Matthew Goldberg, *Even Americans Highly Concerned About Climate Change Dramatically Underestimate the Scientific Consensus*, Yale Prog. on Climate Change Comm. (Oct. 18, 2018), https://climatecommunication.yale.edu/publications/even-americans-highly-concerned-about-climate-change-dramatically-underestimate-the-scientific-consensus/ (last visited Feb. 3, 2020).
57 Dan M. Kahan, *"Messaging" Scientific Consensus: Ruminations on the External Validity of Climate-Science-Communication Studies, Part 2*, Yale L. Sch. Cultural Cognition Project (June 17, 2014, 9:28 AM), http://www.culturalcognition.net/blog/2014/6/17/messaging-scientific-consensus-ruminations-on-the-external-v.html (last visited Feb. 3, 2020). *See generally* Dan M Kahan et al., *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 Nature: Climate Change 732 (2012).
58 Quoted in Caroline Haskins, *Framing Climate Change as a 'National Security Threat' Is Dangerous*, Vice (May 17, 2019, 1:03 PM), https://www.vice.com/en_us/article/vb93ey/framing-climate-change-as-a-national-security-threat-is-dangerous.
59 Susan Sontag, Illness as Metaphor and Aids and Its Metaphors 99 (2013).
60 Haskins, *supra* note 58.
61 *Id.*
62 *Id.*

increase nationalist sentiment (neither of which are conducive to an international solution for climate migration).[63] Clearly, the military metaphor is not how we should engage climate catastrophe. So how should we? What is the right language, in our desperation, with which to craft the right message to compel the powers that be to do *something*?

I don't have the complete answers to any of these questions, but I know where we could start: let's talk about the warming climate as it is — catastrophe, not just a change. Environmental hyperbole in the late Anthropocene isn't hyperbole at all: it's our lived reality. Instead of using the military metaphor, we must employ its antidote: empathy and universalism. The West needs to show that it cares for other people, especially as borders and the nation state — punctured by storms and fires and rising seas — begin to bleed, we need to find our common humanity, not a common enemy.

63 *Id.*

An Overdue Update to International Law Regarding Refugees

Priscilla Jin (PO '22)
Staff Writer

I. Introduction

Like many transnational issues, the regulation of migration is a difficult problem to tackle because of the fundamental problem in international relations: state sovereignty and the lack of accountability amongst countries. The movement of refugees is a controversial issue that transcends boundaries and implicates almost every state. Despite the far-reaching effects of migration, it is difficult to mobilize states that are inevitably motivated by self-interest and lack a supreme law to guide them. Consequently, any protocol seeking to effectively address the migration of humans requires a two-pronged approach: one that delineates a specific course of action and another that enforces it.

Current international law regarding refugees, as I outline in Part II, not only relies on too narrow a definition of refugee, but also lacks an enforcement measure to ensure accountability amongst participating states. Part III identifies the various problems and inefficiencies that result from the shortcomings of current international law. These problems include a huge protection gap and a disproportionate allocation of refugees to less developed countries. In Part IV, I suggest amending the 1951 Convention[1] and the 1967 Protocol[2] Relating to the Status of Refugees by broadening the parameters that grant a person refugee status; this expansion would account for millions of migrants who are displaced by circumstances not already accounted for by the U.N. Refugee Agency, particularly three groups of refugees: LGBTQ migrants, women threatened by domestic and gendered violence, and climate refugees. Each subsection under Part IV identifies the threat facing each group and explains why it is necessary to add them to the refugee definition. Part V proposes a new quota system that will appropriately allocate refugees amongst participating states, including those that fall under the new definition. Following the new quota system, Part VI describes how the protocol will isolate the issue of accountability by instating a set of punitive measures against states who agree to participate in the solution. Finally, Part VII discusses the feasibility of the protocol and analyzes how successful it would be as a permanent solution to the refugee problem should it be accepted by a majority of states.

1 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention].
2 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

II. Current International Law Regarding Refugees

The devastation left behind after World War II prompted a new era of transnational cooperation and transparency. With this newfound multilateralism, the world was confronted with over sixty million people displaced by combat operations, ethnic cleansing, and fear of genocide.[3] As a result, the United Nations drafted the 1951 Refugee Convention to establish a global rule of conduct regarding refugees. As new refugee situations arose, the 1967 Protocol was created to amend the existing international laws. These stipulations continue to act as guiding principles in conflicts regarding refugees today. The protocol includes: a principle of non-refoulement forbidding countries from forcibly ejecting refugees to places where they are at risk of persecution;[4] providing refugees with some form of legitimate legal status;[5] granting refugees access to employment, education, and social security;[6] and disallowing refugees to be punished for entering countries illegally.[7]

III. The Failures of our Current System

Currently, the United Nations reports an unprecedented 70.8 million displaced people around the world.[8] This number may very well be an underestimate as there is no way to obtain the exact data. Widespread war and conflict, including the Syrian Civil War, the war in Afghanistan, and decades of continuous conflict in Somalia, have contributed significantly to the global surge of displaced people.[9] Of these 70.8 million people displaced, 25.9 million are registered as refugees (the subset of migrants who are fleeing persecution) by the United Nations High Commissioner for Refugees (UNHCR).[10] Despite the accelerating crisis, the responsibility of mitigating the problem disproportionately falls upon poor countries who are ill-equipped

3 Bernard Wasserstein, *History - World Wars: European Refugee Movements After World War Two*, BBC (Feb. 17. 2011), http://www.bbc.co.uk/history/worldwars/wwtwo/refugees_01.shtml (last visited Feb. 2, 2020).
4 *See* 1951 Convention, *supra* note 1, art. 33.
5 *See, e.g., id.* art. 12.
6 *Id.* arts. 17, 22 & 24.
7 *Id.* art. 31. *See generally* U. New S. Wales Andrew & Renata Kaldor Ctr. for Int'l Refugee L., Factsheet: The 1967 Protocol (Sept. 2018), https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_1967%20Protocol_Sep2018.pdf (last visited Feb. 2, 2020).
8 *Figures at a Glance*, U.N. High Comm'r for Refugees, https://www.unhcr.org/en-us/figures-at-a-glance.html (last visited Feb. 2, 2020).
9 U.N. High Comm'r for Refugees, Global Trends: Forced Displacement in 2017, at 6, https://www.unhcr.org/5b27be547.pdf (last visited Feb. 2, 2020).
10 *See Figures at a Glance*, *supra* note 8.

to accommodate the massive exodus of people crossing their borders; for example, the U.N.'s Refugee Agency predicts that approximately eighty-six percent of the world's refugees reside in Turkey, Pakistan, and Lebanon alone.[11] In 2015, Lebanon hosted about the same number of refugees as all of Europe.[12] The pattern of underdeveloped countries bearing the burden of refugee migration is not coincidental — wealthy states curtail their legal and moral responsibilities by paying other countries to receive displaced people that otherwise would have sought asylum within their own borders. In 2016, the E.U. struck a deal with Turkey to tighten controls along its coastline in order to stymie the flow of migrants from entering Europe through Greece in exchange for six billion euros in financial assistance.[13] This "pass-off" mentality started long before the European migrant crisis. Before he was ousted in 2011, millions of euros were paid to Libyan dictator Muammar al-Qaddafi to stop migrant boats from leaving the coast for European countries.[14] In September 2014, Australia and the Kingdom of Cambodia signed an agreement providing for the relocation of refugees from the island of Nauru to Cambodia.[15] The refusal of refugees in wealthy countries is often driven by xenophobia, adding more obstacles to finding a permanent solution to the refugee problem. For example, less than one percent of the 20.4 million refugees of concern to the UNHCR are submitted for resettlement.[16]

IV. A New Protocol Relating to the Status of Refugees

The 1967 Protocol was created in order to account for the inefficiencies of the outdated 1951 Convention that did not anticipate the new conflicts and refugees that became prevalent sixteen years later. Now — more than five decades after the last protocol — the current number of displaced people has surpassed the number following World War II by more than ten million. Now that the world is confronted with a refugee crisis even larger than the post-WWII crisis that propelled the initial 1951 Convention, an update to international law is long overdue. Specifically, I argue that there are two key flaws in international law governing refugees: an under-inclusive definition of refugee and the lack of an equitable enforcement mechanism. Currently, the 1951 Convention and 1967 Protocol define a refugee as someone who is unable to return to their country of origin on grounds of being persecuted for reasons of "race, religion, nationality, membership of a particular social group, or political opinion . . . ."[17] While these forms of persecution are justly recognized by international law, the U.N. Refugee Agency still fails to account for entire groups of people that experience violence or are displaced by other forms of persecution that are neglected or excluded by the existing definition — most notably LGBTQ migrants, women escaping violence, and climate refugees. In order to account for these groups, I propose to expand the parameters of the international definition of a refugee to formally account for those who are unable or unwilling to return to their country of origin owing to a well-founded fear of: persecution on the basis of sexuality or sexual orientation; systematic sexual abuse or violence; or lack of protection by their government against climate change or natural disaster.

I also propose a quota system that fairly distributes and resettles refugees and an additional clause to ensure accountability amongst states. The U.N. would assign each member state an annual refugee quota based off a comprehensive formula that is similarly designed after the model that determines states' mandatory U.N. dues. States would take in these refugees within their own physical boundaries, and those that fail to achieve their quota would be required to pay an increase in their U.N. dues the following year, to be allocated to the UNHCR in its efforts to combat the refugee crisis.

A. Expanding the Parameters that Grant Refugee Status

1. LGBTQ Migrants

The world has evolved significantly since the last revision to the 1951 Convention regarding refugees; subsequently, there are entire demographics of refugees that were either excluded from the definition because of outdated social views or are currently affected by issues that were not foreseen by policymakers at the time. For example, the LGBTQ community suffers from widespread oppression and persecution globally. As a result, many LGBTQ people need to leave intolerant regions to find asylum in more accepting countries. Currently, consensual romantic relations between same-sex couples are criminalized in seventy-two countries.[18] In eight of these countries — six of them United Nations member states — it is punishable by death.[19] LGBTQ persons in these states face not only legal persecution, but also de facto criminalization that cultivates an environment of hostility and danger through, for example, lynching, sexual assault, and discrimination by mainstream society. However, LGBTQ migrants are still challenged by unique obstacles and cumbersome legal processes when attempting to secure refugee status despite the obvious persecution and violence they face. These LGBTQ-specific hurdles are evidenced by a study by the U.K. Lesbian and Gay Immigration Group that reported a staggering ninety-eight to ninety-nine percent rejection rate of asylum claims made by LGBTQ migrants, compared to the seventy-three percent rejection rate of all general asylum

11 Chelsea Roff, *I Volunteered in a Refugee Camp. These Are The Stories You Won't See on TV*, HuffPost (Dec. 7, 2017, 10:04 AM), www.huffpost.com/entry/life-in-a-refugee-camp-hu_b_10245416 (last visited Feb. 2, 2020).
12 *Id.*
13 Loren Landau et al, *Europe is Making Its Migration Problem Worse*, Foreign Aff. (Sept. 5, 2018), https://www.foreignaffairs.com/articles/africa/2018-09-05/europe-making-its-migration-problem-worse (last visited Feb. 2, 2020).
14 *Id.*
15 Madeline Gleeson, U. New S. Wales Andrew & Renata Kaldor Ctr. for Int'l Refugee L., The Australia-Cambodia Refugee Deal 2–4 (Aug. 2018), https://www.kaldorcentre.unsw.edu.au/sites/default/files/Research%20Brief_Cambodia_Aug2018.pdf (last visited Feb. 2, 2020).
16 *Resettlement*, U.N. High Comm'r for Refugees, https://www.unhcr.org/en-us/resettlement.html (last visited Feb. 2, 2020).
17 1951 Convention, *supra* note 1, art. 1(A)(2); *accord* 1967 Protocol, *supra* note 2, art. 1(2) (modifying 1951 Convention's definition to eliminate temporal limits).
18 Kara Fox et al. *Where Being Gay Is Illegal around World*, CNN (Apr. 8, 2019, 2:17 AM), www.cnn.com/2019/04/03/world/same-sex-laws-map-intl/index.html (last visited Feb. 2, 2020).
19 *Id.*

claims.[20] Because gender and sexuality are intimate expressions that cannot be confirmed without a violation of privacy, the credibility of LGBTQ migrants seeking asylum is often challenged. Consequently, LGBTQ migrants must undergo excessive — and sometimes inhumane — procedures in order to achieve refugee status. For example, it was revealed in 2010 that the Czech Republic used genital cuffs to monitor the arousal of gay asylum seekers while they watched pornography. In other countries like the United States, gay asylum seekers must overtly prove their sexuality through dress and demeanor, often in a humiliating way, in order to claim asylum.[21]

To be sure, adding persecution based on sexuality and sexual identity would not eliminate skepticism of LGBTQ migrants nor the discriminatory and inhumane procedures they must endure to be considered for asylum. Despite decades of human rights violations of sexual minorities, it was only November of 2008 when the UNHCR issued a guidance note that recognizes that discrimination and violence on the basis of one's sexual orientation and gender identity may constitute persecution.[22] It also states that if an applicant requesting asylum on the basis of sexuality or sexual identity, he or she must be given the "benefit of the doubt."[23] Seeing that there is de jure protection of LGBTQ migrants, the problem seems to lie in de facto enforcement. Although the Guidance Note serves as a basis for further commentary on the issues facing LGBTQ migrants, there is a lack of implementation in reality; this discrepancy between law and practice confirms the need to include LGBTQ migrants to the Convention's definition. Excluding LGBTQ migrants from the official definition earmarks persecution based on sexuality and sexual identity as somehow less legitimate as the five forms of persecution specified by the Convention, as guidance notes are less authoritative than official handbooks or guidelines and do not follow the extensive drafting processes as the official guidelines on international protection.[24] Consequently, the broader and complex issue of LGBTQ migration is not adequately addressed or analyzed, most likely due to a relatively cursory drafting process. For example, bisexuality and intersexuality are not sufficiently analyzed, there is no clear distinction made between persecution and discrimination amongst LGBTQ migrants, and the availability of documentation is not addressed — a few holes out of many.[25] Merely using a guidance note to address the problems of LGBTQ migrants creates myriad problems, such as de-legitimizing their issues in comparison to the five criteria for refugees and failing to adequately analyze the many layers of the issues facing LGBTQ migrants. Although incorporating LGBTQ migrants to the Convention definition may seem like a hollow gesture, it will be a first step toward changing attitudes toward the legitimacy of global LGBTQ persecution.

2. Women Escaping Gendered or Domestic Violence

Like LGBTQ migrants, women who flee their countries due to gendered violence face extraneous hurdles to prove they meet the criteria of the refugee definition. Many women who face domestic or gendered violence come from repressive states where traveling without a male guardian is outlawed.[26] If women do manage to escape, gathering evidence of gendered violence is difficult.[27] Like the processes involving LGBTQ refugees, the UNHCR recognizes that women's gender-based asylum claims fall under persecution from belonging to a "particular social group."[28] However, the refugee definition itself was not designed to accommodate for the experiences of women.[29] This has resulted in the tendency of refugee status decision-makers to view domestic violence as a private matter, not relevant to the five grounds of persecution stipulated by the 1967 Protocol.[30] A report by the Refugee Women's Resource Project acknowledges that gendered and domestic violence have varying interpretations across different cultures.[31] The discrepancy between cross cultural perspectives makes it easier for women's abusive experiences to be disregarded. The widespread disparity regarding violence against women confirms the need to include persecution based on misogyny or gendered violence to the refugee definition, rather than allowing countries — that may have inconsistent social judgments on women's rights — to individually judge whether a gender-based claim falls under persecution from belonging to a particular social group. Adding gendered and domestic violence to the official definition of a refugee would help largely eliminate the dismissal of cases that get lost in social translation. This act would also take a step towards recognizing that the 1951 Convention and 1967 Protocol's definition of a refugee is male-oriented and that, traditionally, forms of persecution that were unique to women have fallen outside of the understanding of persecution based on "political opinion" or "membership of a particular social group."[32]

20 U.K. Lesbian & Gay Immigr. Group, Failing the Grade: Home Office Initial Decisions on Lesbian and Gay Claims for Asylum 2 (Apr. 2010), https://uklgig.org.uk/wp-content/uploads/2014/04/Failing-the-Grade.pdf (last visited Jan. 19, 2020).

21 *See, e.g.*, Dan Bilefsky, *Gays Seeking Asylum in U.S. Encounter a New Hurdle*, N.Y. Times (Jan. 28, 2011), www.nytimes.com/2011/01/29/nyregion/29asylum.html (last visited Feb. 2, 2020).

22 UNHCR Guidance Note on Refugee Claims Relating to Sexual orientation and Gender Identity ¶ 3 (Nov. 21, 2008), https://www.refworld.org/pdfid/48abd5660.pdf. Note that the UNHCR claims that the guidance note should be read in conjunction with the other guidelines and legal documents to "clarify applicable law and legal standards . . . ." *Id*. at 2.

23 *Id*. ¶¶ 35, 41.

24 *Id*. at 2.

25 Nicole LaViolette. *'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity': A Critical Commentary*, 22 Int'l J. Refugee L. 173, 208 (2010).

26 *See, e.g.*, *Boxed In: Women and Saudi Arabia's Male Guardianship System*, Hum. Rts. Watch (July 16, 2016), https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system (last visited Feb. 2, 2020).

27 *See* Tamara Wood, *Are Women Escaping Family Violence Overseas Considered Refugees?*, The Conversation (Jan. 9, 2019), https://theconversation.com/are-women-escaping-family-violence-overseas-considered-refugees-109509 (last visited Feb. 2, 2020).

28 U.N. High Comm'r for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶ 30, U.N. Doc. HCR/GIP/02/01 (2002).

29 *See* Wood, *supra* note 27.

30 *Id*.

31 *See* Clare Palmer & Heather Smith, Refugee Women's Resource Project Asylum Aid, Refugee Women and Domestic Violence: Country Studies 14–21 (Sept. 2001), https://www.refworld.org/pdfid/478e3c680.pdf.

32 *Id*. at 13.

3. Climate Refugees

Finally, a new definition must account for refugees affected by the most urgent issue of our generation: climate change. Devastating climate impacts such as storms, droughts, and sea-level rise have created an entire class of refugees who are not displaced on the basis of the five criteria listed by international law and consequently currently lack any formal definition, recognition, or legitimate protection under international law even as the magnitude of their plight becomes increasingly undeniable, with an average of twenty-four million people being displaced annually by weather hazards.[33] A World Bank report projects that the impacts of climate change in three densely populated regions of the world (sub-Saharan Africa, South Asia, and Latin America) could result in an unprecedented displacement of over 140 million people within their countries' borders by 2050.[34] Admittedly, there are issues involved with defining a "climate refugee." Unlike refugees escaping persecution from their own governments, climate refugees are escaping disasters of circumstance rather than deliberate and systematic oppression. The UNHCR frequently argues that those displaced because of an environmental change could technically rely on the protection of their own governments, distinguishing them from refugees who are driven out by a well-founded fear of their native governments.[35] However, this mentality creates a protection gap in regard to climate refugees, who are often escaping from countries that are ill-equipped to defend their citizens from environmental disasters.[36] Ironically, it is the wealthiest and most developed countries that have and continue to disproportionately contribute to the catastrophic climate change; however, it is the poorest countries that bear the burden of the global consequence.[37] The largest emitters of greenhouse gases, both in total and per capita, have been large developed nations such as the United States and various European countries — and more recently China and India.[38] As these wealthy countries drive the accelerating global warming, poor countries are overwhelmed with the repercussions, one of the most pressing ones being climate refugees.[39] Droughts and poor harvests have driven millions of people from sub-Saharan Africa and Central America.[40] Low-lying countries are losing their territory to rising oceans, displacing tens of millions.[41] The worst effects of climate change can be avoided by the wealthy countries most responsible: for instance, Miami Beach is spending hundreds of millions of dollars to elevate streets and install pumps in preparation of expected flooding.[42] Conversely, poor countries that contribute a comparatively negligible fraction to climate change are dangerously ill-equipped for the disasters that will either kill or displace their people. For example, Port-au-Prince, Haiti, only seven hundred miles away from Miami Beach, has no protection against rising sea-levels or flooding.[43] Climate refugees may be displaced by matters of circumstance; however, they are left vulnerable when their governments lack the resources to protect them from disasters propelled by the habits of wealthier countries. Therefore, climate refugees that must leave their country of origin because of environmental disasters and a lack of security from their own countries should be recognized by international law. Legal reform would allow the UNHCR to establish more forceful rules help close the protection gap regarding climate refugees.

V. A New Refugee Quota System

As proven in sections above, there are millions of refugees displaced by well-founded fears that must face extraneous hurdles because they are not formally defined by the 1967 Protocol. In order to legitimize their need for asylum by international law, I propose to add LGBTQ migrants, women escaping gendered violence, and people displaced by climate change to the refugee definition while simultaneously introducing a new quota system that can accurately accommodate for the new classes of refugees as well as existing refugees without permanent residences.

The wave of populism and anti-immigrant sentiment that has proliferated across Europe and the United States has caused these countries to retract in their willingness to engage in a permanent solution,[44] stagnating progress toward finding a permanent solution for the refugees at a time when the crisis has reached a historic climax. Currently, refugee quotas are decided at the discretion of individual states.[45] Although the United States has historically resettled more refugees than any other country, its resettlement program has reduced its scope throughout the last few years, preventing it from keeping up with the exponential growth of global refugee population.[46] In 2016, the United States admitted about eighty-five thousand

33 Tim McDonnell, *The Refugees the World Barely Pays Attention To*, NPR (June 20, 2018; 11:25 AM), https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/the-refugees-that-the-world-barely-pays-attention-to (last visited Feb. 2, 2020).

34 World Bank Group, Groundswell: Preparing for Internal Climate Migration xix (2018), https://openknowledge.worldbank.org/handle/10986/29461 (last visited Feb. 2, 2020).

35 *See* Joanna Apap, Eur. Parliamentary Res. Serv., The Concept of 'Climate Refugee': Towards a Possible Definition 5–7 (2019), http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621893_EN.pdf.

36 *Id*. at 2.

37 *See generally* The Times Editorial Board, Opinion, *Wealthy Countries Are Responsible for Climate Change, but It's the Poor Who Will Suffer the Most*, L.A. Times (Sept. 15, 2019; 7:00 AM), https://www.latimes.com/opinion/editorials/la-ed-climate-change-global-warming-part-2-story.html (last visited Feb. 2, 2020) (showing disproportionate consequences of climate change between wealthy and poor countries).

38 *Id*.

39 *Id*.

40 *Id*.

41 *Id*.

42 *Id*.

43 *Id*.

44 Martin A. Schain, Migration Pol'y Inst., Shifting Tides: Radical-Right Populism and Immigration Policy in Europe and the United States 5–9 (Aug. 2018), https://www.migrationpolicy.org/research/radical-right-immigration-europe-united-states (last visited Feb. 2, 2020).

45 *Global Refugee Resettlement: What Do the Statistics Tell Us?*, Migration Data Portal (Aug. 23, 2018), https://migrationdataportal.org/blog/global-refugee-resettlement-what-do-statistics-tell-us (last visited Feb. 2, 2020).

46 *Fact Sheet: U.S. Refugee Settlement*, Nat'l Immigr. F. (Jan. 25, 2019), https://immigrationforum.org/article/fact-sheet-u-s-refugee-resettlement/ (last visited Feb. 2, 2020).

refugees.[47] The cap grew increasingly more stringent the next two years, influenced by the Trump Administration; in 2019, the cap reduced to thirty thousand — the lowest number since the passage of the Refugee Act of 1980.[48] It is important to note that this cap represents the *maximum* number of refugees the country will take in for the 2019 fiscal year; it does not represent the actual number of refugees it will resettle, which will likely be much lower than the thirty-thousand limit.[49] Conflicted with its own refugee crisis, the E.U. had established a quota system in 2015 to more evenly distribute the unprecedented influx of immigrants coming from African and Middle Eastern countries.[50] However, many states remain unwilling to share some of the hundreds of thousands of people seeking asylum in Europe. Instead of strengthening their border patrols, some countries, such as Hungary and Slovakia, outright spurned their quota requirements.[51] The E.U.'s aversion to accepting migrants at its borders has resulted in hundreds of migrants left stranded on rescue ships waiting for a harbor to let them dock; consequently, more than sixteen thousand migrants have died since 2014 attempting to cross the Mediterranean Sea.[52]

When states decide their own roles in international matters, they will be driven by self-interest, inevitably leading to inefficiency. The United States grossly underestimates the number of refugees it can reasonably sustain, closing its borders to more migrants every year. Even when a quota is assigned to a country through a multilateral effort, the participation of member states cannot be guaranteed because of a lack of enforcement, as seen by the E.U.'s failed 2015 quota system. The problems that arise when states self-prescribe their responsibility prove the need for a quota system that is decided by an external third party like the United Nations.

Much of the inefficiency in current refugee solutions can be eliminated when quotas are created impartially. Currently, all U.N. member states are assigned annual mandatory dues, which are not decided individually but calculated by the United Nations. I suggest modeling a new refugee quota system on this already established system, such that the UNHCR would create a uniform and unbiased model that accurately prescribes quotas in accordance with a state's economic ability. The U.N. assessment formula for the apportionment of expenses[53] should serve as an example. The quota system would take a comprehensive and holistic approach, taking into account a country's current contribution to the U.N., its GDP, GNP, income per capita, and the quality of its infrastructure. The model would also include a debt-burden adjustment and a ceiling adjustment for less developed countries: should a country be in extreme debt — a good indicator of the financial state of a state — its quota will be adjusted to a number that better reflects its abilities. Also, there would be a capped number for underdeveloped countries that may be struggling with domestic issues — such as civil war, drought, or famine — that would impede their ability to reasonably sustain more than a certain amount of refugees. The protocol also would require states to resettle the refugees of their quota within their own physical boundaries; passing off refugees to other countries in exchange for financial assistance — as done in the past — would not count towards their quota.

VI. Measures of Enforcement

This protocol acknowledges that merely prescribing quotas is futile without incorporating a stringent means of holding states accountable. An additional measure of enforcement would be necessary to motivate countries to adhere to their quotas. I suggest that countries who fail to fulfill their quotas should be required to pay an increase in their U.N. dues that is proportional to their deficit; these additional funds would go toward the UNHCR in aiding countries who do fulfill their quotas or take in more refugees than their prescribed number due to the deficit of another country. This "deficit clause" should be treated as a punitive measure to dissuade countries from avoiding their responsibilities rather than a way to assign a monetary value to a refugee. This penal system would go some way in preventing another E.U. quota catastrophe by prescribing some consequence should a country fail to follow protocol as Poland and Hungary had before. If a country does fail to fulfill its quota, its additional U.N. funds would be calculated against its individual ability and resources. For example, if a wealthier country like the United States had a refugee deficit of two thousand, its U.N. dues would increase at a higher rate than a two-thousand refugee deficit of a less capable country, such as Turkey or Cambodia.

VII. Conclusion and Feasibility

This protocol relies on the theory of institutionalism which states that countries will have to forgo a substantial portion of their sovereignty in order to maximize a collective interest. I predict that states will initially be hesitant to join the protocol out of fear of the free-rider problem; even if an institutional innovation such as this protocol would increase efficiency, "no one may have the incentive to develop it, since institutional innovation is a public good."[54] Specific to this protocol, I suspect that countries will be reluctant to bear the weight of providing for their quota of refugees if other countries do not adhere to their respective quota promises. The punitive clause of my protocol attempts to account for this shortcoming that arises in multilateral agreements. This proposed protocol has the potential to be an effective solution because of its binding nature. However, I concede that the protocol's stringent

47 *Id.*
48 *Id.*
49 *Id.*
50 James Kanter, *E.U. Countries Must Accept Their Share of Migrants, Court Rules*, N.Y. Times (Sept. 6, 2017), www.nytimes.com/2017/09/06/world/europe/eu-migrants-hungary-slovakia.html (last visited Feb. 2, 2020).
51 *Id.*
52 Taylor Adams & Adam B. Ellick, *How We Made an Invisible Crisis at Sea Visible*, N.Y. Times: Times Insider (Jan. 23, 2019), www.nytimes.com/2019/01/23/reader-center/migrants-mediterranean-sea.html (last visited Feb. 2, 2020).
53 *See generally* U.N. Gen. Assemb. Fifth Comm., *Scale of Assessments for the Apportionment of the Expenses of the United Nations: Report of the Fifth Committee*, U.N. Doc. A/70/416/Add.1 (Dec. 23, 2015).
54 Robert Keohane, *Governance in a Partially Globalized World: Presidential Address, American Political Science Association, 2000*, 95 Am. Pol. Sci. Rev. 1, 4 (2001).

conditions — which are necessary for ensuring accountability and maximizing the proposal's success — will likely deter states from signing the agreement in the first place. Therefore, it is important that all, or at least majority of, member states sign the protocol to make it feasible. I predict that it would be easiest to get the majority of less developed or developing countries to sign the protocol, especially those who are struggling with internal strife that produces refugees or those that are ill-equipped to accommodate with asylum-seekers. Notably, it would be idealistic to assume that wealthier countries such as the United States or members from the E.U. would sign the protocol without suspicions that they would be bearing the brunt of the solution. Ideally, each country would understand that they are more or less equally sharing the burden of the problem, as each individual assigned quota will bear an equal weight across all participating countries — even though they might be different in numeric value — since the number is calculated given a state's existing resources and financial strength. To ensure this protocol's success, the UNHCR must emphasize the importance of a permanent solution to the refugee crisis. Once states pledge to forsake their sovereignty in deciding their own refugee quotas, the protocol will necessarily eliminate the fear that other countries will not fulfill their assigned quotas with the "deficit clause" and stand as a plausible solution to the refugee crisis.

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