THE PERCEPTIONAL GAP: RETHINKING ‘THE MIGRANT THREAT’

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Modern policies on refugee protection increasingly derive from a defining conceptualization: the migrant threat. This conceptualization ensues from a perceptional gap that portrays certain migrants as undesirable for developed host countries. This gap is built on natural and unnatural distortions of reality leading to patterns of distrust, dehumanization, discrimination, and criminalization of migrants. This trend appears related to the race, religion, and nationality of migrants perceived as undesirable and treated as security, economic, and cultural identity threats to developed host countries. The resulting institutional responses prescribe the detention, exclusion, and refoulement of these migrants and neglect their most basic human rights and international refugee law protections. Yet both differences in reception and treatment of different migrant groups and data on terrorism, economic integration, and cultural assimilation debunk perceptional-gap claims that migrants are too dangerous, too many, too expensive, and too different.

Drawing on an interdisciplinary analysis of perception, this Article explores the sociopolitical perception of migrants as threats and the rationale behind institutional responses. The Article argues that the perceptional gap leads to a policy conceptualization of undesirable migrants as threats. The Article describes this process as the fabrication of law; that is, remaking the facts to make the law. Elaborating on selective and physical perception of reality, the Article shows that the perceptional gap constitutes the re-directional factor of migrants’ institutional reality palpable through their reception and treatment. Reflecting on dissimilar dimensions of reality, moreover, the Article finds that the redirection of migrants’ reality from victims to threats is neither subjective nor objective or merely relative but inherently multidimensional. This novel perception-conceptualization approach, the Article concludes, is critical to redress current patterns of dehumanization, criminalization, and segregation of migrants across the world.

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INTRODUCTION

As Ukrainians fled the Russian invasion in 2022, there was the
perception that these refugees were different. An Al Jazeera journalist
reporting on the crisis proclaimed that “[t]hese are not obviously refu-
gees trying to get away from areas in the Middle East . . . They look
like any European family that you would live next door to.”1 Explaining his decision to open his country’s border to Ukrainian refugees, Bulgaria’s Prime Minister Kjilk Petrov stated: “These are not refugees we are used to . . . these people are European. These people are intelligent, they are educated. . . . This is not the refugee wave we have been used to, people we were not sure about their identity, people with unclear pasts, who could have been terrorists.”2

Sociopolitical perception of migrants precedes their institutional reality. Eventually, their policy conceptualization defines it. The reception of Ukrainian refugees with open arms in Poland, Hungary, Romania, Bulgaria, and the United States3 contrasts both with the reception and treatment in Europe of Middle Eastern and African refugees using razor-wire fences, torture, and ship containers4 and with the images of U.S. Border Patrol agents on horseback chasing migrants from Haiti.5 Moreover, reports on the warm welcome of Ukrainian women and children in Europe6 and the United States’ private spon-

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sorship program for Ukrainian refugees further contrast with Italy’s decision to close its ports to migrant rescue ships holding hundreds of unaccompanied minors from North Africa and the United States’ decision to hold Central American children asylum seekers in cages. Reports on African and Middle Eastern refugees being segregated from Ukrainian refugees in their journey for safety shows a trend of discrimination and dehumanization against those often viewed as undesirable migrants. Even Hungary’s Prime Minister Viktor Orbán, who banned African and Middle Eastern refugees from his country because he saw them as cultural and religious threats, welcomed Ukrainian refugees with open arms: “We’re letting everyone in.”

Policy discrimination and institutional exclusion of migrants is not novel. Both Orbán and former U.S. President Donald Trump praised each other for their policy of protecting Christian communities from undesirable migrants. President Trump publicly stated his preference for migrants from “countries like Norway” instead of undesirable migrants from Mexico and Central America, stating “we have criminals, we have gang members, we have human traffickers, we have drug smugglers; we don’t want them in our country.”

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This Article explores the sociopolitical dynamics affecting the perception of millions of migrants around the world as undesirable to developed host countries, and their institutional conceptualization as threats. It explores the sociopolitical dynamics that cause governments and citizens in developed host countries to perceive migrants as undesirable and conceptualize them as threats. Reflecting on immigration policies, practices, narratives, and regulations, this Article shows that the institutionalization of the migrant threat—that is, the evolution from perception to conceptualization of migrants as threats—derives from a perceptional gap portraying undesirable migrants as differential threats. Namely, asylum seekers and refugees are portrayed as threats to the national security, economic stability, and cultural identity of developed host countries. Accordingly, immigration systems increasingly either exclude, preclude, deter, relocate, or suspend the entry of refugees and asylum seekers of certain countries, races, and religious affiliation while developing policies oriented at dissuading, preventing, or discouraging such migrants from even attempting to reach such countries.

The inquiry of this Article is threefold. Specifically, what are the root causes informing the migrant threat? Is the perception of undesirable migrants and their subsequent institutional conceptualization as threats justified? If not, how could governments and policymakers re-dress this trend and the resulting institutional responses?

This Article argues that the modern conceptualization of undesirable migrants as threats to developed host countries suffers from a fatal flaw: the perceptional gap. This misperception ensues from natural distortions of reality, such as bias and fear, and unnatural distortions such as populism, and it informs policy responses to refugees and asylum seekers that redirect their institutional reality from victims to threats. Migrants’ reality is redirected when governments distort forced migration as sociopolitical fact to advance claims that migrants are too many, too dangerous, too expensive, or too different. This gap, the Article holds, leads to a new reality that could not have existed but for the distorted claims through which the redirected reality emerges: the migrant threat. This Article further argues that the precedent reality (i.e., migrants as victims of persecution and conflict) is a social fact whereas the redirected one (i.e., migrants as threats) is a policy misconstruction.

Though race and religion play a role in the perception and conceptualization of certain migrants as threats, the quintessential flaw in modern institutional responses to refugees and asylum seekers is far
more complex. This Article shows that what several governments conceptualize as the migrant threat and the solutions they promote to contain it, such as detention, segregation, exclusion, and refoulement, should be defined neither by selective nor physical perception of migrants but by a multidisciplinary analysis of international forced migration as a social and legal phenomenon.

Part I describes how perception—defined in this Article as the triggering event of reasoning—is affected by natural and unnatural distortions of reality. Drawing on both an interdisciplinary analysis of perception and a legal analysis of the institutional responses to the migrant threat, the Article uncovers critical disconnections of reality showing unequal distribution of the world’s refugee population between developed and developing countries, along with conflicts of diversity, not security. The Article refers to this process as the fabrication of law; that is, remaking the facts to make the law. Part II explains how the perceptional gap becomes the greatest flaw in the institutional conceptualization of migrants as threats. Going from perception to conceptualization, the Article illustrates the path of rationalization that leads to the migrant threat while reflecting on the way governments measure, assimilate, and redirect reality—including policies turning victims of persecution and conflict into security threats.

Part III advances a multidisciplinary analysis of perception to better understand international forced migration as a social and legal phenomenon. This approach, the Article finds, may help redress the perceptional gap along with resulting institutional responses.

I. SELECTIVE PERCEPTION: FRAMING THE MIGRANT THREAT

Perception is the cognitive process of identification, organization, and interpretation of senses in order to form a mental representation. Both natural and unnatural distortions of reality derive not merely from our biological nature but from our social interactions. These distortions affect our perception of reality and, as a result, our conceptu-


alization of the world. This is particularly evident in the case of migrants, who are increasingly viewed and treated as suspects, not victims, leading to gravitational concepts from which a redirected reality embedded in policy responses emerges.

Still, it would be a gross mischaracterization to downplay certain factors arising from international forced migration. For example, following the arrival of thousands of migrants, socioeconomic tensions have been reported in local communities in Bangladesh (Ukhia), Ecuador (Tulcán), and Lebanon (Akkar). These tensions often lead to expressions of xenophobia, social exclusion, and violence. However, for a government to use the very reasons the migrants seek protection to portray refugees as threats and neglect their human suffering is not only illogical but inherently inhumane.

A. The Facts as We Observe Them

This Article argues that the triggering event of reasoning—including policymaking and legal reasoning—is perception. The latter, moreover, drives the conceptualization of reality. Information is the metaphysical place to put the data we collect through our senses (per-

22. See Phillips, supra note 19.
ception) before we come about, rationalize, and define its existence and meaning (conceptualization).\(^{27}\)

We do not know things magically, however. The data upon which we build our idea of reality is not self-collected. As such, this Article argues that perception is precedent, information transitional, and conceptualization is the product of the cognitive-conscious mind. That is while intrinsically connected, perception precedes information because the latter cannot occur without the former. Information distinguishes itself from conceptualization, in that the former is neither an idea, a theory, nor a concept, but data waiting to be reflected upon. As Gottfried Wilhelm Leibniz explains, reasons cannot be known to us.\(^{28}\) We discover reasons through a cognitive process that begins with perception,\(^{29}\) thereby uncovering reality while making us aware of its existence. The product of the reality we perceive is information. Hence, the initial assessment of that information constitutes assertion of reality.

i. Natural Distortions: Bias and Fear Toward (Undesirable) Migrants

Bias is one of the critical root causes of the migrant threat. Bias is defined as “a tendency . . . or prejudice toward . . . or against something or someone.”\(^{30}\) In psychology, bias is defined as a perceptual and motivational shortcut of reality; in that it replaces, consciously or unconsciously, actual perception with modeled perception of the observer’s registered information by including elements that are not perceived or by leaving out others that, although present, are ignored.\(^{31}\) Bias is a corrosive assertion of reality resulting from an inverse proposition where conceptualization of reality is subjectively constructed

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27. Vedral visualizes information as the departing point for rationalization processes resulting from an inverse probability-propensity assertion: we know something might happen because it tends to happen. Though I agree with Vedral’s broad argument, whereby information accomplishes a quintessential role in our conceptualization of the world, I do not think of information as the triggering event of reasoning. See **VLATKO VEDRAL**, **DECODING REALITY: THE UNIVERSE AS QUANTUM INFORMATION** 2-3 (2018).

28. Leibniz distinguishes between perception (unconscious state of mind) and apperception (conscious state of mind), for which “we know is there” (learning attribute) is different from “we know what it means” (rational attribute). See **GOTTFRIED W. LEIBNIZ**, **Principles of Nature and Grace Based on Reason**, in **G.W. LEIBNIZ: PHILOSOPHICAL ESSAYS** 210 (Roger Ariew & Daniel Garber, eds., 1989).

29. Id.


31. Id.
before reality is even perceived. Thus, rather than following a rationalization process, bias leads the observer to register only the facts that conform to the observer’s pre-conceptualized version of the world.

Reality is never absolute but relative. A government may have legitimate national security concerns in suspending the entry of migrants that pose a threat to its population or territory. For instance, 9/11 showed that the notion of foreign nationals using a country’s immigration system\(^{32}\) to enter a country and harm its population is a plausible national security threat. Nevertheless, the use of immigration systems by terrorists does not mean that all those using these systems are terrorists. The gradual dismantling of basic human rights and refugee protections cannot be justified on national security grounds when it appears instead connected to racially oriented policies. Notably, it is difficult to assume that a government is exclusively acting to protect national security when it calls refugees “poison”\(^{33}\) or “animals”\(^{34}\) or refers to the programs it institutes to receive and treat migrants (including children) as “catch and return.”\(^{35}\) Language matters, especially when used in policymaking or by government officials.

As it turns out, immigration policies disarticulating refugee protections are preceded by narratives that promote discrimination and exclusion of refugees and asylum seekers based on their race, religion, or nationality. For example, following historic marches that openly promoted a “White Europe” during the celebrations of the National Independence Day in Poland in 2016 and 2017,\(^{36}\) Polish Prime Minister Mateusz Morawieck announced his government would not accept

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\(^{33}\) Gall, supra note 19.

\(^{34}\) Elise Foley, Trump Refers to Immigrants as ‘Animals.’ Again, HUFF. POST (May 17, 2018), https://www.huffpost.com/entry/trump-calls-immigrants-animals-again_n_5afca15fe46b779345d59e2a.


\(^{36}\) These marches gathered more than 75,000 and 60,000 supporters respectively. Matthew Taylor, White Europe: 60,000 Nationalists March on Poland’s Independence Day, THE GUARDIAN (Nov. 12, 2017), https://www.theguardian.com/world/2017/nov/12/white-europe-60000-nationalists-march-on-polands-independence-day [https://perma.cc/2247-6EUV].
“migrants from the Middle East and Africa.”

Undoubtedly, such institutional response contrasts with Poland’s initial response on Ukrainian refugees in 2022. What is more, nearly all populist parties in Europe have won regional and national elections by promoting narratives of exclusion and discrimination of migrants. This was the case of the Alternative for Germany (AfD), which became a major opposition party in Germany. Similarly, the coalition League and Five Star that took Matteo Salvini to power in Italy campaigned on anti-migrant rhetoric. Before Salvini’s election he announced: “We are no longer about north versus south but against those invading our country.”

The then elected Prime Minister of Italy, Georgia Meloni, called for a naval blockade of the Mediterranean coast to preclude African migrants from reaching Italy. Likewise, Hungary’s Prime Minister Orbán stated that, “we do not want to be a multi-colored country” and further declared that: “We will never allow Hungary to become a target country for immigrants. We do not want to see significantly sized minorities with different cultural characteristics and backgrounds among us. We want to keep Hungary as Hungary.”

It is difficult to reconcile concerns of terrorism, economic stability, and cultural identity with what appears to be xenophobia or racism. Bias is degenerative because it aims not only to distort reality but to redirect a new one that denies the former through institutional responses, in which those perceived as undesirable migrants are treated as dangerous people. I call this the fabrication of law; a process

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38. Brezar, supra note 3.


where politicians and policy makers remake the facts to make the law. In this context, policymaking bias on refugees destroys vital correlations of reality by redirecting it. Here policymakers deploy their bias to move law from protecting migrants to detaining or removing them. This change in reality leads to baseless claims on migrants bringing crime, which further misinform their institutional conceptualization as national security threats.

Not only does bias foster fear, but it is also inherently related to it. Thanks to technological developments in Magnetic Resonance Imaging (MRI), researchers have located the area of the brain where bias is formed. Based on measurements on neural activity, studies on race-related bias have established that the part of the brain known as the amygdala drives the formation of prejudice. In fact, two seminal studies found a core relationship between prejudice and racial attitudes toward young Afro-Americans whose face pictures were perceived by most races as a threat irrespective of the race and gender of the observer. Neurological studies have proved the existence of implicit or unconscious race-related bias in employment discrimination cases, the judicial system, education, healthcare, the media


47. Id. at 728-29. These findings were corroborated by subsequent studies on the amygdala's neural activity. See Mary E. Wheeler & Susan T. Fiske, Controlling Racial Prejudice: Social-Cognitive Goals Affecting Amygdala and Stereotype Activation, 16 PSYCH. SC. 56, 58-63 (2005).


2003), and even Internet. Social science studies further show that bias is formed through external information received from sources of authority such as parents. Biology studies also confirm that humans are more likely to learn apprehensions of fear and safety from in-groups. This means that ingroups’ perception, categorization, and conceptualization influence social attitudes toward outgroups.

ii. Unnatural Distortions: Populism and Dehumanization of (Undesirable) Migrants

Reducing our perception of reality to a single dimension means that there is only one possible version on which our conceptualization of reality develops. A unidimensional perception of reality proposes a uniform reality, for which any other event not conforming to this unique version of the world is rejected, neglected, and treated as untruthful. This is the less evolved form of perception-conceptualization, in that it denies a basic attribute of reality: relativity.

Populism develops as a concept with multiple associations. It emerges as a broader notion attached to different ideological prints and social movements like nationalism or socialism. And it appears frequently as a conflicting perception of power directed to protect the


52. Christopher Josey et al., The Portrayal of Race Online: A Content Analysis of the Portrayal of Racial Stereotypes in a New Media Environment, in RACE/GENDER/MEDIA: CONSIDERING DIVERSITY ACROSS AUDIENCES, CONTENT, AND PRODUCERS 138-142 (Rebecca A. Lind, ed., 2009) (analyzing underrepresentation of minorities in online news and with respect to headlines, stories, and images).


54. See Armita Golkar et al., Social Learning of Fear and Safety Is Determined by the Demonstrator’s Racial Group, 11 BIOL’Y LETT’S 2 (2014) (analyzing transmission of social perception-information through experimental cases with different racial ingroups and outgroups).


“little man” against the negligent establishment or elite.\(^{58}\) Populism is further described as an ideology built upon homogeneous yet antagonistic groups whose distorted depiction of society is deemed to be not only moral but necessary to advance the interests of the people,\(^ {59}\) which the populist actor characterizes as those belonging to the unrepresented group often characterized as the “little” or “forgotten” man.\(^ {60}\)

Though populism has gradually expanded in recent years throughout the world,\(^ {61}\) society today confronts populism’s most dan-

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58. Woods, supra note 56, at 6-10.
60. Id.
gerous version yet: radical populism. The rise of populism in America and the expansion of radical populism in Europe and Latin America show public policy correlations that cannot be neglected.⁶² For instance, following President Trump’s rhetoric of taking the country back,⁶³ the leader of the United Kingdom Independence Party, Nigel Farage, pushed the U.K. to leave the EU by advancing the very idea that “we want our country back.”⁶⁴ Moreover, the trend of reclaiming their countries from those of different races, religious beliefs, and ethnicities became a central platform for right-wing and left-wing parties in Europe.⁶⁵ Le Front National, led by Marine Le Pen, promoted the interests of France based on the exclusion of all other values considered foreign to French culture, history, identity, and society.⁶⁶ In the Netherlands, the people’s party PVV, led by Geert Wilders, called for more aggressive anti-immigrant policies.⁶⁷ The political party AfD
in Germany rejected refugee settlement in the country while promoting strong anti-immigrant policies.\textsuperscript{68} The co-leader of the AfD, Alice Widel, stated: "we are taking our country back from the politicians who have given up on it."\textsuperscript{69} Italy’s former Minister of Interior Matteo Salvini announced anti-refugee policies, including the abolition of humanitarian protection status, the exclusion of asylum seekers from reception centers promoting social inclusion, and the extension of their detention in return centers.\textsuperscript{70} This led UN Special Rapporteurs to denounce hatred against migrants in Italy.\textsuperscript{71} At the same time, populist parties in Poland, Czech Republic, and Hungary have cancelled the reception of African and Middle Eastern refugees,\textsuperscript{72} while populist parties in Norway (Progress Party), Sweden (Sweden Democrats), Finland (Finns Party), and Denmark (Danish People’s Party) have increased their constituency support thanks to anti-immigrant platforms.\textsuperscript{73} What is more, using the slogan “Argentina first,” Argentina’s former President Mauricio Macri issued a decree banning refugees from poor countries in Latin America.\textsuperscript{74}


\textsuperscript{73} Anders Wildfeldt, \textit{The Growth of the Radical Rights in Nordic Countries: Observations from the Past 20 Years}, \textit{MIGRATION POLICY INSTITUTE} (MPI) (2018).

The difference between populism and radical populism is that the former uses emotional distortion of reality to promote the idea of the “little man” forgotten by the establishment, whereas the latter uses bias to ascertain a unidimensional version of reality, in which the “little man” appears as victim of undesirable migrants singled out as the root-cause of social problems. In this context, radical populism not only uses but produces emotions through unidimensional perception of reality that the less fortunate is told will face should the populist narrative be defeated. This rhetoric does not only differ from reality but redirects it through distrust, dehumanization, violence, and hatred against migrants characterized as “terrorists,” “criminals,” and “invaders.”

Furthermore, current research on dehumanization patterns shows ascending and differential levels of blatant dehumanization, going from subtle racial aversion to outright violence of ingroups (White-European Americans) in relation to outgroups in the United States (African Americans, Arab Americans, Muslim Americans, Mexican immigrants). Dehumanization is the most pervasive form of bias because it induces moral disengagement from our judgement of others, along with aggressive measures the ingroup often sees as necessary to contain or even punish the outgroup. Research on the

78. Degenerative bias favors the perception of minorities as less valuable humans. See Nour Kteily et al., The Ascent of Man: Theoretical and Empirical Evidence for Blatant Dehumanization, 109 J. OF PERSONALITY AND SOC. PSYCH., at 901, 905, 907-931 (using studies on nationalities, minorities, and outgroups in the United States).
79. See John T. Jost, The Role of Stereotyping in System-Justification and the Production of False Consciousness, 33 BRITISH J. OF SOC. PSYCH., 2011 at 25, 27 (depicting core and consequential relationships between stereotyping, groups-interests, and social bias to protect individuals or group’s advantageous positions).
80. Id.
81. Id.
82. Id. at 26.
relationship between prejudice and perceived threats\(^{83}\) indicates ingroups’ diluted support for African and Hispanic migration\(^{84}\) as well as aversion toward Muslims.\(^{85}\)

Findings in neuroscience have established connections of empathy and distrust in the relationship between ingroups and outgroups.\(^{86}\) These studies confirm that the characterization of outgroups and the threats they allegedly pose trigger universal stereotypes\(^{87}\) which serve at justifying aggressive actions toward outgroups (e.g., foreign citizens, migrants, minorities).\(^{88}\) For example, dehumanization of Middle Eastern and African refugees in Hungary includes the police throwing food\(^{89}\) at asylum seekers and Prime Minister Orbán calling African and Middle Eastern migrants “poison”\(^{90}\) as well as a religious and cultural threat.\(^{91}\) This narrative was introduced by Orbán as his government was recruiting teams of “border hunters” (“Határvadász”) to capture migrants.\(^{92}\) Distrust towards these migrants in Hungary has been built on government propaganda through billboards containing images and questions linking terrorist attacks to refugee populations.\(^{93}\) The goal of this propaganda is to instigate fear among the population while fostering support for hostile policy responses on those perceived

\(^{83}\) Id. at 25 (indicating higher levels of dehumanization near the time actual terrorist attacks take place).

\(^{84}\) Id. at 13.


\(^{87}\) See Jennifer A. Richeson et al., *Amygdala Eye-gaze Direction Modulates Race-related Activity*, 11 GRP. PROCESSES & INTERGROUP REL., at 232, 233 (2008) (explaining the importance of compound stimulus clues in the perception of racial and social groups based on fMRI neural response of the amygdala).

\(^{88}\) See Jost, supra note 79, at 4.


\(^{91}\) See Vidra, supra note 11, at 17.


\(^{93}\) See Vidra, supra note 11, at 11 (reporting how the Hungarian Government posted billboards across the country with images on terrorist attacks in Paris and rhetorical questions on refugees entering Europe).
as undesirable and conceptualized as threats. These responses include: the construction of wired fences across the Serbian and Croatian borders, the systematic detention of migrants, the criminalization of humanitarian help for asylum seekers, and a refugee referendum rejecting EU’s quotas-settlement policy. Consider, moreover, former U.S. President Trump’s dehumanizing language on migrants:

We have people coming into the country or trying to come in—we’re stopping a lot of them. You wouldn’t believe how bad these people are. These aren’t people, these are animals, and we’re taking them out of the country at a level and at a rate that’s never happened before.

During a meeting with members of Congress to discuss a bipartisan agreement to extend the Temporary Protection Status (TPS) of nearly 200,000 Salvadorians and 60,000 Haitians—which the government decided not to renew—President Trump asked: “Why are we having all these people from shithole countries come here?” “Why do we need more Haitians?” “Take them out!”

Donald Trump’s statements show distrust language towards migrants. Both as candidate and as President, Donald Trump has made remarks fostering distrust between the ingroup and the outgroup. As a candidate, he stated: “When Mexico sends its people, they’re not sending the best. They’re not sending you; they’re sending people that have lots of problems and they’re bringing those problems. They’re

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bringing drugs, they’re bringing crime. They’re rapists and some, I
assume, are good people. . . .” In 2018, President Trump referred to
his past remarks as “100 percent right” while fabricating rates of rape
within the so-called migrant caravan traveling from Central America
through Mexico: “They’re not putting their good ones. Remember my
opening remarks at Trump Tower when I opened. Everybody said
‘Oh, he was so tough’. I used the word rape. Yesterday, it came out
where this journey coming up, women are raped at levels that nobody
has ever seen before.” Nevertheless, data then did not support Presi-
dent Trump’s claims. In fact, of the total 1,629,521 Mexicans that
entered the United States during the 2017 fiscal year, only eight per-
cent were apprehended by U.S. Border Patrol and for a wide range of
legal violations not necessarily related to rape.

Knowing how bias forms and develops is critical to fully appreci-
ate institutional conceptualization of migrants of certain races, reli-
gions, and nationalities, who are perceived as foreign to the host-
country’s culture, identity, race, religion, language, and values. Here,
the underscored evidence raises three major consequences. First, it
shows that bias does not only derive from sociopolitical distortions of
reality, but it is further internalized through perception of that reality,
ultimately affecting institutional response towards refugees and asy-
lum seekers. Second, the evidence pinpoints the presence of race-re-
lated bias across different areas of human interaction, for which its
pervasive effects cannot be dismissed, particularly considering current
distrust and dehumanization patterns towards refugees. Third, notwith-
standing bias may be formed early on in life, it can be taught and
untaught; starting by the very institutional figures that promote it.

B. The Facts as We Present Them

As this section illustrates, millions of refugees and asylum seek-
ers are frequently described as undesirable migrants to developed host

104. Id.
countries due to their race, religion, or nationality. In due course, these migrants are conceptualized as security, economic, and cultural identity threats, but is this perception and institutional conceptualization of migrants truly justified?

### i. Refugees and Asylum Seekers as National Security Threats

National security interests are framed as legal and policy protections concerning a nation’s strategic interests required to preserve the integrity, safety, well-being and development of its population, territory, critical infrastructure (e.g., food supply, stock market, electricity grids, communications, cyber structure), and


107. Protecting a country’s institutional systems is akin to the protection of the people living in such country. Still, from a national security perspective, refugees are not part of the population. See DEREK S. REVERON & KATHLEEN A. MAHONEY-NORRIS, *HUMAN AND NATIONAL SECURITY: UNDERSTANDING TRANSITIONAL CHALLENGES* 9-16 (2nd ed. 2019); JENNIFER DABBS SCIUBBA, *THE FACES OF WAR: POPULATION AND NATIONAL SECURITY* 3 (2011).


109. Traditionally, most countries have identified critical infrastructure protections within their national security strategies. Canada, for instance, identifies food supply, electricity grids, health, transportation, and communication (“national security plan”).

institutional systems (e.g., democracy, economy, environment, immigration, healthcare).\footnote{110}

Institutional responses to national security are deemed justified to the extent that they appear recognizable within progressively integrated values\footnote{111} that a given society sees as essential to its origin, identity, and preservation. As such, national security determinations solely circumscribed to a legal reference or fully detached from any moral apprehension seem rather extreme—especially since such determinations often affect different kinds of relationships and both born and foreign citizens. For example, one cannot help to wonder how the portrayal of refugees (“[migrants carrying] . . . all sorts of parasites and protozoa”)\footnote{112} made by the leader of Poland’s ruling political party Law and Justice Jarosław Kaczyński as well as his characterization of Muslim migrants as cultural security threats\footnote{113} the depiction made by Polish MEP leader Janusz Korwin-Mikke\footnote{114} or even PM Mateusz Morawiecki’s position of not accepting “migrants from Africa or the Middle East,\footnote{115} play with respect to Poland’s membership to the EU.”\footnote{116}

National security interests and threats are not alike. The former refers to military and non-military interests considered strategic for the development and preservation of a nation-state’s constitutional references such as rule of law, population, or territory and institutional sys-
tems such as the economy, healthcare, food supply, and communications, while the latter embodies policy determinations in response to events and actors threatening the realization of those interests. The eventual determination of national security threats further encompasses the assessment of identifiable threats against the backdrop of transactional values like individual rights and non-transactional values like governmental authority. This trend is more noticeable in antiterrorism laws where national security strategies are increasingly more aligned. Moreover, based on the principle of sovereignty states have the constitutionally and internationally recognized authority to control the population that lives in their territories as a necessary extension of state security. In this regard, the U.S. Supreme Court held that: “[E]very sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”

Legal scholarship acknowledges state authority to control territorial borders through immigration law—including culture and national identity, right of self-determination. Nevertheless, the

118. Transactional and non-transactional values vary in every country. Walter Lippman considers non-transactional values as a limit on national security, even in the face of war. National security is not in itself a value placed at the “apex of pyramid of values” because this position is “subscribed to a nationalistic ethics,” which Wolfers sees as a position leading to decisions beyond security. The choice governments face encompasses a moral duty to preserve the nation and its values, which can be nonetheless sacrificed to attain security if justification and adequate means exist. For discussion on this rationale, see Walter Lippman, U.S. Foreign Policy: Shield of the Republic (1943); see also Wolfers, supra note 111, at 500.
120. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (citing to Emer de Vattel, Le Droit des Gens 94 (1758)).
122. Continuity here is viewed in relation to the rights every nation holds to preserve historic and social traditions as part of its patrimony, not as an extended legal deference towards the continuity of a particular race. See David Miller, Immigration: The Case for Limits, in Contemporary Debates in Applied Ethics 200 (Andrew I. Cohen & Christopher Health Wellman eds., 2005).
123. Though language is a fundamental right within the realm of social, economic and cultural rights, the need to “preserve” the language (not merely the right to speak) is part of national identity. As such, countries may favor within their immigration laws immigrants that speak their language (e.g., Canada, France). See Susanna Mancini & Bruno de Witte, Language Rights as Cultural Rights: A European Perspective, in Cultural Human Rights 250 (Francesco Francini & Martin Scheinin eds., 2008).
preservation of a certain race in thought to be uniform societies, or even the preservation of a religion over other religions, or physical and behavioral traits within a given population or state territory are not considered national security interests. Such assimilations, in fact, contradict modern conceptualizations of tolerance, diversity, and puri-ethnic societies legally protected both domestically\textsuperscript{125} and internationally.\textsuperscript{126}

Under U.S. law, however, the power to exclude, deny entry, detain, and deport aliens appears unlimited particularly when it is exercised under national security law. In Jean v. Nelson\textsuperscript{127}—a long litigation involving more than 1,700 Haitians refugees that were held in isolated areas of Texas and New York during the 80s under the authority of the Immigration National Service and following a collective hearing in which no lawyer was present\textsuperscript{128}—the U.S. Supreme Court dismissed Equal Protection claims on migrants. Instead, the Court held that the contended racial discrimination claim was neutral on its face as neither the plaintiff nor the members of the class proved “discriminatory intent.”\textsuperscript{129} They reached this conclusion notwithstanding evidence on record matching each one of the requirements set forth by the Court in similar cases to grant constitutional deference. That is, (i) disparate impact, (ii) unusual or irregular proceeding vis-à-vis normally employed practices, and (iii) circumstantial and direct evidence of discriminatory purpose.\textsuperscript{130} Not only did the Court avoid discussing Due Process and Equal Protection Clause claims, but further affirmed\textsuperscript{131} the lower court’s ruling: “excludable aliens such as the Haitian plaintiffs have no constitutional rights with respect to their applications for admission, asylum, or parole.”\textsuperscript{132}

\textsuperscript{124} U.N. GAOR, 15th Sess., 947th plen. mtg. at 67, U.N. Doc. A/PV.947 (Dec. 14, 1960) (“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

\textsuperscript{125} E.g., Civil Rights Act of 1964, § 701, 42 U.S.C. § 2000(e); 34 C.F.R. § 100(3)(b)(6)(i).


\textsuperscript{128} For a complete description on the factual and procedural history of this case, see IRWIN P. STOTZKY, SEND THEM BACK 77 (2018).

\textsuperscript{129} Id. at 96.


\textsuperscript{131} Jean v. Nelson, 727 F.2d 957, 963 (11th Cir. 1984).

\textsuperscript{132} Id. at 968.
The U.S. Supreme Court has held that when the government raises national security concerns to deny hearing, admission, or parole to aliens, no constitutional challenge ensues because “whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”

In *Shaughnessy v. United States ex rel. Mezei*, the Court upheld the constitutional power of government delegated by Congressional will to imprison inadmissible aliens whenever national security concerns precede such determination. This interpretation led the Court, in two separate decisions—*Zadvydas v. Davis* and *Clark v. Martinez*—to grant diluted constitutional deference to the prolonged detention of aliens—specifically when their detention does not relate strictly to national security. In the landmark decisions *Kleindienst v. Mandel*, denying entry to an alien based on his political opinion; *Fiallo v. Bell*, establishing plenary immigration powers of Congress to exclude or grant special deference to any alien; and *Kerry v. Din*, holding that the denial of visa applications without notice does not raise constitutional rights violations, the Court denied constitutional challenges on immigration authorities’ decisions to exclude aliens. And in *Boumediene v. Bush*, the Court held that a *Writ of Habeas Corpus* against the government’s decision to detain enemy combatants overseas does not affect the government’s authority to impose detention to prevent acts of terrorism. In *Boumediene*, the Court held that the *Writ of Habeas Corpus* concerns individual liberty determinations—as opposed to national security assertions—which are nonetheless related to “an indispensable mechanism for monitoring the separation of powers.” Moreover, in spite of constitutional challenges to the First Amendment’s Establishment Clause and statutory challenges to the Immigration and Nationality Act (INA), the Court upheld President Trump’s Proclamation 9645 banning millions of refugees and migrants mostly from Muslim countries holding that both the immigration authority delegated by Con-

137. *Id.*
142. *Id.* at 797.
143. *Id.* at 765.
gress under INA\(^{144}\) to the President of the United States and the “historical practice” that ensues from such delegation authorizes the President to exclude migrants based on their nationality.\(^{145}\) That is, even though exclusion on religious grounds remains an open legal question, exclusion based on nationality finds constitutional precedent.

Terrorism is another decisive factor of national security that affects institutional conceptualizations of refugees and asylum seekers. Although terrorist attacks did not begin in the 21st century, low-sophistication methods using trained, non-trained, and self-radicalized foreigners and citizens\(^{146}\) have made terrorism a national security concern for host countries. In fact, one of the most common assumptions pundits make while articulating national security risk-assessments refers to the number of people entering the country.\(^{147}\) Still, aside from common restrictions on public health,\(^{148}\) criminal activity,\(^{149}\) political

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affiliation, terrorism was not initially considered a ground for inadmissibility, exclusion, or removal. However, following a terrorist attack in New York City in 1993, under President Bill Clinton Congress included “terrorist activities” as inadmissibility and deportability grounds. Under President George W. Bush, moreover, aliens were gradually assimilated to national security threats. Following the 9/11 Commission Report singling out critical gaps in intelligence and immigration services, Congress extended inadmissibility and deportability grounds to activities related to terrorism such as planning, funding, supporting, or facilitating acts of terrorism. After 9/11, Congress passed the U.S.A. Patriot Act of 2001, which expanded government surveillance programs, funding, institutional cooperation, and mechanisms to prevent and investigate terrorism. Similarly, the Homeland Security Act of 2002 created the Department of Homeland Security, and the REAL ID Act of 2005 provided guiding principles for the “War on Terror” and funding for military operations. It is worth noting that the War on Terror calling for an international military campaign targeting terrorist organizations and sponsoring states has been misrepresented as a war between religions and cultures. Such assimilation portrayed anti-terrorist laws

156. The constitutionality of this Act has been questioned due to “unchecked powers,” resulting from the contended institutional enhancement (U.S. Attorney General) that surveillance programs provide. See ACLU, SURVEILLANCE UNDER THE USA/PATRIOT ACT (2018), https://www.aclu.org/other/surveillance-under-usapatriot-act.
159. Religious extremism promoted by terrorist organizations did eventually alter the perception of Islam in the West. However, the association between terrorism and Islam finds various theoretical contentions. See Daniel Byman, Al Qaeda, the Islamic State, and the Global Jihadist Movement (2015); see also
as the new normal and the War on Terror as an unavoidable clash of civilizations.\textsuperscript{160}

Data indicate that of the 3,391,203 refugees admitted to the United States from 1975 to 2017, only 25 were considered potential or actual terrorists,\textsuperscript{161} representing a security risk of 0.00074% in 40 years. Of 25 identified terrorists, 3 attacks killed 3 people in the 1970s.\textsuperscript{162} In this period, the projected risk of being killed by a refugee was estimated to be 1 in 3,855,342,265.\textsuperscript{163} And of 732,168 asylum seekers admitted from 1975 to 2017, only 11 were identified as terrorists, representing a security risk of 0.0015%.\textsuperscript{164} The projected risk of being killed by an asylum seeker in the United States was estimated as 1 in 1,285,114,088.\textsuperscript{165} Though mathematically justified,\textsuperscript{166} probability cannot be assimilated as an uncontested legal fact indicating that refugees are not terrorists, but rather as a mathematical valuation of the security risk their reception poses, in that refugees are less likely to commit terrorist attacks. Probability can be thus used to inform proportionality as a leading—yet not exclusive—reference. Proportionality, on the other hand, has been accepted across legal disciplines and systems as method of interpretation in decision-making processes concerning rights or interests in conflict,\textsuperscript{167} for which it


162. Id.
163. Id.
164. Id.
165. Id.

167. From constitutional law (fundamental rights), criminal law (self-defense), international humanitarian law (use of force), contracts law (unconscionable contracts), and torts law (comparative negligence) to arbitration (invest-state arbitration) and international human rights law (state interference), proportionality is considered a general principle of law for the resolution of conflicts between competing interests and rights. See EMILY CRAWFORD, \textit{Proportionality, in Max Planck Encyclopedias of International L.}, (May 2011) https://opil.loulaw.com/view/10.1093/law:epil/
can serve to outweigh common differentials between refugees and national security protection.

It must be noted, however, that host countries hold a constitutional duty—also recognized under international refugee law\(^{168}\)—to protect their population and territory, even if that means rejecting refugees. The number of admitted asylum seekers linked to terrorist activities has been internalized as an admissible legal and policy reference used to evaluate the threat that the reception of these migrants poses to the national security of the United States.\(^{169}\) Still, using the number of terrorist attacks committed by refugees as the main reference to either justify or dismiss national security restrictions for undesirable migrants can be misleading and ultimately counterproductive. All that it takes to change public opinion and eventually policy on the perception-conceptualization of similarly categorizable refugees by race, nationality, or religion is for one or a few migrants to commit terrorist attacks. This occurred in France after the Paris synchronized attacks of 2015,\(^{170}\) Germany after the Berlin Christmas market attack of 2016,\(^{171}\) Finland after the Turku market square attack of 2017,\(^{172}\) and in the

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\(^{168}\) Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137, arts. 32(1), 22(2) [hereinafter Refugee Convention].


\(^{170}\) In 2015, terrorist attacks in Paris killed 129 people. Evidence indicated that a Refugee Travel Passport belonging to a Syrian national was found on one suspect. Although questions on whether the passport belonged to the suspect remain, authorities in Serbia and Greece confirmed the passport was used by a Syrian national entering the island of Lesbos in Greece who claimed asylum in Serbia. See Associated Press, With the World on Edge, France Seeks Clues, World Debate Answers, Maclean’s (Nov. 15, 2015), https://www.macleans.ca/news/world/with-the-world-on-edge-police-seek-clues-leaders-debate-answers/#gallery/portraits-of-paris-in-mourning/slide-1 [https://perma.cc/K7M6-XWDA].

\(^{171}\) In 2015, an asylum seeker from Tunisia whose claim had been denied drove a truck into a crowd in a market in Berlin, killing twelve people. Official preliminary reports underscored structural failures in national security information systems. See Ben Knight, Germany Launches New Investigation into Berlin Market Attack Failures, DW (March 1, 2018), https://www.dw.com/en/germany-launches-new-investigation-into-berlin-christmas-market-attack-failures/a-42788351 [https://perma.cc/R8VC-P2US].

\(^{172}\) In 2017, a self-radicalized asylum seeker whose claim had been denied killed two people with a knife in a public market located in the city of Turku. See Thomson Reuters, Refugee Denied Asylum Receives Life Sentences in Finland Stabbing Attack, CBC (June 15, 2018), https://www.cbc.ca/news/world/finland-mass-stabbing-sentence-1.4707384 [https://perma.cc/8SAM-RCYF].
Netherlands after the Amsterdam Central Station attack of 2018. Assuming, nevertheless, that national security threats are identified by focusing exclusively on the immigration system or the immigration status the perpetrator had before or during the attack (or never had in the cases of rejected asylum applications) can be far more dangerous than the threat national security assessments aim to contain.

Consider, for instance, the publicized terrorist attacks in Boston in 2013 and Lyon in 2019. In the first case, the two brothers who activated a bomb during the city’s marathon who subjected Cambridge and Boston to excruciating hours of terror, were U.S. citizens, yet they entered the country with a non-immigrant visa and subsequently claimed asylum protection. Assuming that either the vetting process used during their asylum application a decade earlier did not meet current national security standards, or that they waited ten years to perpetuate the attack is, at best, misleading. In the second case, the fact that an Afghan refugee was found attacking French citizens with a knife in Lyon would have indicated that refugees from Afghanistan represent a national security threat to France. However, a subsequent investigation revealed that the refugee in Lyon was mentally ill. These assertions are counterproductive because data show that anyone can be a terrorist—including not only refugees but, as it turns out, mostly host-countries’ citizens. In fact, from 2014 to 2018, 66.5% of individuals committing terrorist attacks in the United States, Canada, Europe, and Australia were citizens, and only 6.8% had refugee status and 3.4% were asylum seekers.

175. Id.
177. Data correspond to a cross-reference collection of reported and highly publicized terrorist attacks in these countries between June 2014 and December 2018. Data do not include unreported incidents, plots, or other events still under investigation. See LORENZO VIDINO, FRANCESCO MARONE & EVA ENTEMMANN, FEAR THY NEIGHBOR: RADICALIZATION AND JIHADIST ATTACKS IN THE WEST (IPSA, 2017), https://icct.nl/app/uploads/2017/06/FearThyNeighbor-RadicalizationandJihadistAttacksintheWest.pdf; U.S. DIRECTOR OF NATIONAL INTELLIGENCE, ODNI ARCHIVES/Re-
These findings suggest three things. First, the greatest national security threat arising out of jihadist-related terrorism for these countries is their own citizens, not refugees. Second, the foreign threat portraying refugees as terrorists pales in comparison, proportion, and relation to the nearly 30 million refugees worldwide at the time. Third, though the possibility of refugees committing terrorist attacks in these countries cannot be dismissed, such possibility does not establish that refugees pose a major national security threat.

ii. Migrants as Economic and Cultural Identity Threats

The number of refugees entering host countries is often presented by critics as the leading factor supporting the economic threat where refugees constitute an economic burden to host-countries’ economic stability.\footnote{178} The critical inquiry here is whether distrust towards migrants is either an incidental or a justifiable axiological feature in the conceptual development of the relationship between immigration and national security. This economic threat falls short on its own corollary premise of having too many migrants. Despite the publicized figures (e.g., “Canada resettled more refugees than any other country”)\footnote{179} and

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language frequently used\textsuperscript{180} to convey the idea that developed host countries are being invaded by migrants, data do not support such claims. In 2018, the number of refugees in the United States (313,241), China (312,756), Japan (1,895), the United Kingdom (126,720), France (368,352), Italy (189,243), Brazil (11,327), and Canada (114,109)\textsuperscript{181} represented tiny fractions (0.09%, 0.02%, 0.001%, 0.2%, 0.5%, 0.3%, 0.005%, 0.3%, respectively)\textsuperscript{182} compared to the population in each one of these countries. Even in Germany, which hosted the largest refugee population among developed countries at the time,\textsuperscript{183} the refugee population represented only 1.2%. Of the 1.4 million refugee-resettlement claims made worldwide,\textsuperscript{184} only 92,400 people were granted refugee status.\textsuperscript{185} And of these, only sixteen percent were resettled in developed countries.\textsuperscript{186}

If anything, integrated migrant populations boost host-countries’ economic growth.\textsuperscript{187} Data confirm that at the time that most hostile immigration policies were approved around 2018, the largest migrant


\textsuperscript{183} UNHCR, supra note 181, at 66.

\textsuperscript{184} Id.

\textsuperscript{185} Id.

\textsuperscript{186} Id.

populations were hosted not in developed countries, but in poorer countries (e.g., Sudan 1,078,287, Uganda 1,165,653, Ethiopia 903,226, Lebanon 946,666, D.R. of Congo 529,061, Chad 451,210, Cameroon 380,329, Yemen 264,369)\textsuperscript{188} and developing countries (i.e., Turkey 3,681,685, Pakistan 1,404,019, Colombia 1,174,000, Bangladesh 906,645, Iran 979,435, Jordan 715,312).\textsuperscript{189} Therefore, the data does not support the portrayal of refugees as economic burdens for developed host countries when poor and developing countries try to abide by international law commitments despite their economic limitations. Economic tensions ensue only when migrants are resettled under reception-seclusion systems\textsuperscript{190} or reception-integration systems without resources.\textsuperscript{191} This is due to a disproportionate distribution, in which eighty-three percent of refugees worldwide are hosted in low- and middle-income countries like Turkey, Colombia, and Uganda (e.g., Turkey 3.8 million, Colombia 1.8 million, Uganda 1.5 million, Pakistan 1.5 million)\textsuperscript{192} while high income countries continue to reduce their intake of refugees.\textsuperscript{193}

Despite socioeconomic challenges, effective resettlement of migrants occurs under reception-integration\textsuperscript{194} or self-reliance-integra-

\textsuperscript{188}. UNHCR, \textit{supra} note 181, at 65-68.

\textsuperscript{189}. \textit{Id}.


\textsuperscript{192}. \textit{See United Nations High Commissioner for Refugees (UNHCR), Global Trends: Forced Displacement in 2021} (2 June 2022), \url{https://reliefweb.int/attachments/66a09358-2cf3-448c-846a-d299f87768c/62a9d1494.pdf}.


tion systems.\textsuperscript{195} Although reports show significant differentials among refugee groups,\textsuperscript{196} Canada offers public initiatives and a private program known as refugee sponsorship directed at integrating migrants as they become assets to the Canadian economy and the communities that resettle them.\textsuperscript{197} Likewise, Uganda offers refugees education, health care, the possibility to move freely, and a parcel of land to work and live in. In spite of limited funding and the environmental impact, this system has positively impacted the country’s economic growth.\textsuperscript{198} The size of refugee populations in developed host countries raises a defining premise: there are not that many. This precludes perceptual-gap claims towards migrants as being too many and too different while depicting them as cultural identity threats.\textsuperscript{199} First, previously cited figures of resettled refugees and asylum seekers in developed countries by the end of 2018 indicate they could barely threaten—much less destroy—the language, traditions, religion, or culture of these host countries. For example, the very idea of 718,994 asylum seekers in the United States affecting the national identity of more than 330 million Americans, 29,040 asylum seekers in Japan threatening the traditions of more than 126 million Japanese, 603 asylum seekers changing the cultural identity of nearly 1,400 million Chinese, or 78,808 asylum seekers destroying the values and culture of 37 million Canadians falls short on its own. In this context, the portrayal of refugees and asylum seekers as cultural identity threats assumes that they are not just “too many” but an intrinsically related group representing a threat to the host country’s population. As noted, data show that refugees hosted in developed countries neither come from the same country nor speak the same language nor profess the same


\textsuperscript{199} See, e.g., Yasmin Serfian, \textit{Italy Is Getting Its First Female Leader—A Polished Far-Right Firebrand}, \textit{Time} (September 22, 2022), https://time.com/6215723/italy-election-giorgia-meloni-far-right (reporting Italy’s PM narrative on ethnic substitution); Thorpe, \textit{supra} note 43 (quoting Hungary’s PM narrative on cultural identity threats).
religion. As such, the cultural identity threat depiction is disingenuous, because even if we concede there are too many migrants in these countries, they would represent a threat not only to the host country’s culture but to themselves because they come from different cultures, too.

The perceptual gap of undesirable migrants as being too different leads to insurmountable contradictions. The idea of preserving one culture and one national identity in each country regardless of others is debunked by the rise of pluri-ethnic, multicultural, and mobile societies. As it turns out, the population of ‘traditional host countries’ increasingly includes people from around the world. In fact, the international migrant population reached 281 million in 2020. Considering these trends, cultural identity is no longer a homogenous but an evolving concept. Ergo, the fear, the conflict, and the struggle for power. Such claims become an evolving assertion of reality informed by the very values on which a country’s identity is not only built but evolves.

It is worth noting that though migrants do not represent a security, economic, or cultural identity threat to developed host countries, their exclusion and refoulement to poor and developing countries can give rise to socioeconomic tensions within local populations hosting a rather disproportionate number of refugees. This is often due to the host country’s limited economic resources and the reception model being used. This finding is replicated in major refugee populations across the world. For example, in March 2021, Colombia hosted thirty-two percent of all Venezuelan migrants in Latin America which, at the time, outnumbered the population and economic resources of the city of Cúcuta located on the Colombian border with


Venezuela. Economic and social tensions have developed between Venezuelans and Colombians notwithstanding similar cultural references of language and religion. Similaar tensions occur in Turkey, hosting 4 million refugees in September 2021, including 3.7 million Syrian refugees. Notwithstanding policy initiatives to support housing, social services, and work permits, there has been a growing concern among local populations in Turkey over low-skill employment competition. Likewise, macroeconomic impacts on prices, wages, and poverty have been reported along Teknaf-Cox’s Bazar in Bangladesh—hosting the largest refugee population in Asia with 918,000 Rohingya refugees by the end of December 2021. In Uganda, hosting the largest refugee population in Africa—1,494,505 by the end of May 2021—social tensions have been reported too. These tensions ensue from a problem of proportionality related to the unequal distribution of refugees, not security.

Selective perception of migrants is influenced not by security, but by natural distortions of reality like bias and fear as well as unnatural distortions like populism, uncovering untenable disparities, and conflicts of diversity (not security). However, in the physical perception of reality such influences are replaced by verifiable references casting doubt on our thought to be subjective and objective assertions of reality.

203. Id.
II. PHYSICAL PERCEPTION: FRAMING THE MIGRANT THREAT

The area in which perception has reached its highest level of evolution is physics. This is because, unlike other disciplines and forms of reasoning, physics considers not just what we observe but what we cannot, yet should, observe to better understand how the universe works. Here, we test by measuring perception before even elaborating a theory about it. This makes conceptualization of reality a major step in human evolution and perception, the prime source of rationalization. The redirection of reality that ensues from the perceptual gap informing conceptualizations of refugees and asylum seekers is defined through our physical perception of reality. Admittedly, legal reality—that is, the one that matters to the law in that it leads to legal effects—has its own filters such as relevance, authority, and undue prejudice.

Yet both physical and legal reality are defined by a precedent stage of reasoning: perception. Without it, neither scientific principles nor legal effects can be drawn.

A. The Facts as We Measure Them

What otherwise could have been addressed exclusively through premises and nuances of national security, constitutional law, international refugee law, and international human rights law requires a more comprehensive interdisciplinary analysis. This is because what is often questioned in the relationship between protecting refugees or host-countries’ national security is reality itself. For example, that “refugees are criminals,” that they come to “harm us,” to “rape women,” to “take our jobs,” to “change our language, religion, and culture.”

i. Measuring Reality: Objectivity, Subjectivity, Relativity

Physics proposes a critical connection between perception and reality. The correlation between perception and reality in physics is rather simple: once our perception of the world changes, our reality changes, for which perception is both a triggering event of reason-


212. This reaction is also framed as intuitive physics describing commonsense reactions on physical events around us. See Norman H. Anderson, Intuitive Physics: Un-
ing and a directional factor of reality. In this context, populist governments’ most influential yet dangerous perception-conceptualization of migrants as threats lies in their intangible proposition of reality. Society is transitioning from the 20th century’s Postwar paradigm on equality and human dignity to 21st century’s paradigms on diversity and security portraying Muslims as terrorists, migrants as national security threats, or Mexicans as criminals.

Unlike law, physics—that is, the study of reality and its primary functions and relations—builds on a tangible approach to reality: tested, rational, evolving. Three premises, in short, explain physical perception of reality—which is, again, a quintessential factor both in the natural world and the legal world. The first premise of reality in physics hinges on its measurable existence whereby reality exists because it is measurable. We perceive the world because our perception has been measured. The second premise of reality in physics indicates that our physical world aims to be not subjectively but objectively measured, so that its resulting conceptualization may become universal scientific values—this premise, as we will explore in this section is the second element radical populist governments driving policymaking changes on migrants often question: the existence of an objective truth. And the third premise of reality in classical physics is that reality is not absolute but relative. We may accept that reality changes in relation to the observer’s perception of reality making its measurable marks—time, space, acceleration—relative, if not variable, depending on the observer’s position—at rest or moving—with respect to the object or reality being perceived. The latter is best explained through evolving perception informing the Special Theory of Relativity.


215. Subjectivity is becoming an increasingly common proposition in the rationale and the narratives informing national security, public policy, and refugee protection. Studies indicate that media coverage on terrorist attacks tends to focus more on attacks perpetrated by Muslims. See Erin M. Kearns, Why Do Some Terrorist Attacks Receive More Media Attention Than Others?, 36 J.MART. Q. 985 (2019); Caroline M. Corbin, Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda, 86 FORDHAM L. REV. 455 (2017).
Albert Einstein’s initial observations on reality consider three elements: time, space, and exponential motion—represented by the highest then-known possible acceleration, the speed of light. Einstein’s theory of special relativity proposes that time slows down in that the faster one moves through space, the slower one moves through time and vice versa. The theoretical premise is that time passes differently in different places depending on how the observer and the object being observed move considering time and space with respect to one another. To illustrate it, this theoretical perception-assertion of reality portrays a person observing a tower clock’s hands while traveling at the speed of light in a train. The outcome of this exercise reveals that the observer’s motion (traveling at twice the speed of light) makes space-time relationship relative with respect to the observer’s motion. This means that the core unit informing reality—time-space—is neither objective or absolute with respect to the clock’s hands (i.e., it moves at one unique pace) nor subjective with respect to the observer’s thought to be reality (i.e., it moves at my pace), but relative in relation to both the clock’s hands and the observer’s motion (i.e., it moves according to the observer’s motion-acceleration and the object’s position). Reality, in sum, is neither objective nor merely subjective but relative.

To the legal world, Einstein’s observations on reality mean that before we can conceptualize the reality that we hold as relevant—whether in the natural world or in the legal world—we must acknowledge that the measuring of reality as fact hinges, in part, on our physical perception of the world. Hence, the physical elements that define our perception of reality cannot be foreign to its institutional conceptualization. Policymakers must be thus very careful in making sure that the perception of the reality they aim to regulate is not built exclusively on thought to be subjective and objective truths, but on the relative dimensions (e.g., socioeconomic) that present certain refugees and asylum seekers as undesirable migrants or threats. Therefore, before institutional agents conceptualize migrants as threats and treat their

216. Eventually, Einstein added a new element to his equation of reality (“gravity”) to explain why time not only passes differently in different places, but also at different pace or speed. For an overview on Einstein’s progression of relativity, see ALBERT EINSTEIN, THE MEANING OF RELATIVITY (2nd ed., 1945).
217. Id.
218. This means that measurement will be objective reality when time-space are experienced equally by different observers traveling in the same seat of the same train (observer’s position), at the same speed (observer’s motion), yet relative in relation to someone else traveling, for instance, in another train, another seat, at a lower speed, or in dissimilar direction.
presence and protection claims as illegal while telling migrants—including thousands of children—fleeing persecution and conflict, “do not come here.”

Such agents must ascertain in a pre-conceptualized stage, perception-assertion of reality, that migrants are genuinely a threat.

Immanuel Kant further advanced a philosophical disquisition on perception-assertion of reality in the natural world by dividing it between priori cognition, instincts that are independent from our experience and embedded in the logic of the human brain, and posteriori cognition, charity reflected throughout our experience. In the Kantian reflection on perception—envisioning a progressive assertion of reality moving from the appearance of an object (pure intuition) to its actual sensation or encounter (empirical intuition)—time-space is viewed as priori thoughts. Kant considers reality encoded both in the known and in the unknown (or yet-to-be-known) world.

This means that there is a stage when humans become aware of perception before moving to conceptualization. That moment, this Article holds, is perception-assertion of reality. Therefore, if we perceive migrants as threats, we must make sure our empirical experience confirms our perception before we conceptualize them as threats.

**ii. Redirecting Reality: Reception and Treatment of Migrants**

The reality we create through our actions, foster through our inactions, or redirect through our reactions is the reality affecting us (motion-action from Newton’s first law of motion) and others encountering our world (motion-reaction from Newton’s third law of motion). This Article argues that we can create reality by redirecting it, not only through perception (the triggering event of reasoning), but also through conceptualization (a subsequent event of reasoning) and decision-making process (a consequential event of reasoning). For example, during the Syrian Civil War, the state of reality shows indifference and slow reaction on the part of most

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221. Id. at 155-156.
222. See ISAAC NEWTON, NEWTON’S PRINCIPIA: THE MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY 83 (Andrew Motte trans., 1846).
223. Id.
governments in Europe vis-à-vis millions of migrants escaping Syria. Here both inaction and dysfunctional reaction set forth the reality that Syrian refugees encountered: violence in their homeland as well as death, detention and dire humanitarian conditions in Europe. Eventually, the image of Alan Kurdi, a 3-year old Syrian asylum seeker who drowned in the Mediterranean Sea in 2015 while being smuggled from Turkey to Greece changed—for a few months at least—the perception of European citizens and policies concerning the refugee crisis in Syria. Suddenly, Alan’s picture appeared...
THE PERCEPTIONAL GAP

and became a symbol of indifference and human suffering. The perception of migrants as victims of conflict here can be seen in the increase of immigration admissibility quotas in host countries resulting in a period of empathy towards refugees. For instance, Germany saw a net increase in 2015 of 303.4% of the number of asylum applications lodged by Syrian nationals with respect to the year 2014. Yet a volatile combination of factors in Europe, including terrorist attacks in France, Belgium, Germany and growing expressions of hatred, xenophobia, and violence against refugees, along with the ascension of populist leaders, led to the


235. See Rebecca Alder-Nissen et al., supra note 16.


perception of migrants as threats—including narratives promoting their reception and treatment as suspects.

This led several countries, including Germany, Spain, Italy, and United Kingdom, to shift immigration policies and promote international agreements and extraterritorial controls aimed at deterring refugees from reaching their territories, which further precluded migrants’ access to courts in these countries. Then, a redirected reality emerged: unwelcome refugees. As a result, Germany saw a decrease of 81.6% in the number of first-time asylum applications lodged by Syrian nationals in 2017 with respect to the year 2016.

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248. Percho, supra note 16.


252. See EMN, BAMF DEUTSCHLAND (FEDERAL OFFICE FOR MIGRATION AND REFUGEES, IMMIGRATION), MIGRATION, INTEGRATION, ASYLUM 42 (2017), https://
Incidentally, in 2016, migrants smuggled to Europe\(^{253}\) made this the deadliest year with a toll of 5,076 deaths.\(^{254}\)

Perception-assertion of reality is a precedent yet defining stage of rationalization informing its institutional conceptualization. For instance, U.S. President Donald Trump stated that migrants arriving to the southern border were “illegal immigrants” or were “illegally” entering the United States. On January 18, 2019, he denounced a “national security crisis”\(^{255}\) on the southern border while stating: “A lot of people want to come into our country and there are a lot of people we do not want; we have criminals, we have gang members, we have human traffickers, we have drug smugglers; we don’t want them in our country.”\(^{256}\)

To justify President Trump’s request to Congress of $5.7 billion to build a wall across the United States.-Mexico border, U.S. Homeland Security Secretary Kirstjen Nielsen indicated that: “CBP detected over 3,000 of what we call special interest aliens trying to come to the country on the southern border; these are aliens that the intel community has identify of concern.”\(^{257}\) Moreover, in an interview White House Press Secretary Sarah Huckabee Sanders stated: “We know that roughly nearly 4,000 known or suspect terrorists are coming to our country, and we know that our most vulnerable point of entry is our southern border.”\(^{258}\) Nevertheless, a press release posted on the website of the U.S. Department of Homeland Security at the time stated:


255. See Trump GLOB. NEWS, supra note 15.

256. Id.


258. Id.
we stop on average 10 individuals on the terrorist watchlist per day from traveling to or entering the United States—and more than 3,700 in Fiscal Year 2017. Most of these individuals are trying to enter the United States by air, but we must also be focused on stopping.\footnote{[259]} The core unit—time-space—determining physical perception of reality precludes these public officials’ accounts. Physical references of reality do not exist here because the announced figure of migrants entering the United States represents a different time—2017—and the place of entry, a different space—by air. Not only did the DHS Secretary contradict herself with respect to data released by the institution she was leading,\footnote{[260]} but also with regards to U.S. Border Patrol data indicating that only six individuals were detained in 2018 under the suspicion of being related to terrorist organizations,\footnote{[261]} along with Department of State data.\footnote{[262]} Nonetheless, following these perception-assertions of reality, the Trump administration issued some of the most aggressive immigration policies in the world institutionalizing migrants as threats, which included: the systematic exclusion of more than 8 million refugees worldwide based on national origin;\footnote{[263]} the de-
264. Incarceration, and separation of migrant families and children: the refoulement of asylum seekers found at the United States-Mexican border while deterring their access to U.S. courts.

265. Data indicates the United States detains more asylum seekers than any other country in the world. In 2020, the United States reached 182,869 immigration detainees.

266. In 2018, U.S. Attorney General Jeff Sessions issued a memorandum known as “zero-tolerance policy” ordering all federal prosecutors across the southwest border to prosecute anyone unlawfully entering the United States. The memorandum led to the separation of thousands of families seeking asylum in the United States. Yet, following public backlash after reports indicating that nearly 2,000 children had been separated, President Trump issued an Executive Order suspending the policy while instructing the Attorney General to renegotiate the “Flores Agreement” (i.e., a court order setting down limits on child detention, Reno v Flores). In 2018, two children from Guatemala seeking asylum, Felipe Gomez Alonzo and Jakelin Caal, aged 8 and 7 respectively, died while in the custody of U.S. authorities.

the deployment of the military across the southern border, along with the commander-in-chief’s authorization to use lethal force against migrants, including children;268 the pledge to U.S. Congress of $5.7 billion to build a “wall” across the southern border; and the removal of the protective status TPS and DACA affecting nearly 1 million migrants and leading to a self-induced government shutdown.269 Yet, data did not support the “legal assertions of reality” made by President Trump270 and members of his cabinet271 concerning the security threat that refugees and asylum seekers pose. At the time, data showed historic low levels of migrants apprehended while entering the United States.272 In 2018, 396,576 immigrants were detained, which represented the fifth lowest number since 1973. It is also difficult to envision a national security crisis attributable to migrants when at

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least forty percent of those detained were unaccompanied children and families.\textsuperscript{273} Data, in short, show that refugees do not represent a security threat to the United States. Though the 9/11 terrorist attack was perpetuated exclusively by foreign nationals, none were refugees.\textsuperscript{274} Both historic data\textsuperscript{275} and recent strategic intelligence assessments\textsuperscript{276} show that terrorist attacks on U.S. soil have been committed mostly by U.S. citizens and legal residents.

It is true that under U.S. national security law,\textsuperscript{277} constitutional law,\textsuperscript{278} immigration law,\textsuperscript{279} and public international law,\textsuperscript{280} the United States has the right to protect its population and territory against foreign threats. However, under international refugee law\textsuperscript{281} and international human rights law,\textsuperscript{282} the entry of forced migrants who aim to claim asylum protection cannot be considered “illegal” because the right to apply for asylum cannot be unilaterally proscribed by one country.

Under international humanitarian law, moreover, asylum seekers are not considered enemy combatants—not even under U.S. law.\textsuperscript{283}

\textsuperscript{273} Id.
\textsuperscript{277} 8 U.S.C. § 1226(a) [“mandatory detention of terrorist aliens”] and (c) [“detention of criminal aliens”].
\textsuperscript{278} \textit{U.S. CONST.}, art. II, § 2, c. 2; Chae Chan Ping v. United States, 130 U.S. 581 (1889) (challenging the \textit{Scott Act of 1888}, that is, an addendum to the \textit{Chinese Exclusion Act of 1882}); Mandel, 408 U.S. at 769 (upholding the Attorney General’ authority to refuse entry based on alien’s ideas or political opinion); \textit{Bell}, 430 U.S. at 797-98 (deciding on preferential immigration status derived from illegitimate child while upholding exclusionary and plenary powers of Congress over aliens).
\textsuperscript{279} 8 U.S.C. § 1182(1)(A)(i); see also 8 U.S.C. § 1182(f).
\textsuperscript{281} \textit{Refugee Convention, supra} note 168, art. 31(1).
\textsuperscript{283} The U.S. Supreme Court used the government’s definition to establish its constitutional meaning: “an individual who [was] part of or supporting forces hostile to the United States or coalition partners.” This is a profile that children fleeing persecu-
Therefore, the use of force against migrant children and their parents does not pass the proportionality test which balances security justification against humanitarian need. Therefore, President Trump’s authorization to use lethal force on migrants violates international humanitarian law—especially considering that in 2018 there were thousands of children among these migrants including 10,136 unaccompanied children from Mexico, 22,327 from Guatemala, 10,913 from Honduras, and 4,949 from El Salvador. Such institutional response infringes international human rights law too.

Consequently, this Article submits that exposing migrants fleeing persecution and conflict to dire humanitarian conditions and greater risks in other countries violate both international human rights law protections and international refugee law principles.

B. The Facts as We Assimilate Them

Perception is defined as the preliminary cognitive function consisting of the recognition of the world through our senses. Accordingly, perception-assimilation of migrants is a key stage in the
rationalization process leading to their institutional conceptualization as threats.

i. Perception and Misperception

Modern psychology breaks perception into two major theories. The Bottom-Up Theory\(^{291}\) depicts perception as an attribute encoded in human nature beginning with the stimuli or sensorial contact of the environment evolving from simple to complex cognitive tasks. Neither prior knowledge nor interpretation of information or acquired-learning abilities need to be assimilated within our perceptual development of reality; “what you see is what you get.”\(^{292}\) The information we collect is obtained through perception; our understanding of that information is conceptualization. Hence, information is the product of perception. Conversely, the Top-Down Theory\(^{293}\) describes perception, not in relation to our encoded-native abilities, but in connection to our experienced-acquired abilities that help us recognize reality that results from experience to prediction. Here, knowledge precedes perception, turning perception into a cognitive construction of reality that results from recognizing and assimilating prior information.\(^{294}\) Here, moreover, perception-conceptualization encompasses the ability to conceptualize information even before the latter is collected.\(^{295}\) This approach, however, suffers from a circular assertion of reality, in that for conceptualization to exist the concepts that tell us that we are in presence of reality must be elaborated before reality is perceived. Innuendo, we must know something before we observe it. Then, arguing, we define things before we know they even exist. Such a proposition uncovers a misunderstanding of the entities of human evolution and interaction: perception, assimilation, conceptualization and, from then on, experience and prediction.

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\(^{291}\) JAMES J. GIBSON, THE SENSES CONSIDERED AS PERCEPTUAL SYSTEMS (Leonard Carmichael, ed., George Allen & Unwin Ltd. 1966) (arguing that both the environment and the light reaching the eye provide enough information for perception to occur directly without requiring further knowledge on the information we perceive); see also James J. Gibson, A Theory of Direct Visual Perception, in THE PSYCHOLOGY OF KNOWING (Joseph Royce & William Rozeboom, eds., 1972).

\(^{292}\) Id.


\(^{294}\) For instance, the Aristotelian view of perception describes it as a realization process that the observer experiences while being potentially aware of the perceptible object. See S. Marc Cohen, Aristotle on Perception (Apr. 2008), https://faculty.washington.edu/smcohen/433/Perception Lecture.pdf [https://perma.cc/G8DB-N2BR].

\(^{295}\) Id.
ii. Characterization and Conceptualization of Migrants

The Top-Down theory conforms to populist perception-assertions of reality whereby we know something before we observe it. This informs institutional conceptualizations and policy responses on what is often presented as the migrant threat. Consider, for example, former U.S. President Donald Trump’s statements on migrants traveling in the so-called “Migrant Caravan” from Central America to the United States in 2018. During a press conference, President Trump first stated that he had “very good information” that there were “Middle Easterners” traveling in the Caravan. And when he was asked by a reporter about the evidence he had to back up his claim, President Trump replied: “there is no proof of anything, but there could very well be.”

Aside from the xenophobic implications of President Trump’s statement on the presence of “Middle Easterners” in the migrant caravan—notwithstanding international refugee law makes no such distinction—the statement further implicates not only that people from the Middle East are dangerous but also are not entitled to refugee protection. The corollary proposition here suggests that a claim of reality can be made in absence of—or before—evidence to support it is obtained. The subjective conceptualization of reality ("Middle Easterners" are in the caravan) occurs before the perception of the very fact in question takes place (there are “Middle Easterners” in the caravan, and they are dangerous). If admitted, this means that reality would not be defined for what it is but for what we imagine or have assimilated it should be.

This premise is rejected by Plato, who views conceptualization as a distinguishable stage of rationalization. Plato’s epistemological exploration on the meaning of knowledge led him to dispute the very idea that knowledge is perception. He regarded perception as a sensory task deprived of its categorical meaning. Plato considers that perception cannot be knowledge because the one who does not know

297. Id.
298. See PLATO, THEAETETUS 144 (1997).
299. Id. at 164a-b (advancing the very idea that knowledge neither precedes nor defines perception, for which a man can see things he does not know). In this precise exchange, Plato raises the question about what we make of a man that sees something he can remember yet must acknowledge he does not see it because he does not know it.
300. Id. at 164d-e (refuting Protagoras’ assertion of knowledge while distinguishing knowledge from perception).
could not perceive and, as such, would remain ignorant. Plato distinguishes perception from knowledge in two separated yet connected cognitive functions: namely, the perception and the understanding of the world. The former (he argues) is universal to all species while the latter is exclusive to humans.\textsuperscript{301}

Neurologist and psychoanalyst Sigmund Freud further describes perception as a precedent event to the conscious mind, from which the core element of our brain and personality, \textit{ego}, emerges.\textsuperscript{302} For Freud, \textit{ego} begins in our perceptual system, and it is \textit{ego} that defines our very understanding of the world—including the possibility to change or adapt to it.\textsuperscript{303} Perception is an archetypal element in Freudian constitutional psychoanalytical systems (unconscious, preconscious and conscious mind) to the extent that Freud describes it as the recognition of information that may either form in the preconscious mind or travel from the unconscious to the preconscious mind.\textsuperscript{304} Freud and Plato envision the progression-relation of perception-consciousness as an evolving state of mind—Freud does it by separating perception. That is, a precedent factor-formation divided into external perception acquired through experience and affecting the \textit{ego} in the preconscious system\textsuperscript{305} and internal perception acquired through instincts and affecting the \textit{Id} in the unconscious system.\textsuperscript{306} This factor-formation evolves to subsequent factors of conceptualization whereby the person either remembers or learns through memory adaptations of the stimuli uncovering external and internal roots of perception.\textsuperscript{307} Hence, per-

\begin{itemize}
\item \textsuperscript{301} Id. Under the Platonian view of evolution, this apprehension of reality serves at explaining the differentials between humans and other species (animals).
\item \textsuperscript{302} \textit{Richard Wollheim, Sigmund Freud} 214 (1971).
\item \textsuperscript{303} Id.
\item \textsuperscript{304} Sigmund Freud, \textit{An Outline of Psycho-Analysis}, 21 \textit{Int’l J. of Psych’s} 42, 43 (1940) (hereinafter Freud).
\item \textsuperscript{305} Id. at 28. In the Freudian brain-personality constitution (\textit{ego, superego, Id}), humans are defined by the unavoidable interaction of three conflicting psychological forces: unconscious, preconscious, and conscious. \textit{See Sigmund Freud, Das Ich und Das Es} 20 (1923).
\item \textsuperscript{306} \textit{See} Freud, \textit{supra} note 304 at 42.
\item \textsuperscript{307} Using fMRI to monitor blood changes in the human brain and neural stimuli responses, neuroimaging and, social studies indicate neurological responses are driven by our perceptions of our self and others. \textit{See} Lauri Nummenmaa & Andrew J. Calder, \textit{Neural Mechanisms of Social Attention}, 13 \textit{Trends Cognitive Sciences} 135, 137-143 (2009) (formulating both quantitative social-attention analysis of human neuroimaging based on gaze perception and socio-cognitive inferences); Riitta Hari & Miiamaaria V. Kujala, \textit{Brain Basis of Human Social Interaction: From Concepts to Brain Imaging}, 89 \textit{Physiological Reviews} 453, 454-479 (2009) (proposing a model of neuroimaging information that suggests an innate connection between perception-action or “inner world” and the development of external influences driven by social stimuli).}
\end{itemize}
ception and conceptualization are two independent and cognitive yet intertwined functions of reasoning.

To the legal world, this means that the institutional conceptualization of migrants is very much influenced by these stages of rationalization, in which perception-conceptualization of reality leads to the meaning of facts. Such processes convey a natural categorization of reality that we employ to simplify both conceptualization and learning processes by using known comparative approaches—concepts, conventions, forms—and internalized methodological references—inductive, deductive, analogical reasoning. Analogical reasoning, in particular, encompasses the categorization of reality, which is akin both to policymaking and legal reasoning.

III. MULTIDIMENSIONAL PERCEPTION: RETHINKING THE MIGRANT THREAT

Every dimension of reality provides a different layer from which we can perceive reality. The more perspectives we have, the more integral our perception-conceptualization of reality will be. However, social facts like forced migration cannot be categorized through only a single dimension of reality.

A. The Facts as We Assess Them

The assessment of the reality we perceive corrects our conceptualizations about it. Despite economic challenges that both Bangladesh\textsuperscript{308} and Uganda\textsuperscript{309} have faced, in 2020, these countries hosted


more than 2.2 million refugees. Still, neither Rohingya refugees in Bangladesh nor Sudanese refugees in Uganda are viewed as cultural, religious, or security threats. Instead, they are perceived and conceptualized as victims of violence and conflict.

i. International Forced Migration as Social Fact

Policymaking and legal reasoning are informed by two types of facts: legal facts and social facts. Legal facts are the facts that matter to the law, in that their very occurrence produce legal effects. These facts exist because they have been—or can be—proved. Legal facts may or may not conform to reality as their assimilation is narrowed through tests of legal reality. We further test these facts by reflecting on their analogical, customary, and conventional application. Social facts are circumstances with enough social entity to raise political or state action. These are the operative facts that trigger the process of making the law. Public policy is affected by the identification of social facts upon which the making of the law rests: that is, the law that is needed, the law that must be modified, or the law that must be abolished. Yet, unlike legal facts, social facts are not subject to the common filters of legal reality present in most legal systems: relevancy, authenticity, undue prejudice. Instead, social facts are the product of social formation—and sometimes social transformation—arising out of public debates that appear before their conceptual basis fully develops. Sociopolitical perception of reality precedes the social facts framed as relevant before turning them into, through the legislative process or judicial interpretation, legal facts.

Although there are perceptual limitations that may question the admissibility of certain legal facts, the perceptual gap here is formed before law and public policy even develop. Social reality encompasses an amalgam of social, political, and economic facts that not only define but quite often challenge legal systems. Law, in turn, responds to those challenges by setting forth institutional rules of social engage-


ment. Even though they emerge from different drivers, social and legal realities are intertwined. In a sense, social reality defines and is also defined by legal reality.

Unnatural distortions of reality such as populism and political process do not always by themselves alter the existent reality. For example, a government may use asylum seekers to promote xenophobic views while invoking national security concerns even though the latter are unfounded. Here, legal reality does not mirror social reality. When institutional references such as policy, regulations, court decisions, state practices are foreign to the social reality they allegedly confront, the perceptional gap results. And when legal reality is disconnected from social reality, law becomes instead a tool of redirected reality. For example, former U.S. President Donald Trump statement describing the first caravan of Central American migrants traveling to the United States through Mexico as “bad hombres”313 even though, of the 4,000 migrants traveling in that caravan, more than 2,000 were children.314 As to the children, one must admit at most that they are not “hombres” (men) and that their criminal intent is yet to be established.

ii. International Forced Migration as Legal Fact

As discipline, law studies the meaning-effect of facts. From state (e.g., international relations, war, money making), global (e.g., forced migration, climate change), individual (e.g., contracts, torts) and corporate facts (e.g., manufacturing, services) to public (e.g., marriage, elections, taxes, employment) and natural facts (e.g., birth, death, aging), legal reasoning provides tools to identify relevant facts, establish their meaning under institutional rules of engagement, and assign a legal effect to their legally proven existence.

International forced migration constitutes a palpable social and legal fact. Social because given the number (from thousands in some countries to millions worldwide) and type of migrants fleeing their home countries (from unaccompanied children to families) as well as the socioeconomic effects on communities hosting these migrants, society as whole appears increasingly disrupted by a social and legal


phenomenon that is far from a temporary event. And legal because
due to the social event of forced migration across the planet, govern-
ments and policymakers are nonetheless developing hostile institu-
tional responses toward these migrants.

The judicial process—viewed as an institutional agency to re-
solve social conflict—embraces, at minimum, a bidimensional per-
ception of reality: specifically, two parties presenting different
versions of reality on which their claims are framed. And the legisla-
tive process—depicted as a corollary institutional agency to make the
law—encompasses different axes of reality which, depending on
institutional actors, can lead to unidimensional, bidimensional, or tri-
dimensional perception of reality. When a social fact like international
forced migration or the legal fact that derives from it like state protec-
tion is presented before courts, a bidimensional assessment of reality
takes place. The parties before the court hold two versions of reality
that appear—under the law they claim to be applicable—in conflict.
The potential presence of other witnesses offering similar and dissimi-
lar versions of that reality does not truly exceed the contended
bidimensional perception-conceptualization. In the end, these perspec-
tives are aligned with one or the other party. Nor does the presence
of a judge add another perspective as it is limited by the facts both parties
present. Nevertheless, appeal—the process whereby a superior magis-
trate reviews the decision of a trial judge on procedural or substantive
grounds—may trigger a tridimensional yet limited perception of real-
ity, in that appeal judges make their assessment of the facts by assert-
ing first the parties’ predicament in view of the trial judge’s ruling or,
in a word, perspective. With very few exceptions, appellate courts
often face limited standards that restrict their perception of facts and
conceptualization of law. Despite such dimensional restrictions, the
judicial system is the only opportunity available for asylum seekers to
attain a different perception-conceptualization of reality that incorpo-
rates not only the policy that rejects them, but the human suffering
they encounter. This, moreover, considering that the legislative pro-
cess increasingly reduces procedural opportunities for asylum seekers
to present their cases through hearings, access to legal counsel, illegal
pushbacks, or parole requests.317

316. Id.
317. See Amnesty Int’l, supra note 267.
B. The Facts as We Understand Them

Considering the contended dichotomy between refugee and national security protection, is it possible to redress the perception-conceptualization of migrants as threats? This Article argues that the extent of the perceptual gap is such that governments do not truly understand the social and legal phenomenon of international forced migration. This Article further argues that the perceptual gap manifested through exclusion and segregation of migrants is so profound that modern policies and regulations affecting the legal protection of refugees and asylum seekers have contributed to redirect the harsh reality these migrants nowadays encounter. And this Article argues that only a multidimensional perception on international forced migration—including the contended migrant threat—as social and legal phenomenon can serve at redressing the social effects of the perceptual gap and the untenable effects of the resulting human rights gap.

i. Breaking Reality: Certainty, Uncertainty, Probability

The idea of a multidimensional perception of reality is developed best through quantum theory. By exploring reality at a more fundamental level through protons, neutrons, electrons, quantum theory has been able to revolutionize our understanding of the world across multiple fields and applications, including medicine, solar energy, space travel, national security, and biotechnology.318

Quantum theory challenges classical physics’ core attribution—that is, measurement of the physical world to predict reality through relativity—by proposing a different assertion of reality—measurement of the natural world to predict reality through probability. Quantum theory does this by assimilating multiple layers of reality to ascertain its materialization from a multidimensional perspective, which does not necessarily question the reality we observe, but rather our inability

to perceive the one we miss. In this context, one of the greatest contributions of quantum theory is the evolving assertion that the universe is made of particles that are ruled by probability, not certainty. That is, probability, not just relativity, defines reality. In a sense, it is not that we miss different realities, but rather we choose to neglect all their probable dimensions. Two principles explain those dimensions. The Superposition principle states that a particle can show two different velocities or be in two different places at once. This suggests that multidimensional observation is similar to developing a more accurate conceptualization of the world. The Entanglement principle, moreover, states that notwithstanding time and space between two or more particles concomitantly generated or interacting one with each other, such particles are entangled or connected to each other in a way that the state of each particle of the group cannot be explained independently or without considering the state of the other particles.

319. Under quantum theory, matter in the universe is made of particles that are ruled by probability, not certainty. Yet probability can be precise in predicting particles’ positions. See Edward G. Steward, Quantum Mechanics: Its Early Development and Road to Entanglement and Beyond (2012).

320. The Bell experiment proved that two particles can be entangled despite their location (i.e., next to each other or thousands of miles away). The Bell Theorem, in particular, responds to the experimental question posed by John Stewart Bell aimed at solving two partially contradicting views on quantum and classic mechanics: specifically, observations of particle’s dependent/relative or independent reality. For detailed information on Bell’s Theorem, see John F. Clauser & Stuart J. Freedman, Experimental Test of Local Hidden-Variable Theories, 28 Physical Rev. Letters 938, 939-41 (1972); see also Alain Aspect et al., Experimental Tests of Realistic Local Theories Via Bell’s Theorem, 47 Physical Rev. Letters 460, 461-463 (1981). Still, under Bell’s mathematical realizations there are occasions where quantum measurement does not apply, for which absolute determinism seems (at this stage) an implausible solution. J. S. Bell, On the Einstein Podolsky Rosen Paradox, 1 Physics 195, 197-200 (1964).


322. Classic physicists Albert Einstein, Boris Podolsky, and Nathan Rose argued that the quantum physical explanation of reality given by wave-function is not complete (“EPR Paradox”). They argued that, though perhaps possible, two quantities or particles interacting without time-space between them would constitute what has been termed as ‘spooky action at distance’ connection because the properties of particles are defined before everything is set in motion (determinism), see Albert Einstein, Boris Podolsky & Nathan Rosen, Can Quantum-Mechanical Description of Physical Reality Be Considered Complete? 47 Physical Rev. 777 (1935); see also Ben Brubaker, How Bell’s Theorem Proved ‘Spooky Action at a Distance’ Is Real, Quanta Magazine (July 20, 2021), https://www.quantamagazine.org/how-bells-theorem-proved-spooky-action-at-a-distance-is-real-20210720/ [https://perma.cc/KAD3-HE6W]. However, in 1964, John Bell demonstrated that the EPR paradox was incompatible with quantum theory as the locality assumptions of time and space do not necessarily apply in entanglement systems where particles appear connected one to
It follows that our ability to resolve a problem lies first in our limited ability to observe it and, as such, find it. This Article argues that since perception is akin to reasoning, both perception-assertion and perception-conceptualization of reality deprived of multidimensional perception is reasoning’s defining flaw. This is particularly evident in the conceptualization of the migrant threat, in which institutional responses mostly, if not exclusively, consider the host country’s security without policy assertions as to whether the migrants are truly threats, whether such conceptualization is even effective to attain the contended goal of security, or whether resulting legal prescriptions end up creating a far more pervasive reality casting doubt on the contended policy goal: security. Consequently, this Article holds that legislation and public policy on forced migration should begin with a fundamental premise: migrants’ institutional reality is neither objective nor subjective or merely relative but inherently multidimensional. To the legal world, this means that using a bidimensional or tridimensional perception of reality to conceptualize the nature and extent of international forced migration as social and legal phenomenon will result in missing critical yet often neglected connections, relations, and events that shape and form the complexity of migrants’ reality. We then end up developing simple institutional responses to tackle a complex social problem that most governments not only miss but barely understand, making immigration policies part of the problem that redirected reality—the migrant threat—creates.

ii. Shifting Migrants’ Reality: From Security Threats to Security Assets

To break the perceptional gap revealed through the paradigm of inhumane, inconsistent, and endemic reception and treatment of refugees and asylum seekers, this Article proposes a different approach towards migrants’ institutional reality that builds on the perception-assertion and multidimensional perception of that reality. This, in sum, will have a direct impact in the way modern society receives and treats one another despite their location, particularly when such particles are observed from different perspectives or angles. See What Is Entanglement and Why Is It Important? CALTECH SCIENCE EXCHANGE (2022), https://scienceexchange.caltech.edu/topics/quantum-science-explained/entanglement [https://perma.cc/EG59-PSEB].

migrants, and whose threat can be devised through progressive parallel structures of reasoning.

**Parallel Structure 1 (Unidimensional Perception), “them” threat approach.** As noted, current institutional representations portray refugees as terrorists and criminals which has led to the conceptualization of the migrant threat as described, for instance, in Presidential Executive orders 13769 and 13780 titled “Protecting the Nation against Foreign Terrorist Entry into the United States.” As a result, the perception-conceptualization of migrants in the United States conforms to the legal concept of “foreign threat,” which policy formula creates—by redirecting reality through hostile reception and treatment of migrants—a mandate whereby migrants entering the United States must be detained, prosecuted, or returned to another country.

**Parallel Structure 2 (Bidimensional Perception), “them” or “us” ineluctable-choice approach.** The proposition here is this: either we protect refugees, “them,” or we protect ourselves as citizens “us,” as both realities, apparently, cannot coexist. Security threat narratives of national identity and refugee protection are frequently presented and analyzed as contradicting values. As noted, moreover, public international law in general and international refugee law, acknowledge host-countries’ national security. In practice, though, basic human rights protections like due process, liberty, and human dignity and international refugee law principles like non-discrimination, access to courts, non-penalization, and non-refoulement become, at worst, non-existent law and, at best, residual references.

**Parallel Structure 3 (Multidimensional Perception), “them” is “us” approach.** The proposed multidimensional perception

324. Legal scholarship diffuses this tension by presenting these interests as complementary. Yet protecting “them” is not merely complementary but axiologically related to what we are or, at most, claim to be (same interest but in a different dimension/perspective). For a further elaboration on complementary interests, see William W. Burke-White, Human Rights and National Security: The Strategic Correlation, 17 Harv. Hum. Rts. J. 249, 254 (2004) (describing national security and human rights protection as complementary interests).


326. U.N. Charter, art. 1.

327. Refugee Convention, supra note 168, art. 9.


329. Refugee Convention, supra note 168, arts. 3, 16, 31(1), 33(1).

330. AMNESTY INT’L, supra note 267.
here is this: protecting refugees protects humanity. Protecting humanity protects security. Therefore, protecting migrants, protects national security. In the alternative, should we continue to place national and migrant security—including human dignity—as contradicting values, we become the contradiction. If we neglect migrants’ suffering to protect ourselves, we neglect ourselves to protect something we are not. This parallel structure shows that only by assembling various dimensions of the reality we face or think we face, we will be in a super yet entangled position to identify the reality we miss or redirect, precluding us from resolving the social and legal challenges we, in fact, face. Consider the following case.331 Imagine a two-way road offering not only astonishing ocean views, but given its topography, little margin for error. Picture a woman in a sunny day driving a convertible on her legally assigned side of the road as she leaves enough space for upcoming traffic to pass. Let us further imagine that a man driving a second automobile approaches the woman’s vehicle while listening to loud music. Before he attempts to overtake the woman’s car, she waves her right hand forward. Perhaps misled by this signal, the man decides to place his car side-to-side to the woman’s vehicle to speak to her or just to get a better look. The more the woman waves her hand forward and honks her horn, the more the man believes she is showing some interest. When the man realizes that she is rather pointing forward to warn him about upcoming traffic, a bus traveling in the opposite direction appears, forcing the man to drive out of the road and fall into the ocean.

A unidimensional perception of reality, version of reality viewed from the man’s position, will describe a man driving a vehicle in the two-way road, who eventually drives out of the road and falls into the ocean. A bidimensional perception of reality, two versions of reality viewed from both the man’s and the woman’s positions, will depict two contradicting versions of reality. On the one hand, the woman will state that: (i) she was driving in the right side of the road, (ii) she was trying to warn the man about upcoming traffic, and (iii) she did all she could to prevent the accident by waving her hand and honking, but the man continued driving next to her until it was too late for him to avoid the accident. On the other hand, the man would explain that: (i) he saw a woman flattering with him on the road, and (ii) he wanted to approach her when he suddenly saw a bus coming. From a tridimen-

331. I elaborate on Kuhn’s reflections and cases on shift of paradigms to portray not merely dissimilar but evolving layers of perception—which, I argue, may lead to a multidimensional conceptualization of reality. See generally Thomas S. Kuhn, The Structure of Scientific Revolutions (1962).
sional perception of reality, the bus driver will say he saw two people fighting on the road, one being on the wrong side, and that there was no place for one of them to move and avoid the collision. Yet, from a multidimensional perception of reality we will benefit from additional layers of perception showing a rather comprehensive depiction of reality on what each person in the scene saw—the man’s, the woman’s, the bus driver’s perception, and on what a fourth person (“us”) and even a fifth (aerial view, e.g., a helicopter) dimensions of reality could tell us: a misunderstanding of reality—a perceptional gap—leading to an accident. This means that the more layers of perception we add, the more accurate our perception of reality will be. This is because multidimensional perception of reality is not defined for what we are told are the facts, but for our ability to see beyond dimensional information by perceiving those facts from each and all positions at once. “Them,” “us,” “we all,” are therefore dimensional frames to perceive and conceptualize forced migrants’ legal protection. Imagine that at the table of the multidimensional perception approach, we find the host country’s government advocating for national security, refugees claiming protection, host country’s citizens advocating for their own protection, and even more extreme positions advocating for a racially oriented version of society. Each position considered individually is unidimensional and therefore limited, yet at a higher level of reasoning, all positions considered simultaneously force us to visualize reality from its potential connections and relations at once by circulating our interests through each position at the table. In a sense, positions are unidimensional, differences bidimensional, solutions—at minimum—tridimensional, but once we move to a different position, we start seeing all these dimensions and consequences for what they truly are: limited perceptions-conceptualizations of reality.

This multidimensional approach towards migration will not merely redress critical flaws arising out of the perceptional gap, but further allow us to rethink the contended migrant threat. This approach provides a more accurate conceptualization of reality uncovering relations and possible connections. Perhaps, rather than fostering migrants’ smuggling through limited dimensions of reality promoting institutional exclusion and discrimination, host countries may choose to know and integrate refugees and asylum seekers as a far more desirable, humane, and intelligent security asset.

CONCLUSION

Perception is the triggering event of reasoning—including policymaking and legal reasoning informing the reception and treatment
of migrants. Yet a multidisciplinary exploration of perception shows that modern institutional responses to migrants fleeing persecution and conflict are built on a perceptional gap portraying millions of refugees and asylum seekers as undesirable migrants. In due course, the perceived migrants are conceptualized as security, economic, and cultural identity threats to developed host countries. A legal and comparative analysis of state practices, narratives, policies, and regulations proves it. Selective perception then becomes the re-directional factor defining migrants’ conceptualization as threats or, the migrant threat. In this context, the redirection of migrants’ institutional reality from victims of persecution and conflict to threats is the perceptional gap’s most endemic effect. The root-causes of the migrant threat uncover natural (bias, fear) and unnatural distortions of reality (populism) informing claims that undesirable migrants are too dangerous, too many, too expensive, and too different. This, in turn, leads to patterns of distrust, dehumanization, discrimination, and criminalization of migrants related to race, religion, and nationality. Nonetheless, breaking into the rationale of the migrant threat—as we walk from perception-assertion to perception-conceptualization of reality—reveals that more than conflicts of security or identity, institutional discrimination and exclusion of migrants ensues from conflicts of diversity, not security. Such conflicts are often internalized through either unidimensional or bidimensional versions of society, resulting in an amoral, untenable, and disproportionate distribution of the world’s refugee population in poor and developing countries.

The perceptional gap between desirable and undesirable migrants emerges as the quintessential flaw of modern conceptualization of refugees and asylum seekers as threats. This matters to the law because the policy responses arising out of such conceptualization either expose these migrants to greater risks or place them in dire humanitarian conditions. It matters to the law, moreover, because the law that follows does not mirror the reality of international forced migration and the effects of such a critical gap: human suffering. And it matters to the law because such responses violate basic human rights protections such as human dignity, due process rights, proscriptions on torture and degrading treatment as well as international refugee law principles such as non-discrimination, access to courts, non-penalization, non-refoulement. An interdisciplinary exploration of the migrant threat further indicates that the perceptional gap benefits from our limited perception of reality, which is neither objective (absolute) nor subjective or merely relative but, as it turns out, multidimensional. Parallel structures that illustrate multidimensional perception of reality show that
the complexity of migrants’ institutional reality as social and legal phenomenon can be truly pictured only at this level. A multidimensional approach leads us to rethink migrants’ institutional reality and redress its most pervasive effects. In the end, protecting “them,” protects “us” all.