

# 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 perceptual 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 refolement 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 perceptual-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 perceptual 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 perceptual 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 refugees trying to get away from areas in the Middle East . . . They look

like any European family that you would live next door to.”<sup>1</sup> Explaining his decision to open his country’s border to Ukrainian refugees, Bulgaria’s Prime Minister Kiril Petkov 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.”<sup>2</sup>

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 States<sup>3</sup> contrasts both with the reception and treatment in Europe of Middle Eastern and African refugees using razor-wire fences, torture, and ship containers<sup>4</sup> and with the images of U.S. Border Patrol agents on horseback chasing migrants from Haiti.<sup>5</sup> Moreover, reports on the warm welcome of Ukrainian women and children in Europe<sup>6</sup> and the United States’ private spon-

1. Renata Brito, *Europe Welcomes Ukrainian Refugees—Others, Less So*, ABC NEWS (Feb. 28, 2022, 3:25 PM), <https://abcnews.go.com/International/wireStory/europe-welcomes-ukrainian-refugees-83153021> [<http://perma.cc/5655-J2K6>].

2. Renata Brito, *For Ukrainians, Some European Countries Open Their Doors That Were Kept Closed to Middle Eastern and African Refugees*, PBS NEWS HOUR (Feb. 28, 2022, 5:01 PM), <https://www.pbs.org/newshour/world/for-ukrainians-some-european-countries-open-their-doors-that-were-kept-closed-to-middle-eastern-and-african-refugees> [<http://perma.cc/C7GH-GG74>].

3. Nina Lakhani, *US on Course to Welcome 100,000 Ukrainians Fleeing War This Summer*, THE GUARDIAN (June 24, 2022, 9:47 AM), <https://www.theguardian.com/us-news/2022/jun/24/ukrainians-enter-us-asylum-biden-pledge>; Aleksandar Brezar, *Ukraine War: More Than Half a Million Refugees Have Fled in Just Over Four Hours, Says UN*, EURONEWS (May 3, 2022, 10:18 PM), <https://www.euronews.com/my-europe/2022/02/27/ukraine-war-european-nations-open-their-doors-as-nearly-120-000-ukrainian-refugees-flee> [<http://perma.cc/NK2M-NP2H>].

4. Manasi Gopalakrishnan, *Bulgarian Police Robbing, Torturing Refugees: Human Rights Watch*, DEUTSCHE WELLE (Jan. 20, 2016), <https://www.dw.com/en/bulgarian-police-robbing-torturing-refugees-human-rights-watch/a-18994412> [<http://perma.cc/8NP8-N7K6>]; Patrick Wintour, *Hungary to Detain All Asylum Seekers in Container Camps*, THE GUARDIAN (Mar. 7, 2017, 8:56 AM), <https://www.theguardian.com/world/2017/mar/07/-hungary-to-detain-all-asylum-seekers-in-container-camps> [<http://perma.cc/G2CW-VQNR>].

5. Eileen Sullivan & Zolan Kanno-Youngs, *Images of Border Patrol’s Treatment of Haitian Migrants Prompt Outrage*, N.Y. TIMES (Oct. 19, 2021), <https://www.nytimes.com/2021/09/21/us/politics/haitians-border-patrol-photos.html> [<http://perma.cc/8SD7-WEBR>].

6. Margherita Stancati & Francis X. Rocca, *Ukrainian Child Refugees Get Warm Welcome at Italian Schools*, WALL ST. J. (Mar. 16, 2022, 10:51 AM), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-15/card/ukrainian-child-refugees-get-warm-welcome-at-italian-schools-BxawR8YKxuplcHgWIsr1>; *Ukraine’s Neighbors Open Borders to Refugees*, BELSAT (Feb. 25, 2022, 7:35 AM), <https://belsat.eu/en/news/25-02-2022-ukraine-s-neighbors-open-their-borders-to-refugees/> [<http://perma.cc/LR4V-B6WL>].

sorship program for Ukrainian refugees<sup>7</sup> further contrast with Italy's decision to close its ports to migrant rescue ships holding hundreds of unaccompanied minors from North Africa<sup>8</sup> and the United States' decision to hold Central American children asylum seekers in cages.<sup>9</sup> Reports on African and Middle Eastern refugees being segregated from Ukrainian refugees in their journey for safety<sup>10</sup> 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,<sup>11</sup> welcomed Ukrainian refugees with open arms: "We're letting everyone in."<sup>12</sup>

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.<sup>13</sup> President Trump publicly stated his preference for migrants from "countries like Norway"<sup>14</sup> 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."<sup>15</sup>

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7. Since April 25, 2022, U.S.-based individuals and entities may sponsor Ukrainian refugees through a new migration streamlined program known as *Uniting for Ukraine Process*. See President Biden to Announce Uniting for Ukraine, a New Streamlined Process to Welcome Ukrainians Fleeing Russia's Invasion of Ukraine, U.S. DEP'T HOMELAND SEC. (Apr. 27, 2022), <https://www.dhs.gov/news/2022/04/21/president-biden-announce-uniting-ukraine-new-streamlined-process-welcome-ukrainians> [<https://perma.cc/RP4P-6DDW>].

8. *Italy's Matteo Salvini Shuts Ports to Migrant Rescue Ship*, BBC NEWS (June 11, 2018), <https://www.bbc.com/news/world-europe-44432056>.

9. *Kids in Cages: Inhumane Treatment at the Border: Hearing Before the Subcomm. on C.R. & C.L., Comm. of the Oversight & Reform*, 116th Cong. 2 (2019).

10. Brito, *supra* note 1.

11. ZSUZSANNA VIDRA, DOMINANT ISLAMOPHOBIC NARRATIVES: HUNGARY 18 (2017), [https://cps.ceu.edu/sites/cps.ceu.edu/files/attachment/publication/2923/cps-working-paper-countering-islamophobia-dominant-islamophobic-narratives-hungary-2017\\_0.pdf](https://cps.ceu.edu/sites/cps.ceu.edu/files/attachment/publication/2923/cps-working-paper-countering-islamophobia-dominant-islamophobic-narratives-hungary-2017_0.pdf) [<https://perma.cc/K9CH-KFQP>].

12. Brezar, *supra* note 3.

13. Guardian News, *Donald Trump and Viktor Orbán Praise Each Other at White House Meeting*, YOUTUBE (May 14, 2019), <https://www.youtube.com/watch?v=FEwGyHBPMcg> [<http://perma.cc/24EU-W2C8>].

14. *Donald Trump: Shock Over US President's Migrants Remarks*, BBC NEWS (Jan. 12, 2018), <https://www.bbc.com/news/world-us-canada-42661435> [<http://perma.cc/9KKD-QT6B>].

15. *Donald Trump Releases Video Calling Southern Border 'National Security Crisis'*, GLOB. NEWS (Jan. 18, 2019, 11:29 PM) [hereinafter Trump GLOB. NEWS], <https://globalnews.ca/video/4866265/donald-trump-releases-video-calling-southern-border-national-security-crisis> [<https://perma.cc/X3UZ-WG84>].

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 *perceptual 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 redress 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 perceptual 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 misconception.

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.<sup>16</sup> 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 perceptual 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 perceptual 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.<sup>17</sup> 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-

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16. Before their systematic exclusion and eventual refoulement, Syrian refugees were at some point welcomed with open arms in other European countries too. See Philippe Perchoc, *EU-Turkey Statement and Action Plan*, LEGIS. TRAIN SCHEDULE, (Sept. 20, 2022), <https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/towards-a-new-policy-on-migration/file/eu-turkey-statement-action-plan> [<https://perma.cc/54YW-HH6K>]; see also Rebecca Alder-Nissen et al., *Images, Emotions, and International Politics: The Death of Alan Kurdi*, 46 REV. INT’L STUD. 75, 76 (2020).

17. See DANIEL L. SCHACTER, ET AL., INTRODUCING PSYCH. 90 (2011).

alization of the world.<sup>18</sup> This is particularly evident in the case of migrants, who are increasingly viewed and treated as suspects, not victims,<sup>19</sup> leading to gravitational concepts<sup>20</sup> 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),<sup>21</sup> Ecuador (Tulcán),<sup>22</sup> and Lebanon (Akkar).<sup>23</sup> These tensions often lead to expressions of xenophobia,<sup>24</sup> social exclusion,<sup>25</sup> and violence.<sup>26</sup> 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-

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18. See PERRY R. HINTON, *Stereotypes in Mind*, in *STEREOTYPES AND THE CONSTRUCTION OF THE SOCIAL WORLD* 58, 59-60 (2019).

19. E.g., Lydia Gall, *Hungary's War on Refugees*, HUM. RTS. WATCH (Sept. 16, 2016, 4:24 AM), <https://www.hrw.org/news/2016/09/16/hungarys-war-refugees> [<https://perma.cc/W682-878G>]; Tom Phillips, *Fleeing Venezuelans Face Suspicion and Hostility as Migration Crisis Worsens*, THE GUARDIAN (Aug. 19, 2018, 7:45 AM), <https://www.theguardian.com/world/2018/aug/19/fleeing-venezuelans-suspicion-hostility-migration-crisis-ecuador>.

20. See Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

21. Clare Baldwin & Andrew R.C. Marshall, *Rohingya Refugees Test Bangladeshi Welcome as Prices Rise and Repatriation Stalls*, REUTERS (Feb. 27, 2018, 9:13 PM), <https://uk.reuters.com/article/uk-myanmar-rohingya-bangladesh-tensions/rohingya-refugees-test-bangladeshi-welcome-as-prices-rise-and-repatriation-stalls-idUKKC-NIGC08S> [<https://perma.cc/NRT2-7T52>].

22. See Phillips, *supra* note 19.

23. E.g., Ali Alsheikh Kheder & Diego Ibarra Sanchez, *Syrian Refugees: Tension and Solidarity in Exile in Lebanon*, AL JAZEERA (May 6, 2018), <https://www.aljazeera.com/indepth/inpictures/syrian-refugees-tension-solidarity-exile-lebanon-180506093057204.html> [<https://perma.cc/8DCJ-KD52>].

24. E.g., Megan Janetsky, *Fears Stoke Backlash against Venezuelans in Peru*, BBC NEWS (Aug. 1, 2019), <https://www.bbc.com/news/world-latin-america-49156814> [<https://perma.cc/9UUB-U5JA>].

25. MIHAELA ROBILA, *REFUGEES AND SOCIAL INTEGRATION IN EUROPE* 8 (May 2018), <https://www.un.org/development/desa/family/wp-content/uploads/sites/23/2018/05/RobilaEGM2018.pdf> [<https://perma.cc/A8RL-U38N>].

26. BBC News, *Venezuela Crisis: Brazil Deploys Troops After Migrant Attacks*, YOUTUBE (Aug. 20, 2018), <https://www.youtube.com/watch?v=WOa3AUFafCw> [<https://perma.cc/GTK8-TTH8>].

ception) before we come about, rationalize, and define its existence and meaning (conceptualization).<sup>27</sup>

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.<sup>28</sup> We discover reasons through a cognitive process that begins with perception,<sup>29</sup> 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.”<sup>30</sup> 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.<sup>31</sup> 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.*

30. *Bias*, PSYCH. TODAY, <https://www.psychologytoday.com/intl/basics/bias> (last visited Oct. 11, 2022).

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<sup>32</sup> 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"<sup>33</sup> or "animals"<sup>34</sup> or refers to the programs it institutes to receive and treat migrants (including children) as "catch and return."<sup>35</sup> 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,<sup>36</sup> Polish Prime Minister Mateusz Morawieck announced his government would not accept

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32. U.S. 9/11 COMMISSION, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (9/11 REPORT), FINAL REPORT Y3-2/T27/2 215, 216, 220, 224 (July 2004), <https://www.9-11commission.gov/report/911Report.pdf> [<https://perma.cc/M3HG-AJYS>].

33. Gall, *supra* note 19.

34. Elise Foley, *Trump Refers to Immigrants as 'Animals.' Again*, HUFFPOST (May 17, 2018), [https://www.huffpost.com/entry/trump-calls-immigrants-animals-again\\_n\\_5afca15fe4b0779345d59e2a](https://www.huffpost.com/entry/trump-calls-immigrants-animals-again_n_5afca15fe4b0779345d59e2a).

35. In 2018, DHS Secretary Kirstjen Nielsen stated that aliens, "will wait for an immigration court decision while they are in Mexico. 'Catch and release' will be replaced with 'catch and return.'" Kate Smith, "Catch and Return: U.S. Asylum Seekers Will Have to Wait in Mexico," CBC NEWS (Dec. 20, 2018), <https://www.cbsnews.com/news/catch-and-return-us-asylum-seekers-immigrants-migrant-caravan-wait-mexico-2018-12-20-live-update/>.

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.”<sup>37</sup> Undoubtedly, such institutional response contrasts with Poland’s initial response on Ukrainian refugees in 2022.<sup>38</sup> 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.<sup>39</sup> 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.”<sup>40</sup> 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.<sup>41</sup> Likewise, Hungary’s Prime Minister Orbán stated that, “we do not want to be a multi-colored country”<sup>42</sup> 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.”<sup>43</sup>

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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37. Lydia Kelly & Justyna Pawlak, *Poland’s Far-right: Opportunity and Threat for Ruling PiS*, REUTERS (Jan. 3, 2018), <https://www.reuters.com/article/us-poland-politics-farright/polands-far-right-opportunity-and-threat-for-ruling-pis-idUSKBN1ES0BK> [https://perma.cc/K6KD-HMWT].

38. Brezar, *supra* note 3.

39. Melissa Eddy, *Alternative for Germany: Who are They, and What Do They Want?*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/world/europe/germany-election-afd.html> [https://perma.cc/K6KD-HMWT].

40. Frances D’Emilio, *Anti-migrant Leader Pushes to Win National Power in Italy*, CHICAGO TRIBUNE (Dec. 10, 2017), <https://www.chicagotribune.com/nation-world/ct-italy-northern-league-20171210-story.html>.

41. Alessandra Rizzo, *Georgia Meloni: She’s Called for a Naval Blockade of Africa to Stop Migrants – Who Is the Far-Right Leader Set to Become Italy’s First Female PM?*, SKY NEWS (Sept. 24, 2022), <http://news.sky.com/story/who-is-Giorgio-meloni-far-right-leader-set-to-become-italys-first-female-pm-12703271>.

42. Tom Miles, *U.N. Human Rights Chief Calls Hungarian PM Orbán a Racist*, REUTERS (March 6, 2018), <https://www.reuters.com/article/uk-hungary-un/u-n-human-rights-chief-calls-hungarian-pm-orban-a-racist-idUKKCN1GI272> [https://perma.cc/9CJS-RZAM].

43. Nick Thorpe, *The Man Who Thinks Europe Has Been Invaded*, BBC NEWS (April 6, 2018), [https://www.bbc.co.uk/news/resources/idx-sh/Viktor\\_Orban](https://www.bbc.co.uk/news/resources/idx-sh/Viktor_Orban) [https://perma.cc/SJ67-HTWU].

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,<sup>44</sup> 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),<sup>45</sup> 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<sup>46</sup> 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.<sup>47</sup> Neurological studies have proved the existence of implicit or unconscious race-related bias in employment discrimination cases, the judicial system,<sup>48</sup> education,<sup>49</sup> healthcare,<sup>50</sup> the media

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44. Anna Flagg, *The Myth of Criminal Immigration*, N.Y. TIMES (March 30, 2018), <https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html>.

45. See Anne Trafton, *Monitoring Electromagnetic Signals in the Brain with MRI*, MIT NEWS (Oct. 22, 2018), <https://news.mit.edu/2018/monitoring-electromagnetic-signals-brain-mri-1022> [<https://perma.cc/AR4A-MSXG>].

46. Allen J. Hart et al., *Differential Response in the Human Amygdala to Racial Outgroup vs Ingroup Face Stimuli*, 11 NEURO-REPORT 2351, 2352, 2355 (2000) (describing fMRI neurological response in the amygdala to the presentation of racial outgroup v. ingroup faces); see also Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. OF COGN. NEUROSC. 729 (2000) (analyzing fMRI neural activity on racial groups describing how cultural assertions of social groups evolve).

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).

48. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1130-1186 (2012) (following behavioral realism trajectories on criminal justice, employment discrimination cases, and implicit bias).

49. Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 PSYCH. REV. 85, 90, 95-107 (2011) (introducing a study on racial bias on school official's discipline referrals on minorities studying in 365 elementary schools across the United States).

50. Elizabeth N. Chapman et al., *Physicians and Implicit Bias: How Doctors May Unwittingly Perpetuate Health Care Disparities*, 28 J. OF GEN. INTERNAL MED. 1504, 1505-1510 (2013) (presenting evidence on how cultural stereotypes may influence clinical decision-making processes on patient treatment).

2003),<sup>51</sup> and even Internet.<sup>52</sup> Social science studies further show that bias is formed through external information received from sources of authority such as parents.<sup>53</sup> Biology studies also confirm that humans are more likely to learn apprehensions of fear and safety from ingroups.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> It emerges as a broader notion attached to different ideological prints and social movements like nationalism or socialism.<sup>57</sup> And it appears frequently as a conflicting perception of power directed to protect the

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51. Travis L. Dixon et al., *The Portrayal of Race and Crime on Television Network News*, 47 J. OF BROADCASTING AND ELECTRONIC MEDIA 498, 501-523 (2003) (noting a gross underrepresentation of African Americans as victims of crime in the news).

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).

53. See Zoe Liberman & Amanda L. Woodward, *The Origins of Social Categorization*, 21 TRENDS IN COGN. SC. 558-568 (2017) (underscoring the importance of social categorization while acknowledging its consequences, including prejudice, discrimination, and stereotyping through various sources of authority).

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).

55. E.g., Chimamanda Ngozi Adichie, *The Danger of a Single Story*, TED GLOBAL (July 2009), [https://www.ted.com/talks/chimamanda\\_ngozi\\_adichie\\_the\\_danger\\_of\\_a\\_single\\_story?language=EN](https://www.ted.com/talks/chimamanda_ngozi_adichie_the_danger_of_a_single_story?language=EN) [[https://perma.cc/55R8-DGK\\_B](https://perma.cc/55R8-DGK_B)] (exploring unidimensional cultural default positions from one society to another).

56. Dwayne Woods, *The Many Faces of Populism: Diverse But Not Disparate*, in THE MAIN FACES OF POPULISM: CURRENT PERSPECTIVES 5 (Dwayne Woods & Barbara Wejnert, eds., 2014).

57. See Cas Mudde, *Populism: An Ideological Approach*, in THE OXFORD HANDBOOK OF POPULISM (Cristobal Rovira Kalwasser, Paul Taggart, Paulina Ochoa Espejo & Pierre Ostiguy, eds., 2017) 27-47.

“little man” against the negligent establishment or elite.<sup>58</sup> 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,<sup>59</sup> which the populist actor characterizes as those belonging to the unrepresented group often characterized as the “little” or “forgotten” man.<sup>60</sup>

Though populism has gradually expanded in recent years throughout the world,<sup>61</sup> society today confronts populism’s most dan-

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58. Woods, *supra* note 56, at 6-10.

59. Cas Mudde, *Populism in Europe: A Primer*, OPEN DEMOCRACY (May 12, 2015), <https://www.opendemocracy.net/en/can-europe-make-it/populism-in-europe-primer/> [<https://perma.cc/GE2M-8TUU>].

60. *Id.*

61. In 2016, Donald Trump was elected President of the United States of America with 304 electoral votes and more than 62 million popular votes. Though he lost his re-election to Joe Biden, President Trump obtained more than 74 million popular votes in 2020. U.S. FED. ELECTIONS COMM’N, FEDERAL ELECTIONS 2016: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (Dec. 2017) 5 and 6, <https://www.fec.gov/resources/cms-content/documents/federalelections2016.pdf>; U.S. FEDERAL ELECTIONS COMMISSION, OFFICIAL 2020 PRESIDENTIAL GENERAL ELECTION RESULTS (Nov. 2020) 8, <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf>. In 2017, far-right political party AfD won 94 seats (12.6%) in the German Parliament (*Bundestag*). BUNDESWAHLLEITER DEUTSCHLAND, BUNDESTAG ELECTION 2017, <https://www.bundeswahlleiter.de/en/bundestagswahlen/2017/ergebnisse.html>. Moreover, populist parties and candidates have consolidated political power in Italy, Poland, Belgium, Denmark, Finland, Sweden, Austria, Switzerland, Hungary, Slovakia, Czech Republic, and Greece. GOVERNO ITALIANO, MINISTERO DELL’INTERNO, ELEZIONI CAMARA DI DIPUTATI 2018, <https://www.interno.gov.it/it/notizie/elezioni-2018-i-dati-viminale>; POLAND PKV PARLIAMENT, WYBORY DO SEJMU I SENATU RZECYPOSPOLITEJ POLSKIEJ 2015, [https://parlament2015.pkw.gov.pl/349\\_Wyniki\\_Sejm.html](https://parlament2015.pkw.gov.pl/349_Wyniki_Sejm.html); BELGIUM IBZ CHAMBER, ELECTIONS 2014, [https://elections2014.belgium.be/en/cha/results/results\\_tab\\_CKR00\\_000.html](https://elections2014.belgium.be/en/cha/results/results_tab_CKR00_000.html); DENMARK PARLIAMENT KVS, ELECTIONS 2015, [https://www.thedanishparliament.dk/en/news/2015/06/2015\\_eng\\_results](https://www.thedanishparliament.dk/en/news/2015/06/2015_eng_results); SWEDEN VALMYNDIGHETEN, VALRESULTAT 2014, <https://www.val.se/valresultat/riksdag-region-och-kommun/2014/valresultat.html>; AUSTRIA BUNDESMINISTERIUM, BUNDESPRAESIDENTENWAHL 2016, [https://www.bmi.gv.at/412/Bundespraesidentenwahlen/Bundespraesidentenwahl\\_2016/start.aspx](https://www.bmi.gv.at/412/Bundespraesidentenwahlen/Bundespraesidentenwahl_2016/start.aspx); SWISS FEDERAL STATISTICAL OFFICE, FEDERAL ELECTIONS STATISTICS 2015, <https://www.bfs.admin.ch/bfs/en/home/statistics/catalogues-databases/press-releases.assetdetail.40174.html>; HUNGARY NAMZETI VALASZTASY IRODA, PARLIAMENTARY ELECTIONS 2018, <https://www.valasztas.hu/web/national-election-office/parliamentary-elections-2018>; SLOVAKIA STATISTICS VOLBY, DEFINITIVNE VYSLEDKY HLASOVANIA SR 2016, <https://volby.statistics.sk/nrst/nrst2016/sk/data02.html>; VOLBY CZECH REPUBLIC, ELECTION OF THE PRESIDENT OF THE CZECH REPUBLIC HELD ON 12-13 JANUARY 2018, <https://www.volby.cz/pls/prez2018/pe2?xjazyk=EN>; HELLENIC PARLIAMENT, ELECTIONS RESULTS 2015, <https://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Ekloges/Eklogika-apotelesmata-New/#Per-17>. Aside from Europe and the United States, populist candidates have also been elected in Brazil, Mexico, Nicaragua, Guatemala, Venezuela, Colombia, Egypt, Burundi, and Philippines. TRIBUNAL SUPERIOR ELEITORAL DO BRASIL, ELEICOES 2018, [Superior Electoral Court] (2018), <https://www.tse.jus.br/eleicoes/ele>

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.<sup>62</sup> For instance, following President Trump's rhetoric of taking the country back,<sup>63</sup> 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."<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> In the Netherlands, the people's party PVV, led by Geert Wilders, called for more aggressive anti-immigrant policies.<sup>67</sup> The political party AfD

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icoes-2018. Instituto Nacional Electoral Mexico, Elecciones Presidenciales, (2018) <https://centralectoralelectoral.ine.mx/2018/07/06/da-conocer-ine-resultados-del-computo-de-la-eleccion-presidencial-2018/>; Consejo Nacional Electoral de La Republica Bolivariana de Venezuela, Elecciones Presidenciales 2018, (2018), <http://www.cne.gob.ve/ResultadosElecciones2018/>; Elecciones Congreso de La Republica de Guatemala, Elecciones Presidenciales 2015, (2015); *Nicaragua: Ortega Asume por Quinta Vez como Presidente con la Ausencia de la Mayoría de Líderes de América Latina*, BBC MUNDO (Jan. 11, 2022), <https://www.bbc.com/mundo/noticias-america-latina-59946402>; Javier Lafuente, *Elecciones en Bolivia: Bolivia Reelige a Evo Morales para un Tercer Mandato*, EL PAÍS (Oct. 12, 2014), [https://elpais.com/internacional/2014/10/12/actualidad/1413146256\\_185646.html](https://elpais.com/internacional/2014/10/12/actualidad/1413146256_185646.html); EGYPT NATIONAL ELECTIONS AUTHORITY, PRESIDENTIAL ELECTIONS 2018, <https://pres2018.elections.eg/en/>; Jean Claude Niyomgabo, Jason Hanna and Eli Watkins, *Burundi President Pierre Nkurunziza Winds Third Term*, CNN (July 24, 2015), <https://www.cnn.com/2015/07/24/africa/burundi-elections>; Jason Gutierrez, Tiffany Ap and Toni Macolino, *Duterte Rival Concedes in Philippines Presidential Election*, CNN (May 9, 2016), <https://www.cnn.com/2016/05/09/asia/philippines-election>.

62. Jose Mauricio Gaona, *Venezuela Nears the Road's End between Populism and Dictatorship*, WASH. EXAMINER (July 29, 2017), <https://www.washingtonexaminer.com/venezuela-nears-the-roads-end-between-populism-and-dictatorship> [https://perma.cc/W5LF-AAYD].

63. Elizabeth Chuck, *Donald Trump: 'Don't Worry, We'll Take Our Country Back'*, NBC NEWS (July 11, 2016), <https://www.nbcnews.com/politics/2016-election/donald-trump-freedomfest-you-cant-be-great-if-you-dont-n390546>.

64. *UKIP Leader Nigel Farage: 'We want our country back,'* BBC NEWS, (Sept. 25, 2015), <https://www.bbc.com/news/av/uk-politics-34356165>.

65. See Eline Schaart, *Under Far-right Pressure, Europe Retreats from UN Migration Pact*, POLITICO (Nov. 30, 2018), <https://www.politico.eu/article/migration-un-viktor-orban-sebastian-kurz-far-right-pressure-europe-retreats-from-pact/> [https://perma.cc/JN9L-UKRA].

66. *Discours aux Estivales de Fréjus*, (Le Front National Sept. 18, 2016), YOUTUBE, <https://www.youtube.com/watch?v=oxxNCvAxsuM> [https://perma.cc/4BFM-ZJSD].

67. Bill Chappell, *Geert Wilders 'Dutch Donald Trump' Takes Second Place in Closely Watched Election*, NPR (March 16, 2017), <https://www.npr.org/sections/>

in Germany rejected refugee settlement in the country while promoting strong anti-immigrant policies.<sup>68</sup> The co-leader of the AfD, Alice Widel, stated: “we are taking our country back from the politicians who have given up on it.”<sup>69</sup> 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.<sup>70</sup> This led UN Special Rapporteurs to denounce hatred against migrants in Italy.<sup>71</sup> At the same time, populist parties in Poland, Czech Republic, and Hungary have cancelled the reception of African and Middle Eastern refugees,<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup>

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thetwo-way/2017/03/16/520376715/geert-wilders-dutch-donald-trump-takes-second-place-in-closely-watched-election [https://perma.cc/K3BG-4DCE].

68. Melissa Eddy, *Alternative for Germany: Who are They, and What Do They Want?*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/world/europe/germany-election-afd.html> [https://perma.cc/5H3R-6 WPT].

69. Elizabeth Schumacher, *AfD: Meet the Far-right Bosses*, DW (Dec. 3, 2017), <http://www.dw.com/en/afd-meet-the-far-right-bosses/a-41632235> [https://perma.cc/FR2K-TMDF].

70. Cecilia Butini, *There’s No End in Sight for Mateo Salvini’s War on Migrants*, FOREIGN POLICY (Aug. 21, 2019), <https://foreignpolicy.com/2019/08/21/theres-no-end-in-sight-for-matteo-salvinis-war-on-migrants-league-liga-open-arms-rescue-ships-mediterranean-libya/>; *see also* SENATO DELLA REPUBBLICA ITALIANA, D.L. NO 53: RECANTE DISPOSIZIONI URGENTE IN MATERIA DI ORDINE E SICUREZA PUBBLICA, (Jun. 14, 2019) Arts. 2, 3, <https://www.senato.it/service/PDF/PDFServer/BGT/01123157.pdf>.

71. United Nations Special Rapporteurs, *Legal Changes and Climate of Hatred Threaten Migrants’ Rights in Italy, Say UN Experts* [joint declaration] (Nov. 21, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23908&LangID=> [https://perma.cc/RV2K-P29R] [joint declaration].

72. Will Hutton, *Beware the Illiberal Alliance of Poland and Hungary, A Grave Threat to the EU*, THE GUARDIAN (Jan. 7, 2018), <https://www.theguardian.com/commentisfree/2018/jan/07/hungary-poland-had-enough-of-liberal-democracy-eu-must-act> [https://perma.cc/UV97-X3WV].

73. Anders Wildfeldt, *The Growth of the Radical Rights in Nordic Countries: Observations from the Past 20 Years* 7, MIGRATION POLICY INSTITUTE (MPI) (2018). David Crouch & Emily Rauhala, *Anti-Immigrant Party Helps Defeat Sweden’s Government*, WASH. POST (Sept. 14, 2022), <https://www.washingtonpost.com/world/2022/09/14/sweden-democrats-election/>.

74. Simon Romero & Daniel Politi, *Argentina’s Trump-Like Immigration Order Rattles South America*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/>

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,<sup>75</sup> and hatred<sup>76</sup> against migrants characterized as “terrorists,” “criminals,” and “invaders.”<sup>77</sup>

Furthermore, current research on dehumanization patterns<sup>78</sup> shows ascending and differential levels of blatant dehumanization, going from subtle racial aversion to outright violence of ingroups<sup>79</sup> (White-European Americans) in relation to outgroups in the United States<sup>80</sup> (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,<sup>81</sup> along with aggressive measures the ingroup often sees as necessary to contain or even punish the outgroup.<sup>82</sup> Research on the

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02/04/world/americas/argentinas-trump-like-immigration-order-rattles-south-america.html [https://perma.cc/34EX-ZFEV].

75. See, e.g., *Germany Hate Crime: Nearly 10 Attacks a Day on Migrants in 2016*, BBC NEWS (Feb. 26, 2017), <https://www.bbc.com/news/world-europe-39096833> [https://perma.cc/LF2J-N767].

76. See, e.g., *Syrian Refugees Confused, Disappointed by Pepper Spray Attack in Vancouver*, CBC NEWS (Jan. 9, 2018), <https://www.cbc.ca/news/canada/british-columbia/vancouver-police-chief-constable-speaks-on-hate-motivated-pepper-spray-incident-1.3397228> [https://perma.cc/9SQF-554U].

77. United Nations, *Hungary Urged Halt Campaign Portraying Refugees and Migrants As ‘Invaders’—UN Agency and Partners*, UN NEWS (Dec. 21, 2015), <https://news.un.org/en/story/2015/12/518692-hungary-urged-halt-campaign-portraying-refugees-and-migrants-invaders-un-agency> [https://perma.cc/9R6H-2FSK].

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<sup>83</sup> indicates ingroups' diluted support for African and Hispanic migration<sup>84</sup> as well as aversion toward Muslims.<sup>85</sup>

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

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

84. *Id.* at 13.

85. Brian Resnik, *The Dark Psychology of Dehumanization, Explained*, VOX (March 7, 2017), <https://www.vox.com/science-and-health/2017/3/7/14456154/dehumanization-psychology-explained>.

86. Anne Trafton, *Seeking the Neurological Roots of Conflict: Neuroscientists Explore How Longstanding Conflict Influences Empathy for Others*, MIT MEDICAL PRESS (Jan. 23, 2012), <https://news.mit.edu/2012/empathy-conflict-0123> [<https://perma.cc/C529-NJRB>] (analyzing ingroups and outgroups relationships when perceived as conflicting or unrelated sides).

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.

89. *Hungary: Shocking Footage Shows Hungarian Police Throwing Bread at Desperate Refugees*, YOUTUBE 24 (Sept. 11, 2015), <https://youtu.be/kcRNfNS6HWo> [<https://perma.cc/HR2G-GZNA>].

90. *Amnesty International United Kingdom, Hungary's Anti-refugee Campaign*, AI NEWS (Oct. 19, 2016), <https://www.amnesty.org.uk/hungary-anti-refugee-campaign> [<https://perma.cc/3SGQ-W4PC>].

91. See Vidra, *supra* note 11, at 17.

92. Karen McVeigh, *Fear Stalks Migrants Huddled along Hungary's Border*, THE GUARDIAN (March 19, 2017), <https://www.theguardian.com/global-development/2017/mar/19/hungary-serbia-border-migration-controls-containers>.

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,<sup>94</sup> the systematic detention of migrants,<sup>95</sup> the criminalization of humanitarian help for asylum seekers,<sup>96</sup> and a refugee referendum rejecting EU's quotas-settlement policy.<sup>97</sup> 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.<sup>98</sup>

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?”<sup>99</sup> “Why do we need more Haitians?” “Take them out!”<sup>100</sup>

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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94. Alsadair Sandford, *Hungary Completes New Anti-Migrant Border Fence with Serbia*, EURONEWS (Apr. 28, 2017), <https://www.euronews.com/2017/04/28/hungary-completes-new-anti-migrant-border-fence-with-serbia>.

95. See Kitty Mckinsey, *On Visit to Hungary, UNCHR Chief Calls for End to Detention and Greater Solidarity with Refugees*, UNCHR NEWS (Sept. 12, 2017), <https://www.unhcr.org/en-us/news/latest/2017/9/59b7fb324/visit-hungary-unhcr-chief-calls-end-detention-greater-solidarity-refugees.html> [<https://perma.cc/ZHB3-JJKK>].

96. See Patrick Kingsley, *Hungary Criminalizes Aiding Illegal Immigrants*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/world/europe/hungary-stop-soros-law.html> [<https://perma.cc/H2YT-MC2F>].

97. *Hungary PM Claims Migrant Quota Referendum Victory*, BBC NEWS (Oct. 3, 2016), <https://www.bbc.com/news/world-europe-37528325> [<https://perma.cc/SQG3-3MXW>].

98. Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html>.

99. Ryan Teague Beckwith, *President Trump Called El Salvador, Haiti 'Shithole Countries': Report*, TIME (Jan. 11, 2018, 5:05 PM), <http://time.com/5100058/donald-trump-shithole-countries/> [<https://perma.cc/G64C-TLFC>].

100. Christina Wilkie, *Trump asked why the US needs more Haitians. Mar-A-Lago may hold the answer*, CNBC (Jan. 12, 2018, 3:14 AM), <https://www.cnbc.com/2018/01/12/trump-asked-why-the-us-needs-more-haitians-mar-a-lago-may-hold-the-answer.html> [<https://perma.cc/U3PP-BMTM>].

bringing drugs, they're bringing crime. They're rapists and some, I assume, are good people. . . ."<sup>101</sup> 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."<sup>102</sup> Nevertheless, data then did not support President Trump's claims. In fact, of the total 1,629,521 Mexicans<sup>103</sup> that entered the United States during the 2017 fiscal year, only eight percent were apprehended by U.S. Border Patrol and for a wide range of legal violations not necessarily related to rape.<sup>104</sup>

Knowing how bias forms and develops is critical to fully appreciate institutional conceptualization of migrants of certain races, religions, 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 asylum seekers. Second, the evidence pinpoints the presence of race-related 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, notwithstanding 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 seekers are frequently described as undesirable migrants to developed host

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101. Suzanne Gamboa, *Donald Trump Announces Presidential Bid By Trashing Mexico, Mexicans*, NBC NEWS (June 16, 2015, 4:16 PM), <https://www.nbcnews.com/news/latino/donald-trump-announces-presidential-bid-trashing-mexico-mexicans-n376521> [<https://perma.cc/QV5U-CGBV>].

102. Vivian Salama, *Donald Trump Claims Women 'Are Raped at Levels Never Seen Before' During Immigrant Caravan*, NBC NEWS (Apr. 5, 2018, 7:28 PM), <https://www.nbcnews.com/politics/white-house/trump-claims-women-immigrant-caravan-being-raped-levels-never-seen-n863061>.

103. U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL NATIONWIDE APPREHENSIONS BY CITIZENSHIP AND SECTOR IN FY2017, at 2 (2018), <https://www.cbp.gov/sites/default/files/assets/documents/2018-May/usbp-apprehensions-citizenship-sector-fy2017.pdf>.

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<sup>105</sup> concerning a nation's strategic interests<sup>106</sup> required to preserve the integrity, safety, well-being and development of its population,<sup>107</sup> territory,<sup>108</sup> critical infrastructure<sup>109</sup> (e.g., food supply, stock market, electricity grids, communications, cyber structure), and

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105. Both domestic and foreign policies are part of national security strategies. For further discussion, Shoon Murray & Jordan Tama, *U.S. Foreign Policymaking and National Security*, in *THE OXFORD HANDBOOK OF U.S NATIONAL SECURITY* (Derek S. Reveron, Nikolas K. Gvosdev & John A Cloud eds., 2018).

106. See Gerry C. Alons, *Predicting a State's Foreign Policy: State Preference between Domestic and International Constraints*, 3 *FOREIGN POL'Y ANALYSIS* 211, 211-232 (2007).

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).

108. See Sharon L. Claude, *National Security Strategies: Security from What, for Whom, and by What Means*, 6 *J. OF HOMELAND SEC. & EMERGENCY MGMT.*, 2009, at 1, 12.

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"). PUBLIC SAFETY CANADA, *NATIONAL CROSS SECTOR FORUM: 2018-2020 ACTION PLAN FOR CRITICAL INFRASTRUCTURE* (2018), <https://www.publicsafety.gc.ca/cnt/rsrsc/pblctns/pln-crtcl-nfrstrctr-2018-20/pln-crtcl-nfrstrctr-2018-20-en.pdf>. The United States identifies up to 16 critical infrastructure sectors on national security from chemical production, manufacturing, and nuclear reactors, to information technology and water supply. *Presidential Directive – Critical Infrastructure Security and Resilience*, THE WHITE HOUSE (Feb. 12, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil> [<https://perma.cc/M9XY-XWBE>]. France, moreover, has divided its critical security infrastructure in four groups: basic human needs, sovereign activities, economic systems, and technology. *SECRETARIAT GÉNÉRAL DE LA DÉFENSE ET DE LA SÉCURITÉ NATIONALE, THE CRITICAL INFRASTRUCTURE PROTECTION IN FRANCE* 2 (Dec. 8, 2018), <http://www.sgdsn.gouv.fr/uploads/2017/03/plaquette-saiv-anglais.pdf> [<https://perma.cc/7NWM-Z2WP>]. Still, Germany and China have adopted a more specialized approach on national security infrastructure (cybersecurity plans). GERMANY BUNDESMINISTERIUMS, *Cyber Security Strategy for Germany* (2016), <https://www.bmi.bund.de/DE/themen/it-und-digitalpolitik/it-und-cybersicherheit/cybersicherheitsstrategie/cyber-sicherheitsstrategie-node.html> [<https://perma.cc/F89K-4CEG>]; see also NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS, *UNDERSTANDING CHINA'S CYBERSECURITY LAW* (2017), <https://www.mfat.govt.nz/assets/Countries-and>

institutional systems (e.g., democracy, economy, environment, immigration, healthcare).<sup>110</sup>

Institutional responses to national security are deemed justified to the extent that they appear recognizable within progressively integrated values<sup>111</sup> 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”)<sup>112</sup> 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<sup>113</sup> the depiction made by Polish MEP leader Janusz Korwin-Mikke<sup>114</sup> or even PM Mateusz Morawiecki’s position of not accepting “migrants from Africa or the Middle East,<sup>115</sup> play with respect to Poland’s membership to the EU.”<sup>116</sup>

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-

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-Regions/North-Asia/China/Understanding-Chinas-cybersecurity-law.pdf [https://perma.cc/GSW9 -NAAS].

110. NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS, *supra* note 109.

111. In his seminal concept of national security, Wolfers makes critical distinctions between subjective and objective elements of national security while acknowledging moral dilemmas affecting the axiological acquisition of national security as a concept. Arnold Wolfers, “National Security” as an Ambiguous Symbol, 67 POL. SCI. Q. 481, 483-84 (1952) (depicting values that reflect both political decisions and moral choices).

112. Jan Cienski, *Why Poland Doesn’t Want Refugees*, POLITICO (May 21, 2017, 2:20 PM), <https://www.politico.eu/article/politics-nationalism-and-religion-explain-why-poland-doesnt-want-refugees/> [https://perma.cc/Z744-5LN4] (quoting the President of Poland as saying immigrants carry “all sorts of parasites and protozoa.”).

113. *Id.* (“[the admission of Muslims] . . . would have to completely change our culture and radically lower the security threats level [sic] of safety in our country”).

114. *Polish and Italian MEPs Sanctioned for Hitler Salutes*, BBC NEWS (Oct. 27, 2015), <https://www.bbc.com/news/world-europe-34651255>.

115. *Poland Refuses Middle Eastern Migrants*, EURONEWS (Feb. 1, 2018), <https://www.euronews.com/2018/01/02/poland-refuses-mid-east-migrants> [https://perma.cc/GWE4-BTZX] (quoting Polish PM Morawiecki).

116. Treaty on the European Union and of the Treaty Establishing the European Community, art. 1, Sept. 23, 2003, Off. J. of the Eur. Cmty. [hereinafter Treaty of Accession]; Treaty on the European Union, art. 2, Feb. 7, 1992, Off. J. of the Eur. Cmty. (amended by the Treaties of Amsterdam, Nice, Lisbon) [hereinafter Treaty of Maastricht].

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.<sup>117</sup> 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.<sup>118</sup> This trend is more noticeable in antiterrorism laws where national security strategies are increasingly more aligned.<sup>119</sup> 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.”<sup>120</sup>

Legal scholarship acknowledges state authority<sup>121</sup> to control territorial borders through immigration law—including culture,<sup>122</sup> and national identity,<sup>123</sup> right of self-determination.<sup>124</sup> Nevertheless, the

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117. See generally GEOFFREY CORN, JIMMY GURULÉ, ERIC TALBOT JENSEN & PETER MARGULIES, *NATIONAL SECURITY LAW: PRINCIPLES AND POLICIES* (2d ed. 2019).

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.

119. Kim Lane Scheppele, *The Internationalization of National Security Law*, 4 J. NAT'L SEC. L. & POL'Y 437 (2010).

120. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (citing to EMER DE VATEL, *LE DROIT DES GENS* 94 (1758)).

121. Sarah Song, *Why Does the State Have the Right to Control Immigration?*, in *IMMIGRATION, EMIGRATION, AND MIGRATION* 14 (Jack Knight ed., 2017).

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 Heath 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 Francioni & 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<sup>125</sup> and internationally.<sup>126</sup>

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*<sup>127</sup>—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<sup>128</sup>—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.”<sup>129</sup> 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.<sup>130</sup> Not only did the Court avoid discussing Due Process and Equal Protection Clause claims, but further affirmed<sup>131</sup> 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.”<sup>132</sup>

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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.”).

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

126. *E.g.*, UNESCO, The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), <https://en.unesco.org/creativity/convention> [<https://perma.cc/FMY3-XVUX>].

127. *Jean v. Nelson*, 472 U.S. 846 (1985).

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

129. *Id.* at 96.

130. This is the constitutional rule established in *Washington v. Davis*, not just something that “has preceded”. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

131. *Jean v. Nelson*, 727 F.2d 957, 963 (11th Cir. 1984).

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.”<sup>133</sup> In *Shaughnessy v. United States ex rel. Mezei*,<sup>134</sup> 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*<sup>135</sup> and *Clark v. Martinez*,<sup>136</sup>—to grant diluted constitutional deference to the prolonged detention of aliens—specifically when their detention does not relate strictly to national security.<sup>137</sup> In the landmark decisions *Kleindienst v. Mandel*, denying entry to an alien based on his political opinion;<sup>138</sup> *Fiallo v. Bell*, establishing plenary immigration powers of Congress to exclude or grant special deference to any alien;<sup>139</sup> and *Kerry v. Din*, holding that the denial of visa applications without notice does not raise constitutional rights violations,<sup>140</sup> the Court denied constitutional challenges on immigration authorities’ decisions to exclude aliens. And in *Boumediene v. Bush*,<sup>141</sup> 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.<sup>142</sup> 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.”<sup>143</sup> 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-

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133. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 554 (1950).

134. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953).

135. *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (reflecting on aliens’ continued detention).

136. *Clark v. Martinez*, 543 U.S. 371, 384 (2005) (clarifying *Zadvydas* ruling’s interpretation on prolonged detention).

137. *Id.*

138. *Kleindienst v. Mandel*, 408 U.S. 753, 759-69 (1972).

139. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

140. *Kerry v. Din*, 135 S. Ct. 2128, 2138 (2015).

141. *Boumediene v. Bush*, 553 U.S. 723 (2008).

142. *Id.* at 797.

143. *Id.* at 765.

gress under INA<sup>144</sup> 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.<sup>145</sup> 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<sup>146</sup> 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.<sup>147</sup> Still, aside from common restrictions on public health,<sup>148</sup> criminal activity,<sup>149</sup> political

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144. Immigration Nationality Act, 8 U.S.C. § 1182(f).

145. *Trump v. Hawaii*, 138 S. Ct. 2392, 2410 (2018).

146. See PUB. SAFETY CAN., 2018 PUBLIC REPORT ON THE TERRORIST THREAT TO CANADA: BUILDING A SAFE AND RESILIENT CANADA 15 (3rd rev. 2019), <https://www.publicsafety.gc.ca/cnt/rsrscsHLS6/pblctns/pblc-rprt-trrtsm-thrt-cnd-2018/pblc-rprt-trrtsm-thrt-cnd-2018-en.pdf> [<https://perma.cc/SGT2->]; U.S. DIR. OF NAT'L INTEL., 2019 NATIONAL INTELLIGENCE STRATEGY OF THE UNITED STATES OF AMERICA 4-5 (2019), [https://www.dni.gov/files/ODNI/documents/National\\_Intelligence\\_Strategy\\_2019.pdf](https://www.dni.gov/files/ODNI/documents/National_Intelligence_Strategy_2019.pdf) [<https://perma.cc/G4N7-DSJW>]; PRC STATE COUNCIL, GOV'T OF CHINA, THE FIGHT AGAINST TERRORISM AND EXTREMISM AND HUMAN RIGHTS PROTECTION IN XINJIANG (USC US-China Institute, Mar. 2019), <https://china.usc.edu/prc-state-council-fight-against-terrorism-and-extremism-and-human-rights-protection-xinjiang-march> [<https://perma.cc/7JQ7-CTWZ>]; see also EUROPOL, 2018 EUROPEAN UNION TERRORISM AND TREND REPORT 5-7 (2018), <https://www.europol.europa.eu/publications-events/main-reports/european-union-terrorism-situation-and-trend-report-2018-tesat-2018> [<https://perma.cc/8JZZ-2W6S>]; U.N. Secretary-General, *Activities of the United Nations System in Implementing the United Nations Global Counter-Terrorism Strategy*, 3, U.N. Doc. A/72/840 118 (Apr. 20, 2018), <https://digitallibrary.un.org/record/3854657?ln=EN> [<https://perma.cc/L56W-NQNX>].

147. E.g., David J. Bier, *The Cold War's Lesson for Immigration Policy*, CATO INSTITUTE (Aug. 23, 2016), <https://www.cato.org/publications/commentary/cold-wars-lesson-immigration-policy> [<https://perma.cc/356S-NBT5>].

148. This considering its inclusion as inadmissibility ground in 1982 and the legal articulation of those concerns in 1990 and 1996 (communicable diseases of public health significance and mental health illnesses with potential harm to others). See United States Immigration Act of 1882, Pub. L. No. 47-376, 22 Stat. 214 (1982); United States Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Immigration Nationality Act, 8 U.S.C. § 1182(f), 8 U.S.C. § 1182(a)(1)(A)(ii).

149. Criminal convictions involving moral turpitude offenses (*supra* note 144, 8 U.S.C. § 1182 (a)(2)(A)(i)(I)), along with criminal activity related to prostitution (*supra* note 144, 8 U.S.C. § 1182 (a)(2)(D)), drug trafficking (*supra* note 144, 8 U.S.C. § 1182 (a)(2)(C)), human trafficking (*supra* note 144, 8 U.S.C. § 1182 (a)(2)(H)), and money laundering (*supra* note 144, 8 U.S.C. § 1182 (a)(2)(I)). See Immigration Nationality Act, 8 U.S.C. § 1182(f)

affiliation,<sup>150</sup> and immigration law violations,<sup>151</sup> 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.<sup>152</sup> 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,<sup>153</sup> Congress extended inadmissibility and deportability grounds to activities related to terrorism such as planning, funding, supporting, or facilitating acts of terrorism.<sup>154</sup> After 9/11, Congress passed the *U.S.A. Patriot Act of 2001*,<sup>155</sup> which expanded government surveillance programs, funding, institutional cooperation, and mechanisms to prevent and investigate terrorism.<sup>156</sup> Similarly, the *Homeland Security Act of 2002* created the Department of Homeland Security,<sup>157</sup> and the *REAL ID Act of 2005* provided guiding principles for the “War on Terror” and funding for military operations.<sup>158</sup> 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.<sup>159</sup> Such assimilation portrayed anti-terrorist laws

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150. See INA, 8 U.S.C. § 1182(a)(3)(D).

151. See INA, 8 U.S.C. § 1182(a)(3)(D). Before 2001, failure to attend removal hearing under INA §212(a)(6)(B), or unlawful entry under § 212(a)(9)(C)(i)(I).

152. The U.S. Congress enacted provisions on terrorist activities committed by aliens as well as special witness protection for foreign nationals informing on terrorist activities through the nonimmigrant visa “S.” United States Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

153. U.S. 9/11 COMMISSION REPORT, *supra* note 32, at 35.

154. MICHAEL JOHN GARCIA & RUTH ELLEN WASEN, CONG. RSCH. SERV., RL32564 IMMIGRATION: TERRORIST GROUNDS FOR EXCLUSION AND REMOVAL OF ALIENS 3 (2010), <https://fas.org/sgp/crs/homesecc/RL32564.pdf> [<https://perma.cc/2YR3-3RW2>].

155. United States Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996). The Act led to a fundamental addition of INA instructing immigration authorities to ascertain inadmissibility and deportability of aliens based on terrorist activities (8 U.S.C. § 1182 (a)(3)(B), (F)).

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>.

157. United States Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (harmonizing information on terrorist threats through immigration and national security systems between the Departments of Homeland Security, Justice, and State).

158. U.S. Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

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 Chapter 7 (2015); see also

as the new normal and the War on Terror as an unavoidable clash of civilizations.<sup>160</sup>

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,<sup>161</sup> representing a security risk of 0.00074% in 40 years. Of 25 identified terrorists, 3 attacks killed 3 people in the 1970s.<sup>162</sup> In this period, the projected risk of being killed by a refugee was estimated to be 1 in 3,855,342,265.<sup>163</sup> And of 732,168 asylum seekers admitted from 1975 to 2017, only 11 were identified as terrorists, representing a security risk of 0.0015%.<sup>164</sup> The projected risk of being killed by an asylum seeker in the United States was estimated as 1 in 1,285,114,088.<sup>165</sup> Though mathematically justified,<sup>166</sup> 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,<sup>167</sup> for which it

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Zuleyha Keskin & Fatih Tuncer, *Causes of Radicalization: Theological Arguments as the Ultimate Trigger*, in *CONTESTING THE THEOLOGICAL FOUNDATIONS OF ISLAMISM AND VIOLENT EXTREMISM*, 15-16 (Felhi Mansouri & Zuleyha Keskin, eds., 2019); U.S. CENT. INTEL. AGENCY (CIA), *THE WORLD FACTBOOK: TERRORIST GROUPS—FOREIGN BASED* (2019), <https://www.cia.gov/the-world-factbook/references/terrorist-organizations/1> [<https://perma.cc/2L3P-SQAA>].

160. See Sudha Setty, *Assessing Unconventional Applications of the “Terrorism” Label*, in *BEYOND HUMAN RIGHTS AND THE WAR ON TERROR* 6-18 (Satvinder S. Juss, ed., 2019) (analyzing cases concerning the *United States Anti-Terrorism and Effective Death Penalty Act of 1996*, the *USA Patriot Act of 2001*, and *India Prevention of Terrorism Act of 2002*).

161. Alex Nowrasteh, *Terrorists by Immigration Status and Nationality: A Risk Analysis, 1975-2017*, 866 *POL’Y ANALYSIS* 8 (2019).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. RICHARD ROYALL, *THE STRENGTH OF STATISTICAL EVIDENCE* 2 (1999), <https://www.tilastokeskus.fi/isi99/proceedings/arkisto/varasto/roya0578.pdf> [<https://perma.cc/WX5D-TA9B>] (describing the value and limitations of statistical evidence).

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, *Proportionality*, in *MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL L.*, (May 2011) <https://opil.ouplaw.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<sup>168</sup>—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.<sup>169</sup> 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,<sup>170</sup> Germany after the Berlin Christmas market attack of 2016,<sup>171</sup> Finland after the Turku market square attack of 2017,<sup>172</sup> and in the

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9780199231690/law-9780199231690-e1459?rskey=N47wuf&result=1&prd=MPIL  
[https://perma.cc/CH55-KLMU].

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].

169. See, e.g., UNITED STATES INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004 (IRTPA), 108th Cong., Pub. L. 108-458, 118 Stat. 3638, § 5403(b), (Dec. 17, 2004) [codified 50 U.S.C. Chap. 15, § 401].

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.<sup>173</sup> 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,<sup>174</sup> yet they entered the country with a non-immigrant visa and subsequently claimed asylum protection.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup>

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173. In 2018, a self-radicalized refugee from Afghanistan living in Germany traveled to Amsterdam's Central Station where he stabbed two American tourists. See DN, *Man Jailed for 26 Years for Stabbing US Tourists in Amsterdam Terror Attack*, DUTCH NEWS (Oct. 14, 2019), <https://www.dutchnews.nl/news/2019/10/central-station-stabber-jailed-for-26-years-for-attacking-american-tourists/> [https://perma.cc/3CDU-JXW8].

174. *Profile: Who is Boston Bomber Dzhokhar Tsarnaev?*, BBC NEWS (April 8, 2005), <https://www.bbc.com/news/world-us-canada-31734557> [https://perma.cc/WJT8-JP4Y].

175. *Id.*

176. Associated Press, *Suspect Detained in French Knife Attack—Believed to Have Been on Drugs and in 'Psychotic State'*, CBS NEWS (Sept. 1, 2019), <https://www.cbsnews.com/news/france-knife-attack-suspect-drugs-psychotic-state-latest-updates-2019-09-01/> [https://perma.cc/4LPV-V5AS].

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 ENTENMANN, *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.<sup>178</sup> 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")<sup>179</sup> and

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PORTS (2014-2018), <https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2014>; NEW EUROPOL, TE-SAT TERRORISM REPORTS (2015-2018), <https://www.europol.europa.eu/publications-events/main-reports/tesat-report>; PRIME MINISTER OF AUSTRALIA AND CABINET, REPORT OF THE AUSTRALIAN TASKFORCE TO COMBAT TERRORIST AND EXTREME VIOLENT MATERIAL ONLINE 1-2 (June 2019), <https://www.pmc.gov.au/sites/default/files/publications/combatterrorism-extreme-violent-material-online.pdf>; see also PRIME MINISTER OF AUSTRALIA AND CABINET, NATIONAL SECURITY INITIATIVES AND REPORTS (2014-2018), <https://www.pmc.gov.au/national-security>; BBC NEWS ARCHIVES (2018), <https://www.bbc.co.uk/archive/>; NEW AMERICA, TERRORISM IN AMERICA AFTER 9/11: TERRORIST PROFILES (2020), <https://www.newamerica.org/international-security/reports/terrorism-in-america/who-are-the-terrorists>. NEW AMERICA, TERRORISM IN AMERICA AFTER 9/11: TERRORIST PROFILES (2020), <https://www.newamerica.org/international-security/reports/terrorism-in-america/who-are-the-terrorists>.

178. Gretchen Frazee, *4 Myths about How Immigrants Affect the U.S. Economy*, PBS (Nov. 2, 2018), <https://www.pbs.org/newshour/economy/making-sense/4-myths-about-how-immigrants-affect-the-u-s-economy> [<https://perma.cc/84M9-PQWB>]; see also, e.g., David Cameron, *Taking More and More Refugees, Not Answer*, BBC NEWS (Sept. 2, 2015), <https://www.bbc.com/news/uk-politics-34130067> [<https://perma.cc/63WF-CXRA>]; Gill Plimer, *Rising Refugee Flows Test Britain's Housing Resources*, FINANCIAL TIMES (Feb. 16, 2016), <https://www.ft.com/content/each29b0-d0df-11e5-92a1-c5e23ef99c77> [<https://perma.cc/8KE2-DZ6Z>].

179. Paul Chiasson, *Canada Resettled More Refugees than Any Other Country in 2018, UN Says*, THE CANADIAN PRESS (June 20, 2019), <https://www.cbc.ca/news/politics/canada-resettled-most-refugees-un-1.5182621> [<https://perma.cc/TZC7-P5V2>] ("Canada resettled more refugees than any other country").

language frequently used<sup>180</sup> 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)<sup>181</sup> represented tiny fractions (0.09%, 0.02%, 0.001%, 0.2%, 0.5%, 0.3%, 0.005%, 0.3%, respectively)<sup>182</sup> 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,<sup>183</sup> the refugee population represented only 1.2%. Of the 1.4 million refugee-resettlement claims made worldwide,<sup>184</sup> only 92,400 people were granted refugee status.<sup>185</sup> And of these, only sixteen percent were resettled in developed countries.<sup>186</sup>

If anything, integrated migrant populations boost host-countries' economic growth.<sup>187</sup> Data confirm that at the time that most hostile immigration policies were approved around 2018, the largest migrant

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180. *E.g.*, Jane Onyanga-Omara, *Record Refugee Crisis Hits All Parts of Globe*, USA TODAY (Nov. 19, 2015), <https://www.usatoday.com/story/news/world/2015/11/19/migrants/32039203/> [<https://perma.cc/BR9P-P2FA>] (“nations worried about the costs of housing migrants and threats from terrorists sneaking across borders amid the hordes of refugees”); Justin Giovannetti, *Influx of Refugees Fleeing U.S. Is Putting Ottawa to the Test*, THE GLOBE AND MAIL (April 14, 2017), <https://www.theglobeandmail.com/news/national/influx-of-refugees-fleeing-us-are-putting-ottawa-to-the-test/article34087595/> [<https://perma.cc/R8CR-WEX7>]; Neetu Garcha, *Wave of Syrian Refugees Coming to Okanagan*, GLOBALNEWS (Feb. 19, 2016), <https://globalnews.ca/news/2529476/wave-of-syrian-refugees-coming-to-the-okanagan/> [<https://perma.cc/7A5C-52D8>].

181. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), GLOBAL TRENDS: FORCED DISPLACEMENT IN 2018 (June 2019) 65-68, <https://reliefweb.int/attachments/5ee61624-975c-3354-9b7e-f2c1e9c8185a/5d08d7ee7.pdf> [hereinafter “UNHCR”].

182. WORLD BANK DATA, POPULATION TOTAL BY COUNTRY 2018, <https://data.worldbank.org/indicator/SP.POP.TOTL?end=2018&start=1960>.

183. UNHCR, *supra* note 181, at 66.

184. *Id.*

185. *Id.*

186. *Id.*

187. *See* MICHAEL CLEMENS ET AL., CENTER FOR GLOBAL DEVELOPMENT, THE ECONOMIC AND FISCAL EFFECTS OF GRANTING REFUGEES FORMAL LABOR MARKET ACCESS 7-8 (2018), <https://www.cgdev.org/sites/default/files/economic-and-fiscal-effects-granting-refugees-formal-labor-market-access-brief.pdf> [<https://perma.cc/HH55-JU9Q>] (describing refugees' economic contributions); Dany Bahar, *Why Accepting Refugees Is a Win-Win Formula* (June 19, 2018), <https://www.brookings.edu/blog/up-front/2018/06/19/refugees-are-a-win-win-win-formula-for-economic-development/> [<https://perma.cc/KDC6-446C>]; *see also* Daniel Oberhaus, *30 Years of Data Shows Asylum Seekers Are Not an Economic Burden*, VICE NEWS (June 20, 2018), [https://www.vice.com/en\\_us/article/ywejb5/30-years-of-data-shows-asylum-seekers-are-not-an-economic-burden](https://www.vice.com/en_us/article/ywejb5/30-years-of-data-shows-asylum-seekers-are-not-an-economic-burden) [<https://perma.cc/4APR-UG8X>].

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)<sup>188</sup> 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).<sup>189</sup> 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<sup>190</sup> or reception-integration systems without resources.<sup>191</sup> 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)<sup>192</sup> while high income countries continue to reduce their intake of refugees.<sup>193</sup>

Despite socioeconomic challenges, effective resettlement of migrants occurs under reception-integration<sup>194</sup> or self-reliance-integra-

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188. UNHCR, *supra* note 181, at 65-68.

189. *Id.*

190. See IZZA LEGHTAS, REFUGEES INTERNATIONAL, INSECURE FUTURE: DEPORTATIONS AND LACK OF LEGAL WORK FOR REFUGEES IN TURKEY (Sept. 2019), <https://www.refugeesinternational.org/reports/2019/9/18/insecure-future-deportations-and-lack-of-legal-work-for-refugees-in-turkey> [<https://perma.cc/N5P5-ZAMS>]; see also HUMAN RIGHTS WATCH, BANGLADESH IS NOT MY COUNTRY (Aug. 2018), [https://www.hrw.org/sites/default/files/report\\_pdf/bangladesh0818\\_web2.pdf](https://www.hrw.org/sites/default/files/report_pdf/bangladesh0818_web2.pdf) [<https://perma.cc/5CVW-L7BJ>].

191. Danny Glenwright, *In an Orderly Ethiopian Camp, South Sudanese Refugees Face Malnutrition, Trauma*, TORONTO STAR (March 24, 2019), <https://www.thestar.com/news/world/2019/03/24/in-an-orderly-ethiopian-camp-south-sudanese-refugees-face-malnutrition-trauma.html> [<https://perma.cc/6U9B-24QK>]; see also e.g., Karen McVeigh, *Life-saving: Hundreds of Refugees to Be Evacuated from Libya*, THE GUARDIAN (Sept. 10 2019), <https://www.theguardian.com/global-development/2019/sep/10/hundreds-refugees-evacuated-libya-to-rwanda>.

192. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), GLOBAL TRENDS: FORCED DISPLACEMENT IN 2021 2 (June 2022), <https://reliefweb.int/attachments/66a09358-2cf3-448c-846a-d29f9f8f768c/62a9d1494.pdf>.

193. For example, United States reduced refugees' intake cap to 18,000 migrants for the fiscal year 2019-2020, see Presidential Determination No. 2020-04, 84 Fed. Reg. 65903, (Nov. 1, 2019). In 2018, Japan accepted 42 refugees out of 10,439 applications. Sakari Mesimaki, *The Quiet Desperation of Refugees in Japan*, THE DIPLOMAT (Aug. 23, 2019), <https://thediplomat.com/2019/08/the-quiet-desperation-of-refugees-in-japan>.

194. See Lori Wilkinson & Joseph Garcea, THE ECONOMIC INTEGRATION OF REFUGEES IN CANADA: A MIXED RECORD? 1 (2017), [https://www.migrationpolicy.org/sites/default/files/publications/TCM-Asylum\\_Canada-FINAL.pdf](https://www.migrationpolicy.org/sites/default/files/publications/TCM-Asylum_Canada-FINAL.pdf) (comparing advantages and disadvantages on reception-integration system).

tion systems.<sup>195</sup> Although reports show significant differentials among refugee groups,<sup>196</sup> 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.<sup>197</sup> 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.<sup>198</sup> 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.<sup>199</sup> 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

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195. A. BETTS ET AL., *REFUGEE ECONOMIES IN UGANDA: WHAT DIFFERENCE DOES THE SELF-RELIANCE MODEL MAKE?* 35-36 (2019), <https://www.fsc.ox.ac.uk/publications/refugee-economies-in-uganda-what-difference-does-the-self-reliance-model-make> (comparing integrated and self-reliance reception models in Africa).

196. G. PICOT ET AL., *LABOUR MARKET OUTCOMES AMONG REFUGEES TO CANADA* 6 (2019), <https://www150.statcan.gc.ca/n1/pub/11f0019m/11f0019m2019007-eng.htm>; SARAH DEARDORFF MILLER, *ASSESSING THE IMPACTS OF HOSTING REFUGEES* 1-3 (2018).

197. See Audrey Macklin, *Audrey Macklin, Resettler Society: Private Refugee Sponsorship and Citizenship*, YOUTUBE (Jan. 22, 2018), <https://youtu.be/iyzq0uiUTjY>.

198. Tessa Coggio, *Can Uganda's Breakthrough Refugee-Hosting Be Sustained?*, MIGRATION POLICY INSTITUTE (Oct. 31, 2018), <https://www.migrationpolicy.org/article/can-ugandas-breakthrough-refugee-hosting-model-be-sustained>.

199. See, e.g., Yasmin Serían, *Italy Is Getting Its First Female Leader—A Polished Far-Right Firebrand*, TIME (September 22, 2022), <https://time.com/6215723/italy-election-giorgia-meloni-far-right> (reporting Italy's PM narrative on ethnic substitution); Thorpe, *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.<sup>200</sup> In fact, the international migrant population reached 281 million in 2020.<sup>201</sup> 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<sup>202</sup> which, at the time, outnumbered the population and economic resources of the city of Cúcuta located on the Colombian border with

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200. For instance, a quarter (20.5 million) of Germany's population (83 million) has immigrant background. See Chase Winter, *Germany: 20.8 Million People with Immigrant Background*, DW (Aug. 21, 2019), <https://www.dw.com/en/germany-208-million-people-with-immigrant-background/a-50108141>. Canada's population (37 million) increased by over half a million from July 2017 to July 2018 (i.e., one person every minute in 12 months, 518,588 people). The increase was attributed to international migration (303,257 people). STATISTICS CANADA, CANADA'S POPULATION ESTIMATES: TOTAL POPULATION—JULY 1, 2018 1-2 (2018), <https://www150.statcan.gc.ca/n1/en/daily-quotidien/180927/dq180927c-eng.pdf?st=MGnP4GB6>.

201. *International Migrants Day 18 December*, UNITED NATIONS (2021), <https://www.un.org/en/observances/migrants-day>.

202. The World Bank, *Supporting Colombian Host Communities and Venezuelan Migrants During the COVID-19 Pandemic*, THE WORLD BANK (Oct. 31, 2021), <https://www.worldbank.org/en/results/2021/10/31/supporting-colombian-host-communities-and-venezuelan-migrants-during-the-covid-19-pandemic#:~:text=the%20World%20Bank%20has%20allocated,to%20the%20Venezuelan%20migration%20crisis>.

Venezuela.<sup>203</sup> Economic and social tensions have developed between Venezuelans and Colombians notwithstanding similar cultural references of language and religion.<sup>204</sup> Similaar tensions occur in Turkey, hosting 4 million refugees in September 2021, including 3.7 million Syrian refugees.<sup>205</sup> 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.<sup>206</sup> Likewise, macroeconomic impacts on prices, wages, and poverty have been reported along Teknaf-Cox's Bazar in Bangladesh<sup>207</sup>—hosting the largest refugee population in Asia with 918,000 Rohingya refugees by the end of December 2021.<sup>208</sup> In Uganda, hosting the largest refugee population in Africa—1,494,505 by the end of May 2021<sup>209</sup>—social tensions have been reported too.<sup>210</sup> 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.

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203. *Id.*

204. WORLD BANK, *MIGRACIÓN DESDE VENEZUELA A COLOMBIA* 73-90 (2018), <https://openknowledge.worldbank.org/bitstream/handle/10986/30651/131472SP.pdf> (describing institutional, social, and economic tensions between Venezuelan migrants and Colombian citizens).

205. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, UNHCR TURKEY OPERATIONAL UPDATE SEPTEMBER 2021 (2021), <https://data.unhcr.org/en/documents/details/89383>.

206. INTERNATIONAL ORGANIZATION FOR MIGRATION TURKEY, IOM TURKEY: MIGRATION CRISIS OPERATIONAL FRAMEWORK (MCOF) 2018 – 2019 (2018), <https://www.iom.int/sites/g/files/tmzbdl486/files/documents/MCOF-SP-Turkey.pdf>.

207. UNITED NATIONS DEVELOPMENT PROGRAM, *IMPACTS OF THE ROHINGYA REFUGEE INFLUX ON HOST COMMUNITIES* 71-75 (2019), <https://reliefweb.int/report/bangladesh/impacts-rohingya-refugee-influx-host-communities> (providing quantitative-qualitative data on macroeconomic impacts).

208. UNICEF, *BANGLADESH HUMANITARIAN SITUATION REPORT No. 58* 1 (2022), <https://www.unicef.org/media/115001/file/Bangladesh-Humanitarian-SitRep-December-2021.pdf>.

209. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *UGANDA—REFUGEE STATISTICS MAY 2021* (2021), <https://data.unhcr.org/en/documents/details/87091>.

210. Coggio, *supra* note 198.

## 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.”<sup>211</sup>

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,<sup>212</sup> for which perception is both a triggering event of reason-

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211. C. Lucey et al., *Trump Stokes Pre-Election Fear of Immigrants to Drive Voters*, PBS NEWSHOUR (Oct. 31, 2018), <https://www.pbs.org/newshour/politics/trump-stokes-pre-election-fear-of-immigrants-to-drive-voters>; see also, e.g., Sarah Boseley, *Myths About Migrants Spreading Disease 'Inform Hostile Policies'*, THE GUARDIAN (Dec. 5, 2018), <https://www.theguardian.com/society/2018/dec/05/myths-about-migrants-spreading-disease-inform-hostile-policies>.

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.<sup>213</sup> 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<sup>214</sup>—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.<sup>215</sup> 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.

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*derstanding and Learning of Physical Relations, in PERCEPTION, COGNITION, AND DEVELOPMENT: INTERACTIONAL ANALYSES 231 (Thomas J. Tighe & Bryan E. Shepp eds., 2019).*

213. *See generally* C. D. BROAD, *PERCEPTION, PHYSICS, AND REALITY: AN INQUIRY INTO THE INFORMATION THAT PHYSICAL SCIENCE CAN SUPPLY ABOUT THE REAL* (1914).

214. *See generally* Joseph F. Hanna, *The Scope and Limits of Scientific Objectivity*, 71 *PHIL. OF SCI.* 339 (2004).

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 perpetuated by Muslims. *See* Erin M. Kearns, *Why Do Some Terrorist Attacks Receive More Media Attention Than Others?*, 36 *JUST. 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*<sup>216</sup>—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.<sup>217</sup> 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).<sup>218</sup> 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

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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.”<sup>219</sup> 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.<sup>220</sup> 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.<sup>221</sup> 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)<sup>222</sup> and others encountering our world (motion-reaction from Newton’s third law of motion).<sup>223</sup> 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<sup>224</sup> and slow reaction on the part of most

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219. The Guardian, *Kamala Harris Tells Migrants ‘Do Not Come’ During Talks in Guatemala*, YouTube (Jun. 7, 2021), <https://youtu.be/bpGitFizamQ>.

220. IMMANUEL KANT, *CRITIQUE OF PURE REASON* 3-4 (Paul Guyer & Allen W. Wood eds., 1998).

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.*

224. See Filippo Grandi, *Refugees Deserve Action and Investment, Not Indifference and Cruelty*, *WORLD ECON. FORUM* (May 24, 2016), <https://www.weforum.org/agenda/2016/05/refugees-deserve-action-and-investment-not-indifference-and-cruelty/>.

governments in Europe vis-à-vis millions of migrants escaping Syria.<sup>225</sup> Here both inaction and dysfunctional reaction<sup>226</sup> set forth the reality that Syrian refugees encountered: violence in their homeland<sup>227</sup> as well as death,<sup>228</sup> detention,<sup>229</sup> and dire humanitarian conditions in Europe.<sup>230</sup> 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<sup>231</sup>—the perception of European citizens<sup>232</sup> and policies<sup>233</sup> concerning the refugee crisis in Syria. Suddenly, Alan’s picture appeared

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225. See Sam Jones, *1.7m Syrian Refugees Face Food Crisis as UN Funds Dry Up*, THE GUARDIAN (Dec. 1, 2014), <https://www.theguardian.com/world/2014/dec/01/syrian-refugees-food-crisis-un-world-programme>.

226. See Catheryn Costello & Minos Mouzourakis, *The Common European Asylum System—Where Did It All Go Wrong?*, in THE EUROPEAN UNION AS AN AREA OF FREEDOM, SECURITY AND JUSTICE (Maria Fletcher et al. eds., 2016); see also generally Elizabeth Collett, *The Asylum Crisis in Europe: Designed Dysfunction*, MIGRATION POLICY INSTITUTE (Sept. 2015), <https://www.migrationpolicy.org/news/asylum-crisis-europe-designed-dysfunction>.

227. UNHCR DAMASCUS SYRIA, PROTECTING AND SUPPORTING THE DISPLACED IN SYRIA - UNHCR SYRIA END OF YEAR REPORT 2015 9-11 (Damien Sweeny & Nouar Al Shara eds., 2015), <https://www.unhcr.org/56cad5a99.pdf>; UNITED NATIONS INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY, RULE OF TERROR: LIVING UNDER ISIS IN SYRIA (2014), <https://www.ohchr.org/en/hr-bodies/hrc/iici-syria/documentation>.

228. See *Refugees and Migrants Face Heightened Risks While Trying to Reach Europe*, UNHCR NEWS (Feb. 27, 2017), <http://www.unhcr.org/news/press/2017/2/58b458654/refugees-migrants-face-heightened-risks-trying-reach-europe-unhcr-report.html> [<https://perma.cc/PE4R-3XQQ>].

229. JESUIT REFUGEE SERVICE, BECOMING VULNERABLE IN DETENTION (June 2010), <https://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29338/20111014ATT29338EN.pdf> [<https://perma.cc/2K39-3PUS>].

230. Wintour, *supra* note 4.

231. Editorial, *Alan Kurdi’s Death Did Change the World, If Only for an All-too-brief Time*, THE INDEPENDENT (Sept. 1, 2016), <https://www.independent.co.uk/voices/editorials/alan-kurdi-s-death-did-change-the-world-if-only-for-an-all-too-brief-time-a7220561.html> [<https://perma.cc/LNW8-7GYT>].

232. See Laura G. E. Smith et al., *After Alan Kurdi: How Tweeting About Death, Threat, and Harm Predict Increased Expressions of Solidarity with Refugees Over Time*, 29 PSYCH. SC. 623, 625-634 (2018) (introducing a longitudinal paradigm on social media posts indicating how images and discussions on Alan Kurdi’s death influenced public perception while fostering expressions of solidarity toward refugees). See also Markus Dettmer et al., *German Companies See Refugees As Opportunity*, DER SPIEGEL (Aug. 27, 2015), <http://www.spiegel.de/international/germany/refugees-an-opportunity-for-the-germaneconomy-a-1050102> [<https://perma.cc/T7DK-FQZX>].

233. Emma Graham-Harrison et al., *Cheering German Crowds Greet Refugees After Long Trek from Budapest to Munich*, THE GUARDIAN (Sept. 5, 2015), <https://www.theguardian.com/world/2015/sep/05/refugee-crisis-warm-welcome-for-people-bussed-from-budapest> [<https://perma.cc/666M-ZK7N>]; Paul Carrel & Noah Barkin, *Refugee Crisis Shows the Changing Soul of Germany*, REUTERS (Sept. 13, 2015), <https://www.reuters.com/article/us-europe-migrants-germany-insight/refugee-crisis->

around the world<sup>234</sup> and became a symbol of indifference and human suffering.<sup>235</sup> 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.<sup>236</sup> Yet a volatile combination of factors in Europe, including terrorist attacks in France,<sup>237</sup> Belgium,<sup>238</sup> Germany<sup>239</sup> and growing expressions of hatred,<sup>240</sup> xenophobia, and violence<sup>241</sup> against refugees, along with the ascension of populist leaders,<sup>242</sup> led to the

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shows-the-changing-soul-of-germany-idUSKCN0RD0JU20150913 [https://perma.cc/7LU5-AT7L].

234. Patrick Kingsley & Safak Timur, *Stories of 2015: How Alan Kurdi's Death Changed the World*, THE GUARDIAN (Dec. 31, 2015), <https://www.theguardian.com/world/2015/dec/31/alan-kurdi-death-canada-refugee-policy-syria-boy-beach-turkey-photo> [https://perma.cc/94A2-7EYT]; Joel Gunter, *Alan Kurdi: Why One Picture Cut Through*, BBC NEWS (Sept. 4, 2015), <https://www.bbc.com/news/world-europe-34150419> [https://perma.cc/Q34Q-RZB6].

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

236. See EMN, BAMF DEUTSCHLAND (FEDERAL OFFICE FOR MIGRATION AND REFUGEES, IMMIGRATION), MIGRATION, INTEGRATION, ASYLUM 46 (2016), [https://www.bamf.de/SharedDocs/Anlagen/EN/EMN/Politikberichte/emn-politikbericht-2016-germany.pdf?\\_\\_blob=PublicationFile&v=7](https://www.bamf.de/SharedDocs/Anlagen/EN/EMN/Politikberichte/emn-politikbericht-2016-germany.pdf?__blob=PublicationFile&v=7) [https://perma.cc/C5MJ-BPM5].

237. See Gavin Hewitt, *Paris attacks: Impact on border and refugee policy*, BBC NEWS (Nov. 15, 2015), <https://www.bbc.com/news/world-europe-34826438> [https://perma.cc/RD7E-TQ79].

238. See Steven Erlanger, *Brussels Attacks Fuel Debate Over Migrants in a Fractured Europe*, N.Y. TIMES (March 22, 2016), <https://www.nytimes.com/2016/03/23/world/europe/belgium-attacks-migrants.html> [https://perma.cc/K9Q K-G3UC].

239. See RICHARD WIKE ET AL., PEW INSTITUTE, EUROPEANS FEAR WAVE OF REFUGEES WILL MEAN MORE TERRORISM, FEWER JOBS 3 (2017), <https://www.pewresearch.org/global/2016/07/11/europeans-fear-wave-of-refugees-will-mean-more-terrorism-fewer-jobs/> [https://perma.cc/5B54-922W] (describing a direct correlation between the terrorist attacks in Paris and Brussels and the perception of Europeans toward refugees as security and economic threats).

240. *Is the Ugly German Back? Flames of Hate Haunt a Nation*, DER SPIEGEL (July 24, 2015), <http://www.spiegel.de/international/germany/germany-registers-sharp-increase-in-attacks-on-asylum-seekers-a-1045207.html>.

241. *More than 3,500 Attacks on Refugees in Germany in 2016: Report*, DW (Feb. 26, 2017), <http://www.dw.com/en/more-than-3500-attacks-on-refugees-in-germany-in-2016-report/a-37719365> [https://perma.cc/5LND-RKMW].

242. UNITED NATIONS HUMAN RIGHTS COUNCIL, BANKING ON MOBILITY OVER A GENERATION: FOLLOW-UP TO THE REGIONAL STUDY ON THE MANAGEMENT OF THE EXTERNAL BORDERS OF THE EUROPEAN UNION AND ITS IMPACT ON THE HUMAN RIGHTS OF MIGRANTS, REPORT BY THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS A/HRC/29/36, 6-7 (2015), [https://www.ohchr.org/en/hr\\_bodies/hrc/regularsessions/session29/pages/lis\\_reports.aspx](https://www.ohchr.org/en/hr_bodies/hrc/regularsessions/session29/pages/lis_reports.aspx) [https://perma.cc/29LF-PKS6].

perception of migrants as threats—including narratives<sup>243</sup> promoting their reception<sup>244</sup> and treatment<sup>245</sup> as suspects.<sup>246</sup>

This led several countries, including Germany, Spain, Italy, and United Kingdom,<sup>247</sup> to shift immigration policies and promote international agreements<sup>248</sup> and extraterritorial controls<sup>249</sup> aimed at deterring refugees from reaching their territories, which further precluded migrants' access to courts in these countries.<sup>250</sup> Then, a redirected reality emerged: unwelcome refugees.<sup>251</sup> 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.<sup>252</sup>

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243. See, e.g., Jennifer Newton, *Swedish Foreign Minister Claims the Country Is 'Facing Collapse' Because of the Mass Influx of Refugees*, THE DAILY MAIL (Oct. 30, 2015), <http://www.dailymail.co.uk/news/article-3297317/> [https://perma.cc/RH7J-ADRE].

244. See, e.g., Patrick Kingsley, *Prisoners of Europe: The Everyday Humiliation of Refugees Stuck in Greece*, THE GUARDIAN (Sept. 6, 2016), <https://www.theguardian.com/world/2016/sep/06/prisoners-of-europe-the-everyday-humiliation-of-refugees-stuck-in-greece-migration> [https://perma.cc/XPB3-JV5U].

245. See, e.g., Rick Lyman, *Already Unwelcoming, Hungary Now Detains Asylum Seekers*, N.Y. TIMES (April 18, 2017), <https://www.nytimes.com/2017/04/18/world/europe/hungary-orban-populism-migrants-border-european-union.html> [https://perma.cc/BJ2H-4TSA].

246. See Amnesty International, *Greece: Refugees Detained in Dire Conditions Amid Rush to Implement EU-Turkey Deal*, AI NEWS (April 7, 2016), <https://www.amnesty.org/en/latest/news/2016/04/greece-refugees-detained-in-dire-conditions-amid-rush-to-implement-eu-turkey-deal/> [https://perma.cc/2ZE8-WLCV].

247. See Eric Maurice, *Germany Makes a U-turn on Syrian Refugees*, EU OBSERVER (Nov. 11, 2015), <https://euobserver.com/migration/131062> [https://perma.cc/6FML-TF4Q]; see also J. Jiménez Gálvez, *Refugiados: España No Es un País Para Asilados*, EL PAÍS (Sept. 22, 2015), [http://politica.elpais.com/politica/2015/09/22/actualidad/1442919246\\_574978.html](http://politica.elpais.com/politica/2015/09/22/actualidad/1442919246_574978.html) [https://perma.cc/RRU8-2C46]; Francesco Grignetti, *Patto fra Libia e Italia per Fermare i Flussi dei Migranti dal Sud*, LA STAMPA (Feb. 2, 2017), <http://lastampa.it/2017/02/15/esteri/patto-fra-libia-e-italia-per-fermare-i-flussi-dei-migranti-dal-sud> [https://perma.cc/Ls9eNzMeZPV8MePZ6HXOQO/pagina.html]; Rowena Mason, *Theresa May Resists Calls for UK to Accept More Syrian Refugees*, THE GUARDIAN (Sept. 19, 2016), <https://www.theguardian.com/uk-news/2016/sep/19/theresa-may-resists-calls-uk-accept-syrian-refugees-aid> [https://perma.cc/SE34-G83R].

248. Perchoc, *supra* note 16.

249. See Asher Lazarus Hirish, *The Borders Beyond the Border: Australia's Extraterritorial Migration Controls*, 36 REF. SURVEY QUART'Y 48-80 (analyzing legal consequences of Australia's non-entrée policies).

250. See HUMAN RIGHTS WATCH, EUROPE'S REFUGEE CRISIS: AN AGENDA FOR ACTION (2015), <https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action> [https://perma.cc/KMD6-RKK2].

251. See, e.g., Alberto Nardelli, *Syrian Refugees: Empathy Wanes in US and UK as More Voters Say Shut Borders*, THE GUARDIAN (Nov. 20, 2015), <https://www.theguardian.com/world/2015/nov/20/syrian-refugees-public-opinion-border-security>.

252. See EMN, BAMF DEUTSCHLAND (FEDERAL OFFICE FOR MIGRATION AND REFUGEES, IMMIGRATION), MIGRATION, INTEGRATION, ASYLUM 42 (2017), [https://www.bamf.de/SharedDocs/DE/Serviceleistungen/Erstaufnahmekarte/Erstaufnahmekarte-2017.pdf?\\_\\_blob=publicationFile](https://www.bamf.de/SharedDocs/DE/Serviceleistungen/Erstaufnahmekarte/Erstaufnahmekarte-2017.pdf?__blob=publicationFile).

Incidentally, in 2016, migrants smuggled to Europe<sup>253</sup> made this the deadliest year with a toll of 5,076 deaths.<sup>254</sup>

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”<sup>255</sup> 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.”<sup>256</sup>

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.”<sup>257</sup> 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.”<sup>258</sup> Nevertheless, a press release posted on the website of the U.S. Department of Homeland Security at the time stated:

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[www.bamf.de/SharedDocs/Anlagen/EN/EMN/Politikberichte/emn-politikbericht-2017-germany.html?nn=285176](http://www.bamf.de/SharedDocs/Anlagen/EN/EMN/Politikberichte/emn-politikbericht-2017-germany.html?nn=285176) [<https://perma.cc/9G85-MMLF>].

253. In 2015, ninety percent of forced migrants traveling to Europe used smugglers. It is estimated the smuggling industry received up to 6 million euros that year. See EUROPOL, *MIGRANT SMUGGLING IN THE EU 2* (2016), <https://www.europol.europa.eu/publications-events/publications/migrant-smuggling-in-eu> [<https://perma.cc/L6RA-5CY6>]; see also Michael Bornbaum, *Smuggling Refugees into Europe Is a New Growth Industry*, WASH. POST (Sept. 3, 2015), [https://www.washingtonpost.com/world/europe/smuggling-refugees-into-europe-is-a-new-growth-industry/2015/09/03/398c72c4-517f-11e5-b225-90edbd49f362\\_story.html](https://www.washingtonpost.com/world/europe/smuggling-refugees-into-europe-is-a-new-growth-industry/2015/09/03/398c72c4-517f-11e5-b225-90edbd49f362_story.html) [<https://perma.cc/J2BQ-ESMP>].

254. See IOM, *Mediterranean Migrant Arrivals Top 363,348 in 2016; Deaths at Sea: 5,079*, IOM NEWS (June 1, 2017), <https://www.iom.int/news/mediterranean-migrant-arrivals-top-363348-2016-deaths-sea-5079> [<https://perma.cc/D2AJ-J6J4>]; see also United Nations, *UN Refugee Agency: 2016 Is Deadliest Year for Refugees Crossing Europe Via Central Mediterranean*, UN NEWS (Sept. 2, 2016), <https://refugees-migrants.un.org/un-refugee-agency-2016-deadliest-year-refugees-crossing-europe-central-mediterranean> [<https://perma.cc/KRJ3-UJK4>].

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

256. *Id.*

257. Calvin Woodward, *AP Fact Check: Trump’s Mythical Tide from Mexico*, ABC NEWS (Jan. 7, 2019), <https://abcnews.go.com/Politics/wireStory/ap-fact-check-trumps-myth-terrorist-tide-mexico-60217825>.

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<sup>259</sup>

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,<sup>260</sup> 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,<sup>261</sup> along with Department of State data.<sup>262</sup> 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;<sup>263</sup> the de-

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259. U.S. DEPARTMENT OF HOMELAND SECURITY (DHS), MYTH/FACT: KNOWN AND SUSPECTED TERRORISTS/SPECIAL INTEREST ALIENS (2019), <https://www.dhs.gov/news/2019/01/07/mythfact-known-and-suspected-terroristsspecial-interest-aliens> [<https://perma.cc/U5Q8-XZKA>].

260. *Id.*

261. See Julia Ainsley, *Only Six Immigrants in Terrorism Database Stopped by CBP at Southern Border from October to March*, NBC NEWS (Jan. 7, 2019), <https://www.nbcnews.com/politics/immigration/only-six-immigrants-terrorism-database-stopped-cbp-southern-border-first-n955861> [<https://perma.cc/U5Q8-XZKA>]; Kevin Kelleher, *4,000 Suspected Terrorists Stopped at the Mexico Border, Says White House. Actually, It’s More Like Six, Reports U.S. Customs*, FORTUNE (Jan. 7, 2019), <http://fortune.com/2019/01/07/4000-suspected-terrorists-stopped-mexico-border-white-house-six-reports-customs/> [<https://perma.cc/NWY6-6AAP>].

262. See Dan De Luce & Julia Ainsley, *Trump Admin Rejected Report Showing Refugees Did Not Pose Major Security Threat*, NBC NEWS (Sept. 5, 2018), <https://www.nbcnews.com/politics/immigration/trump-admin-rejected-report-showing-refugees-did-not-pose-major-n906681>.

263. The “U.S. travel ban” precluded refugees from certain countries from entering the United States. At the time (July 2018), 6.3 million refugees from Syria, 986,400 from Somalia, 280,692 refugees from Yemen, and 670,972 from Libya, 204 from North Korea, along with special qualifications on Venezuelan asylum seekers and Iranian refugees. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), GLOBAL TRENDS: FORCED DISPLACEMENT IN 2017 14 (2018), <https://www.unhcr.org/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017.html> [<https://perma.cc/RQW6-HMJ2>]; see also UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), YEMEN UNHCR UPDATE—MARCH 2018 (2018), <https://reliefweb.int/report/yemen/yemen-unhcr-update-march-2018> [<https://perma.cc/64MM-VJWE>]; TASSILO TEPPORT, DTM, LIBYA’S MIGRANT REPORT ROUND 22: SEPTEMBER—OCTOBER 2018 (2018), <https://reliefweb.int/report/libya/displacement-tracking-matrix-dtm->

tention,<sup>264</sup> incarceration,<sup>265</sup> and separation of migrant families and children;<sup>266</sup> the refoulement of asylum seekers found at the United States-Mexican border while deterring their access to U.S. courts;<sup>267</sup>

libya-s-migrant-report-round-22-september-october-2018 [https://perma.cc/AVD7-62X8]; WORLD DATA, Refugees from Iran (2018), https://www.worlddata.info/asia/iran/asylum.php [https://perma.cc/SQ9K-Q76X] (accessed Jan. 30, 2022, 4:45 AM); WORLD DATA 2018, REFUGEES FROM NORTH KOREA (2018) (last visited Jan. 30, 2022, 4:50 AM).

264. 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. U.S. DEPARTMENT OF HOMELAND SECURITY & DEPARTMENT OF JUSTICE, ALIEN INCARCERATION REPORT: FISCAL YEAR 2018, QUARTER 1, 1 (June 2018), https://cis.org/sites/cis.org/files/data-portal/Alien\_Incarceration\_Report\_2018\_Q1.pdf [https://perma.cc/U6MC-KC8Y]; see also GLOBAL DETENTION PROJECT, UNITED STATES IMMIGRATION DETENTION (2020), https://www.globaldetentionproject.org/countries/americas/united-states#country-report [https://perma.cc/L47C-NH98].

265. Kids in Cages *supra* note 9.

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. See *Reno v. Flores*, 507 U.S. 292 (1993); U.S. OFFICE OF THE ATTORNEY GENERAL, MEMORANDUM FOR FEDERAL PROSECUTORS ALONG THE SOUTHWEST BORDER (2018), https://www.justice.gov/opa/press-release/file/1049751/download [https://perma.cc/T368-FNF5]; see also *Why the US Is Separating Migrant Children from Their Parents*, BBC NEWS (June 15, 2018), https://www.bbc.com/news/world-us-canada-44503514 [https://perma.cc/P83H-EZEF]; Sonia Perez, *2nd Child Dead in US Custody Mourned in Guatemala Village*, US NEWS (Dec. 30, 2018), https://www.usnews.com/news/politics/articles/2018-12-30/trump-blames-democrats-not-his-team-for-border-deaths; MUZAFFAR CHISHTI & SARAH PIERCE, MIGRATION POLICY, TRUMP ADMINISTRATION’S NEW INDEFINITE FAMILY DETENTION POLICY: DETERRENCE NOR GUARANTEED (2018), https://www.migrationpolicy.org/article/trump-administration-new-indefinite-family-detention-policy [https://perma.cc/FN9Z-VNM6].

267. Based on the policy known as “*Migrant Protection Protocols*” (MPP) concerning asylum seekers and unlawfully present aliens detained at the southern border, U.S. Homeland Security Secretary Kirstjen Nielsen issued a memorandum instructing immigration authorities to return those migrants to Mexico after their asylum hearing. Accordingly, asylum seekers entering the southern border must wait there until final court ruling. These memorandums violate both the principle of non-refoulement (art. 33(1) *Refugee Convention*) and core human rights protections (art. 22(8) of the *American Convention on Human Rights*, art. 3 of the *Convention Against Torture*). U.S. DEPARTMENT OF HOMELAND SECURITY, MEMORANDUM FOR IMPLEMENTATION OF MIGRANT PROTECTION PROTOCOLS (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19\_0129\_OPA\_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/9D73-5EUX]; U.S. DEPARTMENT OF HOMELAND SECURITY, MIGRANT PROTECTION PROTOCOLS (January 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols; AMNESTY INT’L, USA: ‘YOU DON’T HAVE ANY

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;<sup>268</sup> 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.<sup>269</sup>

Yet, data did not support the "legal assertions of reality" made by President Trump<sup>270</sup> and members of his cabinet<sup>271</sup> 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.<sup>272</sup> 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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RIGHTS HERE' ILLEGAL PUSHBACKS, ARBITRARY DETENTION & ILL-TREATMENT OF ASYLUM-SEEKERS IN THE UNITED STATES (2018), <https://www.amnesty.org/en/latest/research/2018/10/usa-treatment-of-asylum-seekers-southern-border/> [<https://perma.cc/K8LH-WEE6>] [hereinafter AMNESTY INT'L]; Azam Ahmed et al., *Mexico Protests U.S. Decision to Return Asylum Seekers*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/world/americas/mexico-asylum-seekers.html> [<https://perma.cc/DVS6-VCXC>]; see also Refugee Convention, *supra* note 168, art. 31(1); Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 26, 1144 U.N.T.S. 123., art. 22(8); U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

268. Nancy A. Youssef & Alicia A. Caldwell, *Trump to Deploy 5,200 Troops to Southern Border*, WALL ST. J. (Oct. 30, 2018), <https://www.wsj.com/articles/military-to-deploy-5-000-troops-to-southern-border-u-s-officials-say-1540820650> [<https://perma.cc/L6S7-68R5>]; David Smith, *Trump Grants Troops Guarding Border Authority to Use 'Lethal Force'—Report*, THE GUARDIAN (Nov. 21, 2018), <https://www.theguardian.com/us-news/2018/nov/21/trump-us-mexico-border-troops-decision-memorandum-force-report> [<https://perma.cc/VC93-XN3S>].

269. Jose Mauricio Gaona, *Experts: DACA and TPS*, NEWSROOM—MCGILL UNIVERSITY (Jan. 15, 2018), <https://www.mcgill.ca/newsroom/channels/news/experts-daca-and-tps-283863> [<https://perma.cc/H3KV-VZAT>]; see also Jose Mauricio Gaona, *Trump's Self-Induced Government Shutdown*, TORONTO STAR (Jan. 22, 2018), p. A13, <https://www.thestar.com/opinion/contributors/2018/01/22/trumps-self-induced-government-shutdown.html> [<https://perma.cc/L7FQ-GW9R>].

270. See Benjamin Siegel & Jordyn Phelps, *In Prime-time Address, Trump Argues National Security 'Crisis' at Southern Border*, ABC NEWS (Jan. 8, 2019), <https://abcnews.go.com/Politics/trump-argue-national-security-crisis-southern-border-prime-time-story?id=60232539> [<https://perma.cc/3XEG-C7VG>].

271. See Holly Rosenkrantz, *Sanders Repeats Claim on Terrorists at the Border Refuted by Administration's Own Data*, CBS NEWS (Jan. 7, 2019), <https://www.cbsnews.com/news/sanders-repeats-claim-on-terrorists-at-the-border-refuted-by-administrations-own-data-chris-wallace-fox-news-sunday/> [<https://perma.cc/C7HC-Q6XP>].

272. See Adam Isaacson, *The U.S. Government's 2018 Border Data Clearly Shows Why the Trump Administration Is On the Wrong Track*, WOLA (Nov. 9, 2018), <https://www.wola.org/analysis/us-government-2018-border-data-trump-immigration-asylum-policy/> [<https://perma.cc/NA4R-U37K>].

least forty percent of those detained were unaccompanied children and families.<sup>273</sup> 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.<sup>274</sup> Both historic data<sup>275</sup> and recent strategic intelligence assessments<sup>276</sup> 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,<sup>277</sup> constitutional law,<sup>278</sup> immigration law,<sup>279</sup> and public international law,<sup>280</sup> the United States has the right to protect its population and territory against foreign threats. However, under international refugee law<sup>281</sup> and international human rights law,<sup>282</sup> 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.<sup>283</sup>

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273. *Id.*

274. FEDERATION FOR AMERICAN IMMIGRATION REFORM (FAIR), IDENTITY AND IMMIGRATION STATUS OF 9/11 TERRORISTS (2011), <https://www.fairus.org/issue/national-security/identity-and-immigration-status-911-terrorists> [<https://perma.cc/UZ6U-6WRJ>].

275. See Sarah Frostenson, *Most Terrorist Attacks in the US Are Committed by Americans—Not Foreigners*, VOX (Sept. 9, 2016), <https://www.vox.com/2015/11/23/9765718/domestic-terrorism-threat> [<https://perma.cc/K37D-885A>].

276. See FEDERAL BUREAU OF INVESTIGATION (FBI) & U.S. DEPARTMENT OF HOMELAND SECURITY (DHS), STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM 6-8 (May 2021), [https://www.dhs.gov/sites/default/files/publications/21\\_0514\\_strategic-intelligence-assessment-data-domestic-terrorism\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/21_0514_strategic-intelligence-assessment-data-domestic-terrorism_0.pdf) [<https://perma.cc/R7ND-GH77>].

277. 8 U.S.C. § 1226(a) [“mandatory detention of terrorist aliens”] and (c) [“detention of criminal aliens”].

278. U.S. CONST., art. II, § 2, c. 2; *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (challenging the *Scott Act of 1888*, that is, an addendum to the *Chinese Exclusion Act of 1882*); *Mandel*, 408 U.S. at 769 (upholding the Attorney General’s authority to refuse entry based on alien’s ideas or political opinion); *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).

279. 8 U.S.C. § 1182(1)(A)(i); see also 8 U.S.C. § 1182(f).

280. See generally Father Robert Araujo, *Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law*, 24 *FORDHAM INT. L. J.* 1477-1532 (2000).

281. Refugee Convention, *supra* note 168, art. 31(1).

282. UNITED NATIONS GENERAL ASSEMBLY, UNIVERSAL DECLARATION OF HUMAN RIGHTS, Dec. 10, 1948, Res. 217 A (III) (1948), art. 14(1).

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 hostiles 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.<sup>284</sup> Hence, President Trump's<sup>285</sup> 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.<sup>286</sup> Such institutional response infringes international human rights law too.<sup>287</sup>

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<sup>288</sup> and international refugee law principles.<sup>289</sup>

### 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.<sup>290</sup> Accordingly, perception-assimilation of migrants is a key stage in the

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tion with their parents barely fit, however. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 571 (2004) (upholding due process rights to US citizens detained as “enemy combatants”).

284. *See* Theodora Christodoulidou & Kalliopi Chainoglou, *The Principle of Proportionality from a Jus ad Bellum Perspective*, *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 1187 (Marc Weller, ed., 2015).

285. Memorandum for the Secretary of Defense: Securing the Southern Border of the United States, 2018 DAILY COMP. PRES. DOC. 217 (Apr. 4, 2018), <https://www.govinfo.gov/content/pkg/DCPD-201800218/pdf/DCPD-201800218.pdf> [<https://perma.cc/7YZX-RMH5>]; Jonathan Allen, *Trump Says Troops Will Use ‘Lethal Force’ at the Border ‘If They Have to’*, NBC NEWS (Nov. 22, 2018), <https://www.nbcnews.com/politics/white-house/trump-says-troops-will-use-lethal-force-border-if-they-n939321> [<https://perma.cc/EEM2-7RB7>].

286. U.S. CUSTOMS AND BORDER PROTECTION (CBP), U.S. BORDER PATROL SOUTHWEST BORDER APPREHENSIONS BY SECTOR (2021), <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters/usbp-sw-border-apprehensions> [<https://perma.cc/UM43-8BBQ>].

287. *See* G.A. Res. 44/25, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; *see also* Universal Declaration of Human Rights, *supra* note 282, arts. 1, 3, 5, 14(1). Though the principle of “best interest of the child” is recognized under U.S. law, the United States has not yet ratified the Convention on the Rights of the Child. *See Troxel v. Granville*, 530 U.S. 57 (2000) (ordering state courts to apply the non-parent visitation petition when it is consistent with the best interests of the child).

288. Universal Declaration of Human Rights, *supra* note 282, arts. 1, 5, 14(1); *see also* U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 267, arts. 3(1)(2), 16(1).

289. *See* Refugee Convention, *supra* note 168, arts. 3, 16, 31(1), 33(1).

290. *See* Markus Raab, *What Is Performance Psychology?*, in *PERFORMANCE PSYCHOLOGY: PERCEPTION, ACTION, COGNITION, AND EMOTION* 4-8 (Markus Raab, et al., eds., 2016).

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<sup>291</sup> 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.”<sup>292</sup> 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<sup>293</sup> 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.<sup>294</sup> Here, moreover, perception-conceptualization encompasses the ability to conceptualize information even before the latter is collected.<sup>295</sup> 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, arguendo, 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.*

293. See generally R.L. Gregory, *The Intelligent Eye* (Weidenfeld & Nicolson 1970).

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://faculty.washington.edu/smcohen/433/Perception%20Lecture.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.<sup>296</sup> 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."<sup>297</sup> 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.<sup>298</sup> Plato's epistemological exploration on the meaning of knowledge led him to dispute the very idea that knowledge is perception.<sup>299</sup> He regarded perception as a sensory task deprived of its categorical meaning.<sup>300</sup> Plato considers that perception cannot be knowledge because the one who does not know

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296. Bill Hutchinson et al., *Trump Admits He Has 'No Proof' of 'Middle Easterners' in Caravan, 'But There Could Very Well Be'*, ABC NEWS (Oct. 23, 2018), <https://abcnews.go.com/US/trump-admits-proof-middle-easterners-caravan/story?id=58686056> [<https://perma.cc/C49H-HAHG>].

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.<sup>301</sup>

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, *ego*, emerges.<sup>302</sup> For Freud, *ego* begins in our perceptual system, and it is *ego* that defines our very understanding of the world—including the possibility to change or adapt to it.<sup>303</sup> 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.<sup>304</sup> 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 *ego* in the preconscious system<sup>305</sup> and internal perception acquired through instincts and affecting the *Id* in the unconscious system.<sup>306</sup> 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.<sup>307</sup> Hence, per-

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301. *Id.* Under the Platonian view of evolution, this apprehension of reality serves at explaining the differentials between humans and other species (animals).

302. RICHARD WOLLHEIM, SIGMUND FREUD 214 (1971).

303. *Id.*

304. Sigmund Freud, *An Outline of Psycho-Analysis*, 21 INT'L J. OF PSYCH'S 42, 43 (1940) (hereinafter Freud).

305. *Id.* at 28. In the Freudian brain-personality constitution (*ego*, *superego*, *Id*), humans are defined by the unavoidable interaction of three conflicting psychological forces: unconscious, preconscious, and conscious. See SIGMUND FREUD, DAS ICH UND DAS ES 20 (1923).

306. See Freud, *supra* note 304 at 42.

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. See Lauri Nummenmaa & Andrew J. Calder, *Neural Mechanisms of Social Attention*, 13 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, *Brain Basis of Human Social Interaction: From Concepts to Brain Imaging*, 89 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).

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<sup>308</sup> and Uganda<sup>309</sup> have faced, in 2020, these countries hosted

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308. In 2019, there were 3.3 million people living in extreme poverty in Bangladesh. Notwithstanding the initial welcome to more than 700,000 Rohingya refugees (nearly 1 million by December 2019), food and economic resources have become a socioeconomic challenge as rising sea levels are likely to force thousands of residents to migrate inland. *Bangladesh Development Update: Building on Resilience*, THE WORLD BANK (Apr. 9, 2018), <https://www.worldbank.org/en/news/feature/2018/04/09/bangladesh-development-update-building-on-resilience> [https://perma.cc/6M6E-FPA3]; *International Food Policy Research Institute, New Study: Sea Level Rise to Force 200,000 to Migrate from Bangladesh Coastal Areas*, INT'L FOOD POL'Y RSCH. INSTITUTE (Oct. 22, 2018) <https://www.ifpri.org/news-release/new-study-sea-level-rise-force-200000-migrate-bangladesh-coastal-areas> [https://perma.cc/6UPB-5X62].

309. Thanks to the agri-food system extended to refugees, Uganda saw an economic growth of two percent in 2018. Yet, 21.4% of the population in this country lives in poverty. *Uganda's Economy Expected to Grow at 6% and Above*, THE WORLD BANK (Nov. 20, 2018), <https://www.worldbank.org/en/news/press-release/2018/11/20/ugandas-economy-expected-to-grow-at-6-and-above> [https://perma.cc/U2MV-E8SS]; PRICE WATERHOUSE COOPERS, *UGANDA ECONOMIC OUTLOOK 2018 5* (2018), <https://www.pwc.com/ug/en/assets/pdf/ug-economic-outlook-2018.pdf> [https://perma.cc/9DLZ-R69K].

more than 2.2 million refugees.<sup>310</sup> 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.<sup>311</sup>

*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.<sup>312</sup> 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-

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310. In 2020, Uganda hosted 1,429,268 million refugees while Bangladesh hosts 860,697 refugees. *Uganda Comprehensive Refugee Response Portal*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Aug. 31, 2022), <https://data2.unhcr.org/en/country/uga> [<https://perma.cc/U2MV-E8SS>]; see also *Joint Government of Bangladesh - UNHCR Population Factsheet*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Aug. 31, 2020), <http://data2.unhcr.org/en/documents/details/78973> [<https://perma.cc/XTA2-98WY>].

311. See *UN Chief Applauds Bangladesh for 'Opening Borders' to Rohingya Refugees in Need*, UN NEWS (July 1, 2018), <https://news.un.org/en/story/2018/07/1013672> [<https://perma.cc/QP7F-3KYR>]; see Coggio, *supra* note 198.

312. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 14 (1996).

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 perceptual 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”<sup>313</sup> even though, of the 4,000 migrants traveling in that caravan, more than 2,000 were children.<sup>314</sup> 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

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313. Amien Kacou, *Trump’s Flailing Ratchet: From “Bad Hombres” to “Zero Tolerance,”* HARV. L. & POL’Y REV. BLOG (July 2, 2018), <https://harvardlpr.com/2018/07/02/trumps-flailing-ratchet-from-bad-hombres-to-zero-tolerance/> [https://perma.cc/VW9M-7RUA].

314. See Susan Ormiston, *U.S.-bound Migrant Caravan Rolls North through Mexico Despite Obstacles,* CBC NEWS (Nov. 4, 2018), <https://www.cbc.ca/news/world/migrant-caravan-mexico-united-states-1.4890996> [https://perma.cc/9M5Z-3JC3].

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

The judicial process—viewed as an institutional agency to resolve social conflict<sup>315</sup>—embodies, at minimum, a bidimensional perception of reality: specifically, two parties presenting different versions of reality on which their claims are framed. And the legislative process—depicted as a corollary institutional agency to make the law<sup>316</sup>—encompasses different axes of reality which, depending on institutional actors, can lead to unidimensional, bidimensional, or tridimensional perception of reality. When a *social fact* like international forced migration or the legal fact that derives from it like state protection 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 dissimilar versions of that reality does not truly exceed the contended bidimensional perception-conceptualization. In the end, these perspectives 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 magistrate reviews the decision of a trial judge on procedural or substantive grounds—may trigger a tridimensional yet limited perception of reality, in that appeal judges make their assessment of the facts by asserting 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 incorporates not only the policy that rejects them, but the human suffering they encounter. This, moreover, considering that the legislative process increasingly reduces procedural opportunities for asylum seekers to present their cases through hearings, access to legal counsel, illegal pushbacks, or parole requests.<sup>317</sup>

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315. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (2005).

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.<sup>318</sup>

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

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318. See, e.g., David L. Chandler, *Sensor Based on Quantum Physics Could Detect SARS-CoV-2 Virus*, MIT NEWS (Dec. 20, 2021), <https://news.mit.edu/2021/quantum-sensor-detect-covid-1220> [<https://perma.cc/H589-XDJE>]; Karl B. Billie, *NASA Engineer's Quantum Dot Instrument Enables Spacecraft-as-Sensor Concept*, NASA (Aug. 23, 2022), <https://www.nasa.gov/feature/goddard/2022/quantum-dot-instrument-enables-spacecraft-as-sensor-concept> [<https://perma.cc/V2PF-HHJQ>]; Michael Van Amerongen, *Quantum Technologies in Defence and Security*, NATO REVIEW (June 3, 2021), <https://www.nato.int/docu/review/articles/2021/06/03/quantum-technologies-in-defence-security/index.html> [<https://perma.cc/W3GF-W5RW>]; Jeffrey C. Grossman, *Application of QM Modeling to Solar Thermal Fuels*, MIT DEPARTMENT OF MATERIALS SCIENCE AND ENGINEERING (Spring 2012); Michael Van Amerongen, *Quantum Technologies in Defence and Security*, NATO REVIEW (June 3, 2021), <https://www.nato.int/docu/review/articles/2021/06/03/quantum-technologies-in-defence-security/index.html>.

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.<sup>319</sup> In a sense, it is not that we miss different realities, but rather we choose to neglect all their probable dimensions.<sup>320</sup> 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.<sup>321</sup> 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.<sup>322</sup>

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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* 135 (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).

321. See *What Is Superposition and Why Is It Important?*, CALTECH SCIENCE EXCHANGE (2022), <https://scienceexchange.caltech.edu/topics/quantum-science-explained/quantum-superposition> [https://perma.cc/QPP2-6X4A].

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-improved-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<sup>323</sup> 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 *perceptual 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

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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].

323. Policies that either eliminate pathways to regular migration or aim to systematically exclude certain migrants may increase the smuggling of migrants. See United Nations Office on Drug and Crime, UNODC Submission to the Report of the UN Special Rapporteur on the Human Rights of Migrants (Feb. 2022) 4, <https://www.ohchr.org/sites/default/files/2022-04/UNODCSubmission.pdf> [https://perma.cc/T95R-V7W6].

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.<sup>324</sup> Security threat narratives of national identity<sup>325</sup> and refugee protection are frequently presented and analyzed as contradicting values. As noted, moreover, public international law in general<sup>326</sup> and international refugee law, acknowledge host-countries’ national security.<sup>327</sup> In practice, though, basic human rights protections like due process, liberty, and human dignity<sup>328</sup> and international refugee law principles like non-discrimination, access to courts, non-penalization, and non-refoulement<sup>329</sup> become, at worst, non-existent law<sup>330</sup> and, at best, residual references.

PARALLEL STRUCTURE 3 (MULTIDIMENSIONAL PERCEPTION), “*them*” is “*us*” *approach*. The proposed multidimensional perception

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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).

325. See François Crépeau & Charles Taylor, *A Lawyer and A Philosopher on “Us and Them,”* FRANÇOIS CRÉPEAU (Mar. 10, 2017), <http://francoiscrepeau.com/a-lawyer-and-a-philosopher-on-us-and-them/> [<https://perma.cc/X8V7-3XPJ>].

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

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

328. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, arts. 2, 9, 14, 26.; Universal Declaration of Human Rights, *supra* note 282, arts. 1, 6, 7.

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.<sup>331</sup> 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-

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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 perceptual 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 perceptual 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 perceptual 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 perceptual 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 perceptual 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 perceptual 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

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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.

