

# EXTERNAL AND INTERNAL MIGRATION

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*Migration is an external and internal phenomenon. Persons move across international borders and internally across state borders or vast distances in search of a better life or because life in their place of residence has become untenable and unsustainable. Increasingly, climate change and other related disasters or environmental conditions will cause greater internal and external migration. Still, the actual presentation of refugees at the border has yielded a conversation about how receiving states and nations, like the United States, treat refugees that has exacerbated tensions and hostility toward migrants. This piece considers external and internal migration to frustrate the perpetuation of refugee myths and stereotypes, expose the frailty of the concept of citizenship as a source of protection for persons, and promote humane adaptive responses to refugees, whether they are internal or external.*

## I. INTRODUCTION

Migrants who flee climate change, violence, wars, economic desperation, or victimization at the hands of drug cartels, gangs, or brutal repressive governments, for the most part have been forced to leave their place of residence and set out on a journey in search of refuge: the possibility of employment, education, and the normalcy of living one's life and one's family life in relative peace. These migrants travel long distances across borders. Often, migrants are searching for circumstances unlikely to greet them at their chosen destinations. Often, the journeys themselves are as treacherous as the misery they flee. Still, people engage in the journey in hopes of something better for themselves and their loved ones.

Migration is also an internal phenomenon. Exploring the internal migration of domestic refugees makes clear the commonality in the experiences of both types of migrants. Both external and internal migration speak to the universality of the migrant experience and the need for the legal system to accommodate, to the extent possible, the needs of displaced people. Norms that are common to both types of migrants include family-focused migration, misconceptions about the receiving state often provided by media, government, or corporate actors, fear in the receiving state that the new arrivals will destabilize economic expectations and create social or civil change in negative ways, and stereotypes about the arriving migrants or refugees in the receiving state, as well as stereotypes about the receiving state at work in the new refugees. Internal "refugees" who are subjected to the same type of "othering" as external refugees expose the frailty and

artificiality of the concept of citizenship as a line demarcating the extent to which law will protect individuals or groups of individuals in need. At the same time, recognizing commonalities between the two may better inform responses to both.

Migration is associated with higher socioeconomic status. Researchers have found that social mobility and the likelihood of migration correlate to a higher socioeconomic status—that is, persons from a higher socioeconomic status are more likely to seek to migrate internally and externally.<sup>1</sup> The reality of climate change and global warming means that displacement of persons is likely to increase both within the United States and across international borders. It is imperative that the legal system acknowledge the inevitability of increased displacement and develop humane policies that anticipate and mitigate the challenges of internal and external migration. Humane policies include prompt processing of persons at the border as they present and prompt issuance of work authorization during their stay in the United States.

First, the author briefly examines the legal norms that developed in response to refugee flows and those that govern our current treatment of external refugees, particularly at the border between the United States and Mexico, and notes some common norms in refugee populations. The author identifies how stereotypes about refugees, including stereotypes about race, ethnicity, class, and other traits, may impact how the United States treats and receives those refugees. The author then shifts the focus of the article to internal migration of refugees: first noting the creation of the Freedmen’s Bureau, designed in part to address internal refugees from the Civil War, then through the case of Puerto Rico, which speaks to both internal and external migration because although Puerto Ricans are U.S. citizens, they are treated as immigrants in legal and other narratives. The author then looks at the Great Migration, the migration of Black southerners to the northern and western United States during the first half of the 20th century, and the Great American Plains migration to California during the period known as the “Dust Bowl.” Last, the author considers internal migration through the case of persons evacuating New Orleans during Hurricane Katrina and its aftermath.

The author identifies the stereotypes that are at play in internal and external migration, including, for example, stereotypes of migrants/refugees as criminals, migrants/refugees as ignorant or naive persons easily duped,

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<sup>1</sup> Aude Bernard, *Does Internal Migration Contribute to the Intergenerational Transmission of Socioeconomic Inequalities? The Role of Childhood Migration*, 60 *DEMOGRAPHY* 1059, 1079 (2023).

or migrants/refugees as invading the U.S. These stereotypes inform the narratives that dominate the national conversation about refugees and migration. Stereotypes make their way into law and decision-making in ways that frustrate humane treatment of the individuals who bear the brunt of the law's reach. Lastly, the author advocates for the consideration of internal and external migration flows in a unified way to devise mitigating and adaptive policies that are responsive to those flows.

## II. EXTERNAL MIGRATION AND ASYLUM THROUGH PLACE AND TIME

How the United States has responded to and welcomed displaced or dispossessed persons or persons seeking better economic lives is complicated. Although the United States has a narrative that many of the American colonies reflected migration of persons fleeing political and religious persecution in Europe, the classic “refugee” story, early federal immigration statutes provided no preference or particular provisions for persons fleeing persecution, with some minor exceptions.<sup>2</sup> The “refugee” narrative has to be considered alongside the “nation of immigrants” and genocide of indigenous people narratives<sup>3</sup> and the reality of slavery.<sup>4</sup> Since the founding of the United States as a constitutional republic, various refugee groups have fled to the United States, including persons fleeing the

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<sup>2</sup> Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215 (2021) (recognizing the federal ban on the international slave trade of 1807 as part of the origins of federal immigration law); see *Importation of Slaves Prohibited After January 1, 1808*, ch. 22, 2 Stat. 426 (1807); see generally E. P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965*, at 521–33 (1981) (the first statutes to restrict or bar entry are the statutes banning importation of enslaved persons).

<sup>3</sup> M. Isabel Medina, *In Search of the Nation of Immigrants: Balancing the Federal State Divide*, 20 HARV. LATINX L. REV. 1, 7–12 (2017); ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES* 40 (2014) (90% of indigenous people died as a result of the European settlements); see generally JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* (1963); see also MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 110 (1964) (“Our nation was born in genocide . . .”).

<sup>4</sup> Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 Mo. L. REV. 743 (1996); see Rhonda V. Magee, *Slavery as Immigration?*, 44 U.S.F.L. REV. 273 (2009) (criticizing the reluctance of scholarship to engage with the relationship of enslavement to immigration).

French revolution,<sup>5</sup> persons fleeing the 1791 revolution in Haiti,<sup>6</sup> and in the early 20th century, as noted by Julian Lim, persons, in particular Mexicans and Chinese people, fleeing the Mexican revolution of 1910.<sup>7</sup> For the most part, the first two of those refugee groups faced no national legal barriers to admission to the United States because the United States did not restrict entry at the time. Congress, as authorized by the migration clause of the original Constitution, acted in 1807 to bar the admission of enslaved persons.<sup>8</sup>

In 1875, Congress barred admission to additional categories of noncitizens when it excluded prostitutes, subjects of China, Japan, “or any oriental country,” and convicts from admission.<sup>9</sup> In response to political pressure from Western states, in 1882, Congress sharply restricted admission of Chinese workers for ten years, prohibited admitting Chinese people for citizenship, and provided for the deportation of Chinese people found unlawfully within the U.S.<sup>10</sup> That same year, Congress enacted legislation excluding any “lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.”<sup>11</sup> These exclusion grounds would have adversely impacted refugees unless they or their families were well-resourced and financially secure. The first comprehensive admissions statute was enacted in the 1920s, establishing

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<sup>5</sup> FRANÇOIS FURSTENBERG, *WHEN THE UNITED STATES SPOKE FRENCH: FIVE REFUGEES WHO SHAPED A NATION* (2014); see Elsie Murray, *French Refugees of 1793 in Pennsylvania*, 87 PROC. AM. PHIL. SOC'Y 387 (1944). In 1798, however, the United States enacted the Alien and Sedition Acts, which among other things granted the President power to deport enemy aliens and aliens deemed to be dangerous to the peace and safety of the United States, and required ship masters to report in writing immediately upon arrival at a U.S. port the name, age, and nationality of every alien on board the vessel. An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798); An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798). The Alien and Sedition Acts reflected Federalist Party concerns over French refugees and the response of Americans to the French revolution. See Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 927–32 (1991).

<sup>6</sup> José Morales, *Fleeing the Nightmare: French Émigrés in Cuba and Louisiana During the Haitian Revolution, 1791–1810*, MIDDLE ATL. COUNCIL LATIN AM. STUD. 133 (2000).

<sup>7</sup> See Julian Lim, *Immigration, Asylum, and Citizenship: A More Holistic Approach*, 101 CAL. L. REV. 1013, 1025 (2013) (case study of approximately 500 Chinese refugees admitted to the U.S. fleeing religious persecution in Mexico alongside over 2,000 Mormons, Mexicans, and other U.S. citizens fleeing targeted violence from the Mexican revolution).

<sup>8</sup> Importation of Slaves Prohibited After January 1, 1808, ch. 22, 2 Stat. 426 (1807).

<sup>9</sup> The Page Act of 1875, ch. 141, 18 Stat. 477; see Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005); see also Chinese Exclusion Act of 1882, 22 Stat. 58 (suspending immigration of Chinese laborers to the U.S. for ten years, prohibiting Chinese people from naturalizing, and providing for the deportation of Chinese people found unlawfully within the U.S.).

<sup>10</sup> Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882); see Lim, *supra* note 7, at 1026–27.

<sup>11</sup> Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214.

quantitative and national origin restrictions on immigrants.<sup>12</sup> That statutory scheme made no special provisions for refugees arriving in the United States. Ironically, those who might today be described as economic refugees, not treated as refugees under the strict meaning of current law, were often welcomed and recruited to come to the United States. The bars to entry that followed the Civil War and the statutes enacted throughout the late 1800s and early 1900s increasingly restricted admission, in particular along racial lines that often correlated to national origin, culture, or religion, and would impact refugees seeking admission.<sup>13</sup>

Instead, throughout much of the twentieth century, the United States addressed refugee populations through executive action and statutory enactments designed to address a particular refugee flow.<sup>14</sup> The first statute to admit persons who had been displaced was the Displaced Persons Act of 1948,<sup>15</sup> designed to respond to the thousands of persons displaced by the Nazis and World War II. U.S. interventionist policies and unstable political regimes in many of those countries generated waves of refugees and migrants to the United States.<sup>16</sup> The Vietnam War and other U.S. interventions in southeast Asia generated additional refugee flows.<sup>17</sup>

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<sup>12</sup> Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (establishing a national origins quota system for immigrants from the Eastern Hemisphere and giving a preferred quota status to unmarried children under twenty-one of U.S. citizens, parents of U.S. citizens, and spouses of U.S. citizens aged twenty-one and over). The act exempted wives (not husbands), unmarried children under eighteen of U.S. citizens, and natives of Western Hemisphere countries, among others, from the quotas. The 1924 Act also prohibited noncitizens from entering the U.S. without a visa issued by an American consular officer abroad.

<sup>13</sup> Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (regulating the immigration of aliens to, and the residence of aliens in, the United States, which exempted persons fleeing religious persecution from taking the literacy test).

<sup>14</sup> Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (adjusting the status of Cuban refugees to that of lawful permanent residents); Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1010; Fair Share Refugee Act of 1960, Pub. L. No. 86-648, 74 Stat. 504 (enabling the United States to participate in the resettlement of certain refugees); The Indochina Migration and Refugee Assistance Act of 1975, Pub. L. No. 94-23, 89 Stat. 87 (rendering emergency assistance to Cambodian and Vietnamese migrants and refugees for their transportation, temporary maintenance, and resettlement) *amended by* An Act of 1976, Pub. L. No. 94-313, 90 Stat. 691 (including Laotian refugees).

<sup>15</sup> Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1010.

<sup>16</sup> See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (generally arguing for greater delegation to the Executive over immigration and in particular describing refugee flows before the 1980 Refugee Act). The policies of the Castro regime generated waves of refugees throughout the twentieth century and into the twenty-first. *But see* SUSAN EVA ECKSTEIN, *CUBAN PRIVILEGE: THE MAKING OF IMMIGRANT INEQUALITY IN AMERICA* (2022).

<sup>17</sup> AMANDA C. DEMMER, *AFTER SAIGON'S FALL: REFUGEES AND US-VIETNAMESE RELATIONS, 1975-2000* (2021).

It was not until 1980 that the United States adopted comprehensive refugee legislation designed to implement the United States' obligations under the International Convention on Refugees.<sup>18</sup> That convention imposed a duty on nations to give refuge to persons fleeing government-based persecution primarily on account of their race, nationality, religion, or political opinion.<sup>19</sup> Even after the adoption of the Refugee Act, however, scholars have noted that refugees fleeing revolution or political strife in their home countries were often deemed to be economic refugees rather than political refugees and thus not entitled to protection.<sup>20</sup>

#### A. THE CURRENT LAW OF ASYLUM AND REFUGEE STATUS

United States law currently provides for the admission of refugees through an overseas process that involves an application and processing overseas, which may take a substantial amount of time. For example, Afghans who undertake this process may await a visa overseas in precarious conditions for over a year. In addition, the law grants asylum to refugees who present themselves to the United States and who satisfy the legal definition of a refugee: a person who is likely to face persecution by their government (or by parties the government is unable or unwilling to control) if they return to their home country on account of race, nationality, religion, political opinion, or their membership in a particular social group (narrowly defined).<sup>21</sup> The number of refugees admitted as refugees or asylees annually is restricted by statute.

Asylum has never generated a substantial number of immigrants to the United States. According to the Department of Homeland Security's data for fiscal year 2017, the United States granted asylum to 26,568 persons and admitted 53,691 persons as refugees.<sup>22</sup> Refugee admissions are subject to a ceiling set by the President and Congress, which has differed through the years. Admission of refugees has ranged from a high of 122,066 in 1990 to a low of 26,785 in 2002, the year after the September 11, 2001 attacks on

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<sup>18</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of Title 8 U.S. Code) (amending Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911; Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121).

<sup>19</sup> Final Act and Convention Relating to the Status of Refugees, 189 U.N.T.S. 2545 (entered into force Apr. 22, 1954), *amended by* the Protocol Relating to the Status of Refugees, 606 U.N.T.S. 8791 (entered into force Oct. 4, 1967).

<sup>20</sup> Bill Ong Hing, *Mistreating Central American Refugees: Repeating History in Response to Humanitarian Challenges*, 17 HASTINGS RACE & POVERTY L.J. 359, 360–70 (2020).

<sup>21</sup> 8 U.S.C. § 1101(a)(42); 8 U.S.C. § 1158.

<sup>22</sup> OFF. OF IMMIGR. STAT., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2017, at 2 (2019), [https://www.dhs.gov/sites/default/files/publications/Refugees\\_Asylees\\_2017.pdf](https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf) [<https://perma.cc/FPX9-TLR9>].

the Twin Towers and the Pentagon. Since 1996, refugee admissions have hovered roughly between 50,000 to 80,000.<sup>23</sup> The United States grants asylum to far fewer persons—since 1990, the number has always been less than 30,000. For example, in 2016, the United States granted asylum to 20,340 persons. In 2017, the United States granted asylum to 26,568 persons.<sup>24</sup> In 2021, the United States granted asylum to 17,692 persons.<sup>25</sup> The leading countries of nationality for persons granted asylum in 2021 were Venezuela, the People’s Republic of China, and El Salvador.<sup>26</sup>

Generally, the United States has been at the top or near the top of the list of refugee resettlement countries,<sup>27</sup> but it is not one of the countries bearing the brunt of actually dealing with the physical presence of refugees. Those countries are Turkey, the Islamic Republic of Iran, Colombia, Germany, and Pakistan.<sup>28</sup> Resettlement countries accept refugees for permanent residence. The United States hosts resettlement populations, populations that receive temporary protection, and populations that enter without official protection.

Asylum is a generous form of relief that leads to permanent residence and naturalization, but eligibility for the relief is narrowly defined. It is limited to persons who can establish that state actors have persecuted or threatened them with persecution based on five classifications: race, religion, nationality, political opinion, and membership in a particular group.<sup>29</sup> Persons fleeing persecution on account of their sex or gender are not expressly included in the definition; neither are persons fleeing

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<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.* at 8.

<sup>25</sup> RYAN BAUGH, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2021, at 1 (2022), [https://www.dhs.gov/sites/default/files/2022-10/2022\\_0920\\_ply\\_refugees\\_and\\_asylees\\_fy2021.pdf](https://www.dhs.gov/sites/default/files/2022-10/2022_0920_ply_refugees_and_asylees_fy2021.pdf) [<https://perma.cc/64NK-NCQV>].

<sup>26</sup> *Id.*

<sup>27</sup> UNHCR, *Resettlement at a Glance: January 2023* (Feb. 23, 2023), [https://www.unhcr.org/ie/sites/en-ie/files/legacy-pdf/63f88f2b4\\_26.pdf](https://www.unhcr.org/ie/sites/en-ie/files/legacy-pdf/63f88f2b4_26.pdf).

<sup>28</sup> The countries hosting the largest number of refugees are Turkey (3.6 million), the Islamic Republic of Iran (3.4 million), Colombia (2.3 million), Germany (2.3 million), and Pakistan (1.7 million). UNHCR, *Refugee Data Finder*, <https://www.unhcr.org/refugee-statistics> [<https://perma.cc/CA5P-5DTN>].

<sup>29</sup> 8 U.S.C. §§ 1101(a)(42), 1158. For a discussion of the “membership in a particular group” category, see Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505 (1993); see also Jenni Millbank & Catherine Dauvergne, *Forced Marriage and the Exoticization of Gendered Harms in United States Asylum Law*, 19 COLUM. J. GENDER & L. 898, 936–47 (2010) (comparative treatment of forced marriage asylum claims through membership in a particular social group category).



persecution on account of their sexual orientation or gender identity.<sup>30</sup> Persons fleeing the effects of climate change or disasters are not expressly included as well and would find it difficult to fit under the “state-sponsored persecution” rationale underlying asylum law.<sup>31</sup> Some of these groupings have encountered minimal success with the “membership in a particular group” category. However, as a general matter, the United States has rejected sex or gender as a protected classification for purposes of asylum.<sup>32</sup> So asylum in the U.S. as a form of relief to persons needing help was sharply limited at its inception. The extent to which the legal understanding of refugees has expanded or contracted is contested.<sup>33</sup>

The current state of domestic asylum law is unresponsive to modern world conditions, inconsistent with a conception that all countries should remain open to those fleeing persecution or dispossessed from their homes, and particularly inconsistent with the view that highly affluent societies like

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<sup>30</sup> Fullerton, *supra* note 29; Millbank & Dauvergne, *supra* note 29, at 936–47; Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN’S L.J. 221 (2000) (advocating adding gender to the international and U.S. definitions of refugee); see T.S. Twibell, *The Development of Gender as a Basis for Asylum in United States Immigration Law and Under the United Nations Refugee Convention: Case Studies of Female Asylum Seekers from Cameroon, Eritrea, Iraq and Somalia*, 24 GEO. IMMIGR. L.J. 189 (2010).

<sup>31</sup> Alan W. Clarke, *Climate Change, Migration, and Pandemics: Human Rights in the Anthropocene*, 47 VT. L. REV. 1 (2022); Jeanhee Hong, *Refugees of the 21st Century: Environmental Injustice*, 10 CORNELL J.L. & PUB. POL’Y 323 (2001).

<sup>32</sup> Membership in a particular social group has been defined in the case law as a group whose members share a common immutable characteristic or a characteristic which the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). U.S. immigration administrative authorities have imposed additional requirements like that the group be socially distinct. *In re M-E-V-G*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014). See *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (asylum claim based on persecution on account of sexual orientation); *S.E.R.L. v. Att’y Gen.*, 894 F.3d 535 (3d Cir. 2018) (rejecting an asylum claim based on persecution on account of her family relationships to a daughter and mother who had been in battering relationships); *Paloka v. Holder*, 762 F.3d 191 (2d Cir. 2014) (hearing an asylum claim based on persecution on account of membership in a particular social group composed of unmarried young Albanian women subjected to sex trafficking); *De Velasquez v. U.S. Att’y Gen.*, 490 Fed. Appx. 266, 268 (11th Cir. 2012) (rejecting an asylum claim based on persecution on account of gender because the group of young daughters who were raped was “overly broad and does not have the particularity necessary to constitute a PSG”); *Fejza v. U.S. Att’y Gen.*, 489 Fed. Appx. 326 (11th Cir. 2012) (rejecting an asylum claim based on forced marriage); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (hearing an asylum claim based on female genital mutilation); *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (rejecting a claim that resistance to conservative gender norms yielding persecution constituted persecution on religious or political opinion grounds). *But see* Andrew I. Schoenholtz, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, 16 CHI. J. INT’L L. 81 (2015) (arguing that the Refugee Convention definition proved adaptable and responsive to the changing nature of forced migration through interpretation and state practice).

<sup>33</sup> See Schoenholtz, *supra* note 32; William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law*, 30 BERKELEY J. INT’L L. 94 (2012) (exploring the extent to which customary law has affected the definition of refugee).

the United States are positioned the best to welcome or host refugee flows.<sup>34</sup> The relief conceptualized in the early post-world War II conventions did not go far enough: persons who flee climate change, war, unremitting violence, revolution, biological weapons use, and natural disasters justifiably have to move away from a home that no longer sustains life and are equally deserving of assistance.<sup>35</sup> With regard to persons fleeing climate change, researchers predict substantial increases in the number of persons forced to migrate.<sup>36</sup> Increasingly, asylum claims are pursued as a way to remain or enter the U.S. regardless of the reasons that stimulated the migration, including for persons fleeing generalized violence or disastrous economic conditions.<sup>37</sup> Notwithstanding these tremendous pressures to change our refugee law, the national legislature, for the most part, has failed to produce meaningful national policy, leaving it to the executive branch to respond piecemeal to jumps in migrant flows.

Asylum seekers have to establish their entitlement to asylum in individual proceedings. Each person must establish that they are or have been persecuted based on one of the recognized categories by a state actor. Even refugees fleeing known areas of economic, environmental, and violent conditions are expected to make their case. Failures of proof and individual decision-making by immigration officials facilitate the high rate of asylum denials.<sup>38</sup>

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<sup>34</sup> See Eunice Lee, *Non-Discrimination in Refugee and Asylum Law (Against Travel Ban 1.0 and 2.0)*, 31 GEO. IMMIGR. L.J. 459 (2017). A different view challenges a perspective focused only on the United States, supports viewing refugees through a “responsibility sharing” lens, and suggests that the U.S.-Afghanistan measures of 2021 are good models of responsibility sharing. See Katerina Linos & Elena Chachko, *Refugee Responsibility Sharing or Responsibility Dumping?*, 110 CAL. L. REV. 897 (2022).

<sup>35</sup> See Matthew E. Price, *Persecution Complex: Justifying Asylum Law’s Preference for Persecuted People*, 47 HARV. INT’L L.J. 413 (2006) (defending asylum law’s requirement of persecution).

<sup>36</sup> Elizabeth Ferris, Senior Fellow, Brookings Institution, Keynote Address at the Durham University Conference on Human Migration and the Environment: Futures, Politics, Invention (July 1, 2015) (explaining the complexity of the issues posed by migration that results from environmental changes).

<sup>37</sup> See, e.g., Lim, *supra* note 7, at 1015 (arguing that scholars have ignored the intersection or “mutually constitutive” nature of asylum and immigration law).

<sup>38</sup> See generally *supra* notes 21–24.

B. EXTERNAL MIGRANTS: THE CASE OF REFUGEES FROM  
VENEZUELA, HAITI & UKRAINE

Refugees are forced to relocate for a variety of reasons that often reflect a confluence of factors rather than a single cause.<sup>39</sup> In recent years, the United States experienced steep increases in refugee flows of nationals from Colombia, Cuba, Nicaragua, Peru, and Venezuela at the U.S.-Mexico border.<sup>40</sup> Individuals from these countries may be fleeing for a variety of reasons, including political repression, uncontrolled violence, and desperate economic conditions, which may be caused by climate-related conditions.

To the extent that they can decide where to relocate, refugees may follow family members who have already relocated or aim for places where there already is a significant number of persons of their nationality.<sup>41</sup> Differences in language and customs may be minimized in places where their community is already present, and other aspects of life, like ethnic food availability and ethnic church preference, are more likely to be accessible.

The nationalities spiking refugee flows may not necessarily reflect the groups that receive asylum from the United States. Chinese and Turkish people, for example, were in the top five nationalities granted asylum in 2021; only Venezuelans of the groups identified above were granted asylum in significant numbers in 2021.<sup>42</sup> This dynamic may reflect the use of

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<sup>39</sup> See, e.g., Caitlyn Yates, *Haitian Migration Through the Americas: A Decade in the Making*, MIGRATION POL'Y INST. (Sept. 30, 2021), <https://www.migrationpolicy.org/article/haitian-migration-through-americas> [<https://perma.cc/5CNR-4YCR>] (describing the factors that have driven the migration of Haitian refugees in recent years).

<sup>40</sup> John Gramlich, *Monthly Encounters with Migrants at U.S.-Mexico Border Remain near Record Highs*, PEW RSCH. CTR. (Jan. 13, 2023), <https://www.pewresearch.org/short-reads/2023/01/13/monthly-encounters-with-migrants-at-u-s-mexico-border-remain-near-record-highs/#:~:text=Some%20of%20the%20biggest%20increases,figure%20had%20increased%20to%2015%2C439> [<https://perma.cc/U5C7-HS3F>].

<sup>41</sup> This holds true for regular immigrants as well. The top five destination cities/counties for new immigrant/refugee populations continue to be the New York City area, Miami-Dade County, Florida area, Los Angeles County in California, Harris County (Houston) Texas area, and Cook County (Chicago) in Illinois. See *Top County Destinations for Asylum Seekers*, TRAC IMMIGR. (June 21, 2023), <https://trac.syr.edu/reports/720> [<https://perma.cc/E5WK-8PWE>]. The top 5 destination states continue to be California, Texas, New York, Florida, and New Jersey. See Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Mar. 13, 2024), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#destinations> [<https://perma.cc/9EPL-F8MF>]; Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020) <https://www.pewresearch.org/short-reads/2020/08/20/key-findings-about-u-s-immigrants/> [<https://perma.cc/H9XY-WFNW>] (largest immigrant populations in New York, Los Angeles, and Miami metro areas and top four states are California, Texas, Florida, and New York).

<sup>42</sup> Nicole Ward & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POL'Y INST. (June 15, 2023), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states> [<https://perma.cc/C5PB-LCP9>].

temporary status to address surge populations, stricter policies applied to surge populations described earlier, and substantial backlogs in immigration courts. Treatment at the border, particularly in the initial response to a surge in numbers, also may reflect bias based on ethnicity, race, and class.<sup>43</sup> Scholars have noted that U.S. asylum cases show a government preference for asylum claims from countries that are geographically distant from the United States, like China and India, as opposed to countries closer to the U.S., like Mexico, Cuba, and Haiti.<sup>44</sup>

Venezuelan, Haitian, and Ukrainian nationals all sought refuge in the United States during this period. These three nations experienced major national crises that, in the case of Venezuela and Haiti, dramatically destabilized their governments and economies and produced internal violence and repression. The case of Ukraine differs in that parts of the state were ravaged by war when Russian forces invaded the state. All three nations produced significant refugee flows at the U.S.-Mexico border at roughly the same time period. However, the U.S. initially treated the three nationalities differently regardless of the reasons for the forced relocation and the individual socioeconomics, offering a window through which to examine U.S. responses to asylum seekers.

### 1. Venezuela

The UN High Commissioner for Refugees identifies Venezuela as the second highest country, after the Syrian Arab Republic, to generate refugees (5.6 million) in need of international protection: following Venezuela on the list is Ukraine (5.4 million).<sup>45</sup> Venezuelans are a mixed race, with a relatively small percentage of the population, approximately 10–12%, identifying as Afro-Venezuelan, so that many Venezuelans may present as White. The last decade witnessed a substantial increase in Venezuelans seeking refuge in the United States.<sup>46</sup> According to the Migration Policy

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<sup>43</sup> The United States' treatment of Haitian refugees historically (except for refugees, primarily white persons, who fled the 1791 revolution) reflects bias. See Jean-Pierre Benoît & Lewis A. Kornhauser, *Unsafe Havens*, 59 U. CHI. L. REV. 1421, 1437–63 (1992) (discussing the interdiction and treatment of Haitian refugees from 1991 to 1992).

<sup>44</sup> Denise Gilman, *Making Protection Unexceptional: A Reconceptualization of the U.S. Asylum System*, 55 LOY. U. CHI. L.J. 1, n.11, 42–60 (2023) (central American asylum claims stereotypically treated as economic migrants rather than asylees).

<sup>45</sup> UNHCR, *supra* note 27.

<sup>46</sup> Ari Hoffman & Jeanne Batalova, *Venezuelan Immigrants in the United States*, MIGRATION POL'Y INST. (Feb. 15, 2023), <https://www.migrationpolicy.org/article/venezuelan-immigrants-united-states-2021#:~:text=type%20of%20insurance,-,Source%3A%20MPI%20tabulation%20of%20data%20from,U.S.%20Census%20Bureau%2020>

Institute, Venezuela's repressive political and disastrous economic conditions resulted in more than seven million of its citizens fleeing the country since 2015, with 545,000 arriving in the United States in 2021. Venezuelans arriving in the U.S., however, are more likely than the average U.S. immigrant to have a college or higher degree and to secure permanent resident status after receiving a grant of humanitarian relief and more likely than native born individuals to participate in the civilian labor force.<sup>47</sup> Initially, Venezuelans, unlike Haitians, were released into the United States and allowed to stay in the United States.<sup>48</sup>

Venezuela's current problems were precipitated by the drop in the price of oil globally and increasing political repression by President Maduro. The Venezuelan economy has contracted sharply since 2013 and, combined with a high inflation rate, resulted in 94% of the population living below the poverty line in 2018.<sup>49</sup> The country's infrastructure essentially has collapsed, and the rate of violence in the country has made it the most violent country in Latin America.<sup>50</sup> In 2019, Venezuela ceased diplomatic relations with the United States when President Trump refused to recognize the legitimacy of President Maduro's government and instead recognized the leader of Venezuela's National Assembly, Juan Guaidó, as Interim

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21%20ACS.&text=The%20Venezuelan%20diaspora%20in%20the,U.S.%20Census%20Bureau's%202021%20ACS [https://perma.cc/TUP3-VFPB].

<sup>47</sup> *Id.* But see Tony Frangie Mawad, *A Flood of Venezuelan Migrants Is Angering Other Venezuelans*, POLITICO (Nov. 29, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/11/29/a-flood-of-venezuelan-migrants-has-angered-a-surprising-group-other-venezuelans-00070990> [https://perma.cc/A82G-R6T5] (explaining that newer Venezuelan refugees were viewed as less deserving or desirable than those previously admitted).

<sup>48</sup> *DHS Secretary Designates Venezuela for TPS; Implements DED for Venezuela*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-9-central/form-i-9-related-news/dhs-secretary-designates-venezuela-for-tps-implements-ded-for-venezuela> [https://perma.cc/W7HQ-ZJT2] (stating that Venezuelan nationals who can establish continuous residence in the U.S. since March 9, 2021 can apply during a 180-day registration period beginning March 9, 2021 and ending on September 5, 2021); see *Designation of Venezuela for Temporary Protected Status and Implementation of Employment Authorization for Venezuelans Covered by Deferred Enforced Departure*, 86 FED. REG. 13574 (Mar. 9, 2021); see also *Extension of the Designation of Venezuela for Temporary Protected Status*, 87 FED. REG. 55024 (Sept. 8, 2022).

<sup>49</sup> Oriana Van Praag, *Understanding the Venezuelan Refugee Crisis*, WILSON CTR. (Sept. 13, 2019), <https://www.wilsoncenter.org/article/understanding-the-venezuelan-refugee-crisis> [https://perma.cc/7L3R-RN4A].

<sup>50</sup> See Luz Estella Nagle & Juan Manuel Zarama, *Taking Responsibility Under International Law: Human Trafficking and Colombia's Venezuelan Migration Crisis*, 53 U. MIA. INTER-AM. L. REV. 1, 16–17 (2022); Jenny García and José Manuel Aburto, *The Impact of Violence on Venezuelan Life Expectancy and Lifespan Inequality*, 48 INT'L J. EPIDEMIOLOGY 1593–1601 (2019).

President.<sup>51</sup> The cessation of diplomatic relations means that the United States may not deport Venezuelans to Venezuela. Although many Venezuelans, like Haitians, are fleeing generalized country conditions, including violence, poverty, economic instability, and political repression, many Venezuelans may be able to satisfy eligibility for asylum.

## 2. Haiti

Haiti's relationship with the United States regarding refugee flows is long and complicated. Haiti is responsible for one of the earliest refugee flows to the United States when many white slave owners fled the island during the Haitian revolution of 1791 and sought refuge in the southern United States, where they were welcomed and accommodated.<sup>52</sup> Throughout the twentieth century, the United States intervened in Haitian politics and supported highly repressive dictatorial regimes. At several points, the United States experienced substantial refugee flows from Haiti, including during the 1970s, 1980s, and 1990s,<sup>53</sup> the latter occurring after the Haitian military overthrew Haiti's first democratically elected government. The United States developed policies to deter and exclude Haitians as refugees from the United States, including the interdiction of Haitians on the high seas. The United States has the largest Haitian migrant population in the world.<sup>54</sup>

Haiti's most recent crisis was prompted by the assassination of its president in July 2021, followed by an earthquake in August 2021, which

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<sup>51</sup> Presidential Statement on Recognizing Venezuelan National Assembly President Juan Guaido as the Interim President of Venezuela, U.S. EMBASSY & CONSULATE ECUADOR (Jan. 23, 2019). *See also President Donald J. Trump Supports the Venezuelan People's Efforts to Restore Democracy in Their Country*, TRUMP WHITE HOUSE (Jan. 29, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-supports-venezuelan-peoples-efforts-restore-democracy-country> [<https://perma.cc/Z4R5-XTVA>]; Jean Galbraith, *Contemporary Practice of the United States Relating to International Law*, 113 AM. J. INT'L L. 601, 602 (2019).

<sup>52</sup> FURSTENBERG, *supra* note 5.

<sup>53</sup> Carlos Ortiz Miranda, *Haiti and the United States During the 1980s and 1990s: Refugees, Immigration, and Foreign Policy*, 32 SAN DIEGO L. REV. 673 (1995); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994); Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States*, 60 BROOK. L. REV. 841 (1994); *see* Carl Lindskoog, *The Historical Origins of the World's Largest Immigration Detention System*, 97 DENV. L. REV. 655, 656–66 (2020).

<sup>54</sup> Beatrice Dain & Jeanne Batalova, *Haitian Immigrants in the United States*, MIGRATION POL'Y INST. (Nov. 8, 2023), <https://www.migrationpolicy.org/article/haitian-immigrants-united-states#:~:text=More%20than%2055%2C00%20Haitian%20immigrants,more%20than%20two%2Dthirds%20live> [<https://perma.cc/SV6W-JZN4>].

prompted thousands of Haitians to flee to the United States for safety.<sup>55</sup> The initial response of U.S. officials mirrored that taken by prior administrations—Haitians would not be welcomed at the border or anywhere else.<sup>56</sup> In large part, this response was continued by the Trump administration’s policy which canceled Temporary Protected Status for Haitians in 2017.<sup>57</sup> Haitians, thus, were fleeing political instability at best, repression and violence at worst, and disastrous economic conditions like their counterparts in Venezuela. While the number of Haitians displaced is substantially less than the numbers displaced in Venezuela and Ukraine, their treatment at the border was harsh and “inhumane”<sup>58</sup> which prompted the resignation of the special envoy to Haiti, Daniel Foote, and a protest by a high-level Department of State officer and the former Yale Law School dean, Harold Koh.<sup>59</sup>

Haitian refugees are Black and perceived to be poor and under-

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<sup>55</sup> Emmanuela Douyon, *Haitians Flee a Nation Nearing Collapse*, MIGRATION POL’Y INST. (July 5, 2023), <https://www.migrationpolicy.org/article/haitians-flee-collapse> [<https://perma.cc/UPM8-MUV9>]; Nadia B. Ahmad, *The Cliodynamics of Mass Incarceration, Climate Change, and “Chains on Our Feet,”* 49 FORDHAM URB. L.J. 371, 373–75 (2022).

<sup>56</sup> Press Release, U.S. Citizenship & Immigr. Servs., DHS Announces Registration Process for Temporary Protected Status for Haiti (July 30, 2021), <https://www.uscis.gov/news/news-releases/dhs-announces-registration-process-for-temporary-protected-status-for-haiti> [<https://perma.cc/4FY5-VQ57>] (extending Temporary Protected Status (“TPS”) to those already protected but limiting TPS to Haitians who could establish continuous residence in the U.S. since July 29, 2021 and making clear that any Haitians entering after July 29 would be ineligible for the relief). Relief was subsequently extended through August 3, 2024. Extension and Redesignation of Haiti for Temporary Protected Status, 88 FED. REG. 5022 (Jan. 26, 2023) (allowing Haitians continuously residing in the U.S. since November 6, 2022 to apply); see Haiyun Damon-Feng, *Refolement as Pandemic Policy*, 31 WASH. INT’L L.J. 185 (2022).

<sup>57</sup> Press Release, U.S. Citizenship & Immigr. Servs., Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Haiti (Nov. 20, 2017), <https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti> [<https://perma.cc/4XME-J9E5>]; see Sarah E. Baranik de Alarcón, David H. Secor & Norma Fuentes-Mayorga, *“We Are Asking Why You Treat Us This Way. Is It Because We Are Negroes?” A Reparations-Based Approach to Remediating the Trump Administration’s Cancellation of TPS Protections for Haitians*, 26 MICH. J. RACE & L. 1 (2020); Raymond Audain, *Not Yet Forgiven for Being Black: Haiti’s TPS, LDF, and the Protean Struggle for Racial Justice*, 52 LOY. L.A. L. REV. 409 (2019).

<sup>58</sup> Yates, *supra* note 39 (discussing the complexity of Haitian migration to the U.S., which resulted at various times in part from Haitians who relocated to South American countries like Brazil and Chile and subsequently were forced to move).

<sup>59</sup> Letter from Daniel Foote to Anthony Blinken, Secretary of State, U.S. Secretary of State (Sept. 22, 2021), <https://www.washingtonpost.com/context/read-resignation-letter-from-u-s-special-envoy-for-haiti-daniel-foote/3136ae0e-96e5-448e-9d12-0e0cabfb3c0b> [<https://perma.cc/2CB3-93YT>]; John Hudson, *Senior Legal Adviser at State Dept. Calls Administration Policy Toward Expelling Migrants “Inhumane” and “Illegal,”* WASH. POST (Oct. 4, 2021, 6:36 PM), [https://www.washingtonpost.com/national-security/koh-resign-biden-border-deportations/2021/10/04/c04468ec-254c-11ec-a6ad-9ee7deda7f34\\_story.html](https://www.washingtonpost.com/national-security/koh-resign-biden-border-deportations/2021/10/04/c04468ec-254c-11ec-a6ad-9ee7deda7f34_story.html) [<https://perma.cc/4BNH-AGVE>].

educated; more recent Haitian asylum seekers are more affluent and better educated than previous Haitian migrants.<sup>60</sup> Of the three groups considered—Ukrainians, Venezuelans, and Haitians—Haitians were the closest geographically to the United States and had the closest historical political ties.<sup>61</sup> Yet, the United States treated them the worst.

Haitians have tended to settle in Florida and New York. As of 2020, 43% percent of Haitians in the U.S. resided in Miami-Dade County, Broward County, Palm Beach County (Florida), and Kings County (New York), which includes Brooklyn.

### 3. Ukraine

On February 24, 2022, Russia invaded Ukraine, prompting thousands of Ukrainians to flee the country and strong condemnation and sanctions by world leaders, including President Biden.<sup>62</sup> Ukraine, however, mounted a fierce defense as Ukrainian President Volodymyr Zelensky persuaded allies, including the United States, to support its cause to not only impose economic sanctions on Russia, but also to provide Ukraine with armaments and weaponry.<sup>63</sup> Ukrainians elicited global sympathy, including from the United States, that generated positive responses to Ukrainians fleeing the violence of war.<sup>64</sup> Nearly seven weeks after the February 2022 invasion, the New York Times reported that many Ukrainians had flown to Mexico to

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<sup>60</sup> Douyon, *supra* note 55.

<sup>61</sup> See Dain & Batalova, *supra* note 54.

<sup>62</sup> Michael Schwartz, Eric Schmitt & Neil MacFarquhar, *Russia Batters Ukraine with Artillery Strikes as West Condemns Invasion*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/world/russia-ukraine-invasion-putin-biden.html> [<https://perma.cc/PES5-WKYZ>].

<sup>63</sup> Eric Nagourney, Dan Bilefsky & Richard Pérez-Peña, *A Year of War in Ukraine: The Roots of the Crisis*, N.Y. TIMES (Feb. 27, 2023), <https://www.nytimes.com/article/russia-ukraine-nato-europe.html> [<https://perma.cc/B5QS-EW4E>].

<sup>64</sup> Miriam Jordan, Zolan Kanno-Youngs & Michael D. Shear, *United States Will Welcome Up to 100,000 Ukrainian Refugees*, N.Y. TIMES (Mar. 24, 2022), <https://www.nytimes.com/2022/03/24/us/ukrainian-refugees-biden.html> [<https://perma.cc/QEH3-JRJX>]; Monika Pronczuk & Dan Bilefsky, *The E.U. Is Expected to Grant Blanket Protection to Ukrainian Refugees*, N.Y. TIMES (Mar. 2, 2022), <https://www.nytimes.com/2022/03/02/world/europe/ukraine-refugees-eu.html> [<https://perma.cc/2XZ9-QGWJ>]; Chris Cameron, *How Americans Can Sponsor Ukrainian Refugees*, N.Y. TIMES (Apr. 25, 2022), <https://www.nytimes.com/2022/04/25/us/politics/americans-sponsor-ukrainians.html> [<https://perma.cc/H488-QB9S>]; *U.S. Releases Details of Plan to Ease Entry By Ukrainians*, N.Y. TIMES, Apr. 27, 2022, at A14.



seek asylum in the United States at the California border.<sup>65</sup> Their treatment at the border was significantly different from that of Haitians.<sup>66</sup>

Under new regulations, all three groups, Haitians, Venezuelans, and Ukrainians, are subject to the new process requiring registration through a website for humanitarian visas and are forced to return to Mexico if they present at the border.

### III. INTERNAL MIGRATION THROUGH PLACE AND TIME

It is not just global refugees that engage in the journey, however: persons fleeing displacement or persecution of some type move internally as well. Climate change, environmental disasters, the targeting of particular groups, and excessive, uncontrolled civil violence motivate migration within a country's territory.<sup>67</sup> Migration is an internal as well as external phenomenon. The history of the United States is replete with examples of internal migration: enslaved persons forced to flee from Southern states and territories to escape enslavement;<sup>68</sup> migrants from U.S. territories, most of which were eventually admitted as states;<sup>69</sup> migrants from a region of the U.S. to another fleeing persecution or natural disasters and seeking greater economic opportunities, like the approximately six million Black persons

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<sup>65</sup> Soumya Karlamangla, *A Surge in Ukrainian Refugees at California's Southern Border*, N.Y. TIMES (Apr. 7, 2022), <https://www.nytimes.com/2022/04/07/us/ukrainian-refugees-california-border.html> [<https://perma.cc/34EB-ZUBW>].

<sup>66</sup> *DHS Secretary Designates Ukraine for TPS*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/save/whats-new/dhs-secretary-designates-ukraine-for-tps> [<https://perma.cc/2UW7-N4Q6>]. Ukrainian nationals who could establish continuous residence in the U.S. since April 11, 2022, and continuous physical presence in the U.S. since April 19, 2022, could apply for TPS for 18 months beginning on April 19, 2022, and ending on October 19, 2023. See Designation of Ukraine for Temporary Protected Status, 87 FED. REG. 23211 (Apr. 19, 2022).

<sup>67</sup> See Clarke, *supra* note 31, at 1, 3–4, 17–18, 24–25 (recognizing that environmental or climate change will impact internal and external displacement). The U.N. High Commissioner for Refugees tracks internally displaced persons as well; however, they are not entitled to the protection secured to refugees as the term is defined under the Refugee Convention.

<sup>68</sup> The trade in enslaved persons encompasses both external and internal migration, and the internal migration story in particular may be examined in part as a refugee story. Paul Finkelman, *When International Law Was a Domestic Problem*, 44 VAL. U. L. REV. 779 (2010); Magee, *supra* note 4 (criticizing the reluctance of scholarship to engage with the relationship of enslavement to immigration); Kunal M. Parker, *Making Blacks Foreigners: The Legal Construction of Former Slaves in Post-Revolutionary Massachusetts*, 2001 UTAH L. REV. 75 (2001); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1865–80 (1993); see Chin & Finkelman, *supra* note 2 (examining U.S. law banning the international African slave trade as part of the origins of U.S. federal immigration regulation to support an argument that there were unauthorized migrants in the U.S. at the time of the adoption of the Fourteenth Amendment).

<sup>69</sup> Tom C.W. Lin, *Americans, Beyond States and Territories*, 107 MINN. L. REV. 1183 (2023) (describing the impact of residing in the Territories of American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands).

who migrated to the North, Midwest, and West during the Great Migration from 1915 to 1970;<sup>70</sup> the more than a quarter to half of a million persons who fled the Dust Bowl;<sup>71</sup> and more recently, the over 200,000 persons from New Orleans displaced by Hurricane Katrina in 2005.<sup>72</sup> To some extent, some migration stories reflect natural disasters resulting from human policies. For example, the Dust Bowl migration was partly caused by developers' efforts to attract and recruit international migrants to work the land in that part of the country.<sup>73</sup> Similarly, the devastation wreaked by Hurricane Katrina in New Orleans was partly caused by governmental policies and practices that maintained the levee system protecting the city from storm surges.<sup>74</sup> These three internal refugee flows are compared to the external refugee narratives involving Venezuelans, Haitians, and Ukrainians.

Internal migration by country, region, or state may be tracked through the U.S. Census.<sup>75</sup> Census records, however, do not tell the whole story because what drives internal migration is not necessarily identified or reflected in census records. Nonetheless, census records do tell us the number of persons who stay in a particular local or region, despite whatever disastrous circumstances drive others to leave, as well as the number who leave. In this way, internal migration reflects external migration: generally, there are always populations who stay in a place that is no longer hospitable or sustainable.

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<sup>70</sup> ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2010).

<sup>71</sup> TIMOTHY EGAN, *THE WORST HARD TIME: THE UNTOLD STORY OF THOSE WHO SURVIVED THE GREAT AMERICAN DUST BOWL* (2006).

<sup>72</sup> JOHN MCQUAID & MARK SCHLEIFSTEIN, *PATH OF DESTRUCTION: THE DEVASTATION OF NEW ORLEANS AND THE COMING AGE OF SUPERSTORMS* 332–39 (2006); see Ruth Gordon, *Afro America and the Third World in the Wake of Hurricane Katrina*, 21 *NAT'L BLACK L.J.* 1, 6–8, 24–37 (2009) (discussing the use of the term, “refugee,” in the media to refer to persons forced to leave New Orleans, in particular as it impacted Black people); see also Mitchell F. Crusto, *Enslaved Constitution: Obstructing the Freedom to Travel*, 70 *U. PITT. L. REV.* 233 (2008) (exploring the right to travel intrastate in Louisiana in the aftermath of Hurricane Katrina).

<sup>73</sup> EGAN, *supra* note 71, at 65–66.

<sup>74</sup> MCQUAID & SCHLEIFSTEIN, *supra* note 72, at 340–44, 356–59.

<sup>75</sup> Amel Toukabri, Crystal Delbé, Esther Miller & Basak Ozgenc, *New Data Reveal Continued Outmigration from Some Larger Combined Statistical Areas and Counties*, U.S. CENSUS BUREAU (Mar. 24, 2022), <https://www.census.gov/library/stories/2022/03/net-domestic-migration-increased-in-united-states-counties-2021.html> [https://perma.cc/5P9H-PNF8]; U.S. CENSUS BUREAU, *2020 Census Apportionment Results* (Apr. 26, 2021), <https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html> [https://perma.cc/PU43-9JFW]; see Riordan Frost, *Domestic Migration Drove State and Local Population Change in 2021*, *JOINT CTR. FOR HOUS. STUD. HARV. U.* (Aug. 25, 2022), <https://www.jchs.harvard.edu/blog/domestic-migration-drove-state-and-local-population-change-2021> [https://perma.cc/4WSP-QBZN].

Numerous scholars have explored how certain traits, including class, race, national origin, color, religion, disability, and gender, historically and currently operate to deprive citizens of full citizenship. After the Civil War, in particular during segregation, laws and de facto conditions in many states sharply limited the enjoyment of full citizenship, residence, and employment rights by Black persons, persons from Asian countries or of Asian ancestry, Latinx, and poor persons. This narrative has been so well-examined and recounted that it does not need retelling here, except to compare the reception of internal migrants in host states or territories with that encountered by external migrants in the U.S. and other countries.

#### A. MANAGING INTERNAL REFUGEES—THE FREEDMEN’S BUREAU

In 1865, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands (“Bureau”) to provide relief to and manage refugees and freedmen from the Civil War and manage lands in the former Confederate and border states abandoned or seized by the military during the war.<sup>76</sup> The Freedmen’s Bureau, as it came to be known, operated in the states until 1869;<sup>77</sup> Congress abolished it in 1872.<sup>78</sup> The Bureau was responsible for the apportionment of confiscated land among freedmen.<sup>79</sup> It was also charged with providing relief to thousands of persons displaced by the war. The relief included providing homes, regular employment, and food.<sup>80</sup> Displacement, hunger, and the need for medical care afflicting persons resulted not only from the war, but also from natural disasters like floods and epidemics like yellow fever,<sup>81</sup> cholera, and smallpox.<sup>82</sup> Of particular relevance to this piece was the Bureau’s management of refugee camps and its role in providing transportation to refugees and freedmen attempting to reunite with family or relocate to other parts of the country.<sup>83</sup> The term

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<sup>76</sup> Act of March 3, 1865, ch. 90, 13 Stat. 507 (establishing the Bureau of Refugees, Freedman, and Abandoned Lands).

<sup>77</sup> Act of July 25, 1868, ch. 245, 15 Stat. 193 (ordering the withdrawal of Bureau officers from states by Jan. 1, 1869, and discontinuing Bureau activities except education and collection and payment of claims).

<sup>78</sup> Act of June 10, 1872, ch. 415, 17 Stat. 347 (abolishing the Bureau effective June 30, 1872).

<sup>79</sup> In Louisiana, most White persons were successful in regaining confiscated property. HOWARD A. WHITE, *THE FREEDMEN’S BUREAU IN LOUISIANA* 49, 56–57 (1970).

<sup>80</sup> *Id.* at 65–66.

<sup>81</sup> *Id.* at 69, 71, 73.

<sup>82</sup> *Id.* at 88, 123.

<sup>83</sup> U.S. CONG. & NAT’L ARCHIVES & RECS. ADMIN., *RECORDS OF THE FIELD OFFICES FOR THE STATE OF LOUISIANA, BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, 1863–1872*, at 3 (2004), <https://www.archives.gov/files/research/microfilm/m1905.pdf> [<https://perma.cc/RKR8-ZZFN>].

“refugee” was used to describe displaced White persons, apparently without negative connotations ascribed to the term. For example, in Louisiana, the Bureau’s activities are described in government documents as including the issuance of “some 455,290 rations to destitute freedmen and 157,691 to white refugees.”<sup>84</sup> The Bureau also provided housing and medical aid to freedmen and White refugees.<sup>85</sup> The *New Era* credited the Bureau with lowering the national death rate for Black persons during its first year of operation from thirty percent to four percent.<sup>86</sup> Citizenship appears to have been immaterial to the use of the term “refugee,” at least in the context of the Bureau, but the term referred primarily to White persons. Not infrequently, Black and White persons were ordered to move from one state to another. For example, in July 1865, a government official in West Florida ordered persons discharged from government employment and anyone unable to support themselves to report to the Freedmen’s Bureau in New Orleans.<sup>87</sup> Approximately 567 refugees from Louisiana, Texas, Florida, and Kentucky were housed in New Orleans hotels in the spring of 1865 for a short period of time. By the end of September 1865, they had been discharged.<sup>88</sup> Subsequently, other temporary homes were provided for refugees from different states.<sup>89</sup> Frequently, persons relocated from one state to another, and in some instances, states patrolled their borders to try to keep out-of-staters from entering the state.<sup>90</sup>

#### B. THE CASE OF PUERTO RICO: THE CITIZENSHIP/PLACE DISTINCTION<sup>91</sup>

The case of Puerto Rico evokes both an internal migration story and an external one. Although they are U.S. citizens at birth, Puerto Ricans are often described and understood in the literature as immigrants<sup>92</sup> who have

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<sup>84</sup> *Id.* at 5.

<sup>85</sup> WHITE, *supra* note 79, at 86–100.

<sup>86</sup> *Review of the Work of the Freedmen’s Bureau*, THE NEW ERA, Jan. 20, 1870, at 3.

<sup>87</sup> WHITE, *supra* note 79, at 76–77.

<sup>88</sup> *Id.* The term “refugee” here is used to include freed persons.

<sup>89</sup> *Id.* at 78.

<sup>90</sup> *Id.* at 116.

<sup>91</sup> Alongside Puerto Rico are the territories of American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands; see Lin, *supra* note 69.

<sup>92</sup> Immigrants are defined in immigration statutes as aliens (noncitizens). 8 U.S.C. § 1101(a)(15). See Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai’i’s Plantations to Congress—Puerto Rican’s Claims to Membership in the Polity*, 20 S. CAL. REV. L. & SOC. JUST. 353 (2011); see, e.g., Daniel K. Cooper, Rahel Bachem, Maya G. Meentken, Lorena Aceves & Ana G. Perez Barrios, *Cumulative Lifetime Adversity and Depression Among a National*

been “othered” or rendered second-class citizens.<sup>93</sup> U.S. citizens at birth are not “immigrants” to the United States. Ediberto Roman and other scholars exposed this duality and the resulting inequalities in the experience of Puerto Rican U.S. citizens.<sup>94</sup>

The United States Supreme Court has upheld differential treatment for Puerto Rican U.S. residents when they reside in Puerto Rico, most recently in *United States v. Vaello-Madero*.<sup>95</sup> The case involved a challenge to the denial of supplemental security benefits to residents of Puerto Rico pursuant to a federal law that restricted the benefits to residents of the fifty states and the District of Columbia.<sup>96</sup> Jose Luis Vaello Madero had received the benefits while residing in New York.<sup>97</sup> He moved to Puerto Rico, where he was not eligible to receive the benefits, but the government kept making the payments.<sup>98</sup> Eventually, the government sued him to recover \$28,000 in benefits paid to him while he resided in Puerto Rico.<sup>99</sup> Vaello Madero defended himself on the grounds that the statutory differential treatment of residents of Puerto Rico violated the equality component of the Fifth Amendment Due Process Clause.<sup>100</sup> Lower courts held that the statute’s differential treatment violated equal protection, but the Supreme Court reversed, applying a low level of scrutiny to the difference in treatment. The Court then reasoned that the difference in treatment was rational because

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*Sample of U.S. Latinx Immigrants: Within-group Differences in Risk and Protective Factors Using Data from HCHS/SOL Sociocultural Ancillary Study*, 8 J. LATINX PSYCH. 202–20 (2022) (acknowledging that Puerto Ricans are U.S. citizens but including them in studies of Latinx immigrants). An early Supreme Court case brought before Congress specifically provided for U.S. citizenship at birth for Puerto Ricans: *Gonzales v. Williams* held that a person from Puerto Rico was not an alien immigrant and thus could not be detained or deported from the United States reasoning that Puerto Ricans were persons whose permanent allegiance is due to the United States. *Gonzales v. Williams*, 192 U.S. 1, 21 (1904).

<sup>93</sup> See, e.g., Lisa Maria Perez, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029 (2008); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000); Kevin R. Johnson, *Puerto Rico, Puerto Ricans, and Latcrit Theory: Commonalities and Differences between Latina/o Experiences*, 6 MICH. J. RACE & L. 107, 110–11 (2000) (“Both Mexican Americans and Puerto Ricans enjoy citizenship and membership rights unequal to those accorded Anglos, although one group (Mexican Americans) is composed of citizens by law with full legal rights while the other (Puerto Ricans) includes United States citizens with limited legal rights in Puerto Rico.”); Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. STATE U. L. REV. 1 (1998).

<sup>94</sup> Ediberto Román, *Empire Forgotten: The United States’s Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997); Román, *supra* note 93.

<sup>95</sup> *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022).

<sup>96</sup> 42 U.S.C. § 1382c(a)(1)(B)(i).

<sup>97</sup> *Vaello-Madero*, 142 S. Ct. at 1542.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

Puerto Rican residents were exempted from paying most federal income and other taxes.<sup>101</sup> To require full equality, the majority opinion noted it would mean that residents of the fifty states could insist that residents of Puerto Rico pay the same income and other taxes, which might impose a heavier burden on those residents.

Previously, in *Harris v. Rosario*, U.S. citizens in Puerto Rico challenged a federal assistance program that gave a lower amount of aid to Puerto Rican families with dependent children than U.S. citizen families in the United States.<sup>102</sup> The Supreme Court upheld the differential treatment as not violating the Fifth Amendment's equality guarantee.<sup>103</sup> The Supreme Court's treatment of Puerto Ricans rests on cases decided in the early twentieth century, roundly condemned by jurists and scholars for their reliance on racist stereotypes, which hold that Congress has the power to regulate unincorporated territories, like Puerto Rico, without being bound by the strictures of the Constitution to the same extent as their treatment of the United States.<sup>104</sup>

In *Califano v. Torres*,<sup>105</sup> the Court upheld a federal statute that limited Social Security Supplemental Security Income benefits for aged, blind, or disabled persons to only residents of the states and the District of Columbia. Persons who moved to Puerto Rico, very much like Vaello Madero, lost these benefits. Claimants asserted an equal protection claim and a right to travel claim. The district court ruled for the claimants on the right to travel claim and held that the geographic limitations interfered with their constitutional right to travel, and the government had not shown a compelling interest to justify the interference.<sup>106</sup> On appeal, the Court reversed in a per curiam decision. The Court agreed that "laws prohibiting newly arrived residents in a State or county from receiving the same vital benefits as other residents unconstitutionally burdened the right of interstate

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<sup>101</sup> *Id.* at 1543.

<sup>102</sup> *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam).

<sup>103</sup> *Id.*

<sup>104</sup> *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Downes v. Bidwell*, 182 U.S. 244 (1901). See RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (Gerald L. Neuman & Tomiko Brown-Nagin, eds., 2015); PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (N.Y. Univ. Press 2004); René Pinto-Lugo, *Puerto Ricans: The Inequality of "Equals" Through Time*, 50 REVISTA JURÍDICA U.I.P.R. 153 (2015); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Obergefell v. Hodges*, 576 U.S. 644 (2015); G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>105</sup> *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam).

<sup>106</sup> *Torres v. Mathews*, 426 F. Supp 1106 (D.P.R. 1977), *rev'd sub nom. Califano*, 435 U.S. 1 (1978).

travel.”<sup>107</sup> The case at hand, however, differed—the persons moving to Puerto Rico were getting the same benefits as other Puerto Ricans. The opinion ignored the fact that the benefits and the geographical limitation were nationally defined, not left up to the individual state to determine. In a footnote, the per curiam opinion relied on the early twentieth-century cases recognizing that Congress had the power to treat Puerto Rico differently than the states.<sup>108</sup> Ironically, the Court, in a different footnote, noted that “there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union.”<sup>109</sup>

Much of the citizenship scholarship and most of the cases discussed above, however, focus on the experiences of Puerto Ricans in Puerto Rico or of residents of Puerto Rico, rather than that of Puerto Ricans who reside in the United States. The focus of these cases is not on the journey or on how Puerto Ricans are treated when they reside in the United States.

In *Katzenbach v. Morgan*, the Court considered a challenge to a provision of the Voting Rights Act of 1965 that restricted the state of New York from requiring Puerto Rican U.S. citizens who had achieved a sixth-grade education in Puerto Rico in any language to pass an English literacy test to exercise the franchise in New York.<sup>110</sup> The Court reasoned that Congress had the power to prevent discriminatory treatment of Puerto Ricans by restricting a state’s use of English literacy tests, even though the use of literacy tests had been upheld by the Court in prior cases. The Court, in an opinion by Justice Brennan, noted that although the state maintained that the reason for its English literacy tests was “to provide an incentive for non-English speaking immigrants to learn the English language” and secure the intelligent use of the franchise,<sup>111</sup> the evidence in the record supported Congress’s decision that those might not be the actual goals of the requirement, and that the measure reflected prejudice against Puerto Ricans. The Court recognized that the intelligent exercise of the franchise was not dependent upon English literacy and that literacy in Spanish sufficed to accomplish that goal.<sup>112</sup> In a footnote, the Court included references to the danger the white race faced by the “infusion of Southern and Eastern European races” that echoes the “threat” and “unchecked numbers” narratives that are critical to “othering” of internal and external migrants.<sup>113</sup>

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<sup>107</sup> *Califano*, 435 U.S. at 4.

<sup>108</sup> *Id.* at 3 n.4.

<sup>109</sup> *Id.* at 4 n.6.

<sup>110</sup> *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

<sup>111</sup> *Id.* at 654.

<sup>112</sup> *Id.* at 655.

<sup>113</sup> *Id.* at 654 n.14.

Lower courts have decided cases involving claims of discrimination against Puerto Ricans while residing in the United States in a variety of contexts, including employment, voting, education, and language.<sup>114</sup> These cases reflect discrimination directed at Puerto Ricans within the United States on the basis of their race or ethnicity, and the perception that they do not really belong in the United States, despite their U.S. citizenship.

A survey conducted by the Pew Research Center in March 2021 concluded that Latinos who have darker skin and are born outside the United States, including in Puerto Rico, are more likely to have experienced discrimination.<sup>115</sup> The kinds of discrimination reported included being criticized for speaking Spanish in public, being called offensive names, and hearing racist or racially insensitive comments or jokes.<sup>116</sup> At least one study suggests that Puerto Ricans have one of the highest rates of divorce of Latinx groups in the United States, report one of the highest levels of discrimination, and have the highest rates of unemployment compared with other Latinx groups in the United States.<sup>117</sup> Other research reports that Puerto Ricans and Mexicans register the highest levels of discrimination among Latinx groups in the United States, but of all of the groups studied, Mexicans, Puerto Ricans, Cubans, and Dominicans reported significant levels of discrimination.<sup>118</sup>

### C. THE GREAT MIGRATION

Isabel Wilkerson's Pulitzer prize-winning history, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION*,<sup>119</sup> is a thorough and detailed narrative of the migration of Black southerners to the

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<sup>114</sup> *United States v. Berks Cnty.*, 277 F. Supp. 2d 570 (E.D. Pa 2003) (enjoining the county from providing election materials in English only); *Garcia v. Gardner's Nurseries, Inc.*, 585 F. Supp. 369 (D. Conn. 1984) (accepting Puerto Rican descent as a race within the protections of 42 U.S.C. § 1981 for employment discrimination); *see also* Katherine Culliton-González, *Time to Revive Puerto Rican Voting Rights*, 19 BERKELEY LA RAZA L.J. 27 (2008) (analyzing federal cases that involve language-discrimination and mainland Puerto Rican voter rights).

<sup>115</sup> Luis Noe-Bustamante, *Latinos Experience Discrimination from Other Latinos About as Much as from Non-Latinos*, PEW RSCH. CTR. (May 2, 2022), <https://www.pewresearch.org/short-reads/2022/05/02/latinos-experience-discrimination-from-other-latinos-about-as-much-as-from-non-latinos> [<https://perma.cc/U5YT-KLMA>].

<sup>116</sup> *Id.*; *see, e.g.*, Daniel K. Cooper, Mayra Bámaca-Colbert, Eric K. Layland, Emily G. Simpson & Benjamin L. Bayly, *Puerto Ricans and Mexican Immigrants Differ in Their Psychological Responses to Patterns of Lifetime Adversity*, PLOS ONE 1 (2021) (discussing adversity and perceived discrimination in the two groups compared, Mexicans and Puerto Ricans, but ignoring the fact that Puerto Ricans are not immigrants).

<sup>117</sup> Cooper et al., *supra* note 116.

<sup>118</sup> *Id.*

<sup>119</sup> WILKERSON, *supra* note 70.



northern and western United States during the first half of the twentieth century. From 1915 to 1970, approximately six million black persons left the southern states.<sup>120</sup> Most major American northern and western metropolitan areas bear the imprint of this migration, from Los Angeles to Detroit, Chicago, Pittsburgh, Philadelphia, and New York. Southern states, including those in which Black persons had constituted a majority of the population, saw a substantial drop in their numbers. Wilkerson's work emphasizes the parallels of this internal migration to that of the international refugee:

The people did not cross the turnstiles of customs at Ellis Island. They were already citizens. But where they came from, they were not treated as such. Their every step was controlled by the meticulous laws of Jim Crow, a nineteenth-century minstrel figure that would become shorthand for the violently enforced codes of the southern caste system . . . .

They did what humans have done for centuries when life became untenable—what the pilgrims did under the tyranny of British rule, what the Scotch-Irish did in Oklahoma when the land turned to dust, what the Irish did when there was nothing to eat, what the European Jews did during the spread of Nazism, what the landless in Russia, Italy, China, and elsewhere did when something better across the ocean called to them. What binds these stories together was the back-against-the-wall, reluctant yet hopeful search for something better, any place but where they were. They did what human beings looking for freedom, throughout history, have often done.

They left.<sup>121</sup>

The reasons for departing have been well-documented—legally mandated and de facto segregation, targeted public and private violence, and relentless discrimination and disrespect,<sup>122</sup> the kinds of reasons that should justify the grant of asylum to external asylum seekers. But during the many years of the migration, environmental and economic conditions

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<sup>120</sup> *Id.* at 9.

<sup>121</sup> *Id.* at 9–10, 14–15.

<sup>122</sup> *Id.* at 36–45, 52–55, 58–62, 84–88, 157.

also impacted the migration.<sup>123</sup> Black migrants who headed North, like many asylum seekers today, were willing to travel long distances in hope of a safer and better life.<sup>124</sup>

Wilkerson describes many of the experiences of external asylum seekers or refugees at work in the Great Migration, including advertisements and recruitment by corporate actors encouraging Black workers to go north, perhaps only to fill a known but undisclosed temporary need, media reports encouraging migration,<sup>125</sup> and worker expectations generated by the advertisements that were unlikely to exist in the receiving community.<sup>126</sup> Corporate entities might issue a flyer claiming hundreds of workers were needed in a particular area, but that flyer might go to thousands of potential workers in many locations. Black workers also tended to follow and rely on information and assistance from relatives and friends.<sup>127</sup> Like external refugees, some set out alone and others with family.<sup>128</sup> Many sent money back to their families in the South.<sup>129</sup> Some left spouses and children behind, hoping to bring the family together at some point in the future.<sup>130</sup>

The response in northern communities was not always welcoming, notwithstanding the promises of corporate entities soliciting Black workers to head north for jobs.<sup>131</sup> The impact in terms of population was substantial: Wilkerson reports that Chicago went from having a 1.8 percent Black population at the beginning of the twentieth century to one-third Black in 1970, and Detroit went from 1.4 percent to 44 percent Black population.<sup>132</sup> Race riots occurred in numerous cities, in particular Detroit, marked by

<sup>123</sup> *Id.* at 216–17.

<sup>124</sup> *Id.* at 178–79.

<sup>125</sup> *Id.* at 161–62.

<sup>126</sup> *Id.* at 245, 249.

<sup>127</sup> *Id.* at 90, 163, 226, 228, 236.

<sup>128</sup> *Id.* at 7, 190, 226–29.

<sup>129</sup> *Id.* at 241.

<sup>130</sup> *Id.* at 127–130, 140–45.

<sup>131</sup> *Id.* at 206–11 (exclusion from hotels on the road to California); *id.* at 232 (cross-burning in California); *id.* at 237 (inability to work in the profession or skill developed in the place of origin); *id.* at 246–47, 254 (race-based wage discrimination); *id.* at 249–50 (racially restrictive covenants, firebombing of houses, and organized resistance to fight “‘a growing menace,’ an ‘invasion’ of ‘black hordes’” in Harlem—efforts that ultimately failed); *id.* at 254–56 (discrimination by Black persons in favor of White persons).

<sup>132</sup> *Id.* at 190. Some migrants headed west to California and were part of the Dust Bowl migration. On the trains to and from California, passengers experienced the start and cessation of mandated segregation in El Paso, Texas. *Id.* at 199. On the train north, the change began in Washington, D.C., and on the way to Chicago, in Cairo, Illinois. *Id.* at 200. But even after leaving behind the mandated segregation of the South, travelers experienced actual exclusion and segregation.

resistance from Black communities.<sup>133</sup> Although the northern and central states did not institute legally mandated segregation, de facto segregation took hold and led to many legal challenges to attempt to eliminate racially segregated schools throughout the country.<sup>134</sup>

The newcomers brought their cultural and food traditions to their receiving communities and, to some extent, changed the character of their neighborhoods.<sup>135</sup> Black workers, like many asylum seekers and migrant workers, were subjected to stereotyping.<sup>136</sup> Further, when economic conditions in the receiving states deteriorated and work became scarce, the targeting of Black workers, like the targeting of the Okies in California, became common.<sup>137</sup>

#### D. THE GREAT PLAINS MIGRATION TO CALIFORNIA

The migration that followed the severe drought that affected the arid parts of the Great Plains is analogous to the external migration of refugees from natural disasters like drought and hurricanes. It may be that in countries beset by natural disasters, most residents stay and try to survive the conditions. That was true of the Dust Bowl, as argued by Timothy Egan in his 2006 book, *THE WORST HARD TIME*, which focused on those who stayed rather than those who left.<sup>138</sup> Egan traces the origins of the Dust Bowl to the area's natural aridness and low average rainfall, generally too low to support agriculture, and how the area nonetheless experienced rapid and arguably unprincipled agricultural development in a way that would prove unsustainable.<sup>139</sup> This is similar to many natural disasters that reflect not just

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<sup>133</sup> *Id.* at 131, 274.

<sup>134</sup> See *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (affirming the lower court's holding that the Dayton Board of Education had operated a racially segregated dual school system in violation of the Equal Protection Clause of the Fourteenth Amendment); *Milliken v. Bradley*, 418 U.S. 717 (1974) (striking down a desegregation plan in Detroit that relied on inter-district remedies on the grounds that only districts that had been found to engage in unlawful segregation in violation of the Equal Protection Clause of the Fourteenth Amendment could be part of a remedy to desegregate inner-city schools in Detroit); *Keyes v. Sch. Dist.*, 413 U.S. 189 (1973) (stating that the plaintiffs alleging segregation in schools in a school system in which no statutory dual system has ever existed must prove that segregated schooling exists and that the segregation was brought about or maintained by intentional state action).

<sup>135</sup> *Keyes*, 413 U.S. at 231–41, 245.

<sup>136</sup> *Id.* at 245, 265.

<sup>137</sup> *Id.* at 244–45.

<sup>138</sup> EGAN, *supra* note 71, at 250–53. Pare Lorentz directed a short documentary about the Dust Bowl in 1935 called *The Plow that Broke the Plains*. The film was financed by the United States Resettlement Administration and is available at <https://www.youtube.com/watch?v=8uEwGmjquU>.

<sup>139</sup> *Id.* at 5, 13–73.

forces of nature but also human activity or conduct.

This part of the United States was prairie—made up of grasslands that supported Native Americans and herds of buffalo—covering one hundred million acres, sometimes called the Great American Desert, over parts of Texas, Oklahoma, Kansas, Nebraska, Colorado, and New Mexico. By 1914, which Egan describes as the peak year for homesteads in the twentieth century, 53,000 land claims had been staked throughout the Great Plains.<sup>140</sup> The government encouraged and drove the settlements and farming despite the area's aridity. The initial success of farming wheat resulted in overproduction. The start of the Great Depression in 1929 coincided with a change in the weather and black blizzards that blew for days and caused diseases that killed many, particularly the elderly and children.

Egan described the origins of the disaster:

When the native sod of the Great Plains was in place, it did not matter if people looked twice at a piece of ground. Wind blew twenty, thirty, forty miles an hour, as always. Droughts came and went. Prairie fires, many of them started deliberately . . . , took a great gulp of grass in a few day. . . . As long as the weave of grass was stitched to the land, the prairie would flourish in dry years and wet. The grass could look brown and dead, but beneath the surface, the roots held the soil in place; it was alive and dormant. The short grass . . . had evolved as the perfect fit for the sandy loam of the arid zone. . . . In turn, the grass nurtured pin-tailed grouse, prairie chickens, cranes, jackrabbits, snakes, and other creatures that got their water from foraging on the native turf. Through the driest years, the web of life held. When a farmer tore out the sod and then walked away, leaving the land naked, however, that barren patch posed a threat to neighbors. It could not revert to grass, because the roots were gone. It was empty, dead, and transient. . . . So when the winds blew in the winter of 1932, they picked up the soil with little resistance and sent it skyward.<sup>141</sup>

Vast devastation gripped the land and its inhabitants. Dust built up in people's lungs and caused extensive damage and a new condition known as

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<sup>140</sup> *Id.* at 36.

<sup>141</sup> *Id.* at 112–13.

dust pneumonia, which became one of the biggest killers of that era.<sup>142</sup> Approximately 7000 people, including children, died from dust pneumonia, starvation, and other lung diseases. More than a quarter-million people left.<sup>143</sup>

Between 1935 and 1941, over 300,000 persons from the southern Great Plains moved to California. Some originated in urban areas and settled in urban areas in California; others originated in rural areas and settled in rural areas in California, primarily Kern County, which grew by more than 63% between 1935 and 1940.<sup>144</sup> Unsurprisingly, scholars have noted that access to capital and social, economic, and cultural resources significantly influenced migration behavior. Most persons who migrated were tenant farmers; most landowners stayed.<sup>145</sup> Access to capital is likely to influence significantly the response of receiving communities to migrants; that is, if the migrants arriving are wealthy or have access to cash or other sources of capital, receiving communities may be more open to welcoming them. Although there were government programs that made some assistance available to the farmers, tenants, and landowners who faced severe drought, the aid was insufficient and unavailable to many of the families that needed it.

Robert McLeman conducted a study of the Great Plains migration to determine whether adverse climatic conditions would prompt internal migration and who would be most likely to leave. He concluded that whether migration results might depend on the nature and effectiveness of institutional and community-level adaptations—in particular, the availability of government assistance.<sup>146</sup> McLeman also noted that other factors, such as the respiratory illness caused by the dust storms, would likely provide an incentive to migrate and that these factors may reflect different locations and experiences. The availability of government aid, for example, or adequate and easily accessible health care might have an impact on whether persons in that area would choose to migrate. The Dust Bowl migration, like all migration reflects complexity—different conditions in different places will influence whether persons choose to migrate or not and will impact whether receiving territories or states will welcome persons who migrate.

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<sup>142</sup> *Id.* at 224.

<sup>143</sup> *Id.* at 7.

<sup>144</sup> Robert McLeman, *Migration Out of 1930s Rural Eastern Oklahoma: Insights for Climate Change Research*, 26 GREAT PLAINS Q. 27, 28 (2006).

<sup>145</sup> *Id.* at 34.

<sup>146</sup> *Id.* at 36.

Family ties, a form of social capital, also played a significant role in drawing migrating families to California. Many households that migrated to California during this period had preexisting family connections to California; approximately 60,000 persons from Oklahoma had migrated to California by the 1920s.<sup>147</sup> Family connections also provided a way to communicate about job opportunities, the trustworthiness of particular employers, the possibility of migrating to California, and possible places to stay.<sup>148</sup> The presence of family connections may explain why the migration flowed to California and not to Washington.<sup>149</sup> Further, the presence of family and social connections made it possible for the “Okies” to survive in a community that was increasingly hostile to the migrants, similar to the hostility that Black workers who migrated north during the Great Migration and external migrants to the United States experienced. Migrant children in California schools suffered discrimination in local public schools, which prompted the building of a school by migrants.<sup>150</sup>

Migrants from the Great Plains also brought with them a set of skills, such as chopping and picking cotton efficiently. Migrants also had developed skills in managing draft teams, in surplus in Oklahoma but which could be used in California, albeit by moving frequently from farm to farm. Many migrants were young, healthy couples with children who frequently worked alongside their parents in the fields. Most were not well-educated prior to migrating, but they valued the importance of education for their children.<sup>151</sup> A quarter of children who enrolled in Kern County schools in 1938 came from Oklahoma.<sup>152</sup>

The majority of migrants to California had the economic capital to finance their trip. They were poor, but had sufficient capital in the forms of a car, draft animals, agricultural equipment, and other possessions to finance the trip west.<sup>153</sup> The migration of Okies to California was predictable, and McLeman notes that at least one researcher predicted it before it gained momentum.<sup>154</sup>

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<sup>147</sup> *Id.* at 31; JAMES N. GREGORY, AMERICAN EXODUS: THE DUST BOWL MIGRATION AND OKIE CULTURE IN CALIFORNIA 26–29 (Oxford Univ. Press 1989).

<sup>148</sup> McLeman, *supra* note 144, at 32.

<sup>149</sup> *Id.* at 37.

<sup>150</sup> *Id.* at 32.

<sup>151</sup> *Id.* at 33.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 33–34.

<sup>154</sup> *Id.* at 37.

## E. THE NEW ORLEANS MIGRATION AFTER KATRINA

On August 28, 2005, the mayor of New Orleans ordered a mandatory evacuation of the city.<sup>155</sup> By that time, most of the city's residents who could afford to evacuate had begun to do so. Scholar Mitchell Crusto described the events preceding and following Hurricane Katrina's impact on the city and its residents.<sup>156</sup> After the mandatory evacuation order, many more left the city. However, many either chose to stay or could not afford to leave, opting to wait for the predicted catastrophic storm to hit the city. By early Monday morning, the city had appeared to avoid the catastrophe. As the news trickled in, however, residents began to realize that the catastrophe had been realized through the failure of the city's levees. The city of New Orleans flooded to an extent that rendered the city uninhabitable for the majority of the population for a substantial period.

Those who had stayed began to look for relief or rescue from the flooding. One group sought to reach a majority white neighborhood but was blocked by police.<sup>157</sup> Those who ended up in other places or were forced to evacuate eventually encountered bias and resistance to their presence, similar to those encountered by external refugees in receiving communities and by persons moving during the Great Migration and the Dust Bowl.<sup>158</sup> The Katrina experience bore out the impact of race, class, and gender on persons forced to migrate internally and their reception in the places to which they relocated.<sup>159</sup>

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<sup>155</sup> Mitchell F. Crusto, *State of Emergency: An Emergency Constitution Revisited*, 61 LOY. L. REV. 471, 482 n.48 (2015).

<sup>156</sup> *Id.* at 477–501.

<sup>157</sup> *Alexander v. City of Gretna*, No. 06-5405, 2008 U.S. Dist. LEXIS 109090; see Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 402–06, 421–23, 437 (2010).

<sup>158</sup> Daniel Golden, *Separate but Equal? Schooling of Evacuees Provokes Debate*, WALL ST. J. (Sept. 14, 2005, 12:01 AM), <https://www.wsj.com/articles/SB112666498176540100> [<https://perma.cc/289D-788B>]; Thaddeus Herrick, *Teen Tension Trails Hurricane Evacuees into Houston School*, WALL ST. J. (Dec. 2, 2005, 12:01 AM), <https://www.wsj.com/articles/SB113349151947412113> [<https://perma.cc/89R7-HEVT>]; Trymaine Lee, *Haven and Hell*, TIMES PICAYUNE PUBL'G CO., Feb. 12, 2006, at A.01; Juan A. Lozano, *Katrina Sent Members of Gangs, Violent Crime to Texas*, CHARLOTTE OBSERVER (Jan. 29, 2006), <https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&docref=news/10F77204990D8360&f=basic> [<https://perma.cc/H6C3-SD2D>]; see Ilan Brant & Janet Adamy, *Job Outpouring for Evacuees Sparks Backlash*, WALL ST. J. (Sept. 13, 2005, 12:01 AM), <https://www.wsj.com/articles/SB112656950332038745> [<https://perma.cc/TE6Q-XCD9>]; see also Lolita Buckner Inniss, *A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina*, 27 B.C. THIRD WORLD L.J. 325, 331–32 (2007).

<sup>159</sup> Lori Rodriguez, *Some Houstonians Question Welcome-mat Effort: BACKLASH Refugees Being Helped at Expense of the City's Poor Is One Sentiment*, CHRON. (Sept. 2, 2005),

The Katrina migration was the first significant internal migration to occur during the twenty-first century. It laid bare the legacy and enduring reality of racial discrimination in the United States.<sup>160</sup>

#### IV. STEREOTYPES THAT ANIMATE RECEPTION OF REFUGEES

Asylum and refugee law and its implementation historically and currently reflect class, racial, ethnic, religious, or national origin bias.<sup>161</sup> Yet at the beginning of the twenty-first century, scholar Kevin Johnson wrote dispassionately to urge other scholars to recognize the “[u]nquestionable [r]elevance of [r]ace” in immigration law.<sup>162</sup> With regard to refugees in the United States, scholars have noted the “othering” of Haitian refugees and women refugees, in particular African women.<sup>163</sup> It is fair to claim, however, that any refugees arriving in the United States are likely to experience bias by some in the receiving community, who may resent the new arrivals for being foreign (whether in language, customs, religion, or culture) and for the perceived threat that the foreigners pose to native jobs and to native

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<https://www.chron.com/news/hurricanes/article/Some-Houstonians-question-welcome-mat-effort-1483657.php>; David Ellison, *Katrina Controversy: Evacuees Say Blame for Crime Is Not Fair*, HOUSTON CHRON., Sept. 1, 2006, at A.1.

<sup>160</sup> Inniss, *supra* note 158, at 328–30.

<sup>161</sup> Numerous scholars have explored the role of race and traits that have been treated synonymously with race in immigration and refugee law. See Charles Adside, III, *It's a Blowhorn, Not a Dog-Whistle: How President Trump's Travel Ban Orders, Not His Statements, Are Enough to Establish a Violation Under the Religion Clauses*, 47 HASTINGS CONST. L.Q. 367 (2020); Kaila C. Randolph, *Executive Order 13769 and America's Longstanding Practice of Institutionalized Racial Discrimination Towards Refugees and Asylum Seekers*, 47 STETSON L. REV. 1 (2017); S. PRIYA MORLEY, MOLLY GOSS, YUSUF ABDULKAREEM, TSION GURMU & KATHERINE LA PUENTE, “THERE IS A TARGET ON US”: THE IMPACT OF ANTI-BLACK RACISM ON AFRICAN MIGRANTS AT MEXICO'S SOUTHERN BORDER (2021), <https://imumi.org/attachments/2020/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf> [https://perma.cc/TY2N-4MYE] (identifying racism in Mexico and the toll on migrants seeking refuge in the U.S. when they are forced to remain in Mexico); Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, 2019 U. ILL. L. REV. 563 (2019) (exploring nationality bans in the U.S. and Israel); Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004); Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: *The Social and Legal Construction of Non-Persons*, 28 INTER-AM. L. REV. 263 (1996–1997); Margot K. Mendelson, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 YALE L.J. 1012 (2010); Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827, 829 (2000); Villiers, *supra* note 53.

<sup>162</sup> Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 532 (2000).

<sup>163</sup> See Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 691–98 (2009) (examining the role of race in interdictions at sea as applied to Haitians reaching U.S. shores and Africans attempting to reach the E.U.); Millbank & Dauvergne, *supra* note 29 (identifying a gendered and “exoticized” construct of current legal approaches to forced marriages in U.S. asylum law).



culture itself. Being a refugee in and of itself is a characteristic that draws or generates bias in the host state. Race, class, and other traits heighten the degree to which that bias is given voice, but the basic condition of having a foreign or non-native identity generates bias.

The impact of race, class, and other traits is to worsen the bias, as exemplified in the treatment of Haitians, in particular, and Venezuelans. Ukrainians, Venezuelans, and Haitians presented differently at the border, and their treatment at the border initially suggests that race, class, and cultural stereotypes about the groups influenced their reception at the border.

The reception of refugees to the United States is impacted by race and ethnicity and is further complicated by color and colorism.<sup>164</sup> Scholars have discussed the impact of color on society's responses to refugees, and other scholars have explored the role of colorism more generally in United States society.<sup>165</sup> In fashioning humane responses to refugees, the role of race, ethnicity, color, gender, class, and disability cannot be ignored. It matters in the United States legally because often the relief is tied to national origin, which has historically aligned in U.S. law with race, and to how law is implemented as a practical matter, to the extent race, ethnicity, or color is playing a role in how individual decisionmakers (consular officers, citizenship and immigration officers, asylum officers, immigration judges, and others) decide individual asylum cases. The role of formal legal protections in this context is complicated and limited. As a general matter, the extent to which constitutional norms apply to the admission of refugees varies depending on the location of the person,<sup>166</sup> the context (admission, conditions of status, or non-immigration related matter),<sup>167</sup> the status of the person (noncitizen who is claiming citizen, citizen, or noncitizen),<sup>168</sup> and whether it is the federal or state government regulating.<sup>169</sup>

Poverty and the perception that refugees presenting at a border are likely to be poor and, thus, a drain on resources or competition for jobs are other traits or stereotypes that, regardless of whether they are descriptive of

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<sup>164</sup> *Id.* at 32 n.131. Katrina persons deemed "refugees" were darker hued Black people.

<sup>165</sup> *Id.*; Tanya Katerí Hernández, "Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97 (1998); see Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1713 (2000); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1498 (2000).

<sup>166</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); see *Fiallo v. Bell*, 430 U.S. 787, 789–90 (1977).

<sup>167</sup> See *Kerry v. Din*, 576 U.S. 86, 95–96, 191 (2015) (concluding that a citizen spouse who was denied a visa to their noncitizen spouse was not entitled to further explanation).

<sup>168</sup> See *Session v. Morales Santana*, 582 U.S. 47, 53 (2017).

<sup>169</sup> See *Matthews v. Diaz*, 426 U.S. 67, 79–80 (1976); *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

actual individual refugees, may cause apprehension in the receiving community. Concerns about poverty emerged early in the history of immigration to the United States—American immigration law's exclusionary provisions rendered poverty a barrier to admission to the United States in the nineteenth century, and current American immigration law continues to identify poverty as a reason to refuse admission.<sup>170</sup> Legal norms, moreover, insulate the targeting of the poor from legal redress as a constitutional matter because wealth is not treated as a category entitled to meaningful protection.<sup>171</sup>

Religion and religious stereotypes may also prompt fears or concerns about refugees presenting at the border. Plaintiffs suing to set aside the “visa ban” policy instituted by the Trump administration in its first weeks in office alleged that the policy banning entry to persons from Muslim countries constituted religious discrimination in violation of the First Amendment.<sup>172</sup> Ultimately, the Supreme Court upheld the policy, as amended to include non-Muslim countries, as a facially neutral policy and applied a lesser standard of review than it would have to a purely domestic government action, resting on the reasoning that admission of foreign nationals is a “fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”<sup>173</sup> The Court would consider the extensive extrinsic evidence submitted to establish religious animus on the part of the Executive, but since the challenge involved the admission of foreign nationals and national security, it would be sustained if the order could be justified on other grounds independent of religious animus.<sup>174</sup> Since the policy could be grounded in national security concerns, apart from religious animus, it was valid.<sup>175</sup>

To some extent, race, wealth, or class, and the degree to which a particular group is viewed as inherently different, not just racially but culturally, is likely to impact the United States’ openness to receiving or welcoming the group. Many in the United States would accept denial of entry to avowed Nazi white supremacists as reasonable, even though expressing such views in the United States presumably is protected by the

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<sup>170</sup> See 8 U.S.C. § 1182(a)(4) (providing that a noncitizen likely to become a public charge is inadmissible); HUTCHINSON, *supra* note 2, at 390–93, 410–14 (historical account of the public charge exclusion).

<sup>171</sup> See Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993) (arguing for heightened judicial review of laws targeting or impacting poor persons).

<sup>172</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018).

<sup>173</sup> *Id.* at 2418 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

<sup>174</sup> *Id.* at 2418–19.

<sup>175</sup> *Id.* at 2421–25.

First Amendment. Many would accept the denial of entry to Taliban-aligned individuals who profess adherence to terrorism, to denial of human rights to women, and to the subordination of the rights of women to full citizenship, even though the First Amendment would protect the expression of such views in the United States. The denial of entry to such persons is presumably tied to the threat that such views pose to our constitutional national order, culture, and laws. Fears that admitting substantial numbers of persons who hold views inimical to long-standing and defining human values may be rational but obscures the reality that those views are already present in the United States, and that frequently these views are fluid and capable of change. Recognizing that some of the fears that prompt resistance to refugees are reasonable may facilitate developing policies that are responsive to those fears while facilitating assistance to refugee populations.

Work is of primary importance to residents of the United States and its importance as a motive for relocation suggests it is one of the primary contexts to gauge discrimination. An Equal Employment Opportunity Commission (“EEOC”) task force issued a report in 2016 that suggested that the experience of migrants within the United States in the workplace is highly correlated to whether they are members of a racial minority group and whether they are women, so the group most likely to experience higher rates of harassment and discrimination in employment are workers of color and in particular, women of color (experiencing both gender harassment (hostile behaviors devoid of sexual interest) and sexual attention or coercion).<sup>176</sup> One of the conclusions of the EEOC report was that race-based and ethnicity-based harassment are significantly understudied. Most of the research on gender harassment is based on the experiences of white women, and much of the research on ethnic harassment is based on the experiences of men who are members of racial minority groups. As a result, current research may underestimate the extent and nature of intersectional harassment.

The Task Force also reported that “[t]he least common response to harassment is to take some formal action—either to report the harassment internally or file a formal legal complaint.”<sup>177</sup> Three out of four individuals who experienced harassment never even talked to a supervisor, manager, or union rep about the harassment.<sup>178</sup> The failure to report is due to “fear [of]

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<sup>176</sup> CHAI R. FELDBLUM & VICTORIA A. LIPNIC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace> [<https://perma.cc/K2UM-5ZBY>].

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.”<sup>179</sup> The fears are well-founded. One 2003 study found that 75% of workers who complained faced some form of retaliation.<sup>180</sup> Workers who complain may face trivialization of their complaint, indifference or hostility, and reprisal.<sup>181</sup> While these reports are not specific to persons forced to move within the United States, they establish that members of these groups are more likely to experience discrimination in employment in receiving communities.

#### V. CRITIQUE OF THE TERM “REFUGEE” TO REFER TO BOTH INTERNAL AND EXTERNAL MIGRANTS

The Puerto Rican, Great Migration, Dust Bowl, and Katrina experiences all evidenced negative stereotypes at work in the receiving communities. Similarly, the United States’ response to various external refugee groups evidences negative stereotypes about the groups at work in responding to individual refugees presenting at the border. Both internal and external refugees are forced or motivated to migrate by similar forces and both follow family and friend ties and tend to resettle in communities in which their group already has a footing. Both are likely responding to communications from private or public sources indicating that they would be welcome in the receiving community. Despite the commonalities, some scholars have advanced caution or rejection of the use of the term “refugee” to describe internal as well as external refugees.

International law scholar Ruth Gordon noted the ways in which the term refugee has acquired a pejorative context, reflecting racial bias rooted in a vision of the world of refugees as Black, underdeveloped, and poor.<sup>182</sup> Gordon developed her theme in an article exploring the response to the use of the term “refugees” in the national media to refer to persons who had evacuated or who were forced to evacuate the city of New Orleans after Hurricane Katrina devastated the city in 2005.<sup>183</sup> Gordon explored the “othering” of refugees, particularly refugees from Black and Brown countries, and how that othering played a role in the outcry, particularly in the Black community at the use of the term “refugee” to refer to Katrina refugees. In her piece, she notes the failure of the government to respond

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Gordon, *supra* note 72; *see also* Inniss, *supra* note 158, at 330–31 nn.22–23.

<sup>183</sup> Inniss, *supra* note 158, at 328–29 n.14. In other pieces, Gordon had explored the way in which “Third World” had become pejorative. Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT’L L.J. 1, 79 (2004); Gordon, *supra* note 161, at 834.

effectively to the disaster, which appeared unprecedented at the time, as well as the daunting poverty in the city exposed by the failure to facilitate early evacuation and to prompt rescue of residents too poor to be able to finance their own evacuation.<sup>184</sup> In this, twenty-first century Katrina refugees evoked a view of the United States that seemed to eliminate the “distance” between United States society and the societies that international refugees fled.

The relationship between international and national norms may also support advocacy on behalf of internal refugees. Immigration and citizenship law scholar Lolita Buckner Inniss drew on international law norms to argue for a right of return domestically for poor Black persons displaced by Katrina. In her piece, she developed the theme that poor Black persons had been rendered “outsiders”<sup>185</sup> and subjected to racist stereotypes about Black culture, poverty, housing, and crime, which facilitated policies that made it hard for Katrina refugees to return to the city when other residents were allowed to return.<sup>186</sup>

Other scholars have critiqued using the term “refugee” to refer to internal migrants, including in the context of the internal migration commonly referred to as the “Dust Bowl migration.”<sup>187</sup> James Gregory, in his study of the Dust Bowl migration to California, objected to the use of the term as misleading because he thought the Dust Bowl migration was not comparable to the migration of post-World War II refugees in Europe and other refugee populations globally. In his view, the Dust Bowl migration was “a tragedy in the rather privileged white American sense of the term.”<sup>188</sup> He also thought the use of the term exaggerated the distinctions between the Dust Bowl migration and other westward migrations. Nonetheless, he recognized that the migration could be characterized as a refugee migration because it was prompted primarily by desperate conditions and comprised mostly of poor people.

## VI. CONCLUSION

Ultimately, recognizing the similarities inherent in the experiences of internal and external refugees may be a way to facilitate the humane treatment of both groups. There are substantial differences, as illustrated by the examples discussed in this piece, such as the case of Puerto Ricans, Dust

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<sup>184</sup> Gordon & Sylvester, *supra* note 183, at 21–28.

<sup>185</sup> Inniss, *supra* note 158, at 358.

<sup>186</sup> *Id.* at 353–57.

<sup>187</sup> GREGORY, *supra* note 147, at 10.

<sup>188</sup> *Id.*

Bowl migrants, and Black persons migrating north and west during the Great Migration. For the most part, these persons were U.S. citizens, but still, their treatment in receiving communities was not fully equal. External refugees are not citizens, and their right to mobility in the United States may be protected only once they are admitted as refugees or asylees. Persons presenting at the border to ask for asylum do not have a protected right to travel in the United States at all.

As a legal and practical matter, however, our experience with internal and external refugee-type migrations suggests that legal norms like the right to travel and the right to claim asylum may lay the groundwork for facilitating refuge when refuge is needed but do not suffice to ensure the accommodation, tolerance, and acceptance of either internal or external refugee seekers. Educating native and migrant populations with primary, secondary, and tertiary education about the needs for temporary or permanent refuge and the ways in which communities have received refugee populations internally and externally is the place to start addressing what is likely to be a substantial challenge in the years to come.

Reform of asylum and refugee law to recognize the different global challenges of the twentieth century, in particular the forced movement of persons due to global warming and climate change, is long overdue. Asylum law must be responsive to forced movements of persons fleeing a composite of conditions including economic and environmental distress and political violence. Asylum and refugee law must also be responsive to negative stereotypes at work in the United States, including in enforcement personnel at the border and immigration officers charged with implementing asylum and refugee law.