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Distancing Refugees

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DISTANCING REFUGEES

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ABSTRACT

Today, two systems exist for addressing the humanitarian claims of persons fleeing persecution. One system consists of refugees living in host countries, often in large camps, who ideally are then resettled in other countries or repatriated when it is safe to do so. The other system involves refugees arriving in a country and seeking asylum—a right with ancient religious roots. The first "encampment model" is fundamentally broken, as most refugees are housed in the developing or least developed world in terrible conditions for extended periods of time, with little or no realistic hope of resettlement elsewhere or repatriation. The developed world, which takes in only a tiny percentage of refugees worldwide, has tacitly acquiesced to this humanitarian catastrophe occurring outside its borders. Yet it has been forced in recent years to confront the worldwide refugee crisis as the number of persons traveling to wealthy countries to seek asylum has increased. Rather than respond with policies that address the roots of refugee flows, many developed nations have pursued a variety of strategies to interdict and otherwise distance asylum seekers.

Refugee distancing is a way to import the encampment model into the asylum systems of the developed world. This blurring of the lines between encampment and asylum is strikingly clear, for example, in the tent cities that have cropped up along the U.S.–Mexico border under the Trump Administration's "Migrant Protection Protocol" (MPP), which requires asylum seekers to wait in Mexico while their claims are adjudicated. The overreaching impact of such policies is to dismantle the normative force of asylum by creating physical, psychological, and legal distance between the public and the asylum seekers who make a moral claim on them.

This Article assesses refugee distancing policies—offering a history and analysis of their causes, as well as a commentary on their future. It contends that current policies may have unintended consequences, as did the U.S. government's efforts to thwart asylum for Haitian and Central American claimants in the 1980s–1990s. These efforts led to legal precedent allowing for the extraterritorial reach of the Constitution and to a political movement that created new immigration benefits for many asy-

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lum applicants. The Article sketches out the legal challenges to one prominent refugee distancing policy, the MPP, and describes how a transnational legal process might contest refugee distancing over the long term.

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INTRODUCTION

Worldwide there are nearly thirty million people displaced by persecution, conflict, violence, or human rights violations.[1] This number includes 25.9 million refugees, as well as 3.5 million persons who have sought asylum in another country.[2] Asylum is a right with ancient and religious roots that is recognized in the Universal Declaration of Human Rights and in many national constitutions.[3] Closely connected to the notion of hospitality, asylum is at essence the ability to indefinitely reside in a space and enjoy some set of basic rights while there.[4] Not all countries offer asylum; the Convention Relating to the Status of Refugees (the Convention) acknowledges that it may pose a burden on many nations, making international cooperation necessary to deal with the worldwide

1. UNITED NATIONS HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2018, at 2 (2019) [hereinafter UNHCR GLOBAL TRENDS].
2. *Id.*
3. G.A. Res. 217 (III), art. 14, Universal Declaration of Human Rights (Dec. 10, 1948); *see generally* María-Teresa Gil-Bazo, *Asylum as a General Principle of International Law*, 27 INT'L J. REFUGEE L. 3, 7–8 (2015).
4. *See id.* at 9.

problem of refugees.[5] Therefore, the Convention does not require its signatories to offer the permanent solution of asylum. Rather, the Convention prohibits refoulement, or returning a refugee back to a country of persecution.[6]

Eighty-four percent of refugees live in countries in the developing world,[7] and a large number of refugees live in camps with very poor housing conditions and serious risks to refugees' health and personal safety.[8] Even those refugees who do not live in camps predominately reside in countries with high poverty rates, food insecurity, and a lack of basic health care.[9] Most refugees lack stable legal status in their host country, and many cannot legally work.[10] Although the United Nations High Commissioner for Refugees (UNHCR) endeavors to resettle refugees, less than 1% of refugees are resettled, meaning that many refugees are encamped indefinitely.[11] This bleak reality has precipitated an increase in asylum seekers who undertake enormous risks to travel to developed countries in search of greater security.[12]

The long-term encampment of refugees in the developing world was not envisioned by the drafters of the Convention, who had assumed full integration of refugees into host countries would be the norm.[13] Most

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5. Convention Relating to the Status of Refugees pmbl., July 28, 1951, 189 U.N.T.S. 137.

6. *Id.* art. 33.

7. UNHCR GLOBAL TRENDS, *supra* note 1, at 18.

8. BART DE BRUIJN, UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT RESEARCH PAPER 2009/25: THE LIVING CONDITIONS AND WELL-BEING OF REFUGEES 11, 16–20 (2009); Karen Jacobsen, *The Forgotten Solution: Local Integration for Refugees in Developing Countries* 11–15 (Tufts Univ., Working Paper No. 45, 2001).

9. UNCHR GLOBAL TRENDS, *supra* note 1, at 17–18.

> The Least Developed Countries, such as Bangladesh, Chad, DRC, Ethiopia, Rwanda, South Sudan, Sudan, Tanzania, Uganda and Yemen, hosted 6.7 million refugees, 33 per cent of the global total, while being home to 13 per cent of the world population and accounting for a combined 1.25 per cent of the global gross domestic product. These nations already face severe structural barriers to sustainable development, and usually have the least resources to respond to the needs of people seeking refuge. Altogether, nine of the top ten refugee-hosting countries were in developing regions (according to the United Nations Statistics Division classification) and 84 per cent of refugees lived in these countries.

Id. (footnotes omitted); *see also* Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235, 242 (2015) ("Whether measured in raw numbers, refugees per capita, or refugees per dollar of GDP, the brutal reality is that the overwhelming majority of today's refugees are in—and will remain in—many of the world's poorest countries.") (footnotes omitted).

10. ASYLUM ACCESS AND THE REFUGEE WORK RIGHTS COAL., GLOBAL REFUGEE WORK RIGHTS REPORT 5 (2014).

11. "There were 20.4 million refugees of concern to UNHCR around the world at the end of 2018, but less than one per cent of refugees are resettled each year." *Resettlement*, UNHCR, https://www.unhcr.org/en-us/resettlement.html (last visited May 21, 2020) [hereinafter *Resettlement*].

12. *See* UNHCR GLOBAL TRENDS, *supra* note 1, at 42 tbl.3 (documenting an increase from 1,079,700 asylum applications worldwide in 2013 to 2,145,600 in 2018).

13. *See* UNITED NATIONS ECON. & SOC. COUNCIL, AD HOC COMMITTEE ON STATELESSNESS AND RELATED PROBLEMS, STATUS OF REFUGEES AND STATELESS PERSONS – MEMORANDUM BY THE SECRETARY-GENERAL 2–3 (1950) ("[T]he refugees will lead an independent life in the countries

developed countries do not seem eager to alter this encampment model, which has disproportionately placed the burden of hosting refugees on the developing world.[14] Many developed countries have responded to the uptick in asylum seekers with efforts to externalize their borders and tighten their asylum systems.[15] These efforts have taken a variety of forms: interdicting refugees at sea; detaining asylum seekers; negotiating with transit or sending countries to limit refugee flows or take back refugees; remotely adjudicating cases; and imposing doctrinal barriers to legal relief.[16]

In the United States, the Trump Administration is zealously pursuing all of these strategies.[17] Among human rights advocates, its agenda has been met with outrage and a sense that what the Administration is doing is unprecedented and unprecedentedly cruel. However, a historical survey of international migration control measures suggests that the Administration's agenda is in line with an anti-asylum trend among many of its peer nations.[18] Since the 1980s at least, developed nations have pursued policy designed to distance refugees—to warehouse them as much

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which have given them shelter . . . . They will be integrated in the economic system of the countries of asylum and will themselves provide for their own needs and for those of their families.").

14. *See* UNHCR GLOBAL TRENDS, *supra* note 1, at 17 fig.6 (highlighting that the only developed nation among the top ten refugee-hosting countries in 2017–2018 was Germany).

15. *See* EXTERNALIZING MIGRATION MANAGEMENT: EUROPE, NORTH AMERICA AND THE SPREAD OF 'REMOTE CONTROL' PRACTICES 14–21 (Ruben Zaiotti ed., 2016); Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 629–30 (2009).

16. Nessel, *supra* note 15, at 629–30, 638–41.

17. On March 20, 2020, the Trump Administration cited the Covid-19 pandemic as a pretext to close the border entirely to asylum seekers. *See* Jack Herrera & Quito Tsui, *Could Covid-19 Mean the End of Asylum Law in the United States?*, NATION (June 3, 2020), https://www.thenation.com/article/politics/coronavirus-refugee-asylum-law/. Time will tell whether this extraordinary step—in clear defiance of international law—will lapse or become a new norm. *Id.* In addition, the Trump Administration has pursued a variety of other policies to doctrinally narrow asylum and to limit its availability, in particular to Central American asylum seekers. *See* L-E-A-, 27 I. & N. Dec. 581, 582 (Att'y Gen. 2019) (reversing prior precedent that had recognized persecution on account of family membership as a basis for asylum); M-S-, 27 I. & N. Dec. 509, 509–10 (Att'y Gen. 2019) (overturning prior precedent allowing for bond for certain asylum seekers); Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018) [hereinafter Exec. Order 13841] (discussing the Administration's policy of prosecuting asylum applicants who enter without inspection and separating them from their children); Addressing Mass Migration Through the Southern Border of the United States, Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018) [hereinafter Proclamation 9822] (barring asylum claims from individuals who enter the United States from Mexico between ports of entry); 8 C.F.R. § 208 (2019) (allowing for the removal of asylum seekers entering at the U.S.–Mexico border to the countries with which the United States has entered into "Asylum Cooperative Agreements," or putative Safe Third Country Agreements: Guatemala, Honduras, and El Salvador); *id.* § 208.13 (making asylum applicants at the southern border ineligible for asylum if they have transited through at least one country outside of their country of origin and have not applied for protection in that country); Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship and Immigration Servs., Kevin K. McAleenan, Comm'r, U.S. Customs and Border Prot., & Ronald D. Vitiello, Deputy Dir., U.S. Immigration and Customs Enf't (Jan. 25, 2019) [hereinafter Homeland Sec. Memo] (on file with author) (requiring most asylum seekers entering at the Southern border of the United States to wait in Mexico while their cases are adjudicated).

18. *See infra* Sections I.D–F.

as possible in poor countries.[19] Like lottery winners, a relatively small number will be picked out of the masses each year for resettlement in the developed world.[20] The minimal resettlement of refugees allows the world's richest countries to preserve a façade of legitimacy around a system that places the burden of refugee protections on the least well-equipped nations.[21]

Recent procedural barriers to asylum, like the United States' "Migrant Protection Protocol" (MPP), are the latest trend in distancing refugees from the developed world. The MPP, which requires asylum applicants to wait in Mexico while their cases are adjudicated by U.S. Immigration Courts, is a way to import the encampment model into the asylum system of the world's most well-resourced nation.[22] Asylum applicants who survive the dangerous journey through Mesoamerica must wait in some of Mexico's poorest and most dangerous municipalities for hearings in tent courts on the border, where judges on TV screens decide their cases based on a doctrinally ever-narrowing asylum standard.[23]

The MPP's crafters likely hoped that federal courts would not take the Refugee Convention seriously and would view applicants in the system as being in a legal netherworld in which the Constitution only marginally applies.[24] The abuses they experienced in Mexico would deter future migration while being mostly outside public scrutiny.[25] Their claims would be efficiently denied by judges who would never have to be in the same room with them, and applicants would never gain community ties in the United States that might make the public or adjudicators sympathetic.[26]

This cynical vision is only one of the Trump Administration's many innovations in distancing refugees.[27] Whether by making applicants wait in Mexico, removing refugees to purportedly safe third countries in the violent Northern Triangle of Central America, or erecting new doctrinal barriers, the overreaching impact of the Trump Administration's asylum policy is to create physical, psychological, and legal distance between the American public and the asylum seekers who make a moral claim on them.[28] Distancing refugees serves many purposes, but one of the most

19. *See infra* Sections I.B–F.
20. *See Resettlement*, *supra* note 11.
21. Gammeltoft-Hansen & Hathaway, *supra* note 9, at 242.
22. *See infra* Section I.F.
23. *See infra* notes 158–59 and accompanying text.
24. *See infra* Section I.F.
25. *See infra* Section I.F.
26. *See infra* Section I.F.
27. *See* sources cited *supra* note 17.
28. *See* sources cited *supra* note 17.

disturbing is to elide the moral tradition of asylum—a duty stretching back to biblical times.[29]

This Article focuses on the MPP, although much of its analysis applies to other forms of refugee distancing as well. The Article dissects the possible rationales for the MPP and questions whether the program will function as planned. The MPP might backfire, as did equally callous measures the United States employed to deny Haitian and Central American asylum claims in the 1980s–1990s. Faced with the humanitarian claims of persons fleeing some of the twentieth century's worst human rights abuses in the Western Hemisphere, the United States pursued a policy of maritime interdiction of Haitians and initially denied almost all Central American asylum cases.[30] Although challenges to interdiction failed, successful collateral litigation forced the government to recognize the due process rights of Haitians detained at Guantánamo—a ruling that paved the way for later challenges to the government's offshore program of detention and torture during the War on Terror.[31] Similarly, creative lawyering and political mobilization forced the government to ultimately offer asylum to many Central American claimants whose cases had initially been denied and to create new immigration benefits for them that still exist today.[32]

The MPP will make it difficult for the latest generation of refugees to gain a foothold for having their claims recognized. Yet, their access to U.S. courts is a start. Advocates for asylum applicants in the MPP should draw lessons from the asylum battles of the 1980s–1990s, in which international law played an important part in establishing norms, even if U.S. courts did not always adhere to the standards of the international community. In particular, procedural challenges to Haitian interdiction enjoyed success; claims challenging the procedural defects of the MPP might prove similarly viable.[33]

This Article proceeds in three parts. Part I describes the history of efforts to distance refugees, showing that remote adjudication programs—like the MPP—are part of a growing trend in developed nations to treat asylum seekers like refugees in camps, and ultimately, to preserve the status quo of refugees' long-term encampment in the least developed or developing world. Part II examines the causes and consequences of refugee distancing as well as the normative arguments and strategies used by advocates to combat it. Part III provides a series of international and domestic law arguments against the MPP and posits these claims as part of a long-term strategy to contest the program. The

29. Gil-Bazo, *supra* note 3, at 17–20.
30. *See infra* Sections I.B–C.
31. *See infra* notes 88–96 and accompanying text.
32. *See infra* notes 70, 203 and accompanying text.
33. See *infra* Part III, for a discussion of procedural challenges to the MPP.

Article concludes with a reflection on the importance of challenging programs that distance asylum seekers, while recognizing that the overarching human rights problem is the vast population of refugees stranded in the developing world.

I. A HISTORY OF REFUGEE DISTANCING

Asylum has deep historical roots. Ancient Greeks and Romans could seek asylum in temples.[34] Judaism, Christianity, and Islam all have lengthy traditions of respecting some version of the right to asylum.[35] The Judeo-Christian and Islamic doctrines of asylum were developed in coordination with extensive theological commitments to hospitality toward strangers.[36] As many monarchies became republics after the Enlightenment, asylum began to shift from an ecclesiastical prerogative to a secular right.[37] Modern asylum laws have evolved to allow for refugees to achieve full integration into the civic and economic life of some of the world's wealthiest countries.[38]

In comparison to asylum, the mass encampment of refugees in the Third World is a new model, evolving in the twentieth century alongside the phenomena of global conflict, international institutions, the development of international law, and the militarization of border control.[39] Although the drafters of the refugee conventions did not envision the current reality—refugees warehoused in poor countries—international law and institutions validate it.[40] By taking great risks to travel to the developed world, asylum seekers resist this status quo.

The response of developed countries has been to collapse the two models of asylum and refugee encampment—to distance asylum seekers. This Section outlines the history of this trend, locating it in the United States' refugee crises concerning Central American and Haitian asylum seekers in the 1980s and 1990s. The tactics the United States developed during that time period spread and mutated in Australia and Europe, giving rise to new forms of refugee distancing abroad that in turn influenced the development of the United States' response to a second Central American refugee crisis in the 2010s.

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34. Gil-Bazo, *supra* note 3, at 21–22.
35. *Id.* at 18–20.
36. *Id.*
37. *Id.* at 22–23.
38. *See, e.g.*, 8 U.S.C. §§ 1158, 1159 (2018).
39. *See* Kelsey Kofford, *An Examination of the Law, or Lack Thereof, in Refugee and Displacement Camps*, 35 HASTINGS INT'L & COMP. L. REV. 173, 177–81 (2012).
40. *See infra* Section I.A.

A. The Development of Dichotomous Models for Asylum and Refugee Encampment

In the early twentieth century, the League of Nations struggled with how to address several large-scale Russian, Armenian, and other refugee crises.[41] At the time, there was a problem of states expelling refugees, "who were very often pushed back and forth between two or more countries and punished each time for illegal entry."[42] This led to the drafting of Article 7 of the 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees and then to the 1933, 1938, and 1951 refugee conventions, all of which prohibited refoulement of refugees.[43]

After World War II, the United States admitted "[d]isplaced persons from refugee camps in Europe . . . as part of a broader policy of assisting in the political and social stabilization of U.S. Western allies."[44] The United States did not immediately sign on to the 1951 Convention Relating to the Status of Refugees (the Convention),[45] but rather pursued an idiosyncratic refugee policy over the following years. The country used informal legal mechanisms (e.g., parole) to achieve its Cold War diplomatic priorities, admitting substantial numbers of refugees from communist countries.[46]

In 1967, the United States signed the Protocol Relating to Refugees, which incorporated the Convention.[47] Soon thereafter, the Vietnam War precipitated a mass exodus of Southeast Asian refugees to neighboring countries.[48] The United States participated in a regional effort in coordination with Pacific nations to address the refugee crisis.[49] Refugees were housed in camps operated by the UNHCR on the condition that developed nations—the United States, Canada, and Australia—would take them in. Between 1975 and 1980, about 300,000 Southeast Asians were paroled into the United States.[50]

The resettlement of Southeast Asian refugees during this time period now represents an exceptional moment of true international coopera-

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41. *See* Louise W. Holborn, *The League of Nations and the Refugee Problem*, 203 ANNALS AM. ACAD. POL. & SOC. SCI. 124, 126–29 (1939).

42. UNITED NATIONS HIGH COMMISS'R ON REFUGEES, DIV. OF INT'L PROTECTION, COMMENTARY ON THE REFUGEE CONVENTION 1951: ARTICLES 2-11, 13-37 art. 32 cmt. 1 (1997).

43. *Id.*

44. Deborah Anker, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, 13 DEF. ALIEN 74, 77 (1990).

45. *See* Convention Relating to the Status of Refugees, *supra* note 5.

46. Anker, *supra* note 44, at 78.

47. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

48. W. Courtland Robinson, *The Comprehensive Plan of Actions for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck*, 17 J. REFUGEE STUD. 319, 324 (2004).

49. Mary Crock, *Shadow Plays, Shifting Sands and International Refugee Law: Convergences in the Asia-Pacific*, 63 INT'L & COMP. L.Q. 247, 255 (2014).

50. *Refugee Timeline, 1975: Indochinese Immigration and Refugee Act of 1975*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/history-and-genealogy/featured-stories-uscis-history-office-and-library/refugee-timeline (last updated Oct. 16, 2019).

tion in refugee resettlement. Since then, only a tiny percentage of refugees have been resettled.[51] Moreover, in the early 1980s, the international community shifted from an emphasis on local integration of refugees to repatriation, despite the fact that the latter goal regularly proved difficult, if not impossible.[52] As large refugee populations built up in Africa in the wake of the African independence movement of the 1960s and 1970s, "[d]evelopment agencies such as the World Bank, UN Development Programme (UNDP), and others collaborated in the segregation of the refugee settlements to avoid the opposition of host governments."[53] During the two International Conferences on Refugees in Africa (ICARA) in the early 1980s, issues related to refugee integration took a back seat to aid and development. Since the early 1980s, "the international community has come to see long-term displacement and dependency in the third world as acceptable and unremarkable."[54] Refugees languish for years in austere camps such as the Kakuma camp in Kenya, a virtual city of 184,550 residents, where child "[m]alnutrition is rampant . . . and overcrowding has accelerated the spread of infectious diseases."[55]

As the encampment model for refugee populations became entrenched, the United States finally created a legal mechanism for persons who reached the United States to request asylum. In 1980, the United States passed the Refugee Act. The Refugee Act amended the Immigration and Nationality Act (INA) to impose a non-refoulement obligation mirroring the one set out in the Refugee Convention and to create a separate application process for asylum.[56] A stark dichotomy now exists between the two systems for adjudicating refugee claims—asylum and the adjudication of the claims of refugees waiting abroad. While vast populations of refugees waited indefinitely in poor conditions in the developing world, those who made it to the United States could theoretically obtain a durable status with attendant benefits, work permission, and a pathway to citizenship.[57]

B. The First Central American Refugee Crisis

The commitment of the United States to new standards to formalize the Refugee Act was immediately challenged by influxes of asylum

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51. *Resettlement*, *supra* note 11.

52. *See* Merrill Smith, *Warehousing Refugees: A Denial of Rights, a Waste of Humanity*, *in* U.S. COMMITTEE FOR REFUGEES WORLD REFUGEE SURVEY 2004 - UNITED STATES 38, 44 (2004).

53. *Id.*

54. *Id.* at 44–45.

55. *Inside the World's 10 Largest Refugee Camps*, UNHCR, https://www.arcgis.com/apps/MapJournal/index.html?appid=8ff1d1534e8c41adb5c04ab435b7974b (last visited May 21, 2020).

56. *See* Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987); Immigration & Naturalization Serv. v. Stevic, 467 U.S. 407, 425–26 (1984).

57. *Benefits and Responsibilities of Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/benefits-and-responsibilities-asylees (last updated Mar. 8, 2018).

seekers fleeing civil wars in Nicaragua, Guatemala, and El Salvador, and human rights abuses in Honduras, Haiti, and Cuba.[58] Despite the new legal framework for assessing asylum claims, the United States did not address these claims in an evenhanded fashion.[59] The United States largely hewed to its pre-Refugee Act policy of using humanitarian immigration in the service of Cold War priorities and generally dealt favorably with migrants fleeing communist governments in Nicaragua and Cuba, and negatively with the Haitian and other Central American claimants.[60]

On the Mexican border, the Immigration and Naturalization Service (INS) was inundated with Central American asylum applicants—about two thousand per week by 1988 in South Texas alone.[61] "[B]y early spring 1989, [the] INS implemented a policy providing for initial asylum decisions within one day of application, coupled with detention of all unsuccessful applicants in South Texas."[62] The approval rates in the 1980s for Salvadoran and Guatemalan asylum applicants were consistently around 1%–3%.[63] In comparison, the approval rate for applications from the USSR was 72.6%.[64] In 1990, the Lautenberg Amendment to the Refugee Act even codified a reduced evidentiary burden for refugee applications submitted by Jews and some Christian minorities from the former Soviet Union.[65]

In stark contrast, the U.S. Department of Justice attempted to interpret the Refugee Act in ways that facilitated the mass denial of claims by Central Americans. For example, the U.S. Department of Justice initially took the position "that the term 'well founded fear' requires a showing of clear probability of persecution"[66]—an onerous standard for refugees who typically fled without documentation and had little more than their own scars and stories to back up their claims.

Lawyers successfully argued before the U.S. Supreme Court in *Immigration & Naturalization Service v. Cardoza-Fonseca*[67] that this standard—clear probability of persecution—was inconsistent with the

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58. *See* Rebecca Hamlin, *Ideology, International Law, and the INS: The Development of American Asylum Politics 1948–Present*, 47 POLITY 320, 327–30 (2015).

59. *See id.* at 328–30.

60. *See id.*; *see also* JEFFREY S. KAHN, ISLANDS OF SOVEREIGNTY: HAITIAN MIGRATION AND THE BORDERS OF EMPIRE 6 (2019); Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 LAW & SOC. INQUIRY 569, 575 (2011); Maryellen Fullerton, *Cuban Exceptionalism: Migration and Asylum in Spain and the United States*, 35 U. MIAMI INTER-AM. L. REV. 527, 553–54 (2004).

61. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1251 (1990).

62. *Id.* at 1252.

63. Anker, *supra* note 44, at 81.

64. *Id.* at 80.

65. CONG. RESEARCH SERV., REFUGEE ADMISSIONS AND RESETTLEMENT POLICY 9 (2018).

66. Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987).

67. 480 U.S. 421 (1987).

UNHCR's interpretation of the Refugee Convention and Protocol.[68] In its analysis of the Refugee Act, the Court found persuasive international law documents—like the UNHCR Handbook—and the views of international law scholars; the Court noted the Refugee Act was passed in order to bring the United States into conformance with its international law obligations.[69] Yet, after *Cardoza-Fonseca*, the government used various other doctrinal bases and strategies for denying almost all Central American asylum claims:

> [C]hallenging witnesses' credibility, requiring nonexistent or dangerous documentation (such as copies of death threats), delinking the decision to emigrate from the experience of violence, treating individual experiences as instances of generalized suffering, defining violence as criminal rather than political in nature, and defining "indirect" threats, such as the assassination of neighbors or family members, as not rising to the level of persecution.[70]

Central American asylum seekers and their allies and lawyers resisted the United States' discriminatory treatment of asylum claims through multiple class action lawsuits, lobbying for legislative relief, and a solidarity movement.[71] These efforts led to reforms in the U.S. asylum system that improved fairness and efficiency (e.g., the creation of an independent corps of asylum officers).[72] A variety of temporary executive and legislative immigration benefits protected many claimants.[73] Class actions led to streamlined asylum processes for persons whose applications had initially been wrongly denied.[74]

Thousands of Guatemalan and Salvadoran applicants eventually obtained status in the United States, although the legacy of unequal treatment in processing delays persisted.[75] The less stable status occasioned by the delays caused the children of many Central American asylum seekers to be vulnerable to deportation for criminal offenses.[76] Many of the deportees were members of American street gangs like MS-13, making the exportation of American gang violence to Central America one of

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68. *See id.* at 441–50.
69. *Id.* at 436–37.
70. *See* Coutin, *supra* note 60, at 576–77.
71. *Id.* at 575.
72. Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 274–75 (1992).
73. *See* Andrew I. Schoenholtz, *The Promise and Challenge of Humanitarian Protection in the United States: Making Temporary Protected Status Work as a Safe Haven*, 15 NW. J. L. & SOC. POL'Y 1, 4–8 (2019). The temporary immigration benefits included Extended Voluntary Departure (EVD), Deferred Enforced Departure (DED), and Temporary Protected Status (TPS). *Id.*
74. Coutin, *supra* note 60, at 578 (discussing Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991)).
75. *See id.* at 590–91.
76. *Id.* at 591.

the principal consequences of the United States' discriminatory asylum policy of the 1980s–1990s.[77]

C. Haitian Interdiction

The United States developed a policy of interdiction in the 1980s to address Haitians fleeing the dictatorship of "Baby Doc" Duvalier.[78] The government signed an agreement with Haiti allowing the U.S. Coast Guard to stop boats carrying Haitians and forcibly return them to Haiti.[79] Although the agreement prohibited the United States from returning refugees "who [were] genuinely fleeing persecution in their homeland," the vast majority of Haitians were returned to Haiti in the 1980s. From 1981 through September 1991, the Coast Guard interdicted and interviewed approximately 24,600 Haitians aboard Coast Guard cutters; 28 Haitians aboard the Coast Guard cutters were found to have credible asylum claims and brought to the United States to seek asylum—the remainder were returned to Haiti.[80]

In 1991, a military coup overthrew Haiti's first democratically elected president, Jean Bertrand Aristide, precipitating a human rights crisis in which thousands of Haitians were detained, beaten, tortured, and killed by the Haitian military.[81] The United States reacted to the subsequent surge of Haitian refugees with an erratic and shifting policy as it searched for alternatives to offering refugee protection.[82] The U.S. policy interdicted and screened asylum seekers; held asylum seekers on Coast Guard cutters; sought to negotiate agreements with Belize, Honduras, Trinidad and Tobago, and Venezuela to house refugees with credible claims; and then began returning hundreds of Haitians to Haiti.[83] In the wake of a district court injunction blocking further returns, the United States took interdicted Haitians to the U.S. Naval Station at Guantánamo Bay, Cuba—where agents interviewed interdicted Haitians to determine

77. Daniel Denvir, *Deporting People Made Central America's Gangs. More Deportation Won't Help*, WASH. POST (July 20, 2017, 10:06 AM), https://www.washingtonpost.com/news/posteverything/wp/2017/07/20/deporting-people-made-central-americas-gangs-more-deportation-wont-help/.

78. *See* Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 INT'L J. REFUGEE L. 677, 679 (2006); *see generally Jean-Claude Duvalier Fast Facts*, CNN (Apr. 30, 2017, 11:58 AM), https://www.cnn.com/2013/07/16/world/jean-claude-duvalier-fast-facts/index.html (providing background on the former Haitian President).

79. Claire P. Gutekunst, *Interdiction of Haitian Migrants on the High Seas: A Legal and Policy Analysis*, 10 YALE J. INT'L L. 151, 164–65 (1984).

80. U.S. Processing of Haitian Asylum Seekers: Hearing Before the H. Subcomm. on Legis. and Nat'l Sec., Comm. on Gov't Operations, 102d Cong. 1 (1992) (statement of Harold J. Johnson, Director, Foreign Economic Assistance Issues, National Security and International Affairs Division of the General Accounting Office) [hereinafter Harold Johnson Statement].

81. Michael Ratner, *How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation*, 11 HARV. HUM. RTS. J. 187, 189 (1998).

82. *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., RS21349, U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS 4 (2010).

83. *Id.*

if they had a credible fear of persecution in Haiti.[84] "During this period, . . . approximately 10,490 Haitians were paroled into the United States" after passing their interviews.[85]

Along with screening Haitian asylum seekers for fear of persecution, the U.S. government also screened Haitian asylum seekers for HIV and took the position that those who tested positive would remain at Guantánamo Bay for full asylum hearings, thereby establishing "the world's first HIV detention camp."[86] The U.S. government contended that the Due Process Clause did not apply outside the territorial jurisdiction of the United States, and therefore, the asylum applicants at Guantánamo Bay were not entitled to counsel.[87]

In May 1992, after the Eleventh Circuit lifted its injunction and the U.S. Supreme Court declined review, President Bush terminated the screening process, and all intercepted Haitians were returned to Haiti with the offer of in-country refugee processing as part of a new program.[88] The refugees pursued a separate lawsuit challenging the returns as being a refoulement of Haitians in violation of the Refugee Act and the Refugee Convention and Protocol.[89] The case worked its way to the Second Circuit and all the way to the U.S. Supreme Court. In *Sale v. Haitian Ctrs. Council*,[90] the Court held that the non-refoulement obligation set out in the Refugee Act and the Refugee Convention did not apply to refugees interdicted at sea, outside the territorial jurisdiction of the United States.[91]

However, the Haitian refugees' claims were not entirely unsuccessful. The Court was soon criticized by the Inter-American Commission of Human Rights and the UNHCR for its *Sale* holding.[92] Moreover, the Haitian refugees' litigation efforts set important precedent concerning the extraterritorial reach of the U.S. Constitution. In *Haitian Centers Coun-*

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84. *See* Ratner, *supra* note 81, at 191.

85. WASEM, *supra* note 82, at 4.

86. Ratner, *supra* note 81, at 195.

87. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1341 (2d Cir. 1992), *vacated as moot sub nom.* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 918, 918 (1993).

88. Haitian Refugee Ctr., Inc. v. Baker, 502 U.S. 1122, 1122 (1992); *McNary*, 969 F.2d at 1331; Ratner, *supra* note 81, at 191. The Haitian in-country refugee processing program received applications on behalf of 106,000 individuals between 1992 and 1995. "Many satisfied the refugee definition, but only the prominent – political prisoners, former government officials, targeted dissidents, well-known religious leaders and human rights activists – were resettled in the US." SERGIO CARRERA ET AL., OPEN SOC'Y EUR. POL'Y INST., OFFSHORING ASYLUM AND MIGRATION IN AUSTRALIA, SPAIN, TUNISIA AND THE US 36 (2018).

89. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 166 (1993).

90. 509 U.S. 155 (1993).

91. *Id.* at 186–88.

92. Haitian Ctr. for Human Rights v. United States, Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L./V/II.95, doc. 7 rev. ¶¶ 156–57, 159, 163, 171 (1997); UNITED NATIONS HIGH COMM'R FOR REFUGEES, ADVISORY OPINION ON THE EXTRATERRITORIAL APPLICATION OF NON-REFOULEMENT OBLIGATIONS UNDER THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL ¶¶ 24, 43 (2007).

cil, Inc. v McNary,[93] the refugees obtained an injunction granting the detained HIV-positive Haitian refugees access to counsel.[94] The Second Circuit held that the United States' control over Guantánamo Bay suggested that the Due Process Clause applied to the Guantánamo Bay detention facility;[95] after a full trial, the district court held that the denial of counsel violated the refugees' Due Process Clause and First Amendment rights.[96] The logic applied by the district court and the Second Circuit—that the U.S. Constitution applied to the Guantánamo Bay camp because of the United States' exclusive jurisdiction and control over it—foreshadowed and paved the way for the U.S. Supreme Court's similar decisions during the War on Terror.[97]

The United States resumed screening of Haitians on Coast Guard ships in 1994 and transported Haitians with credible claims to Guantánamo Bay for full refugee hearings.[98] The plan was for those who won their hearings to be resettled in other countries in the region, but several months later Haitian President Aristide returned to Haiti and the majority of resettled Haitians residing in the United States and Haitians at Guantánamo Bay returned voluntarily to Haiti.[99]

In 1994, a wave of Cuban asylum seekers set out for Florida, and U.S. Coast Guard cutters intercepted and delivered about 32,000 Cubans to Guantánamo Bay.[100] The United States negotiated with Cuba to reduce departures, opened a refugee processing center in Havana, and resettled the Guantánamo Bay Cubans in that were determined to have valid asylum claims in other countries.[101] Interdiction of Caribbean asylum seekers remains U.S. policy today, although the number of interdicted persons has paled in recent years as compared to the mid-1990s.[102]

D. Distancing Refugees in Australia and the European Union

Shortly after interdiction was upheld by the U.S. Supreme Court, other countries tried similar strategies.[103] To varying degrees, a large number of asylum-granting countries have engaged in some efforts to distance asylum seekers.[104] These efforts range from the relatively benign

93. 969 F.2d 1326 (2d Cir. 1992).
94. *See id.* at 1334.
95. *Id.* at 1342–43.
96. Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1040-43 (1993).
97. *See* Harold Hongju Koh & Michael J. Wishnie, *The Story of* Sale v. Haitian Centers Council*: Guantánamo and* Refoulment, *in* HUMAN RIGHTS ADVOCACY STORIES 385, 420, 422 (Deena R. Hurwitz et al. eds., 2009).
98. CARRERA ET AL., *supra* note 88, at 36.
99. *Id.*
100. *Id.* at 38.
101. *Id.*
102. *Id.* at 36–37.
103. *See* Tara Magner, *A Less than 'Pacific' Solution for Asylum Seekers in Australia*, 16 INT'L J. REFUGEE L. 53, 54–55 (2004) (describing interdiction in Australia); Nessel, *supra* note 15, at 626 (describing interdiction in Europe).
104. Magner, *supra* note 103, at 54; Nessel, *supra* note 15, at 638, 643.

practice of Canada dealing with influxes of asylum seekers by turning them back to New York,[105] to Australia's draconian regime of interdiction and offshore detention.[106]

1. Australia

In August 2001, Australia refused permission to land the Norwegian freighter MV Tampa, which was carrying 433 Afghan and Iraqi refugees rescued at sea.[107] That same year, Australia negotiated an agreement with the Pacific island of Nauru and Manus Island in Papua New Guinea to conduct offshore refugee determinations.[108] The program initially lasted until 2007, when most of the asylum seekers on the islands were resettled in Australia at considerable cost, and the project was "condemned by the then immigration minister, Chris Evans, as 'a cynical, costly and ultimately unsuccessful exercise.'"[109] Australia quietly continued offshore refugee determinations at Christmas Island (instead of Nauru and Manus).[110]

In 2010, the Australian High Court complicated the offshore refugee processing program when it held that offshore asylum applicants could seek judicial review in Australian courts.[111] Two years later, Australia passed legislation limiting judicial review over refugee claims made by offshore asylum applicants and creating a legislative basis for the designation of a "regional processing country."[112]

After passing legislation that limited judicial review, Australia negotiated new agreements with Nauru and Papua New Guinea for offsite detention of asylum seekers.[113] The first cohort of about 950 refugees transferred under these agreements never received refugee status determinations and were instead sent to Australia; in Australia, the 950 refugees faced extended waits before being allowed to submit asylum applications that were processed on an expedited track.[114]

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105. *See* ABA Immigration and Nationality Comm., Int'l Law Section, *The Canada-U.S. Border: Balancing Trade, Security and Migrant Rights in the Post-9/11 Era*, 19 GEO. IMMIGR. L.J. 199, 205 (2004); Sophie Feal, *Issues Facing Refugee Claimants Traveling from the U.S. to Canada*, 26 DEF. ALIEN 183, 185 (2003); Melinda Henneberger, *Waiting, Waiting and Dreaming of Canada; At a Shelter in Buffalo, Hundreds of Asylum Seekers Sit out Their Appeals*, N.Y. TIMES, Aug. 2, 1993, at B1.

106. *See* Magner, *supra* note 103, at 56.

107. *Id.* at 53–54.

108. *Id.* at 56.

109. Ben Doherty, *A Short History of Nauru, Australia's Dumping Ground for Refugees*, GUARDIAN (Aug. 9, 2016, 4:44 PM), https://www.theguardian.com/world/2016/aug/10/a-short-history-of-nauru-australias-dumping-ground-for-refugees.

110. *See* Crock, *supra* note 49, at 263.

111. *See* Plaintiff M61/2010E v Commonwealth [2010] 272 ALR 14, 36 (Austl.).

112. Crock, *supra* note 49, at 265–66.

113. Doherty, *supra* note 109.

114. CARRERA ET AL., *supra* note 88, at 12.

From 2013 to 2014, Australia sent a second cohort of asylum seekers to Nauru and Manus. During this time, Australia took a hard-line approach that this second cohort would be denied resettlement in Australia; if applicants prevailed in their claims, the refugees would be resettled in Nauru or Papua New Guinea. However, the applicants instead languished for years in detention.[115] Since 2014, Australia has interdicted all new asylum seekers trying to reach Australia by boat and turned them back at sea or returned them to their countries of origin.[116] In 2015, the United States agreed to accept 1,200 of the refugees.[117]

2. The European Union (EU)

In 1993, Professor James Hathaway described the EU's evolving immigration criteria as "devastating" for refugees.[118] EU countries, in isolation or in collaboration, have developed a series of mechanisms for distancing refugees: (1) strict visa requirements; (2) interdiction; (3) detention; and (4) agreements with transit or sending countries to take back refugees or limit refugee movement.[119] Notably, all EU member states participate in the Dublin III Regulation, which requires asylum seekers to apply for asylum in the first country of arrival and allows for the transfer of persons who later apply for asylum in a different country.[120]

EU member states have adopted their own distancing policies. In Britain, the government dealt with an increase in Roma asylum claims by negotiating an agreement in 2001 with the Czech Republic allowing British immigration officers to deny persons leave to board flights bound for Britain if they intended to claim asylum.[121] Spain has pursued a policy of interdiction and refugee distancing in collaboration with Mauritania—in 2006, the two countries established the Nouadhibou Centre, essentially a detention center for migrants returned from Spain or detained in transit in Mauritania.[122]

In 2015, the number of refugees fleeing to Europe (from the Syrian Civil War and other conflicts) spiked; more than one million migrants arrived by sea, most taking flimsy rubber dinghies or small wooden boats

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115. *See* id.
116. *Id.*
117. *Id.*
118. James C. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 CORNELL INT'L L.J. 719, 723 (1993).
119. *See* Nessel, *supra* note 15, at 654–62.
120. *See* UNITED NATIONS HIGH COMM'R FOR REFUGEES, LEFT IN LIMBO: UNHCR STUDY ON THE IMPLEMENTATION OF THE DUBLIN III REGULATION 9 (2017).
121. *See* Regina v. Immigration Officer at Prague Airport [2004] UKHL 55, [2005] 2 AC (HL) 1 (appeal taken from Eng.) (holding that the Convention did not apply to the Roma who had been denied leave to travel to Britain because they were not outside their country of origin and immigration actions impermissibly discriminated against the Roma applicants on the basis of race).
122. CARRERA ET AL., *supra* note 88, at 19–20.

from Turkey to the Greek Isles.[123] In response to the spike in refugees, the EU and Turkey negotiated the "EU–Turkey Agreement" in March 2016. The EU–Turkey Agreement sets out an approach of financial support for Turkish immigration authorities and cooperation with resettlement and readmission "by returning new arrivals in Greece to Turkey and resettling, for every Syrian readmitted by Turkey, another Syrian from Turkey to an EU member state."[124]

Pursuant to the EU–Turkey Agreement, asylum seekers arriving in Greece have been excluded from relocation to EU member states and subjected to a "fast-track" border procedure that focuses on whether applications may be dismissed on the ground that Turkey is a "safe third country" in which they can seek asylum.[125] Asylum applicants subject to the fast-track border procedure are held in "Reception and Identification Centres" on the Greek Islands of Lesvos, Chios, Samos, Leros, and Kos.[126]

Lesvos is home to the infamous Moria refugee camp, built for 3,000 refugees and now housing more than 13,000 refugees, including 1,000 unaccompanied minors.[127] Although Greek procedures are supposed to be "fast-track," refugees sometimes wait in Moria for more than a year.[128] The EU–Turkey Agreement and the EU and Greek asylum practices conjoin to distance refugees in an archipelago of tent cities on the Aegean Sea.

E. The Second Central American Refugee Crisis

As Europe struggled to address an increase in Syrian asylum seekers, the number of children and families fleeing gang violence in the Northern Triangle of Honduras, El Salvador, and Guatemala began to also increase.[129] Asylum applications throughout the region rose rapidly, and many asylum seekers came to the United States.[130] In 2014, a total of 68,541 unaccompanied children were apprehended at the Southwest border—a 77% increase over the previous year.[131] Further, 68,445 families

123. *Migrant Crisis: Migration to Europe Explained in Seven Charts*, BBC NEWS (Mar. 4, 2016), https://www.bbc.com/news/world-europe-34131911.

124. Nanda Oudejans et al., *Protecting the EU External Borders and the Prohibition of Refoulement*, 19 MELB. J. INT'L L. 614, 632 (2018).

125. GREEK COUNCIL FOR REFUGEES, ASYLUM INFORMATION DATABASE, COUNTRY REPORT: GREECE 13–14, 20 (2016).

126. *Id.* at 14.

127. Rachel Donadio, *'Welcome to Europe. Now Go Home.'*, ATLANTIC (Nov. 15, 2019), https://www.theatlantic.com/international/archive/2019/11/greeces-moria-refugee-camp-a-european-failure/601132/.

128. *Id.*

129. UNITED NATIONS HIGH COMM'R FOR REFUGEES, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO 2 (2015).

130. *See id.*

131. Dara Lind, *The 2014 Central American Migrant Crisis*, VOX (Oct. 10, 2014, 2:01 PM), https://www.vox.com/2014/10/10/18088638/child-migrant-crisis-unaccompanied-alien-children-rio-grande-valley-obama-immigration.

were also apprehended in 2014 at the U.S.–Mexico border—about three times the number apprehended the prior year.[132] The number of apprehensions decreased in 2015 before continuing to climb again; by 2018 there were 107,212 apprehensions at the Mexico border.[133] To describe the increase of asylum seekers as a crisis—either one of border control or humanitarian protection—has become common.[134]

This "crisis" is modest from a global and historical perspective. In 2018, there were 105,472 affirmative and 115,074 defensive asylum filings in the United States.[135] In contrast, there were 664,480 asylum applications filed in the EU in 2018.[136] While asylum filings in recent years have reached historical highs for the United States, there have also been large peaks in asylum applications during earlier periods; for example, 155,868 refugees filed asylum applications in 1996.[137] The INS expeditiously processed the applications, adjudicating almost all 155,868 applications in one year.[138]

Thus, it is not impossible to imagine the United States adopting an orderly system for efficiently and fairly adjudicating the increased number of asylum applications that have been filed in recent years. Instead, the system has become overwhelmed with a growing backlog, and the U.S. government has pursued a rapid-fire series of measures to deter or distance refugees.[139] The Obama Administration used a deterrent policy of family detention and implemented a remote Central American Minors refugee processing program for the children of U.S. residents.[140] The Trump Administration has cascaded through a series of more draconian measures: separating families during processing;[141] prosecuting asylum applicants for illegal entry;[142] narrowing the doctrinal basis for asylum;[143]

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132. *Id.*

133. U.S. BORDER PATROL, TOTAL FAMILY UNIT APPREHENSIONS BY MONTH: FY 2015–2018 (2019).

134. Rick Jervis et al., *One Deadly Week Reveals Where the Immigration Crisis Begins — and Where It Ends*, USA TODAY (Oct. 1, 2019, 1:21 PM), https://www.usatoday.com/in-depth/news/2019/09/23/immigration-crisis-migrants-us-mexico-border/2022670001/.

135. NADWA MOSSAAD, DEPARTMENT OF HOMELAND SECURITY, REFUGEES AND ASYLEES: 2018 at 6 tbl.6a (2019) (noting in a footnote that it only represents principal filers and there are an additional 55,089 dependents); U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS: DEFENSIVE ASYLUM APPLICATIONS (2020).

136. EUROPEAN ASYLUM SUPPORT OFFICE, ANNUAL REPORT ON THE SITUATION OF ASYLUM IN THE EUROPEAN UNION 2018 at 11 (2019) (noting that 9% of the filings were repeat applicants).

137. U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 80 (1999).

138. *See id.*

139. *See, e.g.*, Exec. Order 13841, *supra* note 17.

140. *See* CARRERA ET AL., *supra* note 88, at 41 (describing the Central American Minors refugee program); PHILIP G. SCHRAG, BABY JAILS: THE FIGHT TO END THE INCARCERATION OF REFUGEE CHILDREN IN AMERICA 117, 130 (2020) (describing the Obama Administration's detention policies for unaccompanied immigrant minors).

141. Exec. Order 13841, *supra* note 17.

142. *See id.*

143. *See, e.g.*, Proclamation 9822, *supra* note 17.

banning applications from persons who entered without inspection;[144] banning applications from persons who failed to seek asylum from another country while in transit to the United States;[145] negotiating "Asylum Cooperative Agreements" with Central American countries;[146] and implementing the MPP for requiring applicants to wait in Mexico while their cases are decided.[147]

F. The Migrant Protection Protocol

By pushing asylum seekers back into a chaotic border region, the MPP has considerably changed the shape of asylum adjudication in the United States. Yet an examination of the program shows that it draws from precedents like the adjudication of Haitian cases at Guantánamo Bay and the Australian and EU programs (described above) that grew up in the wake of Haitian interdiction and offshore processing.[148] This history suggests that the MPP is in fact part of a broader trend and that forms of refugee distancing like the MPP will potentially become the norm.

The Department of Homeland Security (DHS) announced the MPP in December 2018 and began implementation in January 2019.[149] Before the MPP, asylum applicants without valid visas were processed for "expedited removal" but would be detained or paroled into the United States for an Immigration Court to hear the applicant's asylum case if they passed a "credible fear screening."[150] The MPP instead returns "certain applicants for admission" to Mexico pending adjudication of their cases by an immigration judge.[151] Customs and Border Protection (CBP) officers have discretion to consider whether to apply expedited removal or the MPP to any given noncitizen arriving at the border, and there is not much information available about how they make this determination.[152] The

144. *See id.*
145. *See* Homeland Sec. Memo, *supra* note 17.
146. *See* 8 C.F.R. § 208 (2019).
147. *See* Homeland Sec. Memo, *supra* note 17.
148. *See supra* Sections I.C–D.
149. *See* Homeland Sec. Memo, *supra* note 17.
150. 8 U.S.C. § 1225(b)(1)(D) (2018) (held unconstitutional in 2020 by United States v. Gonzalez-Fierro, 949 F.3d 512, 514 (10th Cir. 2020)); 8 C.F.R. § 235.3(b)(2)(ii–iii), (b)(4)(ii) (2018) (held invalid in 2019 by Flores v. Barr, 407 F. Supp. 3d 909, 912 (C.D. Cal. 2019)); *id.* § 208.30 (2018). Certain noncitizens who are inadmissible because of misrepresentation or who lack proper entry documents are subject to "expedited removal," a fast-track process for removing persons without them ever going before an immigration court. However, those arriving noncitizens who express a fear of return to their country of origin receive a "credible fear" screening to determine whether they have a colorable claim for asylum. If so, they are referred for an asylum hearing before the Immigration Court. *See, e.g.*, DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES § 1 (2019).
151. Memorandum from Kevin K. McAleenan, Comm'r, U.S. Customs & Border Prot., to Todd C. Owen, Exec. Assistant Comm'r, Field Operations, & Carla L. Provost, Chief, U.S. Border Patrol (Jan. 28, 2019) (on file with author).
152. U.S. CUSTOMS & BORDER PROT., MPP GUIDING PRINCIPLES 1 (2019) [hereinafter MPP GUIDANCE].

limited guidance that exists states that CBP does not apply the program to unaccompanied minors and Mexican nationals.

Once CBP decides to apply the MPP to a noncitizen, it issues a Notice to Appear (NTA) for a removal hearing and then returns the individual to Mexico.[153] Before doing so, CBP is supposed to notify MPP participants of their specific court hearing date and time.[154] If a noncitizen, without prompting, expresses a fear of returning to Mexico, CBP states it will refer the person to a USCIS asylum officer for screening to "assess whether it is more likely than not that the alien will face persecution or torture if returned to Mexico."[155] If asylum seekers pass the screening, they cannot be returned to Mexico and can be detained or paroled into the United States.[156]

In Mexico, persons in the MPP are left to their own devices to find food and shelter and fend off the criminal gangs that have opportunistically organized to prey on asylum seekers.[157] The Mexican government has stated that it will grant work permits to them.[158] Lately, refugee camps have started to crop up along the border, such as one in Matamoros with makeshift schools, legal centers, and sanitation services.[159] Refugees wait months in these camps for hearings that occur either in existing immigration courts near the border, like San Diego, or tent courts constructed specially for the program.[160]

A district court initially enjoined the MPP, finding that the plaintiffs were likely to succeed on their claims that (1) the INA did not authorize the MPP; (2) the MPP violated the Administrative Procedure Act; and (3) DHS implemented its policy without sufficient regard to the government's legal obligations to avoid refoulement.[161] However, the Ninth Circuit stayed the district court's injunction, largely focusing on and rejecting the district court's analysis of the statutory interpretation question and allowing the program to go into effect.[162]

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153. *Id.*
154. *Id.* at 2.
155. *Id.* at 1–2.
156. *Id.* at 2.
157. *See* Jonathan Blitzer, *How the U.S. Asylum System Is Keeping Migrants at Risk in Mexico*, NEW YORKER (Oct. 1, 2019), https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico?verso=true.
158. Scott McDonald, *Mexico to Issue Temporary Work Permits for Migrants Seeking Asylum in U.S.*, NEWSWEEK (June 26, 2019, 10:44 PM), https://www.newsweek.com/mexico-issue-temporary-work-permits-migrants-seeking-asylum-us-1446179.
159. Oliver Laughland, *Inside Trump's Tent Immigration Courts that Turn Away Thousands of Asylum Seekers*, GUARDIAN (Jan. 16, 2020, 3:00 AM), https://www.theguardian.com/us-news/2020/jan/16/us-immigration-tent-court-trump-mexico.
160. Blitzer, *supra* note 157; Laughland, *supra* note 159.
161. Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110, 1123–30 (N.D. Cal. 2019).
162. *See* Wolf v. Innovation Law Lab, 140 S. Ct. 1564 (2020) (staying the injunction pending resolution of the petition for certiorari); Innovation Law Lab v. Wolf, 951 F.3d 1073, 1095 (9th Cir. 2020) (affirming the District Court injunction); Innovation Law Lab v. McAleenan, 924 F.3d 503, 508–09 (9th Cir. 2019) (per curiam) (staying the District Court's injunction). Much of the Innovation

As of October 28, 2019, the United States employed the MPP along the U.S.–Mexico border in six cities: San Ysidro, Calexico, El Paso, Eagle Pass, Laredo, and Brownsville.[163] On the Mexican side of the U.S.–Mexico border from Brownsville and Laredo, Matamoros and Nuevo Laredo are both in Tamaulipas, a Level 4 "Do Not Travel" zone (designated by the U.S. State Department) due to crime and kidnapping.[164] Tens of thousands of persons have been made to wait in dangerous zones of Mexico that are wholly unequipped to offer housing and assistance to a large population of refugees.[165] As Part III outlines in greater detail, MPP procedures raise significant Due Process Clause concerns.[166]

II. THE FUTURE OF REFUGEE DISTANCING

In the wake of the monstrous violence of World War II and the moral horror of Nazism, the international community agreed there is value to a shared duty of sheltering refugees of global conflict.[167] After WWII, the United States accepted many refugees, but did so primarily in service of its anti-communist Cold War agenda.[168] Today's refugees are more frequently fleeing from weak states unable to protect their citizens from private violence, rather than strong totalitarian governments.[169] Developed nations are less eager to offer asylum to these applicants than they were to Soviet bloc refugees.[170] Instead, they distance them, offering

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Law Lab litigation focuses on a statutory interpretation argument about whether persons eligible for expedited removal can be subjected to 8 U.S.C. 1225(b)(2)(C), the "foreign contiguous territory" provision of the INA that purportedly authorizes the MPP. The government drew its authority for the MPP from the statute that creates the expedited removal procedure. 8 U.S.C. 1225 (2018). A provision of that statute, section 1125(b)(2)(A), states that persons not put in expedited removal are referred for full removal proceedings before an immigration judge pursuant to 8 U.S.C. 1229a. The foreign contiguous territory provision, section 1225(b)(2)(C), permits applicants processed under section 1225(b)(2)(A) to be returned to the contiguous territory from which they arrived for the duration of removal proceedings. The statute also states that section 1225(b)(2)(A) shall not be applied to persons in expedited removal. One reading of these statutes is that persons eligible for expedited removal cannot be placed in removal proceedings, and therefore cannot be subject to the foreign contiguous territory provision. On the other hand, the Ninth Circuit motions panel held that "Congress' creation of expedited removal did not impliedly preclude the use of § 1229a removal proceedings for those who could otherwise have been placed in the more streamlined expedited removal process." *McAleenan*, 924 F.3d at 508.

163. Press Release, U.S. Dep't of Homeland Sec., DHS Expands MPP Operations to Eagle Pass (Oct. 28, 2019) (on file with author).

164. *Mexico Travel Advisory*, U.S. DEP'T ST. (Dec. 17, 2019), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

165. *See* Julián Aguilar, *Migrants, Advocates Mark the Anniversary of "Remain in Mexico" with Fear, Anger and Trepidation*, TEX. TRIB. (Jan. 30, 2020, 12:00 AM), https://www.texastribune.org/2020/01/30/migrants-advocates-mark-anniversary-remain-mexico/ (more than 60,000 migrants have been sent back across the border through the MPP).

166. *See* Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement* 7 (Texas A&M University School of Law Legal Studies Research Paper Series, Research Paper No. 19-55, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463718.

167. *See* Gammeltoft-Hansen & Hathaway, *supra* note 9, at 240–41.

168. *See* Anker, *supra* note 44, at 77.

169. 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, 93–94 (2015).

170. *See id.* at 86–88.

refugees summary adjudications that take place on remote islands or in violent borderlands. Doing so precludes many (if not most) asylum claims while signaling solidarity to the anti-immigrant political interests that have become increasingly powerful in developed countries.

At its ancient roots, asylum was an aspect of hospitality.[171] But the system of distancing refugees is so inhospitable that one wonders why states even bother. If the goal is to choke off the flow of refugees, one must wonder why these developed nations do not simply withdraw from international law obligations entirely.[172] Perhaps, if countries only acted according to realpolitik and economic self-interest (as some scholars have contended), countries would withdraw from international agreements.[173] But asylum still exerts normative force—the concept of asylum will not fade away easily because asylum is engrained in religious traditions, the modern regime of international human rights, and liberal democracies' sense of national identity.[174] Every developed nation has outspoken constituencies in favor of asylum: faith groups, immigrant rights advocates, internationalists, and sometimes even business interests.[175] These actors participate in—as Professor Harold Hongju Koh put it—a "transnational legal process": governmental officials, courts, and international institutions working to maintain the international norms of asylum and nonrefoulement.[176]

Yet distancing refugees is a way to dismantle the normative force of asylum. When refugees are distant—in camps or tenements in the developing world—refugees are someone else's problem. But when refugees leave the developing world and become asylum seekers, they present a moral claim. Distancing refugees is a strategy to keep them at arm's length long enough to blur that claim, so that it is not clear they are being turned away. And when refugees' claims are denied, it might be a little easier for decisionmakers to do so because the people, the refugees, are distant.

Distancing refugees recalls the infamous Milgram Experiment, where participants were asked by an authority figure to administer a shock to another person as part of what they were told was a study con-

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171. Gil-Bazo, *supra* note 3, at 18.

172. For several accounts of why nations largely follow international law, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1997).

173. One branch of scholarship does argue that international rules are merely "instruments whereby states seek to attain their interests in wealth, power, and the like" *Id.* at 2632.

174. For a discussion of the role of national identity in compliance with international law, see *id.* at 2633–34.

175. *See, e.g.*, Karin Sohler et al., *Refugees and Asylum Seekers as Civic and Political Actors in European Asylum Regimes: Comparative Case Studies in Austria, France, Czech Republic and at EU Policy Level*, 4 FINNISH J. ETHNICITY & MIGRATION 39, 43–44 (2009) (describing political constituencies supporting asylum in several EU countries).

176. Hongju Koh, *supra* note 171, at 2633–34 (setting out a "transnational legal process" explanation for compliance with international law).

cerning the impact of the administered shocks on the learning process.[177] Participants in the Milgram Experiment believed the shock was real, even though it was not, and a disturbing 65% of participants were initially willing to administer what would have been a lethal shock.[178] Milgram later varied the distance between the participant and the person receiving the shock and observed that physical proximity decreased compliance.[179] The drafters of the MPP likely counted on this psychological dynamic when deciding not only to house people fleeing terrible trauma outside the territorial boundaries of the United States, but to make those refugees plead their case and tell their horror stories in tent courts to judges appearing by videoconference. Yet history shows that there are ways to amplify the normative claims of distanced refugees and that distancing refugees in a pluralist democracy can have unintended consequences.

A. Unintended Consequences

Deterrence is an often-cited rationale for distancing refugees.[180] However, studies of refugee distancing are inconclusive on whether distancing refugees disincentivizes additional refugees from fleeing and seeking asylum.[181] When facing serious violence, people flee because they have no other choice.[182] Regardless of whether distancing refugees deters future refugees from fleeing, the costs and practical consequences of these policies undermines the utility of deterrent measures.

First, distancing refugees is not necessarily cheap as the proponents of such systems likely believe. Distancing refugees often involves significant costs; Australia spent $1.1 billion Australian Dollars in 2016–2017 to support offshore processing of a fairly small number of asylum seekers.[183] In addition to logistical costs, distancing refugees requires negotiations between rich and poor neighboring states; these negotiations can create diplomatic issues. A case in point is the EU–Turkey Agreement,

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177. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 2–4 (1974).

178. *See id.* at 33.

179. *Id.* at 34–36.

180. *See, e.g.*, Joel Rose, *Few Asylum-Seekers Winning Cases Under 'Remain in Mexico' Program*, NPR (Dec. 19, 2019, 3:46 PM), https://www.npr.org/2019/12/19/789780155/few-asylum-seekers-winning-cases-under-remain-in-mexico-program (stating that the Trump Administration argues that Remain in Mexico is a big reason the number of migrants arriving at the southern border is down sharply over the past six months).

181. *See* CARRERA ET AL., *supra* note 88, at 10 ("No evidence has been found for the effectiveness of the Australian model of extraterritorial asylum processing in the reduction of migration flows deviating from the global trend.") (emphasis removed); Gutekunst, *supra* note 79, at 167 (stating that statistics concerning Haitian interdiction during the 1980s suggest that it did not have a deterrent effect).

182. As the British-Somali poet Warsan Shire says, "[n]o one leaves home unless home is the mouth of a shark." Marta Bausells & Maeve Shearlaw, *Poets Speak out for Refugees: 'No One Leaves Home, Unless Home Is the Mouth of a Shark'*, GUARDIAN (Sept. 16, 2015, 5:35 AM), https://www.theguardian.com/books/2015/sep/16/poets-speak-out-for-refugees-.

183. *See* ELIBRITT KARLSEN, PARLIAMENT OF AUSTRALIA, AUSTRALIA'S OFFSHORE PROCESSING OF ASYLUM SEEKERS IN NAURU AND PNG: A QUICK GUIDE TO STATISTICS AND RESOURCES 3 (2016).

which brought the EU into an expensive accord concerning refugee rights with a regime with a dubious human rights record —and that recently launched a military incursion into Syria that has generated even more refugees.[184]

At the end of the day, there are a number of reasons why distancing refugees is not cheaper than paroling refugees—especially since refugees sometimes provide an economic benefit if they are able to work.[185] First, distancing regimes may be less administratively efficient than the domestic asylum adjudication systems of countries, which have evolved and been refined over time. For example, the MPP is less efficient than the prior model of expedited removal, which screened out asylum seekers who were deemed to not have a "credible fear" of persecution.[186] Pursuant to the MPP, all asylum seekers are funneled into the overburdened Immigration Court system.[187] The government must assist in the transportation of MPP asylum seekers to and from courts.[188] Moreover, the asylum officers are required to conduct screenings for the MPP in addition to conducting credible fear and asylum interviews, adding to the administrative burden on that office.[189]

Because of the chaotic nature of border regions, distancing refugees can lead to adjudication errors that can become embarrassing or expensive. For example, in a 1992 review of Haitian interdiction, the U.S. General Accounting Office found that at least 54 Haitians were repatriated who were determined (even under the ad hoc screening process used) to have a credible fear of persecution in Haiti.[190]

The risk of error for the MPP is particularly high because the process for assessing asylum seekers' fear of return to Mexico is defective. Asylum seekers are only screened concerning whether they have a fear of persecution in Mexico if they affirmatively raise that issue without any prompting from DHS and without even being told that they will be sent to Mexico.[191] If they do so, they are assessed according to the standard of whether they are "more likely than not" to face persecution or

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184. *See* Nicole Narea, *Turkey's Invasion in Syria Is Creating Even More Refugees—Just As the US Shuts the Door*, VOX (Oct. 11, 2019, 8:20 AM), https://www.vox.com/policy-and-politics/2019/10/11/20908160/turkey-invasion-syria-refugee-crisis-trump.

185. *See* Hippolyte d'Albis et al., *Macroeconomic Evidence Suggests That Asylum Seekers Are Not a "Burden" for Western European Countries*, 4 SCI. ADVANCES 1, 6 (2018).

186. *See* Brief for Local 1924 as Amicus Curiae Supporting Appellees at 25–27, Innovation Law Lab v. McAleenan, 924 F.3d 503 (9th Cir. 2019) (No. 19-15716) [hereinafter Local 1924 Brief].

187. *Id.*

188. MPP GUIDANCE, *supra* note 152, at 2.

189. Local 1924 Brief, *supra* note 186, at 26.

190. Harold Johnson Statement, *supra* note 80, at 2 (the report also noted that the data may understate the problem, which could not be fully assessed due to problematic records).

191. Innovation Law Lab v. McAleenan, 924 F.3d 503, 511 (9th Cir. 2019) (Watford, J., concurring) (per curiam).

torture in Mexico.[192] This is the standard that normally applies to withholding of removal (which is applied by an immigration judge at the end of an evidentiary hearing with time to find counsel and to prepare).[193] In contrast, when there is no right to counsel and no right to appeal, the MPP screening interviews take place within days.[194]

Applicants returned to the chaotic Mexican border region are often homeless or in tent cities, meaning that they are unlikely to receive hearing notices, leading to *in absentia* removal orders that could later be vacated.[195] Without transportation to the port of entry, applicants must "navigate through border areas controlled by deadly cartels seeking to kidnap and extort them, in order to make it to a port of entry—often at 4:00 AM, only to wait in line for several hours, often with minor children in tow, for court hearings that begin at 8:00 AM or later."[196]

Adjudication errors are significant because countries with a well-developed rule of law will have courts willing to hear the claims of distanced refugees. In 2010, the Australian High Court held that offshore asylum applicants could seek judicial review in Australian courts.[197] Although the U.S. Supreme Court upheld Haitian interdiction, lower federal courts found the Due Process Clause applicable to Guantánamo Bay—a finding that likely paved the way for the Supreme Court's later willingness to hear habeas petitions from War on Terror suspects held at Guantánamo Bay.[198]

Legal battles over refugee distancing can have far reaching consequences—creating precedents that impact national security or other initiatives. For example, the United States could end up being liable for particularly egregious crimes and human rights abuses committed against asylum seekers who were returned to Mexico despite raising strong arguments that they would be harmed there.[199] At a minimum, defending the likely litigation over refugee distancing is a significant added cost.

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192. Marouf, *supra* note 166, at 6–7.

193. *Id.*

194. *Id.* at 7.

195. 8 C.F.R. § 1003.23(b)(4)(ii), *invalidated by* Garcia-Carias v. Holder, 697 F.3d 257 (5th Cir. 2012) (allowing for a motion to reopen an *in absentia* order of removal if filed within 180 days or at any time if the notice to appear for removal proceedings was not properly served or the noncitizen was in state or federal custody).

196. Letter from Immigration, Human Rights, & Civil Rights Orgs. & Acads. to Cong. (Nov. 18, 2019) (citing Molly Hennessy-Fiske, *Tent Courts Open as Latest Hurdle for Migrants Seeking Asylum in the U.S.*, L.A. TIMES (Sept. 16, 2019, 7:08 PM), https://www.latimes.com/world-nation/story/2019-09-16/secretive-tent-courts-latest-hurdle-for-asylum-seekers).

197. *See* Plaintiff M61/2010E v Commonwealth [2010] 272 ALR 14, 36 (Austl.).

198. *See* Hongju Koh & Wishnie, *supra* note 97, at 420–24.

199. *See* HUMAN RIGHTS FIRST, HUMAN RIGHTS FIASCO: THE TRUMP ADMINISTRATION'S DANGEROUS ASYLUM RETURNS CONTINUE 1–2 (2019) (documenting at least 636 public reports of rape, kidnapping, torture, and other violent attacks against asylum seekers and migrants returned to Mexico under MPP). For a discussion of damages claims against the United States for wrongful returns under the MPP, see *infra* Section III.B.

In addition to the cost of future litigation, distanced refugees sometimes win their cases, belying the assumption at the heart of some distancing programs that the claims are frivolous. During the chaotic initial period of Haitian interdiction, "approximately 10,490 Haitians . . . were paroled into the United States after a pre-screening interview at Guantánamo determined that they had a credible fear of persecution if returned to Haiti."[200] The majority of Australian asylum applicants initially housed offshore were eventually resettled in Australia; although Australia stopped resettling the offshore applicants on the mainland, most offshore applicants continue to be found as deserving of protection, leaving the country with an expensive burden of trying to convince other countries to accept them.[201] It is possible that many MPP claimants will also win their cases—although results will depend on the willingness of federal courts to countenance the United States' narrowing of asylum doctrine.[202]

History shows that systemic failures to comply with international obligations lead to remedies that, over time, thwart a country's initial expectation to not accept refugees.[203] The first Central American refugee crisis generated a solidarity movement and extensive political advocacy, leading to the creation of various immigration benefits for denied Central American and Haitian asylum seekers.[204] Moreover, litigation efforts on behalf of Central American refugees led to the U.S. Supreme Court accepting norms of international law and the interpretive authority of the UNHCR in its analysis of domestic asylum law.[205]

The legislative relief for Central American refugees of the 1980s–1990s could not ultimately overcome the years of processing delays,

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200. WASEM, *supra* note 82, at 4.

201. Of the 1,637 people detained in Nauru and Manus between 2001 and 2008, "70% were resettled to Australia or other countries, including New Zealand and Sweden. Of those, around 61% (705 people) were resettled in Australia." CARRERA ET AL., *supra* note 88, at 12. As of October 31, 2016, "of the 1,195 people who have had their claims for asylum assessed by the Nauruan Government, 941 (79 per cent) [were] found to be refugees." Karlsen, *supra* note 183, at 10.

202. Since MPP has been in effect for less than a year, it is too soon to empirically assess outcomes. NPR reported recently that 117 applicants had been granted protection out of 24,000 cases that had been completed as of Nov. 19—a success rate of less than 1%. Rose, *supra* note 180. However, the statistics were not particularly meaningful:

> Asylum cases that were granted relief in FY 2019 took on average over 1,000 days—or about 3 years—to decide. MPP and non-MPP cases examined in this report have been pending for a relatively short period of time. Accordingly, cases completed thus far tend to be cases which take little time to resolve. These are likely to be those in which applicants failed to attend their hearings, or where they lacked representation and thus were limited in their ability to meaningfully argue their case.

TRAC IMMIGRATION, CONTRASTING EXPERIENCES: MPP VS. NON-MPP IMMIGRATION COURT CASES (2019).

203. *See* Coutin, *supra* note 60, at 570–72.

204. Among the new benefits that came from Congress and the Executive Branch in the wake of the mass denial of Central American claims in the 1980s and 1990s were TPS, DED, the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the Haitian Refugee Immigration Fairness Act (HRIFA). *See id.* at 581–83.

205. Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 436–40 (1987).

which led to persistent inequalities and a more tenuous status for some ethnic groups.[206] One result of this more tenuous status was the deportation of thousands of Central American youth who had come to the country as children and absorbed the culture of American street gangs.[207] The exportation of thousands of American gang members destabilized countries already teetering from decades of civil war, prompting, in part, the second Central American refugee crisis.[208] This experience shows that a callous response to a refugee crisis can have far-reaching, negative consequences.

B. Crossing Distance

One impact of distancing refugees is less public visibility into the issue. Media attention, human rights activism, litigation, scholarship, literature, and artwork offer methods to combat this dynamic. Considerable attention, for example, has been paid to the poignant art of Iraqi plasterer turned artist, Abbas Al Aboudi, who has been detained for years on Nauru.[209] In 2018, a group of thirty-three artists illustrated the "Nauru Files," Guardian Australia's 2016 release of 2,000 leaked reports from Australia's immigration detention system concerning violence, self-harm, sexual assault, and mental illness.[210]

Distancing also limits refugees' legal claims. Australia has sought to legislate away offshore asylum applicants' right to access domestic courts.[211] The U.S. government may rely on the plenary power doctrine to argue that it deserves significant deference to implement the MPP in a way that offers minimal due process.[212] For over a century, federal courts have adopted an "entry fiction" whereby some immigrants are deemed outside the United States for legal purposes even when they are physically present for years, litigating their claims.[213] In the case of the MPP, the entry fiction is less fictional; the government has physically removed the asylum seekers, who just barely cross the border only on occasions when they have hearings.

During Haitian interdiction, the U.S. government argued (as it did during the War on Terror) that Guantánamo Bay is outside the jurisdiction of the U.S. Constitution. Because the U.S. government's position was rejected, it would be difficult for the U.S. government to contend

206. *See* Coutin, *supra* note 60, at 585–86.
207. Denvir, *supra* note 77.
208. *See id.*
209. Ben Winsor, *"I Paint to Forget": A Refugee Turns to Art on Nauru*, SBS NEWS (Jan. 3, 2018), https://www.sbs.com.au/news/i-paint-to-forget-a-refugee-turns-to-art-on-nauru.
210. Naaman Zhou, *Illustrating the Nauru Files: "We Have to Fight with Something"*, GUARDIAN (Feb. 2, 2018, 4:40 PM), https://www.theguardian.com/australia-news/2018/feb/03/illustrating-the-nauru-files-we-have-to-fight-with-something.
211. *See* Crock, *supra* note 49, at 266.
212. *See* Marouf, *supra* note 166, at 18, 35.
213. *See id.* at 19.

that the MPP participants cannot claim the protection of the Due Process Clause. After all, proceedings take place pursuant to the Immigration and Nationality Act, which mandates certain procedural rights, such as the ability to present evidence and examine the government's evidence.[214] However, the U.S. government may rely on its plenary power to claim deference for its narrow interpretation of those rights in the MPP context.

The Haitian interdiction by the U.S. government provides insight on how to amplify the MPP refugees' claims. The likelihood of success at the U.S. Supreme Court on the non-refoulement argument in *Sale* was always in doubt.[215] Yet, the Haitian refugees' lawyers secured victories in the litigation: bringing thousands of refugees to the United States, vindicating a right to due process for them, and closing the HIV detention camp on Guantánamo Bay.[216] The refugees' lawyers achieved these successes through a strategy of provoking "the articulation of norms by sympathetic judicial fora," which they then used for political bargaining.[217] The refugee attorneys sought to marshal the media, sympathetic constituencies and political figures, and international institutions and actors such as the Inter-American Commission for Human Rights and exiled Haitian President Aristide, who condemned the interdiction policy.[218] A similar transnational legal strategy—focusing on lower federal courts, the Inter-American Commission, and lobbying of American and Mexican governmental officials—might limit the impact of the MPP.

III. CHALLENGING THE MPP

History teaches that even when it is an uphill battle, litigation can be an effective component of a broader advocacy strategy contesting refugee distancing. Litigation challenges to the MPP are already underway but in early stages.[219] Without pretending to be comprehensive, this Section sketches out some of the relevant issues concerning MPP litigation.

A. International Law

There are strong arguments that the MPP violates international law.[220] First, it systematically subjects asylum seekers to refoulement in

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214. 8 U.S.C. § 1229a(b)(4)(B) (2018).

215. *See* Sale v. Haitian Ctrs. Council, 509 U.S. 155, 159 (1993).

216. Ratner, *supra* note 81, at 187.

217. Hongju Koh & Wishnie, *supra* note 97, at 414.

218. *See id.* at 414–15.

219. *See, e.g.*, Innovation Law Lab v. McAleenan, 924 F.3d 503, 508 (9th Cir. 2019) (per curiam); Doe v. Wolf, No. 19-CV-2119-DMS, 2020 WL 209100, at *1 (S.D. Cal. Jan. 14, 2020).

220. *See* Brief for Amnesty Int'l USA et al. as Amici Curiae Supporting Plaintiffs-Appellees, *Innovation Law Lab*, 924 F.3d 503 (No. 19-15716) [hereinafter Brief for Amnesty]; Brief for Human Rights First as Amicus Curiae Supporting Plaintiffs-Appellees, Innovation Law Lab v. Nielson, 366 F. Supp. 3d 1110 (9th Cir. 2019) (No. 19-15716) [hereinafter Human Rights First Brief]; Brief for United Nations High Comm'r for Refugees as Amicus Curiae Supporting Plaintiffs-Appellees, *Innovation Law Lab*, 366 F. Supp. 3d 1110 (No. 19-15716) [hereinafter Brief for UNHCR]; Local 1924 Brief, *supra* note 185.

violation of Article 33 of the Refugee Convention by returning them to Mexico where they may be at risk of persecution by the same transnational criminal actors they fled.[221] It also subjects asylum seekers to refoulement by creating substantial logistical barriers to their attendance at their final asylum hearings. Next, conditions in Mexico are so hazardous that they violate guarantees in the International Covenant on Civil and Political Rights (ICCPR) to life, "liberty and security of person[,] . . . respect for the inherent dignity of the human person[,]" and to freedom from "torture or . . . cruel, inhuman or degrading treatment or punishment."[222]

Past challenges to refugee distancing like *Sale*[223] and *Regina v. Immigration Officer at Prague Airport*[224] failed on the question of jurisdiction. In contrast to those challenges, asylum seekers on U.S. territory are unquestionably subject to the jurisdiction of American courts to the extent that they receive screenings and hearings where U.S. law applies.[225] American courts clearly have jurisdiction, as a general matter, to address the adequacy of the process that the United States conducts to determine whether or not to place persons in the MPP and to ultimately decide their claims.

The screenings to determine whether to subject asylum seekers to the MPP fail to comply with the requirements of the Refugee Convention. Under the Convention, the primary responsibility to offer protection to asylum seekers rests with the country where asylum is sought.[226] Transfer arrangements, according to the UNHCR, must be secured through a binding agreement securing the rights guaranteed under the Convention and enforceable by asylum seekers in a court.[227] Most importantly, any process for referring refugees to another country for processing must assure that they will not be subjected to persecution in the

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221. Brief for Amnesty, *supra* note 222; Human Rights Brief, *supra* note 222; Brief for UNHCR, *supra* note 222; Local 1924 Brief, *supra* note 185.

222. International Covenant on Civil and Political Rights, Part III, art. 6, ¶ 1, art. 7, ¶ 1, art. 9, ¶ 1, art. 10, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into by the United States on Sept. 8, 1992) [hereinafter International Covenant]; *see id.* art. 17, art. 23, ¶ 1, art. 24, ¶ 1 (family separation violates the ICCPR); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 (entered into by the United States on Nov. 20, 1994); Letter from Women's Refugee Comm'n to Cameron Quinn, Office of Civil Rights & Civil Liberties, Dep't of Homeland Sec., and Joseph Cuffari, Inspector Gen., Dep't of Homeland Sec. (Aug. 16, 2019) (on file with author) (the MPP also leads to family separation by sometimes paroling some family members while returning others to Mexico).

223. Sale v. Haitian Ctrs. Council, 509 U.S. 155, 159 (1993).

224. Regina v. Immigration Officer at Prague Airport [2004] UKHL 55, 11–12, 16, 32 [2005] 2 AC (HL) 1 (appeal taken from Eng.).

225. The MPP hearings occur pursuant to 8 U.S.C. §§ 1225(b)(2)(C), 1229a (2018). *See Innovation Law Lab*, 924 F.3d at 507–08.

226. UNITED NATIONS HIGH COMM'R FOR REFUGEES, GUIDANCE NOTE ON BILATERAL AND/OR MULTILATERAL TRANSFER ARRANGEMENTS OF ASYLUM SEEKERS 1 (2013) [hereinafter UNHCR GUIDANCE NOTE].

227. GUY GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 252–53 (3d ed. 2007); UNHCR GUIDANCE NOTE, *supra* note 226, at 1.

receiving state and must contain procedural safeguards such as the right to counsel and a means of appeal.[228]

The MPP process is defective in this regard: asylum seekers are only screened concerning whether they have a fear of persecution in Mexico if they affirmatively raise that issue without any prompting from DHS and without even being told that they will be sent to Mexico.[229] Although the UNHCR states that asylum seekers share the burden of proof with the state in which they seek asylum,[230] the MPP requires asylum seekers to meet the onerous burden of showing that they are "'more likely than not' to face persecution or torture in Mexico."[231] Moreover, the entire process takes place within days, with little practical possibility of obtaining legal counsel.[232]

The conditions that asylum applicants face in Mexico violate international law. The region in Mexico along the U.S. border does not offer a safe environment for asylum seekers, who are regularly assaulted and extorted there and who could be at risk from the same transnational actors they fled.[233] Cities in Northern Mexico long ago ran out of shelter space for migrants, resulting in thousands of asylum seekers living in encampments on the street without regular access to food, potable water, or sanitation facilities.[234] These hazardous conditions violate guarantees in the ICCPR to life, "liberty and security of person[,] . . . respect for the inherent dignity of the human person," and to freedom from "torture or . . . cruel, inhuman or degrading treatment or punishment."[235]

The United States is liable for these conditions under the prevailing tests for analyzing international human rights claims.[236] First, the United

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228. *See* UNHCR GUIDANCE NOTE, *supra* note 226, at 1–2; UNITED NATIONS HIGH COMM'R FOR REFUGEES, GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION: ASYLUM PROCESSES (FAIR AND EFFICIENT ASYLUM PROCEDURES) 11–13 (2001) [hereinafter UNHCR GLOBAL CONSULTATIONS].

229. *Innovation Law Lab*, 924 F.3d at 511.

230. UNHCR GLOBAL CONSULTATIONS, *supra* note 228, at 13.

231. Marouf, *supra* note 166, at 6.

232. *Id.* at 7.

233. *See* Human Rights First Brief, *supra* note 220, at 28–31.

234. *See "We Can't Help You Here": US Returns of Asylum Seekers to Mexico*, HUMAN RIGHTS WATCH (July 2, 2019), https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico.

235. International Covenant, *supra* note 222, at pt. III, art. 6, ¶ 1, art. 7, ¶ 1, art. 9, ¶ 1, art. 10, ¶ 1. In the analogous context of transfers pursuant to the Dublin III Regulation, European courts have held that transfers violate Article 4 of the European Charter where an EU member state is aware of reception conditions of asylum seekers in the other state that could create a risk of being subjected to "inhuman or degrading treatment." Joined Cases C-411/10 & C-493/10, N.S., M.E., et al. v. Sec'y of State for the Home Dep't and Refugee Applications Comm'r, Minister for Justice, Equal. & Law Reform, 2011 (Algeria – Ireland).

236. *See* UNITED NATIONS HUMAN RIGHTS COMM., GENERAL COMMENT NO. 31 [80]: THE NATURE OF THE GENERAL LEGAL OBLIGATION IMPOSED ON STATES PARTIES TO THE COVENANT 4 (2004).

> States . . . are required by [the Civil and Political Covenant] to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State . . . must respect and ensure the rights laid

States exercises significant control over MPP transferees when it returns them to Mexico and requires them to remain in the chaotic border region while awaiting adjudication of their asylum claims. A state is clearly accountable under international law when it "initially takes custody and control of refugees and asylum seekers, whether they are found outside territory, such as on the high seas, or on state territory, after arrival."[237] Moreover, the United States is the architect of the MPP and encouraged Mexico to participate in it, leading to the development of de facto refugee camps along the border and all the resulting problems of deprivation and criminal exploitation. The European Court of Human Rights has found that the exercise of public powers abroad is also a basis for jurisdiction over extraterritorial breaches of international law.[238] By conscripting Mexico into housing a large refugee population along the border, the United States has effectively exercised public powers abroad. Since the United States has exercised public powers in Mexico and control over the MPP transferees, there should be jurisdiction under the prevailing tests for claims involving extraterritorial human rights claims.

The underlying merits hearings for the MPP are also fundamentally defective in at least one regard. Leaving aside interpretation issues, or that the hearings often occur in tent courts presided over by judges appearing via video, there is a larger problem. Once returned to Mexico, applicants are typically homeless or in tent cities, and their poor and itinerant status puts them at a fundamental disadvantage when it comes to accessing counsel, gathering evidence, or even just receiving their hearing notices. As a result, 32,318 of the 65,105 MPP cases to date have resulted in *in absentia* orders.[239] Typically, an *in absentia* order is an order of removal, and in fact, 27,846 of the 32,318 removal orders were *in absentia* orders.[240] The fact that over 40% of asylum seekers in the MPP are being ordered removed *in absentia* reveals that the system does not offer a process reasonably designed to prevent refoulement as required by Article 33 of the Refugee Convention.

> down in the Covenant to anyone within the power or effective control of that State . . . even if not situated within the territory of the State . . . .

Id.; Gammeltoft-Hansen & Hathaway, *supra* note 9, at 266; Guy Goodwin-Gill, *The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations*, 9 U. TECH. SYDNEY L. REV. 26, 38 (2007); Oudejans et al., *supra* note 124, at 627.

237. Goodwin-Gill, *supra* note 236, at 38.

238. *See* Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. 589, 46, 57–63 (2011) ("[T]he Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government . . . .").

239. TRAC IMMIGRATION, DETAILS ON MPP (REMAIN IN MEXICO) DEPORTATION PROCEEDINGS BY HEARING LOCATION AND ATTENDANCE, REPRESENTATION, NATIONALITY, MONTH AND YEAR OF NTA, OUTCOME, AND CURRENT STATUS (2020) [hereinafter TRAC IMMIGRATION] (providing statistics as of April 2020).

240. *Id.*

B. Domestic Legal Challenges

There are a host of possible challenges to the MPP under United States law. Some of these pertain to the legality of the program and could result in a declaratory judgment that it is unlawful or an injunction against it; others could take the form of damages claims for harms to asylum seekers in Mexico.

With respect to the first category, there initially is the complex question of statutory interpretation concerning whether the MPP is authorized by the INA.[241] Separate from the question of statutory interpretation are questions of administrative law concerning whether the sudden and scattershot implementation of the program complies with norms for agency action; if not, it may violate the Administrative Procedure Act (APA).[242] Next, there is a question under domestic law of whether the MPP violates the prohibition on refoulement, since that standard is codified in the INA as well as the Refugee Convention.[243] Last, there is the question of whether the program violates the Due Process Clause because the legal screenings and ultimate hearings create a very high possibility for erroneous transfers to life threatening conditions in Mexico.[244]

The Due Process argument will have to contend with the deferential treatment courts give to the Executive Branch with respect to the admission of noncitizens under the "plenary power" doctrine.[245] The Court has also often applied an "entry fiction" under which noncitizens seeking admission are considered outside the United States for constitutional purposes.[246] This entry fiction could be at issue for due process challenges to the MPP, particularly those pertaining to the screening stage at which noncitizens are caught at the threshold. In contrast, courts should

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241. *See* Peter Margulies, *Asylum Update: Ninth Circuit Deals Two Defeats to the Trump Administration*, LAWFARE (Mar. 3, 2020, 8:00 AM), https://www.lawfareblog.com/asylum-update-ninth-circuit-deals-two-defeats-trump-administration. One panel of the Ninth Circuit initially rejected a group of challengers' reading of the statute as not authorizing the MPP; a separate panel then found otherwise. *Id.*

242. The Ninth Circuit found that the plaintiffs in one challenge were unlikely to prevail on a claim that the MPP should have been subject to notice and comment rulemaking under the APA. Innovation Law Lab v. McAleenan, 924 F.3d 503, 509 (9th Cir. 2019) (per curiam). The Court did not address the questions of whether the MPP is "arbitrary and capricious" in violation of the APA or represented a change from established agency practices without the agency having first gone through a rational decision-making process. *See id.* at 509–10; *see also* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 527–29 (2011) (discussing the standard of review for arbitrary and capricious agency action).

243. *See* 8 U.S.C. § 1231(b)(3) (2018).

244. For an example of a similar recently-filed claim, see Complaint for Declaratory and Injunctive Relief at 48–50, Al Otro Lado, Inc. v. Kelly, No. CV17-5111-JFW, 2017 WL 10592130 (C.D. Cal. Nov. 21, 2017) (alleging violation of the Fifth Amendment Due Process Clause as a result of CBP's procedural use of "a variety of tactics to turn away asylum seekers at POEs along the U.S.-Mexico border").

245. *See* Marouf, *supra* note 166, at 17–20; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992) (describing the plenary power doctrine).

246. Marouf, *supra* note 166, at 19–20.

view challenges to MPP merits hearings as they have other challenges to removal hearings; in such cases courts have generally affirmed the due process rights of noncitizens.[247]

The merits of the due process claim are compelling. The MPP design fails to offer adequate procedures in at least the following ways: (1) by interfering with access to counsel at the screening and merits stage; (2) by placing the burden on applicants to request a screening without any notice concerning the nature of the MPP process; (3) by putting the burden on applicants to show in MPP screenings that they face harm in Mexico by a preponderance of the evidence; (4) by failing to offer a means to appeal negative screening decisions; and (5) by placing logistical barriers on applicants that prevent them from attending their merits hearings and failing to provide notice to applicants sufficient to assure their appearance at their hearings.[248]

As discussed above, the screenings fail to comply with the standards advanced by the UNHCR, which states that the burden of proof should be shared between asylum seekers and the state and that there should be a right to counsel and appeal at all stages of the process.[249] DHS initially took the position that there could be no access to counsel in MPP screenings.[250] Although a federal court has enjoined the agency from denying access to counsel at the screening stage, it is extraordinarily difficult, if not impossible, for most MPP asylum applicants to obtain representation.[251] In fact, only 4,192 or less than 1% of MPP asylum seekers have been represented at any point in the process, and the percentage of those represented at the screening stage is undoubtedly miniscule.[252] This compares to an overall representation rate in 2019 for Immigration Court of 68%, showing that the program design systematically interferes with legal representation.[253] Moreover, the high percentage of *in absentia* orders entered in MPP cases demonstrates that the program imposes unconstitutional barriers on asylum seekers that prevent them from accessing the court process.[254]

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247. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982); Yamataya v. Fisher, 189 U.S. 86, 101–02 (1903).

248. For a general discussion of these issues (without discussing procedural due process, specifically), see Human Rights First Brief, *supra* note 220.

249. UNHCR GLOBAL CONSULTATIONS, *supra* note 228, at 13.

250. U.S. CITIZENSHIP AND IMMIGRATION SERV., PM602-0169, GUIDANCE FOR IMPLEMENTING SECTION 235(B)(2)(C) OF THE IMMIGRATION AND NATIONALITY ACT AND THE MIGRANT PROTECTION PROTOCOLS (2019).

251. Doe v. Wolf, No. 19-cv-2119-DMS, 2020 WL 209100, at *10–11 (S.D. Cal. Jan. 14, 2020) (granting a preliminary injunction based on a finding that the plaintiffs were likely to succeed on their claim that the APA guaranteed a right to counsel for MPP screenings).

252. TRAC IMMIGRATION, *supra* note 239.

253. EXEC. OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS: CURRENT REPRESENTATION RATES (2020).

254. *See* TRAC IMMIGRATION, *supra* note 239 (showing that about 46% of cases so far have resulted in *in absentia* orders).

The test for procedural due process claims involves a balancing of the potential harms and burdens on the government and the claimant.[255] That analysis should come out on the side of the MPP applicants, who face life-threatening risks in Mexico[256] and who are only seeking a process equivalent to that which the United States has been implementing for decades through expedited removal.[257] It is clear that the government could, without prohibitively high costs, offer a right to counsel and appeal, better admonitions concerning the MPP process, and a more equitable standard of proof for MPP screenings because it has long been offering these procedures as part of the expedited removal process.[258]

Another challenge to the MPP might take the form of damages claims by MPP transferees or their estate in cases in which they have been killed or seriously injured upon their return to Mexico.[259] Transferees might allege that government officials breached their duty to consider available evidence that they would face harm upon return, although such claims face a host of serious jurisprudential roadblocks.[260] Ordinarily, such a claim might fall under the Federal Tort Claims Act (FTCA), but there is an exception that has been broadly applied to "any claim arising in a foreign country."[261] There is an implied cause of action under the case of *Bivens v. Six Unknown Named Agents*[262] for constitutional violations, so claimants might try to bring complaints directly under the Fifth Amendment Due Process Clause against federal officials.[263] However, the extraterritorial reach of *Bivens* is doubtful under current caselaw.[264]

Another avenue might lie under the Alien Tort Statute (ATS), which creates federal court jurisdiction for torts that violate the "law of nations."[265] The principle of non-refoulement is a well-established principle of customary international law, such that the failure of immigration offi-

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255. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (setting out a balancing test for procedural due process claims that weighs the importance of the individual's and government's interests, together with "the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards").

256. *See* HUMAN RIGHTS FIRST, *supra* note 199, at 1.

257. *See* Human Rights First Brief, *supra* note 220.

258. *See id.*

259. *See* HUMAN RIGHTS FIRST, *supra* note 199, at 2 (describing harms to MPP transferees in Mexico).

260. *See, e.g.*, Gwynne L. Skinner, *Roadblocks to Remedies: Recently Developed Barriers to Relief for Aliens Injured by U.S. Officials, Contrary to the Founders' Intent*, 47 U. RICH. L. REV. 555, 580–620 (2013).

261. 28 U.S.C. § 2680(k) (2018). The Court has interpreted this exception to "bar[] all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

262. 403 U.S. 388, 389 (1971).

263. *See id.*

264. *See* Hernandez v. Mesa, 140 S. Ct. 735, 749 (2020) (holding that "multiple factors . . . counsel hesitation" from extending *Bivens* to the context of a cross-border shooting).

265. 28 U.S.C. § 1350. The Court has held that the ATS is a jurisdictional statute that does not in and of itself create a cause of action, but that courts have authority to recognize "claim[s] under the law of nations as an element of common law." *Sosa*, 542 U.S. at 724–25.

cials to apply it in MPP cases might give rise to ATS claims against them.[266] Claimants would need to argue, however, that they fall under an exception to the Westfall Act, which requires that claims against federal officials for negligent or wrongful acts committed within the scope of their employment be generally brought under the FTCA.[267]

There are complex legal questions bearing on all of these international and domestic claims, and this Section has only begun to address them. The point of sketching out these claims in this part has been to establish that litigation can be part of a broad strategy to resist the MPP and other forms of refugee distancing.

CONCLUSION

In the 1980s, the international community largely accepted the warehousing of refugees in terrible conditions in the least developed and developed countries. A growing number of refugees reject this status quo by traveling to more developed countries and claiming asylum. Asylum has deep, normative roots and draws support from many constituencies, even as the presence of a large number of asylum seekers in developed countries generates a political backlash from nativist groups.

This tension created the phenomenon of refugee distancing—an effort to import the refugee camp model into the asylum systems of some of the world's richest countries. Asylum seekers must make their claims on the margins of the developed world—in violent borderlands like Tamaulipas or bleak island detention camps like Moria on Lesvos or Manus in Papua New Guinea. Their physical isolation allows the adjudicators, policy makers, and public of the countries the refugees seek to reach to morally disengage from their claims.

Challenging this system requires crossing distance, whether by art, media attention, or a transnational legal process that asserts humanitarian norms in a variety of domestic and international fora. Earlier struggles over refugee rights suggest the battle will lead to consequences policy makers never intended and at least intermediate victories. Some forms of distancing may prove permanent, while others might be limited.

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266. *See* Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT'L J. REFUGEE L. 533, 539 (2001).

267. The D.C. Circuit has held thar the Westfall Act creates immunity for federal officials under the ATS and requires substitution of the United States as a party, bringing the claims under the rubric of the FTCA instead of the ATS. Ali v. Rumsfeld, 649 F.3d 762, 775–76 (D.C. Cir. 2011) (construing 28 U.S.C. § 2679 (1988)). This logic would doom claims against the MPP, since the FTCA does not offer redress for harms committed outside the United States. 28 U.S.C. § 2680(k). However, the *Ali* decision was arguably wrongly decided, since the Westfall Act contains an exception for claims "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized," and arguably the ATS is such a statute. *See* 28 U.S.C. § 2679(b)(2)(B); *Ali*, 649 F.3d at 779 (Edwards, J., dissenting). Although the *Ali* majority held that the ATS is only a jurisdictional statute and thus does not fall under the exception, Judge Edwards pointed out in his dissent that the ATS "authoriz[es] the federal courts to *impose* liability." *Ali*, 649 F.3d at 792 (Edwards, J., dissenting).

More than four decades old, interdiction has proven durable, despite a scholarly consensus that it violates the Refugee Convention.[268] Although President Clinton criticized the Bush Administration's policy of interdiction and return of Haitian asylum seekers when running for office, he decided to continue interdiction policies when elected.[269] On the other hand, resistance and lobbying led to benefits that remedied some of the other draconian asylum policies of the 1980s and early 1990s.[270] Moreover, the challenges in the 1990s to Haitian interdiction established precedent concerning procedural rights that had far-reaching consequences.[271]

It is very possible to imagine future presidents looking at a program like the MPP and making the same political calculation that President Clinton did when he left in place Haitian interdiction. On the other hand, the more glaring procedural defects of the MPP might be as vulnerable to challenge as the egregious aspects of the Haitian asylum screening during the 1990s. Yet Haitian interdiction teaches that procedural challenges do not always lead to substantive victories. In one vision of the future, the MPP evolves in response to litigation challenges to become more procedurally fair, while remaining in place in some form. On the other hand, conditions along the Mexican border are so disastrous from a humanitarian perspective that it is also possible to imagine resistance leading to the abandonment of the program entirely.

The battles over refugee distancing distract from one of the most significant human rights failures of the modern era: millions of displaced refugees remain in refugee camps or other poor conditions in the developing or least developed world.[272] This means that the struggle over programs like the MPP can only ever amount to tinkering around the edges of a humanitarian catastrophe. Yet the lawsuits, photographs, news stories, and paintings are a way, if nothing else, to counter the moral disengagement of a comfortable developed world. Asylum will not solve the world's refugee problem, but it can cross the distance of human suffering in individual cases.

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268. *See* Gammeltoft-Hansen & Hathaway, *supra* note 9, at 247–48.
269. Ratner, *supra* note 81, at 200–02.
270. *See* discussion *supra* Section II.A.
271. *See* Hongju Koh & Wishnie, *supra* note 97, at 423–24.
272. *See* UNHCR GLOBAL TRENDS, *supra* note 1, at 18.