

*Mercy Versus Fear, or Where the Law on Migration Stands

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*“I was a stranger and you welcomed me,
I was naked and you clothed me.”
(Mt 25:35–36).*

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INTRODUCTION

Proceeding from the principle of “[s]olidarity with the migrant, solidarity with the foreigner[.]”¹ Pope Francis² has provided what is perhaps the most progressive and visionary blueprint for immigration and refugee policy, both domestic and international, of any Pope in our collective memory. The first Jesuit and Latino Pope, he has entreated both the United States specifically and the world community more generally to follow the “Golden Rule,”³ admonishing that “[w]e must not be taken aback by their numbers, but rather view [migrants] as persons[.]”⁴

1. Pope Francis, Works of Welcoming the Stranger and Clothing the Naked, General Audience at St. Peter’s Square (Oct. 26, 2016), https://w2.vatican.va/content/francesco/en/audiences/2016/documents/papa-francesco_20161026_udienza-generale.html [<https://perma.cc/F5DY-KDDD>]. The exegesis of Papa Francisco can be traced back to passages in the Old Testament as well. See e.g., *Leviticus* 19:33 (“When an alien resides with you in your land, do not molest him. You shall treat the alien who resides with you no differently than the native born among you.”); *Exodus* 22:21 (“You shall not wrong a stranger or oppress him, for you were strangers in the land of Egypt.”); *Leviticus* 24:22 (“Ye shall have one manner of law, as well for the stranger, as for one of your own country,” quoted by Justice Thurgood Marshall in his opinion for a majority of the U.S. Supreme Court in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974)). See also *Leviticus* 19:34; *Exodus* 22:20; *Exodus* 23:9; *Jeremiah* 22:3; *Malachi* 3:5; *Deuteronomy* 10:19 (“Love the sojourner, therefore, for you were sojourners in the land of Egypt.”). For exegesis of additional germane Scripture, see Terry Coonan, *There Are No Strangers Among Us: Catholic Social Teachings and U.S. Immigration Law*, 40 CATH. L. 105, 107–12 (2001); James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT’L L. 804, 809 n.20 (quoting *Leviticus* and discussing Catholic social teaching).

2. Pope Francis is referred to as “Papa Francisco” in his native Argentina and throughout Latin America.

3. “Do unto others as you would have them do unto you.” *Matthew* 7:12.

4. Pope Francis, Address to the Joint Session of the United States Congress (Sept. 24, 2015) [hereinafter Pope Francis, Address to Congress], https://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150924_usa-us-congress.html [<https://perma.cc/Q2SU-62HA>].

Papa Francisco has emphasized the linkages between globalization, poverty, armed conflict, security of the person, and migration. This Article explores the degree to which American law has reflected these ideals. On the positive side of the national scale, American law permits immigration through relationships of consanguinity and based on persecution that results in flight from native lands. More recently, Pope Francis has remarked that politicians who propose building walls instead of bridges are “not Christian.”⁵ Many grave challenges lie ahead for national leaders in the United States; unfortunately, many in power, driven by racism and xenophobia, will predictably generate problems rather than be devoted to their resolution.

According to the United Nations High Commissioner for Refugees, 65.3 million people around the world have been forced from home. Among them are nearly 21.3 million refugees, over half of whom are under the age of 18. There are also 10 million stateless people who have been denied a nationality and access to basic rights such as education, healthcare, employment and freedom of movement.⁶

The numbers create anxiety and provoke fears; however, Pope Francis addresses the anxiety in a very direct way:

We must not be taken aback by their numbers, but rather view them as persons, seeing their faces and listening to their stories, trying to respond as best we can to their situation. To respond in a way which is always humane, just and fraternal. We need to avoid a common temptation nowadays: to discard whatever proves troublesome.⁷

Much of the research reflected in various social surveys is framed not in legal, but in moral⁸ and cultural dimensions; however, mercy is juxtaposed against fear, fear that is often fueled by political rhetoric that purports to justify it and ultimately shapes policy and influences law. An objective of this Article is to offer well-grounded responses to specifically identified fears, from the perspective not only of the law but also of the Pope as an international spiritual leader.

5. Pope Francis, In-flight Press Conference of His Holiness Pope Francis from Mexico to Rome (Feb. 17, 2016) [hereinafter Pope Francis, In-flight Conference], https://w2.vatican.va/content/francesco/en/speeches/2016/february/documents/papa-francesco_20160217_messico-conferenza-stampa.html [<https://perma.cc/D7XW-V88N>].

6. *Figures at a Glance*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/figures-at-a-glance.html> [<https://perma.cc/KFY3-YA3C>].

7. Pope Francis, Address to Congress, *supra* note 4.

8. See Vincent D. Rougeau, *Catholic Social Teaching and Global Migration: Bridging the Paradox of Universal Human Rights and Territorial Self-Determination*, 32 SEATTLE U. L. REV. 343 (2009).

We are called to promote a *culture of mercy* based on the rediscovery of encounter with others, a culture in which no one looks at another with indifference or turns away from the suffering of our brothers and sisters. *The works of mercy are “handcrafted,”* in the sense that none of them is alike. Our hands can craft them in a thousand different ways, and even though the one God inspires them, and they are all fashioned from the same “material,” mercy itself, each one takes on a different form.⁹

The theme of this Article contrasts the perspective of Papa Francisco on the subject of migration, juxtaposing his blueprint of mercy as the point of departure, with the oppositional resistance, which is based on various dimensions of fear. This perspective will be contextualized within the framework of both American immigration law and within the parameters of international human rights and transnational migration.

Part I of this Article will consider the paradigm of mercy and fear in light of the various provisions of federal American immigration law in their historical context. It will recount many of the restrictive and nativist episodes encapsulated in United States immigration law and policy, suggesting that, for most of our history, federal law has been driven by the dark side of human morality. That being said, it is also recognized that more noble callings have inspired exceptions to that general tenor that resulted in the enactment of law that more closely reflects an ideology of mercy. In his address to American bishops, Pope Francis commended the steps that the United States has taken to unify families and to assimilate refugees. Recognizing it as the zenith of mercy in federal law, this Article will recount the particular experience of regularization of status that occurred as a result of the enactment of the Immigration Reform and Control Act of 1986 and the participation in its implementation by the Office of Migration and Refugee Services of the U.S. Catholic Conference. Subsequently, and particularly concerning events that are transpiring at the time of this writing, the United States has tragically returned to federal law and policy that is seemingly inspired by fear.

Part II of this Article explores the legal response to migration after World War II, outlining the main sources and development of international law on forced migration. It also examines categorization of forced migrants based on international law and current practices in light of the reasons for and causes of flight. The issue of categorization is connected to the treatment of migrants, and this Article highlights Papa Francisco’s

9. Pope Francis, *Apostolic Letter, Misericordia et misera* (Nov. 20, 2016) [hereinafter Pope Francis, *Misericordia et misera*], https://w2.vatican.va/content/francesco/en/apost_letters/documents/papa-francesco-lettera-ap_20161120_misericordia-et-misera.html [https://perma.cc/P7G2-HRWA].

position on both the causes of flight as well as the status of migrants and refugees.

Part III of this Article considers the various reservations different nations have toward migrants. This Article collates relevant data collected by the United Nations, the Pew Research Center, Amnesty International, and the Cato Institute. Such reservations are characterized as “fears,” within its thematic construct. This analysis builds on Papa Francisco’s teaching on the power of mercy and the significance of the corporal and spiritual work of mercy.¹⁰ The antithesis of the power to love and its concomitant power of mercy is the power of fear.

I. THE EVOLUTION OF FEDERAL LAW FROM FEAR TO MERCY AND ITS REGRESSION TO FEAR

A. The Historical Fear of the “Other” in American Immigration Law

The overall history of immigration as reflected in statutes enacted by Congress, implemented by the Executive Branch, and sanctioned by the judiciary, is not something of which Americans should be proud. In many instances, they reflect fear, xenophobia, nativism, and even hatred. Examples are legion, so what is discussed here can only be partially illustrative of how fear adversely affected American federal law.

Not only was racism, in the ugly form of slavery, imbued in our Constitution itself,¹¹ but just a few months following its ratification, the first Congress limited naturalization to “any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years.”¹² This fear of people of color persisted¹³ and, as to African-Americans, was not significantly rectified until the enactment of the McCarran–Walter Act.¹⁴

10. “Let us rediscover these *corporal works of mercy*: to feed the hungry, give drink to the thirsty, clothe the naked, welcome the stranger, heal the sick, visit the imprisoned, and bury the dead. And let us not forget the *spiritual works of mercy*: to counsel the doubtful, instruct the ignorant, admonish sinners, comfort the afflicted, forgive offences, bear patiently those who do us ill, and pray for the living and the dead.” Pope Francis, *Bull of Indiction*, MISERICORDIAE VULTUS (Apr. 11, 2015), https://w2.vatican.va/content/francesco/en/apost_letters/documents/papa-francesco_bolla_20150411_misericordiae-vultus.html [<https://perma.cc/J6CN-R5YT>].

11. U.S. CONST. art. I, § 9, cl. 1; *id.* art. IV, § 2, cl. 2; *id.* art. IV, § 2, cl. 3.

12. The Act of March 26, 1790, ch. 3, 1 Stat. 103–04, *repealed* by Naturalization Act of 1795, ch. 19, 20, 1 Stat. 414; IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 31 (1996).

13. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (“[H]ad no rights which the white man was bound to respect . . .”).

14. Immigration and Nationality Act of 1952, ch. 2, § 311, 66 Stat. 239 (1952) (amended 1965) [hereinafter INA] (“The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married.”).

An early example of American fear that drove immigration policy is the Know-Nothing Party, a political manifestation of the nativist movement that gained support in the 1840s and sought to impose restrictions on the admission of Catholics in the eastern United States.¹⁵ As a result of the European depressions during that period, many Catholics from Ireland and Germany flowed into the country.¹⁶ The nativist sentiment against them was largely based on the perception that they would be unable to become good citizens because of their perceived obeisance to orders from the Church.¹⁷ The party's moniker was coined in 1853 by Horace Greeley, a journalist with the *New York Tribune*, based on reports that their members said that they "know nothing" when outsiders asked about their society.¹⁸ Comprised primarily of Protestant Evangelicals, the Know-Nothings were fearful that Catholics engaged in fraudulent voting and thus sought to prohibit naturalized immigrants from participation in the political process.¹⁹ Their influence was ultimately overshadowed by a preoccupation with the events that led to the Civil War, but not before anti-Catholic riots wreaked havoc in New York, Philadelphia, and Boston.²⁰

In addition to discrimination based on religion, facially discriminatory policies based on race and nationality were common in this era. Some of the most infamous restrictionist immigration statutes came in the form of the Chinese Exclusion Acts, enacted initially in 1882 to prohibit Chinese immigrants from obtaining U.S. citizenship and suspending immigration of Chinese laborers for ten years.²¹ The Act was expanded in 1884 and 1888 (the Scott Act), extended in 1892,²² extended again in 1902, and extended indefinitely in 1904.²³ These Acts were finally repealed in 1943.²⁴ Fear of the Chinese, although not substantiated by the

15. U.S. COMM'N ON CIV. RTS., *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* 7 (1980).

16. Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 13, 18–19 (Juan F. Perea ed., 1997) [hereinafter *IMMIGRANTS OUT!*].

17. *Id.* at 19.

18. BRIAN N. FRY, *RESPONDING TO IMMIGRATION: PERCEPTIONS OF PROMISE AND THREAT* 64–74 (2001).

19. U.S. SELECT COMM'N ON IMMIGR. & REFUGEE POL'Y, *STAFF REPORT: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST* 161–216 (1981) [hereinafter *SELECT COMM'N*].

20. *Id.*

21. Act of May 6, 1882, ch. 126, Stat. 58 (repealed 1943); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 25 (2006).

22. Ch. 220, 23 Stat. 115 (1884); ch. 1015, 25 Stat. 476 (1888); ch. 1064, 25 Stat. 504 (1888); Act of May 5, 1892, ch. 60, 27 Stat. 25 (repealed 1943).

23. 32 Stat. 176 (1902); 33 Stat. 428 (1904).

24. In 2011 and 2012, the U.S. Senate and House of Representatives formally apologized for the discriminatory legislation. S. Res. 201, 112th Cong. (2011); H. Res. 683, 112th Cong. (2012).

crime statistics of the period, was based on their supposed criminality, particularly concerning gambling and prostitution.²⁵ A California Senate Committee concluded that “the Chinese are inferior to any race God ever made . . . [and] have no souls to save, and if they have, they are not worth saving.”²⁶

It was bad enough that Congress enacted the Chinese Exclusion Acts, but decisions of the U.S. Supreme Court added insult to injury by upholding their most explicitly racist provisions. Before the Scott Act became law, Chinese nationals who left the United States to visit their homeland were guaranteed the right to return if they obtained certificates from the U.S. government before their departure.²⁷ Notwithstanding provisions of treaties with China that were entered with the United States in 1868 (the Burlingame Treaty) and 1880, the Scott Act rescinded the validity of such certificates.²⁸ In upholding this change in the rules of the game, the Court said,

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.²⁹

In a similar vein, the Court upheld the provision of the 1892 Act that required the presentation of “at least one credible white witness, as required by the statute” as a prerequisite to obtaining a certificate of residence, thereby mercilessly affirming the deportation of a man who had lived in the United States for more than a decade.³⁰

Mexicans have not escaped the harshest manifestations of American immigration policy. The infamous *Bracero* Program infected the relationship between the United States and Mexican migrants from 1942–1964.³¹ Initially based on treaties and at times recast as statutes,³²

25. See SELECT COMM’N, *supra* note 19.

26. *Id.* at 180.

27. The 1884 Act provided that such certificates were to be the “only evidence permissible” to establish the right of re-entry. Chinese Exclusion Act of 1882, § 4 (added in 1884 amendment) (Act repealed by Magnuson Act of December 17, 1943).

28. SUSAN F. MARTIN, *A NATION OF IMMIGRANTS* 95–96 (2011).

29. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889).

30. *Fong Yue Ting v. United States*, 149 U.S. 698, 703 (1893).

31. JUAN R. GARCIA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954*, at 18–35 (1980).

32. The 1942 bilateral treaty was styled the “Agreement of August 4, 1942 for the Temporary Migration of Mexican Agricultural Workers to the United States, as Revised on April 26, 1943, by the Exchange of Notes Between the American Embassy at Mexico City and the Mexican Ministry of Foreign Affairs.” Letter from Licenciado Ezequiel Padilla, Minister of Foreign Affairs, Mexico, to

workers from Mexico were imported initially to provide much needed labor in lieu of the thousands of American men who fought in World War II.³³ Over the course of the decades during which the Program existed, “*Braceros* across the country were compelled to endure poor food, excessive charges for board, substandard housing, discrimination, physical mistreatment, inappropriate deductions from their wages, and exposure to pesticides and other dangerous chemicals.”³⁴ The U.S. government transported five million migrant farm workers from Mexico to provide labor to farmers and ranchers in twenty-four states over the course of the *Bracero* Program.³⁵

Discriminatory immigration policies were also directed specifically against Mexicans in the “Repatriation Campaign” from 1929 to 1934 and “Operation Wetback” between 1954 and 1959.³⁶ The first Repatriation Campaign attended the Great Depression. Because of the Depression,

Mexican workers and immigrants were no longer welcomed. In fact, they were so unpopular that many were driven from the country. For example, Latinos in Oklahoma were threatened with being burned out of their homes, in Indiana a mob forced railworkers to “give up their jobs,” and in Texas signs were displayed warning Mexicans to get out of town Tragically, some, if not most, of the repatriated Latinos were lawful permanent residents of the United States. They had lived in the United States for decades, establishing homes and roots By the end of the Depression, over 400,000 Latinos were

the American Ambassador (Apr. 26, 1943), <https://www.loc.gov/law/help/us-treaties/bevans/b-mx-ust000009-1129.pdf>. This international instrument was codified by Joint Resolution on April 29, 1943 in Public Law 45. See generally Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in *IMMIGRANTS OUT!*, *supra* note 16, at 194–97. In 1947, Congress passed Public Law 80–40, which allowed the *Bracero* Program to expire at the end of 1947. From 1948–1951, direct grower-to-*bracero* agreements replaced the government-to-government agreement under which the program had formerly operated. Negotiations led to a new *bracero* agreement in 1949. In 1951, against the backdrop of renewed labor shortages resulting from the Korean War, Congress enacted Public Law 78, pursuant to which the United States and Mexico entered into yet another *bracero* agreement. Another bilateral agreement was reached between the United States and Mexico in 1954, extending the migrant-labor program to December 31, 1955. Gilbert Paul Carrasco, *Short-Hoeing the Long Row of Bondage: From Braceros to Compassionate Farm Worker Migration*, in *COMPASSIONATE MIGRATION AND REGIONAL POLICY IN THE AMERICAS* 71, 74 (Steven W. Bender & William F. Arrocha eds., forthcoming 2017). The U.S. government finally terminated the *Bracero* Program in 1964 to reduce the systematic exploitation of migrant workers that it engendered. *Id.*

33. JUAN R. GARCIA, *supra* note 31, at 18.

34. Carrasco, *Latinos in the United States*, *supra* note 32, at 195.

35. Carrasco, *Short-Hoeing the Long Row of Bondage*, *supra* note 32, at 72.

36. U.S. COMM’N ON CIV. RTS., *THE TARNISHED GOLDEN DOOR*, *supra* note 15, at 10–11; Carrasco, *Latinos in the United States*, *supra* note 32, at 193–98.

“repatriated” to Mexico without any formal deportation proceedings, including thousands of American citizens.³⁷

The second repatriation initiative, “Operation Wetback,” was ordered by Herbert Brownell Jr., the Attorney General of the United States.³⁸ He enlisted Joseph P. Swing, the Commissioner of Immigration and reputed “professional, long-time Mexican hater,” to conduct a massive deportation drive along the lines of a military campaign.³⁹

“Operation Wetback” went beyond its scope, however, and Americans of Mexican descent were also deported, stirring up memories of the mass deportations of the 1930s. Many of those deported were denied the opportunity to present evidence that would have prevented their deportation. Between 1954 and 1959, “Operation Wetback” was responsible for over 3.7 million Latinos being deported. Of that number, an unknown amount were American citizens.⁴⁰

Fear prevailed, with no mercy for those subject to the power of the U.S. government.

B. The Zenith of Mercy in American Immigration Law

Although there are not many examples⁴¹ of provisions of American immigration law that reflect the noblest dimensions of our immigrant heritage,⁴² the legalization initiative of the Immigration Reform and Control Act of 1986 (IRCA)⁴³ epitomizes the zenith of mercy. Coincidentally, the Catholic Church played a substantial role in its successful implementation.⁴⁴

37. *Id.* at 193–94; see also STEVEN W. BENDER, *RUN FOR THE BORDER: VICE AND VIRTUE IN U.S.–MEXICO BORDER CROSSINGS* 122 (2012) [hereinafter BENDER, *RUN FOR THE BORDER*].

38. Carrasco, *Latinos in the United States*, *supra* note 32, at 197.

39. GARCIA, *supra* note 31, at 183; see also BENDER, *RUN FOR THE BORDER*, *supra* note 37, at 125.

40. Carrasco, *Latinos in the United States*, *supra* note 32, at 197.

41. Some of the more noteworthy include the elimination of the national origins quotas, which culminated in the Immigration and Nationality Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911, and the establishment of family-based preference and humanitarian admission categories. See, e.g., INA §§ 201, 203; 8 U.S.C. §§ 1151, 1153 (2012); Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980); INA §§ 208, 241, 8 U.S.C. §§ 1158, 1231 (2012).

42. EMMA LAZARUS, *THE NEW COLOSSUS* (1883) (the inscription on the Statue of Liberty).

43. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (amending the INA, 8 U.S.C. §§ 1101–1524 (1952)).

44. The legalization program of the Church was overseen by the Committee on Migration of the National Conference of Catholic Bishops, whose President was then His Excellency Archbishop John J. May. The members of the Committee included the Chairman, His Excellency Archbishop Theodore McCarrick (then of Newark); His Eminence Anthony Cardinal Bevilacqua (of Philadelphia, and a canon lawyer); His Excellency Archbishop John Flores (of San Antonio); His Eminence Bernard Cardinal Law (of Boston); and His Excellency Archbishop Roger M. Mahony (of Los Angeles). The

Both legislative advocacy, before enactment,⁴⁵ and regulatory advocacy⁴⁶ afterward, were strongly supported by the Catholic Church. The statute provided that non-governmental organizations could serve as qualified designated entities (QDE's) to serve as filing sites in addition to the offices of the Attorney General.⁴⁷ In addition to the national offices and the four regional offices in Washington, D.C., New York, San Francisco, and El Paso, the Church had seventy-seven immigration offices and established 102 legalization offices nationwide to serve as a buffer between the government and the undocumented.⁴⁸ During that time the Catholic Legal Immigration Network, Inc. (or "CLINIC") was established, whereby many offices were staffed with lawyers in an attempt to further professionalize the immigration work that was undertaken under the auspices of the Church.⁴⁹

Pursuant to the provisions of IRCA, the legalization program was essentially divided into a two-step process. Eligible undocumented persons had one year, starting on May 5, 1987, to apply for lawful temporary resident status.⁵⁰ Following the granting of such status, they had to wait eighteen months, and within one year after that, they had to apply

staff, which actually implemented the Program and reported to the Committee, was led by the Director of the Office of Migration and Refugee Services, Rev. Msgr. Nicholas DiMarzio (now His Excellency Bishop of Brooklyn) and author Gilbert Paul Carrasco, National Director of Immigration Services. Other lawyers in leadership positions included Mary McClymont, National Director of Legalization, and Luis Torres, National Coordinator for SAW (Special Agricultural Workers) Legalization.

45. Efforts were made to strengthen the Frank Amendment, which prohibits employment discrimination in hiring or dismissal based on national origin or citizenship status. H.R. 1510, 98th Cong., 2nd Sess. § 274B (1984).

46. Meetings with then-Commissioner of the INS (Immigration and Naturalization Service, now Department of Homeland Security), Alan Nelson, formed the blueprint for the involvement of the Church and other non-profit organizations in the implementation of legalization. Gilbert Paul Carrasco, *The Implementation of the American Legalization Experiment in Recent Retrospect*, in 11 IN DEFENSE OF THE ALIEN 30, 31 (1988); see also INS and the Budgetary Impact of Implementing of the Immigration Reform and Control Act of 1986: Hearing Before the Committee on Budget, House of Representatives, 100th Cong., 20, 45 (1987) (statement of Gilbert P. Carrasco, Dir. of Immigr. Servs., U.S. Cath. Confs.), <https://www.loc.gov/law/find/hearings/pdf/00114289838.pdf> [<https://perma.cc/3H75-LBUH>].

47. INA § 245(c)(1), 8 U.S.C. § 1255a(c)(1) (2012). As applied to Special Agricultural Workers, see INA § 210(b)(1), 8 U.S.C. § 1160(b)(1) (2012). Of the total of 2,961,048 applications, the QDEs had submitted 507,632 applications, as of December 14, 1988. Carrasco, *The Implementation of the American Legalization Experiment in Recent Retrospect*, supra note 46, at 34 n.11 (citing telephone conversation between Gilbert Paul Carrasco and Raymond Penn, I.N.S. Assistant Commissioner for Legalization (December 14, 1988)).

48. H.R. REP. No. 99-682, pt. 1 (1986) (explicating intent).

49. During his tenure with the U.S. Catholic Conference, Professor Carrasco participated in the establishment of CLINIC and coined the name of the organization and the acronym.

50. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, §§ 245A(a)(1)(A), 245A(b)(1)(A) (codified as amended at 8 U.S.C.A § 1255a (West 2015)).

for permanent resident status, failure of which resulted in the loss of all legal status.⁵¹

To qualify for the legalization program, the undocumented person must have entered the United States before 1982, had to have maintained unlawful residence since then, and had to have been continuously physically present in the United States since November 6, 1986, when the law was enacted.⁵² The applicant also must not have committed a felony or more than three misdemeanors in the United States; must not have assisted in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; and must have registered for the Selective Service System, if so required.⁵³

Although there were many problematic dimensions in the manner in which the government implemented the legalization program,⁵⁴ it was the most evident manifestation of mercy in the history of American immigration law. In addition to the other positive aspects of legalization, the steps the Church took to make this program a success⁵⁵ are likely related to the following observation of Papa Francisco during his visit to the United States:

I ask you to excuse me if in some way I am pleading my own case. The Church in the United States knows like few others the hopes present in the hearts of these “pilgrims.” From the beginning you have learned their languages, promoted their cause, made their contributions your own, defended their rights, helped them to prosper, and kept alive the flame of their faith. Even today, no American institution does more for immigrants than your Christian communities. Now you are facing this stream of Latin immigration which affects many of your dioceses. Not only as the Bishop of Rome, but also as a pastor from the South, I feel the need to thank and encourage you. Perhaps it will not be easy for you to look into their soul; perhaps you will be challenged by their diversity. But know that they also possess resources meant to be shared. So do not

51. *Id.*

52. *Id.* at §§ 245A(a)(2)(A), 245A(a)(3)(A).

53. *Id.* at § 245A(a)(4).

54. Gilbert Paul Carrasco, *The Golden Moment of Legalization*, in 10 IN DEFENSE OF THE ALIEN 32, 42–45 (1987); Coonan, *supra* note 1, at 146 n.146.

55. “In the years after enactment of IRCA, 1.6 million immigrants who were in the United States illegally were found eligible for legalization under the pre-1982 program and 1.1 million were found eligible under the SAW [Special Agricultural Workers] program. These numbers represented 90 percent of pre-1982 applicants and 86 percent of SAW applicants.” MARTIN, *supra* note 28, at 215. Under the auspices of the Catholic Church, its network of immigration offices located throughout the country facilitated the legalization of approximately 300,000 of a total of nearly three million undocumented persons who emerged from the shadows as a result of that law. See Carrasco, *The Implementation of the American Legalization Experiment in Recent Retrospect*, *supra* note 46, at 34 n.11 (extrapolating from the data referenced herein).

be afraid to welcome them. Offer them the warmth of the love of Christ and you will unlock the mystery of their heart. I am certain that, as so often in the past, these people will enrich America and its Church.⁵⁶

*C. The Downward Spiral of Mercy in American
Immigration Law and Policy*

Following the enactment of IRCA and its legalization program, Congress consistently enacted more and more restrictive immigration statutes. For example, it created the “aggravated felony” category in the Anti-Drug Abuse Act of 1988, which is principally a ground of deportability, and that ground was expanded in 1990 and subsequent years.⁵⁷

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),⁵⁸ the Anti-Terrorism and Effective Death Penalty Act (AEDPA),⁵⁹ and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the Welfare Reform Act).⁶⁰ The combination of the IIRIRA and AEDPA provided for the removal of those who commit crimes and reduced lawful permanent residents’ due process rights. The AEDPA retroactively applied new definitions of “crimes of moral turpitude” and “aggravated felony.” It rendered removable those who committed less serious crimes than those to which the previous law applied, encompassing those crimes for which the potential sentence was at least a year.⁶¹ The Welfare Reform Act, in combination with IIRIRA, substantially reduced eligibility for public benefit programs for lawful permanent residents that are available to

56. Pope Francis, Address of the Holy Father at a Meeting with the Bishops of the United States of America (Sept. 23, 2015), https://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150923_usa-vescovi.html.

57. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2014); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

58. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996), amended by 8 U.S.C. §§ 1101–1524 (West 2016).

59. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

60. Personal Responsibility and Work Opportunity Act of 1995, Pub. L. No. 104-193, 110 Stat. 2105 (1996); Michael Scaperlanda, *Who is My Neighbor? An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587, 1588 (arguing that this law “conflicts with a Judeo-Christian vision of our constitutional community”).

61. The AEDPA, for example, adopted a new definition of “crimes of moral turpitude” to include those crimes potentially punishable by imprisonment of one year or more, rather than encompassing only those, under the previous definition, involving actual sentences to imprisonment of one year or more. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 435–444, 110 Stat. 1214 (1996).

citizens.⁶² For example, among many other restrictions, they are ineligible for Supplemental Security Income (SSI) and food stamps until they naturalize.⁶³

As merciless as the aforementioned laws appear, they pale in comparison to the Draconian initiatives introduced by the Trump Administration. During his campaign, Trump referred to Mexicans as “criminals” and “rapists” and said that, if elected, he would build a wall 2,500 kilometers long between the United States and Mexico and deport 11 million “illegal immigrants.”⁶⁴ He also “suggested that Francis was serving as a pawn of the Mexican government.”⁶⁵ Philip Pulella, a Reuters journalist, referred to such statements in asking Papa Francisco what he thought about them and whether a Catholic in the United States could vote for this kind of person.⁶⁶ Papa Francisco stated:

Then, a person who thinks only of building walls, wherever it may be, and not of building bridges, is not Christian. This is not in the Gospel. . . . I only say: if a man says these things, he is not Christian. We have to see if he said these things, and thus I will give him the benefit of the doubt.⁶⁷

Not only did candidate Trump say these things but he also acted on them once he was elected. On January 25, 2017, President Trump signed an Executive Order entitled “Border Security and Immigration Enforcement Improvements.”⁶⁸ It directs the Department of Homeland Security to take immediate steps to allocate available funds to start constructing a wall on the southern border.⁶⁹ As of early 2017, there were

62. Whereas the law before the enactment of these statutes rendered only the undocumented ineligible for Supplementary Security Income and food stamps, the new regime also rendered ineligible lawful permanent residents until citizenship.

63. Until 1996, no federal program denied eligibility for benefits to lawful permanent residents solely on the basis of their alien status.

64. Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.a6387453c984 [<https://perma.cc/DW57-NHFK>]. See also Nicole Winfield & Julie Pace, *Pope Says Trump Is 'Not Christian' for Wanting to Build a Wall on U.S.-Mexico Border*, PBS NEWSHOUR (Feb. 18, 2016, 12:24 PM), <http://www.pbs.org/newshour/rundown/pope-says-trump-is-not-christian-for-plan-to-build-a-wall-on-u-s-mexico-border/> [<https://perma.cc/2EJB-ZXYW>].

65. Alan Rappoport, *Donald Trump Criticizes Pope Francis as 'Very Political' for Mexico Trip*, N.Y. TIMES (Feb. 11, 2016), <https://www.nytimes.com/politics/first-draft/2016/02/11/donald-trump-criticizes-pope-francis-as-very-political-for-mexico-trip/>.

66. Philip Pulella, *Pope Says Trump 'not Christian' in Views, Plans Over Immigration*, REUTERS (Feb. 18, 2016), <http://www.reuters.com/article/us-usa-election-trump-pope-idUSKCN0VR277> [<https://perma.cc/PQF3-VANH>].

67. Pope Francis, In-flight Conference, *supra* note 5.

68. Exec. Order No. 13767, 82 Fed. Reg. 8,793 (Jan. 25, 2017).

69. During his campaign, Trump repeatedly stated that Mexico would somehow be forced to pay for the cost of construction. Douglas Perry, *'And Mexico will pay for the Wall': Donald Trump*

already approximately 650 miles of border fence (350 miles of primary pedestrian fencing, 300 miles of vehicle fencing, 36 miles of secondary fencing behind the primary fencing, and 14 miles of tertiary pedestrian fencing behind the secondary fence).⁷⁰ The estimated cost of the remaining border wall segments ranges from \$15 to \$25 billion—with each mile of fencing costing \$16 million.⁷¹

Two days after signing the Border Security Executive Order, President Trump signed an Executive Order, “Protecting the Nation from Foreign Terrorist Entry into the United States,”⁷² which had immediate consequences. During the campaign, Trump made several statements of his intent to issue “a total and complete shutdown of Muslims entering the United States,” and there is evidence that indicates that this Executive Order was intended to be that ban.⁷³ The Order purported to ban the admission of all Syrian refugees indefinitely and to ban, for at least ninety days, immigrant and nonimmigrant entries of nationals from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.⁷⁴ It also purported to give preference to Christians in the refugee admissions process “when the person is a religious minority in his country of nationality facing religious persecution.”⁷⁵

Executive Order 13769 was not rolled out properly and caused havoc—not only because it upset the expectations of many people with a legal right to enter the United States but also because agents of the Department of Homeland Security had not been briefed on how to interpret it. When it was implemented to prevent lawful permanent residents and

Lays Out His Immigration Vision (Complete Speech), OREGONIAN (Sep. 1, 2016), http://www.oregonlive.com/today/index.ssf/2016/09/and_mexico_will_pay_for_the_wa.html [<https://perma.cc/3TR2-TJH4>]. This, apparently, is the reason for the following: “The President has directed the heads of all executive departments to identify and quantify all sources of direct and indirect Federal aid or assistance to the Government of Mexico.” Memorandum from John Kelly, Sec’y of the U.S. Dep’t of Homeland Sec., Implementing the President’s Border Security and Immigration Enforcement Improvements Policies 4 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [<https://perma.cc/5VP8-48SY>].

70. *The High Cost and Diminishing Returns of a Border Wall*, AM. IMMIGR. COUNCIL (Jan. 25, 2017), <https://www.americanimmigrationcouncil.org/research/cost-of-border-wall> [<https://perma.cc/Y8KS-ZCPM>].

71. *Id.*

72. Exec. Order No. 13769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

73. *Donald J. Trump Statement on Preventing Muslim Immigration*, DONALDJTRUMP.COM (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>; Erik Larson & Kartikay Mehrotra, *Appeals Court Keeps U.S. Doors Open During Immigration Fight*, CRAIN’S DETROIT (Feb. 9, 2017), <http://www.craindetroit.com/article/20170209/NEWS01/170209794/appeals-court-keeps-u-s-doors-open-during-immigration-fight> [<https://perma.cc/6U8A-4DUA>]; *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017).

74. Exec. Order No. 13769, 82 Fed. Reg. 8,977 § 3 (Jan. 27, 2017).

75. Exec. Order No. 13769, 82 Fed. Reg. 8,977 § 5 (Jan. 27, 2017).

those with properly issued immigrant and nonimmigrant visas from entering the United States, several courts immediately responded by issuing temporary restraining orders to protect the legal rights of those affected.⁷⁶ Notwithstanding the overwhelming judicial intolerance for Executive Order 13769, Trump remained adamant in his insistence that this demonization of Muslims, this Islamophobia, this fear, should prevail, vowing to overcome its many legal deficiencies.⁷⁷

Pope Francis, in his address to a joint session of the United States Congress, made the following observation:

A delicate balance is required to combat violence perpetrated in the name of a religion, an ideology or an economic system, while also safeguarding religious freedom, intellectual freedom and individual freedoms. But there is another temptation which we must especially

76. *Darweesh v. Trump*, 17 Civ. 480, 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017) (granting motion for stay of removal); *Vayeghan v. Kelly*, No. CV 17-0702, 2017 WL 396531 (C.D. Cal. Jan. 29, 2017) (ordering United States to return plaintiff from Dubai and to admit him); *Tootkaboni v. Trump*, No. 17-cv-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017) (issuing TRO), motion to extend TRO denied *sub nom.*, *Louhghalam v. Trump*, No. 17-10154-NMG, 2017 WL 479779 (D. Mass. Feb. 3, 2017); *Badr Dhaifallah Ahmed Mohammed v. United States*, No. CV 17-00786 AB (PLAx), 2017 U.S. Dist. LEXIS 16405 (C.D. Cal. Jan. 31, 2017) (issuing TRO); *Washington v. Trump*, 847 F.3d 1151, 1156 (per curiam), *reconsideration denied*, 853 F.3d 933 (9th Cir. 2017) (en banc) (denying motion to stay nationwide preliminary injunction); *State of Hawai'i v. Trump*, No. CV 17-00050 DKW-KJM, 2017 WL 536826 (D. Haw. Feb. 9, 2017) (granting in part and denying in part motion to stay TRO, deferring to extant nationwide injunction issued in *Washington v. Trump*); *Aziz v. Trump*, No. 117CV116LMBTCB, 2017 WL 580855 (E.D. Va. Feb. 13, 2017) (granting preliminary injunction).

77. With respect to the first Executive Order (13769), the Ninth Circuit rejected the government's claim of unreviewable authority, observing that "it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017). It also concluded that it was likely that the plaintiffs would prevail on the merits of their due process claim. *Id.* Although "significant constitutional questions" were presented regarding the equal protection and establishment claims of religious discrimination, the court reserved judgment on them until they were more fully briefed. *Id.* Subsequently, the Trump Administration revoked Executive Order 13769 and issued another in its place. "Protecting the Nation from Foreign Terrorist Entry Into the United States," Exec. Order 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). Consequently, the Administration abandoned its defense of Executive Order 13769. *See* Notice of Filing of Executive Order, *State of Washington and State of Minnesota v. Trump*, No. 2:17-cv-00141 (D. Wash. Mar. 6, 2017). Notwithstanding that it eliminated the Christian preference, dropped Iraq from the list of banned Muslim countries, and exempted lawful permanent residents and those with valid visas from its reach, the second travel ban was also swiftly enjoined by federal courts. *Hawaii v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15, 2017), *aff'd* in part, *vacated* in part, and *remanded*, -- F.3d --, No. 17-15589 (9th Cir. June 12, 2017) (ruling against the Trump Administration on all issues but permitting the internal vetting procedures to be analyzed and improved); *Int'l Refugee Assistance Project v. Trump*, No. CV TDC-17-0361, 2017 WL 1018235 (D. Md. Mar. 16, 2017), *aff'd* -- F.3d --, No. 17-1351, 2017 WL 2273306 (4th Cir. May 25, 2017) (*en banc*), as amended (May 31, 2017). *See* Kartikay Mehrotra, Erik Larson & Bob Van Voris, *Trump's Second Bid at Travel Ban Axed by Two U.S. Judges*, BLOOMBERG (Mar. 16, 2017), <https://www.bloomberg.com/politics/articles/2017-03-15/trump-s-second-travel-ban-is-blocked-by-u-s-judge-j0bk602s> [<https://perma.cc/5HU9-DBY7>].

guard against: the simplistic reductionism which sees only good or evil; or, if you will, the righteous and sinners. The contemporary world, with its open wounds which affect so many of our brothers and sisters, demands that we confront every form of polarization which would divide it into these two camps. We know that in the attempt to be freed of the enemy without, we can be tempted to feed the enemy within. To imitate the hatred and violence of tyrants and murderers is the best way to take their place. That is something which you, as a people, reject.⁷⁸

The Trump Executive Orders fuel the hatred and division that Papa Francisco described. Indeed, Executive Order 13768 “Enhancing Public Safety in the Interior of the United States” goes further, compromising the cardinal principle of “innocent until proven guilty” in Anglo-American law and attempting to punish the merciful.⁷⁹ It punishes “sanctuary jurisdictions” by rendering them ineligible for federal grants.⁸⁰

In addition to targeting sanctuary jurisdictions, Executive Order 13768 establishes new priorities for removal of non-citizens.⁸¹ It prioritizes the removal of non-citizens on the basis of criminality,⁸² security,⁸³ fraud,⁸⁴ circumstances indicating expedited removal,⁸⁵ and other related grounds⁸⁶ of inadmissibility.⁸⁷ Although it may be expected that the exercise of discretion related to those grounds will be less forthcoming (what Papa Francisco would describe as “mercy”), Executive Order 13768 adds additional grounds that are difficult to reconcile with general principles of fairness and due process. Priorities for removal now include: (1) removable aliens who have been convicted of *any* criminal offense; (2) those who have only been *charged* with any criminal offense, *where the charge has not been resolved*; (3) those who have *committed acts that constitute a chargeable criminal offense*; (4) those who have engaged in fraud or willful misrepresentation in connection with *any* official matter before a governmental agency; (5) those who have

78. Pope Francis, Address to Congress, *supra* note 4.

79. Exec. Order No. 13768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

80. *Id.* at § 9(a) (“[T]he Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or by the Secretary. . . . The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. § 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”).

81. Exec. Order No. 13768, 82 Fed. Reg. 8,799 § 5 (Jan. 27, 2017).

82. INA § 212(a)(2), 8 U.S.C. § 1182 (2013).

83. INA § 212(a)(3), 8 U.S.C. § 1182 (2013).

84. INA § 212(a)(6)(C), 8 U.S.C. § 1182 (2013).

85. INA § 235, 8 U.S.C. § 1225 (2009).

86. INA § 237(a)(2), 8 U.S.C. § 1227 (2008).

87. INA § 237(a)(4), 8 U.S.C. § 1227 (2008).

“abused” any program related to receipt of public benefits; (6) those who are subject to a final order of removal but who have not departed; and (7) those who, in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.⁸⁸ No mercy.

The purported justification for the sanctuary provision of Executive Order 13768 is a federal statute⁸⁹ that provides that state and local jurisdictions “may not prohibit, or in any way restrict, any government entity or official from sending” the federal government “information regarding the citizenship or immigration status . . . of any individual” or restrict the maintenance of such information.⁹⁰ Not only is there inherent constitutional authority to adopt sanctuary policies,⁹¹ the “Federal Government may not compel the States to enact or administer a federal regulatory program.”⁹² Furthermore, requiring information sharing is permissible only when it “does not require [states] to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.”⁹³ There is no apparent conflict, therefore, between this statute and the activities of sanctuary jurisdictions.

Moreover, Executive Order 13768 is also inconsistent with the Spending Clause.⁹⁴ Limitations on expenditures of federal funds must be

88. Memorandum from John Kelly, Secretary of the U.S. Department of Homeland Security, Enforcement of the Immigration Laws to Serve the National Interest 2 (Feb. 20, 2017) (emphasis added), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [<https://perma.cc/T3UC-Y4KR>].

89. The government argues that sanctuary policies violate § 642 of the Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1373 (2016).

90. *Id.* The government also maintains that sanctuary jurisdictions are in violation of § 434 of the Personal Responsibility and Work Opportunity Act, which proscribes “any prohibition or restriction placed on state or local governments to send or receive information regarding immigration status of an individual to or from federal immigration authorities.” 8 U.S.C. § 1644 (2016).

91. U.S. CONST. amend. X. *See generally* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103 (2012).

92. *Printz v. United States*, 521 U.S. 898, 933 (1997). In refusing to require Miami to honor a detainer request issued by U.S. Immigration and Customs Enforcement (ICE), a court has relied on this rationale, striking a blow to the initiative against sanctuary cities. Erik Larson, *Miami Barred from Detaining Immigrants in Blow to Trump Push*, BLOOMBERG (Mar. 3, 2017), <https://www.bloomberg.com/news/articles/2017-03-03/miami-judge-says-city-can-t-hold-immigrants-on-federal-request> [<https://perma.cc/BQ4X-F7LG>]. A detainer request is a request from ICE to local law enforcement after suspects have already been taken into custody for some reason, to hold such people without having probable cause to justify detention for an immigration violation subsequent to the time the detainees would normally have to be released so as to give ICE time to take them into custody. Other courts have raised the possibility of liability of jurisdictions that honor detainer requests. *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *4 (D. Or. Apr. 11, 2014); *see also* *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014); *Morales v. Chadbourne*, 793 F.3d 208, 215 (1st Cir. 2015).

93. *Reno v. Condon*, 528 U.S. 141, 151 (2000).

94. U.S. CONST. art. I, § 8, cl.1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the Common Defence and general

specifically circumscribed. Not only do federal grants to sanctuary jurisdictions fail to state unambiguously that compliance with 8 U.S.C. § 1373 is a condition of their disbursement,⁹⁵ spending conditions must be germane to the “federal interest” in the particular “project or program.”⁹⁶ Moreover, it is Congress that possesses the spending power, not the President. Indubitably, the issue will ultimately be resolved in the courts.⁹⁷ Providing sanctuary is truly a manifestation of mercy; in the words of Pope Francis, “those who are weak and vulnerable, distant and alone, ought to feel the presence of brothers and sisters who can help them in their need.”⁹⁸

II. THE “STRANGERS” OF THE XXIST CENTURY AND INTERNATIONAL HUMAN RIGHTS

A. The Causes of Flight and People’s Needs

The works of mercy affect a person’s entire life. For this reason, we can set in motion a real cultural revolution, beginning with simple gestures capable of reaching body and spirit, people’s very lives. This is a commitment that the Christian community should take up, in the knowledge that God’s word constantly calls us to leave behind the temptation to hide behind indifference and individualism in order to lead a comfortable life free of problems.⁹⁹

The conventional religious approach considers the concept of “welcoming the stranger” within the triangle of the native, the migrant, and God. Pope Francis, however, equally emphasizes global governance, participation by the government of each state, by international organizations, by non-governmental actors, and by every person in their responsibility to treat all individuals with dignity and respect in this modern era of turbulence.¹⁰⁰

Welfare of the United States”). Executive Order 13768 “cross[es] the line distinguishing encouragement from coercion.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603 (2012).

95. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

96. *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

97. Complaints on the issue have been filed. *See, e.g.*, *City of San Francisco v. Donald Trump*, No. 4:17CV00485 (N.D. Cal. filed Jan. 31, 2017) (seeking declaratory and injunctive relief); *City of Chelsea v. Trump*, No. 1:17CV10214 (D. Mass. filed Feb. 8, 2017) (seeking declaratory and injunctive relief); *City of Seattle v. Donald J. Trump*, No. 2:17-cv-00497 (W.D. Wash. filed Mar. 29, 2017). *See generally* Ming Hsu Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities after Secure Communities*, 91 CHI.-KENT L. REV. 13 (2016).

98. Pope Francis, *Misericordia et misera*, *supra* note 9.

99. *Id.*

100. Pope Francis, Address of The Holy Father at the Meeting with the Members of the General Assembly of The United Nations Organization (Sept. 25, 2015) [hereinafter Pope Francis, Address to U.N. General Assembly], http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150925_onu-visita.html [https://perma.cc/WQK8-RCKT].

Pope Francis has embraced merciful pastoral practices, complementing them with his deep understanding of the very complex social and legal phenomena of migration and the realities that face migrants. His understanding of immigration includes consideration of the responsibilities of all actors and recognition of its causes, consequences, and underlying circumstances.

Migration today is not a phenomenon limited to some areas of the planet. It affects all continents and is growing into a tragic situation of global proportions. Not only does this concern those looking for dignified work or better living conditions, but also men and women, the elderly and children, who are forced to leave their homes in the hope of finding safety, peace and security.¹⁰¹

Legal categories of displaced people have developed based on the cause of flight and the fact of crossing an international border. These criteria do not necessarily address the needs of displaced persons and leave thousands of people beyond the law's protection.¹⁰² Pope Francis has taken a different approach, which is "human-centered" and inclusive. He always situates men and women at the center of political and economic activity, calling on the law to be just and efficient. At the Meeting with the Members of The General Assembly of The United Nations, Pope Francis said:

[W]e must avoid every temptation to fall into a declarationist nominalism which would assuage our consciences. We need to ensure that our institutions are truly effective in the struggle We can rest content with the bureaucratic exercise of drawing up long lists of good proposals—goals, objectives and statistics—or we can think that a single theoretical and aprioristic solution will provide an answer to all the challenges. It must never be forgotten that political and economic activity is only effective when it is understood as a prudential activity, guided by a perennial concept of justice and constantly conscious of the fact that, above and beyond our plans and programs, we are dealing with real men and women who live, struggle and suffer, and are often forced to live in great poverty, deprived of all rights.¹⁰³

101. Pope Francis, Message of His Holiness Pope Francis for The World Day of Migrants and Refugees (Jan. 15, 2017), https://w2.vatican.va/content/francesco/en/messages/migration/documents/papa-francesco_20160908_world-migrants-day-2017.html [https://perma.cc/HG9Y-DYQF] [hereinafter Pope Francis, World Day of Migrants and Refugees].

102. "The average length of major refugee situations has increased from nine years in 1993 to over twenty years today." Gil Loescher, *Human Rights and Forced Migration*, in HUMAN RIGHTS: POLITICS AND PRACTICE 312 (Steven Saltzman ed., 3d ed. 2016).

103. Pope Francis, Address to U.N. General Assembly, *supra* note 100.

Pope Francis appears to be fully aware of the causes of flight and the challenges of people who are in transition and who have arrived in a foreign country. The Pope does not draw a distinction between displaced people based on the cause of flight but rather stresses the needs of men, women, and children regardless of whether they fled war, poverty, or discrimination.

[T]housands of persons are led to travel north in search of a better life for themselves and for their loved ones, in search of greater opportunities. Is this not what we want for our own children? . . . All political activity must serve and promote the good of the human person and be based on respect for his or her dignity. “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.”¹⁰⁴

For the Pope, any cause of flight is a call for unity and action. It is an enterprise on which international organizations, states, and non-state actors should collaborate and implement all possible remedies to eliminate such causes.

To be truly united with those forced to flee their homelands, we need to eliminate the causes of this dramatic situation: it is not enough to limit ourselves to responding to emergencies as they arise. Instead, we need to encourage political efforts that are broader in scope and multilateral. It is necessary, above all, to build peace where war has brought destruction and death, and to stop this scourge from spreading. To do this, resolute efforts must be made to counter the arms trade and arms trafficking, and the often hidden machinations associated with them; those who carry out acts of hatred and violence must be denied all means of support. Cooperation among nations, international organizations and humanitarian agencies must be tirelessly promoted, and those on the frontlines must be assisted, not kept at a distance.¹⁰⁵

B. International Human Rights and Forced Migration

The modern era of international legal response to the status of displaced people began in the aftermath of World War I under the auspices of the League of Nations.¹⁰⁶ The horrors of World War II caused the

104. Pope Francis, Address to Congress, *supra* note 4 (quoting the Declaration of Independence (July 4, 1776)).

105. *Pope Francis' Full Speech to Citizens and Catholic Community in Lesbos*, ROME REP. (Apr. 16, 2016), <http://www.romereports.com/2016/04/16/pope-francis-full-speech-in-the-meeting-with-the-citizens-and-with-the-catholic-community> [<https://perma.cc/MXC3-T65U>].

106. The first modern international response to the problems of displaced people in Europe was an appointment by the League of Nations of Fridtjof Nansen as the first High Commissioner for

highest historical level of displacement—an estimated 60 million people.¹⁰⁷ The postwar era also featured deep polarization of the world between the East, led by a totalitarian government of the Soviet Union (U.S.S.R.), and the West.¹⁰⁸ The first significant flight of people from Socialist Hungary to neighboring Austria happened during the Hungarian Revolution in 1956.¹⁰⁹ The effects of decolonization, and later the fall of “the Iron Curtain,”¹¹⁰ led to the struggle for statehood and the redistribution of power in many modern states. These events also revealed ethnic, religious, territorial, and other conflicts that caused people to flee from the East to the West and from the South to the North.¹¹¹ Thus, international human rights law influenced the evolution of modern law on forced migration based on the collective international response to the movement of people.

Cornerstones of the law of forced migration are the Universal Declaration of Human Rights (1948),¹¹² the Convention for the Protection of Human Rights and Fundamental Freedoms (1950),¹¹³ and the International Covenant on Economic, Social and Cultural Rights (1966).¹¹⁴ These instruments demonstrate that the law on forced migration was built

Refugees (1920–1930). He personally directed the repatriation of 450,000 prisoners of World War I, and developed programs of settlement for millions of displaced persons. The first identification document for displaced people was called the “nansen passport.” On October 28, 1933, the League of Nations adopted the Convention Relating to the International Status of Refugees, ratified by nine states. Convention Relating to the International Status of Refugees, League of Nations, Treaty Series Vol. CLIX No. 3663 (1933); *About Fridtjof Nansen*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/en-us/about-fridtjof-nansen.html?query=Fridtjof> [https://perma.cc/KU29-U47E].

107. See Giada Zampano, Liam Moloney & Jovi Juan, *Migrant Crisis: A History of Displacement*, WALL ST. J. (Sept. 22, 2015), <http://graphics.wsj.com/migrant-crisis-a-history-of-displacement/> [https://perma.cc/N6WF-43FG].

108. The Cold War split the world into two alliances of political and military groups: communists/socialists and anti-communists, respectively, under the leadership of the U.S.S.R. or under the leadership of the U.S.A. The so-called socialist camp, united under the Warsaw Pact (Treaty of Friendship, Cooperation, and Mutual Assistance (1955)), was a mutual defense treaty between the Soviet Union, Hungary, Czechoslovakia, Poland, Bulgaria, Romania, Albania, and East Germany and was the counterparty of the North Atlantic Treaty Organization (NATO) (1941). *Cold War Alliances*, ALPHA HIST., <http://alphahistory.com/coldwar/cold-war-alliances/> [https://perma.cc/DCX6-AUBL].

109. *History of UNHCR*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/en-us/history-of-unhcr.html> [https://perma.cc/8X7Z-FCV8].

110. The term was used by Winston Churchill in 1946 to describe the sphere of influence and control of the Soviet Union on the European continent. See Winston Churchill, *Sinews of Peace*, Address at Westminster College (Mar. 5, 1946), <http://www.cfr.org/defense-and-security/churchills-sinews-peace-speech/p18909> [https://perma.cc/UL59-NWX5].

111. *History of UNHCR*, *supra* note 109.

112. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 3 (Dec. 10, 1948).

113. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

114. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

on human rights law because the rights of displaced persons are human rights. This principle absolutely resonates with the Pope's teaching. He does not classify people: "Each person is precious; persons are more important than things, and the worth of an institution is measured by the way it treats the life and dignity of human beings, particularly when they are vulnerable"¹¹⁵

The first international law on refugees is the Convention Relating to the Status of Refugees (1951) and its Protocol (1967).¹¹⁶ There are 145 states that are Parties to the Refugee Convention (1951).¹¹⁷ In 2001, States issued a declaration reaffirming their commitment to the 1951 Convention and the 1967 Protocol.¹¹⁸ They also confirmed that the principle of *non-refoulement*, which describes the practice of not forcing refugees or asylum seekers to return to a country in which they are liable to be subjected to persecution, became a part of customary international law.¹¹⁹

C. The "Strangers" of the XXIst Century

Let us not fall into humiliating indifference or a monotonous routine that prevents us from discovering what is new! Let us ward off destructive cynicism! Let us open our eyes and see the misery of the world, the wounds of our brothers and sisters who are denied their dignity, and let us recognize that we are compelled to heed their cry for help! May we reach out to them and support them so they can feel the warmth of our presence, our friendship, and our fraternity! May their cry become our own, and together may we break down the barriers of indifference that too often reign supreme and mask our hypocrisy and egoism!¹²⁰

1. Refugees¹²¹

Despite the benefits of international collaboration established through the Geneva Convention Relating to the Status of Refugees (Refugee Convention), some technicalities and strict definitions have led to limitations. The Refugee Convention defines the term "refugee" as one who:

115. Pope Francis, World Day of Migrants and Refugees, *supra* note 101.

116. G.A. Res. 429 (V) (Dec. 14, 1950); G.A. Res. 2198 (XXI) (Dec. 16, 1966).

117. *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> [<https://perma.cc/GLY4-ACK9>].

118. Declaration of States parties to the 1951 Convention and/or its Protocol Relating to the Status of Refugees art. 4, Ministerial Meeting of States parties, Geneva, Switzerland, 12–13 Dec. 2001, UN Doc. HCR/MMSP/2001/09 (2002).

119. *Id.*

120. Pope Francis, *Misericordia et misera*, *supra* note 9.

121. The tabulation is illustrative, not comprehensive.

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹²²

The Refugee Convention emphasizes the cause of displacement as a significant criterion in the categorization of forced migrants, particularly those who claim asylum.¹²³ Armed conflicts around the globe and the need for a humanitarian solution revealed the weakness of employing this criterion: thousands of war-migrants are left beyond the main unified international law and procedures for asylum seekers.¹²⁴ This weakness impacts the degree to which there is access to humanitarian and legal help for displaced persons. It also had a negative impact on constructive international negotiations and the peace-building process. Lack of uniform law, tragic circumstances of travel, and the number of migrants proved this causal criterion inadequate.

Later, the regional development of law set an example of acceptance of people who fled home for other reasons. In 1969, the Organization of African Union (OAU) adopted the Convention Governing Specific Aspects of Refugee Problems in Africa.¹²⁵ According to Article 1 (2):

[T]he term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.¹²⁶

Similarly, the Cartagena Declaration on Refugees (1984), adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, expanded the category of “refugees.” Article 3 of the Declaration explicitly states that:

[T]he definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of

122. Convention on Refugees, *supra* note 116.

123. *Id.*

124. E.g., Markus Gehrsitz & Martin Ungerer, *Jobs, Crime, and Votes: A Short-Run Evaluation of the Refugee Crisis in Germany* 10 (IZA Institute of Labor Economics, Discussion Paper No. 10494, 2017), <https://ssrn.com/abstract=2903116>.

125. Convention Governing Specific Aspects of Refugee Problems in Africa, Assembly of Heads of State and Government, Sept. 10, 1969, 1001 U.N.T.S. 45.

126. *Id.* at art. 1 (2).

the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.¹²⁷

It was not until 2004 that binding European law introduced a new regime of protection in all countries of the European Union (EU).¹²⁸ However, this document was only the first phase in establishing the Common European Asylum System (CEAS). The issues of implementation and interpretation of EU law by Member States were not yet resolved. The ultimate objective of the system was to develop asylum policy that would incorporate not only the Refugee Convention and its Protocol but literally all major international human rights instruments.¹²⁹

The harmonization of eligibility criteria and the content of protection in the EU culminated in Directive 2011/95/EU.¹³⁰ The recast Qualification Directive applies to all EU Member States except the UK,

127. Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 22, 1984, <http://www.refworld.org/docid/3ae6b36ec.html> [<https://perma.cc/PPQ3-WBHW>].

128. Council Directive 2004/83, of the European Council of 29 Apr. 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise Need International Protection and the Content of the Protection Granted, 2004, O.J. (L.304) 12 (EC).

129. “[T]he recast Qualification Directive should be interpreted and applied in a manner consistent with relevant legal instruments including not only the 1951 Refugee Convention but also international human rights instruments *inter alia* the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities, the Convention against Torture, the Convention on the Rights of the Child (CRC) and the ECHR [European Convention on Human Rights]. Similarly, given the legally binding nature of the EU Charter, Member States, when implementing this Directive, must do so in a manner which is in compliance with the fundamental rights guaranteed under it. For this reason, the provisions of the Directive must be interpreted in the light of its general scheme and purpose in a manner that respects the fundamental rights and principles recognised by the EU Charter and in accordance with the objective of the CEAS as a whole.” See European Council on Refugees and Exiles, ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Qualification-Directive-recast_October-2013.pdf [<https://perma.cc/7HHH-ZWGT>].

130. Directive 2011/95 of the European Parliament and of the Council of 13 Dec. 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast), O.J. (L. 337) 9, 26, [hereinafter Directive 2011/95] <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=EN> [<https://perma.cc/42LA-HHVP>].

Ireland, and Denmark.¹³¹ The main objective of the Directive was to adopt common criteria in all Member States and procedures for granting international protection (refugee or subsidiary protection status)¹³² so flight to one State would not be more attractive or discriminatory than to another. The Directive grants beneficiaries of subsidiary protection the same rights and benefits as those who are refugees.¹³³ The Directive also includes the definition of “serious harm.”¹³⁴

The late twentieth century also featured discussion on the convergence of law in Europe.¹³⁵ The complex and unified approach of this convergence, which considers different types of threats that result in flight and the concomitant obligation of the host state to provide refuge to displaced people, is a step toward mercy in compliance with the admonition of the Pope, who is on the side of those who are in need.

In 2015, Europe experienced a record high flow of refugees and other migrants into the continent.¹³⁶ Although transit states like Greece, Turkey, and Libya absorbed the greatest impact, the migration challenged every European state and the legal system of the European Union as a whole. The European community was faced with more than 1 million displaced people who crossed into the EU.¹³⁷ Pope Francis responded to the European confusion:

131. *Id.*

132. According to Directive 2011/95, “‘refugee’ means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.” *Id.* art. 2(d). Additionally, Art. 2(f) states, “‘person eligible for subsidiary protection’ means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.” *Id.* art. 2(f).

133. *Id.* art. 22–35.

134. *Id.* art. 15 (“[S]erious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict[.]”).

135. See Meryll Dean, *Bridging the Gap: Humanitarian Protection and the Convergence of Laws in Europe*, 20 EUR. L.J. 34 (2014). The article discusses the issue of interpretation of law, and development of a “common interpretation methodology” in Europe, as well as interplay of Migration Law, Human Rights Law, and International Humanitarian Law.

136. See Phillip Connor, *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RES. CTR. (Aug. 2, 2016), <http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/> [https://perma.cc/EKW6-5XPJ].

137. *Id.*

The worries expressed by institutions and people, both in Greece and in other European countries, are understandable and legitimate. We must never forget, however, that migrants, rather than simply being a statistic, are first of all persons who have faces, names and individual stories. Europe is the homeland of human rights, and whoever sets foot on European soil ought to sense this, and thus become more aware of the duty to respect and defend those rights. Unfortunately, some, including many infants, could not even make it to these shores: they died at sea, victims of unsafe and inhumane means of transport, prey to unscrupulous thugs.¹³⁸

2. Reflection of the Pope's Teachings in International Human Rights Law Relating to Children

And yet among migrants, children constitute the most vulnerable group, because as they face the life ahead of them, they are invisible and voiceless: their precarious situation deprives them of documentation, hiding them from the world's eyes; the absence of adults to accompany them prevents their voices from being raised and heard. In this way, migrant children easily end up at the lowest levels of human degradation, where illegality and violence destroy the future of too many innocents, while the network of child abuse is difficult to break up.¹³⁹

The United Nations International Children's Emergency Fund (UNICEF) states that nearly one of every 200 children in the world is a child refugee. Worldwide, nearly 28 million children have been forcibly displaced.¹⁴⁰ In the ten-year period between 2005 and 2015, the global number of child refugees under the protection of UNHCR more than doubled, from 4 million to over 8 million.¹⁴¹

The legal history of the international protection of children's rights began in 1924 with the Declaration of the Rights of the Child, adopted by the League of Nations.¹⁴² It developed later in the UN Declaration of the Rights of the Child (1959),¹⁴³ and currently is proclaimed in the UN

138. *Pope Francis' Full Speech to Citizens and Catholic Community in Lesbos*, *supra* note 105.

139. Pope Francis, *World Day of Migrants and Refugees*, *supra* note 101.

140. UNICEF, *Uprooted: The Growing Crisis for Refugee and Migrant Children* 18 (2016), https://www.unicef.org/publications/files/Uprooted_growing_crisis_for_refugee_and_migrant_children.pdf [https://perma.cc/K33L-SSMC]. This number includes ten million child refugees, approximately one million asylum-seeking children, and an estimated seventeen million children displaced within their own countries by violence and conflict. Yet more children have been displaced by natural disasters and other crises, though they are not included in this total. *See id.*

141. *Id.*

142. Geneva Declaration of the Rights of the Child (Sept. 26, 1924), <http://www.un-documents.net/gdrc1924.htm> [https://perma.cc/SMM7-2EZL].

143. G.A. Declaration of the Rights of the Child, Nov. 20, 1959, A/RES/1386 (XIV).

Convention on the Rights of the Child (CRC).¹⁴⁴ The CRC explicitly emphasizes the role of the state in protecting children's rights within its jurisdiction, regardless of whether a child remains within her country of birth, residence, or abroad.¹⁴⁵

The CRC is the most widely ratified human rights treaty.¹⁴⁶ Every country has ratified the CRC except the United States.¹⁴⁷ While the United States may have various arguments for resisting ratification of the CRC, fear appears to be one of them.

The fear of change and reform seems to be paralyzing certain political groups in the United States. Ratification of the CRC could lead to the reform of criminal justice, maternity leave, and social security.¹⁴⁸ There is also fear relating to children's choice, instead of their parents, in terms of religion and other personal preferences.¹⁴⁹ Fear of "losing control" under American domestic law, particularly family law, is embodied in the argument that children are better protected by domestic laws than they would be under international law.¹⁵⁰

Conversely, the European Union incorporated the CRC, with particular reference to the law on forced migration. This is directly stated in European Directive 2011/95/EU in its definition of the "best interests of the child."¹⁵¹ The Convention also includes direct reference to refugee law and includes the norm against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.¹⁵² The CRC requires "appropriate protection and humanitarian assistance in the enjoyment of applicable rights" of a child who "is seeking refugee status or who is considered a refugee," regardless of whether he or she is

144. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

145. See *id.* pt. 1, art. 2.

146. *CRC Frequently Asked Questions*, UNICEF, https://www.unicef.org/crc/index_30229.html [<https://perma.cc/CJM6-JHK9>].

147. This list of ratifying countries is up to date and indicates that the United States is the only state not to ratify the CRC. *Status of Treaties: Convention on the Rights of the Child*, UNITED NATIONS, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=en [<https://perma.cc/8KPY-YNEL>].

148. S.C., *Why Won't America Ratify the UN Convention on Children's Rights?*, ECONOMIST: THE ECONOMIST EXPLAINS (Oct. 7, 2013), <http://www.economist.com/blogs/economist-explains/2013/10/economist-explains-2> [<https://perma.cc/QLD2-6A4U>].

149. Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty*, WASH. POST: POST PARTISAN (Nov. 21, 2014), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/?utm_term=.934d103fa5be [<https://perma.cc/8GW2-3E8F>].

150. *Id.*; S.C., *supra* note 148.

151. Directive 2011/95, *supra* note 130, art. 18.

152. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art 2.

accompanied by parents or other adults.¹⁵³ The states are also obliged to cooperate with the United Nations and other organizations, particularly in tracing the whereabouts of any refugee child's parents or family members to obtain information necessary for the family's reunification. In cases where no parents or other family members can be found, the child must be accorded the same protection as other children permanently or temporarily deprived of their family environment for any reason.¹⁵⁴ However, the reality does not always reflect the law.

The Convention explicitly defines the duty of the state to:

[T]ake all appropriate measures to promote [the] physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts."¹⁵⁵ Recovery and reintegration must take place in an environment that "fosters the health, self-respect, and dignity of the child."¹⁵⁶

While this international law reflects a humane perspective, the reality is often otherwise. The life of a child migrant is full of dangers. The most common forms of violence are human trafficking¹⁵⁷ and smuggling.¹⁵⁸

153. *Id.* art. 22.

154. *Id.* art. 22.

155. *Id.* art. 39.

156. *Id.*

157. U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, Art. 3(a) (defining trafficking in persons as: "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."). According to UNICEF,

trafficking is a concern in every region of the world: victims with 152 different citizenships were identified in 124 countries between 2010 and 2012. Globally, the vast majority of detected trafficking is for either sexual exploitation (just over half) or forced labour (40 per cent), although there is notably more trafficking for sexual exploitation in Europe and Central Asia and more forced labour trafficking in East Asia, South Asia and the Pacific.

See UNICEF, *supra* note 140, at 37.

158. UNICEF, *supra* note 140, at 38 ("[S]muggling begins as a commercial transaction between a smuggler and migrant, in which a smuggler agrees to arrange illegal passage for a migrant into another country in exchange for financial or material benefits from the migrants. While that relationship may change over the course of a journey, sometimes resulting in violence or turning into trafficking, it is different in nature than trafficking, which always implies the threat of force or coercion. Children travelling on their own are particularly vulnerable to the most dangerous aspects of smuggling—including dangerous routes of passage, abandonment by smugglers, and inhumane treatment—making it an issue of ongoing concern for the well-being of child refugees and migrants.").

There is a considerable lack of data on crime, exploitation, and violence against migrant children. One of the main reasons for this deficiency is the “hidden nature” of those crimes.¹⁵⁹ According to the Pope, the most powerful force driving the exploitation and abuse of children is demand:

[T]he dividing line between migration and trafficking can at times be very subtle. There are many factors which contribute to making migrants vulnerable, especially if they are children: poverty and the lack of means to survive — to which are added unrealistic expectations generated by the media; the low level of literacy; ignorance of the law, of the culture and frequently of the language of host countries. All of this renders children physically and psychologically dependent. But the most powerful force driving the exploitation and abuse of children is demand. If more rigorous and effective action is not taken against those who profit from such abuse, we will not be able to stop the multiple forms of slavery where children are the victims.¹⁶⁰

According to the International Labour Organization in 2014, there were approximately 21 million victims of human trafficking, among whom 5.5 million were children.¹⁶¹ Profit from human trafficking reaches approximately 150 billion dollars annually.¹⁶²

In his Message for the World Day of Migrants and Refugees on January 15, 2017, Pope Francis stressed the importance of work “in their country of origin” on issues that cause the flight of people:

Since this is a complex phenomenon, the question of child migrants must be tackled at its source. Wars, human rights violations, corruption, poverty, environmental imbalance and disasters, are all causes of this problem. Children are the first to suffer, at times suffering torture and other physical violence, in addition to moral and psychological aggression, which almost always leave indelible scars.

159. “[T]he only data available are generally based on the few reports that come to light — for example when trafficking victims are found and appear in official police, immigration or social welfare statistics. Some figures are calculated from data on cases that come to court, hospital and health reports on victims, or national data that are often a mix of police and immigration figures, social services input” See IPEC, TRAINING MANUAL TO FIGHT TRAFFICKING IN CHILDREN FOR LABOR, SEXUAL AND OTHER FORMS OF EXPLOITATION—TEXTBOOK 1: UNDERSTANDING CHILD TRAFFICKING 34 (2009), http://www.ilo.org/ipecc/Informationresources/WCMS_IPEC_PUB_10771/lang-en/index.htm [<https://perma.cc/SW2Q-CXMA>].

160. Pope Francis, World Day of Migrants and Refugees, *supra* note 101.

161. INT’L LABOUR ORG., PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR 7 (2014), http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_243391.pdf [<https://perma.cc/4VPH-MS9L>].

162. *Human Trafficking by the Numbers: Fact Sheet*, HUMAN RIGHTS FIRST (Jan. 2016), <http://www.humanrightsfirst.org/sites/default/files/TraffickingbytheNumbers.pdf> [<https://perma.cc/CB7T-AWGG>]; *supra* note 161, at 2.

It is absolutely necessary, therefore, to deal with the causes which trigger migrations in the countries of origin. This requires, as a first step, the commitment of the whole international community to eliminate the conflicts and violence that force people to flee. Furthermore, far-sighted perspectives are called for, capable of offering adequate programmes for areas struck by the worst injustice and instability, in order that access to authentic development can be guaranteed for all. This development should promote the good of boys and girls, who are humanity's hope.¹⁶³

Detention and encampment of migrants are other big issues. Pope Francis calls on the states to consider migrants' need for respect and dignity and never to ignore the duty to resolve child migrants' problems:

The condition of child migrants is worsened when their status is not regularized or when they are recruited by criminal organizations. In such cases they are usually sent to detention centers. It is not unusual for them to be arrested, and because they have no money to pay the fine or for the return journey, they can be incarcerated for long periods, exposed to various kinds of abuse and violence. In these instances, the right of states to control migratory movement and to protect the common good of the nation must be seen in conjunction with the duty to resolve and regularize the situation of child migrants, fully respecting their dignity and seeking to meet their needs when they are alone, but also the needs of their parents, for the good of the entire family.

Of fundamental importance is the adoption of adequate national procedures and mutually agreed plans of cooperation between countries of origin and of destination, with the intention of eliminating the causes of the forced emigration of minors.¹⁶⁴

Article 37 regulates the conditions of child detention, and the rights of children while they are deprived of liberty. This issue remains an acute problem. In its report, UNICEF states:

Worldwide, more than 100 countries are estimated to detain children for migration-related reasons. The exact number of children who face detention solely because of their migration status is not known, but detention's lasting consequences for children are clearly documented. Children subjected to immigration detention experience both physical and psychological trauma, shaping their immediate well-being as well as their lifelong prospects. Court rulings in multiple countries have made it clear that migration-related detention is not appropriate for children, including as a deterrence mechanism.

163. Pope Francis, World Day of Migrants and Refugees, *supra* note 101.

164. *Id.*

In 2012, the Committee on the Rights of the Child emphatically condemned the practice, arguing that “Children should not be criminalized or subject to punitive measures because of their or their parent’s migration status. The detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child.” The Secretary-General has recently echoed this sentiment, calling on governments “to consider alternatives to detention for purposes of immigration control and to adopt a commitment never to detain children for this purpose.”¹⁶⁵

Protracted encampment violates human rights specified in international law, including, *inter alia*, in the 1951 Refugee Convention.¹⁶⁶ In most camps people cannot exercise their rights of movement, employment, and wage payment.¹⁶⁷ The despair and frustration within an encamped community affects family lives, aggravates domestic violence, and fosters sexual abuse.¹⁶⁸ Further, the lack of opportunities for youth and children leads to demoralization and crime.¹⁶⁹

The appropriate response to children’s migration is complex. Law and international cooperation are the first remedies to address this; however, the issue necessarily has economic, political, humanitarian, cultural, and moral dimensions. Despite international efforts toward legalization of child migrants, as well as the proclaimed rights of the child and relevant duties of the states, many children remain beyond the law.

Being unemployed or not receiving a sufficient salary; not being able to have a home or a land in which to live; experiencing discrimination on account of one’s faith, race or social status: these are just a few examples of many situations that attack the dignity of the person. In the face of such attacks, Christian mercy responds above all with vigilance and solidarity. How many situations exist today where we can restore dignity to individuals and make possible a truly humane life! Let us think only about the many children who suffer from forms of violence that rob them of the joy of life. I keep thinking of their sorrowful and bewildered faces. They are pleading for our help to be set free from the slavery of the contemporary world. These children are the young adults of tomorrow. How are we preparing them to live with dignity and responsibility? With what hope can they face their present or their future?¹⁷⁰

165. UNICEF, *supra* note 140, at 39.

166. *See generally* Convention on Refugees, *supra* note 116.

167. Loescher, *supra* note 102, at 313.

168. *Id.* at 314.

169. *Id.*

170. Pope Francis, *Misericordia et misera*, *supra* note 9, para. 19.

3. Environmental Migrants

There is one more category of migrants to which Pope Francis has alerted us: people who flee environmental disasters.

There has been a tragic rise in the number of migrants seeking to flee from the growing poverty caused by environmental degradation. They are not recognized by international conventions as refugees; they bear the loss of the lives they have left behind, without enjoying any legal protection whatsoever. Sadly, there is widespread indifference to such suffering, which is even now taking place throughout our world. Our lack of response to these tragedies involving our brothers and sisters points to the loss of that sense of responsibility for our fellow men and women upon which all civil society is founded.¹⁷¹

According to the Norwegian Refugee Council, more than 19.3 million people became displaced by disasters in 100 countries worldwide in 2014.¹⁷² There is no solid international response to this issue. Most environmental migrants stay within their countries' borders and are treated as internally displaced persons.¹⁷³ The Guiding Principles on International Displacement address the rights of environmental migrants;¹⁷⁴ however, those who cross an international border remain at the mercy of the host-states, and the resolution of their fate depends on domestic law.¹⁷⁵

4. Migration Caused by Foreign Occupation

Pope Francis consistently makes a connection between the cause of flight, the remedies, and the status of displaced persons, which brings us to the tragic consequences of Russian aggression in Ukraine. Russia occupied, and continues effectively to control, a part of Ukrainian

171. Pope Francis, *Encyclical Letter, Laudato si': On Care for Our Common Home*, para. 25 (May 24, 2015), http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html [<https://perma.cc/YX4R-HKE2>].

172. *19.3 Million Displaced by Disasters but "Mother Nature Not to Blame" Says New Report*, NORWEGIAN REFUGEE COUNCIL: INTERNAL DISPLACEMENT MONITORING CTR. (July 20, 2015), <http://www.internal-displacement.org/assets/library/Media/201507-globalEstimates-2015/20150706-GE-2015Press-release-FINAL-v1.pdf> [<https://perma.cc/43GF-K89P>].

173. Frank Laczko & Christine Aghazarm, *Introduction and Overview: Enhancing the Knowledge Base*, in *MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: ASSESSING THE EVIDENCE* 7, 18, 23, 25 (Frank Laczko & Christine Aghazarm eds., 2009), http://publications.iom.int/system/files/pdf/migration_and_environment.pdf [<https://perma.cc/9PQA-X49H>].

174. Representative of the Secretary-General Francis M. Deng, *Report Pursuant to Commission Resolution 1997/39, Addendum: Guiding Principles on Internal Displacement*, U.N. DOC. E/CN.4/1998/53/ADD.2 (Feb. 11, 1998), <http://www.un-documents.net/gpid.htm> [<https://perma.cc/W9KH-KRRC>] [hereinafter *Guiding Principles*].

175. Iryna Zaverukha, *The Trajectory of Crimean Flight 2014: Falling Through the Cracks Between the Rock of "Refugee" and the Hard Place of "Internally Displaced Person*, 49 *INT'L LAW.* 373, 374–77 (2016). See generally INTERNAL DISPLACEMENT MONITORING CTR., *supra* note 172.

territory: the Crimean Peninsula, the Donetsk region, and the Luhansk region.¹⁷⁶ This raises the issue of the status of people who have found themselves subject to foreign occupation.

The issue of *de jure* and *de facto* jurisdiction of the state and of the occupying power, and the location and regime of the international border, raise substantial doubts whether international law offers an adequate criterion to classify these displaced persons. . . . [P]eople who have fled foreign occupation remain in a unique situation, compared to refugees or other categories of internally displaced persons.

. . . [T]he Crimean example demonstrates the lack of an adequate system of protection for such displaced persons. It also addresses the uncertainty that characterizes the security and military measures of a state that is subject to intervention and occupation, the issue of liability for abuse of human rights in occupied territory, and the reasons that led people to flee their homeland. Domestication of the liability for this international conflict is inappropriate and misleading.¹⁷⁷

III. ARGUING AGAINST AND RESISTING FEARS

“Let us remember the Golden Rule: ‘Do unto others as you would have them do unto you’ (*Mt 7:12*). This Rule points us in a clear direction. Let us treat others with the same passion and compassion with which we want to be treated.”¹⁷⁸

According to the UN Refugee Agency UNHCR, 53% of refugees worldwide came from three countries: Somalia—1.1 million people; Afghanistan—2.7 million; and Syria—4.9 million.¹⁷⁹

Europeans and Americans most often cite three fears toward refugees: increase of crimes in the host country; economic burden (fewer jobs, decrease of social benefits); and the threat of terrorism.¹⁸⁰

176. See Tom Burridge, *Eastern Ukraine Conflict: A New, Bloody Chapter*, BBC (Feb. 2, 2017), <http://www.bbc.com/news/world-europe-38837730> [<https://perma.cc/ZVG8-N82F>].

177. Zaverukha, *supra* note 175, at 374. The article argues that, while United Nations High Commissioner for Refugees and the Ukrainian authorities treat the category of those who fled Crimea to the Ukrainian mainland as internally displaced persons, the question remains as to whether the concept of internally displaced persons (IDP) described in the Guiding Principles on Internal Displacement should apply to displaced persons who flee foreign occupation. *See id.* The article takes the position that the obligation of the state to protect people’s rights should be proportional to the jurisdiction that the state enjoys. *See id.*

178. Pope Francis, Address to Congress, *supra* note 4.

179. UNHCR, *supra* note 6.

180. Richard Wike, Bruce Stokes & Katie Simmons, *Europeans Fear Wave of Refugees Will Mean More Terrorism, Fewer Jobs*, PEW RES. CTR. 3–4 (July 11, 2016), <http://www.pewglobal.org/files/2016/07/Pew-Research-Center-EU-Refugees-and-National-Identity-Report-FINAL-July-11-2016.pdf> [<https://perma.cc/M72B-S9LE>].

A. Fear of Crime and Economic Burden

“It is not about the facts, it is not about the women, it is not about the victim, it is not even really about the perpetrator. It is about fear[.] . . . And the essence of fear is that which is feared becomes reality.”¹⁸¹

Fear of crime committed by refugees in a host country is the least dominant of the three principal fears associated with refugees. Only in Italy and Sweden do close to half of the populations believe refugees are more to blame for crime than other people.¹⁸² At least half of the population in five nations say refugees will take away jobs and social benefits: “Hungarians, Poles, Greeks, Italians and French identify this as their greatest concern.”¹⁸³

One of the very few studies on this subject was conducted in Germany,¹⁸⁴ the country hosting the highest number of refugees in Europe.¹⁸⁵ Although the study offers only a short-term perspective, it evaluates the issue in its complexity. It shows that, for example, in different regions of Germany, regardless of whether it is a high- or low-migration region, the criminal situation in terms of number and the types of crimes is similar to what existed before the beginning of the exodus from Syria.¹⁸⁶ The authors state that different rates of migrant influx appear to be unrelated to changes in crime rates.¹⁸⁷

According to Germany’s Federal Criminal Office,

Of the roughly two million people investigated for all crimes, just 6 percent were migrants.

Of 2,721 crimes that ended in a death, migrants were responsible for 233, or about 9 percent. And of 1,683 cases of sexual abuse, including rape, migrants were responsible for about 5 percent.

All of those percentages were at least double the previous year’s, but the BKA report noted that the migrant population had increased by 357 percent.¹⁸⁸

181. Melissa Eddy, *Refugee’s Arrest Turns a Crime into National News (and Debate) in Germany*, N.Y. TIMES (Dec. 9, 2016), https://www.nytimes.com/2016/12/09/world/europe/refugees-arrest-turns-a-crime-into-national-news-and-debate-in-germany.html?_r=0 (quoting Jakob Augstein).

182. Wike et al., *supra* note 180, at 4.

183. *Id.*

184. See generally Gehrsitz & Ungerer, *supra* note 124 (examining employment, crime, and elections in Germany within the context of the refugee crisis).

185. See generally *Migrant Crisis: Migration to Europe Explained in Seven Charts*, BBC (Mar. 4, 2016), <http://www.bbc.com/news/world-europe-34131911> [<https://perma.cc/AB3T-U3HM>].

186. Gehrsitz & Ungerer, *supra* note 124, at 9–10.

187. *Id.*

188. Eddy, *supra* note 181.

Papa Francisco stresses the importance of integration and encourages migrant communities to bring their best behavior into the host country:

I address a special greeting to the representatives of various ethnic communities. Dear friends, I hope you may live peacefully in the places that receive you, respecting their laws and traditions, and at the same time, safeguarding the values of your culture of origin. Encountering different cultures is always an enrichment for all!¹⁸⁹

The response to economic outcomes is more complicated. Expenses for humanitarian assistance increased substantially, and provided for millions of refugees and migrants in different countries. For example, since the beginning of the refugee crisis in mid-2014, the European Commission has provided humanitarian aid amounting to over 22.5 million euro to the Western Balkans (Serbia, Macedonia), and more than 8 million euro to Libya.¹⁹⁰ European Union funding for emergency support in Greece totaled 83 million euro for 2016.¹⁹¹

The countries that host the greatest number of refugees need to undertake a complex package of reforms: adjusting their labor markets; lessening barriers for legal employment and entrepreneurship; removing bans on refugee employment; implementing minimum wage requirements; and many others, depending on the particular circumstances in each region.¹⁹²

B. Fear of Terrorism: Myths and Realities

According to a Pew Research Center survey, in eight of the ten European nations surveyed, half or more believe incoming refugees increase the likelihood of terrorism.¹⁹³ The flow of refugees from Syria and the terrorist attacks in Paris on November 13, 2015,¹⁹⁴ and San

189. Pope Francis, *Angelus at Saint Peter's Square* (Jan. 15, 2017), https://w2.vatican.va/content/francesco/en/angelus/2017/documents/papa-francesco_angelus_20170115.html [https://perma.cc/V7JN-RJAG].

190. EUROPEAN CIVIL PROT. & HUMANITARIAN AID OPERATIONS, *Refugee Crisis in Europe*, http://ec.europa.eu/echo/refugee-crisis_en [https://perma.cc/L5XU-QEHK].

191. *Id.*

192. Alex Nowrasteh, *Economics of the Syrian Refugee Crisis*, CATO INST. (May 2, 2016, 3:06 PM), <https://www.cato.org/blog/economics-syrian-refugee-crisis> [https://perma.cc/3FSG-EKFH].

193. Wike et al., *supra* note 180, at 29.

194.

Three suicide bombers with explosives-laden vests opened fire on Bataclan concert hall, . . . in 11th arrondissement area, Paris, Ile-de-France region, France. In addition, to the three assailants, 89 people were killed and at least 101 others were injured in the attack. . . . Additionally, at least 20 civilians were taken hostage for at least two hours during the incident. This was one of eight coordinated attacks carried out by the Islamic State of Iraq and the Levant (ISIL) in Paris on November 13, 2015. The Islamic State of Iraq and the Levant (ISIL) claimed responsibility for the incident and stated that the attack was

Bernardino on December 2, 2015,¹⁹⁵ intensified these fears in Europe and in the United States. Public opinion in the United States regarding the Syrian refugee crisis shifted dramatically in the following eight years.¹⁹⁶ The rhetoric during the U.S. Presidential election campaigns of 2008 and 2016 presented a dramatic change. Galston called it a “tectonic shift” that “underscores impact of high profile events and the plasticity of public sentiment.”¹⁹⁷ The quality of leadership influences society. Modern populism feeds fear of terrorism, and public opinion is reflected in political slogans. As a result, falsehood that is often repeated substitutes for the truth.

Myth one: People are not willing to deal with refugees and want them to return to their countries of origin.

A global survey conducted by Amnesty International shed light on people’s willingness to let refugees live in their countries, towns, neighborhoods, and homes.¹⁹⁸ The research showed that, globally, one person in ten would take refugees into their home; 32% would accept refugees in their neighborhood; 47% in their city, town, or village; and 80% in their country.¹⁹⁹ “Globally, only 17% said they would refuse refugees entry to their country. Only in one country, Russia, did more than a third of people say they would deny them access (61%).”²⁰⁰ Globally, “73% of people agreed that people fleeing war or persecution should be

carried out in retaliation for France’s participation in the United States-led coalition that carried out airstrikes on ISIL targets in Iraq and Syria.

See Global Terrorism Database, *Incident Summary: 11/13/2015*, <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=201511130008> [<https://perma.cc/UXG2-CYQS>].

195.

Two assailants opened fire on a holiday party at the Inland Regional Center for disabled people in San Bernardino, California, United States. The assailants also attempted to trigger an explosive device, which failed to detonate. Fourteen people were killed and at least 17 people were injured in the attack. Both assailants, identified as Syed Rizwan Farook and Tashfeen Malik, fled the scene but were located and killed in a shootout with police later the same day. No group claimed responsibility for the incident.

See Global Terrorism Database, *Incident Summary: 12/02/2015*, <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=201512020012> [<https://perma.cc/TF3B-97DB>].

196. Elizabeth McElvin, *What Do Americans Really Think about Syrian Refugees?*, BROOKINGS INST. (Mar. 4, 2016), <https://www.brookings.edu/blog/markaz/2016/03/04/what-do-americans-really-think-about-syrian-refugees/> [<https://perma.cc/Y34K-GZXC>].

197. *Id.*

198. *Refugees Welcome Index Shows Government Refugee Policies Out of Touch With Public Opinion*, AMNESTY INT’L (May 19, 2016, 16:43 UTC), <https://www.amnesty.org/en/latest/news/2016/05/refugees-welcome-index-shows-government-refugee-policies-out-of-touch/> [<https://perma.cc/XTR9-8W46>].

199. *Id.*

200. *Id.*

able to take refuge in other countries”; “66% of people said their governments should do more to help refugees.”²⁰¹

Amnesty International Secretary General Salil Shetty concluded that:

People seem to be more committed to principles set down in international law than many of their governments, who are increasingly tearing up or ignoring commitments that have stood for 65 years.

. . .

Politicians should stop pandering to intolerance and division, and listen to their people who want to help their fellow human beings. They must address the shameful imbalance that sees 86% of the world’s refugees welcomed by the world’s poorer countries while the wealthy ones renege on their responsibilities.²⁰²

In the United States, “[b]y a narrow 51%–45% margin, more approve than disapprove of the U.S. decision to increase the number of refugees”²⁰³ In addition, 73% of Americans are in favor of U.S. assistance in “search and rescue operations in the Mediterranean Sea,” and 83% believe that the United States should provide direct humanitarian assistance to the refugees.²⁰⁴

Myth two: Terrorist attacks are committed by refugees.

A Cato Institute paper produced some interesting data:

[F]rom 1975 to the end of 2015, America allowed in just over 700,000 asylum-seekers and 3.25 million refugees. Four of those asylum-seekers became terrorists and killed four people in attacks on U.S. soil. Twenty of the 3.25 million refugees became terrorists and they killed three Americans on U.S. soil.²⁰⁵

Myth three: The United States and the European Union host the highest number of refugees and displaced persons.

201. *Id.*

202. *Id.*

203. *Mixed Views of Initial U.S. Response to Europe’s Migrant Crisis*, PEW RESEARCH CTR. (Sept. 29, 2015), <http://www.people-press.org/2015/09/29/mixed-views-of-initial-u-s-response-to-europes-migrant-crisis/> [<https://perma.cc/87M3-SZU5>].

204. *CNN/ORC Poll: Full Results on Migrant Crisis*, CNN (Sept. 14, 2015), <http://www.cnn.com/2015/09/14/politics/migrant-crisis-refugees-poll-cnn-orc/index.html> [<https://perma.cc/WJD9-4732>].

205. *Id.* Alex Nowrasteh, *The Terrorism Risk of Asylum-Seekers and Refugees: The Minnesota, New York, and New Jersey Terrorist Attacks*, CATO INST. (Sept. 20, 2016, 1:49 PM), <http://www.cato.org/blog/terrorism-risk-asylum-seekers-refugees-minnesota-new-york-new-jersey-terrorist-attacks> [<https://perma.cc/SV5V-7KMR>].

According to the UNHCR, 39% of all displaced people are being hosted in the Middle East and North Africa; 29% in Africa; 14% in Asia and Pacific; 12% in the Americas; and 6% in Europe.²⁰⁶ Among the top hosting countries of refugees are Turkey, Pakistan, Lebanon, the Islamic Republic of Iran, Ethiopia, and Jordan.²⁰⁷

The Syrian conflict caused the displacement of an estimated 11 million Syrians; however, 6.6 million of them remain in Syria as internally displaced persons.²⁰⁸ According to the UNHCR, 5,020,470 persons are registered as Syrian Refugees.²⁰⁹ Despite the inflammatory political rhetoric of Europeans and Americans about threats from Syrian flight, the majority of Syrian refugees are not in Europe or the United States. Among the countries who host the most Syrian refugees are: Turkey—2,967,149 people;²¹⁰ Lebanon—1,011,366 people,²¹¹ which is 24% of Lebanon's population (the highest Syrian refugee-to-population ratio in the world);²¹² Jordan—657,000 people;²¹³ Iraq—235,526 people;²¹⁴ and Egypt—120,154 people.²¹⁵

In Europe, the number of those resettled varies dramatically between countries. Between April 2011 and October 2016, there were 884,461 asylum applications in a total of thirty-seven European countries.²¹⁶ Germany and Sweden combined have received 64% of all Syrian asylum applications in Europe.²¹⁷ The variation among countries is substantial. Germany received 456,023 applications—the highest amount—while

206. UNHCR, *supra* note 6.

207. *Id.*

208. *The Syrian Refugee Crisis and Its Repercussions for the EU*, SYRIAN REFUGEES (Sept. 2016), <http://syrianrefugees.eu> [<https://perma.cc/D288-UMHZ>].

209. *Syria Regional Refugee Response, Regional Overview*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/regional.php> [<https://perma.cc/9L7W-KKUT>].

210. *Syria Regional Refugee Response, Turkey*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/country.php?id=224> [<https://perma.cc/66XW-8TLS>].

211. *Syria Regional Refugee Response, Lebanon*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/country.php?id=122> [<https://perma.cc/EN7C-2JF8>].

212. Nowrasteh, *supra* note 192.

213. *Syria Regional Refugee Response, Jordan*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/country.php?id=107> [<https://perma.cc/QG79-9JGS>].

214. *Syria Regional Refugee Response, Iraq*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/country.php?id=103> [<https://perma.cc/C6UM-RD9W>].

215. *Syria Regional Refugee Response, Egypt*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/country.php?id=8> [<https://perma.cc/7Q9Q-PUX3>].

216. UNHCR, *supra* note 209.

217. *Id.*

Poland received 795 applications.²¹⁸ From the outset of the conflict in Syria in 2011 until the end of fiscal year 2016, the United States resettled 18,007 Syrian refugees,²¹⁹ the majority of whom, 12,587, were admitted during the fiscal year of 2016.²²⁰

Another relevant observation is that concerns about refugees are not necessarily related to the number of migrants coming to the country. Poland, “where 73% say refugees are a major threat,” has had far fewer applications than Germany, which has had several hundred thousand applications.²²¹ “Just 31% of Germans are concerned about refugees.”²²² “Building a nation calls us to recognize that we must constantly relate to others, rejecting a mindset of hostility in order to adopt one of reciprocal subsidiarity, in a constant effort to do our best. I am confident that we can do this.”²²³

C. Fear of Diversity

[W]hen the stranger in our midst appeals to us, we must not repeat the sins and the errors of the past. We must resolve now to live as nobly and as justly as possible, as we educate new generations not to turn their back on our “neighbors” and everything around us.²²⁴

Unspoken fear of diversity is often expressed in strong sentiment toward national identity. The Pew Research Center identified four questions regarding national identity: the importance of being born in the country, being able to speak the national language, belonging to the dominant religious denomination of the country, and sharing the customs and traditions of that country.²²⁵ Among those four, the ability to converse in the language of the country is the strongest expectation in Europe and the United States²²⁶ “More than nine-in-ten people in all of the nations

218. *Syria Regional Refugee Response, Europe: Syrian Asylum Applications from Apr. 2011 to Oct. 2016*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/asylum.php> [https://perma.cc/C7XV-98GF].

219. Jie Zong & Jeanne Batalova, *Syrian Refugees in the United States*, MIGRATION POL’Y INST. (Jan. 12, 2017), <http://www.migrationpolicy.org/article/syrian-refugees-united-states> [https://perma.cc/SHY8-HASX].

220. *Id.* Jens Manuel Krogstad & Jynnah Radford, *Key Facts about Refugees to the U.S.*, PEW RES. CTR. (Jan. 30, 2017), <http://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/> [https://perma.cc/PRT7-8JU8]. “The U.S. admitted 84,995 refugees in the fiscal year ending in September 2016”

221. Wike et al., *supra* note 180, at 29.

222. *Id.*

223. Pope Francis, Address to Congress, *supra* note 4.

224. *Id.*

225. Wike et al., *supra* note 180, at 11.

226. *Id.* at 10, 15–16.

surveyed say that to be a true national of their country it is important to speak the country's national language."²²⁷

Relatively few Europeans believe diversity has a positive impact on their countries. In many countries, the prevailing view is that diversity makes no difference in the quality of life.²²⁸ At 36%, Sweden registers the highest percentage of people among surveyed European countries who "believe[] an increasingly diverse society makes their country a better place to live."²²⁹ "In contrast, 58% Americans say that growing diversity makes the U.S. a better place to live."²³⁰ In response to the statistic of fear of diversity, it is appropriate to quote Pope Francis' address to the Hispanic Community in the United States:

I repeat, do not be ashamed of what is part of you, your life blood. You are also called to be responsible citizens, and to contribute fruitfully . . . to the life of the communities in which you live. I think in particular of the vibrant faith which so many of you possess, the deep sense of family life and all those other values which you have inherited. By contributing your gifts, you will not only find your place here, you will help to renew society from within.²³¹

D. "Islamophobia"

God created mankind to be one family; when any of our brothers and sisters suffer, we are all affected. We all know from experience how easy it is for some to ignore other people's suffering and even to

227. *Id.* at 15. The study illustrates that "[m]ajorities in all of these countries say it is very important to be able to converse in the local tongue. This includes 84% of the Dutch and 81% of the British and Hungarians." *Id.* (emphasis in original) "Americans also see language facility as important to national identity. Roughly nine-in-ten people in the United States believe it is very important (70%) or somewhat important (22%) to speak English to be a true American." *Id.* at 16. "There is less agreement about the need to be born in a given country. Still, a median of 58% say it is important for someone to be born in a country to be truly considered a national of that country; a third think this is very important. Religion is generally seen as less central to national identity. However, it is an essential factor to many in Greece, where 54% say it is very important to be Christian to be truly Greek." *Id.* at 10. "A median of 86% believe sharing national customs and traditions is important, with 48% saying this is very important. Fully 68% in Hungary say sharing national customs and traditions is very important for being truly Hungarian, and 66% express similar sentiments in Greece. In contrast, fewer than four-in-ten consider sharing these traditions and customs very important in the Netherlands (37%), Germany (29%) and Sweden (26%)." *Id.*

228. *Id.* at 12.

229. *Id.* at 8.

230. Jacob Poushter, *European Opinions of the Refugee Crisis in 5 Charts*, PEW RESEARCH CTR. (Sept. 16, 2016), <http://www.pewresearch.org/fact-tank/2016/09/16/european-opinions-of-the-refugee-crisis-in-5-charts/#> [<https://perma.cc/W95G-HTFD>].

231. Pope Francis, Meeting for Religious Liberty with the Hispanic Community and other Immigrants, Address of the Holy Father (Sept. 26, 2015), http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150926_usa-liberta-religiosa.html [<https://perma.cc/TWQ5-FRTJJ>].

exploit their vulnerability. But we also know that these crises can bring out the very best in us.²³²

Considering the large number of refugees from the Middle East, the concern about the refugee crisis is directly related to the perception of the Muslim population. According to the Pew Research Center, “[i]n Hungary, Italy, Poland, and Greece, more than six-in-ten [individuals] say they have an unfavorable opinion of Muslims in their country—an opinion shared by at least one-in-four persons in each nation polled.”²³³ It appears that some Europeans believe that Muslims do not wish to participate in the broader society. The Pew survey revealed the dominant view that “Muslims want to be distinct from the rest of society rather than adopt the nation’s customs and way of life.”²³⁴ “Six-in-ten or more hold this view in Greece, Hungary, Spain, Italy and Germany.”²³⁵

CONCLUSION

According to Pope Francis, “mercy is the divine attitude which embraces, it is God’s giving himself to us, accepting us, and bowing to forgive.”²³⁶ In other words, mercy is the nature of God. Christians believe that God created humankind in his image, after his likeness. God created man in his image; in the divine image he created him; male and female he created them.²³⁷ Thus, everybody on this planet has a chance to experience mercy in many different ways. It is also a choice and a motivation.

Mercy renews and redeems because it is the meeting of two hearts: the heart of God who comes to meet the human heart. The latter is warmed and healed by the former. Our hearts of stone become hearts of flesh (cf. *Ezek 36:26*) capable of love despite our sinfulness. I come to realize that I am truly a “new creation” (*Gal 6:15*): *I am loved, therefore I exist; I am forgiven, therefore I am reborn; I have been shown mercy, therefore I have become a vessel of mercy.*²³⁸

And, so, the pendulum continues to swing between the ideal of mercy, the principle of legal accommodation that welcomes the stranger as a fundamental human dimension of our global or, in the case of the United States, domestic family, and the Damocles’ sword of fear, that

232. Pope Francis, Speech During the Visit of His Holiness Pope Francis to Lesbos (Greece), Visit to Refugees (Apr. 16, 2016), https://w2.vatican.va/content/francesco/en/speeches/2016/april/documents/papa-francesco_20160416_lesvos-rifugiati.html [<https://perma.cc/UXG4-JS2J>].

233. Wike et al., *supra* note 180, at 4.

234. *Id.* at 5, 25.

235. *Id.* at 24–25.

236. POPE FRANCIS, THE NAME OF GOD IS MERCY 8 (2016).

237. *Genesis* 1:26–27.

238. Pope Francis, *Misericordia et misera*, *supra* note 9.

dimension of human frailty that considers the “other,” restricting and excluding on the basis of xenophobia and skeptical speculation. The choice is ours. Fortunately, we have Papa Francisco to show us the way.