NATIONALITY BANS

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This Article conducts a comparative analysis between the nationality bans that exist in both Israel and the United States. In exploring the similarities and differences between these two countries' nationality bans, this Article critically evaluates the publicly projected rationales for the bans and argues that these bans promote blanket discrimination rather than effectuating their stated justifications. Furthermore, the comparison between these two nations' approaches to nationality bans allows this Article to expose the damaging effects these types of bans can have beyond those directly involved in the immigration system while examining the potential threat of these temporary measures being prolonged.

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I. INTRODUCTION

Immigration regimes are regimes of bans and permits. They include islands—differing in size depending on the relevant nation's level of openness—of permission to immigrate, alongside seas of prohibitions whose width and depth have fluctuated over time and from country to country. All prohibitions suffer from a degree of generality and bias, reflecting social values and perceptions, including preconceived notions of dangerousness. Within those prohibitions, this Article focuses on nationality bans. Nationality bans are prohibitions on the entry of persons, whether migrants, asylum seekers, or visitors, from specific nationalities (as opposed to place of residence or citizenship).[1] These bans may be explicit, targeting particular nationalities, or indirect, by implementing entry restrictions or prohibitions on grounds other than nationality that nonetheless disproportionately impact certain nationalities. They may be hard, such as outright bans on certain nationalities, or soft, such as implementing heightened entry requirements or quotas rather than blanket prohibitions against specific nationalities. This Article offers a comparative analysis of nationality bans within the immigration and asylum regimes of two countries: The United States and Israel. It draws out four salient features of these bans and examines their implementation in these variegated landscapes.

The two countries' immigration and asylum regimes differ significantly—almost as much as the countries differ from each other. Israel is a country of about 8.7 million citizens[2] and is predominantly Jewish, with a large Palestinian indigenous minority population.[3] The United States has a population nearly forty times that size, of over 325 million, which is marked by diversity of religion,

1. For an explanation of the difference between citizenship and nationality, see, for example, 8 U.S.C. § 1101(a)(21) (2018) ("The term 'national' means a person owing permanent allegiance to a state."); *id.* § 1101(a)(22) (2018) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."). In the United States, the current nationality ban restricts entry of nationals from seven countries but contains an exception for dual nationals "traveling on a passport issued by a non-designated country." Presidential Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45,161, 45,168 (Sept. 27, 2017).

2. *Media Release*, *On the Eve of Israel's 69th Independence Day—8.7 Million Residents in the State of Israel*, CENT. BUREAU OF STAT. (Apr. 27, 2017), https://www.cbs.gov.il/he/mediarelease/DocLib/2017/113/11_17_113e.pdf.

3. *Id.*

national origin, and race.[4] The United States is a self-declared migration state, with a migration policy primarily based in *jus soli*;[5] whereas Israel is a nation state with a strong *jus sanguinis* tradition based on a preference for Jewish descendants.[6] Israel has been embroiled in an ongoing regional conflict for decades and has continental borders with the countries with which it is in conflict, some of which are refugee-producing countries.[7] In contrast, the United States is quite remote from most of the world's leading refugee-producing countries and is not in conflict with any of its neighbors.[8] Both the United States and Israel have experienced international terrorist attacks on their soil.[9] Israel has a nascent, yet-to-be-codified asylum system that is highly exclusionary toward non-Jewish asylum seekers,[10] whereas the U.S. system has provided protection to asylum seekers of all nationalities since 1980.[11] While the U.S. prides itself on being a diverse society of immigrants, in which expressions of anti-immigrant sentiments are rare, far-between, and condoned,[12] Israel is openly seeking to maintain a demography with a Jewish majority,[13] and highly ranked officials publicly express anti-immigrant opinions.[14] The two countries also have different cultures, economies, and ideologies, all of which impact their immigration and asylum regimes.

4. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock (last visited Jan. 12, 2019).

5. The U.S. citizenship statute also contains elements of *jus sanguinis.* 8 U.S.C. § 1401 (2018).

6. Adriana Kemp, *Managing Migration, Reprioritizing National Citizenship: Undocumented Migrant Workers' Children and Policy Reforms in Israel*, 8 THEORETICAL INQUIRIES L. 663, 665 (2007).

7. *See generally* Tally Kritzman-Amir, *Refugees and Asylum Seekers in the State of Israel*, 6 ISR. J. FOREIGN AFF. 97 (2012).

8. In 2016, the world's top refugee-producing countries were, in order, Syria, Afghanistan, South Sudan, Myanmar, Somalia, Sudan, Democratic Republic of Congo, Central African Republic, Eritrea, and Burundi. U.N. HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2017, at 15 (2018), https://www.unhcr.org/5b27be547.pdf.

9. Aaron Clauset et al., *The Strategic Calculus of Terrorism: Substitution and Competition in the Israel–Palestine Conflict*, 45 COOPERATION & CONFLICT 6, 8 (2010).

10. Tally Kritzman-Amir, *Introduction* to WHERE LEVINSKI MEETS ASMARA: ASYLUM SEEKERS AND REFUGEES IN ISRAEL, 9 (Tally Kritzman-Amir ed., 2015). Jewish asylum seekers are not processed as asylum seekers but rather acquire status immediately.

11. *See* Refugee Act of 198, Pub. L. No. 96–212, 94 Stat. 102; Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT'L J. REFUGEE L. 455, 456 (1992).

12. Eli Watkins & Abby Phillip, *Trump Decries Immigrants from 'Shithole Countries' Coming to US*, CNN (Jan. 12, 2018, 9:53 AM), https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html.

13. On the Court being criticized for not promoting the Jewish majority demography, see Revital Hovel, *Justice Minister Slams Israel's Top Court, Says It Disregards Zionism and Upholding Jewish Majority*, HAARETZ (Aug. 29, 2017, 6:45 PM), https://www.haaretz.com/israel-news/israel-s-top-court-disregards-zionism-justice-minister-says-1.5446684; *see also* Revital Hovel, *Justice Minister: Israel Must Keep Jewish Majority Even at the Expense of Human Rights*, HAARETZ (Feb. 13, 2018, 2:57 AM), https://www.haaretz.com/israel-news/justice-minister-israel-s-jewish-majority-trumps-than-human-rights-1.5811106.

14. ELIZABETH TSURKOV, THE HOTLINE FOR MIGRANT WORKERS, "CANCER IN OUR BODY: ON RACIAL INCITEMENT, DISCRIMINATION AND HATE CRIMES AGAINST AFRICAN ASYLUM-SEEKERS IN ISRAEL, JANUARY–JUNE 2012, at 6 (Gila Babich et al. trans., 2012), http://hotline.org.il/en/publication/cancer-in-our-body-eng/. See also a more recent statement by the deputy foreign minister, Zipi Hotovely, saying that "[t]here is infiltrator terror in southern Tel Aviv." Daniel K. Eisenbud, *Hotovely: Israeli Citizens are Living Under the Terror of the Infiltrators,* JERUSALEM POST (FEB. 29, 2018, 3:53 PM), http://www.jpost.com/Israel-News/Hotovely-Israeli-citizens-are-living-under-the-terror-of-the-infiltrators-543032.

We chose to compare these two countries because, despite these differences, Israel and the United States share an ignominious aspect of their immigration policies: both countries have, in the past, banned the immigration of groups of persons due to their nationality and have recently reinstated such bans. Such bans do not exist within the immigration and asylum regimes of other liberal democracies. Though Israeli and U.S. immigration and asylum regimes may currently be outliers with respect to these bans, they represent a growing trend to utilize immigration and asylum regimes to promote nationalist ideology. Israel's asylum procedure excludes from its very first versions the diffuse category of "enemy nationals" from receiving protection in Israel.[15] This exclusion interacts with a reinstated ban on "enemy nationals" from the Prevention of Infiltration Law, originally enacted in 1954 to exclude "infiltrators," some of whom entered clandestinely for terrorism purposes.[16] Between 2012 and 2016, the law was amended to authorize detention of asylum seekers on immigration grounds, allowing a longer detention period for "enemy nationals."[17] Israel has also excluded Palestinians from its asylum system, under a questionably broad interpretation of Article 1D of the United Nations Convention and Protocol Relating to the Status of Refugees.[18] Finally, since a 2002 government decision[19] that was later codified in the Citizenship and Entry into Israel Law,[20] Israel has prohibited the immigration of Palestinians as well as nationals of four enemy states, including the immigration of relatives of Israeli residents and citizens for family reunification.[21] These nationality bans have been either explicit or indirect. The prolonged presence and the institutionalization of nationality bans in the Israeli immigration and asylum regimes—compiled with the discriminatory effect of the bans on the Palestinian citizens of Israel, a native, disempowered, and discriminated against minority group—renders Israel a cautionary tale for the United States.

In the United States, explicit nationality bans historically focused on Asians, from the 1882 Chinese Exclusion Act to the 1917 and 1924 Immigration

15. Procedure for Handling Political Asylum Seekers in Israel, 5777–2017, Procedure No. 5.2.0012, p.1, 12, 13, https://www.gov.il/BlobFolder/policy/handling_political_asylum_seekers_in_israel/en/5.2.0012_eng.pdf [hereinafter The Asylum Procedure] (Isr.).

16. Prevention of Infiltration Law (Crimes and Jurisdiction), 5714–1954, (as amended), https://www.nevo.co.il/law_html/law01/247_001.htm.

17. *See* Law for the Prevention of Infiltration (Offences and Judging) (Amendment no. 3 and Temporary Order), 5772–2012, SH No. 2332 p. 119 (Isr.) [hereinafter Amendment 3]. For a detailed description of the amendments and the litigation which initiated them, see *infra* notes 387–96 and accompanying text.

18. G.A. Res. 2198 (XXI), Convention and Protocol Relating to the Status of Refugees art. 1D (July 28, 1951). Article 1D excludes from refugee status persons who receive assistance from United Nations organizations other than the United Nations High Commissioner for Refugees. Palestinian refugees are assisted by the United Nations Relief and Works Agency (UNRWA). For more information about the work of UNRWA, see UNRWA, https://www.unrwa.org/ (last visited Jan. 12, 2019). *See, e.g.*, *infra* note 80.

19. Government Decision No. 1813 (May 12, 2002) (Isr.).

20. The Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003, http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm (last visited Jan. 12, 2019).

21. *See id.*; *Five Ways Israeli Law Discriminates Against Palestinians*, AL JAZEERA NEWS (July 19, 2018), https://www.aljazeera.com/news/2018/07/ways-israeli-law-discriminates-palestinians-180719120357886.html.

Acts that excluded all Asian nationals.[22] Until 2017, the more common approach to exclusion has been soft, through national origins quotas, from the 1924 Immigration Act that kept out many southern Europeans, to the worldwide national origins quota system of the 1952 Immigration and Nationality Act.[23] President Lyndon B. Johnson famously ended this quota system and the Asia-Pacific nationality ban when he signed the 1965 Immigration and Nationality Act in honor of John F. Kennedy's egalitarian vision.[24] In his signing statement, President Johnson said that, according to "our basic American tradition," we "ask not where a person comes from but what are his personal qualities."[25]

The ideal of an immigration system free of national origins discrimination prevailed for over fifty years, until the election of Donald Trump.[26] A week after his inauguration, the Trump administration issued an executive order containing two explicit nationality bans: one temporarily excluding nationals of seven predominantly Muslim countries and another prohibiting the entry of Syrian refugees indefinitely and without exception.[27] The January 2017 ban was enjoined through litigation and replaced in March of that year with a second, narrower ban that temporarily excluded nationals of only six majority-Muslim countries and created exceptions to allow the entry of admitted refugees.[28] The second nationality ban was also enjoined and narrowed, and it expired by its own terms in

22. Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (1882) (repealed 1943); Immigration Act of 1917, Pub. L. No. 301-29, 39 Stat. 874 (1917) (amended 1952); Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924) (amended 1952); *see* Helen F. Eckerson, *Immigration and National Origins*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 4, 10 (1966) (noting that the 1882 Chinese Exclusion Act was "the first act that excluded a national or racial group rather than individuals" and explaining that the Immigration Act of February 5, 1917 contained a "'geographical delimitation clause' that automatically excluded most persons coming from a designated so-called Asiatic-barred zone, comprising most of Asia and the Pacific Islands").

23. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101 (2018)).

24. *See* Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 546 PUB. PAPERS 1037, 1038 (Oct. 3, 1965).

25. Special Message to Congress on Immigration, 13 PUB. PAPERS 37, (Jan. 13, 1965). Among other provisions, the 1965 Amendments added to the Immigration and Nationality Act 8 U.S.C. § 1152(a)(1)(A) (2018), which prohibits discrimination in the issuance of visas.

26. In terms of entry of immigrants, the two exceptions to this general rule responded to specific foreign affairs disputes and were much narrower in scope. In 1980, President Carter prohibited the entry of Iranians as part of a sanctions regime during the hostage crisis. Sanctions Against Iran Remarks Announcing U.S. Actions, 16 PUB. PAPERS 611 (Apr. 7, 1980). In 1986, President Reagan prohibited the entry of Cuban nationals in response to Cuba's decision to suspend an immigration agreement. Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986). There are other examples of nationality discrimination against immigrants who have entered the United States such as Operation Liberty Shield, which mandated detention of asylum seekers based on nationality and the National Security Exit-Entry Registration System, which required non-immigrant men and boys from predominantly Arab and Muslim-majority nations to register with the Department of Homeland Security. *See* U.N. High Commissioner for Refugees, *UNHCR Appeals for Protection of Asylum Seekers in the United States,* UNHCR (Mar. 21, 2003), http://www.unhcr.org/news/press/2003/3/3e7b27384/unhcr-appeals-protection-asylum-seekers-united-states.html; PENN STATE LAW IMMIGRANTS' RIGHTS CLINIC & RIGHTS WORKING GRP., THE NSEERS EFFECT: A DECADE OF RACIAL PROFILING, FEAR, AND SECRECY, 15–16 (2012). This Article also discusses the role nationality still plays in parts of the immigration process in the United States. *See infra* Section II.B–C.

27. *See infra* Subsection II.B.1.

28. *See infra* Subsection II.B.2.

October 2017.[29] The third nationality ban, issued in September 2017, is permanent and excludes nationals of seven countries (of which two do not have a majority-Muslim population) and exempts refugees.[30] Finally, in October 2017, the Trump administration issued a fourth, soft nationality ban, requiring higher screening standards for refugees from eleven countries rather than excluding them outright.[31]

These U.S. nationality bans have been at the top of the newsfeed, capturing the attention of the media and the public throughout the world.[32] Though some have drawn parallels with prior nationality bans within the United States,[33] this Article breaks new ground in comparing Trump's bans with more recent nationality bans in a closely allied state, Israel. Given the extensive contemporary reliance on nationality bans in the Israeli immigration and asylum system, the comparison between the two countries might shed some light on the potential impacts of the newer U.S. nationality bans. In both countries, the nationality bans were introduced through administrative measures and were contested through litigation. Though the bans have taken different shape on the very different soils of Israel and the U.S., the comparison gives rise to four salient features on which this Article focuses.

The first shared feature of the nationality bans is their factual grounding in unsubstantiated national security arguments. These bans demonstrate the dangers of laws and policies based on emotion rather than scientific evidence, particularly risk assessment. In terms of the facts, the bans are justified by no or little information linking individuals from a certain nationality to security threats.[34] Security risks loom large in the eyes of the executive, legislatures, and courts, as well as the general public, despite the slim probability that they will actually come to pass.[35] In other words, the factual rationales for the bans are not supported by reliable evidence.

As a result, these bans are legally overbroad, in that they construct blanket discrimination on the basis of nationality rather than examine security considerations on an individual level. This approach violates international human rights

29. *See infra* Subsection II.B.2.

30. *See infra* Subsection II.B.3.

31. This soft ban was also enjoined, and the litigation over the ban is ongoing even though the ban has expired by its own terms. *See Groups Respond to Court Ruling Allowing Refugee Ban Lawsuit to Continue*, NAT'L IMMIGRATION LAW CTR. (Mar. 29, 2018), https://www.nilc.org/2018/03/29/groups-respond-to-court-ruling-allowing-refugee-ban-lawsuit-to-continue/.

32. *Charting the News of 2017*, THE ECONOMIST (Dec. 19, 2017), https://www.economist.com/news/christmas-specials/21732709-years-events-most-grabbed-worlds-attention-charting-news-2017.

33. Kat Chow, *As Chinese Exclusion Act Turns 135, Experts Point to Parallels Today*, NPR: CODE SWITCH (May 5, 2017, 6:06 PM), https://www.npr.org/sections/codeswitch/2017/05/05/527091890/the-135-year-bridge-between-the-chinese-exclusion-act-and-a-proposed-travel-ban; David J. Bier, *Trump's Immigration Ban is Illegal*, N.Y. TIMES (Jan. 27, 2017), https://www.nytimes.com/2017/01/27/opinion/trumps-immigration-ban-is-illegal.html.

34. *See* Vivian Salama, *AP Exclusive: DHS Report Disputes Threat from Banned Nations*, AP NEWS (Feb. 24, 2017), https://apnews.com/39f1f8e4ceed4a30a4570f693291c866.

35. Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis,* CATO INST. POL'Y ANALYSIS NO. 798 (Sept. 13, 2016), *available at* https://www.cato.org/publications/policy-analysis/terrorism-immigration-risk-analysis.

law as well as fundamental principles of due process and nondiscrimination.[36] Nationality bans evade international law obligations by rendering people of a certain nationality ineligible for protection due to an irrefutable presumption of dangerousness. Where international law sets a general duty to provide protection, and individualized exclusions for persons who are determined to constitute a threat to the host state, nationality bans create a presumption of excludability, with inclusion as the rare discretionary exception. In *Trump v. Hawaii*, Justice Breyer's dissent focuses on the failures of the nationality ban's exemption and waiver processes, explaining that the proclamation would more likely comport with the Constitution if this "strict case-by-case scrutiny of applications" were effective.[37] Justice Sotomayor explains in dissent that the current nationality ban in the United States is unconstitutional because "'its sheer breadth [is] so discontinuous with the reasons offered for it.'"[38]

The flimsy proffered justifications for nationality bans go hand-in-hand with their pretextual purposes. National security is not the real reason for the bans; their true aims, be they religious and racial preference or discrimination, are hidden behind the smoke of security arguments. Nationality is a more palatable basis for distinction in the immigration realm than religion or race because it has been used regularly in immigration and asylum regimes both to admit and to exclude.[39] In both the United States and Israel, given the (different forms of) correlation between nationality and religion, the nationality bans have largely targeted one religious group: Muslims. Yet the religious basis for the bans is excised from the legal documents because discrimination on the basis of nationality appears politically and legally preferable.[40] At the same time, the bans seek to impact the racial composition of the two countries, assisting, together with other measures within and beyond immigration law, to maintain the white Jewish majority in Israel and, as part of a broader effort to exclude immigrants,[41] the

36. *See* AM. BAR ASS'N, RESOLUTION 10C (2017), https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/10c.pdf.

37. Trump v. Hawaii, 138 S. Ct. 2392, 2340–41 (2018) (Breyer, J., dissenting).

38. *Id.* at 2441 (Sotomayor, J., dissenting) (quoting Romer v. Evans, 517 U.S. 620, 632 (1996)).

39. We do not take a stance in this Article on the question of whether nationality is a valid basis for distinction in immigration laws. Distinctions based on nationality are so deeply embedded in contemporary immigration regimes that we find it difficult to imagine them without such distinctions and have chosen in this Article to analyze existing legal regimes rather than examining alternative approaches.

40. In the first two versions of the United States nationality bans of 2017, however, animus towards Islam and Muslims was very thinly veiled. The text of both bans referenced honor killings. Executive Order No. 13769, 82 Fed. Reg. 8,977, 8,981 (Feb. 1, 2017); Executive Order No. 13780, 82 Fed. Reg. 13,209, 13,217 (Mar. 9, 2017). In the words of the Fourth Circuit, "the specter of 'honor killings' [is] a well-worn tactic for stigmatizing and demeaning Islam and painting the religion, and its men, as violent and barbaric." Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 596 n.17 (4th Cir.) (en banc), *vacated,* 138 S. Ct. 353 (2017); Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 322–23 (4th Cir. 2018) (Wynn, J., concurring); *see also* Brief of Muslim Rights, Professional and Public Health Organizations as *Amici Curiae*, in Support of Appellees, and in Opposition to Appellants' Motion for a Stay and on the Merits at 16, Hawaii v. Trump (9th Cir. 2017) (No. 17-15589).

41. *See, e.g.*, Dana Milbank, *Is It a Coincidence that Trump Uses the Language of White Supremacy?*, WASH. POST (Apr. 20, 2018), https://www.washingtonpost.com/opinions/is-it-a-coincidence-that-trump-uses-the-language-of-white-supremacy/2018/04/20/01a2c202-44aa-11e8-ad8f-27a8c409298b_story.html?utm_term=.0ad196315a0b.

white Christian majority in the United States. As some courts have done, a review of blanket prohibitions should go beyond the language of the ban to explore the unwritten consequences (whether intended or unintended) that entail de facto religious and racial discrimination.[42]

Beyond their weak and misleading justifications, nationality bans demonstrate the problem of subject creep.[43] While they are, allegedly, temporary measures intended to ban specific nationals, their effects extend far beyond their impact on potential immigrants from certain nationalities. Using the symbolism of law to exclude,[44] nationality bans stigmatize a broad swathe of noncitizens and citizens.[45] This stigmatization can be severe and is likely to hit heaviest on disempowered populations.[46] The bans' exclusionary logic may leak into policies implemented against nationals of countries not targeted by the bans.[47] They also harm citizens who have substantial relationships with those targeted by the nationality bans.[48] In the United States, where immigrants are a core component of the country's economic engine, nationality bans have serious financial consequences.[49] On a societal level, the stigmatization process created by the nationality bans enable a discriminatory and even abusive mindset towards anyone who shares racial, religious, or linguistic characteristics with members of that group.[50]

Nationality bans also demonstrate that the claim of temporariness in laws and policies can create a dangerous illusion, disguising the authors' intent that

42. *See* Trump v. Hawaii, 138 S. Ct. at 2430–31 (Breyer, J., dissenting) ("How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation's own terms?").

43. *See, e.g.*, Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609 (2014).

44. *See generally* JOSEPH GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (1963) (discussing how the Temperance movement used law's symbolic or expressive function to create and reinforce status distinctions in American society).

45. We rely here on Link and Phelan's five-part definition of stigma:

> [F]irst . . . people distinguish and label human differences. [Second], dominant cultural beliefs link labeled persons to undesirable characteristics—to negative stereotypes. [Third,] labeled persons are placed in distinct categories so as to accomplish some degree of separation of "us" from "them." [Fourth], labeled persons experience status loss and discrimination that lead to unequal outcomes. Finally, stigmatization is entirely contingent on access to social, economic, and political power that allows the identification of differentness, the construction of stereotypes, the separation of labeled persons into distinct categories, and the full execution of disapproval, rejection, exclusion, and discrimination.

Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 367 (2001).

46. Link and Phelan posit that "stigma processes likely play a major role in" determining individuals' life chances. *Id.* at 381–82.

47. *See* Johnathan Blitzer, *What the Supreme Court's Travel-Ban Ruling Means in Practice*, NEW YORKER (June 26, 2017), https://www.newyorker.com/news/news-desk/what-the-supreme-courts-travel-ban-ruling-means-in-practice.

48. Rachel Brown & Georgia Travers, *The Muslim Ban Expands the Cruel Policy of Family Separations*, WASH. POST (July 3, 2018), https://www.washingtonpost.com/news/global-opinions/wp/2018/07/03/the-muslim-ban-expands-the-cruel-policy-of-family-separation/?utm_term=.f69c85fd1da2.

49. *See* John Wasik, *Here's How Trump Muslim Ban Will Slam U.S. Economy*, FORBES (Feb. 1, 2017, 9:18 AM), *available at* https://www.forbes.com/sites/johnwasik/2017/02/01/heres-how-trump-muslim-ban-will-slam-u-s-economy/#1ee1bf024930.

50. *See* Abed Ayoub & Khaled Beydoun, *Executive Disorder: The Muslim Ban, Emergency Advocacy, and the Fires Next Time*, 22 MICH. J. RACE & L. 215, 224–28 (2017).

they continue indefinitely. Although these bans are generally introduced as temporary measures in light of a pressing (real or imagined) security concern, they run the risk of existing in prolonged temporariness, perhaps more so in cultures whose histories include nationality bans. Changes that at first seem extreme, which could only be permissible on a temporary emergency basis, become normalized and accepted over time.[51] They may gain increased normative force through repeated administrative regulation, through grounding in primary legislation, and through the direct or inadvertent support of the judiciary.[52] Their prima facie temporariness might prevent effective judicial review and might obscure their long-term impact and validity from the judiciary.

This Article examines these features in Israeli nationality bans and U.S. nationality bans. The structure of the Article is as follows: Part II discusses the national security justifications on which the nationality bans are based in Israel and the United States, exposing their weakness. Part III argues that the bans share a pretextual purpose and uncovers the actual reasons for the bans in Israel and in the U.S. The shape-shifting nature of these bans gives rise to two additional concerns described in Parts IV and V: subject and temporal creep. Part III outlines the impact of the nationality bans on individuals and organizations not directly targeted by the bans. Part V reviews the nationality bans' prolonged temporariness and gradual institutionalization in both countries. In each of these Parts, we discuss the relevant components of the immigration regimes of Israel and the United States, as they are laid out in executive orders, regulations, laws, and court decisions, and compare them. In Part VI, we conclude by drawing out the broader implications of these nationality bans.

II. THE SECURITY-RELATED JUSTIFICATIONS OF NATIONALITY BANS

A. Israel

The question whether security concerns can account for and justify nationality bans arises in two contexts in the Israeli immigration and asylum regime: (1) bans on family migration of certain nationals; and (2) the exclusion of Palestinians and "enemy nationals" from the asylum system.

1. Security Considerations, Nationality Bans, and Family Reunification Migration

Israel's first explicit nationality ban relating to family reunification was issued in an administrative decision in 2002.[53] This decision responded to a suicide bomb attack in which sixteen Israelis were killed, carried out by a resident of the

51. *See, e.g.*, Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1054 (2004).

52. *See id.* at 1003, 1006.

53. This was an administrative decision, made by the cabinet, which holds an inferior normative status. *See* Government Decision No. 1813 (May 12, 2002) (in Hebrew) (Isr.).

West Bank who acquired Israeli citizenship through his Israeli mother.[54] The administrative decision banned family reunification between Israeli citizens or residents and their Palestinian partners, putting an end to a previous set of procedures that had allowed family reunification and set a gradual process of naturalization for persons who moved to Israel for family reunification purposes.[55] The decision was challenged in a petition to the High Court of Justice, in part because this was an arrangement that should have been set in primary legislation.[56] In response to the petition—and at the government's initiative—the Parliament passed a temporary provision[57] in July 2003: The Nationality and Entry to Israel Law (Temporary Provisions).[58]

The legislated ban required the Minister of the Interior to refrain from granting citizenship or a permit to reside in Israel to a Palestinian from the West Bank or Gaza.[59] The law did not reference the explicit language of nationality used in the administrative ban, referring instead to persons residing in the West Bank or Gaza, regardless of whether they are registered as residents, excluding Israelis.[60] This indirect construction effectively banned only Palestinians. The focus on residency rather than nationality is consistent with the denial of the mere existence of Palestinian national identity by some Israeli legislators and other public figures.

The law contained only a few exceptions under which permits may be issued: temporary permits for employment or for medical reasons, permits to prevent the separation of a child below the age of fourteen from a parent who is lawfully staying in Israel,[61] and permits to Palestinian collaborators with the Israeli security forces.[62] It reflected an irrefutable presumption of the dangerousness of Palestinians, suspended only when a Palestinian collaborates with the Israeli security forces or has otherwise demonstrated exceptional circumstances. Denial of family reunification requests became the norm, and approving them

54. Na'ama Carmi, *The Nationality and Entry into Israel Case Before the Supreme Court of Israel*, 22 ISR. STUD. F. 26, 31–32 (2007); Suzanne Goldenberg, *Suicide Bomb Kills 16 Israelis in Hotel*, GUARDIAN (Mar. 28, 2002), https://www.theguardian.com/world/2002/mar/28/israel1.

55. Carmi, *supra* note 54, at 32.

56. *Id.* at 50 n.11.

57. The temporary provision is valid until a preset date and can be extended subject to parliamentary approval.

58. *See generally* Nationality and Entry to Israel law (Temporary Provision), 5763–2003, §§ 1–5 (Isr.).

59. *Id.* § 2.

60. *Compare* Government Decision No. 1813 (May 12, 2002) (in Hebrew) (Isr.) (referring to people residing in the occupied territories and foreigners "from a Palestinian origin"), *with* Nationality and Entry to Israel law (Temporary Provision), 5763-2003, § 1, (Isr.) (referring to "including anyone residing in the area [Judea and Samaria and Gaza], even though he is not registered in the population register of the area, and excluding the inhabitant of an Israeli settlement in the area"). Such distinction between Israelis and Palestinians within the occupied territories is not uncommon. On the application of two different legal regimes, including laws and legal institutions, on the two populations in the West Bank (the Palestinian and the Israeli), see LIMOR YEHUDA ET AL., ONE RULE, TWO LEGAL SYSTEMS: ISRAEL'S REGIME OF LAWS IN THE WEST BANK (Tal Dahan, Tamar Feldman & Gili Re'i eds., Yoana Gonen trans., 2014), https://www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf.

61. Nationality and Entry to Israel law (Temporary Provision), 5763–2003, § 3(1) (Isr.). Initially the age was twelve but this was amended in 2005.

62. *Id.* § 3(2).

became the exception.[63] The burden of proof shifted. Rather than requiring that the government show cause for denying Palestinians the ability to unite with their families—such as grounds for suspicion of dangerousness—Palestinians who seek family reunification must establish that their case meets the exceptions set in the law.[64]

Over the years, the law has been amended.[65] Amendments included a relaxed version of the presumption, which left room for discretion in granting status to men over the age of thirty-five and women over the age of twenty-five,[66] as well as to persons who demonstrate humanitarian needs.[67] These restrictions have to do with a presumption, supported by the security apparatus, that people under the specified ages are more likely to be involved in terrorism.[68] Amendments also added explicit nationality bans on entry or stay of nationals of four additional countries: Syria, Lebanon, Iran, and Iraq.[69]

Israel's High Court of Justice twice reviewed the nationality ban law and twice effectively upheld it by a slim minority.[70] The story the court tells to justify the law is one of security concerns.[71] As the court conducts the constitutional analysis, it must first outline the purpose of the legislation to determine whether it is legitimate.[72] The majority of the court found the law to be justified on security grounds, despite the dearth of reliable statistics supporting the proffered security concerns.[73] To support the security justification, the government pointed

63. YEHUDA ET AL., *supra* note 60, at 118.

64. Carmi, *supra* note 54, at 43–44.

65. Amendment 1 was legislated on August 1, 2005, and allowed the family reunification with Palestinian men over thirty-five and women over twenty-five, as well as with children until the age of fourteen, and for exceptional reasons such as medical care, employment, or other temporary purposes. Nationality and Entry into Israel law (Temporary Order) (Amendment), 5765–2005, SH 2018 p. 730 (Isr.). Amendment 2 was legislated in March 28, 2007, creating a committee which examines humanitarian requests for permits, on the other hand, and expanding the prohibition onto nationals of four additional countries: Iran, Lebanon, Syria, and Iraq. Nationality and Entry to Israel Law (Temporary Order) (Amendment No. 2), 5767–2007, SH 2092 p. 295 (Isr.).

66. *See* Nationality and Entry into Israel Law (Temporary Order), 5765-2005, SH No. 2018 p. 730 (Isr.).

67. Nationality and Entry to Israel law (Temporary Order) (Amendment No. 2), 5767–2007, SH No. 2092 p.295, § 3(A)(1) (Isr.) allows granting permits for exceptional humanitarian reasons and sets a procedure for requesting humanitarian permits before a special committee. The Article, however, clearly states that the fact that a person has a spouse or children in Israel is not in itself an exceptional humanitarian reason, while allowing spousal relationship as an exceptional humanitarian reason for Syrian nationals whose Druze relatives live in the Golan Heights, a territory which was occupied from Syria and annexed to Israel. *Id.* § 3(A)(1)(e). Special permits may be granted, according to Article 3b for the purpose of medical treatment, employment or other temporary reasons, for a period no longer than six months. Nationality and Entry into Israel Law (Temporary Order) (Amendment), 5765–2005, SH No. 2018 p. 730, § 3(B) (Isr.).

68. HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel et al. v. Minister of Interior 61(2) PD 202, 338 (2006) (Isr.). It should be taken into account that allowing family reunification for Palestinian women of over twenty-five and Palestinian men of over thirty-five makes little difference since Palestinians typically marry at a much younger age.

69. Nationality and Entry into Israel Law (Temporary Order) (Amendment No.2), 5767–2007, SH No. 2092 p.295 (Isr.).

70. *Adalah*, 61(2) PD at 338; HCJ 466/07 MK Galon v. The Legal Advisor to the Government 65(2) PD 44 (2012) (Isr.).

71. *See e.g.*, *Adalah*, 61(2) PD at 265–66, 336–39.

72. *See id.*

73. *Id.* In the *Adalah* case, the petition was rejected by the following Justices: Cheshin, Rivlin, Levy, Grunis, Naor, and Adiel—against the opinion of Chief Justice Barak and Justices Beinish, Procaccia, Joubran,

to twenty-six Palestinians who had been granted entry permits and were involved in terrorism.[74] While any terrorist attack is cause for concern, the numerator alone is deeply misleading. Once the denominator of 130,000 Palestinians who received entry permits is introduced, the statistics become much less convincing.[75] A blanket prohibition was applied to an entire population on account of the behavior of 0.02% of that population.[76]

2. Security Considerations, Nationality Bans, and the Asylum System

a. Exclusion of Palestinian Asylum Seekers

Perhaps the best-known nationality ban in Israel is an indirect one that eliminates protection for asylum seekers from the Palestinian National Authority. They are excluded through a broad interpretation of the Refugee Convention,[77] to which Israel is a party.[78] Article 1D of the Refugee Convention states that it "shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance."[79] Israel interprets this provision as excising Palestinians from Refugee Convention protections, since some Palestinians receive assistance from UNRWA.[80] This interpretation deviates from soft law that interprets Article 1D as excluding only the Palestinians with actual access to UNRWA.[81] The result is that Palestinians' applications for protection are not

and Hayut. *See generally id.* In the *Galon* case, the law was upheld by Justices Rivlin, Grunis, Naor, Rubinstein, Meltzer, and Hendel—against the opinion of Chief Justice Beinish and Justices Levy, Arbel, Joubran, and Hayut. *See generally Galon*, 65(2) PD 44.

74. Barak Medina & Ilan Saban, *Human Rights and Risk Taking: On Democracy, "Ethnic Profiling" and the Limitation Clause Tests (Following the Decision on the Citizenship and Entry to Israel Law)*, 29 MISHPATIM 47, 51 (2009).

75. Carmi, *supra* note 54, at 32; Medina & Saban, *supra* note 74, at 51 n.7.

76. Moshe Cohen Eliya & Gila Stopler, *Probability Thresholds as Deontological Constraints in Global Constitutionalism*, 49 COLUM. J. TRANSNAT'L. L., 75, 96, 103–04 (2010).

77. Convention and Protocol Relating to the Status of Refugees, *supra* note 18, at 16.

78. Israel signed and ratified The Refugee Convention on October 1st, 1954. *See* U.N. High Comm'r for Refugees, States Parties to the 1951 Convention and Protocol Relating to the Status of Refugees and the 1967 Protocol, at 3 (2015), http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html. Israel has also signed and the additional protocol to the convention in 1968. In Israel's dualist legal system, the convention is not self-executing and was never incorporated into Israel's domestic system. The Israeli Courts, however, interpret domestic legislation as compatible to Israel's international law obligation, in the absence of explicit incompatibility, thus giving Israeli legislation obligation-compliant interpretation. *See, e.g.*, CrimA 7048/97 Anon v. Minister of Defense, 54(1) PD 721 (2000) (Isr.).

79. Convention and Protocol Relating to the Status of Refugees, *supra* note 18, at 16.

80. UNRWA is the United Nations Works and Relief Agency for Palestinian Refugees in the Near East. The agency began its operation in 1950, prior to the entry to force of the refugee convention and, in absence of a solution to the Palestinian refugees problem, still operates to date. *See* Riccardo Bocco, *UNRWA and the Palestinian Refugees: A History Within History*, 28 REFUGEE SURV. Q. 229 230–37 (2010); *Who We Are*, UNRWA, https://www.unrwa.org/who-we-are (last visited Jan. 12, 2019).

81. On the interpretation of Article 1D, see MICHAEL KAGAN & ANAT BEN-DOR, NOWHERE TO RUN: GAY PALESTINIAN ASYLUM-SEEKERS IN ISRAEL (Tel Aviv Univ. Public Interest Law Program 2008), https://en-law.tau.ac.il/sites/law-english.tau.ac.il/files/media_server/Law/NowheretoRun,%20Michael%20Kagan%20%26%20Anat%20Ben-Dor%20(2008).pdf; LEX TAAKENBERG, THE STATUS OF PALESTINIAN REFUGEES IN

processed through the Israeli asylum system. Some Palestinian asylum seekers are refused any form of protection and removed, while a few others receive discretionary administrative forms of protection.[82]

There is little litigation concerning the Israeli interpretation of Article 1D and the connection between this interpretation and the manner in which the article is used to exclude Palestinians (or, at least demote them to subsidiary and discretionary protection schemes).[83] In this litigation, the security concern is mentioned indirectly.[84] In cases in which Palestinians petitioned to receive protection as refugees, the courts were quick to accept the state's interpretation of Article 1D, referring them to discretionary forms of protection.[85]

b. Exclusion of "Enemy National" Asylum Seekers

Security considerations are more clearly referenced in the "Procedure for Handling Political Asylum Seekers in Israel."[86] The asylum procedure, which creates the legal framework for Israeli asylum adjudication, also includes an explicit nationality ban, which interplays interestingly with the laws on immigration detention. Drafted in 2001 and entered into force in 2002, the procedure, which was later amended several times, included a section which introduced an "enemy national" ban:

> The State of Israel reserves the right not to absorb into Israel and not to grant permits to stay in Israel to subjects of enemy or hostile states—as determined from time to time by the authorized authorities, and so long as they have that status, and the question of their release on bond will be considered on a case by case basis, according to the circumstances and to security considerations. Israel appreciates the UN Refugee Agency's notice according to which until a comprehensive political settlement is reached in

INTERNATIONAL LAW 90–122 (1998). *See generally* U.N. High Comm'r for Refugees, Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention and Protocol Relating to the Status of Refugees to Palestinian Refugees (Dec. 2017), http://www.refworld.org/pdfid/5a1836804.pdf; U.N. High Comm'r for Refugees, Note on UNHCR's Interpretation of Article 1D of the 1951 Convention and Protocol Relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the Context of Palestinian Refugees Seeking International Protection (May 2013), http://www.refworld.org/docid/518cb8c84.html.

82. Some Palestinians who collaborate with the Israeli security apparatuses may receive protection and assistance from the Security Authority for Assistance. *See* Menachem Hofnung, *The Price of Information: Admission and Rehabilitation of Collaborators with the Israeli Security Apparatuses in the Israeli Cities*, 18 L. & GOVERNANCE 55, 58 (2017). Others are directed to apply for humanitarian status. *See* Oded Feller, *The Ministerion—On Human Rights Violations of the Population Administration*, ASS'N FOR CIV. RTS. ISR. (2004), http://www.acri.org.il/he/1002.

83. For an overview of the case law, see Yonatan Berman, *LGBTQ Refugees in Israel*, *in* LGBTQ RIGHTS IN ISRAEL: GENDER IDENTITY, SEXUAL ORIENTATION AND THE LAW 1073 (Einav H. Morgenstern, et al. eds. 2016).

84. Appeal (TA) 2250/14 Doe v. Ministry of Interior (Mar. 7, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.), in which the Court accepts the Israeli interpretation of Article 1D which excludes all Palestinians from receiving protection as refugees in light of the "complexities in the relationship between Israel and the Palestinian Authority and its residents."

85. *See generally* Yuval Livnat, *Palestinian Collaborators as Asylum Seekers in Israel*, 19 L. & GOVERNANCE 79 (2018).

86. *See generally* The Asylum Procedure, *supra* note 15.

> our region it will make every effort to find refugees asylum in other countries.[87]

The section does not define which are the "enemy" or "hostile" states, and attempts to clarify precisely which states meet this definition have been in vain.[88] To date, the "enemy or hostile states" ban has been used to limit the rights of asylum-seekers from Sudan, Lebanon, Syria, Iran, Iraq, Saudi Arabia, and possibly other states.[89] Asylum applicants from these countries were either rejected, not allowed to apply at all,[90] or received protection through humanitarian, discretionary avenues.[91] Even asylum seekers from Egypt have encountered problems obtaining working permits due to their nationality, despite Israel's peace treaty with that country.[92]

This section resulted from an unofficial understanding between the Israeli government and the United Nation High Commissioner for Refugees (UNHCR) representative's office in Jerusalem, according to which UNHCR will resettle asylum seekers from enemy countries in lieu of Israel placing them in prolonged immigration detention.[93] The agreement follows an earlier High Court of Justice decision from 1995 on the legality of detaining Iraqi asylum seekers for many months and sometimes as much as three years awaiting their deportation.[94] In this decision, the court determined that enemy nationals cannot be indefinitely detained, despite the possible security risk, which should be balanced against

87. *Id.* § 10. On the role of the UNHCR in drafting this section and finding resettlement solutions, see *infra* text accompanying note 93.

88. *See* Michael Kagan & Anat Ben Dor, *The Refugee from My Enemy is My Enemy: The Detention and Exclusion of Sudanese Refugees in Israel* 5 n.8 (Minerva Center for Human Rights Bi-annual Conference for Human Rights in Israel, Working Paper, 2006) ("In a letter written on August 1, 2005, to the legal advisor of the Ministry of Foreign Affairs the authors have asked for the list of the 'enemy states' and the mechanism for the determination of a country as an enemy state. Despite several requests, this letter was never answered.").

89. *Id.* at 5.

90. Syrians who came to Israel for medical treatment were returned to Syria upon recovery without having an opportunity to apply for asylum. Colum Lynch, *Exclusive: Israel Is Tending to Wounded Syrian Rebels*, FOREIGN POLICY (June 11, 2014), http://foreignpolicy.com/2014/06/11/exclusive-israel-is-tending-to-wounded-syrian-rebels/; Benjamin Weinthal & Yonah Jeremy Bob, *Israel Returns Syrian Girl Who Sought Asylum*, JERUSALEM POST (Jan. 29, 2014, 12:50 AM), http://www.jpost.com/Middle-East/Israel-returns-Syrian-girl-who-sought-asylum-339680.

91. The authors are familiar with at least one case of a woman who is an enemy national whose application for asylum was rejected but she was able to stay in Israel after receiving inferior, short-term protection after applying for humanitarian protection.

92. A request for a working permit served by an Egyptian asylum-seeker was rejected in July 2005 by the Ministry of the Interior since the applicant is a "citizen of an enemy country." After protests from the applicant's lawyer, the Ministry stopped claiming Egypt is an "enemy country" but claimed that applications served by Egyptian nationals undergo "strict security scrutiny" which might require six-months to two-years. Following a petition to the Tel-Aviv Administrative Court, the applicant received a work permit. Administrative Petition, 1379/06 IM v. The Minister of the Interior (Mar. 16, 2006) (Isr.).

93. Asylum Access, *UNHCR Grapples with Sudanese Refugees Detained and Excluded from Asylum in Israel*, RSDWATCH (June 16, 2006), https://rsdwatch.com/2006/06/16/unhcr-grapples-with-sudanese-refugees-detained-and-excluded-from-asylum-in-israel/.

94. HCJ 4702/94 AlTayi v. Minister of Interior 49(3) PD 843, 843 (1995) (Isr.).

their human right to freedom.[95] Additionally, the court held that the Israeli Ministry of Interior should consider alternatives to detention.[96] This agreement between the UNHCR and Israel was reached under the assumption that enemy national asylum seekers will be few and far between.[97] Until 2007, UNHCR assisted with resettling a few dozen "enemy national" asylum seekers.[98]

In the mid-2000s, however, as the numbers of Sudanese asylum seekers grew,[99] it became increasingly unlikely that UNHCR would be able to resettle all "enemy nationals."[100] While Israel continued to implement the first part of the "enemy nationals" ban in its 2002 asylum procedure, it failed to uphold its obligation to consider alternatives to detention as per the former part of the ban. Sudan and Israel had a hostile relationship, and as a result, Sudanese asylum seekers were considered "enemy nationals." Israel's Ministry of Justice responded by invoking an old law, titled "The Prevention of Infiltration Law (Crimes and Jurisdiction)" (hereafter "the Infiltration Law"),[101] and applying it to Sudanese asylum seekers to authorize their prolonged immigration detention.[102] Sudanese asylum seekers entered Israel clandestinely and are, in fact, unable to enter it in a documented manner given the lack of diplomatic relations between Sudan and Israel; they were referred to as "infiltrators."[103] Immigration officials applied this label despite Israel's commitment under Article 31 of the Refugee Convention to refrain from imposing

> penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[104]

95. *Id.* at 851–52.

96. *Id.* at 851.

97. *See id.* at 852.

98. Kagan & Ben Dor, *supra* note 90, at 6.

99. Sharon Harel, *The Israeli Asylum Apparatus: The Process of Transferring the Review of Asylum Applications from the United Nations High Commissioner for Refugees to the State of Israel*, *in* WHERE LEVINSKI MEETS ASMARA, *supra* note 10, at 43, 64.

100. On the difficulty of UNHCR to assist with the resettlement of enemy nationals, see, for example, Administrative Petition (TA) 1563/07, AlRachman v. Ministry of Interior (Oct. 30, 2007), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

101. *See generally* Prevention of Infiltration Law (Crimes and Jurisdiction), 5714–1954, (as amended).

102. *See* HCJ 3208/06 4, Anonymous Parties v. The Head of the Operations Division in the Israeli Defense Forces (October 7, 2008) (Isr.) (On file with authors, in Hebrew).

103. On the difficult journey of Sudanese and other asylum seekers through the Israeli-Egyptian border, see BILL VAN ESVELD, SINAI PERILS: RISKS TO MIGRANTS, REFUGEES, AND ASYLUM SEEKERS IN EGYPT AND ISRAEL (2008), https://www.hrw.org/report/2008/11/12/sinai-perils/risks-migrants-refugees-and-asylum-seekers-egypt-and-israel#page.

104. Convention and Protocol Relating to the Status of Refugees, *supra* note 18, at 29. Most asylum seekers pass through several other countries on their way to Israel but do not firmly resettle in any of them, and most of them do not apply for asylum in any of them. The safety of some of those countries is quite questionable, due to political instability, a tendency to deport asylum seekers, and the inability of asylum seekers to receive effective protection, status, or protection from detention. Most asylum seekers in Israel present to them to the authorities immediately and are unable to enter it in a documented manner because of the lack of diplomatic relationship between their country and Israel which makes it impossible for them to obtain a visa (in the case of Sudanese

The Infiltration Law was enacted in 1954 to allow criminalization, removal and detention of undocumented entrants into Israel.[105] The security and military apparatuses authorized and executed these detentions and removals, which were not subject to judicial review.[106] At the time, it was enacted as a state of emergency law, since few of those undocumented entries posed a risk of terrorist activities.[107] The law listed as enemy states Lebanon, Syria, Egypt, Jordan, Saudi Arabia, Iraq, Yemen, and Iran, although it was used in the early years against "infiltrators" from Jordan.[108]

In January 2006, the law was applied to Sudanese asylum seekers, some of whom were victims of the harsh events, often classified as genocide, perpetrated in Darfur, and others from other civil war-stricken areas.[109] These individuals were thus the enemies of the Sudanese regime, which has a hostile (yet nonviolent) relationship with Israel, and thus the enemies of the enemy of Israel. Despite the lack of any proof of any sort of personal connection to terrorism, these Sudanese asylum seekers were excluded solely based on their nationality.[110] It should be noted that at the time the law was introduced, there was not even a single case in which an asylum seeker from Sudan, or from any other country for that matter, had been involved in terrorism.[111]

A parallel law, The Entry to Israel Law from 1952, was applied to all other asylum seekers, allowing shorter immigration detention periods, subject to judicial review, in civil detention facilities rather than in military facilities.[112] In

asylum seekers) or because of their inability to obtain travel documents and visas for reasons connected to their flight (in the case of Eritrean asylum seekers).

105. For the original version of the law, see Prevention of Infiltration Law (Crimes and Jurisdiction), 5714–1954, SH No. 161 p. 160 (Isr.).

106. *Id.* § 30; Yonatan Berman, *Detention of Refugees and Asylum Seekers in Israel*, *in* WHERE LEVINSKI MEETS ASMARA, *supra* note 10, at 147, 188.

107. The majority of those coming in an undocumented manner were Palestinians who fled from their homes in Palestine in the 1948 war of independence, which followed the creation of the state of Israel, and wanted to return to them, either to resettle or to work their fields or collect their belongings. Oren Bracha, *Unfortunate or Perilous: The Infiltrators, the Law and the Supreme Court 1948–1954*, 21 TEL AVIV U. L. REV. 333, 351–85 (1998).

108. Prevention of Infiltration Law (Crimes and Jurisdiction), 5714–1954, SH No. 161 p. 160 (Isr.); *see* HCJ 7146/12 Adam v. the Knesset ¶ 11 (Sept. 16, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

109. Berman, *supra* note 106, at 187.

110. Over the course of the years it became unreasonable to hold the Sudanese asylum seekers in immigration detention, and they were released to the supervision of employers. This arrangement made little (or no) sense if there was a security concern. On this policy of releasing from detention to employment, see Tally Kritzman-Amir, *Privatization and Delegation of State Authority in Asylum Systems*, 5 L. & ETHICS HUM. RTS. 193, 195-7 (2011).

111. The only case of a Sudanese individual who was involved in terrorism occurred many years after, in 2016. Almog Ben Zikri et al., *Sudanese National Wounds Israeli Soldier in Stabbing Attack*, HAARETZ (Feb. 7, 2016, 4:56 PM), https://www.haaretz.com/israel-news/1.701937.

112. *Israel: Law No. 5712–1951, Entry into Israel Law*, REFWROLD (Sept. 5, 1952), http://www.refworld.org/docid/3ae6b4ec0.html.

2006, the use of the Infiltration Law was challenged in the High Court of Justice.[113] Eventually, in 2008, and after over a year of litigation, the state committed to refraining from detaining asylum seekers under the Infiltration Law.[114] At this point, the security argument seemed too farfetched, given that many Sudanese asylum seekers had already been released to alternatives to detention and resided in various parts of Israel.[115]

Immediately following the state's commitment to refrain from applying the Infiltration Law on asylum seekers, an amendment to the law was pursued.[116] Following a lengthy legislation process, five years later, in 2013, the Parliament introduced an amendment to the Infiltration Law, which was then used to detain asylum seekers for three years and enemy nationals indefinitely.[117] The High Court of Justice has repeatedly struck down[118] three amendments to the Infiltration Law[119]—all of which allowed prolonged the detention of asylum seekers,[120] and some of which specifically targeted enemy nationals[121]—and forced the state to redraft them.[122] Much like it did in the process of examining the family reunification nationality ban, the court applied a tripartite constitutional law test used typically for judicial review of primary legislation: (1) checking whether the law serves an adequate purpose; (2) whether there is a rational connection between the law and the purpose; and (3) whether the law's infringements of the right to freedom from arbitrary detention and the right to freedom of movement are proportionate to its benefits.[123] This time, however, the security argument did not dominate the court's decisions. The court noted that the arrival of the asylum

113. HCJ 3208/06, 4 Anonymous Parties v. The Head of the Operations Division in the Israeli Defense Forces (Oct. 7, 2008) (Isr.).

114. *Id.* (updating announcement of the respondents to the Court, July 10, 2007).

115. Yusri Mohamed, *Feature—Sudan Migrants Make Dangerous Desert Run for Israel*, RELIEFWEB (July 11, 2007), https://reliefweb.int/report/sudan/feature-sudan-migrants-make-dangerous-desert-run-israel.

116. *See generally* Amendment 3, *supra* note 17.

117. *Id.*

118. HCJ 7146/12 Adam v. the Knesset (Sept. 16, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); HCJ 7385/13, Eitan—Israeli Immigration Policy Ctr. v. The Israeli Gov't (Sept. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [hereinafter Eitan decision]; HCJ 8665/14, Desta v. Knesset (Aug. 11, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

119. Amendment 3, *supra* note 18, at 119; Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment no. 4 and Temporary Order), 5774–2013, SH No. 2419 p. 74 (Isr.) [hereinafter Amendment 4]; Law for Prevention of Infiltration (Offenses and Jurisdiction) (Amendments and Temporary Order), 5775–2014, SH No. 2483 p. 84 (Isr.) [hereinafter Amendment 5].

120. *See* Amendment 3, *supra* note 17, § 30A(iii)(3) (allowing for a three-year detention for asylum seekers); Amendment 4, *supra* note 119, § 30A(c) (allowing for a twelve-month immigration detention and an indefinite stay in a residential facility); Amendment 5, *supra* note 119, § 30A(c) (allowing for a three-month immigration detention and an eighteen-month stay in the residential facility).

121. Amendment 3 allowed the indefinite detention of enemy nationals. Amendment 3, *supra* note 17, §30A(a)(iv)(3).

122. Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 6 and Temporary Order), 5778–2017, SH No. 2673 p. 60 [hereinafter Amendment 6].

123. HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel et al. v. Minister of Interior 61(2) PD 202, 338 (2006) (Isr.).

seekers raise internal security concerns,[124] that some of the asylum seekers arrived from hostile countries,[125] and that the presence of the asylum seekers compromised the feelings of safety for those who reside next to them.[126] But these considerations appeared less significant than others.

Although in some of the decisions, the court expressed some unease regarding the purpose of the legislation, namely deterring asylum seekers from coming to Israel in the future, it ultimately based its decisions to strike down the amendments not on the fact that the amendments served problematic purposes but rather on the fact that their detrimental effect on the rights of asylum seekers was disproportional to their value.[127] The court refrained almost entirely from referring specifically to norms on immigration detention of "enemy nationals" in its decisions. Through its focus instead on non-enemy nationals, the court signaled that indefinite detention cannot be upheld.

Most recently, the Infiltration Law[128] was used to indiscriminately detain all asylum seekers, enemy nationals included, for three months.[129] Afterwards, they were moved to a "residential facility,"[130] which resembles a detention facility but gave them some (though still very limited) freedom of movement.[131] The law currently allows the extension of detention of a person whose release from detention will risk the safety of the state, the public peace, or the public health, as well as reliance on the security apparatus' opinion regarding activities that might risk the safety of Israel or its citizens and that occur in the asylum seeker's country of nationality or region of domicile.[132]

124. HCJ 7146/12 Adam v. the Knesset (Sept. 16, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

125. *See id.* at ¶ 3 (Vogelman, J., opinion).

126. *Id.* at ¶ 14 (Arbel, J., opinion); Eitan decision, *supra* note 118, at ¶ 68 (Vogelman, J., opinion).

127. Eitan decision, *supra* note 118, at ¶ 69 (Vogelman, J., opinion).

128. *See generally* Prevention of Infiltration Law (Crimes and Jurisdiction), 5714–1954, (as amended).

129. The indefinite detention of enemy nationals no longer applies. Amendment 5, *supra* note 119, at § 30A(c).

130. Amendment 4, *supra* note 119, at § 32D(a). Allegedly, Darfurian asylum seekers were not being held in the residential center due to the fact that most of them applied for asylum several years ago and have yet to receive a response from the Population and Immigration Authorities, which— according to their own statement— have not yet established a policy on Darfurian asylum applications. Ilan Lior, *Asylum Seekers from Darfur No Longer Being Sent to Israeli Detention Facility*, HAARETZ (Oct. 30, 2016, 11:26 AM), https://www.haaretz.com/israel-news/.premium-asylum-seekers-from-darfur-no-longer-being-sent-to-holot-1.5453672. The facilities were shut down in March 2018. *Id.*

131. The asylum seekers were required to spend the night at the facility, and given its remote location and the high transportation costs, they were not able to travel far nor frequently to Israeli towns. They were free to wander around aimlessly in the desert. Several aspects of their daily lives were monitored and subject to restrictions. Eitan decision, *supra* note 118, at ¶ 115 (noting Justice Vogelman's opinion). The residency center was closed in March 2018. *See infra* notes 394–95 and accompanying text.

132. Amendment 4, *supra* note 119, at § 30A(d)(2).

B. The United States

Similarly, the 2017 nationality bans in the United States have been justified on national security grounds with little grounding in the facts.[133] Though the arguments concerning national security have become more sophisticated in each updated version of the ban, the current version still bears little relationship to actual security risks.

1. The First Nationality Ban

The first version of the Trump administration's nationality ban, issued as an executive order on January 27, 2017,[134] was justified as an effort to "protect the American people from terrorist attacks by foreign nationals admitted to the United States."[135] The administration claimed, without factual support, that "[n]umerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States . . . through the United States refugee resettlement program."[136] Without explanation for its selection of certain nationalities beyond that their entry would be "detrimental to the interests of the United States," the executive order banned all entries, for any reason, of nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[137] This general ban contained a case-by-case exception for nationals whose admission would be "in the national interest."[138] The specific ban prohibited admission of Syrian refugees indefinitely and without exception, and was similarly justified only by a claim that their admission was "detrimental to the interests of the United States."[139] This ban did not contain any exceptions.[140] As part of a broader closure of the U.S. Refugee Admission Program, this specific ban was justified as enabling the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence to "review the USRAP application and adjudication process . . . to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States . . . ."[141]

133. Exec. Order No. 13,769, 82 Fed. Reg. 20, 8980–81 (Feb. 1, 2017).

134. *Id.*

135. *Id.* at 8977.

136. *Id.*; *see* Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, CATO INST. POL'Y ANALYSIS NO. 798 (Sept. 13, 2016), https://www.cato.org/publications/policy-analysis/terrorism-immigration-risk-analysis ("[T]he chance of an American being murdered in a terrorist attack caused by a refugee is 1 in 3.64 billion per year . . . .").

137. Exec. Order No. 13,769, 82 Fed. Reg. at 8978.

138. *Id.*

139. *Id.* at 8979.

140. In contrast, the ban on refugee admissions generally in Sec. 5(a) contained a case-by-case exception for refugees whose admission would be "in the national interest," including religious minorities facing religious persecution. *Id.*

141. *Id.*

The first ban was enjoined by two federal courts that rejected its national security justifications.[142] In its preliminary injunction order, the Virginia federal district court noted that the Trump administration failed to provide "any evidence to identify the national security concerns that allegedly prompted this [executive order], or even described the process by which the president concluded that this action is was necessary."[143] The court also cited "the only evidence in the record" relating to the national security concerns, which was a declaration by ten high-level current and former national security officials, who wrote that they were

> unaware of any specific threat that would justify the travel ban established by the Executive Order issued on January 27, 2017. We view the Order as one that ultimately undermines the national security of the United States, rather than making us safer. [Moreover, since September 11, 2001], not a single terrorist attack in the United States has been perpetrated by aliens from the countries named in the Order.[144]

Similarly, the Ninth Circuit Court of Appeals noted that despite its requests for further explanation of the immediacy of the executive order, "[r]ather than present evidence to explain the [national security justification] for the executive order, the Government has taken the position that we must not review its decision at all."[145] The court rejected the government's argument that "the President's decisions about immigration policy, particularly when motivated by national security concerns, are *unreviewable*, even if those actions potentially contravene constitutional rights and protections."[146]

2. The Second Nationality Ban

In response to these two injunctions and numerous additional lawsuits,[147] the Trump administration issued a new executive order on March 6, 2017 ("the second order").[148] The second order contained a narrowed version of the general nationality ban, prohibiting entry for nationals of only six countries for ninety days and creating exceptions for several categories of entrants, including asylees and admitted refugees.[149] Iraqi nationals were no longer subject to the nationality

142. *See* Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017); Aziz v. Trump, 234 F. Supp. 3d 724 (E.D. Va. 2017).

143. *Aziz*, 234 F. Supp. 3d at 729.

144. *Id.*

145. *Washington*, 847 F.3d at 1168.

146. *Id.* at 1161.

147. *Id.* at 1157; *Aziz*, 234 F. Supp. 3d at 739. Thirty-five lawsuits were filed challenging various aspects of Trump's nationality bans. *See Civil Rights Challenges to Trump Refugee/Visa Order*, CIVIL RIGHTS LITIGATION CLEARINGHOUSE, https://www.clearinghouse.net/results.php?searchSpecialCollection=44 (last visited Jan. 12, 2019).

148. Exec. Order No. 13,780, 82 Fed. Reg. 45 (Mar. 9, 2017).

149. *Id.* at §§ 3(a), (b), 14 (stating that (1) the ban applied only to nationals of the listed countries who were outside of the United States on March 16, 2017 *and* did not have a valid visa at 5 pm EST on January 27, 2017 *and* did not have a valid visa on March 16, 2017 and that (2) the ban did not apply to lawful permanent residents, noncitizens admitted or paroled into the United States on or after March 16, 2017, noncitizens with a document valid on or after March 16, 2017 that enabled them to travel to the United States (such as advance parole), dual nationals travelling on a passport of a country not on the list, noncitizens traveling on a diplomatic visa, and

ban, ostensibly because the Iraqi government agreed to share security information and accept the return of removed Iraqis.[150] The second order also included a case-by-case waiver available on grounds of undue hardship.[151]

The second order took great pains to justify the earlier January 27 order on national security grounds. It explained that the earlier order was an effort to "improve the screening and vetting protocols and procedures associated with the [United States Refugee Admissions Program and the visa issuance process more generally],"[152] in order to "protect [United States] citizens from terrorist attacks, including those committed by foreign nationals."[153] It also noted that the seven countries subject to the general ban in the January order "had already been identified as presenting heightened concerns about terrorism and travel to the United States."[154] Yet the second order continued to rely on unfounded factual claims relating to national security, namely that "Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe."[155] It also provided anecdotal examples of two terrorist attacks by individuals who entered as refugees,[156] ignoring the broader statistical evidence of the exceptionally limited risk of such attacks.[157]

The second order explained in detail the risks of admission of immigrants from each banned nationality, noting that each country was a "state sponsor of

asylees, refugees, and recipients of withholding of removal or relief under the Convention Against Torture, Section 3(c) also lays out the waiver process for individuals to whom the nationality ban applies.).

150. The new order suspended entry of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen for ninety days. *Id.* § 1(b)(i).

151. Trump v. Hawaii, 138 S. Ct. 2392, 2436 (Breyer, J., dissenting) (2018). This waiver has proven nearly impossible to obtain in practice. The State Department website indicates that as of September 30, 2018, 1,836 applicants had been cleared for waivers. U.S. Dep't of State—Bureau of Consular Affairs, *June 26 Supreme Court Decision on Presidential Proclamation*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/june_26_supreme_court_decision_on_presidential_proclamation9645.html (last visited Jan. 12, 2019). The State Department website does not provide numbers of applicants, but according to a recently filed complaint, a letter from the State Department to a U.S. Senator indicated that 27,129 applicants from banned countries that had been considered for waivers and 579 had been "cleared" as of April 30, a rate of 2%. Complaint at 54, Vazehrad v Trump, Civ. Case No. 3:18-cv-01587 (N.D. Cal. Mar. 13, 2018) (citing Letter from Mary K. Waters, Assistant Sec'y, Legislative Affairs, U.S. Dep't of State, to Chris Van Hollen, U.S. Senator (June 22, 2018)).

152. Exec. Order No. 13,780, 82 Fed. Reg. 45 § 1(a) (Mar. 9, 2017).

153. *Id.*

154. *Id.* at Sec. 1(b)(i) (referencing 8 U.S.C. § 1187(a)(12)) (noting that Congress restricted the use of the Visa Waiver Program for nationals of, and aliens recently present in, (A) Iraq or Syria, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence). This was a reference to 8 U.S.C § 1187(a)(12), in which Congress prevented the use of the Visa Waiver program by dual nationals of or individuals who had visited in the last six years: (1) Iraq and Syria; (2) any country designated by the Secretary of State as a state sponsor of terrorism; and (3) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence.

155. *Id.*

156. *Id.* § 1(h).

157. Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, CATO INSTITUTE POLICY ANALYSIS NO. 798 (Sept. 13, 2016), https://www.cato.org/publications/policy-analysis/terrorism-immigration-risk-analysis ("[T]he chance of an American being murdered in a terrorist attack caused by a refugee is 1 in 3.64 *billion* per year.").

terrorism, . . . significantly compromised by terrorist organizations, or contain[ed] active conflict zones."[158] It proceeded to provide a paragraph description of the risks posed by each country.[159] The second order also distinguished Iraq, which was removed from this revised nationality ban, because of its "close cooperative relationship" with the United States and its efforts to share information with the United States and accept the return of its deported nationals.[160] Nonetheless, Iraqis "suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS" were to face additional screening processes.[161]

The second nationality ban was also challenged quickly in the courts. Noting the "questionable evidence supporting the Government's national security motivations," the Hawaii federal district court enjoined the entry ban provision nationwide.[162] The court discussed a draft report by the Department of Homeland Security that undermined the national security justifications of the first nationality ban.[163] The report noted that "citizenship is an 'unlikely indicator' of terrorism threats against the United States and that very few individuals from the seven countries listed in the [first nationality ban] had carried out or attempted to carry out terrorism activities in the United States."[164] On appeal, the Ninth Circuit Court of Appeals determined that the second order contained "no sufficient finding . . . that the entry of the excluded classes would be detrimental to the [national security] interests of the United States."[165] Specifically, the court noted that the government had made no finding "that present vetting standards are inadequate [or that] absent the improved vetting procedures there likely will be harm to our national interests."[166] The court further explained that the second order failed to show that

> nationality alone renders this broad class of individuals a heightened security risk to the United States, [and fails] to tie these nationals in any way to terrorist organizations within the six designated Countries. It does not identify these nationals as contributors to active conflict or as those responsible

158. Exec. Order No. 13,780, 82 Fed. Reg. 45 § 1(d) (Mar. 9, 2017).

159. *Id.* § 1(e)(i)–(vi).

160. *Id.* § 1(g).

161. *Id.* § 4.

162. Hawai'i v. Trump, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017). The TRO was converted into a preliminary injunction on March 29. Hawai'i v. Trump, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017). Also, it enjoined section 6, the 120-day suspension of the US Refugee Admissions Program. The Ninth Circuit affirmed the core holding in June 2017. Hawaii v. Trump, 859 F.3d 741, 755–56 (9th Cir. 2017) (per curiam) (holding that "[t]he President must make a sufficient finding that the entry of these classes of people would be 'detrimental to the interests of the United States.' Further, the order runs afoul of other provisions of the INS that prohibit nationality-based discrimination and require the President to follow a specific process when setting the annual cap on the admission of refugees"). The court "vacate[d] the preliminary injunction to the extent it enjoin[ed] internal review procedures that do not burden individuals outside of the executive branch of the federal government." *Id.* at 786. In addition, the court "vacate[d] the district court's injunction to the extent the order runs against the President, but affirm[ed] to the extent that it runs against the remaining '[d]efendants.'" *Id.* at 788.

163. *Hawaii*, 241 F. Supp. 3d at 1127.

164. *Id.* (citation omitted).

165. *Hawaii*, 859 F.3d at 770.

166. *Id.* at 771.

> for insecure country conditions. It does not provide any link between an individual's nationality and their propensity to commit terrorism or their inherent dangerousness.[167]

The following day, on the other side of the country, the Maryland federal district court issued a nationwide injunction against the entry ban provision of the second Order, which the Fourth Circuit Court of Appeals affirmed.[168] The district court opinion cited Secretary of State Rex Tillerson's claim that the second order was "a vital measure for strengthening our national security" and that it focused on "countries with 'questionable vetting procedures.'"[169] Tillerson went on to note that there are "13 or 14 countries with questionable vetting procedures, 'not all of them Muslim countries and not all of them in the Middle East,'"[170] a claim somewhat orthogonal to the second order which targeted six majority-Muslim countries in the Middle East and North Africa.

The Maryland court also referenced an affidavit filed by ten former national security, foreign policy, and intelligence officials who had served in the White House, the State Department, the Department of Homeland Security, and the Central Intelligence Agency in both Democratic and Republican administrations.[171] These officials "stated that 'there is no national security purpose'" for the nationality ban, that there was no justification for the "abrupt shift from individualized vetting to group bans," that "no terrorist acts have been committed on U.S. soil by nationals of the banned countries since September 11, 2001, and that no intelligence as of January 19, 2017 suggested any potential threat."[172] Though the court declined to "second-guess the [executive branch's] conclusion that national security interests would be served by the travel ban," it found "strong indications" in the record that the primary purpose for the ban was not national security but rather religious discrimination.[173] In short, the Maryland court held that the government did not show, "or even [assert] that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in history."[174]

Just over two months later, on May 25, 2017, the U.S. Court of Appeals for the Fourth Circuit issued a mammoth opinion, over two-hundred pages in length,

167. *Id.* at 772 (citation omitted).

168. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 606 (4th Cir. 2017); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 566 (D. Md. 2017).

169. *Int'l Refugee Assistance Project*, 241 F. Supp. 3d at 548.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 562–63 (reasoning on three points: first, that the first nationality ban was adopted in a "highly irregular" fashion, without the typical interagency consultation process, and was issued without recommendations from the Attorney General or the Secretary of Homeland Security; second, "the national security rationale was offered only after courts issued injunctions against the" first nationality ban, leading the court to suspect that the religious purpose was primary; and third, that the second nationality ban was an "unprecedented response" to actual heightened security risks in the countries whose nationals were targeted by the ban, and the order "does not explain specifically why this extraordinary, unprecedented action is the necessary response to the existing risks").

174. *Id.* at 565.

upholding the preliminary injunction.[175] In its analysis of the Establishment Clause claim, the majority found that the second nationality ban "invoked national security in bad faith, as a pretext for what really is an anti-Muslim religious purpose," based on the

> weak evidence that [it] is meant to address national security interests, including the exclusion of national security agencies from the decision-making process, the post hoc nature of the national security rationale, and evidence from DHS that [the second ban] would not operate to diminish the threat of potential terrorist activity.[176]

The Fourth Circuit held that the government's "asserted national security interests" did not outweigh the harm to the plaintiffs caused by religious discrimination.[177]

These cases before the Fourth and Ninth Circuits were consolidated at the Supreme Court, which narrowed the injunctions.[178] The government argued that the Fourth Circuit should have upheld the second order because it rested on "the 'facially legitimate and bona fide' justification of protecting national security, and that the Ninth Circuit "impermissibly [second-guessed the President's judgment on a matter of national security."[179] The government further argued that "a 90-day pause on entry [was] necessary to prevent potentially dangerous individuals from entering the United States while the executive reviews the adequacy of information provided by foreign governments in connection with visa adjudications."[180] On June 26, 2017, explaining that the executive's national security interest is paramount over foreign nationals with no ties to the United States and that "the interest in preserving national security is 'an urgent objective of the highest order,'" the Supreme Court narrowed the injunctions against the second nationality ban.[181] It exempted "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States" from Sections 2(c) and 6(a)–(b) of the second nationality ban.[182] In other words, individuals seeking visas to visit family, to attend a university at which they were admitted, to accept an offer of employment, or to address an American audience were eligible for visas or admission as a refugee; those without such relationships were not. The Supreme Court never heard the challenge on its merits, as the second nationality ban expired before it could do so.[183]

175. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 606 (4th Cir. 2017).
176. *Id.* at 591–92.
177. *Id.* at 592.
178. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2086, 2089 (2017).
179. *Id.* at 2086.
180. *Id.*
181. *Id.* at 2088.
182. *Id.* at 2088–89.
183. *See* Amy Howe, *Court Releases October Calendar*, SCOTUSBLOG (July 19, 2017, 9:59 PM), http://www.scotusblog.com/2017/07/court-releases-october-calendar/.

3. The Third Nationality Ban

In the meantime, the Trump administration issued the third nationality ban in the form of a "proclamation" on September 24, 2017, justified by the need for "information sharing in support of immigration screening and vetting."[184] The third ban is explicit and general, restricts entry of immigrants but allows the entry of some nonimmigrants, and includes "insubstantial, if not entirely symbolic"[185] restrictions on two countries without a majority Muslim population. Notably, unlike the prior two nationality bans, the provisions of which expired after ninety or one-hundred twenty days, the current ban has no end date.[186]

Noting that the Secretaries of State and Homeland Security and the Director of National Intelligence created three categories of national security information needed from foreign countries, the document explains that sixteen countries' practices were characterized as inadequate.[187] It then orders entry restrictions for nationals of eight countries: Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen.[188] The proclamation explicitly exempts from its nationality ban asylees, recipients of protection under the Convention Against Torture, and admitted refugees.[189] Though the language of the ban professes that it does not "limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture," it remains unclear how individuals subject to the nationality ban will be able to enter the United States and seek protection if they are unable to obtain a visa.[190] Finally, the ban contains a case-by-case waiver for a variety of foreign nationals, including those who have previously been admitted for long-term activity (work or study) and seek reentry; those who seek to visit a close family member who is a U.S. citizen, lawful permanent resident, or on a nonimmigrant visa and would suffer undue hardship if denied entry; current and former employees of the U.S. government; and other special circumstances, including infants, young children, and those in need of urgent medical care.[191] In practice, the State Department has

184. Proclamation No. 9645, *supra* note 1.

185. Trump v. Hawaii, 138 S. Ct. 2392, 2442 (2018) (Sotomayor, J., dissenting).

186. Proclamation No. 9645, *supra* note 1, at § 1(c). Section 4 creates a process to review countries' efforts to comply with identity-management and information-sharing requirements, including reporting every 180 days to the president on

> the interests of the United States, if any, that continue to require the suspension of, or limitations on, the entry on certain classes of nationals of countries identified in section 2 of this proclamation and whether the restrictions and limitations imposed by section 2 of this proclamation should be continued, modified, terminated, or supplemented . . . .

Id. at § 4(1).

187. *Id.* at § 1(c), (e) (noting the following criteria: identity-management information; national security and public-safety information; and national security and public-safety risk assessment).

188. *Id.* at Sec. 1(g), (h)(2). As noted below, Chad was removed from this list as of April 13, 2018, through a presidential announcement. Press Release, U.S. Dep't of Homeland Sec., Chad Has Met Baseline Security Requirements, Travel Restrictions to Be Removed (Apr. 10, 2018).

189. Also exempts LPRs, dual nationals, valid entry documents, and diplomatic visas. Proclamation No. 9645, *supra* note 1, at Sec. 3(b) (exempting LPRs, dual nationals, valid entry documents, and diplomatic visas).

190. *Id.* at § 6(e).

191. *Id.* at § 3. Additional categories eligible for a waiver are as follows:

granted exceptionally limited numbers of waivers—in the range of 2% of waiver applications.[192]

This third nationality ban creates a sliding scale of state compliance with the national security information sharing demands of the United States, looking both to efforts to cooperate and to capabilities. In the least restrictive category is Somalia, which has willingly shared national security information but has deficiencies in technology and is a terrorist safe-haven with limited government control.[193] That nation is subject to a ban on immigrant visas and additional scrutiny for other visas.[194] One category higher, Chad, Libya, and Yemen's governments are viewed as cooperative but not sharing enough national security information. Libyan and Yemeni nationals are excluded from immigrant visas as well as business and tourist visas.[195] (Chadian nationals were exempted from the ban in April 2018.[196]) Iran is portrayed as even less compliant, failing to cooperate with the United States and receive deported nationals, and is categorized by the State Department as a state sponsor of terrorism.[197] Iranian nationals are banned from

(B) the foreign national has previously established significant contacts with the United States but is outside the United States on the applicable effective date under section 7 of this proclamation for work, study, or other lawful activity; (C) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry would impair those obligations; . . . (G) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 et seq., traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA; (H) the foreign national is a Canadian permanent resident who applies for a visa at a location within Canada; (I) the foreign national is traveling as a United States Government–sponsored exchange visitor; or (J) the foreign national is traveling to the United States, at the request of a United States Government department or agency, for legitimate law enforcement, foreign policy, or national security purposes.

Id.

192. Indeed, Justice Breyer's dissent notes that a consular official "filed a sworn affidavit asserting that he and other officials do not, in fact, have discretion to grant waivers." Trump v. Hawaii, 138 S. Ct. 2392, 2432 (2018) (Breyer, J., dissenting). The State Department website indicates that as of September 30, 2018, 1,836 applicants had been cleared for waivers. U.S. Dep't of State, *June 26 Supreme Court Decision*, *supra* note 151. The State Department website does not provide numbers of applicants, but according to a recently filed complaint, a letter from the State Department to a U.S. Senator indicated that 6,555 applicants from banned countries had been considered for waivers and 102 had been "cleared" as of April 30, a rate of about 2%. Complaint at 54, Toloubeydokhti v. Nielsen, Civil Case No. 3:18-cv-01587, (N.D. Ca. Mar. 13, 2018) (citing Letter from Mary K. Waters, U.S. Dep't of State, to Chris Van Hollen, U.S. Senator (Feb. 22, 2018)).

193. Proclamation No. 9645, *supra* note 1, at § 2(h)(i).

194. *Id.* at § 2(h)(ii).

195. *Id.* at § 2(a), (c), (g).

196. On April 13, 2018, the Trump administration began issuing visas to Chadian nationals, announcing that "Chad, a critical U.S. counterterrorism partner, has made strides in meeting the criteria established in the Presidential Proclamation and has addressed previous deficiencies." U.S. Dep't of Homeland Sec., Chad Has Met Baseline Security Requirements*, supra* note 188. It was never clear why Chad, which has been for many years one of the United States' most valuable counterterrorism allies in Africa, was included in the third nationality ban. Brief of Former National Security Officials as Amici Curiae in Support of Respondents at 41, Trump v. Hawaii, 138 S. Ct. 2392, 2432 (2018) (No. 17-965) (citing Kevin Sieff*, Why Did the U.S. Travel Ban Add Counterterrorism Partner Chad? No One Seems Quite Sure,* WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/09/25/why-did-the-u-s-travel-ban-add-counterterrorism-partner-chad-no-one-seems-quite-sure/?utm_term=.6c48ce2dba5e; Krishnadev Calamur, *Why Was Chad Included in the New Travel Ban?*, ATLANTIC (Sept. 26, 2017), https://www.theatlantic.com/international/archive/2017/09/chad-travel-ban/540963/).

197. Proclamation No. 9645, *supra* note 1, at § 2(b)(i).

immigrant and nonimmigrant visas except student and exchange visitors who may be subject to enhanced screening and vetting requirements.[198] In a more targeted nationality ban, Venezuela has adopted acceptable national security standards, but its government is uncooperative, so entry is banned for officials of the government agency involved in screening and vetting and their immediate families on business and tourist visas plus additional security measures are implemented for visa holders.[199] In the most restrictive category are both North Korea (which doesn't cooperate at all) and Syria, which regularly fails to cooperate and is a state sponsor of terrorism.[200] All types of entry, immigrant or nonimmigrant, are banned for nationals of these countries.[201] The proclamation explicitly exempts Iraqi nationals from this ban even though Iraq also failed the national security information sharing test.[202]

This third nationality ban was once again challenged in the courts.[203] On October 17, 2017, the day before it went into full effect,[204] the federal district court in Hawaii enjoined the proclamation, except as to nationals of North Korea and Venezuela, because it likely violated a statute prohibiting nationality-based discrimination in immigrant visa issuance.[205] Two months later, on December 22, the Ninth Circuit affirmed the TRO, noting that "[n]ational security is undoubtedly a paramount public interest . . . but cannot be used as a 'talisman . . . to ward off inconvenient claims.'"[206] The Ninth Circuit held that "the President has failed to make sufficient findings that the 'entry of certain classes of aliens would be detrimental to the national interest'"[207] and upheld a narrower version of the preliminary injunction that covered "those persons who have a credible bona fide relationship with a person or entity in the United States."[208]

That same day, the Maryland federal district court also enjoined the third nationality ban.[209] The Maryland district court opinion called the order a "Muslim ban" in the context of the two prior nationality bans and found that it likely violates the Establishment Clause.[210] The court also found that the plaintiffs were

198. *Id.* at § 2(b)(ii).
199. *Id.* at § 2(f).
200. *Id.* at § 2(d)(i), (e)(i).
201. *Id.* at § 2(d)(ii), (e)(ii).
202. *Id.* at § 1(g).
203. Trump v. Hawaii, 138 S. Ct. 2392, 2406 (2018).
204. The third nationality ban contains two effective dates: September 24, 2017, for individuals subject to the second nationality ban who lack a credible claim of a bona fide relationship with a person or entity in the United States, and October 18, 2018, for individuals subject to the second nationality ban who have a credible claim of a bona fide relationship with a person or entity in the United States as well as nationals of Chad, North Korea, and Venezuela (the three nationalities banned in the third nationality ban but not subject to the second nationality ban). Proclamation No. 9645, *supra* note 1, at §. 7.
205. Hawaii v. Trump, 265 F. Supp. 3d 1140, 1160–61 (D. Haw. 2017) (granting motion for temporary restraining order).
206. Hawaii v. Trump, 878 F.3d 662, 699 (9th Cir. 2017) (citation omitted).
207. *Id.*
208. *Id.* at 702.
209. *See generally* Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017).
210. *Id.* at 628–29.

likely to succeed on their claim that the proclamation violates the nondiscrimination provisions of the INA with respect to immigrants.[211] It issued a preliminary injunction prohibiting enforcement of Section 2 of the Proclamation against "individuals 'who have a credible claim of a bona fide relationship with a person or entity in the United States.'"[212] On February 15, 2018, the Fourth Circuit Court of Appeals decided that the Proclamation was "unconstitutionally tainted with animus towards Islam."[213] In the meantime, in two extremely brief orders on December 4, 2017, the Supreme Court stayed the preliminary injunctions in both cases, meaning that the third nationality ban went into effect.[214]

On June 26, 2018, the Supreme Court upheld the third nationality ban, with the majority accepting wholesale the Trump administration's national security justifications for the ban.[215] Walking through each ban in turn, Justice Roberts, writing for the majority, noted that the seven countries whose nationals were subject to the first ban "had been previously identified by Congress or prior administrations as posing heightened terrorism risks."[216] The countries whose nationals were banned by the second order were each "a state sponsor of terrorism, ha[d] been significantly compromised by terrorist organizations, or contain[ed] active conflict zones."[217] The third nationality ban "placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing [public safety] information about their nationals the President deemed inadequate."[218] The majority determined that 8 U.S.C. § 1182(f) not only grants "the President broad discretion to suspend the entry of aliens into the United States" but also "exudes deference to the President in every clause."[219] As a result, the national security justifications offered by the Trump administration were sufficient to uphold the ban.[220]

In response to the plaintiffs' argument that the third nationality ban did not present a sufficient or persuasive justification for using nationality as a proxy for national security risk, Justice Roberts exhibited extreme deference to the executive.[221] The majority opinion explained that the plaintiffs' claims "are grounded on the premise that § 1182(f) not only requires the President to *make* a finding that entry 'would be detrimental to the interests of the United States,' but also to

211. *Id.* at 629.

212. *Id.* at 631 (quoting Trump v. Hawaii, 137 S. Ct. 2080, 2088 (2017)).

213. Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 256–57 (4th Cir. 2018).

214. *See generally* Trump v. Hawaii, 138 S. Ct. 542 (2017); Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 542 (2017).

215. Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018) ("The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion.").

216. *Id.* at 2403.

217. *Id.* at 2404 (citation omitted).

218. *Id.*

219. *Id.* at 2408.

220. *Id*. at 2423.

221. *Id.* at 2409.

explain that finding with sufficient detail to enable judicial review. That premise is questionable."[222]

Rejecting arguments that it violates statutory and constitutional antidiscrimination provisions, the Court upheld the third nationality ban.[223] This decision rested on the majority's finding that the ban's national security purpose is legitimate and that the Court is unable to override the executive's judgment on national security matters.[224] Justice Roberts found three factors particularly important: (1) the removal of three countries from the nationality bans, (2) the exceptions for different categories of affected nationals, and (3) the availability of a waiver.[225]

In dissent, Justices Breyer and Sotomayor disagreed with the majority's national security analysis.[226] In Justice Sotomayor's words, the third nationality ban "leaves undisturbed a policy first advertised openly and unequivocally as a 'total and complete shutdown of Muslims entering the United States' because the policy now masquerades behind a façade of national-security concerns."[227] She found that the evidence in the record would lead a reasonable person to determine that the third nationality ban was "motivated by anti-Muslim animus" and therefore unconstitutional.[228] Justice Sotomayor explained that "Congress has already addressed the national-security concerns supposedly undergirding" the third nationality ban and that the Trump administration "offers no evidence that this current vetting scheme . . . is inadequate to achieve the Proclamation's claimed objectives."[229]

Justice Sotomayor further dismantled the majority opinion by drawing on an amicus brief submitted by "several national security officials from both political parties,"[230] which stated that the third nationality ban "do[es] not advance the national-security or foreign policy interests of the United States, and in fact do serious harm to those interests."[231] That brief highlights the Administration's failure to find "a single national security official" who will submit a sworn declaration in support of the nationality bans, and explains that this is a striking deviation from past practice.[232] It also notes that in forty years, not a single national

222. *Id.*

223. *Id.* at 2406–09 (holding that 8 U.S.C. §1152(1)(A) prohibits discrimination only in visa issuance but not in admissibility criteria); *Id.* at 2418, 2420 (holding that the "Proclamation . . . is facially neutral toward religion" (29) and that the Court's "inquiry into matters of entry and national security is highly constrained"). Applying a rational basis review standard, the court determined that it would "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420.

224. *Id.* at 2412

225. *Id.* at 2422.

226. *Id*. at 2433 (Breyer, J., Sotomayor, J., dissenting).

227. *Id.* at 2433.

228. *Id.*

229. *Id.* at 2443–44.

230. *Id.* at 2444–45.

231. Brief for Former National Security Officials as Amici Curiae Supporting Respondents, Trump v. Hawaii, 138 S. Ct. 2393 (2018) (No. 17-965), 2018 U.S. S. Ct. Briefs LEXIS 1383, at *31.

232. *Id.* at 31 (filed Mar. 30, 2018) ("As the Court well knows, in countless prior cases where the Executive Branch has faced a legal challenge to a significant national security initiative, it has submitted into the record at

of the countries targeted by the third nationality ban has committed a deadly terrorist attack on U.S. soil.[233]

Justice Breyer's dissent painstakingly detailed the failures of the exemption and waiver process laid out in the third nationality ban.[234] Justice Breyer explained that, "if the Government is not applying the Proclamation's exemption and waiver system, the claim that the Proclamation is a "Muslim ban,' rather than a 'security-based ban,' becomes much stronger."[235]

4. The Fourth Nationality Ban

The fourth nationality ban is a "soft" ban. Issued as an executive order on October 24, 2017, this ban takes the form of heightened screening for refugees from eleven countries.[236] Resuming the refugee admissions program that was suspended as part of the previous travel bans, the order created a ninety-day review period to enable the administration to conduct a "threat assessment" of the countries targeted by the ban.[237] The implementing memo for the fourth nationality ban explains that nationals of eleven countries which it does not name will be subject to additional vetting during the refugee admissions process.[238] Statements from senior administration officials indicated that nationals of the following countries are impacted by the fourth nationality ban: Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Syria, and Yemen.[239] While the memo implementing the order indicates that nationals of these countries will be admitted as refugees on a "case-by-case" basis if their "resettlement in the United States would fulfill critical foreign policy interests, without compromising national security," presumably, the vast majority will be excluded by this standard.[240]

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least one sworn declaration from a federal official that seeks to explain the motivation and origins of the challenged policy. Indeed, *this Administration has followed that same standard practice when its other immigration policies have faced substantial constitutional and statutory challenges.* Yet here, after more than a year of litigation, Petitioners still have not proffered a single national security official who will so attest in defense of the broadest travel ban in American history.") (citations omitted)).

233. *Id*. at *36. (citing Alex Nowrasteh, *President Trump's New Travel Executive Order Has Little National Security Justification*, CATO INSTITUTE: CATO AT LIBERTY (Sept. 25, 2017, 6:47 AM), https://www.cato.org/blog/zero-terrorists-eight-countries-new-trump-travel-executive-order.

234. Trump v. Hawaii 138 S. Ct. 2392, 2429–2433 (Breyer, J., dissenting)

235. *Id.* at 2430.

236. *Presidential Executive Order on Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities*, WHITE HOUSE (Oct. 24, 2017), https://www.whitehouse.gov/presidential-actions/presidential-executive-order-resuming-united-states-refugee-admissions-program-enhanced-vetting-capabilities/ [hereinafter *Presidential Order*].

237. *Id.* at § 3(a)(ii).

238. Rex Tillerson Memorandum, Sec'y of State, Elane Duke, Acting Sec'y of Homeland Sec., & Daniel Coats, Dir. of Nat'l Intelligence on Resuming the U.S. Admissions Program with Enhanced Vetting Capabilities to the President of the U.S. 2 (Oct. 23, 2017), https://www.dhs.gov/sites/default/files/publications/17_1023_S1_Refugee-Admissions-Program.pdf [hereinafter Memorandum].

239. Ted Hesson, *Trump Targets 11 Nations in Refugee Order*, POLITICO (Oct. 24, 2017, 11:22 PM), https://www.politico.com/story/2017/10/24/refugee-nations-trump-administration-muslim-244135.

240. Memorandum, *supra* note 238, at 2.

The fourth nationality ban was partially enjoined on December 23, 2017, and the litigation is ongoing.[241] The ban required the Secretary of Homeland Security to undertake, within ninety days, a review to determine whether any aspects of the program should be changed.[242] A week after that review period ended, the Secretary announced enhanced screening requirements for "certain nationals of high-risk countries," claiming that these restrictions would "bolster public safety and national security."[243]

C. Discussion

The national security justification for the Israeli nationality ban on "enemy nationals" and for the four United States nationality bans was a presumption that a person's nationality is a strong indicator of their political beliefs and may serve as a predictor of their future (security threatening) behavior.[244] In other words, the use of the nationality bans stem from an alleged belief that immigrants from certain countries may pose a security threat, despite the lack of any information connecting them personally to terrorism or even statistical support for that assumption.[245] Nationality bans create irrefutable or hard-to-refute presumptions of dangerousness, shifting the (nearly impossible) burden to the immigrant to establish their innocence.

The security justifications underlying the nationality bans in both countries raise two central issues. These bans represent the opposite of evidence-based policymaking; they are instead irrational, fear-based policymaking. The inference that nationals of certain nationalities constitute a security risk based on a small fraction of cases in which those nationals were actually involved in global terrorism, out of the entire immigrant population from that country of nationality, is an example of "probability neglect."[246] Cass Sunstein, following Richard Thaller, defines "probability neglect" as a state in which the emotional response to a certain trigger results in the tendency to neglect a small probability that the risk will actually materialize.[247] National security threats evoke strong emotions, which amplify the impact of probability neglect.[248] In other words, people react to terrorist attacks with "more intense fear, and a larger behavioral response, than

241. Doe v. Trump and Jewish Family Services v. Trump, Preliminary Injunction Order Relating to Both Cases (W.D. Wa. Dec. 23, 2017). The litigation over the ban is ongoing even though the ban has expired by its own terms. *See Groups Respond to Court Ruling Allowing Refugee Ban Lawsuit to Continue*, NAT'L IMMIGR. L. CTR. (Mar. 29, 2018), https://www.nilc.org/2018/03/29/groups-respond-to-court-ruling-allowing-refugee-ban-lawsuit-to-continue/ (last visited Jan. 12, 2019).

242. *Presidential Order*, *supra* note 236, at §§ 2(c), 3(a)(ii).

243. Press Release, U.S. Dep't of Homeland Sec., DHS Announces Additional, Enhanced Security Procedures for Refugees Seeking Resettlement in the United States (Jan. 29, 2018), https://www.dhs.gov/news/2018/01/29/dhs-announces-additional-enhanced-security-procedures-refugees-seeking-resettlement.

244. Michael Kagan, *Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East,* 38 COLUM. HUM. RTS. L. REV. 263, 264 (2007).

245. *Id.* at 264–65.

246. Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law,* 112 YALE L. J. 61, 62–63 (2002).

247. *Id.* at 63.

248. Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK AND UNCERTAINTY 121, 124 (2003).

[they do to] statistically identical risks."[249] Thus in the national security realm, differences in probability make even less difference in individuals' perception of risk. This extreme failure to appropriately weigh the slim probability of national security risks impacts government, legislatures, and courts, as well as the general public.[250]

The widespread coverage of terrorism in the media amplifies this emotional response, instilling anxiety that may exacerbate the resulting cognitive bias.[251] In the case of nationality bans, it appears that the fear of terrorism causes legislatures and the courts to perceive the security threats as sufficiently imminent to justify blanket prohibitions against immigrants of certain nationalities. Alternatively, it might be that the nationality bans are legislatures' and courts' response to the public's "probability neglect"—a response, or a performance, that seeks, whether intendedly or unintendedly, institutional public legitimacy. Generally, courts may find it difficult to scrutinize alleged security measures that target non-nationals and may struggle to protect their institutional public legitimacy in such a context.

During the Israeli immigration nationality ban litigation, some of the Justices actually referred to the slim probability of a security risk,[252] yet others refused to acknowledge probability as a relevant consideration.[253] In *Trump v. Hawaii,* Justice Roberts entirely avoided the question, opining that "'[whether] the President's chosen method' of addressing perceived risks is justified from a policy perspective is "irrelevant to the scope of his [§ 1182(f)] authority.'"[254] The ability to understand the probability of a certain risk is influenced substantially by the framing of such risks.[255] Instead of taking the opportunity to educate and inform the public, the courts of both countries declined to engage with the factual evidence underling the bans.[256] This extreme deference to the executive at the expense of the facts will not make either country safer.[257] To the contrary, it is likely to generate political backlash from affected populations that will damage each country's legitimacy.[258]

249. *Id.* at 126.

250. *Id.* at 129–30.

251. Moshe Cohen Eliya & Gila Stopler, *Probability Thresholds as Deontological Constraints in Global Constitutionalism*, 49 COLUM. J. TRANSNAT'L. L., 75, 93–94 (2011).

252. *See, e.g.*, Adalah Legal Centre for Arab Minority Rights in Israel et al. v. Minister of Interior 61(2) PD 202, 383 (2006) (Isr.); *Id.* at ¶ 11 (Beinsisch, J., opinion); *Id.* at ¶ 110 (Barak, C.J., opinion). *Id.* at ¶¶ 5, 8, 9 (Proccacia, J., opinion); *Id.* at ¶ 23 (Joubran, J., opinion); *Id.* at ¶ 4 (Hayut, J., opinion); *Id.* at ¶ 8 (Levy, J., opinion).

253. *See id.* at ¶ 5 (Grunis, J., opinion); *Id.* at ¶ 2 (Cheshin, J., opinion); *Id.* at ¶¶ 19–20 (Naor, J., opinion); *Id.* at ¶ 6 (Adiel, J., opinion); *Id.* at ¶ 17 (Rivlin, J., opinion).

254. Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018) (quoting Sale v. Haitian Ctrs. Council, 509 U.S. 155, 187 (1993)).

255. Medina & Saban, *supra* note 74, at 58.

256. Sunstein, *supra* note 248, at 132–33.

257. Ironically, the Department of Homeland Security has recently extended Temporary Protected Status to nationals of three countries (Somalia, Syria, and Yemen) subject to the nationality ban. This underscores the lack of factual justification for the bans.

258. *See* Brief for Former Nat'l Sec. Officials as Amici Curiae Supporting Respondents at *31–59, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 U.S. S. Ct. Briefs LEXIS 1383.

In addition to being factually unsubstantiated, these nationality bans are legally overbroad. Rather than assessing individuals on a case-by-case basis, these laws designate all individuals from a certain country as suspect on national security grounds. Instead of looking to actions as a basis for exclusion, this excessively broad legal category relies on identity to prohibit entry. In this way, the nationality bans stigmatize immigrants from targeted countries, designating them as national security threats.[259] This approach is reminiscent of the use of character evidence to predict behavior from a personality trait—an analytical move that is generally prohibited by the Federal Rules of Evidence in U.S. courts.[260] It is also part of a broader pattern of national security exceptionalism in immigration law that has been used to justify legal overreach despite questionable factual support, resulting in substantial harm to foreign nationals.[261]

By justifying these bans through security arguments, states mark potential immigrants from the banned nationalities as "enemies."[262] Israel has shifted perceptions explicitly through the use of the "enemy nationals" label.[263] The Trump administration has similarly marked banned nationals and Muslims more broadly as threats to national security, providing government endorsement of long-standing stereotypes.[264] Michael Kagan rightfully raises the concern that such labels "can easily be used to lend apparent justification to policies that would otherwise be labeled illegitimate discrimination."[265] In the absence of a real, direct, ongoing conflict between Sudan and Israel, and in light of the totality of the exclusion measures applied throughout the years in Israel's asylum regime, it seems that the use of the concept of enemy nationals was mostly meant to deter the arrival of Sudanese asylum seekers and to prevent those present from settling and integrating into Israeli society.[266] In the case of the United States, the nationality ban has drawn from and amplified fears of Muslim migrants, particularly Syrians.[267]

These nationality-based bans are problematic as a question of international law, which frowns on blanket prohibitions, instead favoring individual investigation of security risks. International refugee law offers an example of how to strike a balance between the rights of refugees and the security interests of the host states. While Article 3 of the Refugee Convention prohibits discrimination

259. *See* Link & Phelan, *supra* note 45, at 367.

260. *See* FED. R. EVID. 404 (recognizing that character-propensity evidence is generally banned because the jury is likely to assign more weight to this type of evidence than it merits, in some cases because the evidence inflames their emotions).

261. *See generally* Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485 (2010).

262. Kagan, *supra* note 244, at 264.

263. Referring the middle-eastern context, Kagan notes that "the logic behind the enemy nationals concept has been aggressively used by Arab states and Israel to define civilians as enemies on the basis of their ethnic, religious, or national origins rather than on their actual involvement in armed conflict." *Id*. at 265.

264. Brief for Civil Rights Orgs. as Amici Curiae Supporting Respondents at 15–16, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965).

265. Kagan, *supra* note 244, at 264–65.

266. *See generally* Kritzman-Amir, *supra* note 10.

267. *See, e.g.*, Arnie Seipel, *30 Governors Call for Halt to U.S. Resettlement of Syrian Refugees*, NPR (Nov. 17, 2015), https://www.npr.org/2015/11/17/456336432/more-governors-oppose-u-s-resettlement-of-syrian-refugees.

on the basis of nationality,[268] Article 1F allows for limited grounds of individual exclusion,[269] and Articles 32 and 33(2) allow the expulsion of and deny *nonrefoulement* protection to individuals about "whom there are reasonable grounds for regarding as a danger to the security of the country" in which they reside.[270] In other words, international refugee law allows banning individuals after an investigation of the threat they pose but prohibits generalizations based on nationality. Similar prohibitions on discrimination against refugees on the basis of their nationality exist in international humanitarian law.[271] International human rights law also includes general prohibitions on racial discrimination,[272] applicable to both refugees and other immigrants.

These nationality bans push members of the affected populations further into the discretionary realm of immigration adjudication. In Michael Kagan's most recent writing on the subject, he argues that the enemy national bans were invoked to regulate migration, to exclude people from procedures through which they can claim rights, and to leave them only the option to apply for protection through discretionary procedures.[273] Indeed, labelling persons as enemy nationals renders them external to the asylum system, and leaves their only option the hope of protection through a humanitarian complementary form of protection, or to remain in a state of legal limbo.[274] It is for this reason that there is only one Sudanese refugee in Israel, whereas all the other Sudanese asylum seekers are neither refouled nor granted asylum,[275] with only a few hundred asylum seekers from Darfur receiving group-basis discretionary protection outside the framework of the asylum system.[276] In the United States, potential immigrants who are

268. United Nations Convention and Protocol Relating to the Status of Refugees art. 3, Apr. 22, 1951, 189 U.N.T.S. 137. Israel has not entered a reservation to this article, and it is unclear whether such a reservation would even be legal. For the other reservations made by Israel, see *id.* art. 2.

269. United Nations Convention and Protocol Relating to the Status of Refugees art. 1F, Apr. 22, 1951, 189 U.N.T.S. 137 (allowing the exclusion of a person for "whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations").

270. United Nations Convention and Protocol Relating to the Status of Refugees arts. 32–33, Apr. 22, 1951, 189 U.N.T.S. 137.

271. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 44–45, Aug. 12, 1949, 75 U.N.T.S. 287.

272. U.N. Doc A/810 at 71, GAOR Res. 217 (III) A, Universal Declaration of Human Rights, ¶¶ 1–2 (1948); United Nations International Covenant on Civil and Political Rights art. 2(1), Dec. 19, 1966, 999 U.N.T.S. 171; United Nations International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3.

273. Michael Kagan, *Refugees and the Changing Israeli Perception of Enemy Nationals*, *in* WHERE LEVINSKI MEETS ASMARA, *supra* note 10, at 427–28.

274. *Id.*

275. Ilan Lior, *Israel Grants Refugee Status to Sudanese Asylum Seeker for First Time*, HAARETZ (June 23, 2016, 8:25 PM), https://www.haaretz.com/israel-news/1.726774; Lee Yaron, *Interior Minister Refuses to Grant Darfuri Asylum Seekers Resident's Visas Ahead of Election*, HAARTEZ (Feb. 27, 2019, 4:37 PM), https://www.haaretz.com/israel-news/elections/.premium-interior-minister-refuses-to-grant-darfuri-asylum-seekers-resident-s-visas-1.6976535.

276. In 2007, the Government decided to give status and protection a group of over 400 asylum seekers from Darfur. Mazal Mualem, *Israel to Grant Citizenship to Hundreds of Darfur Refugees*, HAARETZ (Sept. 5,

barred from entry by the third nationality ban may obtain a waiver on a case-by-case basis, subject to the discretion of the consular officer.[277] These waivers have been nearly impossible to obtain, with an approval rate of approximately 2%.[278] For nationals of the impacted countries who wish to seek asylum in the United States, it will become much harder to enter the country and access the asylum process.

III. NATIONALITY BANS AS PRETEXTUAL

The Israeli and U.S. nationality bans are pretextual.[279] In addition to being grounded in an unfounded national security rationale, they use nationality as a smokescreen to hide the laws' true and constitutionally invalid purpose. Nationality has long been used as a ground for group admission and exclusion in the immigration realm.[280] As a result, in both countries, nationality-based distinctions in immigration hold a veneer of respectability that can be leveraged to disguise other types of discrimination.[281]

In the United States, in addition to the history of exclusion of Asians, Congress has used nationality to admit and prioritize the admission of immigrants and nonimmigrants, as well as refugees and people in refugee-like situations.[282] Temporary Protected Status is awarded to individuals based on their nationality

2007, 12:00 AM), https://www.haaretz.com/1.4971232. It was decided in late 2017 that an additional group of Darfurians will also be granted status and protection. This decision was made only after them spending many years in Israel and following the Court's intervention. Ilan Lior, *High Court Slams Israeli Government for Failing to Develop Policy on Darfur Refugees*, HAARETZ (Dec. 20, 2017, 12:35 AM), https://www.haaretz.com/israel-news/.premium-1.830052.

277. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,165 (Sept. 27, 2017).

278. Trump v. Hawaii, 138 S. Ct. 2392, 2431–32 (2018) (Breyer, J., dissenting). The State Department website indicates that as of July 15, 2018, 996 applicants had been cleared for waivers. U.S. Dep't of State—Bureau of Consular Affairs, *June 26 Supreme Court Decision on Presidential Proclamation 9645*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/june_26_supreme_court_decision_on_presidential_proclamation9645.html (last visited Jan. 12, 2019). The State Department website does not provide numbers of applicants, but according to a recently filed complaint, a letter from the State Department to a U.S. Senator indicated that 27,129 applicants from banned countries had been considered for waivers and 579 had been "cleared" as of April 30, a rate of 2%. Complaint at 10, Toloubeydokhti et al. v. Nielsen, (N.D. Cal. June 29, 2018) (No. 3:18-cv-01587) (citing *Letter from Mary K. Waters, Assistant Secretary, Legislative Affairs. U.S. Department of State, to Senator Chris Van Hollen*, (June. 22, 2018)).

279. Benjamin Wittes argues that *Trump v. Hawaii* is a case about the constitutional status of pretext, and that, "all nine justices conclude either that the stated rationale for the presidential proclamation is a pretext." Benjamin Wittes, *Reflections on the Travel Ban Case and the Constitutional Status of Pretext,* LAWFARE (July 6, 2018), https://www.lawfareblog.com/reflections-travel-ban-case-and-constitutional-status-pretext. *See also* Elizabeth Goitein, Trump v Hawaii: *Giving Pretext a Pass*, JUST SECURITY (June 27, 2018), https://www.justsecurity.org/58553/trump-hawaii-giving-pretext-pass/.

280. *See, e.g.*, Kagan, *supra* note 244, at 264 ("The enemy nationals doctrine presumes that in times of international conflict, a person can be considered potentially dangerous solely on the basis of his or her nationality.").

281. The nationality ban litigation has, for example, focused on 8 U.S.C. § 1182(f), which authorizes the President to suspend or restrict the entry of "any aliens or . . . class of aliens [whose entry] into the United States would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f) (2018).

282. *See id.*

and presence on U.S. soil, even without lawful status.[283] The diversity visa program admits immigrants from specific countries that have sent relatively few recent immigrants to the United States.[284] Congress has periodically authorized the admission as immigrants of nationals of countries perceived to be underrepresented in immigration flows to the United States, and has also awarded permanent residence to groups of nationals who arrive in an unusual migration pattern.[285] Refugees who seek admission to the United States through family reunification processes are prioritized based on nationality, and refugees from certain countries face stricter vetting processes.[286] Similarly, recipients of employment and family-based immigrant visas face annual per-country limits in visa issuance.[287] Under the Visa Waiver Program, nationals of thirty-eight countries are able to travel to the United States for up to ninety days without a visa.[288]

In Israel, there is an official perception that being Jewish means belonging to a Jewish nationality, rather than merely belonging to the Jewish religion.[289] Persons with a broadly defined Jewish nationality are automatically included in the Israeli nationality and are offered automatic citizenship.[290] Additionally, in Israel, a person's nationality influences the vetting process she undergoes as well as the visa requirements.[291] Only persons from certain nationalities are included in the Israeli migrant workers program, with each nationality assigned a specific employment sector and employment patterns, typically as per the bilateral agreements between Israel and different countries of origin.[292] The Israeli asylum system has been stratified, giving different statuses to asylum seekers from different

283. 8 U.S.C. § 1254(a) (2018).

284. Immigration and Nationality Act § 203, 8 U.S.C. § 1153(c) (2018).

285. *See. e.g.*, Immigration Act of 1990, Pub. L. No. 101-648, §§ 132–33; Immigration Amendments of 1988, Pub. L. 100-658, §§ 2–3; Immigration Reform and Control Act of 1986, Pub. L. 99-603, § 202, 314.

286. U.S. DEPT. OF ST. ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2016: REPORT TO THE CONGRESS 11–15 (2015).

287. *See* CARLA N. ARGUETA, CONG. RESEARCH SERV., R42048, NUMERICAL LIMITS ON PERMANENT EMPLOYMENT-BASED IMMIGRATION: ANALYSIS OF THE PER-COUNTRY CEILINGS 2 (2016); Ramah McKay, *Family Reunification*, MIGRATION POLICY INST. (May 1, 2003), https://www.migrationpolicy.org/article/family-reunification#4.

288. U.S. DEPT. OF HOMELAND SEC., *U.S. Visa Waiver Program*, https://www.dhs.gov/visa-waiver-program (last updated Apr. 6, 2016).

289. *See generally* CA 8573/08, Ornan v. Ministry of the Interior (2013) (Isr.). In this decision the Court determines that it has not been established that there is an Israeli nationality, which is separate from the Jewish nationality.

290. The Law of Return, 5710–1950, §§ 1, 4B (Isr.); Nationality Law, 5712–1952, § 2 (Isr.).

291. The Entry to Israel Regulations, 5734–1974, KT, https://www.nevo.co.il/law_word/Law01/189_005.doc (in Hebrew) (Isr.) (listing countries where nationals can obtain a visa to Israel in the port of entry and countries where nationals are exempt from visa fees or who are not required to obtain a visa); Procedure for Handling Tourist Visa Application, 5.4.0001, ¶ C.5.5 (Isr.), https://www.gov.il/BlobFolder/policy/procedure_for_handling_tourist_visa_application_b2/he/105%20%D7%94%D7%92%D7%A9%D7%AA%20%D7%91%D7%A7%D7%A9%D7%94%20%D7%9C%D7%90%D7%A9%D7%A8%D7%AA%20%D7%9B%D7%A0%D7%99%D7%A1%D7%94%20%D7%912.pdf. (last updated June 10, 2012) (noting the inclusion of a nationality ban on enemy nationals which is broader than that in the Citizenship and Entry to Israel Law, since it also covers nationals of Yemen and Saudi Arabia).

292. *See, e.g.*, *Employment of Jordanian Workers in Eilat and Its Surroundings*, POPULATION & IMMIGR. AUTH., https://www.gov.il/he/Departments/Guides/employment_of_eilat_and_jordanian_environment_2016 (last updated May 6, 2018); *Notification on Terms for Applications for Employment of Foreign Workers from Sri*

nationalities.[293] Asylum seekers from different nationalities were excluded from the refugee status determination process, rendered unable to apply for asylum.[294] Asylum seekers from certain nationalities were diverted to receiving protection under formal or informal temporary protection regimes[295] or through humanitarian mechanisms,[296] instead of the asylum system. Nationality served as a precursor to examining asylum applications in expedited procedures, leading to their quicker rejection.[297] Reference to nationality in Israel has been characterized as part of a divide and conquer strategy, aiming to bring the refugee communities apart and weaken them, a policy which has mirrored into the work of civil society, which also divides the assistance mechanisms it offers asylum seekers according to their nationality.[298]

In the U.S., nationality has been used as a pretext for racial and religious discrimination.[299] In Israel, since, as mentioned above, the official position is that nationality and religious identity are understood as being one and the same, nationality bans also include a discriminatory religious pretext, which correlates to demographic concerns about maintaining a Jewish majority in Israel.[300]

When analyzing this argument in the Israeli context, it is important to note that the Israeli immigration regime, as a whole, facilitates the immigration of Jewish immigrants and their (broadly defined) family members and allows only narrow paths to immigration for others.[301] Jewish identity is perceived both as a matter of religious identity and a matter of nationality.[302] The nationality bans play an important role within this regime by excluding non-Jewish immigrants and asylum seekers.[303] They enable the expeditious inclusion of Jewish asylum seekers and immigrants as full members with full rights and the general exclusion of non-Jewish asylum seekers and immigrants.[304] Religion and demography intertwine.

Lanka in Agriculture for 2018, POPULATION & IMMIGR. AUTH., https://www.gov.il/he/Departments/policies/srilanka_eployment_form_111217 (last updated Dec. 11, 2017); *Procedure for the Invitation and Employment of Chinese Foreign Workers in Construction*, POPULATION & IMMIGR. AUTH., https://www.gov.il/he/Departments/policies/inviting_chinese_workers_for_constructions_procedure (last updated Nov. 14, 2017).

293. Hadas Yaron Mesegene, *Divide and Conquer with Order: The Politics of Asylum in Israel— Bureaucracy and Public Discourse*, *in* WHERE LEVINSKY MEETS ASMARA, *supra* note 10, at 88.

294. Until 2012, Eritrean and Sudanese asylum seekers were excluded from the refugee status determination (RSD) process and unable to submit asylum applications. Ilan Lior, *Israel Outright Rejects Asylum Requests by Eritreans and Sudanese*, HAARETZ (Apr. 2, 2016, 8:09 AM), https://www.haaretz.com/israel-news/.premium-1.711867.

295. Kritzman-Amir, *supra* note 10, at 23–25.

296. *Id.* at 27.

297. *Id.*

298. Yaron Mesegene, *supra* note 293.

299. *See generally* Exec. Order No. 13,780, 82 Fed. Reg. 45 13,209 (Mar. 9, 2017).

300. Erik H. Cohen, *Jewish Identity Research: A State of the Art*, INT. J. JEWISH EDUC. R. 7–48 (2010).

301. Tally Kritzman-Amir, *"Otherness" as the Underlying Principle in Israel's Asylum Regime*, 42 ISR. L. REV. 603, 606 (2010).

302. *See generally* Cohen, *supra* note 300.

303. Kritzman-Amir, *supra* note 301, at 605–06.

304. *Id.* at 611.

One pretext for the nationality bans in Israel is demographic: maintaining a Jewish majority and ensuring the indigenous, predominantly Muslim Palestinian population remains a minority. The immigration and asylum regimes are utilized, on the one hand, to facilitate the growth of the Jewish majority—through the enabling of Jewish migration—and to prevent the immigration of others who might associate themselves with the Palestinian minority.[305] Throughout the legislative process of the immigration ban, preventing Palestinians and nationals of four countries from entering Israel, the demography justification was prominent. Though some of the judges deciding on the constitutionality of the ban accepted the petitioners' argument that the ban served demographic purposes, the court majority rejected this position, viewing the law as serving security purposes.[306]

Nationality bans within the asylum system are also a pretext for religious discrimination, though a complex one. On the one hand, the Israeli nationality bans are utilized to prevent the entry and stay of Muslim asylum seekers. But on the other hand, they also play a key expressive role that has a negative impact beyond Muslims. The bans lump all individuals from the same nationality into one bucket, such that the public perceives the asylum-seeking population to be Muslim.[307] In fact, most asylum seekers in Israel are Christian.[308] When it comes to the religious pretext, the nationality bans are applied against actual Muslims as well as inaccurately perceived "Muslims" in an effort to sustain the Jewish demographic majority.

Finally, the nationality bans in the asylum system embody a racial preference as well. They are applied to African asylum and Middle Eastern asylum seekers and migrants, while at the same time European asylum seekers are handled differently, through less harsh exclusion mechanisms.[309] Recent protests attacking the harshness of the detention and deportation of asylum seekers emphasized the racial element of these exclusion measures, with asylum seekers painting their faces white, and with the use of the slogan "black lives matter," in argument that had the asylum seekers been white, they would have been treated differently.[310]

305. *Id.* at 607–08.

306. *See* HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel et al. v. Minister of Interior 61(2) PD 202, 338 (2006) (Isr.) (Procaccia, J. & Joubran, J., dissenting). *See generally* HCJ 466/07 MK Galon v. The Legal Advisor to the Government 65(2) PD 44 (2012) (Isr.); Yael Flitman, *The Story of Six Women: Different Faces in the Issue of Family Reunification*, *in* THE LEGAL ASPECTS OF JEWISH-ARAB RELATIONS IN ISRAEL 335, 347 n.57 (Ilan Saban & Rael Zreik eds., 2016).

307. *See Int'l Refugee Assistance Project v. Trump*, 265 F.Supp.3d 570, 583 (D. Md. 2017).

308. Sara Toth Stub, *Christianity in the Holy Land Has Gotten a Big Boost from Migrant Workers*, TOWER (Nov. 2016), http://www.thetower.org/article/strangers-in-a-strange-land-christian-migrants-are-changing-how-israel-prays-and-works/.

309. *See* Mia Swart, *Israel's Deportation of African Refugees 'Racism Of The Worst Kind'*, HUFFINGTON POST (Feb. 20, 2018), http://www.huffingtonpost.co.za/mia-swart/israels-deportation-of-african-refugees-racism-of-the-worst-kind_a_23366079; *Israel: UN Experts Urge Immediate Halt of Plans to Deport Eritrean and Sudanese Nationals*, UNITED NATIONS HUM. RTS., OFF. HIGH COMMISSIONER (Mar. 1, 2018) https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22741&LangID=E.

310. *Id.*

The litigation over the U.S. nationality bans has centered around the religious discrimination at their core.[311] The executive branch has spoken out of two sides of its mouth on this point. Donald Trump has repeatedly stated that the purpose of the travel bans has been to exclude Muslims from the United States.[312] Yet the second order explicitly denied any religious motivation for the first nationality ban:

> Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities—whoever they are and wherever they reside—to avail themselves of the USRAP in light of their particular challenges and circumstances.[313]

The federal courts have focused on Trump's statements. The purpose of these bans—to bar Muslims from the United States—has been blatant and easy to identify. For example, the Maryland federal district court held that the "primary purpose for [the second and third orders] was to effect the equivalent of a Muslim ban."[314] Ironically, one of the first families deported under the first nationality ban were Christians from Syria.[315]

There is also a racial dimension to the U.S. nationality bans, especially when viewed in the context of the Trump administration's vocal hostility to immigrants of color.[316] Set alongside policies that separate migrant children from their parents and ramp up prosecutions for illegal entry along the southwestern border, the nationality bans can be understood as part of a broader effort to prevent racial diversification in the United States.[317] This message has not been lost on the American public; a recent poll found that 44% of respondents believed the motive for Trump's immigration policies to be "racist beliefs."[318]

Nationality bans in the U.S. and Israel have been pretextual. Though presented as nationality-based, given the correlation between religion and nationality, their de facto result has been religious and racial discrimination. In the Israeli

311. *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (4th Cir. 2017).

312. *Id.* at 575.

313. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,210 (Mar. 6, 2017).

314. Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 623 (D. Md. 2017).

315. Julie Shaw, Justine McDaniel & Aubrey Whelan, *2 Christian Syrian Families Detained at PHL, Returned to Qatar; Other Migrants Detained at PHL*, PHILA. INQUIRER (Jan. 31, 2017), http://www.philly.com/philly/blogs/real-time/2-Syrian-families-detained-at-PHL-returned-to-Qatar.html.

316. Lauren Gambino, *Trump Pans Immigration Proposal as Bringing People from 'Shithole Countries'*, GUARDIAN (Jan. 11, 2018, 7:13 PM), https://www.theguardian.com/us-news/2018/jan/11/trump-pans-immigration-proposal-as-bringing-people-from-shithole-countries.

317. *See id*.

318. Louis Nelson, *Poll: 58 Percent Disapprove of Trump's Handling of Immigration*, POLITICO (July 3, 2018, 1:23 PM), https://www.politico.com/story/2018/07/03/poll-trump-racist-692614.

case, they are used to ban those who are not Jewish and who might align themselves with the Palestinian, predominantly Muslim minority. In the United States, nationality has been used as a proxy to exclude Muslims. In both countries they are used to exclude Africans and Middle-Easterners, and the Trump administration has used these bans as part of a larger strategy to prevent racial minorities from immigrating to the United States.[319] The unsubstantiated national security justifications for the bans are easily revealed as pretext for discrimination on other grounds.

IV. NATIONALITY BANS AND SUBJECT CREEP

The nationality bans are grounded in unsubstantiated security concerns and disguise religious discrimination. Subject creep compounds this weak foundation. The bans terms focus on nationals of specific countries, but their impact is felt by relatives and friends of those individuals, organizations that associate with and employ those nationals, and other immigrants and nonimmigrants, particularly those who share characteristics with the banned nationals.[320] The stigma created by these bans causes status loss for entire communities beyond the targeted nationals, and the harm from the resulting discrimination will take years to redress.[321]

The Israeli nationality ban, which restricted the family reunification migration of Palestinians and nationals of four countries, impacted Israeli citizens.[322] In fact, the Israeli court focused its two decisions on the rights of the Israeli citizens and residents who could not bring their family members to live with them.[323] These are the right bearers the court sought to defend, rather than their relatives, who, according to the court, did not have the right to enter Israel, for Israeli sovereignty includes the authority to determine immigration policy.[324] The same is true for the U.S. nationality bans, which were challenged not only by individuals subject to the nationality ban but also by family members of these individuals and organizations that associate with and employ banned nationals.[325]

319. To take a page from Joseph Gusfield's famous book: "since the dominance of his culture and the social status of his group are denied, the coercive reformer turns to law and force as ways to affirm it." JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 1, 7 (1963).

320. *See infra* note 325.

321. Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 367 (2001).

322. HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel et al. v. Minister of Interior 61(2) PD 202, 338 (2006) (Isr.).

323. *Id.*

324. *Id.*

325. *See, e.g.*, Complaint at 1, *Ali v. Trump*, No. 17-cv-135 (W.D. Wa. Jan. 30, 2017) (filing by two U.S. citizens, one lawful permanent resident, and their three minor children—each subject to the nationality ban as citizens and residents of Somalia, Syria, and Yemen); Complaint at 5, Al-Mowafak v. Trump, Case No. 17-cv-557, (N.D. Ca. Feb. 2, 2017) (filing by impacted nationals as well as the American Civil Liberties Union of Northern California and Jewish Family & Community Services East Bay); Complaint at 1, Doe v. Trump, No. 17-cv-1122, (W.D. Wisc. Feb. 13, 2017) (filing by Syrian asylee unable to reunite with his wife and three-year-old daughter); Hawaii v. Trump, 265 F. Supp. 3d 1140, 1140 (D. Haw. 2017) (noting numbers of foreign workers, students, faculty members, and tourists as well as the state's interests in protecting its residents, and Ismail Elshikh, a U.S. citizen and Imam of the Muslim Association of Hawaii whose wife was unable to reunite with

In the Israeli case, the family reunification ban impacted mostly Palestinian citizens and residents of Israel, since they constitute the vast majority of both those marrying Palestinians from the West Bank and "enemy nationals."[326] The law had a discriminatory effect on these nationals, even if it was an indirect, rather than explicit, nationality ban. In its decisions, the court discussed the impact of the nationality bans on Israeli citizens' and residents' rights to family life and equality.[327] The majority of the Israeli court decided that although those rights were not specified in Israel's Basic Law, the legal document pertaining to constitutional nature and weight, these are constitutionally protected rights.[328] Yet the judges on the panels disagreed on the second question regarding the scope of these rights.[329] The judges differed as to whether those rights entail protection of family unity, from which derives a positive duty to allow family reunification.[330] The judges also held different opinions as to whether the law's effect on those rights is proportionate.[331] The majority of the Israeli court in both cases refused to intervene, and thus the law was upheld.[332] Yet the majority of the Israeli court found this to be a proportionate infringement of the right to equality, in light of the security concerns arising from the immigration of Palestinians and "enemy nationals."[333]

In the United States, hundreds if not thousands of U.S. citizens have had their families separated by the nationality ban.[334] Though reliable data are hard

her mother-in-law, a Syrian national and whose children and mosque members were negatively impacted by the nationality ban); Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 593–94 (D. Md. 2017) (filing by refugee resettlement organizations International Refugee Assistance Project and Hebrew Immigrant Aid Society, learned society Middle East Studies Association, as well as a U.S. citizen of Syrian origins who filed a family-based visa petition for sister, a Syrian national; a lawful permanent resident whose Iraqi national brothers awaited refugee resettlement; a U.S. citizen who filed a fiancé visa for his Iranian national future spouse; and a U.S. citizen whose wife and nine children, Somali nationals, had been approved as refugees but awaited travel authorization to the U.S.); Complaint at 3, Pars Equal. Ctr. v. Trump, No. 17-cv-255 (D.D.C. Feb. 8, 2017) (filing by Iranian-American non-profit Pars Equality Center, which works with the Iranian-American community as well as the Iranian American Bar Association, National Iranian American Council, and Public Affairs Alliance of Iranian Americans as well as several dual citizens of Iran and the United States); Complaint at 4–15, Sarsour v. Trump, No. 17-cv-120 (E.D. Va. Jan. 30, 2017) (including plaintiffs from fifteen prominent Muslim American civil rights activists); Complaint at 2–6, Washington v. Trump, No. 17-cv-141 (W.D. Wash. Jan. 30, 2017) (filing on behalf of immigrants from the impacted countries based on harm to the economy, including immigrant and refugee-owned businesses as well as technology corporations that rely on foreign workers, including Microsoft, Amazon, Expedia, and Starbucks as well as the University of Washington and Washington State University, and harm to Washington residents who were separated from their families as a result of the travel ban).

326. *Adalah*, 61(2) PD 202.

327. *Id.* at 304.

328. *Id.* at 285–303.

329. *Id.* at 385–410.

330. *Id.*

331. *Compare* HCJ 466/07, MK Galon v. The Legal Advisor to the Government, 65(2) PD 44 (2012) (Isr.), *with* HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel et al. v. Minister of Interior 61(2) PD 202 (2006) (Isr.).

332. *See* cases cited *supra* note 331.

333. *Adalah*, 61(2) PD 202.

334. Data from the State Department indicate that as of January 8, 2018, 8,406 nationals of countries subject to the third travel ban had applied for visas. 1,723 of those were denied visas for reasons unrelated to the travel ban, and 6,282 failed to meet the criteria for a waiver. 271 applicants—whose visas were denied because of the travel ban and met the waiver criteria—had a waiver considered but were refused. Though these data are not

to come by, anecdotal stories of the anguish suffered by families subject to the ban abound.[335] Family separation has caused substantial emotional, financial, and medical harm to U.S. citizens and permanent residents.[336]

Federal courts hearing challenges to the nationality ban also focused on its impact on U.S. citizens and residents. In the Maryland federal district court, plaintiffs included twenty individual U.S. citizens or permanent residents as well as seven organizational plaintiffs who provide client services, engage in advocacy, or convene events relating to the Middle East.[337] The district court found that individual plaintiffs' "actual imminent injury" due to prolonged "separation from their family members" who are banned from travel to the U.S. was sufficient harm both for standing purposes and as grounds for the preliminary injunction.[338] With respect to the organizational plaintiffs, the court awarded standing because the nationality ban "imped[ed] their efforts to accomplish their missions and disrupt[ed] their ability to raise money, train staff, and convene programs designed to foster the free flow of ideas on topics of significance to their organization's purpose."[339] The Maryland court also noted the harm to U.S. citizen plaintiffs, namely that they felt "condemned, stigmatized, attacked, or discriminated against as a result of the" nationality ban, and that "[t]hese feelings of marginalization constitute an injury in fact in an Establishment Clause case."[340] Indeed, the court's injunction depended upon harm to individuals not subject to the nationality ban as it covered only those individuals with immediate family members in the United States or a formal connection with an organization in the United States.[341]

In the Hawaii litigation, the federal district court found both proprietary harm to the State of Hawaii as the operator of the University of Hawaii system and individual harm to U.S. citizen plaintiffs seeking family reunification sufficient for standing purposes.[342] In establishing irreparable harm in order to grant injunctive relief, the court relied on a "multitude of harms" to plaintiffs not subject to the nationality ban, including "prolonged separation from family mem-

broken down further, many if not of those applicants eligible for a waiver had U.S. citizen family members. Letter from Mary K. Waters, Assistant Sec'y, Legislative Affairs, U.S. Dep't of State, to The Honorable Chris Van Hollen, Senator, U.S. Senate (Feb. 22, 2018) (noting that of 8,406 applicants for immigrants and nonimmigrant visas, 6,282 failed to meet the criteria for a waiver).

335. *See, e.g.*, *A View From the Ground: Stories of Families Separated by the Presidential Proclamation,* PENN ST. L. CTR. FOR IMMIGRANTS' RIGHTS CLINIC (Feb. 20, 2018); Sam Levin, *Tears, Despair and Shattered Hopes: The Families Torn Apart by Trump's Travel Ban*, GUARDIAN (Jan. 8, 2018), https://www.theguardian.com/us-news/2018/jan/08/trump-travel-ban-families-affected-first-month; *Living with the Muslim Ban*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/issues/immigrants-rights/living-muslim-ban (last visited Jan. 12, 2019).

336. *See, e.g.*, *supra* note 335 and accompanying text.

337. Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 593–94 (D. Md. 2017).

338. *Id.* at 596.

339. *Id.* at 598.

340. *Id.* at 601.

341. *Id.* at 629–30. This preliminary injunction was stayed by the U.S. Supreme Court pending the decision of the Fourth Circuit Court of Appeals. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017).

342. Hawai'i v. Trump, 265 F. Supp. 3d 1140, 1149–52 (D. Haw. 2017).

bers, constraints to recruiting and retaining students and faculty members to foster diversity and quality within the University community, and the diminished membership of the [Muslim Association of Hawai'i], which impacts the vibrancy of its religious practices and instills fear among its members."[343] On appeal, the Ninth Circuit affirmed the injunction but limited its scope to cover only those "who have a credible bona fide relationship with a person or entity in the United States."[344]

The Ninth Circuit also noted a variety of harms to individuals not targeted by the ban. In terms of physical harms, the nationality ban has resulted in "increased violence directed at persons of the Muslim faith."[345] Looking at emotional harms, "by singling out nationals from primarily Muslim-majority nations, the [nationality ban] has caused Muslims across the country to suffer from psychological harm and distress, including growing anxiety, fear, and terror."[346] The court also explains "that the cited harms are extensive and extend beyond the community" to a variety of economic harms.[347] The court ends by discussing relational harms, in particular the nationality ban's denial to "LGBTQ persons in the United States the ability to safely bring their partners home to them."[348]

Perhaps the most egregious example of subject creep was the shooting of two Indian nationals in Kansas by an attacker who appeared to believe that they were Middle Eastern.[349] One of the men was killed; the father of the other man pointed to Trump's policies as a reason for Indians to reconsider moving to the United States.[350] The anxiety and fear felt by nationals targeted by the ban has expanded to those who can be mistakenly perceived as belonging to the same racial or religious group, whether or not that categorization is accurate. Similarly, in Israel, an Eritrean asylum seeker who happened to be present during a terrorist attack in a bus station was shot and lynched by security guards and bystanders, who thought he was the terrorist just on the basis of his foreign appearance, though he was visibly unarmed.[351] An analysis of hate crimes and xenophobic political rhetoric aimed at South Asian, Muslim, Sikh, Hindu, Middle Eastern,

343. *Id.* at 1159; *see also* Hawaii v. Trump, 878 F.3d 662, 699 (9th Cir. 2017) (quoting language from district court opinion).

344. *Trump*, 878 F.3d at 675, 702.

345. *Id.* at 700.

346. *Id.*

347. *Id.*

348. *Id.* at 701.

349. Mark Berman & Samantha Schmidt, *He Yelled 'Get out of my Country,' Witnesses Say, and then Shot 2 Men from India, Killing One*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/24/get-out-of-my-country-kansan-reportedly-yelled-before-shooting-2-men-from-india-killing-one/?utm_term=.8908a3f71d62.

350. *Id.*

351. Tim Hume & Michael Schwartz, *Israel: 4 Charged in 'Lynching' of Eritrean Migrant Mistaken for Terrorist*, CNN: WORLD (Jan. 13, 2016, 7:38 AM), https://www.cnn.com/2016/01/13/middleeast/israel-charges-eritrean-migrant-beating/index.html.

and Arab communities in the first year after Trump's election documents an increase of over 45%.[352] One in five perpetrators of hate violence referenced Trump, one of his policies, or one of his campaign slogans.[353]

The Israeli case demonstrates the longer-term effects of nationality bans. In Israel, the nationality ban had a documented impact on the spouses and children of those seeking to enter Israel, especially on Israeli women who married Palestinians.[354] Those effects include: uprooting Israeli nationals from Israel to the West Bank and Gaza in order to be able to cohabitate with their families; poverty, resulting from the Palestinian's inability to contribute to the family's income and having to sustain two households (in Israel and in the West Bank); the chronic pre-existing discrimination and marginalization against women in the Israeli labor market;[355] dependency on welfare;[356] depression; feelings of hardship and sadness; despair and suicidal ideation;[357] and fear of bigamy or divorce.[358] For this minority group, the law was unjust, discriminatory, and a source of trauma, causing some of them to regret having married a Palestinian.[359] In other words, the fact that the ban was specific to Palestinians, interplayed with patterns of disempowerment of the Palestinian minority to achieve an even deeper gap in the human rights situation than a generally restrictive immigration policy would.

The Israeli ban on asylum-seeking enemy nationals also had detrimental effects on others than the ones it seeks to exclude. The alleged enemy-friend dichotomy the asylum procedure puts forth by casting out the enemy nationals—while accepting all the others—was quickly blurred.[360] Under the nationality ban in the asylum procedure, immigration detention was supposed to be reserved for rare occasions of persons who pose a particular danger.[361] But eventually, as the amendments to the Infiltration Law were redrafted, prolonged immigration detention (whether in detention facilities or in residential centers) has become the norm for all asylum seekers entering clandestinely.[362] If the procedure presents a façade that resettlement will be sought for enemy nationals only,[363] whereas the others will be protected and integrated, currently there are intensive attempts to remove all asylum seekers to "third countries."[364] The exclusionary

352. S. ASIAN AMS. LEADING TOGETHER, COMMUNITIES ON FIRE: CONFRONTING HATE VIOLENCE AND XENOPHOBIC POLITICAL RHETORIC 3 (2018), http://saalt.org/wp-content/uploads/2018/01/Communities-on-Fire.pdf.

353. *Id.*

354. *See generally* Flitman, *supra* note 306.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. KRITZMAN-AMIR, *supra* note 10, at 29.

361. *Id.* at 33

362. *Id.* at 35.

363. *See* Procedure for Handling Political Asylum Seekers in Israel, 5778–2017, No. 5.2.0012, §10 (Isr.).

364. *See, e.g.*, Carlos Ballesteros, *Jewish Groups Denounce Israel's Plans to Deport 40,000 African Asylum Seekers*, NEWSWEEK (Nov. 24, 2017, 10:42 AM), http://www.newsweek.com/israel-deport-africa-refugees-asylum-seekers-720495. These attempts have currently been halted.

logic has leaked to policies regarding all asylum seekers, not just enemy nationals, labelling all asylum seekers as the "others" who should be outcast, not just those who originate from enemy states.[365] This results in a multi-layered exclusionary regime, which recognizes less than 0.2% of the asylum seekers as refugees; offers thin protection of the human rights of asylum seekers through group-based, discretionary mechanisms of unofficial temporary protection regimes; and uses coercive measures such as detention, deportation, and economic sanctions.[366]

The scope of nationality bans creeps beyond targeted foreign nationals to harm citizens, permanent residents, organizations, institutions, and corporations.[367] They impact the rights of those not subject to the bans, particularly family members.[368] Those impacted may be members of disempowered groups such as racial, national, lingual, cultural, or religious minorities. Within those disempowered groups, women and children, whose vulnerability is generally higher, might be affected most.[369] In the United States, the nationality bans have economic consequences that are harmful to organizations, institutions, and corporations.[370] The creeping scope of nationality bans can extend to broader treatment of impacted groups, such as Muslims in the United States and asylum-seeking enemy nationals in Israel, as well as racial minorities in both countries. The exclusionary logic may slowly and gradually penetrate other norms, resulting in the exclusion or mistreatment of a far broader group than those targeted by the nationality ban.

V. NATIONALITY BANS AND PROLONGED TEMPORARINESS

In both Israel and the United States, nationality bans suffered from temporal creep: introduced as temporary emergency measures, the bans have become permanent.

Temporary legislation is not necessarily problematic, and in both countries, temporary norms are prevalent and on the rise.[371] Temporariness could be an effective tool to test policy measures, allowing periodic reflection on them, which could potentially result in better regulation.[372] It may also be an appropriate response to a unique emergency situation.[373] Temporary norms, however, are concerning in three ways. First, temporary legislation should draw concern when its experimental or emergency governance infringes human rights, especially rights

365. *See* Kritzman-Amir, *supra* note 301, at 605–07.

366. KRITZMAN-AMIR, *supra* note 10.

367. *Id.*

368. *Id.*

369. *Id.* at 26.

370. John Wasik, *Here's How Trump Muslim Ban Will Slam U.S. Economy*, FORBES (Feb. 1, 2017, 9:18 AM), https://www.forbes.com/sites/johnwasik/2017/02/01/heres-how-trump-muslim-ban-will-slam-u-s-economy/#409ba9ea4930.

371. Ittai Bar-Siman-Tov, *Temporary Legislation, Better Regulation and Experimentalist Governance: An Empirical Study*, 12 REG. AND GOVERNANCE 192, 200–01 (2018).

372. *Id.* at 216–17.

373. *Id.* at 199.

of persons belonging to disempowered groups. A second situation that gives rise to concern is when temporary norms institutionalize and effectively become permanent. The compounded effect of the two is especially problematic since it allows for human rights violations to occur in the absence of sufficient public debate. Third, temporary legislation seems to be questionable when there is neither an experimental nor an emergency reason behind it.[374] For these three reasons, the temporary nature of the nationality bans seems improper. They violate the rights of the banned nationals and those related to them with insufficient public deliberation. They are initiated in nonemergency circumstances, as shown above, despite the empty and factually unsubstantiated gestures to security-related emergencies, but they also hardly serve an experimental purpose.

Often, temporary norms start out as administrative proclamations and evolve into legislation over time. As the allegedly temporary nationality bans shift from administrative proclamations to legislation and undergo judicial review, they change shape but persist and even expand over time.[375] The family reunification bans in Israel provide an example of movement from administrative decision to legislation that withstands repeated judicial review.[376] The Israeli blanket restriction on family reunification of persons from certain nationalities has been in place since the entry into force of the government decision in 2002.[377] The ban was later enacted by the Israeli parliament in the Nationality and Entry to Israel Law (temporary provisions).[378] Since then, the law has been amended twice and extended sixteen times, usually annually but occasionally for shorter periods of time, with little or no public discussion.[379] Since the nationality ban entered into force, it has been reviewed by the court three times, resulting in significant and highly publicized decisions that essentially upheld the law by a slim majority.[380] Over the many years the court has reviewed the constitutionality of the law, it has offered critiques and expressed concern but refrained from issuing interim orders to prevent the operation of the ban.[381] As a result, the ability of Israelis to live together in Israel with their Palestinian partners has been compromised since 2002.[382]

The temporariness of the law has ironically helped to make it permanent by influencing the Court's approach to judicial review. The Court's analysis of the law noted that it was legislated as a temporary provision to prove that the purpose of the law is security-related, rather than demographic.[383] The various exceptions in the law, compounded by its temporary nature, convinced the Court that this

374. *Id.*

375. Carmi, *supra* note 54, at 37.

376. Kemp, *supra* note 6, at 674.

377. Carmi, *supra* note 54, at 32.

378. Nationality and Entry to Israel law (Temporary Provision), 5763–2003 (Isr.).

379. *See, e.g.*, Carmi, *supra* note 54, at 32.

380. *See, e.g.*, Adalah Legal Centre for Arab Minority Rights in Israel et al. v. Minister of Interior 61(2) PD 202 (2006) (Isr.).

381. *See, e.g.*, *id*.

382. This was done retroactively, so even people who got married before the law were not able to live with their spouses since the law came into being. *Id*.

383. *Adalah*, 61(2) PD at 338.

was a well-tailored law of narrow applicability.[384] Some of the judges who reviewed the law indicated that they hesitated to intervene in light of the law's temporary nature[385] or suggested that judicial review of temporary provisions should be more restrained.[386]

The Israeli Prevention of Infiltration Law, which currently governs the detention of asylum seekers, also demonstrates how a temporary ban can permanently impact the immigration system as it changes shape through legislation and judicial review. The Infiltration Law was originally enacted in 1954 as a state of emergency act, having legal force only as long as Israel's declared state of emergency continues to exist.[387] Yet Israel has repeatedly declared the existence of a state of emergency since it gained its independence, without significant parliamentary deliberation or public discussion of the desirability of this situation.[388] Moreover, in the course of a parliamentary process of disconnecting the validity of legislation from the existence of a state of emergency, which was meant to facilitate the ability to end the state of emergency, the Prevention of Infiltration Law became a generally applicable law,[389] valid irrespective of the state of emergency.

Additionally, the amendments to the Prevention of Infiltration Law between 2012 and 2017 were introduced as temporary provisions.[390] Continuous litigation over the constitutionality of those amendments has altered them dramatically,[391] including the removal of provisions that allowed indefinite detention of the ill-defined category of "enemy nationals."[392] Nevertheless, the norms on immigration detention became institutionalized. While the High Court of Justice struck down the amendments to the Infiltration Law three times, the current law still allows immigration detention of individuals whose deportation is impossible, and currently, the Infiltration Law allows a three-month detention followed by a year-long restriction of the freedom of movement of immigrants held in a residential center.[393] Recent amendment has allowed the closing of the residential center,[394] allegedly following an agreement with "third" countries to forcibly remove asylum seekers from Israel to their territories, which has since been

384. *Id.* at 365–66.

385. *Id.* at 223 (Beinisch, J., dissenting).

386. *Id.* at 209 (Cheshin, V.P. Emeritus, concurring).

387. Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954 (Isr.).

388. *Cancel the Declaration of a State of Emergency*, ASS'N FOR CIV. RTS. IN ISR. (July 24, 2003), https://www.acri.org.il/he/698.

389. *See generally* JOINT COMM. FOR THE FOREIGN AFFAIRS AND DEF. COMM. AND THE CONSTITUTION, LAW AND JUSTICE COMM., REVIEW OF THE TREATMENT OF LEGISLATION DEPENDENT ON EMERGENCY DECLARATION (2016) (Isr.), http://main.knesset.gov.il/Activity/committees/ForeignAffairs/LegislationDocs/Emergency_5.pdf.

390. *See generally*, Amendment 3, *supra* note 17; Amendment 4, *supra* note 119; Amendment 5, *supra* note 119; Amendment 6, *supra* note 122; Prevention of Infiltration and Guaranteeing the Removal of Infiltrators from Israel (Amendment and Interim Orders), 5767–2017, SH No. 2595 (Isr.) [hereinafter: Amendment 7].

391. *Compare* Amendment 3, *supra* note 17, *with* Amendment 4, *supra* note 119; Amendment 5, *supra* note 119; Amendment 6, *supra* note 122.

392. *Compare* Amendment 3, *supra* note 17, *with* Amendment 4, *supra* note 119.

393. Amendment 6, *supra* note 122.

394. Amendment 7, *supra* note 390.

put to a halt.[395] Immigration detention will continue to be the main pillar of any future removal plans, since those asylum seekers who refuse to be removed to third countries will be held in immigration detention as they are not cooperating with their removal proceedings.[396]

The current nationality ban in the United States has been in existence for only eighteen months, but it also demonstrates a disturbing trend from temporariness to permanence. The first two bans were time-limited. The first order prevented the entry of nationals from the seven named nationalities for ninety days "to temporarily reduce investigative burdens on relevant agencies" and suspended the U.S. Refugee Admissions Program for 120 days.[397] The prohibition on entry for Syrian refugees was indefinite, "until such time as [Trump] determined that sufficient changes have been made to the USRAP to ensure that the admission of Syrian refugees is consistent with the national interest."[398] Though this portion of the ban did not have a clear expiration date, it was also framed as temporary rather than permanent. Similarly, the second order prohibited the entry of nationals of six countries for ninety days in a section entitled "Temporary Suspension of Entry for Nationals of Particular Concern During Review Period" and suspended the U.S. Refugee Admissions Program for 120 days.[399]

In contrast, the third nationality ban has no end date and could be permanent. The Supreme Court specifically held that the President is not "required to prescribe in advance a fixed end date for the entry restrictions."[400] It found instead that the President may link the time frame of the nationality ban to the resolution of the condition that gave rise to the ban.[401] The Court read the third nationality ban to state that its entry restrictions will remain in force only as long as needed to address problems with the affected countries' information-sharing systems.[402] The President's removal of Chad from the list of impacted countries was offered by the Court as further evidence that a specific end date was not necessary.[403]

The Israeli example provides cause for concern. It demonstrates that nationality bans may start off in temporary provisions but gain normative power by their repeated extension, entrenchment in legislation, and sustainment in judicial review processes.[404] Both the Israeli and the U.S. nationality bans, even where valid for a limited period of time, fail to specify explicitly particular conditions of validity, and their extensions are essentially discretionary. The bans in Israel

395. *Talking Policy: Jean-Marc Liling on Asylum-Seekers in Israel*, WORLD POLICY (Aug. 2, 2018), https://worldpolicy.org/2018/08/02/talking-policy-jean-marc-liling-on-asylum-seekers-in-israel/.

396. *Procedure for Deportation to a Third Country, No. 10.9.0005* (Jan. 1, 2018), https://www.gov.il/he/Departments/policies/third_country_deportation_procedure.

397. Exec. Order No. 13769, 82 Fed. Reg. 8977, 8978–79 (Jan. 27, 2017).

398. *Id.* at 8979.

399. Exec. Order No. 13780, 82 Fed. Reg. 13209, 13212–13, 13215 (Mar. 6, 2017).

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

401. *Id.*

402. *Id.*

403. *Id.*

404. HCJ 7052/03, Adalah Legal Centre for Arab Minority Rights in Israel et al. v. Minister of Interior 61(2) PD 202, 378–79 (2006) (Isr.).

have been reinstated for decades based on generalized security concerns having to do with the ongoing Israeli-Palestinian conflict.[405] Since the Israeli-Palestinian conflict is a long-lasting one, the temporary nationality bans may end up being long-lasting as well. In the United States, as the executive responded to judicial critiques of the nationality bans, those bans became narrower and more permanent. The national security justification for these bans lends power to this temporal creep, as concerns about terrorism are unlikely to diminish in the near future.

Nationality bans in both the United States and Israel began as temporary provisions but became institutionalized. This prolonged temporariness often restricts the scope of judicial review. Given the alleged temporary nature of these nationality bans, courts may be reluctant to engage with a law or policy that may not be valid within a short period of time unless extended. Courts may simply refrain from getting involved and prefer to allow the law to expire.[406] This type of punting may inadvertently lend credence to an approach that may be unconstitutional. Another risk is that courts may find it hard to identify when temporary becomes long-lasting and when long-lasting becomes permanent. Moreover, it may be harder in terms of institutional legitimacy for the court to strike down a temporary policy that has been renewed several times.

VI. CONCLUSION

Nationality bans in Israel and the United States have taken different forms, as is to be expected across two very different countries, cultures, and immigration systems. The Israeli case should serve, in a sense, as a cautionary tale, demonstrating the dangerous evolution of nationality bans. The nationality bans in Israel have moved from administrative law to legislation and have repeatedly withstood judicial review. Originally temporary, they have shifted form in subtle ways that enable their permanence. Apart from this temporal creep, the nationality bans also demonstrate subject creep. Their impact is felt far beyond the nationals targeted, from relatives to potential employers to other immigrants, disproportionately affecting minority religious, racial, and national groups.

An examination of recent Israeli and U.S. nationality bans identifies four shared features. Two of these relate to the rationales for the bans, which are grounded in unsubstantiated national security justifications and use nationality as a pretextual purpose. The nationality bans also demonstrate both subject and temporal creep. The purposive features raise concerns about the quality of norm-making. Laws and policies that are grounded in irrational fears rather than evidence risk unintended and deeply damaging consequences. Similarly, laws and policies that hide their true purpose wreak insidious harms on societies; they disguise less-acceptable forms of bias, making damage to minority and marginalized communities more difficult to unearth and challenge. They also diminish

405. *Id.* at 294 (Adiel, J., concurring).

406. *See, e.g.*, Amy Howe, *Court Releases October Calendar*, SCOTUSBLOG (July 19, 2017, 9:59 PM), http://www.scotusblog.com/2017/07/court-releases-october-calendar.

transparency, which is supposed to be one of the salient features of the norm-making process. These concerns are magnified by the remarkable tenacity demonstrated by these bans.

Through these features, nationality bans in Israel and the United States evade judicial accountability. In both constitutional democracies, the national security justification wields tremendous political power despite its unsubstantiated nature. In Israel, situated amid armed conflicts just outside its borders and quotidian violence within its territory, as well as in the United States—relatively isolated from violent conflict and less frequently the subject of violence on its soil—the specter of terrorism looms large in the popular imagination and in court decisions. The nationality bans represent an extension of the national security exception in immigration law that enables overbroad laws with insufficient factual support. Nationality-based distinctions in the immigration realm are acceptable to the public and the judiciary in both countries and are able to disguise religious and racial exclusion. The constitutional principles of both states, founded by religious minorities fleeing persecution, contain some protections (albeit different in depth and magnitude) against religious discrimination, yet religious intolerance can manifest itself through nationality discrimination.

Though the bans appear on their face to apply to narrow groups, subject creep extends their harm well beyond those groups. Their temporary nature leads courts in Israel and the U.S. to decline to review some versions or some portions of the nationality bans, enabling the executive to extend them, even if in amended form, into permanence.

The nationality bans, along with the growth of restrictive immigration policies throughout wealthy democracies, demonstrate that sovereignty is alive and well in the age of human rights, to the extent that sovereignty might trump human rights and the rule of law. Immigration is one of the few remaining areas over which the state can exercise relatively unfettered power. In an era of uncertainty, both internal and external to the state, political actors seek to demonstrate their sovereign power by issuing policies that they claim protect their citizens from threats to their security. Immigrants are the most convenient target for such efforts, being easily cast as the dangerous other and being endowed with few rights under domestic or international law. One might argue that these nationality bans are merely a continuity, even if an extension or amplification, of the general situation of migrants vis-à-vis the sovereign. In other words, nationality bans conform to the premise that sovereignty is the ability to determine who to include and who to exclude, rather than a duty of responsibility.

This takes us to the final point, which is that the nationality bans highlight a core challenge to Western liberal democracies: their perceived ability to respond to existential threats, imagined or real. The past few years have taught us nothing if not the ability of demagogues to construct such threats in the popular imagination and leverage the resultant fear and panic into political power. The cumbersome processes of democracy do not have an exciting story to tell about good and evil; careful deliberation and balancing of rights does not energize the masses. Migrants, though they may be the enemies of our enemies, are easily

vilified. An explanation of why we should welcome Syrians who are fleeing ISIS is complicated and time-consuming, and not easily reduced to sound bites on Fox News. As the world becomes a more confusing place, with the Cold War and its clear battlefields and delineations of enemy and ally receding into the rearview mirror, such explanations gain less and less traction. Exclusionary instincts prevail; it remains to be seen whether this era is a trough in a longer cycle of liberal progress or a turn toward a darker path. The at once unjustified and tenacious nationality bans remind us that societal attitudes towards and treatment of migrants will play a key role in determining that direction.