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## Grapppling with Global Migration: Judicial Predispositions, Regulatory Regimes, and International Law Systems

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## **GRAPPLING WITH GLOBAL MIGRATION: JUDICIAL PREDISPOSITIONS, REGULATORY REGIMES, AND INTERNATIONAL LAW SYSTEMS**

Leila Kawar\*

BANKS MILLER, LINDA CAMP KEITH, & JENNIFER S. HOLMES, *IMMIGRATION JUDGES AND U.S. ASYLUM POLICY* (UNIVERSITY OF PENNSYLVANIA PRESS 2015). PP. 248. HARDCOVER \$ 69.95.

REBECCA HAMLIN, *LET ME BE A REFUGEE: ADMINISTRATIVE JUSTICE AND THE POLITICS OF ASYLUM IN THE UNITED STATES, CANADA, AND AUSTRALIA* (OXFORD UNIVERSITY PRESS 2014). PP. 248. PAPERBACK \$ 29.95.

MARIE-BÉNÉDICTE DEMBOUR, *WHEN HUMANS BECOME MIGRANTS: STUDY OF THE EUROPEAN COURT OF HUMAN RIGHTS WITH AN INTER-AMERICAN COUNTERPOINT* (OXFORD UNIVERSITY PRESS 2015). PP. 576. PAPERBACK \$ 55.00.

The world is on the move. The United Nations estimates that there are currently some 232 million international migrants and that global migration has increased by fifty percent since 1990.<sup>1</sup> This flux of human mobility is reshaping not only national identities but also the organization and operations of state institutions. As legislators revise legal categories and mandate new programs, administrative apparatuses and policies need to be constructed to give effect to the rapidly evolving shape of migration governance. With regulatory activity related to cross-border movement steadily increasing in scope, legal actors and institutions are increasingly called upon to review how these policies are elaborated and applied.

From the perspective of U.S. legal scholars and practitioners, these developments have transformed immigration law from a domain relegated to marginalized specialists into an increasingly significant subfield. High-profile legal activism on immigration issues is now organized by an institutionalized network of accomplished practitioners and public

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1. U.N. Department of Economic and Social Affairs, *International Migration Report*, 1, U.N. Doc. ST/ESA/SER.A/346 (2013).

interest law firms. This expansion in law reform activity has supported—and has been supported by—a parallel expansion and legitimization of immigration and refugee law within the ranks of legal academia. Immigration-related scholarship has increased in both size and visibility. Clinical practice is also rapidly growing; the Center for the Study of Applied Legal Education lists immigration and refugee law clinics as one of the fastest growing areas within U.S. law schools.<sup>2</sup>

How might empirical sociolegal scholarship contribute to our understanding of law's growing engagement with immigration issues? While legal scholars have tended to focus on the substantive content of regulatory policies and doctrinal principles, social scientists have turned to their own sets of disciplinary tools to explore the institutional settings responsible for handling migrants' claims. Each of the three books discussed in this review aims to inform debates concerning how migrants' claims are adjudicated. Moreover, each empirical analysis is guided by a distinct analytical framework: judicial behavioralism, comparative historical institutionalism, and discourse analysis. By examining different pieces of the institutional architecture charged with implementing immigration and asylum law, they collectively point towards a more nuanced understanding of how legal institutions are grappling with global migration. In what follows, I discuss each book in turn, highlighting elements of their respective empirical analyses that may be of particular interest to U.S. legal scholars and practitioners.

#### DECISION-MAKING OF IMMIGRATION JUDGES

For most migrants seeking to challenge an order of removal or expulsion, an asylum hearing represents the only segment of immigration law's institutional architecture with which they will come into direct contact. As restrictive border-control policies have been adopted by states across the global north, applying for asylum or one of the other forms of subsidiary protection allows migrants a side-door to permanent settlement when the front-door essentially has been closed to them. The 1951 Geneva Convention on Refugees sets a broad normative baseline for asylum adjudication; however, individual asylum decisions are heavily reliant on threshold evidentiary assessments and determinations of credibility. In practice, this means that there is plenty of room for adjudicators acting in good faith to interpret similar facts differently and also ample opportunity for legally-irrelevant considerations to influence their decision-making.

*Immigration Judges and U.S. Asylum Policy* represents the most ambitious and detailed effort to date at examining the drivers of decision-making by street level asylum adjudicators.<sup>3</sup> The authors, Banks Miller, Linda Camp Keith, and Jennifer S. Holmes, are colleagues at the University of Texas at Dallas, and they rely on multiple Freedom of Information Act requests to assemble a dataset of more than 500,000 asylum cases decided by U.S. immigration judges (IJs) between 1990 and 2010. As the authors acknowledge,

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2. Robert R. Kuehn & David A. Santacroce, *2013-14 Survey of Applied Legal Education*, CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION, (2014) [http://www.csale.org/files/Report\\_on\\_2013-14\\_CSALe\\_Survey.pdf](http://www.csale.org/files/Report_on_2013-14_CSALe_Survey.pdf).

3. BANKS MILLER, LINDA CAMP KEITH & JENNIFER S. HOLMES, *IMMIGRATION JUDGES AND U.S. ASYLUM POLICY* 38 (2015).

IJs are not the only adjudicators to decide asylum claims in the first instance. However, IJs do handle the majority of asylum claims and virtually all of the claims in which the applicant is not clearly eligible for asylum, thereby warranting extensive empirical study of their decision patterns.<sup>4</sup>

Applying the theoretical tools of political science scholarship on judicial behavior, the authors aim to tease apart the legal and non-legal factors that are relevant for IJs as they make decisions in individual asylum cases. Their impressively large dataset allows them to use multivariate regression techniques to model the impact of a range of independent variables on case outcomes, something which had not been attempted in prior empirical studies examining differential grant rates among judges. Miller *et al.* collect or create measurements related to the characteristics of the applicant's country of origin, the local district in which the case is adjudicated, and the policy predispositions that shape the individual adjudicator's approach to asylum determinations.

This last variable offers the theoretical hook linking the authors' study of asylum decision-making to the judicial behavior scholarship, and so it deserves special attention. Policy predispositions are measured as the "degree to which an IJ has been socialized to give the benefit of the doubt to asylum seekers."<sup>5</sup> The authors find empirical support for their intuition that experience as a prosecutor, in the military, or in an administrative agency charged with immigration control makes an IJ relatively more skeptical towards asylum claims, whereas working for an NGO or in academia has the opposite effect. They note that this asylum-specific measure of policy predispositions does a much better job of predicting behavior (controlling for other factors) than generic measures of political ideology, such as the political liberalism of the appointing president. This confirms a more general finding in the immigration politics scholarship that attitudes towards immigration-related matters should not be conflated with political party platforms.<sup>6</sup>

Through what kind of cognitive mechanism might these asylum policy predispositions color IJs' determination of individual cases? The authors suggest that the heavy workload of IJs, in combination with the absence of clear doctrinal signals from reviewing courts and the highly ambiguous nature of evidence in asylum cases, make asylum adjudicators especially prone to rely on informal cues. Their cognitive behavioral model suggests that IJs' policy predispositions will be mediated in certain circumstances but not in others. In other words, they organize their analysis of IJ decision-making so as to explore the interaction between, on the one hand, characteristics of an applicant and, on the other hand, the degree to which judges express their intuitive skepticism or sympathy towards asylum seekers.

Applying this model, the authors find evidence that conservative (i.e., skeptical) asylum policy predispositions are expressed more fully when the applicant is from a country "producing high numbers of illegal immigrants," while liberal predispositions are expressed more strongly when the applicant comes from a country receiving U.S. military

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4. *Id.* at 2-3.

5. *Id.* at 38.

6. *See, e.g.*, JAMES G. GIMPEL & JAMES R. EDWARDS, THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM (1998).

aid.<sup>7</sup> By contrast, the authors find that the expression of policy predispositions is unrelated to how the U.S. State Department ranks the asylum applicant's country of origin on a scale of human rights abuse. Turning from foreign policy biases to domestic political biases, the authors find that liberal IJs are substantially more likely to grant some form of deportation relief when they sit on immigration courts in metropolitan areas, where whole areas of the economy (e.g., landscaping labor) are sustained by undocumented migrants. By contrast, liberal IJs are substantially less likely to grant relief when located in areas with high unemployment rates. These findings are clearly significant and deserve attention.

At the same time, it is important to recognize that, while the data gives clear evidence that interaction effects exist, the authors' narration of the politics behind these effects remains open to discussion. For instance, Miller *et al.* characterize their finding that State Department rankings have no particular bias-triggering effect among liberal IJs (as compared to conservative IJs) as demonstrating that "human rights concerns are interpreted less through the lens of asylum liberalism than are material and security concerns."<sup>8</sup> This labeling of State Department country reports as an objectively legal factor is open to discussion, however, because historically the manner in which these reports are legally relevant has itself been the subject of political contestation.<sup>9</sup> Along the same lines, the authors' interpretation of the interaction effects associated with an immigration court's geographic location raises more questions than it answers. Having found that liberal IJs are substantially less likely to grant relief when located in areas with high unemployment rates, Miller *et al.* suggest that these adjudicators may see migrants as a threat to other segments of the domestic labor force "to whom liberals may be more solicitous."<sup>10</sup> This is a plausible account, but the authors acknowledge that it remains a somewhat speculative explanation for a finding that they had not anticipated; as yet, we have no firm way of knowing why liberal IJs in some metropolitan areas act more or less liberally than their peers in other districts.

Tangential to the authors' cognitive approach, but of interest to immigrant rights advocates, the data suggests that being represented by counsel increases the chance of receiving some form of relief by between five and six percent (with other causal factors held constant). This is not as significant an effect as suggested by prior studies, and Miller *et al.* contend that their more comprehensive dataset may include more variable types of legal representation, so that the aggregate quality of representation is lower.<sup>11</sup> By contrast, they find strong evidence that asylum seekers have a substantially better chance of receiving relief when they are based in cities with a developed NGO support network.<sup>12</sup> Finally, they find that legal representation is the single most important factor of an applicant's decision to appeal an IJ's denial of relief.

Somewhat unexpectedly, given the extensive discussion of the cognitive model at

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7. MILLER, KEITH & HOLMES, *supra* note 3, at 58.

8. *Id.* at 81.

9. For most of the 1980s, U.S. refugee advocates struggled to move asylum adjudication away from heavy reliance on State Department country reports and towards more individualized determinations, which they viewed as more in keeping with international legal norms. See Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT'L J. REFUGEE L. 455 (1992).

10. MILLER, KEITH & HOLMES, *supra* note 3, at 101.

11. *Id.* at 71.

12. *Id.* at 104.

the beginning of the book, the final two substantive chapters move away from modeling how predispositions impact asylum adjudication in order to explore other aspects of political behavior related to the asylum process. Chapter five explores the strategic responses of IJs to the incentive structures created by the threat of having their decisions overturned by higher-level jurisdictions. The authors examine these strategic responses in the context of the controversial streamlining program implemented by Attorney General John Ashcroft. Chapter six turns to an impact study of two prominent legislative initiatives that aimed to reform the U.S. asylum system. Looking at monthly aggregated grant rates, the authors aim to debunk what they view as exaggerated claims made by proponents of immigration restrictionism concerning the effects of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Real ID Act of 2005. They argue that the rhetoric surrounding restrictionist initiatives is essentially all bark and no bite, so long as economic forces continue to drive strong demand for low-wage migrant labor. And they find confirmation for this view in time series data showing that the enactment of IIRIRA resulted in a higher grant rate overall and particularly for applicants coming from countries classified as “middle income or above” and “where al-Qaeda does not have a presence.”<sup>13</sup> The authors acknowledge in a footnote that the legislation did prevent many individuals eligible for refugee status from ever entering the United States to claim asylum, but this important caveat is not pursued further.<sup>14</sup> Instead, the authors describe the applicant pool post-1996 as being of higher quality, because it contains fewer economic migrants and potential terrorists.

For this reviewer, the time-series analysis was the least convincing part of the book. In particular, the authors’ operationalization of a migrant’s “quality” solely on the basis of somewhat questionable country-level associations such as “countries in which al-Qaeda is present” appears tenuous at best and at worst misleading, insofar as it misconstrues the standards of international refugee law.<sup>15</sup> Moreover, as Cecilia Menjivar and Daniel Kanstroom, among others, have shown, the rhetoric of restrictionism has pernicious and radiating effects that cannot be grasped in an analysis that flattens the multiple dimensions of migrant governance into a single dependent variable, i.e., number of admitted migrants.<sup>16</sup> In short, the analysis of legislative impact seems tangential to the cognitive behavioral modeling undertaken in earlier chapters. It distracts the reader from the interesting and complex stories suggested by the authors’ sophisticated examination of judicial decision-making.

#### ADMINISTRATIVE JUSTICE AND THE POLITICS OF ASYLUM

Rebecca Hamlin begins her study of the politics of asylum in, *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Aus-*

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13. *Id.* at 171-75.

14. *Id.* at 216.

15. MILLER, KEITH, & HOLMES, *supra* note 3, at 171.

16. *See generally* CECILIA MENJIVAR & DANIEL J. KANSTROOM, *CONSTRUCTING IMMIGRANT ILLEGALITY* (2014).

*tralia*—which recently received an honorable mention for best book on migration and citizenship from the American Political Science Association—with the following puzzle: why do the asylum systems of three culturally similar liberal democracies produce strikingly divergent grant rates, even for applicants from the same country of origin?<sup>17</sup> Rather than trying to investigate how individual adjudicators are influenced by their policy predispositions, Hamlin focuses on institutional features that distinguish U.S., Canadian, and Australian asylum processes at the institutional level. Specifically, she considers the impact of institutionalized features of the administrative agencies charged with refugee status determination as well as the institutionalized patterns that characterize these agencies' relations with other branches of government.

The cross-national comparative approach that Hamlin applies to asylum policy implementation is informed by Robert Kagan's typology of administrative decision-making styles.<sup>18</sup> She argues that cross-national differences in asylum decision outcomes are best explained, not by national-level variation in access to the judiciary, but rather by the distinct decision-making styles institutionalized within each country's "system of refugee status determination."<sup>19</sup> Administrative decision-making styles are at the heart of this analysis, and two distinct dimensions of variation are explored: first, the degree to which refugee status determination is controlled by formalized rules, and second, the degree to which it is open to interest group participation. In other words, while the international law definition of a refugee sets a common starting point, Hamlin finds that national systems have come to rely on differing mixes of the ingredients of administrative justice to guide the application and elaboration of this common standard.<sup>20</sup> The book develops the argument that these differing recipes for refugee status determination have important effects, when viewed in aggregate, on final outcomes for asylum seekers.

The first section of the book sets out the different institutionalized patterns of agency processes in the U.S., Canada, and Australia respectively. Hamlin characterizes refugee status determination in the U.S. as "a terrain that is fraught with turf wars and interbranch conflict."<sup>21</sup> Decision-making is fragmented across multiple agencies, policymaking is open to interest group participation, procedural rules for all but one stage of the process are highly elaborated, and high degrees of variation exist between decision-makers. Focusing on the period since 1999, and particularly on the controversy surrounding the streamlining program of Attorney General Ashcroft, Hamlin describes an explosion of immigration litigation which has judicialized U.S. refugee status determination processes. This description will be familiar to U.S. practitioners, who have written extensively about this period. Yet U.S. immigration specialists may not be aware of how differently things might operate in other national settings. Hamlin's comparative case studies are helpful for placing the U.S. system in perspective.

This is particularly evident when the U.S. system is set against Canada's "Cadillac

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17. REBECCA HAMLIN, *LET ME BE A REFUGEE: ADMINISTRATIVE JUSTICE AND THE POLITICS OF ASYLUM IN THE UNITED STATES, CANADA, AND AUSTRALIA* 19-20 (2014).

18. ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 9-10 (2001).

19. HAMLIN, *supra* note 17.

20. *Id.* at 18.

21. *Id.* at 66.

system” of refugee status determination, in which bureaucratic experts have high levels of discretion to make decisions without legislative tinkering and with relatively minimized and “cordial” judicial guidance.<sup>22</sup> In Hamlin’s account, in the mid-1980s, spurred by a decision of the Supreme Court of Canada holding that the Canadian Charter of Rights was applicable to unauthorized entrants, Canada invested resources in creating a tribunal that aimed to meet high standards of “accuracy, active investigation, and effective management.”<sup>23</sup> Hamlin suggests that centralized decision-making has allowed the Canadian Immigration and Refugee Board (IRB) to effectively manage its operations and adjust them in a timely manner to new circumstances. In contrast to the U.S. system, Canada’s refugee status determination processes are much more insulated from judicial error-correcting, since only one percent of claims rejected by the IRB are overturned.<sup>24</sup> They are also relatively more insulated from interventions from elected officials, although this may partly result from the fact that the IRB has showed a willingness to proactively enact “management strategies” in response to sudden and rapid influx of certain types of claimants in order to ensure that its resources are not overwhelmed.<sup>25</sup>

Of course, as seen in the Canadian response to a sizable and rapid influx of Czech Roma asylum applicants, expert-dominated administrative justice may at times privilege sustainability of the system over individualized determinations.<sup>26</sup> This impulse towards restrictionism in times of “emergency” might be read as evidence that Canada’s systemic bias towards generosity requires investment of substantial resources and is probably only feasible in a country that, most of the time, has relatively low numbers of asylum applicants. Hamlin does not make this argument explicitly, but she does describe how the system has come under pressure in recent years both from conservative politicians and also from leaders of the Canadian legal profession who seek to add greater formality to administrative processes.

While the U.S. and Canada have developed stable institutional structures and settled understandings of how the various parts of their respective systems fit together, it is more difficult to classify any stable refugee status determination “regime” in Australia. Hamlin’s description of the Australian system highlights the influence of frequent changes in legislation and abrupt evolutions in jurisprudence, as well as the dramatically fluctuating rates at which rejected applicants seek a judicial remedy. As she notes, Australia’s main administrative structure for handling refugee status determination was created only in 1992. Hamlin tentatively labels the Australian regime one of “bureaucratic-adversarialism,” a schizophrenic system that cannot choose between its expert-driven and adversarial tendencies and thus achieves neither model of administrative justice particularly well.<sup>27</sup>

Chapters seven through nine offer three illustrative vignettes showing how these national systems kick into action when similarly presented with a new kind of claim. The three kinds of novel claims examined are gender-based asylum claims, asylum claims based on the People’s Republic of China’s coercive population control policies, and claims

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22. *Id.* at 85.

23. *Id.* at 86 (discussing *Singh v. Minister of Emp’t*, 1 S.C.R. (1985)).

24. *Id.* at 94.

25. HAMLIN, *supra* note 17, at 99.

26. *Id.* at 91.

27. *Id.* at 19.



for protection based, not on the 1951 Refugee Convention, but on international human rights instruments. Certainly, the most illuminating illustration of how different regimes produce different outcomes is provided by the case of Chinese asylum claims. In contrast to the U.S. experience, Canadian elected officials have not sought to influence the direction of policymaking, and international refugee law guidelines have set a broad and workable standard, and its application to Chinese applicants generally has been left to the IRB.<sup>28</sup> Moreover, Canadian courts have not played any significant error-correcting role in supervising implementation because the IRB's well-resourced bureaucratic processes ensure relatively consistent outcomes across cases.

At the same time, the case study of Chinese asylum seekers also raises a tension in applying Kagan's typology of administrative decision-making styles to national refugee status determination systems created to apply international norms. In this domain, the country most wedded to professionalized judgment is also the country most integrated into the international system. Yet there is no reason, per se, that internationalism and professional managerialism should go together (think of China, which has a highly developed technocracy but which is often at odds with the normative guidelines generated by international institutions). Hamlin seems at times to suggest that the resistance to international expert judgment in both the U.S. and Australia is linked to these countries' respective modalities of administrative justice. She writes, "[t]he American RSD regime has largely ignored global legal developments, focusing in on its own domestic conflict and fragmentation."<sup>29</sup> Clearly the distraction of partisanship is a major factor in U.S. asylum policymaking, and this is the side of the equation on which Hamlin focuses her analysis. But it would also be interesting to explore the way in which domestic policymakers' relationships with international norms and institutions have been differently institutionalized in the asylum processes of these three countries.

Hamlin's book does not grapple explicitly with activity at the international level, which would inevitably complicate the comparative analysis. Instead, the book aims at clearly elaborating a single argument about the often-overlooked role of adjudicatory and appeals processes *within* administrative institutions and their importance in explaining why strikingly divergent asylum grant rates exist between decision-makers in some countries but not in others.

#### THE ROLE OF INTERNATIONAL COURTS IN MIGRATION GOVERNANCE

The two studies by political scientists discussed thus far both focus on explaining outcomes of cases involving asylum seekers. In these books, doctrinal developments are touched upon only to the extent that they are associated with significant shifts in aggregated decision-outcomes. By contrast, in *When Humans Become Migrants*, legal anthropologist Marie-Bénédicte Dembour devotes substantially greater attention to the text of court decisions elaborating the rights of non-citizens.<sup>30</sup> Her analysis also differs from the two studies discussed above insofar as it focuses not on domestic law but rather on the

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28. *Id.* at 143-58.

29. *Id.* at 142.

30. MARIE-BÉNÉDICTE DEMBOUR, *WHEN HUMANS BECOME MIGRANTS: STUDY OF THE EUROPEAN COURT OF HUMAN RIGHTS WITH AN INTER-AMERICAN COUNTERPOINT* (2015).

lawmaking of two international courts, the European Court of Human Rights (the European Court) and the Inter-American Court of Human Rights (the Inter-American Court).

Many Americans associate the European Court with an assertive human rights jurisprudence, particularly in the area of privacy rights. However, Dembour argues that the European Court's handling of cases involving the rights of non-citizens has been significantly less praiseworthy. In her assessment, the basic conceptual underpinning of the "European Convention system" is that states need not relinquish sovereign authority to control migrants, with the corollary that human rights are simply a principle of good governance agreed to by states.<sup>31</sup> She aims to show that the European Court's attachment to this "statist" paradigm has colored migration cases, even when these cases have widely differing relevant legal issues and fact patterns. Moreover, she argues that this approach is not an inevitable feature of migration governance, and that European jurisprudence takes on a distinctly unflattering character when set against the work of the Inter-American Court in this area.

In this sense, Dembour's analysis goes beyond the detail-oriented doctrinal analysis that characterizes most contemporary legal scholarship. The book does not make any mention of Montesquieu, but it seems to adopt a style of comparison driven by the concept of the "spirit" of the laws.<sup>32</sup> The aim in "dissecting" the case law is not to delineate conceptual boundaries more clearly but rather to extract law's ideological and affective underpinnings.<sup>33</sup> Dembour notes that this approach casts a wider net than doctrinal analysis, since it looks for conceptual foundations that extend beyond doctrinal categories and whose legal relevance is often not well-established. *When Humans Become Migrants* is more than 500 pages in length and is dense with footnotes to case law and archival sources. There are long tangents for social and policy background to be explained. Dembour has also visited both courts, and her analysis is augmented by her personal observations of their operations. The book does not shy away from normative claims, and the text is at times written in a strongly denunciatory tone.

The book begins by undertaking an analysis of the foundational moments for establishing the European and Inter-American human rights systems respectively. Examining the records of the travaux préparatoires for the European Convention on Human Rights, she concludes that the founders of the European human rights system did not exclude migrants from the Convention's ambit, but neither did they wish to consider the predicament of migrants in any detail or specifically grant them rights.<sup>34</sup> The comparison with the Inter-American system reveals a different "reflex" in Latin America, although the comparison is sometimes uneven since it is based on secondary rather than primary sources.

Dembour then proceeds to examine the early decisions of the European Commission on Human Rights and the initial cases considered by the European Court. Through close textual analysis, she aims to show that the underlying philosophy of both the text of the Convention and its initial interpretation was that its rights-protective provisions were not intended for Europe's former colonial subjects. She criticizes the European Court for its

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31. *Id.* at 7.

32. MONTESQUIEU, *DE L'ESPRIT DES LOIS* (1748).

33. DEMBOUR, *supra* note 30, at 22.

34. *Id.* at 60.

formalistic refusal to acknowledge the colonial-racist motivation for distinctions in immigration rules, and contrasts this against a “pro homine” human rights perspective which would place the burden on states to not only provide a public policy justification for these rules but also show that these public objectives could not be achieved in a less burdensome manner.<sup>35</sup> For Dembour, these early foundational cases were a harbinger of subsequent developments, foreshadowing what kinds of cases the court would decide to hear and how it would decide them.

This foundational period of the European Court’s handling of migration questions is then contrasted with an Inter-American counterpoint. Dembour’s claim is that it was not simply different texts and different institutional processes that explain the Inter-American Court’s more rights-protective approach. Rather, she argues that the difference between the two systems reveals their contrasting human rights paradigms. In her view, the Inter-American Court has adopted a posture of openness to civil society as well as to other international human rights instruments. It has tended to adopt broad rulings that aim for inspiration and that eschew pragmatic policy considerations. For Dembour, these are manifestations of a broader “pro homine” paradigm, which puts human beings at the center of its reasoning so that migrants are thought of first as human beings. As she notes, this does not guarantee a finding against any given migration policy, but “the balance is slightly weighted . . . towards the individual.”<sup>36</sup>

The case law of the European Court, discussed in chapters six through eight of the book, receives a much less favorable assessment. According to Dembour, the European Court has produced a “haphazard, inconsistent, and ultimately weak case law,” insofar as the application of a proportionality test to balance state sovereignty with the Article 8 right to family life has resulted in a lottery as to whether a violation will be found.<sup>37</sup> She argues that the majority of the European Court has generally prioritized state sovereignty, using formalism to ignore the lived experiences of non-citizen residents who feel that their center of family life is in Europe. Dembour’s analysis of case law applying Article 3 of the Convention reveals a similar state-centric bias. The European Court has outlined an absolute prohibition on an individual being deported to torture, but it has placed the burden of proof on the individual non-citizen to provide facts countering the conclusions of European state officials that there is no risk of ill-treatment. The crucial point, for Dembour, is that the European Court has showed a remarkable tentativeness in revisiting the facts as established by state asylum systems. In this respect, it adheres to a mode of reasoning—which has become foundational—the starting point of which is a state prerogative to control the entry and residence of aliens. Dembour labels this approach the “Strasbourg reversal” to signify the way that it reverses the prioritization the “pro homine” human rights approach, which places the individual above state sovereignty.<sup>38</sup>

*When Humans Become Migrants* does not offer any explanation for these differences between the European and Inter-American human rights systems. Nor does it explore empirically how decisions in the discussed cases were subsequently taken up by similarly

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35. *Id.* at 7.

36. *Id.* at 303.

37. *Id.* at 162.

38. DEMBOUR, *supra* note 30, at 5.

situated migrants, or by government officials, or by advocates for migrant rights. These are outside the scope of the study. However, Dembour also shies away from any empirical exploration of how the ideas of migrant advocacy groups have changed over time as new arguments are discovered and brought to the Court (strangely, she does not seem to have interviewed any of the expert litigators whose well-known test cases she describes). For the sake of preempting claims that advocates in Europe are to blame for failing to bring sympathetic cases, she stresses that, to the contrary, their persistent efforts to defend migrants continue to be shut down by the majority of the European Court. Yet, as recent sociolegal scholarship has shown, one of the remarkable developments of the past twenty years has been the increased willingness of European immigrant rights legal activists to pursue cases before the European Court.<sup>39</sup> Advocates are now much more comfortable using European case law, and their creativity in seeking out new legal avenues and grounds for decision makes this area of law much more dynamic than Dembour at times suggests.

Dembour takes the view that audaciousness is preferable to timidity in international courts. While some might point out that the Inter-American Court's aspirational use of rights rhetoric often remains unimplemented in the practices of states, she argues that the European Court's case law likewise often remains incompletely implemented. Indeed, she points out that the United Kingdom continues to contest the European Court's migration jurisprudence, even when it is relatively weak on migrant rights. The book is an elaborate argument to the European Court to give up on attempting to appease the British Government's conservatism on migration questions and to adopt a more extensive and rights-protective jurisprudence in this area.

#### CONCLUSION

For advocates and scholars seeking to better understand the U.S. asylum system, the political science studies discussed in this review provide clear evidence that institutional design matters for asylum outcomes. As Miller *et al.* demonstrate through their extensive statistical analyses, U.S. asylum adjudication is characterized by striking variation across metropolitan districts and between individual immigration judges. Moreover, as Hamlin's comparative study makes clear, the wide variation in how U.S. adjudicators handle asylum cases is much less present in an administrative system such as Canada's, where there is a culture of investing resources in public administration and where experts enjoy greater insulation from interest group influence.

Over the past three decades, the perceived shortcomings of the U.S. asylum system repeatedly have become a target for organized class action litigation.<sup>40</sup> Court-ordered injunctions and settlement agreements have improved access to counsel and other procedural protections available in U.S. immigration courts. Yet litigation has been relatively less successful in countering the increased use of expedited asylum screening, which has characterized border control policies in the U.S. and elsewhere.<sup>41</sup> And the crude "streamlining"

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39. LEILA KAWAR, *CONTESTING IMMIGRATION POLICY IN COURT: LEGAL ACTIVISM AND ITS RADIATING EFFECTS IN THE UNITED STATES AND FRANCE* 146-50 (2015).

40. For a discussion of the policy impact of immigrant rights class action litigation, see *id.* at 103-26.

41. CAROL BOHMER & AMY SHUMAN, *REJECTING REFUGEES: POLITICAL ASYLUM IN THE 21ST CENTURY* (2008).

program implemented by Attorney General Ashcroft ten years ago, recounted by both Miller *et al.* and Hamlin, shows that a change in political will is required for a new culture of administrative justice to take hold.

For advocates aiming to influence this broader shaping of public debates over international migration, Marie Dembour's provocative yet gestural study offers food for thought, insofar as it places these issues in a broader historical framework. Examining the European Court's initial forays into immigration matters, Dembour calls our attention to contemporary immigration law's roots in racialized economic imperialism and shows how the juridical move of recasting former colonial subjects as "foreign migrants" continues to provide justification for courts to subordinate individual human rights to sovereign border control authority. Admittedly, turning to the Inter-American Court as an alternative model is not a fully satisfying solution, as it brushes over the dynamics of the Inter-American Court's own politico-legal setting that limit the extent to which its doctrines might be successfully transplanted elsewhere. Yet in carefully documenting the erasure of history and context in contemporary immigration jurisprudence, Dembour's study serves as a reminder that reform initiatives must aim not only for institutional redesign but also for a rethinking of the current doctrinal subordination of migrant rights to sovereign border control authority.

As all of these studies make clear, the adjudication of claims for asylum is inseparable from the contemporary politics of migration and border control. This point is inescapable whether analysis is focused on the individual predispositions that influence how evidence is interpreted in asylum cases, the institutionalized regimes that structure national asylum systems, or the foundational narratives that shape judicial imaginations of migrant rights. Exploring asylum adjudication from an externalist perspective offers a valuable reminder to legal specialists that they cannot take refuge in conceptually neat formalist analysis, but must instead remain sensitive to the complex and continuously evolving political valences of this domain of legal practice.