
BEYOND EMISSIONS: MIGRATION, PRISONS, AND THE GREEN NEW DEAL

BY

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The Green New Deal is a bold resolution that asks us to envision climate policy beyond emissions reductions and pollution controls. The proposal seeks to reduce environmental impacts, including by dramatically reducing carbon emissions, while supporting domestic manufacturing, unionized labor, sustainable agriculture, and social equity. The Biden Administration has expressed support for the Green New Deal as “a crucial framework for meeting the climate challenges we face,” and the proposal has influenced the Administration’s early actions to reduce carbon emissions. How can the Green New Deal’s framework guide climate policy beyond emissions reductions, and who should be a part of this conversation?

Using examples from immigration law and policy, this Article envisions what climate policy beyond emissions looks like in two key areas: climate migration and immigration detention. Rightfully so, the Green New Deal makes several gestures toward the impact its proposals would have on immigration policy and migrant communities. The Green New Deal identifies that climate change will cause—indeed, already has caused—mass migration, labels climate change as a national security threat, and recognizes that climate change will disproportionately impact migrant communities. And it expressly sets out to stop and prevent further oppression of migrant communities. As a framework, the Green New Deal demands attention to the intersection of climate and

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immigration policy and meaningful commitment to reforms in the areas of immigration law that the Green New Deal impacts.

We argue that failure to consider the role of immigration reform in climate policy risks undermining the Green New Deal's goal of aligning environmental and economic policy with racial, social, and economic equality, as well as its specific goals focused on migrant communities. To address the impact of climate change on mass migration and vulnerable communities, immigration reform should be understood as a key element of climate policy guided by the Green New Deal. We start that conversation by offering proposals that integrate key immigration reforms into a climate policy that looks beyond borders and beyond prisons.

I.	INTRODUCTION	163
II.	THE GREEN NEW DEAL.....	170
	A. Structure	171
	1. Congressional Findings.....	171
	2. Green New Deal Goals.....	172
	3. Green New Deal Mobilization	173
	4. Green New Deal "Principles".....	174
	5. Immigration and the Green New Deal	176
	B. Foundations.....	177
	C. Innovations	180
III.	CLIMATE MIGRATION	182
	A. Climate Change and Movement of People	182
	B. Climate Migration and U.S. Immigration Law.....	184
	1. Amending the Definition of "Refugee".....	184
	2. Utilizing Temporary Protected Status.....	187
	3. Creating an Environmental Visa Program	188
	C. Climate Policy Beyond Borders	189
	1. Acknowledging Migrant Communities Outside the U.S.	189
	2. Integrating Migration into U.S. Climate Leadership	190
	3. Confronting the U.S. Military's Role	192
IV.	DETENTION-DRIVEN IMMIGRATION ENFORCEMENT	192
	A. Immigration Detention and the Harms of Confinement.....	193
	B. The "Greening" of Prisons	199
	C. Climate Policy Beyond Prisons	200
	1. Alternatives to Detention	200
	2. Abolishing Detention	202
V.	CONCLUSION: CLIMATE POLICY BEYOND EMISSIONS	203

I. INTRODUCTION

The enormous breadth, scope, and threat of global climate change blurs the lines between environmental law—traditionally associated with pollution control and carbon emissions reductions—and other legal fields. A collective realization that environmental law impacts many areas of law and policy—and vice versa—is emerging. The Green New Deal reflects this reality by seeking to align environmental and climate policy with a wide range of progressive social policy goals, such as labor protections, racial justice, and greater wealth equality.¹ Yet most commentary around climate policy and the Green New Deal is only beginning to grapple with the breadth of this task.² Early work has focused on the technocratic details of climate policy, such as how to achieve the dramatic carbon emission reductions suggested by the proposal. Substantially less attention has been devoted to fleshing out the difficult and more pressing questions about how to design environmental and climate policy that achieves the social justice goals set out in the Green New Deal. This Article aims to shine a light on this necessary work and move forward the conversation about what environmental and climate policy beyond emissions reductions and pollution controls looks like. To do so, we link two ongoing debates in immigration law with the commitments and goals of the Green New Deal to migrant communities: the lack of legal protections for people displaced by climate change and the harms of detention-driven immigration enforcement.³ Through this discussion, we start the process of envisioning climate policy “beyond emissions” to one that also moves “beyond borders” and “beyond prisons.”

To better understand the growing overlap between environmental law and immigration law, consider the story of Mr. Ioane Teitiota. On September 23, 2015, the government of New Zealand, where Mr. Teitiota had lived with his family since 2007, deported him to the island nation where he was born.⁴ Ioane was born “on an islet situated north of

¹ See discussion *infra* Part II.C (discussing the Green New Deal’s progressive commitments that have otherwise been in conflict with environmental and climate policies).

² See discussion *infra* Part II.C (noting the need for legal scholarship that envisions the implications of the Green New Deal).

³ At the outset, we acknowledge that this term “migrant communities” is undefined in the Green New Deal resolution and is ambiguous. H.R. Res. 109, 116th Cong. (2019); S. Res. 59, 116th Cong. (2019). At best—and what we believe to be the drafters’ intent, given the spirit of the Resolution—the term includes communities whose members and/or members’ relatives have migrated to the United States. We fear, however, that the term could conjure the image of an “outsider,” implying that these communities are somehow different or “other than” other American communities. We urge legislators and administrators to consider defining this term in future policy implementing the Resolution’s goals. See discussion *infra* Part II.A.5 (explaining how the Green New Deal explicitly lists migrant communities in its definition of vulnerable groups but does not define the term itself).

⁴ Human Rights Comm., Int’l Covenant on Civil & Political Rights, *Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No.*

Tarawa, a journey of several days away by boat,” in the island Republic of Kiribati, roughly 3,000 miles across the Pacific Ocean from New Zealand.⁵ He completed secondary school and worked at a trading company until the company closed in the 1990s.⁶ He then moved to the larger island of Tarawa, the capital of Kiribati and married his wife, who had also been born on a smaller island in the south of Kiribati.⁷ Together, they lived in a traditional village as farmers and fishers.⁸

Life was difficult for the Teitiotas. In the late 1990s and early 2000s, the population of Tarawa swelled as people moved in from the smaller surrounding islands.⁹ Tarawa provided some of the few government and medical services in the region, which quickly overcrowded.¹⁰ Regular flooding on Tarawa disrupted transportation and made crops difficult to grow.¹¹ Scarcity and crowding turned living on Tarawa from difficult to dangerous as people fought over property and resources.¹² The Teitiotas wanted to have children.¹³ They wanted a better future and a safe home. They left Kiribati for New Zealand in 2007.¹⁴ They had three children there, and when their residence permits expired in 2010, they stayed.¹⁵

In 2012, Mr. Teitiota sought legal help to remain lawfully in New Zealand.¹⁶ He filed a petition for asylum, claiming that it would be dangerous for him and his family to return to Tarawa in light of the risks that moving would pose to him and his family.¹⁷ Mr. Teitiota’s claim was rejected at each stage of New Zealand’s judicial system.¹⁸ The government concluded that the violence and disruption caused by flooding and overcrowding on Tarawa were insufficient to demonstrate that Mr. Teitiota was a “refugee” entitled to asylum under relevant international law.¹⁹ Mr. Teitiota, for example, could not prove that he was subjected to threats of violence as a member of a particular social group or because of an innate identity characteristic.²⁰ Rather, the risks of life on Tarawa were among the many instabilities for which

2728/2016, ¶ 1.1, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019) [hereinafter Committee Views].

⁵ *Id.* ¶ 2.5: *Distance from Kiribati to New Zealand*, DISTANCEFROMTO, <https://perma.cc/LW86-872G> (last visited Nov. 17, 2020).

⁶ *Id.* ¶ 2.5.

⁷ *Id.* ¶ 2.6.

⁸ *Id.* ¶ 2.5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* ¶¶ 2.4, 2.5.

¹³ *Id.* ¶¶ 2.5, 4.1.

¹⁴ *Id.* ¶¶ 2.5, 4.1.

¹⁵ *Id.* ¶ 4.1.

¹⁶ *Id.* ¶ 4.2.

¹⁷ *Id.* ¶¶ 2.1, 2.2.

¹⁸ *Id.* ¶ 2.2.

¹⁹ *Id.* ¶ 2.8.

²⁰ *Id.* ¶ 9.7.

international law provided no refuge.²¹ Mr. Teitiotia lost his final appeal in 2015, and the New Zealand government deported him to Kiribati.²² His family followed him.²³

In 2007—the same year the Teitiotas immigrated to New Zealand—the Republic of Kiribati acknowledged in an action plan prepared pursuant to the United Nations Convention on Climate Change that the sea was swallowing the nation.²⁴ Year by year, sea level rise pushed inhabitants of the smaller islands to the larger islands like Tarawa, overcrowding the nation's lands and straining its resources.²⁵ More frequent floods salted Tarawa's fields and stripped parts of the island of all vegetation.²⁶ Saltwater spoiled wells on which Tarawa's inhabitants relied.²⁷ Residents built seawalls that demanded constant repair to stave off the rising waves.²⁸ There was nowhere else to go. The people of Kiribati became vocal advocates, raising awareness of the impacts of climate change on small and developing nations and demanding action.²⁹ As the sea claimed their nation and global carbon emissions continued to rise, they asked the international community: Where will our people go?³⁰

When New Zealand sent the Teitiotas back to Tarawa in 2015, seawater washed over the island to knee-deep levels whenever floods aligned with high tide.³¹ The Teitiotas could not grow food in these conditions.³² Children on the island were dying from drinking the well

²¹ *Id.* ¶ 2.9.

²² *Id.* ¶¶ 4.3, 4.4.

²³ *Id.* ¶ 5.

²⁴ KIRIBATI CLIMATE CHANGE STUDY TEAM, REPUBLIC OF KIRIBATI: NATIONAL ADAPTATION PROGRAM OF ACTION (NAPA) (Jan. 2007), <https://perma.cc/EVH2-6AE8> (Kiribati).

²⁵ Committee Views, *supra* note 4, ¶ 2.5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* ¶¶ 2.4, 2.5.

²⁹ See Anote Tong, *While My Island Nation Sinks, Australia is Doing Nothing to Solve Climate Change*, GUARDIAN (Oct. 10, 2018), <https://perma.cc/A5LT-TRB7> (the former president of Kiribati calling on Australia to decrease the impacts of climate change by decreasing carbon emissions).

³⁰ *Id.* (“We are being told that we may have to abandon our islands, the places where our ancestors have been buried, where our children have a home and an identity. If this disastrous outcome comes to pass, my people will need a place of safety to move to.”). Notably, some advocates from Kiribati believe that this focus on relocating the people of Kiribati is unnecessary and harmful. See, e.g., Tekau Frere et al., *Climate Change and Challenges to Self-Determination: Case Studies from French Polynesia and the Republic of Kiribati*, 129 YALE L.J. FORUM 648, 667 (2020) (“Other commentators have claimed that countries such as Kiribati have no hope of survival in their current, territorially delimited configuration. This approach implies that emigration is the only option for the people of Kiribati, though the sensitive subject of climate migration does not sit well with the government and people of Kiribati.”).

³¹ Committee Views, *supra* note 4, ¶ 2.5.

³² *Id.* ¶ 5.

water.³³ One of the Teitiotas' children suffered from blood poisoning, causing boils to erupt across the child's body.³⁴ These were the dangers that Mr. Teitiotas feared for his family when he requested asylum in New Zealand.³⁵ And these are the dangers that New Zealand maintained are not within the ambit of its obligation to people migrating from other countries, as dictated by international law.³⁶

Mr. Teitiotas then took his claim to the United Nations Human Rights Committee, an expert body dedicated to resolving disputes regarding the implementation of international human rights treaties.³⁷ Despite accepting Mr. Teitiotas' "claim that sea level rise is likely to render the Republic of Kiribati uninhabitable," the Committee confirmed that New Zealand had no obligation under international law to grant Mr. Teitiotas and his family the protection of asylum.³⁸ The Committee recognized the key gap between climate change and refugee law: "For climate change refugees, the risk of serious harm arises from environmental factors indirectly caused by humans, rather than from violent acts."³⁹ Because the convention requires this threat of violent harm, generally the convention offers no help to people displaced by climate change like Mr. Teitiotas.⁴⁰

The Committee signaled that, "without robust national and international efforts, the effects of climate change in receiving states may," nevertheless, "expose individuals to a violation of their rights under articles 6 or 7 of the [International] Covenant [on Civil and Political Rights], thereby triggering" obligations under international law to not deport people back to their country of origin.⁴¹ But in Mr. Teitiotas' case, the timeframe of Kiribati's descent into the sea—ten to fifteen years—"could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population."⁴² Thus, to the extent any obligation under international law could exist, it did not exist under Mr. Teitiotas' circumstances.

³³ See *id.* ¶ 2.6 ("She had heard stories of children getting diarrhea and even dying because of the poor quality of drinking water").

³⁴ *Id.* ¶ 5.

³⁵ *Id.* ¶ 3.

³⁶ *Id.* ¶ 9.6.

³⁷ *Id.* ¶¶ 1.1–1.2. See also *Human Rights Committee*, INT'L JUST. RESOURCE CTR., <https://perma.cc/QF4S-GU24> (last visited Nov. 11, 2020) (describing the United Nations Human Rights Committee).

³⁸ *Id.* ¶ 9.12.

³⁹ *Id.* ¶ 7.1.

⁴⁰ See *id.* ¶ 9.7 (noting the "absence of a situation of general conflict" and that Teitiotas failed to demonstrate a "real, personal and reasonably foreseeable risk of a threat to his right to life as a result of violent acts resulting from . . . private land disputes.").

⁴¹ *Id.* ¶ 9.11.

⁴² *Id.* ¶ 9.12. Recently, the President of Kiribati has announced plans to adapt Kiribati to a changing climate with international help. Christopher Pala, *Kiribati's President's Plans to Raise Islands in Fight Against Sea-Level Rise*, GUARDIAN (Aug. 9, 2020), <https://perma.cc/2JCY-AFFF> ("Maamau has rejected migration as a strategy, arguing

This story helps demonstrate the chasm between the realities of climate change and the law of the many nations, including the United States, whose immigration law tracks the contours of international law.⁴³ In the coming decades, climate change will displace staggering numbers of people both internally and internationally—estimates reach into the hundreds of millions—under less direct and less dramatic circumstances than those of Mr. Teitiota and his family.⁴⁴ Both subtle changes in climate and environmental degradation, as well as increased instances of catastrophes and dangerous events such as hurricanes and floods, will displace people for a wide range of reasons, from the failure of a season's harvest, to inhabitable living conditions, to full-scale conflict.⁴⁵ And the risk of displacement, both internally and across borders, has been, and continues to be, particularly great for nations in the global south and communities of color across the world, making the issue also one of racial justice.⁴⁶

Mr. Teitiota's story also illustrates how neither immigration law nor environmental law alone can bridge this chasm. The Earth's climate is already changing, and even immediate and dramatic reductions of global carbon emissions will not stop changes that are expected to displace large numbers of people.⁴⁷ Likewise, reforms to immigration law are only a half-measure, alleviating some of the risk facing climate migrants but failing to address either the deep change to communities wrought by climate change or the impact to those who migrate within a country's borders.⁴⁸ A just approach requires matching climate policy with immigration policy intended to avoid displacement and lessen the risks facing climate migrants, while also accommodating people's climate-change-induced movement and easing the transition of

studies have shown the islands can survive with the right adaptation measures, and saying the people of Kiribati will not be forced to leave.”).

⁴³ See discussion *infra* Part III.B (discussing limits of U.S. immigration law in addressing climate migration).

⁴⁴ See discussion *infra* Part II.A.1 (explaining the four-part structure of the Green New Deal resolutions). See also WORLD BANK GROUP, GROUNDSWELL: PREPARING FOR INTERNAL CLIMATE MIGRATION 5–6 (2018), <https://perma.cc/S5RQ-XRMV> (“The cascading impacts linked to climate change are already shifting patterns of migration and will increasingly do so.”).

⁴⁵ WORLD BANK GROUP, *supra* note 44 (describing the climate trends and their adverse effects among different nations).

⁴⁶ See generally INTERNAL DISPLACEMENT MONITORING CENTRE, GLOBAL REPORT ON INTERNAL DISPLACEMENT (May 2016), <https://perma.cc/G7G4-VBF2> (estimating and analyzing displaced populations across the world); Kristin Lambert, *The Paris Agreement: Spotlight on Climate Migrants*, YALE SCH. ENV'T: BLOG (Dec. 29, 2015), <https://perma.cc/M2GH-WR33> (providing examples of communities of color that face displacement issues).

⁴⁷ Lambert, *supra* note 46.

⁴⁸ See *infra* Part III.A (describing climate change's influences on the movement of people).

migrating people into new communities.⁴⁹ Neither alone can bridge the gap.⁵⁰

This lesson takes on an altogether different character when applied to the United States, which implements its immigration policy with a massive system of immigration prisons to detain and isolate migrants.⁵¹ This system of detention-driven immigration enforcement has deep and lasting impacts, not only on migrant communities, but on communities and the nation through environmental and other impacts.⁵² Nor here can a just climate policy ignore the costs and impact this detention-based approach has on migrant communities and the country.⁵³ Observers have already begun to draw connections between likely climate impacts in Central and South America with increased migration to the United States.⁵⁴ And efforts to “green” America’s prison system have led to perverse outcomes.⁵⁵ Again, neither immigration reform nor environmental reform is independently sufficient to address the impacts of detention-driven enforcement in a world of climate change.⁵⁶

The Green New Deal is the United States’ answer to these kinds of complex and difficult overlaps. As a comprehensive vision of climate policy, the Green New Deal recognizes the interrelationships between climate change and a wide range of structural and systemic injustices.⁵⁷ Among these interrelationships is the connection between climate policy

⁴⁹ See *infra* Part III (describing “areas where ongoing collaboration between immigration and environmental advocates is essential for meaningfully addressing climate migration”).

⁵⁰ See discussion *infra* Part III.C (explaining that collaboration between environmental and immigration advocates is essential for meaningfully addressing climate migration).

⁵¹ See discussion *infra* Part IV (explaining that the United States is now home to the largest civil immigration detention system in the world where the government incarcerates nearly 400,000 people annually).

⁵² See discussion *infra* Part IV.A (explaining the negative health and economic effects of confinement on individuals and the broader community).

⁵³ See discussion *infra* Part IV.A (listing the costs of high-rate detention and incarceration on communities including higher rates of chronic health conditions, and an estimated economic burden of \$1 trillion).

⁵⁴ See discussion *infra* Part III.A (explaining that climate change will likely increase the migration and displacement of peoples around the world, and that the United States’ existing immigration laws are ineffective to deal with the resulting effects); Georgina Gustin & Mariana Henninger, *Central America’s Choice: Pray for Rain or Migrate: Ravaged by Drought, Farmers in Rural Honduras and Guatemala Live on the Edge of Hunger*, NBC NEWS (Jul. 9 2019), <https://perma.cc/ZW44-UCJR>.

⁵⁵ See discussion *infra* Part IV.B (explaining that efforts to “green” prisons may support and further entrench mass incarceration by diverting attention away from the harms of incarceration).

⁵⁶ See discussion *infra* Part IV.C.2 (explaining that a full realization of the Green New Deal’s commitments cannot be achieved without reforming immigration law to eliminate the present detention-driven enforcement regime, which will require the intersection of climate policy, immigration reform, and social justice).

⁵⁷ See discussion *infra* Part II.A (explaining that climate change, pollution, and environmental destruction have exacerbated a series of systemic injustices, including racial, economic, and environmental injustices, by disproportionately impacting frontline and vulnerable communities).

and the oppression of migrant communities.⁵⁸ The Green New Deal expressly recognizes that climate change will create societal instability and large-scale migration of people.⁵⁹ In recognition of this risk, the proposal commits to addressing past, and preventing future, oppression of migrant communities.⁶⁰ As we argue, achieving such a commitment requires stepping outside the traditional frameworks of environmental law and immigration law.⁶¹ It demands the expertise of both environmental advocates *and* immigration advocates to design a climate policy that meets the goals of the Green New Deal. Such a climate policy must step beyond borders and must envision a world beyond immigration prisons.

These conversations and issues have received remarkably little attention in legal scholarship and are only starting to begin elsewhere.⁶² Some legal scholarship discussing the Green New Deal is dismissive of its social justice goals, instead urging focus on the suite of policy tools needed to reduce emissions.⁶³ For example, one article views the social policy aspects of the Green New Deal as “laudable objectives” but concludes that they are “distinct from reducing [greenhouse gas] emissions.”⁶⁴ There is therefore an open opportunity to begin envisioning meaningful legal change meeting the goals of the Green New Deal, specifically regarding climate migration.

This Article begins that conversation. Part II discusses the Green New Deal itself, first laying out its structure and content. It then discusses the foundation of the modern Green New Deal resolution, including context surrounding prior iterations of the “Green New Deal” idea, environmentalism’s fraught relationship with many of the values pursued in the Green New Deal, and modern economy-scale carbon policy. Part II concludes by identifying what we see as the Green New Deal’s primary innovation—linking climate policy with social justice goals that have historically been in tension with environmentalism—and noting the resolution’s recent legal and political impacts. Parts III and IV draw out the overlaps between the Green New Deal’s

⁵⁸ See discussion *infra* Part II.A.2 (listing the Green New Deal’s goal of promoting justice by stopping current, preventing future, and repairing historic oppression of migrant communities).

⁵⁹ See discussion *infra* Part II.A (explaining that global warming will lead to mass migration from the regions most affected by climate change, and that climate change threatens the national security of the United States by destabilizing countries and communities around the world).

⁶⁰ See discussion *infra* Part II.A (stating that a primary goal of the Green New Deal is to stop current, prevent future, and repair historic oppression of migrant communities).

⁶¹ See discussion *infra* Part III.C (explaining that collaboration between immigration and environmental law is essential to meaningfully address climate migration).

⁶² See discussion *infra* Parts II, III (explaining that legal scholars are only starting to work out the implications of the Green New Deal’s intersecting interests).

⁶³ See discussion *infra* Part II.C (noting scholars who are dismissive of the Green New Deal’s social justice goals).

⁶⁴ Robert Sussman, *Designing the New Green Deal: Where’s the Sweet Spot?*, 49 ENV’T L. REP. 10428, 10446 (2019).

commitments to migrant communities and two ongoing debates in immigration law and policy: the legal status of “environmental refugees” and the reliance on detention-driven immigration law enforcement. Both Parts conclude with recommendations for envisioning climate policy beyond borders and beyond prisons, consistent with the Green New Deal’s innovations and commitments.

We then conclude with some thoughts intended to generalize our work in this Article. The Green New Deal calls us to envision climate policy beyond emissions reductions and pollution controls. Our discussion of the overlaps between the Green New Deal’s commitments and two problems in immigration law is intended to be exploratory, not complete, and exemplary, not comprehensive. It is intended to inspire future conversations with two general takeaways: First, that there is important and difficult work for legal scholars to do in fleshing out the Green New Deal’s commitment to bridge climate and environmental policy with a wide range of social justice issues, particularly its commitments to migrant communities. Second, neither climate advocates nor social justice advocates should attempt this work alone.

II. THE GREEN NEW DEAL

The Green New Deal is a policy proposal aimed at uniting the goals of environmental protection, specifically climate change policy, with labor protections and other progressive social policy goals.⁶⁵ The proposal is embodied in identical congressional resolutions introduced by Congresswoman Alexandria Ocasio-Cortez and Senator Ed Markey.⁶⁶ For our purposes, we will simply refer to them as one resolution. This Part walks through the structure, foundation, and innovations of the resolution to lay the groundwork for our argument. Specifically, Section A outlines the structure and content of the Green New Deal resolution, highlighting specific provisions related to immigration issues. Section B discusses the foundation of the resolution, including a brief history of the “Green New Deal” phrase and an overview of modern economy-scale climate policy. Section C outlines the Green New Deal’s primary innovations, namely, the scope and scale of carbon reduction policies and tying those policies to specific social justice goals.

⁶⁵ See generally the House resolution recognizing the duty of the federal government to create a Green New Deal, H.R. Res. 109, 116th Cong. (2019); the Senate resolution recognizing the duty of the federal government to create a Green New Deal, S. Res. 59, 116th Cong. (2019); and the joint resolution recognizing the duty of the federal government to create a Green New Deal, S.J. Res. 8, 116th Cong. (2019).

⁶⁶ The relevant resolutions are House Resolution 109, H.R. Res. 109, and Senate Resolution 59, S. Res. 59, introduced by Congresswoman Alexandria Ocasio-Cortez and Senator Ed Markey on February 7, 2019.

A. Structure

The Green New Deal resolution contains a four-part structure that is a helpful way of digesting their content.⁶⁷ The four parts of this structure are: congressional findings, the Green New Deal goals, the Green New Deal mobilization, and what we call the Green New Deal “principles.”⁶⁸

1. Congressional Findings

The resolution begins with a series of congressional findings that can be separated further into four categories.⁶⁹ The first category of findings relates to the risks that climate change presents to the United States.⁷⁰ Relying on the International Panel on Climate Change’s “Special Report on Global Warming of 1.5 C,”⁷¹ the resolutions conclude that “human activity is the dominant cause of observed climate change over the past century,” that climate change “is causing” a wide variety of “extreme weather events that threaten human life, healthy communities, and critical infrastructure,” and that “the United States has historically been responsible for a disproportionate amount of greenhouse gas emissions.”⁷² The resolution notes that warming above two degrees will cause many dramatic, negative outcomes specific to the United States, including losses in “annual economic output.”⁷³ The resolution explains that warming “must be kept below 1.5 degrees Celsius above preindustrialized levels,” which will require global reductions in greenhouse gas emissions between forty and sixty percent from 2010 levels by 2030, and “net-zero global emissions by 2050.”⁷⁴ The resolution asserts that, because of our country’s high technological capacity, “the United States must take a leading role in reducing emissions through economic transformation.”⁷⁵

The second category of findings derive from a wide range of social problems in the United States.⁷⁶ The resolution identifies “several related crises” facing the United States, including declining life expectancy, “a 4-decade trend of wage stagnation, deindustrialization,

⁶⁷ S.J. Res. 8, 116th Cong. (2019).

⁶⁸ *Id.*

⁶⁹ *Id.* § 1.

⁷⁰ *Id.* § 1(1).

⁷¹ Intergovernmental Panel on Climate Change, *Summary for Policymakers: Global Warming of 1.5° C: An IPCC Special Report on the Impacts of Global Warming of 1.5° C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (2018), <https://perma.cc/W554-EPQ8> [hereinafter IPCC 1.5 Report].

⁷² H.R. Res. 109, 116th Cong. (2019).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

and antilabor policies,” and the “greatest income inequality since the 1920s,” including “a large racial wealth divide” and “gender earnings gap.”⁷⁷ It explains that “climate change, pollution, and environmental destruction have exacerbated” a series of “systemic injustices,” including racial, economic, and environmental injustices by disproportionately impacting “frontline and vulnerable communities.”⁷⁸ The resolution defines “frontline and vulnerable communities” to include “indigenous peoples, communities of color, migrant communities, deindustrialized communities, depopulated rural communities, the poor, low-income workers, women, the elderly, the unhoused, people with disabilities, and youth.”⁷⁹

Third, the resolution recognizes that “climate change constitutes a direct threat to the national security of the United States,” including by impacting “stability of countries and communities around the world.”⁸⁰

And fourth, the resolution draws a parallel to the New Deal and “Federal Government-led mobilizations during World War II,” which “created the greatest middle class that the United States has ever seen” but “excluded” many frontline and vulnerable communities.⁸¹ The resolutions therefore identify that a “new national, social, industrial, and economic mobilization on a scale not seen since World War II and the New Deal era is a historic opportunity” to create jobs, provide economic security, and counteract systemic injustice.⁸²

2. *Green New Deal Goals*

Based on these findings, the resolution identifies five goals that it defines as the “Green New Deal goals.”⁸³ These goals are:

- 1) “achieve net-zero greenhouse gas emissions through a fair and just transition for all communities and workers;”⁸⁴
- 2) create jobs and economic security for “all people of the United States;”⁸⁵
- 3) invest in sustainable infrastructure;⁸⁶

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* Notably, the Resolution does not differentiate the aim of its goals among citizens and non-citizens. *See id.*

⁸⁶ *Id.*

- 4) achieve several environmental goals, including clear air and water, climate resiliency, healthy food, access to nature, and a sustainable environment;⁸⁷ and
- 5) promote justice “by stopping current, preventing future, and repairing historic oppression” of frontline and vulnerable communities.⁸⁸

3. *Green New Deal Mobilization*

The heart of the resolution is “a 10-year national mobilization” to achieve the Green New Deal goals that it defines as the “Green New Deal mobilization.”⁸⁹ This mobilization, in turn, “will require” fourteen additional “goals and projects”:⁹⁰

- 1) building resiliency against extreme weather events;⁹¹
- 2) repairing infrastructure to achieve environmental goals and address climate change;⁹²
- 3) satisfy 100 percent of power demand in the United States through “clean, renewable, and zero-emission energy sources,” including both upgrading existing and deploying new renewable energy infrastructure;⁹³
- 4) focusing on the efficiency of the power grid;⁹⁴
- 5) “achieve maximum energy efficiency” in buildings, including “through electrification;”⁹⁵
- 6) reducing emissions of existing manufacturing and encouraging “renewable energy manufacturing;”⁹⁶
- 7) “working collaboratively with farmers and ranchers” to reduce agricultural emissions and build “a more sustainable food system;”⁹⁷

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

- 8) “overhauling transportation systems,” with a focus on zero-emission vehicles, accessible public transit, and high-speed rail;⁹⁸
- 9) mitigating the effects of climate change, including through “community-defined projects;”⁹⁹
- 10) removing carbon from the atmosphere “through proven low-tech solutions that increase soil carbon storage, such as land preservation and afforestation;”¹⁰⁰
- 11) restoring and protecting ecosystems;¹⁰¹
- 12) cleaning up hazardous waste and abandoned sites for economic and sustainable development;¹⁰²
- 13) identifying other emission and pollution sources to address them;¹⁰³
- 14) promoting international exchange of technology, expertise, funding, and services, with the goals of making the United States “the international leader on climate action.”¹⁰⁴

4. *Green New Deal “Principles”*

The resolution concludes with an additional fifteen “projects and goals” required “to achieve the Green New Deal goals and mobilization.”¹⁰⁵ Although not defined in the resolutions, we label these as “principles” to reflect one of the co-sponsor’s description of the resolution.¹⁰⁶ These principles are:

- 1) providing “adequate capital, technical expertise,” and other assistance to communities, government entities, or businesses working on the Green New Deal mobilization;¹⁰⁷

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *H.R. 109: Recognizing the Duty of the Federal Government to Create a Green New Deal*, CONGRESSWOMAN ALEXANDRIA OCASIO-CORTEZ, <https://perma.cc/ZLP3-K4MK> (last visited Nov. 3, 2020) (describing the Green New Deal resolution as consisting of “five Green New Deal goals, fourteen mobilization projects, and fifteen guiding principles.”).

¹⁰⁷ H.R. Res. 109, 116th Cong. (2019).

- 2) ensuring that the federal government accounts for “the complete environmental and social costs” of emissions;¹⁰⁸
- 3) providing “resources, training, and high-quality education . . . to all people of the United States, with a focus on frontline and vulnerable communities,” to ensure “full and equal” participation in the Green New Deal mobilization;¹⁰⁹
- 4) public investment in research and development of new clean and renewable energy technologies;¹¹⁰
- 5) “directing investments” to support communities and industries “that may otherwise struggle with the transition away from greenhouse gas intensive industries;”¹¹¹
- 6) “ensur[e] the use of democratic and participatory processes” to ensure that frontline and vulnerable communities are included in and lead the Green New Deal mobilization;¹¹²
- 7) ensure that the Green New Deal mobilization “creates high-quality union jobs;”¹¹³
- 8) guarantee “a job with a family-sustaining wage” and “adequate family and medical” benefits;¹¹⁴
- 9) strengthen the “right of all workers to organize, unionize, and collectively bargain;”¹¹⁵
- 10) strengthen the enforcement of labor, workplace safety, antidiscrimination, and wage and hour laws;¹¹⁶
- 11) enact trade rules with “strong labor and environmental protections;”¹¹⁷

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

- 12) ensure public lands, waters, and resources are protected and “that eminent domain is not abused;”¹¹⁸
- 13) obtain “free, prior, and informed consent of indigenous peoples;”¹¹⁹
- 14) ensure a commercial environment “free from unfair competition;”¹²⁰ and
- 15) provide “all people of the United States” with high-quality health care, affordable housing, economic security, and clear water, air, affordable food, and access to nature.¹²¹

One way of internalizing the content of this four-part structure is to conceptualize it in simple terms as the problem (the findings), what must be done (the goals and mobilization), and how we will do it (the principles).¹²² This approach helps make sense of the resolution’s sometimes confusing terminology, such as its persistent use of the phrase “goals and projects” to describe elements of the Green New Deal.

5. Immigration and the Green New Deal

The resolution addresses immigration issues both expressly and implicitly. Perhaps most importantly, the resolution expressly includes migrant communities—though the term itself is undefined—in its definition of “frontline and vulnerable communities,” thereby incorporating migrant communities into most of the commitments and policies of the Green New Deal.¹²³ For example, a primary goal of the Green New Deal is to stop current, prevent future, and repair historic oppression of these communities.¹²⁴ Moreover, the resolution guarantees that the Green New Deal policies will be developed through “transparent and inclusive consultation” with these communities, with full awareness of the environmental and social costs imposed on these communities, and with many of the resources and opportunities presented by the Green New Deal mobilization directed at these

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See generally David Roberts, *The Green New Deal, Explained*, VOX, <https://perma.cc/CV6K-TEXZ> (last updated Mar. 30, 2019); Lisa Friedman, *What is the Green New Deal? A Climate Proposal, Explained*, N.Y. TIMES (Feb. 21, 2019), <https://perma.cc/9BZ3-DHRU>; Vox, *The Green New Deal, Explained*, YOUTUBE (June 12, 2019), <https://perma.cc/462S-YQT3> (discussing at 3:50 how American’s will be protected in the transition away from fossil fuels).

¹²³ H.R. Res. 109, 116th Cong. (2019).

¹²⁴ *Id.*

communities.¹²⁵ The Green New Deal therefore represents a commitment to meaningfully involve, support, and protect migrant communities when developing climate policy.

The resolution also includes goals beyond U.S. borders that bear on immigration.¹²⁶ The resolutions expressly recognize that global warming by about two degrees Celsius “will cause . . . mass migration from the regions most affected by climate change,” and that climate change threatens the national security of the United States by destabilizing countries and communities around the world.¹²⁷ The resolution also envisions the United States taking a leadership role among the international community on climate change through investment and technology-sharing, which can have important impacts on how other nations and their communities adapt to climate change.¹²⁸

The resolution also implicates migration issues by directing goals and policies towards sectors of the economy where migrant communities have traditionally played a large role.¹²⁹ For example, the resolution sets out to reduce emissions in the agricultural sector.¹³⁰ Likewise, the resolution commits to stronger enforcement of workplace safety and wage laws, where lax enforcement has substantially endangered migrant workers and their communities.¹³¹

Importantly, many of these commitments reflect long-standing tensions between, for example, environmental law, labor policy, and immigration policy. As the next section explains, it is important to understand this context to fully appreciate the Green New Deal’s goals and innovations.

B. Foundations

While a history of the Green New Deal resolution is well beyond the scope of this Article, some context is helpful to understand the proposal. The Green New Deal resolution builds on a strong foundation. For example, many elements of the Green New Deal Mobilization have long been planks of comprehensive climate policy, such as the need to build resiliency against extreme weather events and “overhaul” the nation’s emissions-heavy transportation system.¹³² Indeed, the idea of leveraging economy-scale climate policy to spur growth and address issues like wealth inequality has been associated with the phrase a “Green New

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 (demonstrating that even in the earliest global resolutions on climate change, the topics of resilience and the need for greenhouse gas emissions reductions in the transportation sector were evident).

Deal” for roughly a decade.¹³³ Rather, as Part I.C discusses, the Green New Deal’s key innovation stems from the Green New Deal “principles,” which recognize a broader entanglement between environmental policy and other economic, environmental, and social justice policies.¹³⁴ Three points of context are helpful in getting us to that understanding.

The first point of context is that the idea of a “Green New Deal” is not all that new. The phrase is often attributed to an opinion column penned by Thomas Friedman in 2007.¹³⁵ Friedman’s column recommended several policy changes to “green” the world, such as ending fossil fuel subsidies, subsidizing renewable energy, and taxing carbon dioxide emissions.¹³⁶ He called such changes a “Green New Deal” because they would fundamentally remake the global economy at a scale reminiscent of the policy interventions of the 1930’s New Deal.¹³⁷ In 2008, a group called the New Economics Foundation developed Friedman’s idea into a plan that focused on the United Kingdom but reacted to the broader downturn of the global economy in 2008.¹³⁸ This plan, in turn, served as a basis of a “Global Green New Deal” offered by the United Nation’s Environment Programme in reaction to the “multiple global crises of 2008 – fuel, food, and financial.”¹³⁹ The U.N.’s plan called “on governments to allocate a significant share of stimulus funding to green sectors and sets out three objectives: (i) economic recovery; (ii) poverty eradication; and (iii) reduced carbon emissions and ecosystem degradation.”¹⁴⁰ These themes are visible in the Green New Deal resolution’s findings, goals, and mobilization.¹⁴¹

The second point of context is that a basic framework for economy-scale intervention to reduce carbon emissions has been around for at least a decade or so.¹⁴² As Friedman’s piece suggests, there is an immense—almost shocking—structure of federal subsidies and support

¹³³ See Julie L. MacArthur et al., *Canada’s Green New Deal: Forging the Socio-Political Foundations of Climate Resilient Infrastructure?*, 65 ENERGY RES. & SOC. SCI. 101442, 101442 (2020) (discussing a brief background of how “Green New Deals” have been used over the past decade to restructure infrastructure towards the betterment of the environment and towards a lessening of inequality).

¹³⁴ H.R. Res. 109, 116th Cong. § 4 (A)–(O) (2019).

¹³⁵ Thomas L. Friedman, *The Power of Green*, N.Y. TIMES (Apr. 15, 2007), <https://perma.cc/2UK5-3WHR>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See Andrew Simms et al., *A Green New Deal*, NEW ECONS. FOUND. (July 20, 2018), <https://perma.cc/6F4M-NNXT> (proposing a Green New Deal in order to prevent the negative effects stemming from the “combination of a credit-fueled financial crisis, accelerating climate change and soaring energy prices” comparable to the Great Depression).

¹³⁹ Edward Barbier, U.N. Env’t, *A Global Green New Deal*, U.N. DEPT ECON. & SOC. AFFAIRS: DIV. FOR SUSTAINABLE DEV. GOALS (2009), <https://perma.cc/4RK5-LDBT>.

¹⁴⁰ *Id.*

¹⁴¹ H.R. Res. 109, 116th Cong. (2019).

¹⁴² See Friedman, *supra* note 135 (noting that then Texas Governor, George W. Bush, implemented a mandate requiring Texas power companies to produce electricity from wind, resulting in a market for wind turbines).

for a wide range of carbon-intensive economic activity.¹⁴³ While many focus on federal subsidies for fossil-fuel power generation (and rightly so), federal support is crucial to the success of many high-carbon elements of the American economy, including industrial agriculture, automobile manufacturing, and sprawling land development.¹⁴⁴ There will be vigorous debate surrounding the proper suite of federal tools to engage economy-scale carbon reductions, but the basic idea of changing this existing web of federal market-interventions to reduce carbon emissions has been, and remains, a basic pillar of a “Green New Deal” approach to climate policy.¹⁴⁵

Early characterizations of the modern congressional resolution sometimes miss this context.¹⁴⁶ We are not suggesting that there is consensus on what suite of tools to use and how best to use them—there is not, and substantial debate on the details of any Green-New-Deal-style climate policy are to be expected. But any suggestion that there is *no* history or framework for the idea is incorrect. For example, many cite President Barack Obama’s 2009 economic-stimulus plan, and in particular its focus on subsidizing green industries, as a model for certain aspects of federal investment under a Green New Deal.¹⁴⁷ There is perhaps more clarity than there ever has been on the methods and means of deploying renewable energy infrastructure to meet American carbon-reduction targets.¹⁴⁸ And proponents of national-scale interventions to reduce carbon emissions have long recognized the opportunity that these interventions present to address social issues such as wealth inequality.¹⁴⁹

The third point of context is that environmentalism and many of the social justice values embraced by the Green New Deal have historically been at odds. For example, the familiar “jobs versus environment” tension reflects a break between labor and environmental

¹⁴³ *Id.*

¹⁴⁴ CONGRESSIONAL RES. SERV., R46277, FEDERAL ASSISTANCE TO TROUBLED INDUSTRIES: SELECTED EXAMPLES 7, 19–20 (2020). *See also* SMART GROWTH AMERICA, FEDERAL INVOLVEMENT IN REAL ESTATE: A CALL FOR EXAMINATION, at iii (2013).

¹⁴⁵ *See* Kate Aronoff, *With a Green New Deal, Here’s What the World Could Look Like for the Next Generation*, INTERCEPT (Dec. 5, 2018), <https://perma.cc/3G4X-44PP>.

¹⁴⁶ *See, e.g.*, Timothy Cama, *Five Things to Know About Ocasio-Cortez’s ‘Green New Deal,’* HILL (Nov. 24, 2018), <https://perma.cc/B49T-4R2S> (characterizing the plan as not being “fleshed out”).

¹⁴⁷ *See* Sussman, *supra* note 64, at 10446 (discussing “The American Recovery and Reinvestment Act of 2009 (ARRA),” or “the Obama stimulus legislation” as a blueprint for the Green New Deal).

¹⁴⁸ *See generally* JAMES H. WILLIAMS ET AL., ENERGY & ENV’T ECON., INC., PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES, at xii, xiv (2015) (study concluding that “it is technically feasible for the U.S. to reduce GHG emissions 80% below 1990 levels” and discussing the technology and infrastructure changes that would accomplish that goal). *See* ENV’T LAW INST., LEGAL PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES: SUMMARY AND KEY RECOMMENDATIONS 1 (Gerrard & Dernbach eds., 2019) (offering a “legal playbook” for achieving deep decarbonization).

¹⁴⁹ *See* Barbier, *supra* note 139 (calling for a Global Green New Deal that eradicates poverty).

values that stretches from the 1970s, but that was by no means inevitable.¹⁵⁰ As Jedidiah Purdy has explained, the view that environmental policy and labor policy are necessarily at odds with each other fails to reflect many overlaps between the two areas, including environmentalism's early origins in workplace health and safety.¹⁵¹

Tensions between environmentalism and immigration advocacy have been high, with environmental values sometimes leveraged to exclude and marginalize migrant communities.¹⁵² For example, influential environmentalist Garrett Hardin famously argued that wealthier nations should restrict immigration from less wealthy nations to avoid "speeding up the destruction of the environment in rich countries."¹⁵³ The popularization of Hardin's image of an ecosystem as a "lifeboat" that, if overcrowded, will flood and condemn everyone has spurred a legacy of environmentalism that many groups have leveraged for decades against fair and just immigration policies in the United States.¹⁵⁴ As Howard Chang has put it, this "perverse myopia is ironic in a movement known for urging us to 'think globally.'"¹⁵⁵ Rather, Chang argues, fair immigration policies are likely to lead to better environmental outcomes than an "ugly brand of environmentalism" that advocates for "immigration restrictions precisely because we expect such restriction to keep poor people in the very poverty they want to escape."¹⁵⁶

This context helps illustrate why the primary innovation of the Green New Deal is neither its economy-scale approach to climate policy nor its intent to leverage that economy-scale policy for the benefit of addressing wealth inequality. Rather, the Green New Deal's true innovation is its commitment to aligning climate policy with social justice values that have long been positioned at odds with environmentalism, including fair and just treatment of migrant communities.

C. Innovations

The primary innovation of the Green New Deal resolution is not its economy-wide approach to addressing carbon emissions and wealth

¹⁵⁰ See Jedidiah Purdy, *The Long Environmental Justice Movement*, 44 *ECOLOGY L.Q.* 809, 849–54 (2018) (discussing how conditions of labor and workplace hazards were not central to mainstream environmentalism from the 1980s onward).

¹⁵¹ *Id.* at 849–54 (discussing the circumstances surrounding the "institutional agenda consolidation" of environmental groups that excluded labor interests).

¹⁵² Howard F. Chang, *The Environment and Climate Change: Is International Migration Part of the Problem or Part of the Solution?*, 20 *FORDHAM ENV'T L. REV.* 341, 348–50 (2009).

¹⁵³ See *id.* at 348 (citing Garret Hardin, *Living on a Lifeboat*, 24 *BIOSCIENCE* 561, 566 (1974)).

¹⁵⁴ *Id.* at 348–49.

¹⁵⁵ *Id.* at 349.

¹⁵⁶ *Id.* at 355.

inequality, but its linking of those commitments to progressive social policy values that have long been seen as in conflict with environmental policy, such as racial justice and unionized labor. For example, many of the goals identified in the Green New Deal mobilization have long been familiar, if not necessary, elements of an effective carbon-reduction policy in the United States, such as focusing on energy efficiency in buildings and achieving carbon reductions in agriculture.¹⁵⁷ Likewise, strategies such as federal subsidies to certain green industries have predecessors in President Obama's stimulus plan and other federal economic policies.¹⁵⁸ The primary value that the Green New Deal brings to the table is its commitment to bridge those strategies and policies with social justice goals embodied in the Green New Deal principles.

This is not to say that the principles are the only innovation of the Green New Deal. For example, the resolution sets exceptionally ambitious targets. Most notably, the resolution envisions a ten-year timeline for the Green New Deal mobilization and sets a target for one hundred percent of the nation's energy to be generated by "clean, renewable, and zero-emission energy sources."¹⁵⁹ Each target is substantially more ambitious than prior policy proposals, including carbon-reduction legislation previously introduced in the United States.¹⁶⁰

While such targets are dramatic, it is the Green New Deal's commitment to match climate policy with a just transition; antitrust enforcement; a living wage; recognizing and addressing environmental, racial, and economic justice; protecting indigenous sovereignty; prioritizing federal investment in the economy; and taking universalized approaches to healthcare, education, and affordable housing that presents the opportunity to fundamentally change how we think about climate policy. In making such broad commitments, the resolution seeks to link environmental protection and climate change policy with progressive policies that have otherwise been in tension with environmental and climate goals, such as labor protections and racial justice. As a result, the resolution offers more than a competing policy proposal: it offers a step towards a comprehensive and unifying view of progressive domestic policy that reflects the scope and societal scale of global climate change.

Legal scholars are only starting to work out the implications of the resolution, and specifically its key innovation of linking these

¹⁵⁷ H.R. 109, 116th Cong. (2019).

¹⁵⁸ EXECUTIVE OFF. OF THE PRESIDENT, THE PRESIDENT CLIMATE ACTION PLAN 7 (2013).

¹⁵⁹ H.R. 109, 116th Cong. (2019).

¹⁶⁰ See, e.g., American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) (the so-called "Waxman-Markey" bill that would have implemented, among other policies, a carbon emissions trading scheme); Amanda Reilly & Kevin Bogardus, *7 Years Later, Failed Waxman-Markey Bill Still Makes Waves*, E&E NEWS (June 27, 2016), <https://perma.cc/LKG6-HAWG>.

interests.¹⁶¹ Importantly, some scholarship has been dismissive of its social justice goals, instead urging focus on the suite of policy tools needed to reduce emissions.¹⁶² For example, in Robert Sussman's experience-based recommendations for climate policy under a Green New Deal, he argues that linking "these broader goals with [greenhouse gas] reductions risks creating unrealistically high expectations for climate policy and compromising the effectiveness of emission reduction strategies by using them to serve a non-climate social and economic policy agenda."¹⁶³ Sussman concedes that many of the social policy aspects of the Green New Deal are "laudable objectives," but concludes that they are "distinct from reducing [greenhouse gas] emissions."¹⁶⁴ There is, therefore, an important and ongoing role for work envisioning what meaningful legal change meeting the justice goals of the Green New Deal would look like. Through the next two Parts, we move that conversation forward.

III. CLIMATE MIGRATION

A. Climate Change and Movement of People

A wide range of sources confirm climate change's potential to increase migration and displacement of peoples around the world. For example, the Intergovernmental Panel on Climate Change's Special Report on Global Warming of 1.5 C identified migration, displacement, and conflict as potential outcomes of predicted warming.¹⁶⁵ Although acknowledging that direct connections between environmental effects and migration patterns are difficult to draw, the report concluded that

¹⁶¹ See Nicholas S. Bryner, *The Green New Deal and Green Transitions*, 44 VT. L. REV. 723, 729 (2020) (highlighting the need to engage "with literature on law and transitions in order to assess the legal, policy design, and implementation challenges of a Green New Deal"); Zachary D. Clopton, *Civil Justice and the (Green) New Deal*, 69 DEPAUL L. REV. 335, 337 (2020) (considering how to incorporate civil justice reforms into the Green New Deal); Steven Ferrey, *The "Green New Deal": Constitutional Limitations; Rerouting Green Technology*, 44 VT. L. REV. 777, 780 (2020) (attempting to situate the Green New Deal's decarbonization goals within the U.S. energy regulatory scheme); Jonas J. Monast, *The Ends and Means of Decarbonization: The Green New Deal in Context*, 50 ENV'T L. 21, 24–25 (2020) (arguing that there is disagreement over the relationship between social justice issues laid out in the Green New Deal resolution and decarbonization, and contrasting three approaches to decarbonization); Tracey M. Roberts, *Greenbacks for the Green New Deal*, 17 PITT. TAX REV. 53, 57 (2019) (surveying financing approaches and policies for implementing Green New Deal proposals).

¹⁶² See, e.g., Sussman, *supra* note 64, at 10446. See also J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693, 701 (2020) (questioning whether "the Green New Deal can be achieved in a timely manner that also satisfies demands for environmental protection, distributive justice, and public participation").

¹⁶³ Sussman, *supra* note 64, at 10446.

¹⁶⁴ *Id.*

¹⁶⁵ IPCC 1.5 Report, *supra* note 71, at 244–45.

temperature changes have meaningful effects on migration for agriculture-dependent communities and that warming beyond 1.5 C will “increase poverty and disadvantage . . . many populations globally,” including making “poor people poorer” and increasing “poverty head count” overall.¹⁶⁶

A recent article by Susan F. Martin from Georgetown’s Institute for the Study of International Migration provides a helpful overview of how people move in relation to environmental pressures.¹⁶⁷ Drawing on a broader literature, Martin identifies four effects of climate change that will likely increase migration of people:

- Changes in weather patterns that contribute to longer-term drying trends that affect access to essential resources such as water and negatively affect the sustainability of a variety of environment-related livelihoods,
- Rising sea levels and glacier melt cause massive and repeated flooding and render coastal and low-lying areas uninhabitable,
- Increased frequency and magnitude of weather-related acute natural hazards,
- Competition over natural resources that may exacerbate pressures contributing to conflict.¹⁶⁸

Estimates of the number of people that will be displaced by these effects are shockingly large.¹⁶⁹ For example, a survey of literature by Frank Biermann and Ingrid Boas suggest that “over 200 million people” are at risk of being displaced by climate change, although “this number is a rough estimate with a large margin of error.”¹⁷⁰ The numbers revealed in their survey are themselves disorienting in scale; a 1995 study concluded “that there were already 25 million ‘environmental refugees’” and that the number would rise to between 162 and 212 million people by 2050.¹⁷¹ A later study recognized that this estimate, while not “rigorously tested,” nevertheless “remains in line with the evidence.”¹⁷² The United Nations then warned that 50 million people would be displaced by 2010, which was also in line with prior

¹⁶⁶ *Id.*

¹⁶⁷ Susan F. Martin, *Environmental Change and Human Mobility: Trends, Law and Policy*, 42 COMP. POPULATION STUD. 187, 190–91 (2017).

¹⁶⁸ *Id.* at 191.

¹⁶⁹ Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 GLOBAL ENV’T POL. 60, 72 (2010).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 68.

¹⁷² *Id.*

estimates.¹⁷³ Biermann and Boas' 2010 study ultimately confirmed that over 200 million people will likely be displaced, noting that "would mean twenty times more refugees than are at present protected" by international law.¹⁷⁴

There is near universal agreement that the United States' existing immigration laws are ineffective for addressing the migration and displacement problems that will result from these effects.¹⁷⁵ Those who have engaged with the issue have proposed a wide range of reforms, primarily focused on amending the refugee and asylum processes to accommodate people displaced by environmental change.¹⁷⁶ This Part will assess those reforms and offer solutions to the climate migration problem that resonate with the goals of the Green New Deal. Part III.B addresses three proposed changes to domestic U.S. immigration law stemming from ongoing debates about how best to address the problems climate migration. Part III.C will then offer three directions for bridging this debate into the goals of the Green New Deal.

B. Climate Migration and U.S. Immigration Law

Several commenters have considered methods for amending or otherwise reforming American immigration law to better address the problems of climate migration, but by and large, these assessments have been pessimistic. Most consider the existing tools of American immigration policy to be poorly suited to the scope, scale, and nature of climate migration and largely see tweaks to the asylum and refugee laws as second-best options to crafting a new visa scheme dedicated to people displaced by environmental change. This section discusses three proposals in particular: amending the definition of "refugee" to extend resettlement and asylum programs to climate migrants, expanding use of temporary protected status to climate migrants, and creating a new visa system for environmentally displaced people.

1. Amending the Definition of "Refugee"

Perhaps the most commonly discussed reform to U.S. immigration law in light of the problems raised by climate migration is to expand the definition of refugee under the Immigration and Nationality Act¹⁷⁷ to include environmentally-displaced people, thereby allowing them to take advantage of American refugee resettlement programs and to claim asylum in the United States.¹⁷⁸ Codified into federal law, the definition

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 72.

¹⁷⁵ *See, e.g.,* Martin, *supra* note 167, at 199.

¹⁷⁶ *Id.* at 207–08.

¹⁷⁷ Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537, 18 U.S.C. § 1429 (2018).

¹⁷⁸ *See, e.g.,* Barbara McIsaac, *Domestic Evolution: Amending the United States Refugee Definition of the INA to Include Environmentally Displaced Refugees*, U. MIAMI RACE &

of “refugee” is drawn from the 1951 United Nations Convention Relating to the Status of Refugees and subsequent changes to that convention.¹⁷⁹ Relevant for our purposes here, a person must demonstrate “a well-founded fear of persecution” in the country of their nationality “on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁸⁰

This definition serves as the gatekeeper for access into the United States under two methods: resettlement in the United States as a refugee and receiving asylum in the United States.¹⁸¹ The resettlement program provides a path to permanent status for people outside the United States who meet the definition of “refugee.”¹⁸² This program is administered through an application program and is subject to strict quotas.¹⁸³ Claims to asylum are available to those within the United States and to people who present themselves at United States ports-of-entry.¹⁸⁴ A person’s claim to asylum is adjudicated by the Department of Homeland Security and the Department of Justice through a complex and widely-criticized administrative structure.¹⁸⁵ As core elements of the American immigration policy directed at people displaced or otherwise fleeing the country of their nationality, several have considered whether these programs could be directed towards those displaced by the effects of climate change.

There is wide agreement that the existing definition of “refugee” is ineffective at addressing the problems of climate migration.¹⁸⁶ For example, not all climate migrants will necessarily be suffering persecution as a member of a protected class included in the

SOC. JUST. L. REV., Spring 2019, at 45, 46 (proposing the United States amend the definition of refugee in the Immigration and Nationality Act to apply to people forced to leave their home countries due to environmental harms).

¹⁷⁹ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 152.

¹⁸⁰ 8 U.S.C. § 1101(a)(42).

¹⁸¹ Refugee Act of 1980, 8 U.S.C. §§ 1522(b), 1158(b)(1) (2018).

¹⁸² *Id.* § 1159(b).

¹⁸³ *Id.* § 1157.

¹⁸⁴ *Id.* § 1158(a)(1).

¹⁸⁵ See JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM, at xv–xvi, 11 (2009) (describing the affirmative asylum process administered by the Department of Homeland Security and the defensive asylum process administered by the Department of Justice and explaining how the system creates arbitrary results); Jonathan Raz, *Constitutional Constraints on Asylum Termination by the United States Department of Homeland Security*, 36 CARDOZO L. REV. 1951 (2015) (explaining how the asylum framework violates procedural due process and allows for adjudicator error); Maureen O’Connor Hurley, *The Asylum Process: Past, Present, Future*, 26 NEW ENG. L. REV. 995 (1992) (describing the historical changes to the asylum process and noting the goal of the Refugee Act of 1980 was to implement a systemic asylum process but the implementation faced numerous issues).

¹⁸⁶ Carey DeGenaro, *Looking Inward: Domestic Policy for Climate Change Refugees in the United States and Beyond*, 86 U. COLO. L. REV. 991, 1013 (2015) (“It is generally settled that the definition of ‘refugee’ in the United States does not apply to individuals or groups fleeing the environmental consequences of climate change.”).

definition.¹⁸⁷ There are examples of persecution of minority groups through discriminatory environmental policies, but these examples are largely seen as unrepresentative of the kind of large-scale, generalized displacement of people that could occur as a result of climate change.¹⁸⁸ Some have argued that increased political conflict and the disproportionate effects of climate change on the poor will expand the class of environmentally displaced people that could take advantage of the existing definition.¹⁸⁹ But most agree that the existing definition's failure to explicitly recognize environmental factors, or protect those people who voluntarily migrate, will exclude most climate migrants.¹⁹⁰

Several commenters have therefore proposed amendments to the definition of "refugee" to encompass climate migrants, although the contours and content of this proposed addition have been the subject of further debate. One primary fault line in these debates is the potential difference between an "environmental refugee" and a "climate change refugee."¹⁹¹ Many other debates regarding the appropriate definition track the potential differences between these two categories, where the environmental refugee is often stereotyped as a person involuntarily displaced by a disaster, whereas a climate refugee is stereotyped as voluntarily migrating away from slow but dramatic changes in natural and economic systems.¹⁹² Nevertheless, there is some precedent for such an amendment. For example, Sweden and Finland have amended their refugee laws to include people displaced because of an "environmental disaster."¹⁹³

But others criticize amending the definition of refugee to encompass climate refugees. Many of these criticisms stem from the potential scope of climate migration. For example, Emily Naser-Hall argues that the asylum system should not be leveraged to assist climate migrants because the "United States is already overwhelmed with asylum applicants under the existing definition" and such an expansion "would overwhelm the already overextended asylum system."¹⁹⁴ Elizabeth

¹⁸⁷ *Id.*

¹⁸⁸ Elizabeth Keyes, *Environmental Refugees? Rethinking What's in a Name*, 44 N.C. J. INT'L L. 461, 468–71 (2019).

¹⁸⁹ *See id.* at 472.

¹⁹⁰ *See, e.g.,* Elizabeth Ferris, *Climate Change, Migration, Law, and Global Governance*, 44 N.C. J. INT'L L. 425, 427–28 (2019) (discussing how environmental factors, existing legal frameworks, and the many ways one may be impacted by climate change can lead to a variety of intervening factors in causing migration, which makes it difficult to create terminology that is inclusive of all these causes); Keyes, *supra* note 188, at 462–63.

¹⁹¹ *See* Bonnie Docherty & Tyler Giannini, *Confronting A Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENV'T L. REV. 349, 367 (2009) (defining "climate change refugees as distinct from environmental refugees").

¹⁹² *See id.* at 364.

¹⁹³ *See* Sireesha V. Chirala, *Acclimating to Climate Change: Filling the International Policy Void for Environmentally Displaced People*, 35 Hous. J. INT'L L. 359, 382–86 (2013).

¹⁹⁴ Emily Naser-Hall, *Square Pegs in Round Holes: The Case of Environmentally Displaced Persons and the Need for a Specific Protection Regime in the United States*, 22 TUL. J. INT'L & COMP. L. 263, 298 (2014).

Keyes offers a similar but distinct concern, noting that “where even the relatively narrow existing framework is under intense stress, using the word ‘refugee’ to encompass all climate-change migrants feeds the dangerous perception that the world can no longer afford the Refugee Convention.”¹⁹⁵ Other criticisms stem from the poor function of the existing system, such as the low quotas for admitting refugees into the United States and discretion inherent in the entire system.¹⁹⁶ All told, many advocates of amending the definition of a “refugee” under American law to leverage the resettlement and asylum programs for climate migrants propose it as a second-best option. Those advocates recognize the significant drawbacks both in the American immigration system itself and in extending that system to a potentially large range of displaced people under a wider range of circumstances than currently contemplated under American law.

2. Utilizing Temporary Protected Status

Commenters have also considered utilizing the temporary-protected-status program to address problems of climate migration. “Temporary protected status” generally refers to a program administered by the Secretary of the Department for Homeland Security that grants people temporary legal status to remain in the United States.¹⁹⁷ The Secretary can extend this temporary status as long as the conditions justifying the status persist.¹⁹⁸ Temporary protected status is often considered as a potential solution for climate migration because it is one of the few immigration policies to expressly recognize environmental conditions as the basis for a person’s status within the United States.¹⁹⁹ Namely, the Secretary may grant temporary protected status to people displaced by an environmental disaster.²⁰⁰ For example, the Secretary extended temporary protected status to Haitians living in the United States after the 2010 earthquake devastated that country.²⁰¹

However, most reject temporary protected status as an effective tool for accommodating climate migration for two reasons. The first is that the program only applies to people in the United States when the environmental disaster occurs.²⁰² The policy could not, therefore,

¹⁹⁵ Keyes, *supra* note 188, at 478. Keyes ultimately argues for a durable immigration status for those displaced by climate change. *Id.* at 483.

¹⁹⁶ See, e.g., DeGenaro, *supra* note 186, at 1015–16 (the United States grants asylum as a matter of discretion on a case-by-case basis).

¹⁹⁷ *Id.* at 1016.

¹⁹⁸ *Id.* at 1016–17.

¹⁹⁹ *Id.* at 1017.

²⁰⁰ *Id.* at 1016–17.

²⁰¹ The Trump Administration recently terminated temporary protected status designation for Haiti, as well as for Sudan, Nicaragua, and El Salvador. See *Ramos v. Wolf*, 975 F.3d 872, 878 (9th Cir. 2020) (describing the termination and vacating a lower court injunction barring the action).

²⁰² DeGenaro, *supra* note 186, at 1017.

address people migrating to the United States from another country as a result of environmental change. The second problem is temporary protected status's temporary and discretionary nature.²⁰³ The program is administered entirely at the discretion of the Secretary, and combined with its stop-gap purpose, cannot serve as the basis for a durable solution to the long-term problem of climate migration.²⁰⁴

3. *Creating an Environmental Visa Program*

In place of utilizing existing structures in immigration law, several commenters have proposed creating an entirely new environmental visa program to address climate migration.²⁰⁵ Crafting a new program offers obvious benefits, such as allowing countries “to start fresh and tailor their new programs to the particular needs of environmental migrants” rather than “fit environmental migrants into their current asylum systems.”²⁰⁶ Others note that a “visa-type program would be able (at least potentially) to grant [environmentally-displaced persons] relief without overextending existing asylum structures and flooding the pool of refugees needing asylum.”²⁰⁷ Moreover, people could apply for visas under such a program from their home states, avoiding the dangerous journey to the United States that asylum seekers frequently must make.²⁰⁸ Some have suggested that such visas be linked to other international climate change policies,²⁰⁹ such as emissions obligations so that the “highest emitters” will “provide the most visas” for those displaced by environmental change.²¹⁰

²⁰³ *Id.* at 1017.

²⁰⁴ *Id.* at 1018. Many of these same criticisms have been levied against a proposal by Senator Brian Schatz of Hawai'i to amend the definition of “stateless persons” under federal immigration law to address those displaced by environmental change. Specifically, the Senator proposed an amendment that would allow the Secretary to designate people or groups “who are no longer considered nationals by any state as a result of sea level rise or other environmental changes that render such state uninhabitable” as “stateless persons” under federal law. *Id.* at 1034. People designated “stateless” under this proposal could ultimately be considered for permanent status in the United States. *Id.* at 1035. “The proposal’s overarching goal was to create protection for climate migrants in the United States even if they cannot meet the narrow requirements of the definition of refugees.” *Id.* However, as with temporary protected status generally, Schatz’s amendment was criticized for its limited scope and temporary and discretionary nature. *Id.* at 1037–38. The proposal would have only benefited those within the United States and would have subjected them to the complete discretion of the Secretary for Homeland Security. *Id.* So, while a salutary development, neither does Schatz’s amendment offer a durable model for addressing the problems raised by climate migration. *Id.* at 1037.

²⁰⁵ Naser-Hall, *supra* note 194, at 265; Amanda A. Doran, *Where Should Haitians Go? Why “Environmental Refugees” Are Up the Creek Without a Paddle*, 22 VILL. ENV'T L.J. 117, 140 (2011); Kara K. Moberg, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection*, 94 IOWA L. REV. 1107, 1113 (2009).

²⁰⁶ Doran, *supra* note 205, at 134.

²⁰⁷ Naser-Hall, *supra* note 194, at 280.

²⁰⁸ Moberg, *supra* note 205, at 1118–19.

²⁰⁹ Naser-Hall, *supra* note 194, at 281 (discussing Biermann and Boas).

²¹⁰ Moberg, *supra* note 205, at 1136.

But standing up a new scheme rather than repurposing an old one comes with obvious costs. For example, at least one proponent has called for not only a “new legal regime but also international agencies to assume the responsibility of dealing with” the task of implementing an environmental visa program.²¹¹ Likewise, that advocates already link a new visa program with broader climate change policies reveals the difficulty of isolating specific policy goals amidst a problem with a huge variety of causes and inputs. While an environmental visa problem offers promise as a potentially effective policy solution, advocates have not confronted the wide range of difficulties and problems presented by that solution.

All told, debate exploring reforms to immigration law that remedy problems raised by climate migration has offered few solutions. In many ways, the debate reflects lessons raised by Ioane Teitiota’s story: that immigration law alone cannot address the problems raised by climate change.²¹² Rather, an approach that draws on both environmental law and immigration law is necessary to address the sources and impacts—an approach to climate policy that reaches beyond the borders of the United States.

C. Climate Policy Beyond Borders

While options for working within existing U.S. immigration law to address climate migration are limited, the breadth and scope of the Green New Deal present opportunities to broaden that discussion. Such opportunities present both risks and benefits well-suited to input from immigration advocates. Below are three areas where ongoing collaboration between immigration and environmental advocates is essential for meaningfully addressing climate migration consistent with the goals of the Green New Deal.

1. Acknowledging Migrant Communities Outside the U.S.

While the resolution makes commitments to migrant communities, the resolution is not clear as to whether those commitments extend to migrant communities beyond the borders of the United States. This presents a threshold issue for developing climate policy that takes migration seriously: advocates must acknowledge that the Green New Deal’s commitment to migrant communities extends to communities outside of the United States.

This acknowledgment is a crucial element of ensuring that the functions of climate policy reflecting Green New Deal work to benefit migrant communities. As we’ve noted, much of the resolution’s benefits and guarantees work through its definition of “frontline and vulnerable

²¹¹ Naser-Hall, *supra* note 194, at 281.

²¹² See *supra* notes 19, 36–43 and accompanying text.

communities.”²¹³ By incorporating migrant communities into this definition, the Green New Deal directs its guarantees, such as “transparent and inclusive consultation” regarding many of the resources and opportunities presented by the Green New Deal, and mobilization at these communities.²¹⁴

Migrant communities are often mobile, living lives that connect across borders and across communities.²¹⁵ Visualizing the Green New Deal as a solely domestic measure, directed only at those migrant communities within the United States, risks severing many of the Green New Deal’s commitments and benefits from these communities. This is a paramount concern in developing climate policy guided by the Green New Deal that necessitates close collaboration between immigration and climate advocates, while also offering opportunities to ensure that climate policy develops sensitive to the unique nature of migrant communities.

2. Integrating Migration into U.S. Climate Leadership

There are two important ways that issues raised by ongoing debates among immigration scholars can be incorporated into the Green New Deal’s commitment to climate leadership: directing investment and technology sharing towards adaptation that mitigates the need for people to migrate and taking a leadership role in developing international standards for internal migration.

There are potential opportunities for climate policy inspired by the Green New Deal to forge closer connections between climate migration, adaptation, and international funding mechanisms. For example, international climate negotiators have identified migration and support for those displaced by climate change as core aspects of climate adaptation, and therefore a key goal for international climate policies.²¹⁶ A longstanding feature of international climate policy has been a series of funds designed for, among other things, supporting adaptation and mitigation efforts in developing countries.²¹⁷ Several commenters and the U.N. Advisory Group on Climate Change and Human Mobility recognized that addressing the problems raised by climate migration will likely benefit from, if not require, investment from funds dedicated to supporting adaptation to the changing climate.²¹⁸

²¹³ H.R. 109, 116th Cong. (2019).

²¹⁴ *Id.* at 6, 10–12.

²¹⁵ Naser-Hall, *supra* note 194, at 264.

²¹⁶ See Martin, *supra* note 167, at 200–01 (explaining the guidance developed by UNHCR, Georgetown University, and Brookings Institute to define planned relocation within countries affected by the relocation of persons due to environmental change).

²¹⁷ Biermann & Boas, *supra* note 169, at 80.

²¹⁸ Martin, *supra* note 167, at 203 (“Crucially, the Advisory Group also recommended that States ‘[r]ecognize that human mobility measures within national and regional climate change adaptation plans, policies and strategies may require adaptation funding,

Biermann and Boas, for example, have recognized the potential value that investment in developing countries can provide for addressing the problems for climate migration.²¹⁹ Along these lines, Biermann and Boas propose a Climate Refugee and Resettlement Fund designed to share the burden of relocating displaced peoples.²²⁰ In developing the United States' commitment to climate leadership on the global stage, directing investment and technology-sharing towards opportunities to mitigate climate migration is an important step towards achieving the Green New Deal's goals.

A criticism frequently raised in debates regarding climate migration is the lack of any domestic or internal structure regarding the displacement of people within a country's borders, often referred to as internal migration.²²¹ Some estimates suggest that much climate migration will occur within national borders rather than across them.²²² As such, critics argue that the lack of protections for those displaced by climate and other environmental factors within their nation's borders is a substantial blind spot in debates.²²³ The displacement of people and communities from New Orleans by Hurricane Katrina presents a particularly compelling example of the gaps in federal law regarding internal movement of people resulting from environmental change.²²⁴

As Martin notes, international initiatives have sought to fill this gap in domestic policies.²²⁵ First, the Guiding Principles on Internal Displacement are a set of non-binding principles developed by the United Nations in 1998.²²⁶ Some countries have adopted the Principles into their domestic law, and tellingly, the Principles offer a range of guarantees that contrast sharply with many of the tragedies faced by those displaced after Katrina.²²⁷ A more recent development called the Nansen Initiative has sought to develop further protections for internal migrants with express reference to climate change.²²⁸ These initiatives may provide a framework for United States leadership in supporting for internal migration. As internal migration may reflect a majority of the

including from the operating entities of the financial mechanism of the UNFCCC supporting both adaptation and loss and damage as well as other mechanisms.”).

²¹⁹ See Biermann & Boas, *supra* note 169, at 79–82 (discussing the need for substantial funds for the protection and resettlement of climate refugees and suggesting four principles that would govern such a fund).

²²⁰ *Id.* at 81–82.

²²¹ Martin, *supra* note 167, at 213. OLI BROWN, INT'L ORG. FOR MIGRATION, MIGRATION AND CLIMATE CHANGE 25 (2008).

²²² BROWN, *supra* note 221, at 14.

²²³ See Keyes, *supra* note 189, at 485–86.

²²⁴ *Id.* at 486.

²²⁵ See *infra* notes 226–228 and accompanying text.

²²⁶ U.N., Econ & Soc. Council, Human Rights Comm'n, Guiding Principles on Internal Displacement, ¶ 8, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

²²⁷ Martin, *supra* note 167, at 212; CHRIS KROMM & SUE STURGIS, INST. FOR S. STUDIES, HURRICANE KATRINA AND GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: A GLOBAL HUMAN RIGHTS PERSPECTIVE ON A NATIONAL DISASTER 5 (2008).

²²⁸ Martin, *supra* note 167, at 204.

migration caused by climate change, incorporating this issue into international leadership is also a crucial element of achieving the Green New Deal's goals.

3. *Confronting the U.S. Military's Role*

Another important area for collaboration is the military's role in addressing climate migration. Some have reacted to evidence that climate change will result in increased instability throughout the world by drawing a potential role for the military in managing climate migration.²²⁹ At first blush, the Green New Deal resonates with such calls by identifying climate change as a national security issue and acknowledging that climate change will result in greater instability.²³⁰ Observers have only begun to investigate the military's role in climate migration, concluding that few restrictions are in place to prevent full-scale use of the military in reaction to migration induced by climate change.²³¹ Such calls raise serious tensions between the Green New Deal's view of climate change and migration as a national security issue with its commitment to prevent and address oppression of migrant communities, particularly in light of the United States' current reliance on detention and prisons to manage its immigration policy. Advocates, particularly those with experience in the militarization of civil immigration enforcement, must respond to claims regarding the U.S. military's role in addressing climate migration. Such concerns offer a regrettable connection to perhaps the defining feature of the United States' current immigration system: its large-scale and institutionalized detention of migrants.

IV. DETENTION-DRIVEN IMMIGRATION ENFORCEMENT

The immigration-enforcement platform of the U.S. government over the last four decades has been one characterized increasingly by detention, both under the civil legal authority and criminal legal authority. Indeed, the government's reliance on detention to enforce migration-related laws has grown to such a degree that the United States is now home to the largest civil immigration detention system in the world.²³² In early 2019, U.S. Immigration and Customs Enforcement

²²⁹ See Holly Locke, *Use of Force in Crisis: A Comparative Look at the Domestic and International Laws Governing the Use of U.S. Military Force to Respond to Mass Climate Refugee Migration*, 26 HASTINGS ENV'T L.J. 27, 28–30 (2020).

²³⁰ H.R. 109, 116th Cong. (2019).

²³¹ See Locke, *supra* note 229, at 45.

²³² See generally Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. 145, 148 (2020) (“[T]he American criminal law system incarcerates the most people in the world, the United States is also the titleholder for the world’s largest civil immigration detention system.”) [hereinafter Jefferis, *Constitutionally Unaccountable*].

confined nearly 50,000 people per day.²³³ “[B]y the middle of 2019, the figure exceeded 52,000—an apparent all-time high.”²³⁴ “Annually, the government incarcerates nearly 400,000 people under the same authority,”²³⁵ a figure that has grown substantially over the last few years and one the government was likely to surpass in 2020 until the pandemic caused daily detention numbers to dip.²³⁶ There is little reason to suggest the numbers will not climb again as a vaccine for the novel coronavirus becomes available and/or court-ordered monitoring of immigration prisons ends.

The Green New Deal’s emphases on achieving net-zero greenhouse gas emissions, creating jobs and economic security for all people in the United States, ensuring a fair and just transition to a green society for all, and promoting justice for frontline and vulnerable communities demand a close examination of the government’s reliance on the detention-driven immigration enforcement regime, especially in light of the impending issue of climate migration. Research shows that incarceration inflicts lasting harms on people and communities, and “green” prison initiatives often do little more than perpetuate those harms.²³⁷ Indeed, working toward the “greening” of prisons is contradictory to the aims of the Green New Deal.²³⁸ Any legislation implementing the Green New Deal must reform U.S. immigration law to eliminate the authority for and reliance on detention-driven enforcement regimes.

A. Immigration Detention and the Harms of Confinement

The federal government’s system of immigration confinement is a sweeping, multi-agency affair.²³⁹ People are incarcerated for migration-

²³³ *Id.* at 149.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Detention Management: Detention Statistics*, U.S. IMMIGRATION & CUSTOMS ENF’T, <https://perma.cc/X2YK-M9MK> (last visited Sept. 22, 2020) (reporting 20,018 people in ICE custody); Spencer S. Hsu, *Number of Migrant Family Members Detained by ICE Plunges 39% in a Week*, WASH. POST (Apr. 13, 2020), <https://perma.cc/226G-Q85G>.

²³⁷ See, e.g., CRAIG HANEY, *THE PSYCHOLOGICAL IMPACT OF INCARCERATION: IMPLICATIONS FOR POST-PRISON ADJUSTMENT* 4–5 (2001) (discussing the long-term psychological effects of incarceration); Yvonne Jewkes & Dominique Moran, *The Paradox of the ‘Green’ Prison: Sustaining the Environment or Sustaining the Penal Complex?*, 19 *THEORETICAL CRIMINOLOGY* 451, 454 (2015) (examining the ways in which sustainability discourses intersect with carceral policies).

²³⁸ Compare, e.g., Jewkes & Moran, *supra* note 237, at 454 (arguing that “the political and cultural hegemony of the green agenda is, perhaps counter-intuitively, serving to sustain . . . the prison system”), with S. Res. 59, 116th Cong. (2019) (calling for the promotion of justice and equity for “frontline and vulnerable communities”).

²³⁹ But “immigration prisons” go beyond just those facilities in which the federal government confines people. People are also incarcerated for migration-related activity in state prisons and local jails across the country. See generally CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 10–11, 16 (2019); Danielle C. Jefferis, *Yearning to Breathe Free: Migration-Related Con-*

related reasons pursuant to both criminal and civil authority.²⁴⁰ As for criminal authority, more people are incarcerated on charges of violating immigration crimes than any other federal offense.²⁴¹ On the civil side, “multiple components of executive-branch agencies are responsible for executing federal civil immigration laws and are statutorily authorized . . . to confine people whose lives in some way touch those laws.”²⁴² “Of those components, the Department of Homeland Security’s U.S. Immigration and Customs Enforcement (ICE) is responsible for the largest numbers of people in immigration confinement.”²⁴³

“ICE’s authority to incarcerate people falls into two distinct categories: mandatory detention authority and discretionary detention authority.”²⁴⁴ Between these two forms of legal authority, a significant proportion of people whose lives intersect in some way with the nation’s immigration enforcement system are at risk of detention pursuant to civil law.

Pursuant to its so-called mandatory detention authority,²⁴⁵ the government *shall* take into “custody”²⁴⁶ any noncitizen who the government has “reason to believe is removable for almost every crime-based reason, including crimes involving moral turpitude, controlled substance offenses, and aggravated felonies,”²⁴⁷ as well as certain classes of “arriving aliens,” including those seeking asylum who have not yet passed their credible fear determination.²⁴⁸ This provision provides no basis for an immigration judge or other independent arbiter to consider bond or otherwise release someone who is detained.²⁴⁹ More

finement in America, 106 CORNELL L. REV. ONLINE 27, 30–31 (2020) [hereinafter Jefferis, *Yearning to Breathe Free*].

²⁴⁰ *Id.* at 32–33.

²⁴¹ GARCÍA HERNÁNDEZ, *supra* note 239, at 8, 82–83 (“[T]he federal criminal justice system also busies itself imprisoning migrants . . . In the last years of the Obama administration, just shy of 100,000 people charged with a federal immigration crime were booked into the custody of the U.S. Marshals Service . . . Just about everyone charged with a federal immigration crime is eventually convicted, and when that happens, migrants are usually sentenced to prison.”).

²⁴² Jefferis, *Yearning to Breathe Free*, *supra* note 239, at 36.

²⁴³ Jefferis, *Constitutionally Unaccountable*, *supra* note 232, at 157–58.

²⁴⁴ *Id.* at 158.

²⁴⁵ The contention that this provision mandates *detention* is dubious. As Professor García Hernández explains, the statute provides that the government shall take into *custody* any person falling into one or more of the enumerated categories. Custody, however, does not traditionally or necessarily mean detention but includes any number of ways in which the government may deprive a person of her liberty. See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 101, 95, 99–100, 252–55 (2015) (discussing that mandatory detention requires migrants to meet particular criteria enumerated by Congress specified in the Immigration and Nationality Act § 236(c) and alternative forms of custody).

²⁴⁶ Immigration and Nationality Act of 1965, 8 U.S.C. § 1226(c)(1) (2018).

²⁴⁷ GARCÍA HERNÁNDEZ, *supra* note 239, at 99–100.

²⁴⁸ See 8 U.S.C. §§ 1225(a)(2), 1226(c)(1) (suggesting that asylum seekers or stowaways are subject to custody prior to passing their credible fear determination).

²⁴⁹ *Id.* § 1226(e) (“No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.”). See also *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018)

than half of the people experiencing immigration confinement pursuant to civil law are held pursuant to this sweeping detention authority.²⁵⁰ The law also obligates the government to confine people who have been ordered removed during the period between the entry of the final removal order and the actual removal²⁵¹ and those who the government “has reasonable grounds to believe” pose a national security threat.²⁵²

Pursuant to its discretionary civil detention authority, the government may arrest anyone it believes is removable from the United States and detain the person pending a decision on his or her removability.²⁵³ Under this authority, an authorized ICE officer may release the noncitizen on conditional parole or a bond²⁵⁴ upon a showing by the noncitizen that he or she is not a flight risk or a danger to the community.²⁵⁵ If ICE denies that initial custody determination, the person may seek the immigration court’s review of ICE’s decision.²⁵⁶ The immigration court’s bond decision may be appealed to the Board of Immigration Appeals (BIA).²⁵⁷ The BIA’s bond determination is not subject to final review and is, therefore, final.²⁵⁸

Critically, the above-discussed authority under which the federal government may detain people is purportedly civil in nature. That is, immigration confinement pursuant to this authority is somehow different than punitive incarceration because most²⁵⁹ immigration laws are civil, sanctions for violating immigration laws (for example, deportation) are considered to be civil,²⁶⁰ and, therefore, detention in

(interpreting three provisions of U.S. immigration law that authorize the government to detain aliens in the course of immigration proceedings).

²⁵⁰ Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1009–10 (2017) (“According to one report, about 66% of noncitizens in immigration detention were held under the mandatory detention provisions in 2009.”).

²⁵¹ 8 U.S.C. § 1226(c)(1)(B).

²⁵² *Id.* § 1226(a)(1)–(3) (authorizing the Attorney General to take into custody a noncitizen suspected of terrorism “if the Attorney General has reasonable grounds to believe that the [noncitizen] (a) is described in [one of the relevant sections] of this title; or (B) is engaged in any other activity that endangers the national security of the United States”).

²⁵³ *Id.* § 1226(a)(1).

²⁵⁴ *Id.* § 1226(a)(2)(A)–(B).

²⁵⁵ Detention of Aliens Prior to Order of Removal, 8 C.F.R. § 236.1(c)(8) (2020).

²⁵⁶ *Id.* § 236.1(d)(1).

²⁵⁷ Executive Office for Immigration Review, 8 C.F.R. § 1003.19(f) (2020).

²⁵⁸ 8 U.S.C. § 1226(e). *But see* Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process than “Enemy Combatants” and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1851–52 (2011) (explaining that while the bond determination is not judicially reviewable, a detainee may seek habeas review to challenge the legality of his or her detention).

²⁵⁹ Some provisions of the United States Code criminalize migration-related activity. *See, e.g.*, 8 U.S.C. § 1253(a)(1) (criminalizing a person’s failure to depart the United States after entry of a civil removal order); *id.* § 1325(a) (criminalizing a noncitizen’s entry into the country at “improper time or place”); *id.* § 1326(a) (criminalizing a person’s unauthorized return to the United States after removal).

²⁶⁰ René Lima-Marín & Danielle C. Jefferis, *It’s Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 DENVER L. REV. 955, 967 (2019).

furtherance of executing civil immigration laws is civil.²⁶¹ That said, the federal government also confines tens of thousands of people each year pursuant to its criminal legal authority for migration-related conduct, either in pre-trial custody or after convictions and primarily in prisons segregated on the basis of citizenship.²⁶²

Conditions in immigration detention facilities across the country are poor, at best.²⁶³ In recent years, ICE detainees have succumbed to limb amputations, serious illness and infections, and death.²⁶⁴ Indeed, ICE has acknowledged publicly at least 185 deaths in its immigration prisons between October 2003 and July 2018.²⁶⁵ At least twenty-four people have died in the agency's custody since 2017.²⁶⁶ The American Immigration Lawyers Association and the American Immigration Council have lodged complaints regarding ICE's failure to provide adequate medical and mental health care in its contract facilities.²⁶⁷ The groups' 2018 complaint submitted to the Department of Homeland Security Inspector General recounts a troubling pattern of systemic failures to provide safe and secure conditions at the Aurora Detention Center in Aurora, Colorado, and immigration prisons across the country, particularly with respect to medical and mental health care:

[The U.S. Constitution, federal law, and detention standards] have failed to translate into consistently effective medical and mental health care. Instead, records from other detention facilities similar to Aurora reveal a general and longstanding pattern of frequent and severe deficiencies in care.

In a June 2014 report, the American Civil Liberties Union (ACLU) studied conditions at certain detention centers reserved for noncitizens who have

²⁶¹ See, e.g., *id.* at 967.

²⁶² Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1403–04 (2019). See also César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 247–48 (2017) (“But ICE is not the only immigration jailer. The Justice Department’s U.S. Marshals Service (“USMS”), the agency charged with detaining everyone charged with a federal crime, counted on its detention rolls for each of 2010, 2011, 2012, and 2013 more than 80,000 people facing prosecution for a federal immigration crime. After conviction—and almost everyone charged with a federal immigration crime is eventually convicted—federal immigration offenders are transferred to the Bureau of Prisons (“BOP”), which imprisons roughly 14,800 to 23,700 people as a result of an immigration conviction on any given day.”).

²⁶³ *Conditions in Migrant Detention Centers*, AM. OVERSIGHT, <https://perma.cc/XZ49-JW8E> (last updated July 31, 2020).

²⁶⁴ Jefferis, *Constitutionally Unaccountable*, *supra* note 232, at 173–74.

²⁶⁵ EMILY RYO & IAN PEACOCK, AM. IMMIGRATION COUNCIL, *THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES* 5 (2018).

²⁶⁶ Gaby Del Valle, *The Trump Administration Has Let 24 People Die in ICE Custody*, VICE NEWS (June 10, 2019), <https://perma.cc/3SHZ-RHJG>.

²⁶⁷ Letter from Am. Immigration Council & Am. Immigration Lawyers Ass’n, to Office of the Inspector Gen. et al., Re: Failure to Provide Adequate Medical and Mental Health Care to Individuals Detained in the Denver Contract Detention Facility 2 (June 4, 2018), <https://perma.cc/2L86-XSAU>.

been convicted of a crime. It found ‘numerous reports of medical understaffing and delayed care’ and was ‘gravely concerned about the ability of some [of these] prisons to provide timely care in urgent situations.’ A 2017 study of a wide range of detention facilities found health care deficiencies, regardless of whether medical care was supplied by private contractors (as at Aurora) or by [ICE Health Service Corps]. The same study—basing its conclusions on information in death reviews produced by ICE’s Office of Detention Oversight (“ODO”)—found that one-third of the detainee deaths between 2012 and 2015 were due at least in part to substandard medical care.²⁶⁸

After the government failed to respond, the groups supplemented the complaint a year later, noting “the situation for individuals detained in the Aurora facility [are] measurably worse.”²⁶⁹ The supplemental letter highlighted a 2019 OIG report “documenting ‘egregious’ conditions at ICE facilities, including the Aurora facility, in 2018” and discussed “[r]ecently leaked DHS documents containing an internal memo bearing the subject line, ‘Urgent Matter,’ [and indicating] that the deaths of multiple individuals detained in ICE custody were preventable.”²⁷⁰ The organizations urged the government “to take immediate action and implement meaningful oversight mechanisms to improve medical and mental healthcare at the Aurora facility,” noting that “[u]ntil then, individuals will continue to needlessly suffer—and perish—in immigration detention facilities such as Aurora.”²⁷¹

Poor medical and mental health care are not the only conditions for concern in immigration prisons. Unsafe and degrading conditions reach every aspect of life in detention, including sleep deprivation from lights that are kept on twenty-four hours per day, being forced to wear dirty clothing that results in infections, being fed food that is rotten,²⁷² and being subjected to invasive strip searches and the overuse of solitary confinement.²⁷³

The costs of confinement in these sorts of conditions are high, and they ripple out from the person who is incarcerated to her family and community and beyond. Research shows even brief exposures to solitary confinement increases the risk of death in the five years following a

²⁶⁸ *Id.* at 8–9.

²⁶⁹ Letter from Am. Immigration Council & Am. Immigration Lawyers Ass’n, to Office of the Inspector Gen. et al., SUPPLEMENT—Failure to Provide Adequate Medical and Mental Health Care to Individuals Detained in the Denver Contract Detention Facility 1 (June 4, 2019), <https://perma.cc/4LL2-US6A>.

²⁷⁰ *Id.* at 2.

²⁷¹ *Id.* at 10.

²⁷² Altaf Saadi, *Immigrants are Suffering in Detention. They Need Adequate Healthcare Now*, L.A. TIMES (Feb. 25, 2019), <https://perma.cc/W8WL-3MGQ> (“Many of the individuals I met with said they experienced sleep deprivation from lights being kept on 24 hours a day. Some said they had to wear dirty prison uniforms that caused urinary and vaginal infections. Others complained of being served rotten or inadequate food, a violation of standards that has been repeatedly documented in inspection reports.”).

²⁷³ Jefferis, *Constitutionally Unaccountable*, *supra* note 232, at 175.

person's release from confinement.²⁷⁴ Confinement, generally, inflicts adverse mental and physical health consequences on the people being confined.²⁷⁵ And communities whose residents are subject to high rates of detention and incarceration face higher rates of chronic health conditions.²⁷⁶ The authors of a study published in the *American Journal of Public Health* explained:

Research on the health consequences of incarceration falls largely into 2 broad categories. The first, which has received the most empirical attention, has focused on individuals directly involved in the criminal justice system. Individual incarceration exposure is associated with adverse mental and physical health outcomes. A second line of inquiry has evaluated the broader health consequences of incarceration—what has been variously called the “long arm” of corrections, the collateral consequences of mass incarceration, and “spillover” effects related to incarceration. For example, female partners of recently released male prisoners experience depression and anxiety symptoms, and the children of incarcerated parents are at increased risk for behavioral and mental health problems. The deleterious health effects of incarceration are not merely confined to the family members of incarcerated individuals, however. Nonincarcerated individuals living in the communities from which inmates are drawn also appear to be at heightened risk for a variety of adverse outcomes, including increased crime rates and infectious diseases.²⁷⁷

The costs of confinement are not limited to health costs. The economic burden on individuals, families, and communities is staggering. Recent estimates place the annual total at \$1 trillion, with families, children, and community members of those who are incarcerated bearing nearly half of the cost.²⁷⁸

²⁷⁴ Christopher Wildeman & Lars H. Anderson, *Solitary Confinement Placement and Post-Release Mortality Risk Among Formerly Incarcerated Individuals: A Population-Based Study*, LANCET (2020), <https://perma.cc/38YZ-WNCS>.

²⁷⁵ See, e.g., Andrew Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666, 668, 670 (2009) (finding the rate of chronic health conditions among prisoners is higher than among general population and noting, “[i]mproved management of chronic conditions in prisons and jails may have important implications for community health and in reducing health care disparities, because the vast majority of inmates are eventually released”).

²⁷⁶ See, e.g., Mark L. Hatzenbuehler et al., *The Collateral Damage of Mass Incarceration: Risk of Psychiatric Morbidity Among Nonincarcerated Residents of High-Incarceration Neighborhoods*, 105 AM. J. OF PUB. HEALTH 138, 141 (2015) (explaining that “individuals living in neighborhoods with high prison admission rates were more likely to meet criteria for [certain mental illnesses]” as well as face higher risks of infectious diseases).

²⁷⁷ *Id.* at 138.

²⁷⁸ Michael McLaughlin et al., *The Economic Burden of Incarceration in the U.S.* 4, 19 (Concordance Inst. for Advancing Soc. Justice, Working Paper No. CI072016, 2016), <https://perma.cc/NC6V-NJK6>.

B. The “Greening” of Prisons

A news article published in 2012, described a Brazil prison system that introduced a program to generate “green” energy.²⁷⁹ The prison permitted incarcerated people to ride stationary bikes connected to car batteries.²⁸⁰ As the men pedaled, their efforts charged the batteries.²⁸¹ The batteries were then used to power streetlights in the local plaza.²⁸² In exchange for their “green” energy, the government reduced the men’s sentences—a one-day reduction for every sixteen hours of pedaling.²⁸³ At the time the story was reported, “there [were] four bicycles that require[d] 10 hours of pedaling to fully charge one battery. The energy [was] enough to power 10 street lamps, out of 34 lamps that provide[d] light for the plaza.”²⁸⁴

Efforts to “green” prisons have existed around the world for at least a decade, ranging from involving incarcerated people in the production of “green” energy for use outside the prison walls to the construction of more efficient, “green” prisons.²⁸⁵ An emissions-focused climate platform would likely focus (and has focused) on improving the efficiency of prisons and detention facilities.²⁸⁶ In 2011, the National Institute of Corrections published a guide titled *The Greening of Corrections: Creating a Sustainable System*.²⁸⁷ The report discussed the need to improve the efficiency and impact of corrections buildings, operations, and programs on the environment in light of “the increase in the prison population combined with the rising costs of protecting public safety and rehabilitating prisoners,”²⁸⁸ and stated that it “provides correctional professionals with a framework to gain a general understanding of sustainability practices and principles and to identify examples of innovative and practical applications of operations, programs, and management strategies for self-sustaining facilities.”²⁸⁹

The construction of “green” prisons and the implementation of environmentally conscious programs for people who are incarcerated may be consistent with an emissions-focused climate platform, but the focus may conflict with social justice and community-care minded policies, such as those the Green New Deal embodies. The “greening” of prisons does little to account for the harm incarceration inflicts on

²⁷⁹ Mariano Castillo, *Brazilian Inmates Reduce Sentences by Hitting the Bike, Books*, CNN (July 15, 2012), <https://perma.cc/XH49-KYRR>.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Jewkes & Moran, *supra* note 237, at 452, 454.

²⁸⁶ *Id.* at 455, 464.

²⁸⁷ U.S. DEP’T OF JUSTICE, NAT’L INST. OF CORR., *THE GREENING OF CORRECTIONS: CREATING A SUSTAINABLE SYSTEM* (2011), <https://perma.cc/7UJK-JRLV>.

²⁸⁸ *Id.* at i.

²⁸⁹ *Id.* at ii.

people, families, and communities.²⁹⁰ Professors Yvonne Jewkes and Dominique Moran explore the idea of the “paradox of the ‘green’ prison” in their *Theoretical Criminology* article, explaining that the emissions-focused efforts to “green” prisons may, in fact, support and further entrench mass incarceration by diverting attention from the harms of incarceration or “absorb[ing] or silenc[ing] critiques of the size and scale of the prison system itself; as if by reducing prison energy bills, and training prisoners to fit solar panels, attention can be deflected from the vast carceral monolith which imprisons one in 100 of the US population”²⁹¹

C. Climate Policy Beyond Prisons

A full realization of the Green New Deal’s commitments to achieving net-zero greenhouse gas emissions, creating jobs and economic security for all people in the United States, and ensuring a fair and just transition to a green society for all, as well as the focus on promoting justice for frontline and vulnerable communities, will not be possible without reform to immigration law to eliminate the present detention-driven enforcement regime. In light of the Green New Deal’s aims, the harms to communities resulting from detention are too significant to ignore. The reforms needed to achieve those commitments must, at minimum, amend the laws providing for mandatory and discretionary civil immigration detention to ensure that the Green New Deal’s goals are within all people’s reach and its protections extend to those frontline and vulnerable communities who need them the most.

1. Alternatives to Detention

The law does not actually mandate *detention* or require ICE to incarcerate anyone pursuant to its civil legal authority.²⁹² Pursuant to its mandatory authority, as discussed above, the government shall take into *custody*²⁹³ any noncitizen who the government has “reason to believe is removable for almost every crime-based reason, including crimes involving moral turpitude, controlled substance offenses, and aggravated felonies,”²⁹⁴ as well as certain classes of “arriving aliens,” including those seeking asylum who have not yet passed their credible fear determination.²⁹⁵ And pursuant to its discretionary authority, the government *may* arrest anyone it believes is removable from the United States and *may* detain the person pending a decision on his or her

²⁹⁰ Jewkes & Moran, *supra* note 237, at 465.

²⁹¹ *Id.* at 466.

²⁹² Immigration and Nationality Act, 8 U.S.C. § 1226(a) (2018).

²⁹³ *Id.* § 1226(c)(1).

²⁹⁴ GARCÍA HERNÁNDEZ, *supra* note 245, at 99–100.

²⁹⁵ 8 U.S.C. § 1225(b)(1)(A).

removability.²⁹⁶ One Green New Deal-focused reform to the present detention-driven immigration enforcement system may be to turn toward non-detention methods of custody²⁹⁷—many of which are underutilized²⁹⁸—despite evidence that they are just as effective as detention²⁹⁹ and cheaper.³⁰⁰

Alternatives to detention include releasing a person on her own recognizance (used often in the pre-trial, criminal law context),³⁰¹ granting a person parole³⁰² or bond,³⁰³ imposing conditions of supervised release (telephone or in-person check-ins, for example),³⁰⁴ mandating the use of electronic monitoring,³⁰⁵ and employing community-based alternatives.³⁰⁶ Certainly, employing an alternative to detention—avoiding the use of incarceration—avoids many of the harms of confinement discussed above. These methods allow families and communities to stay intact, which is a step toward the Green New Deal’s emphasis on promoting justice for frontline and vulnerable communities. However, with the exception of releasing a person on her own recognizance, each alternative still carries with it traces of confinement and its attendant harms.

²⁹⁶ *Id.* § 1226(a)(1).

²⁹⁷ Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2155, 2164 (2017).

²⁹⁸ *Id.* at 2155.

²⁹⁹ See, e.g., NAT’L IMMIGRANT JUSTICE CTR., THE REAL ALTERNATIVES TO DETENTION 1 (June 28, 2017), <https://perma.cc/5T7A-L8Z2> (“ICE’s current [Alternatives to Detention] program and several community supported pilot programs have shown high rates of compliance with immigration check-ins, hearings and—if ordered—removal.”); Marouf, *supra* note 297, at 2157 (“A pilot study conducted by the Vera Institute of Justice in 2000 found that seventy-eight percent of asylum seekers who are released without any supervision comply with court proceedings.”).

³⁰⁰ See, e.g., Alex Nowrasteh, *Alternatives to Detention Are Cheaper than Universal Detention*, CATO INST. (June 20, 2018), <https://perma.cc/SW2F-4RQH>.

³⁰¹ Marouf, *supra* note 297, at 2155–56 (“Those who are not a threat to public safety and present no flight risk may be released on their own recognizance, which does not require posting a bond or complying with supervision requirements. This option avoids restricting liberty and is the least expensive option.”).

³⁰² *Id.* at 2157.

³⁰³ *Id.* at 2158 (“Bond is a highly effective means of ensuring appearance at court hearings, and it is available only to individuals who have been found not to pose a danger.”).

³⁰⁴ *Id.* at 2160 (“An alternative that does not discriminate against indigent individuals is supervised release, which involves being released under an order that requires compliance with certain conditions. These conditions often include being required to check-in regularly with ICE, obtaining permission from ICE before leaving the city or state, keeping ICE informed of any address change, having a curfew, receiving random home visits by ICE, and obtaining travel documents to facilitate removal.”).

³⁰⁵ *Id.* at 2161–62 (“The most restrictive and invasive alternative to being detained is the Intensive Supervision Appearance Program (ISAP), which involves electronic monitoring.”).

³⁰⁶ *Id.* at 2164–70 (“Early explorations of community-based alternatives in the 1980s and 1990s involved partnerships between immigration authorities and faith-based organizations. These programs proved very successful In other countries, community-based case management programs have proven to be effective alternatives to immigration detention.”).

The use of electronic monitoring can restrict a person's freedom of movement in nontrivial ways, for example. While the technology may be cheaper, electronic monitoring may be more restrictive, more privacy-invading, and more harmful to individual dignity than other alternatives. Participants become confined to their own homes, forced to "plug themselves into the wall" to charge the monitoring devices for hours at a time. This can be especially difficult for participants with medical conditions, who are pregnant, or who have young children. Wearing a monitoring device may also be physically painful and socially stigmatizing, which can lead to problems at work or in school.³⁰⁷

Parole, bond, and supervised release conditions can be particularly harmful to people with limited to no financial resources.³⁰⁸ "Immigration bonds do not take into consideration an individual's financial circumstances."³⁰⁹ There is a statutorily mandated minimum of \$1,500 for all civilly imposed immigration bonds, and the median bond amount in FY2016 was \$8,000.³¹⁰ Professor Marouf notes, "The people most vulnerable to harm in immigration detention are often the ones least likely to be able to post a bond. And when people are able to post a bond, the financial consequences for the family can be disastrous, resulting in the loss of housing or other necessities."³¹¹ Additionally, community-based alternatives have not been shown to be especially effective in the United States despite examples of effective programs in other countries.³¹²

2. Abolishing Detention

The Green New Deal proposes a radical reimagining of climate policy that moves beyond emissions- and energy-focused reform to a comprehensive view of the role and intersection of climate policy, immigration reform, and social justice.³¹³ Its commitments to achieving net-zero greenhouse gas emissions, creating jobs and economic security for all people in the United States, ensuring a fair and just transition to a green society for all, and promoting justice for frontline and vulnerable communities, demand a similarly radical reimagining of the role of incarceration in U.S. immigration policy—one where incarceration has no role at all.

A country without immigration detention is not as revolutionary as one might think. We need to look only to our not-too-distant history to see it. Professor García Hernández recounts compellingly the United

³⁰⁷ *Id.* at 2163.

³⁰⁸ *Id.* at 2159; HUMAN RIGHTS WATCH, REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE UNITED STATES 38, 41–42 (2020), <https://perma.cc/7UEK-PN8T>.

³⁰⁹ Marouf, *supra* note 297, at 2158–59.

³¹⁰ *Id.* at 2158–59.

³¹¹ *Id.* at 2159.

³¹² *Id.* at 2166–70.

³¹³ H.R. Res. 109, 116th Cong. (2019).

States' near-abolishment of immigration detention in the twentieth century:

Today, immigration imprisonment is the norm, yet in the United States, while confinement has long been a central feature of criminal proceedings, it has been an anomaly when it comes to immigration-law enforcement. For most of the nation's history, we did not lock up so many people for the act of migration. More often than not government agents turned a blind eye to migrants who flouted the law, either letting them into the United States or sending them back quickly and, in comparison to today, painlessly. If they committed a crime, they were expected to serve their sentence; afterward, they could return to their communities in the United States. In effect, immigration law and criminal law were separate, and citizenship played no role in whether people ended up behind bars.³¹⁴

And much like the Green New Deal's reimagining of climate policy, abolition "involves reimagining institutions, ideas, and strategies, and creating new institutions, ideas, and strategies that will render prisons obsolete."³¹⁵ Implementing climate policy in a way that advances the Green New Deal's goals of aligning environmental and economic policy with racial, social, and economic equality, as well as its specific goals focused on migrant communities, will require such a reimagining of the method by which the government enforces immigration law.

V. CONCLUSION: CLIMATE POLICY BEYOND EMISSIONS

The Green New Deal asks us to envision climate policy beyond emissions reductions and pollution controls. Indeed, the Green New Deal is the United States' answer to the kinds of complex and difficult overlaps in environmental policy, the world's response to climate change, and nations' answers to migration that dominate contemporary conversations. As a comprehensive vision of climate policy, the Green New Deal recognizes the interrelationships between climate change and a wide range of systemic injustices. Among these interrelationships is the connection between climate policy and the oppression of migrant communities. The Green New Deal expressly recognizes that climate change will create societal instability and large-scale migration of people.³¹⁶ In recognition of this risk, the proposal commits to addressing past, and preventing future, oppression of migrant communities.³¹⁷ Achieving such a commitment, however, demands stepping outside the traditional frameworks of environmental law and immigration law. It demands the expertise of both environmental advocates *and* immigration advocates to design a climate policy that meets the goals of

³¹⁴ GARCÍA HERNÁNDEZ, *supra* note 239, at 9.

³¹⁵ ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 75 (2005).

³¹⁶ H.R. Res. 109.

³¹⁷ *Id.*

the Green New Deal. Such a climate policy must step beyond borders and must envision a world beyond immigration prisons.