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Journal

UCLA Journal of Environmental Law and Policy, 42(1)

Author

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Publication Date

2024

DOI

10.5070/L542163338

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Only YOU Can Prevent Immigration Detention: Analyzing the Ways Environmental Laws Can Close or Prevent the Opening of Toxic and Dehumanizing Immigration Detention Centers

Luis González

ABOUT THE AUTHOR

Luis González (they/them) is a soon-to-graduate law student from Vermont Law School. They want to wholeheartedly thank Professor Jill Martin Diaz for their priceless help with finishing this Comment.

As the U.S. government’s response to immigration continues to worsen, there is an ongoing need for creative solutions. Looking into this collection of environmental statutes was not a panacea, but what was discussed in these pages is still a helpful guide for future research and, perhaps, for future legal strategies.

This one goes out to my mom and dad, who immigrated to this country in the nineties. Como quisiera haber estado ahí cada vez que les faltaron el respeto, les dañaron sus corazones, y los hicieron sentir menos, para agarrarles la mano y recordarles que importantes son ustedes.

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“Somos una especie en viaje
 No tenemos pertenencias sino equipaje
 Vamos con el polen en el viento
 Estamos vivos porque estamos en movimiento . . .
 Es más mio lo que sueño, que lo que toco.”¹

INTRODUCTION

This Comment looks at the ways in which environmental law can be used to both delay the opening of new immigration detention centers and shut down existing centers. This Comment is not advocating for unhousing undocumented folks, nor is it advocating for NIMBYist exclusion by white communities.² At its core, the detention of migrants is wrong. The separation of families is wrong. Profiting off other people’s pain is wrong. Although this Comment

1. JORGE DREXLER, *Movimiento, on SALVAVIDAS DE HIELO* (Warner Music Spain, S.L. 2017).

2. NIMBYism is an acronym meaning “not in my backyard.” It is the opposition of residents to the construction of new developments in their neighborhoods. However, the connotation of the word has come to refer to wealthy white communities advocating for public policy that has led to environmentally dangerous development being hyper-focused on areas which hold higher concentrations of low-income people and people of color. *NIMBYS: The Geography and Environment of Public Housing*, THURGOOD MARSHALL INST., <https://tminstituteldf.org/the-geography-and-environment-of-public-housing> [<https://perma.cc/2PMX-YUER>] (last visited Dec. 26, 2023).

discusses environmental law as an avenue of resistance, this Comment is part of a movement that asks for a complete reorganization and abolition of the United States' current immigration system. Additionally, although this piece primarily highlights legal strategies, it is important to recognize the hard work of the advocates on the ground, who are protesting and taking direct action against detention centers and prisons. All the cases discussed below were the result of the combined labor of direct action and legal challenges. Failure to acknowledge these efforts would be unfair to the priceless work of organizers and activists.

Part I discusses a variety of statutes and common law remedies that can delay the opening of new detention centers, close existing detention centers, or provide more information regarding detention center inadequacies, violations, and negligence. These statutes include the Freedom of Information Act, the National Environmental Policy Act, the Endangered Species Act, and environmental torts (negligence).³ Part II provides solutions and alternatives to our current immigration detention system. This Part discusses the importance of addressing the root causes of immigration and emigration by acknowledging the United States' role in migration, and the viability of holistic community-based programs.

ANALYSIS

I. ENVIRONMENTAL STATUTES

Picture this. You hear that there's a migrant detention center slated to open in an abandoned military base. You're not sure what to do, or how to challenge the opening of the new detention center. Below is a roadmap to follow, with suggestions on legal strategies for any advocate to consider. These strategies focus on the ways that our imperfect environmental laws may yet be

3. It is relevant to mention some environmental statutes that are not mentioned in this article and would be interesting to pursue in future research. First, the Migratory Bird Treaty Act (MBTA). This statute only addresses criminal prosecution, not civil litigation, which would make bringing MBTA suits against the government difficult. *See generally* Steven P. Quarles et al., *Another Take on "Take": The Section 9 Prohibition*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* 141, 148–51 (Donald C. Baur & Ya-Wei Li eds., 3rd ed. 2021) (explaining the background of the MBTA). Second, this Comment does not touch on zoning and local ordinances. Nor will it discuss state environmental policy acts and regulations promulgated by state environmental protection agencies. Additionally, conservation statutes under Indian Law are also not discussed. Lastly, this Comment does not touch on the Federal Land Policy and Management Act (FLPMA). The rationale behind not discussing FLPMA was that NEPA and the ESA are both triggered when a project is proposed on Bureau of Land Management (BLM) land. These two statutes both provide a stricter standard for agencies to follow. JOHN D. LESHY ET AL., *COGGINS & WILKINSON'S FEDERAL PUBLIC LAND AND RESOURCE LAW* 422 (8th ed. 2022).

useful in delaying the opening of these new detention centers or closing existing detention centers.⁴

A. *Freedom of Information Act*

The Freedom of Information Act (FOIA) allows private citizens to request government records from federal agencies.⁵ Although FOIA is not necessarily an environmental law, later cases involving NEPA, ESA, and environmental torts almost all start with a FOIA request.⁶ As a result, FOIA requests should be any advocate's first step when tackling new and existing detention centers. The information learned (like in the Fort Bliss case discussed below) can be invaluable to how litigation and advocacy unfolds.

Under FOIA, government agencies are required to timely disclose requested information, unless the requested information falls under one of the nine FOIA exemptions.⁷ The main problem that arises when sending FOIA requests is the issue of "timely" disclosure; requested documents are hardly ever sent within a reasonable time.⁸ It is not uncommon for the govern-

4. In the summer of my 2L year, I learned about nonprofits who were attempting to do this work. Most notably Earthjustice, which, as will be explained in the next section, had used FOIA to get more information about toxic substances used to clean detention centers.

5. *What is FOIA?*, FOIA.GOV, <https://www.foia.gov/about.html> [<https://perma.cc/8WLP-ZR2X>] (last visited Dec. 31, 2022). Additionally, every state has an equivalent state FOIA to request documents from state agencies. See *State Freedom of Information Laws*, NAT'L FREEDOM OF INFO. COAL., <https://www.nfoic.org/state-freedom-of-information-laws> [<https://perma.cc/66VX-5S53>] (last visited Dec. 31, 2022); e.g., *Indiana Sample FOIA Request*, NAT'L FREEDOM OF INFO., <https://www.nfoic.org/indiana-sample-foia-request> [<https://perma.cc/S64Z-NMKP>] (last visited Dec. 31, 2022) (providing an example of FOIA request documents necessary to file).

6. See, e.g., Tom Dreisbach, *Government's Own Experts Found 'Barbaric' and 'Negligent' Conditions in ICE Detention*, NPR (Aug. 16, 2023) <https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions> (noting how an NPR reporter's scathing report on ICE detention began with a FOIA request to illicit government documents); *Freedom of Information Act Exemption*, U.S. DOJ, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/foia-exemptions.pdf> [<https://perma.cc/3BT7-9A58>] (last visited Dec. 31, 2022).

7. These exceptions essentially protect national security secrets, communication between clients and attorneys, agency employees' personal private information, etc. See *Freedom of Information Act Exemption*, *supra* note 6.

8. The statute itself requires that the agency respond within *twenty business days* from the date the agency first received the request. However, requested documents are not required to be sent within that time frame; agencies can request additional time, and the clock stops if agencies ask for more information or clarification. *Guide to Submitting Requests Under the Freedom of Information Act*, U.S. DEPT. OF LABOR, <https://www.dol.gov/general/foia/guide#:~:text=Under%20the%20statute%2C%20federal%20agencies,that%20maintains%20the%20records%20sought> [<https://perma.cc/M37Y-UVDC>] (last visited Dec. 31, 2022); *Time Periods Under FOIA*, DIGITAL MEDIA L. PROJ., <https://www.dmlp.org/legal-guide/time-periods-under-foia> [<https://perma.cc/V4XU-HD56>] (last visited Dec. 31, 2022) ("Realistically, many agencies do not comply with these time limits.").

ment to take years to complete FOIA requests.⁹ Despite their unreliability, FOIA requests can still be extremely useful. They produce banks of information and, at times, may be the closest thing to government transparency that advocates have.

For example, in 2018, the environmental nonprofit Earthjustice first filed suit against the US Army and Air Force (after years of waiting for compliance with their initial FOIA filing request).¹⁰ Earthjustice sought to obtain records “concerning toxic waste sites” at Fort Bliss.¹¹ These documents were necessary because, at the time, the Trump Administration was proposing to establish a temporary civil immigration detention center for migrant families and children at the site.¹² The information obtained through litigation revealed that although parts of Fort Bliss had been remediated, the sites were *not* deemed adequate for residential use.¹³ The temporary detention centers were going to be built near contaminated Superfund sites,¹⁴ adjacent to where thousands of migrant children were intended to live, study, and play.¹⁵

Earthjustice released a report detailing these findings. The detention center was going to be placed just 2,000 feet from a contaminated site called “the Rubble Dump.”¹⁶ Clean up at that site was “incomplete” and documents indicated that the levels of cancer-causing chemicals could be “more than 460

9. For example, Friends of the Earth, a nonprofit working towards environmental justice and clean energy solutions, filed a FOIA request in 2018 looking to obtain documents from the National Oceanic and Atmospheric Administration (NOAA). Friends of the Earth sought to obtain documents that would provide insight on NOAA’s potentially unlawful dealings with industrial ocean fish farms. After over a year of unresponsiveness, Friends of the Earth had no choice but to file suit to force compliance with FOIA. Stephen Lee, *NOAA Sued for ‘Stonewalling’ Over FOIA Requests*, BLOOMBERG L. (Sept. 17, 2019), <https://news.bloomberglaw.com/environment-and-energy/noaa-sued-for-stonewalling-over-foia-requests> [<https://perma.cc/2ABA-WVET>]; *Friends of the Earth and Earthjustice Head to Court Over NOAA’s Lack of FOIA Transparency*, EARTHJUSTICE (Sept. 17, 2019), <https://earthjustice.org/news/press/2019/noaa-lack-foia-transparency-friends-of-the-earth-file-lawsuit> [<https://perma.cc/78PF-NQKZ>].

10. Complaint for Declaratory and Injunctive Relief at 1, *Hispanic Fed’n et al. v. United States Dept. of the Army* (S.D.N.Y. 2018) (1:18-cv-07969).

11. *Id.*

12. Emma Shaw Crane et al., *The Toxic Truth: Organizing Against Migrant Child Detention, Militarism, and Environmental Racism in Homestead, Florida*, AM. FRIENDS SERV. COMM. & EARTHJUSTICE 32 (Oct. 2021), https://earthjustice.org/wp-content/uploads/afsc-toxic_truth-2021.pdf [<https://perma.cc/C6BJ-85ZJ>].

13. *Id.*; James Brinkman, *Fort Bliss Waste Sites and Potential Human Health Impacts at Proposed Migrant Detention Center*, EARTHJUSTICE, at 1 (Nov. 2019), https://earthjustice.org/wp-content/uploads/fort-bliss_expert-report_2019-11-18.pdf [<https://perma.cc/HJD5-8SYX>].

14. Superfund sites are places that have been contaminated due to hazardous waste being dumped or being improperly managed. Oftentimes these places were (or continue to be) manufacturing facilities, processing plants, landfills, mining sites, or military bases. *What is Superfund?*, U.S. Env’t Prot. Agency, <https://www.epa.gov/superfund/what-superfund> [<https://perma.cc/5T76-VVJF>] (last visited Oct. 30, 2023).

15. Crane et al., *supra* note 12, at 16.

16. Brinkman, *supra* note 13, at 1.

times the levels deemed safe by EPA.”¹⁷ The report also details a plethora of other administrative faults and possible chemical spillages that, according to Earthjustice, needed further examination before the proposal of a site could even be considered.¹⁸ In the end, thanks to direct action, protests, and the monetary expenses of litigation and cleanup, the Department of Health and Human Services decided not to pursue the creation of a temporary detention center at Fort Bliss.¹⁹

Unfortunately, three years later in 2021, the new Biden administration moved to open Fort Bliss as a migrant child detention center, ignoring the environmental contamination of the area.²⁰ Although what happened at Fort Bliss does not yet have a happy ending, one should not reject the important lessons learned from this battle. Information acquired through FOIA requests leads to stronger tools for advocates, facilitates information sharing with the public in a way that makes issues easier to understand, and helps shift the public narrative to focus on the injustice occurring inside proposed detention centers.²¹

B. *National Environmental Policy Act*

The National Environmental Policy Act (NEPA) is the premier environmental law in the United States. The question posed in this subpart is whether NEPA can be a useful tool to stop, delay, or close down immigration detention centers. The answer is complicated because, although NEPA has procedural requirements, it does not have robust substantive requirements (NEPA only requires that the government consider its environmental impacts; NEPA does not require that the government mitigate or avoid actions that would be harmful to the environment). And even NEPA’s Section 102 procedural requirements leave a lot to be desired. However, as the case studies below

17. *Id.*

18. *Id.* at 4–6.

19. Crane et al., *supra* note 12, at 32.

20. Priscilla Alvarez, *First on CNN: Government Watchdog Launches Review into Troubled Fort Bliss Facility for Migrant Children*, CNN (Aug. 2, 2021), <https://www.cnn.com/2021/08/02/politics/fort-bliss-migrants-ig/index.html> [<https://perma.cc/9Z69-GR6T>]; Groups: “*Biden Needs to End Child Detention at Fort Bliss Now*”, EARTHJUSTICE (July 15, 2021), <https://earthjustice.org/news/press/2021/groups-biden-needs-to-end-child-detention-at-fort-bliss-now> [<https://perma.cc/5CAF-GMTW>].

21. Similarly, in another case in Goodfellow Air Force Base in San Angelo, Texas, Earthjustice filed a FOIA request resulting in a report of numerous environmental issues at the proposed detention center. Here, the government also paused its plans to open the detention center, and the information acquired shifted the narrative, making the injustice of the detention center clearer to the general public. Alejandro Dávila, *Migrant Children Detention Center Could Be Built on Chemical-Riddled Landfill*, EARTHJUSTICE (Feb. 12, 2019), <https://earthjustice.org/press/2019/report-migrant-children-detention-center-to-be-built-on-chemical-riddled-landfill> [<https://perma.cc/9Y2T-8S3V>]; see Ian Kumamoto, *Biden Wants to Reopen a Child Detention Center on Top of Toxic Military Waste*, VICE (Mar. 11, 2021), <https://www.vice.com/en/article/3an9mb/biden-homestead-migrant-children-detention-center-superfund> [<https://perma.cc/R6Y7-LGBD>].

show, the procedural steps of NEPA provide a legal strategy to delay the building of new correction facilities.

Subpart 1 will give a brief background of NEPA and its procedural steps (Environmental Impact Statement and Environmental Assessment). This background will then be expanded on in Subpart 2, with two case studies of abolitionist and environmentalist advocates who are currently utilizing NEPA challenges against prisons. While prisons and detention centers are not the same, because of the scarcity of detention center examples, prisons will serve as a blueprint and guide for the work that can be done under NEPA in the future.

1. NEPA's Statutory Requirements: Before Destroying the City, Godzilla Must File an Environmental Impact Statement

A NEPA analysis is required anytime there are any “major Federal actions significantly affecting the quality of the human environment.”²² Before a NEPA analysis can be undertaken, NEPA has a few procedural requirements outlined in its Section 102. One way to discuss these procedural steps is using a hypothetical Department of Transportation (DOT) case.²³ Imagine DOT wanted to build a new transcontinental bullet train.²⁴ DOT would first have to consider if this project was a “major federal action,” and whether it would “significantly affect the quality of the human environment.” To answer these questions, DOT would have to conduct an Environmental Assessment (EA).²⁵ Generally, an EA discusses the purposes and needs for a proposed action, mitigation measures that the agency can implement, and an initial analysis of the environmental impacts to the proposed area.²⁶ If DOT, in its EA, determined that the environmental impacts of their proposed railway would be significant, then it would have to go a step further and prepare an Environmental Impact Statement (EIS).²⁷ An EIS is a detailed analysis of the federal project's impact

22. 42 U.S.C. § 4332(2)(c).

23. I find that the Department of Transportation is oftentimes overlooked among environmental advocates, but this agency is closely tied to NEPA and analogous state environmental regulations. I picked DOT for this hypothetical because of how frequently it comes into play in state and federal environmental review processes. See generally Federal Highway Administration, *Environmental Review Toolkit*, U.S. DEPT. OF TRANSP., https://www.environment.fhwa.dot.gov/nepa/trans_decisionmaking.aspx [<https://perma.cc/UUC6-FEEX>] (last visited Dec. 4, 2023).

24. I know, I know, this is way too theoretical. The U.S. building modern public transportation infrastructure—truly impossible.

25. DAVID B. FIRESTONE ET AL., *ENVIRONMENTAL LAW FOR NON-LAWYERS* 46 (5th ed., 2014).

26. *National Environmental Policy Act Review Process*, U.S. EPA, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> [<https://perma.cc/G4HD-UK5F>] (last updated Oct. 5, 2022).

27. *Id.* If an agency determines that the action will not have significant environmental impacts, then it issues a Finding of No Significant Impact (FONSI). In the FONSI, the agency discusses the reasoning behind why it made its decision. At this point, the agency has completed its NEPA statutory requirements and does not need to complete an

on the environment.²⁸ The average EIS takes about 3–5 years to complete.²⁹ This long time frame is useful when advocating against something undesirable, like new immigration detention centers (given that the agency cannot start constructing until the EIS is completed). It is, however, unfortunate for the DOT's bullet train proposal.

NEPA does not have significant substantive requirements. It does not mandate that the government take certain actions, nor does it require that the government mitigate negative environmental effects caused by its actions.³⁰ It merely requires that the agency "consider" its project's environmental impacts (through an EA or an EIS).³¹ However, under the Administrative Procedure Act (APA), an agency's action cannot be "arbitrary and capricious."³² This means that an agency's analysis and data must support the agency's chosen action (i.e., actions cannot just be random and unsupported).³³ Therefore, advocates can challenge an agency's action if it is arbitrary and not supported by the agency's own evidence or analysis.

How would one challenge an agency's EIS or EA analysis? Let's return to the DOT hypothetical. In its EIS, DOT analyzed two alternative routes from Montreal to New York City. Route 1 would essentially be a straight line; it would go down New York State and pass by Albany. Route 2 would be longer, would go around New York State, and pass by Vermont, Massachusetts, and Connecticut. To determine which of the two routes has the most benefits and fewest costs, DOT would undergo a cost-benefit analysis. A cost-benefit analysis identifies all the costs and benefits of a project and expresses them in monetary terms.³⁴ The costs of a project are then subtracted from the benefits and result in a net cost or benefit.³⁵ Say Route 1 (the direct line through New York State) resulted in many costs that outweighed its benefits, while Route 2 (the route that went around New York State) did not have nearly as many costs (the route was cheaper, avoided critical habitats of endangered species, and allowed for more stops at popular cities). Say DOT still chose to use Route 1, even though its own analysis showed that it was an inferior plan (with no rational advantages to Route 2). DOT's decision would be solid grounds to bring

Environmental Impact Statement. LESHY ET AL., *supra* note 3, at 270.

28. An EIS must clearly present the environmental impacts of the proposed action and the alternatives to the proposed action. This allows decision-makers to choose among different options and have a more complete understanding of the action's impact and its alternatives. The EIS needs to address which environmental effects cannot be avoided. FIRESTONE ET AL., *supra* note 25, at 56–57.

29. LESHY ET AL., *supra* note 3, at 270.

30. FIRESTONE ET AL., *supra* note 25, at 56.

31. *Id.*

32. 7 U.S.C. § 706(2)(A).

33. FIRESTONE ET AL., *supra* note 25, at 57.

34. David R. Buntain, *Judicial Review of Cost-Benefit Analysis Under NEPA*, 53(4) NEB. L. REV. 540, 545 (1974).

35. *Id.* at 545–46.

an APA suit; one could argue that DOT acted arbitrarily and capriciously in choosing an unsubstantiated proposal.³⁶

Taking what we learned from the procedural requirements of NEPA and the APA, let's apply them in the following subpart, which will explore the ways that advocates are currently challenging the opening of new detention centers using NEPA. The following case studies should provide a guide for future advocates on how to wield NEPA effectively and zealously.

2. Two NEPA-Challenge Case Studies in Kentucky and Alabama

a. *Kentucky Fried Prisons: How Advocates Stood Up to the Bureau of Prisons and Their Inadequate EIS.*

In 2018, a large coalition of immigration and environmental nonprofits filed a complaint for declaratory and injunctive relief against the Federal Bureau of Prisons (BOP).³⁷ Their complaint was in response to a proposed federal correctional facility being built in Letcher County, Kentucky.³⁸ The project would have cost over \$500 million and would have been built on top of a former mountaintop removal coal mine and near an active mine and coal sludge pond.³⁹ The complaint highlights multiple issues in the federal government's NEPA process.

The complaint's main argument is that BOP did not allow for meaningful public participation in its issuance of a Record of Decision (ROD).⁴⁰ This lack of meaningful participation puts BOP in violation of a procedural requirement

36. Although the choice that an agency makes does not need to be the absolute "best" one, there needs to be a reason why that choice is preferable to all the others. An agency can use its analysis and data to argue and reason that a certain option is the cheapest, or the fastest, or would require the least work, or is the best middle option when taking the totality of circumstances. However, if an agency chooses an option that is not "better" in any way (i.e., "unsubstantiated"), an APA suit would be warranted. FIRESTONE ET AL., *supra* note 25, at 57.

37. Complaint at 1–3, *Barroca v. Bureau of Prison*, 1:18-cv-02740-JEB (D.D.C. 2019) [hereinafter *Kentucky NEPA Complaint*].

38. Panagiota Tsolkas, *Prisoners File Environmental Lawsuit Against Proposed Federal Prison in Kentucky*, PRISON LEGAL NEWS (Jan. 8, 2019), <https://www.prisonlegalnews.org/news/2019/jan/8/prisoners-file-environmental-lawsuit-against-proposed-federal-prison-kentucky> [<https://perma.cc/JKD3-AMWL>].

39. Marianne Cufone, *Media Release: Prisoners and Activists Stop New Prison on Coal Mine Site in Kentucky*, ABOLITIONIST L. CTR. (June 20, 2019), <https://abolitionistlawcenter.org/2019/06/20/media-release-inmates-and-activists-stop-new-prison-on-coal-mine-site-in-kentucky> [<https://perma.cc/YY4A-DNXZ>].

40. *Kentucky NEPA Complaint*, *supra* note 37, at 7. A ROD is an agency's final decision based on what it has uncovered and researched in its EIS (basically, whether or not the agency will continue with its proposed project). It concludes the NEPA EIS process. Federal Transit Administration, *Record of Decision*, U.S. DOT, [https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/record-decision#:~:text=The%20Record%20of%20Decision%20\(ROD,Statement%20of%20FTA's%20environmental%20decision](https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/record-decision#:~:text=The%20Record%20of%20Decision%20(ROD,Statement%20of%20FTA's%20environmental%20decision) [<https://perma.cc/7TXW-RY92>] (last updated Dec. 15, 2015).

under the APA.⁴¹ BOP excluded inmates in Kentucky prisons from participating during the comment period, which is particularly concerning given that Kentucky prisoners are disproportionately people of color.⁴² This dynamic goes into the complaint's next argument, which is that BOP's EIS should have included an Environment Justice analysis.⁴³ Executive Order 12898 requires that federal agencies identify and address disproportional adverse health and environmental effects on communities of color and low-income communities.⁴⁴ As a result of Executive Order 12898, the complaint argues that BOP should have included a "reasonable and adequately explained" environmental justice analysis in their EIS.⁴⁵ BOP failed to conduct any sort of environmental justice analysis.⁴⁶

The third argument in the complaint was that the EIS failed to adequately consider the cumulative and indirect impacts to the health of inmates.⁴⁷ Additionally, the EIS failed to adequately consider mitigation strategies for the surrounding community.⁴⁸ The complaint argues that BOP ignored data regarding serious public health concerns affecting people who live near former or active coal mines.⁴⁹ Thus, BOP ignored relevant information regarding the health impacts to both Kentucky inmates and BOP employees. And as a result, the EIS completely disregarded the health impacts of the project on inmates,

41. Kentucky NEPA Complaint, *supra* note 37, at 8. See generally *Learn About the Regulatory Process*, REGULATIONS.GOV, <https://www.regulations.gov/learn> [<https://perma.cc/TVN9-L8HD>] (last visited Apr. 18, 2023) (providing a step-by-step description of the procedure that an agency must complete to comply with its responsibilities under the APA).

42. BOP refused to post federal notices and NEPA-related documents in locations accessible to inmates, like law libraries. Kentucky NEPA Complaint, *supra* note 37, at 8.

43. *Id.*

44. Exec. Order No. 12898, 59 Fed. Reg. 32 (Feb. 16, 1994); *Summary of Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, U.S. EPA, <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice> [<https://perma.cc/94M7-U478>] (last updated July. 3, 2023).

45. Kentucky NEPA Complaint, *supra* note 37, at 25–26. As a refresher on environmental justice (EJ): EJ centers the idea that environmental issues and climate change disproportionately affect low-income communities of color. As a result, environmental policies and laws need to make sure to center (and not further marginalize) these communities. *Learn About Environmental Justice*, U.S. EPA, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> [<https://perma.cc/GWR9-Z6LQ>] (last updated Aug. 16, 2023). See also Luis González, Note, *Suggestions: Environmental Justice Policy Models for Riverside County, California*, UNIV. LA VERNE L. REV. 101, 102 (2023) (explaining the effects of the State of California's economic and expansionist policies on low-income, primarily-Latinx communities in Riverside, California).

46. Kentucky NEPA Complaint, *supra* note 37, at 58.

47. *Id.* at 8.

48. *Id.*

49. *Id.* at 63.

even after essentially disenfranchising them from public participation during the notice-and-comment period.⁵⁰

As a result of the lawsuit and activism from several groups, in 2019, BOP withdrew its intent to construct the federal prison in Letcher County.⁵¹ Unfortunately, three years later in 2022, BOP revoked the initial denial of the project, and is currently revisiting the option of opening the Letcher County correctional facility.⁵² BOP is preparing a draft EIS for public comment, scheduled to be released in 2023.⁵³ Although the Letcher County case did not involve a permanent project denial, it is still a relevant example of how to slow down the building of correctional facilities using the procedural requirements of NEPA and the APA. And BOP can be assured that the resistance they encountered in 2018 will continue in perpetuity.

b. Clear Guideposts: The NEPA Fight Against the Wetumpka, Alabama Correctional Facility

On a similar thread, in 2022, a complaint was filed against the Alabama Department of Corrections (DOC).⁵⁴ The complaint argued that Alabama DOC should have conducted an EIS for its proposed 400-million-dollar prison.⁵⁵ The 4,000-bed “mega prison” would be opened in Wetumpka, Alabama,⁵⁶ and the plaintiffs sought an injunction until an EIS review was conducted.⁵⁷

The complaint goes on to list the necessary procedural steps of NEPA that DOC skipped and why they are important. According to the complaint,

50. *Id.* at 56–57.

51. Cufone, *supra* note 39.

52. Katie Myers, *A Proposed Prison in Letcher County Reopens Old Divides*, LOUISVILLE PUBL. MEDIA (Nov. 22, 2022), <https://www.lpm.org/news/2022-11-22/a-proposed-prison-in-letcher-county-reopens-old-divides> [<https://perma.cc/U3KR-LAQW>].

53. *Id.*

54. Meera Gajjar, *Alabama Inmates Sue for NEPA Review of New Prison Construction*, WESTLAW TODAY (July 14, 2022), [https://today.westlaw.com/Document/I95f4bce303bd11ed9f24ec7b211d8087/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&firstPage=true&bhcp=1](https://today.westlaw.com/Document/I95f4bce303bd11ed9f24ec7b211d8087/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1) [<https://perma.cc/C7HQ-HPR9>]; Complaint, *Bosarge v. U.S. Dep’t of the Treasury*, 2022 WL 2671345 (M.D. Ala. 2022) (No. 22-cv-00407) [hereinafter *Alabama NEPA Complaint*].

55. The government is only required to conduct EISs for “major federal” projects, and although this is a state project, the complaint argues that the state is using federal funds acquired from the American Rescue Plan Act. This is not without precedent. The seminal example would be *Burton v. Wilmington Parking Authority*, where the Supreme Court affirmed the doctrine of state entanglement. State entanglement essentially argues that privately funded and state-funded projects *may* have to conform to federal standards if they receive federal funding. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724–25 (1961).

56. Panagioti Tsolkas, *Alabama Prisoner File NEPA Lawsuit Against New Prison Construction*, PRISON ECOLOGY PROJ. (July 11, 2022), <https://nationinside.org/campaign/prison-ecology-project/posts/alabama-prisoner-file-nepa-lawsuit-against-new-prison-construction> [<https://perma.cc/8JGN-RNWK>].

57. Gajjar, *supra* note 54.

Alabama failed to analyze the impact to environmental justice communities;⁵⁸ assess cumulative impacts resulting from the project on surrounding communities and inmates;⁵⁹ provide sufficient public notice and an opportunity to comment on the project construction;⁶⁰ disclose all potentially adverse environmental impacts to the surrounding area;⁶¹ and assess the most recent and accurate scientific data about the project's overall impact on the community, environment, and economy of the affected region.⁶²

The complaint argues that Alabama DOC has unlawfully begun building the new correctional facility without completing its required statutory procedures.⁶³ Although this case is still in the early stages, this case provides a clear and concise roadmap on how to write a complaint focused on NEPA accountability.

Regardless of whether the complaint is addressed to prisons or detention centers, key issues to look out for as possible NEPA hooks are whether the agency in its EIS (1) conducted an environmental justice review or discussed cumulative impacts, (2) considered public health concerns, (3) provided time for meaningful participation (notice and comment), and (4) used the most recent scientific data. As the next subpart will show, the Endangered Species Act pairs well with NEPA because it creates another set of procedural requirements that government agencies must complete before going forward with detention center or prison construction projects.

C. *Endangered Species Act*

The Endangered Species Act (ESA) is among the strongest and most frequently used tools for environmental advocates. It has more teeth than NEPA because it contains a citizen suit provision. This means that unlike with NEPA complaints, advocates can sue under the ESA itself⁶⁴ without having to use the APA.⁶⁵

58. Alabama NEPA Complaint, *supra* note 54, at 8, 18-22.

59. *Id.*

60. *Id.* at 2.

61. *Id.* at 18-21, 71.

62. *Id.* at 71-73.

63. Brian Lyman, *Two More Lawsuits Filed to Stop Alabama Prison Construction*, MONTGOMERY ADVERTISER (July 12, 2022), <https://www.montgomeryadvertiser.com/story/news/2022/07/13/two-more-lawsuits-filed-stop-alabama-prison-construction/10033450002> [<https://perma.cc/XV7T-NR8F>].

64. See generally Eric R. Glitzenstein, *Citizens Suits, in* ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 249, 249 (Donald C. Baur & Ya-Wei Li eds., 3d ed. 2021) (“[The ESA] contains one of the most far-reaching citizen suit provisions that Congress has adopted in an environmental law”).

65. However, an advocate can still bring an APA suit as well, but this should be a last resort. There are stronger provisions of the ESA that have stronger results and lower burdens. See *id.* at 259 (noting how advocates can still sue under the APA for agency actions that are “arbitrary and capricious”).

The ESA specifically protects all species listed as “endangered” or “threatened,”⁶⁶ and mandates agencies to act to “conserve” endangered and threatened species.⁶⁷ These mandates create duties that agencies are compelled to follow before and after starting projects. These duties create openings for environmental and immigration advocates to begin lawsuits if the action agency does not correctly perform its statutory requirements.

The following subparts discuss two possible avenues that advocates can take to challenge an agency’s action under the ESA. First, this section discusses the ESA’s “duty to consult” provision under Section 7, which creates some procedural hurdles for agencies, like those discussed in NEPA. Next, this section will discuss the substantive provision of the ESA’s Section 9 “take provision.” The final subpart of this section will conclude with some suggestions for legal advocates regarding possible hooks for future ESA lawsuits against immigration detention centers.

1. Section 7: You Have a Duty to Consult; Anything You Don’t Do, Can and Will Be Used Against You in a Court of Law

The relevant parts of ESA Section 7 require that any actions the government “fund[s], permit[s], or carr[ies] out,” will not “jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat.”⁶⁸ Section 7 affects a broad array of both private and government actions,

66. The ESA contains two categories of listed species: “threatened” and “endangered” species. Endangered species are allotted more federal protection. For threatened species, agencies have more discretion with what protections they are awarded. As a result, the issue of “listing” usually is highly contested and is the first step in ESA litigation. LESHY ET AL., *supra* note 3, at 304–05. In determining whether a species is endangered, agencies oftentimes use factors like the level of threat to the species’ habitat, the extent to which the species is exploited, whether the species is under threat by disease or predation, and the inadequacy of existing regulatory standards. *See, e.g., In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig.*, 709 F.3d 1 (D.C. Cir. 2013) (providing an example of a case where the court applied factors to determine if a certain subspecies of polar bear should be denoted as “endangered”).

67. 16 U.S.C. § 1533(d).

68. 16 U.S.C. § 1536(a)(2) (2017); Melinda E. Taylor & Richard E. Sayers, Jr., *Interagency Consultation and Conversation Duties Under Section 7*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* 111, 116 (Donald C. Baur & Ya-Wei Li eds., 3d ed. 2021) (providing an in-depth analysis of Section 7(a)(1) consultation duty). Note that the ESA’s consultation requirement only comes into play if the agency has discretion in its actions. If Congress mandated a certain agency action through the organic statute, then the agency has no duty to consult. Luckily, there is usually some degree of agency discretion, and the majority of cases involve discretionary agency actions. 50 C.F.R. § 402.03; LESHY ET AL., *supra* note 3, at 328 (“[C]onsultation is . . . triggered only where the agency has some discretion in whether or how to act.”); *See* Melinda E. Taylor & Richard E. Sayers, Jr., *Interagency Consultation and Conversation Duties under Section 7*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* 111, 117 (Donald C. Baur & Ya-Wei Li eds., 3d ed. 2021) (noting how courts define “discretionary” broadly as “hinging on whether the action agency has the flexibility under the applicable law to adjust its action in a manner that would promote the

and comes into play whenever there is a federal “nexus.”⁶⁹ A “nexus” means “any activity that involves federal funding or requires federal authorization.”⁷⁰ This may include (but is not limited to) constructing roads or dams, promulgating regulations, or granting licenses or permits.⁷¹ Advocates traditionally have used Section 7 to bring suit over extractive activities like logging, mining, and water or energy development.⁷²

a. Protecting the Northern Long-Eared Bat: What Are the Statutory Requirements Under Section 7(a)(2)?

An agency that wishes to undertake a project (i.e., a nexus), must undergo ESA § 7(a)(2)’s procedural steps.⁷³ The majority of Section 7 cases involve disputes over the adequacy of the consultation process.⁷⁴ To illustrate, let’s return to the Department of Transportation (DOT) hypothetical that we used to explain NEPA, but this time let’s say that DOT wants to build a train depot in small, rural South Royalton, Vermont.

In this example, DOT is the action agency (the agency that wants to construct, promulgate, etc.). First, DOT must ask the U.S. Fish and Wildlife Services (FWS) or the National Marine Fisheries Service (NMFS) (depending on the type of species in question) to identify any listed species or critical habitats present in the proposed “action area.”⁷⁵ Let’s say FWS identified an endangered species, the Northern Long-Eared Bat, with a critical habitat alongside the White River. Since DOT determined that its project “may” affect a listed species, it will engage FWS in “informal consultation.”⁷⁶

As part of the informal consultation, action agencies often prepare a biological assessment (BA), which lists endangered or threatened species and any effects the action agency foresees will affect these species.⁷⁷ FWS concludes the informal consultation process by issuing a letter where it determines whether the agency action is or is not likely to adversely affect the listed species.⁷⁸ For

conservation of the listed species”).

69. Taylor & Sayers, *supra* note 68, at 111.

70. *Id.*

71. *Id.* at 117.

72. Additionally, unlike Section 9 (discussed later), Section 7 applies to endangered plants as well. *Id.* at 111-12.

73. 16 U.S.C. § 1536(a)(2) (2017).

74. Taylor & Sayers, *supra* note 68, at 117.

75. *Id.* at 119. The action agency can also use the FWS online tool (IPaC) to generate a list of the endangered or threatened species in the action area. *IPaC: Information for Planning and Consultation*, U.S. FISH & WILDLIFE SERV., <https://ipac.ecosphere.fws.gov> [<https://perma.cc/7ALK-QN6H>] (last visited Apr. 18, 2023).

76. However, if the action agency determines that its action will not negatively or positively affect the listed species (or critical habitat), then the consultation process ends and no further consultation with FWS or NMFS is necessary. Taylor & Sayers, *supra* note 68, at 119-20.

77. *Id.* at 120.

78. *Id.* at 119-20.

purposes of our case, let's say that DOT prepared a BA. FWS reviewed the BA and the information collected and determined that it is likely that DOT's proposed train depot will adversely affect the Northern Long-Eared Bat. Thus, DOT must move on to the "formal consultation" step.

The next step, formal consultation, is needed if adverse effects are *likely* to impact listed species.⁷⁹ FWS or NMFS will prepare a written biological opinion (BiOp), which explains in more detail how the proposed action will affect the listed species (the BiOp resembles a NEPA EIS).⁸⁰ In the BiOp, FWS or NMFS evaluate the information collected so far and either issue a jeopardy opinion with reasonable alternatives to avoid jeopardy, or a non-jeopardy opinion with a permit (that also includes reasonable measures that the agency can take to minimize the impact of the action to the listed species).⁸¹

In the last step, DOT, as the action agency, must then choose to (1) implement the original proposed action, (2) adjust their proposal based on the alternatives that FWS and NMFS suggested, (3) revise their proposed action and start over, or (4) abandon the project.⁸² Regardless of what DOT chooses to do, DOT must notify FWS and NMFS of its ultimate decision.⁸³ At this point, FWS and NMFS must determine if the action agency is complying with its Section 7(a)(2) requirements, and if it is not, the action agency must either bring itself into compliance or seek an exemption under Section 7(g).⁸⁴

b. So . . . What Legal Claims Can I Bring Under Section 7?

Section 7 has many procedural steps, and failure by the action agency to comply with the set requirements may open the agency to potential lawsuits under the ESA's citizen suit provision.⁸⁵ Among the most contentious of these legal claims are following procedural requirements under Section 7(a)(2) (like making a proper BA or BiOp), consultation re-initiation, and the Section 7(d) bar.

79. *Id.* at 120.

80. *Id.*

81. *Id.* at 121; In the context of the ESA, a jeopardy opinion gives FWS and NMFS the power to halt or demand modifications to actions if the agency action were to adversely affect listed species. Whether or not a situation constitutes a "jeopardy" is very discretionary, given that lawmakers declined to define the term in the ESA. Daniel J. Rohlf, *Jeopardy Under the Endangered Species Act: Playing a Game Protected Species Can't Win*, 41 WASHBURN L.J. 114, 114–15 (2002).

82. Taylor & Sayers, *supra* note 68, at 124.

83. *Id.*

84. 16 U.S.C. § 1536(g); 50 C.F.R. § 451. Exemptions are extremely rare. Since the passage of the ESA amendment in 1978 where this exemption section was added, only two exemptions have ever been granted. It is a lengthy and expensive process, and it requires the action agency to get an exemption for the project from a high-ranking cabinet-level committee or official, such as the governor of the state or administrator of the U.S. EPA. Taylor & Sayers, *supra* note 68, at 126.

85. 16 U.S.C. § 1540(g); *see, e.g.*, LESHY ET AL., *supra* note 3, at 326 (discussing how an agency's Biological Assessment can be challenged through judicial review).

An action agency's failure to follow any of the Section 7(a)(2) steps is grounds for a citizen suit.⁸⁶ For example, let's say that the Forest Service wanted to construct a gravel road. They complied with NEPA and filed an EA, in which they stated that there were no listed species in the area where the road was proposed. However, you, an advocate, call their bluff. You suspect that the area is home to an endangered species, the Rocky Mountain Gray Wolf. This is what happened in *Thomas v. Peterson*, where a group of landowners, ranchers, fishermen, and hunters sued the Forest Service for not following ESA procedure.⁸⁷ The Ninth Circuit in that case concluded that Congress had set specific procedures for action agencies to follow.⁸⁸ If these procedures were not followed, then the action agencies were more likely to be found noncompliant with the ESA's substantive provisions (like prohibiting taking of endangered species or making sure agencies do not substantially threaten already threatened species).⁸⁹

In our Rocky Mountain Gray Wolf case, the Forest Service could be sued at each stage of the ESA consultation process. For example, a citizen suit can be brought if the Forest Service did not reach out to FWS, or as another example, a citizen suit can be brought by NMFS asking if there are any listed species in the proposed action area (referred to as "conference").⁹⁰ If the Forest Service prepared a BA or a BiOp, an advocate can challenge the documents if they are not sufficiently well-prepared.⁹¹ Furthermore, for "major federal projects," BAs are required—no ifs, ands, or buts about it.⁹² Thus, the ESA's required procedural steps offer multiple entry points for advocates who are seeking to challenge the opening of a new detention center.

86. You must first exhaust all administrative remedies, which means that you also need to give the action agency "notice" that they are not in compliance. This gives the action agency the opportunity to correct its own mistake(s). Glitstein, *supra* note 64, at 250.

87. *Thomas v. Peterson*, 753 F.2d 754, 756 (1985).

88. *Id.* at 763–64.

89. *Id.*

90. 51 Fed. Reg. 19926 (1986); *see, e.g., Peterson*, 753 F.2d at 754, 757 (discussing how the Forest Service did not ask the FWS for a list of endangered and threatened species; instead, they assumed in their EA that there were no endangered or threatened species in the proposed area).

91. The National Park Service's Biological Assessment Guidebook provides a great in-depth analysis of everything a BA needs to cover (and what it does not). Mike Wrigley, *Biological Assessment Guidebook*, NAT'L PARK SERV. (Aug. 2016), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd521133.pdf. There are also lists of requirements for Biological Opinions, including an analysis of the overall potential impacts to listed species, the cumulative effects of the project, etc. Parker Moore et al., *Complying with the Endangered Species Act*, BEVERIDGE & DIAMOND, <https://www.bdlaw.com/publications/complying-with-the-endangered-species-act> [<https://perma.cc/7XYH-447E>] (last updated Feb. 2023).

92. 51 Fed. Reg. 19926 (1986) ("The legislative history of section 7(c) of the Act plainly focused the mandatory duty to prepare biological assessments on 'major Federal actions'...").

On a similar thread, another contentious topic tangentially related to the Section 7(a)(2) process is consultation re-initiation. If a new species gets listed as endangered or threatened while the BA or BiOp is being prepared, the action agency needs to consult with FWS and NMFS to assess the impacts the project will have on the newly listed species.⁹³ This is only true if the action agency did not consider how the project may disturb the newly listed species.⁹⁴ For example, in 2014, FWS listed the Gunnison Sage-Grouse as a threatened species.⁹⁵ The Bureau of Land Management (BLM) had been engaged in the ESA consultation process, but failed to consult FWS about the newly listed species and how it would impact their ongoing project.⁹⁶ In *Board of County Commissioners of San Miguel*, the court concluded that BLM had violated the ESA.⁹⁷ The court stated that BLM had a duty to re-initiate consultation if new information on the effects on listed species was available and not previously considered.⁹⁸

Another area ripe for litigation involves the ESA Section 7(d) bar; this section prevents the action agency from making any “irreversible or irretrievable commitment of resources” while the Section 7 consultation process is still ongoing.⁹⁹ This does not mean that the action agency cannot do *anything* while they wait for the consultation process to end, but that their actions are limited to those that would not hinder implementation of reasonable alternatives.¹⁰⁰ The extent of the actions that an action agency can take is dependent on the jurisdiction. For example, in the D.C. Circuit, Section 7(d) does not allow any investments of large sums of money where the project may violate § 7(a)(2).¹⁰¹ When it comes to the specific question of immigration detention, Section 7(d) can help bolster the argument for temporary injunctions while other litigation is underway. Especially in cases where the government wants to construct

93. Sara Greenberg, *Federal Court Finds BLM Violated ESA in Failing to Reinitiate Consultation for Oil and Gas Leases*, NOSSAMAN LLP (Feb. 24, 2022), <https://www.endangeredspecieslawandpolicy.com/federal-court-finds-blm-violated-esa-in-failing-to-reinitiate-consultation-for-oil-and-gas-leases> [https://perma.cc/S22Q-D77L].

94. *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1324–25 (10th Cir. 2007) (“[T]he action that do[es] not cause effects different from or additional to those considered in the biological opinion will not require reinitiation of formal consultation”).

95. Raillan Brooks, *The Endangered Species List Gains the Gunnison Sage-Grouse*, AUDUBON (Nov. 12, 2014), <https://www.audubon.org/news/the-endangered-species-list-gains-gunnison-sage-grouse#:~:text=The%20Gunnison%20Sage%2DGrouse%2C%20a,and%20Wildlife%20Service%20ruled%20today> [https://perma.cc/J8TM-UTGS].

96. *Bd. of Cnty. Comm’rs of San Miguel v. U.S. BLM*, No. 18-cv-01643-JLK, 2022 U.S. Dist. LEXIS 30122, at *55 (D. Colo. Feb. 9, 2022).

97. *Id.* at *69.

98. Greenberg, *supra* note 93.

99. Endangered Species Act of 1973, 16 U.S.C. § 1536(d).

100. Taylor & Sayers, *supra* note 68, at 125.

101. *See N. Slope Borough v. Andrus*, F. Supp. 326, 330 (D.D.C. 1979) (“... it is clear that the investment of a massive amount of resources before the safety of an endangered species is insured is precisely what Congress intended to preclude with the enactment of § 7(d)”).

large scale projects, this section would not allow for a large commitment of resources until other Section 7 consultation issues have been resolved.¹⁰²

The ESA's Section 7 is not a panacea by any means. Courts have also begun to weaken the effectiveness of Section 7.¹⁰³ Additionally, findings of adverse modification sufficient to stop government projects are rare.¹⁰⁴ But the ESA is still one of environmental law's strongest tools. Under Section 7(d), courts could potentially grant injunctions, and if endangered species or critical habitats are likely to be found in proposed locations, it can also lead to outright findings that the proposed locations are unusable. Although this is still a developing area of the law as it applies to immigration detention centers, the statutory language holds a strong potential to impede agencies that are constructing new detention centers.

2. You Can Look—But You Can't Touch: Section 9 “Take” Prohibition

The second relevant provision of the ESA involves Section 9's prohibition against taking. The term “take” under the ESA is incredibly broad. In essence, no one is allowed to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” an endangered species.¹⁰⁵ This includes state and federal agencies, corporations, and individuals; none of these parties are allowed to “take” listed species.¹⁰⁶ Both the federal government and private citizens are entitled to bring suit to stop Section 9 violations.¹⁰⁷

In another hypothetical scenario, let's say Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP) began construction of a detention center on an abandoned airfield. Their construction ends up cutting trees that are the critical habitat of an endangered bird species. This “harming” of the endangered bird species' critical habitat may qualify as a violation of Section 9. In fact, most cases involving violations of Section 9 are similar to this hypothetical scenario. In most Section 9 cases, an action resulted in the death or injury of a listed species, or the action altered a listed species' habitat.¹⁰⁸ For example, in the *Palila* case, the Ninth Circuit decided that a state agency had violated Section 9.¹⁰⁹ The agency had maintained an exotic game

102. Arthur D. Smith, *Programmatic Consultation Under the Endangered Species Act: An Anatomy of the Salmon Habitat Litigation*, 11 J. ENV'T L. & LITIG. 247, 278 (1996).

103. See Daniel J. Rohlf & Colin Reynolds, *Restoring the Emergency Room: How to Fix Section 7(a)(2) of the Endangered Species Act*, 52 ENV'T L. 685, 687 (2022).

104. Dave Owen, *The Negotiable Implementation of Environmental Law*, 75 STAN. L. REV. 137, 163–64 (2023).

105. 16 U.S.C. § 1532(19).

106. LESHY ET AL., *supra* note 3, at 332.

107. Section 11 allows the federal government to enforce violations of Section 9. And “knowingly” taking a listed species results in significantly greater penalties. Quarles et al., *supra* note 3, at 147.

108. *Id.*

109. *Palila v. Haw. Dep't of Land and Nat. Res.*, 852 F.2d 1106, 1110–11 (9th Cir. 1988).

herd in an area where the endangered Palila Bird was found.¹¹⁰ The appellate court agreed with the lower court in its conclusion that the game animals ate the shoots and seeds of the trees that the Palila Bird depended on to create their habitat; this made it almost impossible for the Palila Bird to repopulate its numbers.¹¹¹ As a result, the Ninth Circuit affirmed the district court's ruling and enjoined the agency from continuing.¹¹² Although the Ninth Circuit's decision is seen as a particularly expansive view of the take prohibition,¹¹³ it shows the flexibility of the term "take" and the result if success is attained.

3. Recommendations for Future Litigation Under Section 9 and Section 7

In essence, the main strategy in using the ESA to stop the opening of new immigration detention centers is to use the presence (or even just the likely presence) of an endangered or threatened species to enjoin construction. Even if an injunction is temporary, the longer the delay, the stronger the argument is for the government to move on and not build its detention center in that location. This means that there is more time for consensus building among advocates, for groups to find other reasons against the building of that detention center, or (and I hope I'm not being too naive or optimistic) a new administration to come in with different policy views towards immigration.

The ESA, as of the writing of this article, has not yet been used to enjoin the construction of a detention center. However, the strategy is not purely theoretical. There have been ESA claims brought against the proposed Border Wall separating Mexico and the United States. In 2017, during the height of the Trump administration's push for construction of the United States-Mexico Border Wall, the Center for Biological Diversity (CBD) and U.S. Representative Raul Grijalva filed a complaint against the Department of Homeland Security (DHS) and CBP.¹¹⁴ Then-DHS Secretary John Kelly had waived provisions of the ESA to build the Border Wall.¹¹⁵ The CBD-Grijalva Complaint alleged that the border wall would have a devastating impact on a large number of threatened and endangered species and on their sensitive critical habitats.¹¹⁶

110. *Id.* at 1107.

111. *Id.* at 1109.

112. *Id.* at 1110–11.

113. LESHY ET AL., *supra* note 3, at 332.

114. Megan Janetsky, *Border Wall Proposal Threatens Delicate Wildlife Habitats*, ARIZ. CTR. FOR INVESTIGATIVE REPORTING (Jan. 12, 2018), <https://azcir.org/news/2018/01/12/trump-border-wall-threatens-delicate-wildlife-habitat> [<https://perma.cc/RBL7-4HTJ>].

115. Claire Fischer, *Waiving Hello to the Wall: The Supreme Court's Denial of a Constitution Challenge to Environmental Challenges to Environmental Law Waivers at the U.S.-Mexico Border*, GEO. ENV'T L. REV. (Feb. 14, 2019), https://www.law.georgetown.edu/environmental-law-review/blog/waiving-hello-to-the-wall-the-supreme-courts-denial-of-a-constitutional-challenge-to-environmental-law-waivers-at-the-u-s-mexico-border/#_ednref7 [<https://perma.cc/SK9M-APLJ>].

116. Complaint at 30, *Ctr. for Biological Diversity v. Kelly*, 4:17-cv-00163-CKJ (D. Ariz.

These species included the Mexican spotted owl, Gila chub, Laguna Mountains skipper, and Mexican flannelbush, among at least 27 other species.¹¹⁷ As a result, the complaint alleged, DHS and CBP *needed* to undergo Section 7 consultation with FWS or risk violating Section 9's take prohibition.¹¹⁸ Although the complaint was ultimately dismissed in 2022,¹¹⁹ the litigation and advocacy surrounding this issue resulted in a partial pause in construction for five years.¹²⁰

Since many detention centers are located close to the Mexican border,¹²¹ many of the listed species that the Center for Biological Diversity identified could be used in complaints against new detention center construction projects. Additionally, new species have been added to the endangered and threatened lists. For example, among the newest is the prostrate milkweed, which was added in February of 2023.¹²² These new additions create more duties for an action agency, such as consultation re-initiation where an agency must consult with FWS and NMFS on the project's effects on newly listed species.¹²³

D. *Environmental Torts*

The subject matter of this subpart is perhaps the most timely, especially with the recently increased visibility of cases involving immigration detention centers negligently using toxic levels of chemical disinfectants.¹²⁴ Cases involving negligent chemical disinfectant exposure have become relatively common,

Apr. 12, 2017) [hereinafter CBD-Grijalva Complaint].

117. *Id.* at 31–32; see also Noah Greenwald et al., *A Wall in the Wild: The Disastrous Impact of Trump's Border Wall on Wildlife*, CTR. FOR BIOLOGICAL DIVERSITY 1 (May 2017), https://www.biologicaldiversity.org/programs/international/borderlands_and_boundary_waters/pdfs/A_Wall_in_the_Wild.pdf [<https://perma.cc/NB26-Y5G4>] (noting how there are 93 threatened and endangered species by the Border Wall).

118. CBD-Grijalva Complaint, *supra* note 116, at 33.

119. *Ctr. for Biological Diversity v. Mayorkas*, No. 4:17-cv-00163-CKJ, 2022 U.S. App. LEXIS 24242, at *2 (9th Cir. June 8, 2022).

120. See Jean Su et al., *Injunction Sought to Halt Trump's Wall in Arizona*, CTR. FOR BIOLOGICAL DIVERSITY (Aug. 6, 2019), <https://biologicaldiversity.org/w/news/press-releases/injunction-sought-to-halt-trumps-wall-in-arizona-2019-08-06> [<https://perma.cc/M2D3-BQU3>] (noting how conservation groups sought an injunction while claims against the Trump administration were completed).

121. *Mapping U.S. Immigration Detention*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/map> [<https://perma.cc/C3GM-MFNX>] (last visited Apr. 9, 2023).

122. Michael Doyle, *Border Plant Joins ESA List Despite Texas AG's Objections*, E&E NEWS: GREENWIRE (Feb. 27, 2023, 1:33 PM), <https://www.eenews.net/articles/border-plant-joins-esa-list-despite-texas-ags-objections> [<https://perma.cc/UJ3J-RWSH>].

123. See Greenberg, *supra* note 93 (discussing how there are ESA requirements to reinitiate consultation if a new species is listed during the BA or BiOp process).

124. See Chase Ford, *Out of the Melting Pot and Into the Polluted Cage: ICE Detention Centers are Exposing Immigrants to Toxins*, VT. J. ENV'T L.: THE BEACON BLOG (Apr. 7, 2023), <https://vjel.vermontlaw.edu/the-beacon-post8c139bb1/thebeacon12> [<https://perma.cc/4JDN-VCPZ>] (discussing three recent examples of toxic detention centers in Texas, Washington, and California).

especially after COVID.¹²⁵ The primary purpose of environmental torts is to provide an avenue through which compensatory damages or injunctive relief can be sought. However, as some of the examples below show, gross negligence can also lead to the decommissioning of immigration detention centers.

Negligence is the preferred environmental tort claim because parties can receive both compensatory and punitive damages. Other environmental torts, like nuisance, can only result in the remedy of an injunction.¹²⁶ Apologies for the bar exam flashbacks, but here is a quick review of negligence. To prove negligence, a plaintiff must prove four elements: (1) the defendant had a duty, (2) the defendant breached that duty, (3) the plaintiff suffered an injury, (4) the defendant's breach of their duty was the cause in fact (or proximate cause) of the plaintiff's injury.¹²⁷ Now that we have the elements to negligence fresh in our minds, let's apply these elements to the following case.

1. Sigue Adelanto: Detainees Fight Against Gross Negligence

The Adelanto Detention Center case is among the most recent negligence cases involving an immigration detention center.¹²⁸ GEO Group, the private company that runs the detention center, began spraying a disinfectant chemical, HDQ Neutral, during the height of the COVID-19 pandemic.¹²⁹ The chemical caused detainees to suffer symptoms like rashes, headaches, persistent coughing, and throat and nasal irritation. Additionally, some detainees even found blood in their saliva, felt dizzy and lightheaded, and suffered debilitating headaches. And some detainees are expected to suffer additional long-term chronic health issues in the future.¹³⁰

125. See FREEDOM FOR IMMIGRANTS, *supra* note 121 (noting how at least 26 immigration detention centers have had reported cases of toxic exposure to chemical disinfectants, creating arguable grounds for a negligence case).

126. FIRESTONE ET AL., *supra* note 25, at 100.

127. Legal Information Institute, *Negligence*, WEX, <https://www.law.cornell.edu/wex/negligence> [<https://perma.cc/CTV7-GE7M>] (last visited Apr. 3, 2023). See also FIRESTONE ET AL., *supra* note 25, at 96 (discussing the seminal environmental torts case, *Boomer v. Atlantic Cement Company* case. This case very clearly touched on all the elements of negligence. In *Boomer*, a cement company had an implied *duty* not to unreasonably interfere with a homeowner's peaceful enjoyment of their land. However, they *breached* that duty, directly *causing* both monetary and aesthetic *injury* to the plaintiffs. And no negligence *exception* applied. As a result, the court paid compensatory *damages* for any past and future injury to the homeowners).

128. Daniel Wu, *ICE Detainees Were 'Poisoned' By Toxic Cleaning Chemicals, Lawsuit Alleges*, WASH. POST (Mar. 17, 2023, 4:59 AM), <https://www.washingtonpost.com/nation/2023/03/27/geo-group-cleaning-chemicals-lawsuit> [<https://perma.cc/N5DJ-5C9X>].

129. Jaelyn Diaz, *GEO Group Sickened ICE Detainees With Hazardous Chemical for Months, a Lawsuit Says*, NPR (Mar. 25, 2023), <https://www.npr.org/2023/03/25/1165890634/geo-group-lawsuit-adelanto-ice-detainees-chemical-exposure> [<https://perma.cc/EF8F-W85Q>].

130. *Id.* Additionally, one of the plaintiffs is on the cleaning staff of GEO Group, and she alleges that employees were not given masks or protective equipment when cleaning. She says that employees would sometimes develop nosebleeds, and on rare occasions, even

The Social Justice Legal Foundation (SJLF) filed a lawsuit on behalf of more than 1,300 detainees,¹³¹ essentially alleging gross negligence from GEO Group and ICE employees.¹³² The complaint alleges that GEO Group and the detention center owed the detainees a duty to keep them “reasonably safe.” Detainees have a “special custodial relationship” with the government that creates a duty “to assume some responsibility for [their] safety and general well-being.”¹³³ This means that the government *must* provide “food, clothing, shelter, medical care, and reasonable safety” for immigrant detainees.¹³⁴ Although the extent of this duty is dependent on the jurisdiction, even in jurisdictions with the lowest standards, noncitizen detainees are still protected from “gross physical abuse” and “malicious infliction of cruel treatment.”¹³⁵

The complaint argues that GEO Group *knowingly* poisoned detainees by spraying HDQ Neutral indoors. It did so by spraying HDQ Neutral every 15–30 minutes,¹³⁶ and by improperly diluting and storing HDQ Neutral.¹³⁷ The term “knowingly” is used intentionally, because well before SJLF’s current lawsuit, advocate groups had voiced their concern regarding the improper use of chemical cleaning products at the Adelanto Detention Center.¹³⁸ GEO Group’s misuse of chemical cleaning agents was so rampant that in 2020, the Environmental Protection Agency (EPA) chastised GEO Group for

start vomiting and fainting. Wu, *supra* note 128.

131. *Class Action Lawsuit on Behalf of Detained Immigrants Alleges GEO Group Poisoned Them at Adelanto Detention Center*, SOC. JUST. LEGAL FOUND. (Mar. 21, 2023), <https://www.socialjusticelaw.org/class-action-lawsuit-on-behalf-of-detained-immigrants-alleges-geo-group-poisoned-them-at-adelanto-detention-center> [<https://perma.cc/B9XM-2NVD>].

132. Diaz, *supra* note 129.

133. *Affirmative Duties in Immigration Detention*, 134(7) HARV. L. REV. 2486, 2494 (2021).

134. *DeShaney v. Winnebago Cnty. Dep’t. of Soc. Servs.*, 489 U.S. 189, 200 (1989).

135. *See, e.g., Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) (“We therefore hold that . . . [detainees] are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials.”).

136. Complaint at 14, *Ronduen v. GEO Group*, No. 5:23-CV-00481 (C.D. Cal. Mar. 20, 2023) (5:23-CV-00481) [hereinafter *Adelanto Negligence Complaint*].

137. *Id.* at 17.

138. *See, e.g., Erin Fitzgerald, Immigrants in Detention Facilities At Risk of Toxic Chemical Exposure, According to Newly Compiled Research*, EARTHJUSTICE (Aug. 13, 2020), <https://earthjustice.org/press/2020/immigrants-in-detention-facilities-at-risk-of-toxic-chemical-exposure-according-to-newly-compiled-research> [<https://perma.cc/6YT3-2MAH>]; Letter from Rebecca Merton, Director of Visitation and Independent Monitoring, Freedom for Immigrants & Lizbeth Abeln, Immigrant Detention Coordinator, Inland Coalition for Immigrant Justice, to Field Office Director Marin, Assistant Field Office Director Valdez, Warden Janecka, and Officer for Civil Rights & Civil Liberties Quinn (May 21, 2020), <https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5ecd29d03bbe218edf9a67d/1590503888290/Toxic+Exposure+of+People+in+ICE+Detention+at+Adelanto+to+Hazardous+Chemicals.pdf> [<https://perma.cc/S6HP-72XF>].

improperly using the HDQ Neutral.¹³⁹ Additionally, GEO Group did not provide their cleaning staff with sufficient training on how to properly use these potentially toxic chemicals.¹⁴⁰

Currently, this case is still in the early stages, but plaintiffs are seeking compensatory damages, injunctive relief, and punitive damages.¹⁴¹ The punitive damages especially would create an important precedent to ensure that detention centers and the private companies that run them do not simply ignore the health concerns of detainees and governmental regulatory requirements.¹⁴²

2. How Community Groups in Glades County, Florida Slayed Goliath

A similar story could be found in 2022 in Glades County, Florida. The Glades County case is perhaps the most hopeful case in this collection, given that the detention center was decommissioned after many complaints and public outcry. In this case, a group of fourteen environmental and immigration advocacy groups lobbied the EPA to investigate the unsafe usage of Mint and Maximum Neutral,¹⁴³ a cleaning agent that was allegedly being used at fifty times the allowable concentration.¹⁴⁴

139. Wu, *supra* note 128.

140. To make matters worse, GEO Group not only knew about the toxic effects of HDQ Neutral, but also concealed the dangers of HDQ from detainees, and made false and misleading statements to government and regulatory bodies. In 2020, the warden of the detention center, James Janecka, lied to the EPA during an EPA inspection, stating that HDQ Neutral was not being used where food was served or where detainees slept. Additionally, Janecka also lied to the EPA and to the Homeland Security Oversight Committee, claiming that “doctors had never reported any adverse effects by anybody” regarding their reaction to HDQ Neutral. Adelanto Negligence Complaint, *supra* note 136, at 15, 19, 21, 22.

141. SOC. JUSTICE LEGAL FOUND., *supra* note 131; Adelanto Negligence Complaint, *supra* note 136, at 56.

142. See generally Belle Wong & Adam Ramirez, *What are Punitive Damages? Definition & Examples*, FORBES: LEGAL ADVISOR, <https://www.forbes.com/advisor/legal/personal-injury/punitive-damages> [<https://perma.cc/9CXX-R2HN>] (last updated Oct. 7, 2022) (noting how punitive damages serve three primary purposes: punishment, individual deterrence, and general deterrence. Punitive damages are generally awarded in cases where parties or an industry as a whole would benefit from a reminder that the misconduct in question is egregious and will result in especially painful damages).

143. *Shut Down Glades County Detention Center*, ACLU, <https://www.aclufl.org/en/campaigns/shut-down-glades-county-detention-center#Coalition> (last visited Apr. 2, 2023).

144. Erin Fitzgerald, *Advocates Ask EPA to Investigate Toxic Chemical Misuse at Florida Detention Center*, EARTHJUSTICE (Mar 1, 2022), <https://earthjustice.org/press/2022/advocates-ask-epa-to-investigate-toxic-chemical-misuse-at-florida-detention-center#:~:text=People%20detained%20at%20Glades%20are,50%20times%20the%20allowed%20concentration> [<https://perma.cc/M5VF-MBK6>]. To make matters worse, the disinfectant in this case has been shown to create long-term damage to human cells and to human reproductive health. Matthew Phelan, *Immigrants in U.S. Detention Exposed to Hazardous Disinfectants Every Day*, SCIENTIFIC AM. (Sept. 17, 2021), <https://www.scientificamerican.com/article/immigrants-in-u-s-detention-exposed-to-hazardous-disinfectants-every-day> [<https://perma.cc/6DGT-CHM6>].

Glades County detainees alleged very similar injuries to Adelanto detainees; some stated that the chemical made it hard to breathe and that it made them feel sick.¹⁴⁵ However, Glades County officials had ignored detainee's complaints.¹⁴⁶ Advocacy groups published a letter to the EPA, detailing specific complaints from a large number of detainees.¹⁴⁷ The letter detailed a plethora of abuses, from sexual assault to medical neglect to toxic exposure of harmful chemicals.¹⁴⁸ Shortly after, the ACLU filed an official complaint against the detention center highlighting ICE's abuses,¹⁴⁹ and a few stories were published from sources like *Scientific American* revealing ICE's records.¹⁵⁰ ICE began to transfer detainees out of the detention center and limited the use of the facility.¹⁵¹ This eventually led to ICE no longer holding people at the Glades County Detention Center.¹⁵²

What happened at Glades County was horrible for the noncitizen detainees held there, and their eventual removal from Glades County was the result of a concerted effort from multiple advocacy groups and attacks from both legal and media groups. The Glades County case provides a helpful guide to future advocates, especially in situations where detention staff are clearly failing to perform their duty to provide very basic reasonable safety. This case also provides some hope that even a negligence case, without any formal statutory environmental law claims, can still slay Goliath (even if just momentarily).

II. SOLUTIONS FOR A MORE EQUITABLE IMMIGRATION SYSTEM

The U.S. immigration system is broken. My underlying motivation for writing this Comment is the fact that the prolonged detention of migrant adults, children, and families is wrong, and the unethical practice of building a

145. Wendy King & Sofia Casini, *Toxic Exposure of People in ICE Detention at Glades to Hazardous Chemicals*, FRIENDS OF MIA. DADE DETAINEES & FREEDOM FOR IMMIGRANTS (June 23, 2020), <https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5ef2341bf2c09a07f1ff4775/1592931355823/Glades+Toxic+Exposure+of+People+in+ICE+Detention+to+Hazardous+Chemicals+%28%29.pdf> [perma.cc/CFJ2-NB9E].

146. *Id.*

147. ACLU, *supra* note 143.

148. *Id.*

149. *CREW & ACLU of Florida File Complaint Against ICE Detention Center*, ACLU FLO. (Jan. 24, 2022), <https://www.aclufl.org/en/press-releases/crew-aclu-florida-file-complaint-against-ice-detention-center> [perma.cc/54ZT-QP4S]; see, e.g., Katie Blankenship, *Re: Claims for Damages Under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671–2680—Mr. Michael Wallace (A# 037333176)*, ACLU FLO. (Apr. 22, 2022), https://www.aclufl.org/sites/default/files/michael_wallace_administrative_complaint.pdf [perma.cc/4F27-BR5M].

150. Phelan, *supra* note 144.

151. ACLU, *supra* note 143.

152. A lot of the current work is focused on pushing for the cancellation of the agreement between ICE and Glades County to make sure that people won't be sent to the Glades County Detention Center anymore. *Id.*

billion-dollar industry out of these people's suffering is wrong.¹⁵³ As a result, it would be wrong to end this Comment without a frank discussion of possible solutions and alternatives to the problem of immigration detention. So, below is a collection of alternatives to the current system of detention.¹⁵⁴ Most emphasize community and restorative justice, instead of criminalization and commodification. The implementation of these suggestions would move the U.S. in the correct direction—one that aligns with compassion, empathy, and love for folks who are facing a new country and new challenges.¹⁵⁵

A. *Addressing the Root Cause of Immigration*

The year was 1994, Schindler's List had just won best picture at the Oscars, Brazil had won the World Cup, and President Clinton signed the North American Free Trade Agreement (NAFTA). What Clinton did not expect (but many analysts did)¹⁵⁶ was the twenty-year wave of immigration from Mexico that was spurred by NAFTA.¹⁵⁷ Thanks to NAFTA, U.S.-government-subsidized corn flooded the Mexican agricultural and food market.¹⁵⁸ Mexican small farmers could not keep up, leading many to lose their jobs and livelihoods.¹⁵⁹ Many Mexicans migrated to bigger cities like Mexico City, Tijuana, or Ciudad Juárez, but others, seeing no economic opportunities in their own country, made the difficult decision to migrate to the U.S.¹⁶⁰ The United States' own faulty eco-

153. Robert Stribley, *What is the 'Immigration Industrial Complex'?*, HUFFPOST, https://www.huffpost.com/entry/what-is-the-immigration-industrial-complex_b_5953b8cae4b0c85b96c65e2c [<https://perma.cc/TA4Q-PCPU>] (last updated June 29, 2017).

154. There are plenty of other alternatives not discussed in detail in this paper. Other policies to look into include expanding the United States' Temporary Protected Status (TPS) and refugee program, as well as revamping H-2A Temporary Worker visas.

155. Additionally, it is important to note that immigration detention is considered "civil," and thus a lot of noncitizen detainees are not provided with the constitutional protections afforded to people subject to criminal detention. This limits the kind of protections, lawsuits, and solutions that can be provided to detainees. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry The deportation hearing looks prospectively to the respondent's right to remain in this country in the future."); see generally Leigh Ainsworth, *Immigration Law Isn't So "Civil" Anymore: The Criminal Nature of the Immigration System*, 53 AM. CRIM. L. REV. 30 (2016) (explaining the history of immigration being categorized as "civil" under U.S. law).

156. *NAFTA: Unintended Immigration Consequences Now Apparent*, MURTHY L. FIRM (Jan. 15, 2014), <https://www.murthy.com/2014/01/15/nafta-unintended-immigration-consequences-now-apparent> [<https://perma.cc/CFF5-85CN>].

157. Ted Robbins, *Wave of Illegal Immigration Gains Speed After NAFTA*, NPR (Dec. 26, 2013, 4:02 AM), <https://www.npr.org/2013/12/26/257255787/wave-of-illegal-immigrants-gains-speed-after-nafta> [<https://perma.cc/V8DP-SDSY>].

158. *Id.*

159. Alejandro Portes, *NAFTA and Mexican Immigration*, SOC. SCI. RSCH. COUNCIL: BORDER BATTLES (July 31, 2006), <https://items.ssrc.org/border-battles/nafta-and-mexican-immigration> [<https://perma.cc/2MET-4G2M>].

160. Robbins, *supra* note 157.

conomic policies led to the uprooting of families in Mexico.¹⁶¹ The United States continues to be the author of its own maladies. The example of Mexico is only one of countless U.S. international and economic policies that have backfired or gone awry. It does not take much to research the calamities that resulted from the Vietnam War,¹⁶² the ousting of the democratically elected Chilean President,¹⁶³ U.S. intervention in Nicaragua,¹⁶⁴ and the diasporas that resulted from those faulty policy decisions. Instead of acknowledging the errors of its own short-sighted capitalist-driven international policies, the United States scapegoats migrants themselves as the one and only source of the problem.¹⁶⁵

This is all to say that the roots of immigration into the United States are complex, and cannot be addressed without first acknowledging the role that the United States itself has played.¹⁶⁶ Acknowledgement is an ongoing requirement, it must be worked on to lead to change at a fundamental level. Only then can the work begin to address the root causes of immigration into the United States.¹⁶⁷ It is important to note that simply throwing money at international problems generally fails to resolve them.¹⁶⁸ Instead, a better alternative

161. Julia G. Young, *The Situation at the U.S.-Mexico Border Can't be 'Solved' Without Acknowledging Its Origins*, TIME, <https://time.com/5951532/migration-factors> [<https://perma.cc/93WG-FR5L>] (last updated Mar. 31, 2021); Cf. Ranko Shiraki Oliver, *In the Twelve Years of NAFTA, the Treaty Gave to Me . . . What, Exactly?: An Assessment of Economic, Social, and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration into the United States*, 10 HARV. LATINO L. REV. 53, 123 (2007) (“ . . . it cannot be said that NAFTA is the principal cause of immigration from Mexico in the last twelve years.”).

162. See Dave Roos, *How the Ends of the Vietnam War Led to a Refugee Crisis*, HISTORY <https://www.history.com/news/vietnam-war-refugees> [<https://perma.cc/X7JH-Y5CS>] (Aug. 29, 2023) (noting how more than 600,000 Vietnamese refugees arrived at the United States after the loss of the Vietnam War).

163. See Boris Martinez, *Chilean Emigration to the United States Post Military Coup of 1973*, CITY UNIV. OF N.Y., <https://cuny.manifoldapp.org/read/27b33cf112096d4a8034641cb051eb69/section/b9c90652-a7e8-42ff-b08a-0479812d00ec> [<https://perma.cc/MNF5-AXBS>] (last visited Apr. 14, 2023) (“During the span of the Chilean dictatorship, an estimated 200,000 Chileans were forced into exile. In 1975 the United States accepted 1,000 political refugees.”).

164. See generally Madeline Linn, *Immigrant Identities: U.S. Intervention and the American Dream in Central America* (May 18, 2028) (Master's Thesis, University of San Francisco) <https://repository.usfca.edu/cgi/viewcontent.cgi?article=2137&context=thes> [<https://perma.cc/U6YL-RG3J>] (discussing the multiple times that the United States has intervened on Nicaragua's sovereignty and the impacts of those actions on emigration).

165. See Glenn C. Altschuler, *The Immigration Crisis Isn't What You Think It Is*, THE HILL (Oct. 16, 2022, 8:30 AM), <https://thehill.com/opinion/immigration/3690232-the-immigration-crisis-isnt-what-you-think-it-is> [perma.cc/23FQ-8MW6] (noting how U.S. citizens generally view immigration xenophobically).

166. Young, *supra* note 161.

167. *Four Ways We Can Improve Our Immigration System*, WORLD RELIEF (July 8, 2021), <https://worldrelief.org/blog-four-ways-we-can-improve-our-immigration-system> [perma.cc/NRV5-7QBZ].

168. Gabriela Soto Laveaga, *Throwing Money at the Problem Won't Solve World Hunger*, WASHINGTON POST (Nov. 22, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/11/22/throwing-money-problem-wont-solve-world-hunger> [perma.cc/23FQ-8MW6].

is to have active dialogue with countries and the people of those countries to assess how best to address these issues. A lot of these principles are tenets of restorative justice, which seeks to have victims and offenders engage with each other to remedy the harm.¹⁶⁹ Through meaningful opportunities to interact with each other, victims play an important role in finding solutions that hold offenders accountable for the harm that they inflicted.¹⁷⁰ Additionally, restorative justice gives offenders a chance to learn from their mistakes and avoid future re-offenses.¹⁷¹

It is certainly a longshot to think that the United States—instigator of many coups, wars, and injustices throughout its short hegemonic reign—would incorporate restorative justice principles into its immigration policy. But this still needs to be said—the United States *needs* to fix its immigration system. And if it ever wants to do so in an effective and long-lasting way, it needs to hear the voices of the communities who emigrate.

The following subpart will transition from discussing the United States' role in forced migration and begin discussing the most promising alternative to detention: community-based programs. Community-based programs underscore the injustice of responding to harm with further harm.

B. *Community-Based Programs*

The most promising of the alternatives to immigration detention are holistic community-based programs. These programs recognize the dignity of migrants and work to first establish a relationship of trust.¹⁷² These programs are run by communities where migrants reside and seek to remove obstacles like finding legal services and adequate housing.¹⁷³ Community-based programs also help introduce migrants to the community and non-governmental

cc/7GWM-8VL7]; see, e.g., TSEMING YANG ET AL., COMPARATIVE AND GLOBAL ENVIRONMENTAL LAW AND POLICY 791 (2020) (discussing the *Trafigura* case, where the private corporation Trafigura illegally dumped waste in the Ivory Coast, causing serious environmental contamination. In this case, Trafigura was required to pay monetary damages to the government and private claimants that it harmed. However, the notes discuss how although restitution was paid in the form of millions of dollars, the people of the Ivory Coast never felt that Trafigura was properly held to account. The *Trafigura* case asks the question of whether monetary damages can ever be sufficient restitution by itself to compensate for large-scale damages.)

169. Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFFALO L. REV. 635, 635 (2021).

170. *Restorative Justice*, BURLINGTON CMTY. JUST. CTR., <https://www.burlingtoncjc.org/restorative-justice> [perma.cc/J5RB-CJGG] (last visited Apr. 14, 2023).

171. *Id.*

172. Isaí Estévez, *A Case for Community-Based Alternatives to Immigration Detention*, 64 ARIZ. L. REV. 1185, 1204 (2022).

173. *Alternatives to Immigration Detention: An Overview*, AM. IMMIGR. COUNCIL (July 11, 2023), <https://www.americanimmigrationcouncil.org/research/alternatives-immigration-detention-overview> [perma.cc/3E39-U9EV].

organizations.¹⁷⁴ What makes these programs particularly special is that they allow for migrant families to stay together while sparing migrants from the psychological strains of detention¹⁷⁵—not to mention the fact that they are significantly cheaper than detention.¹⁷⁶

There are not many examples of community-based programs implemented in the United States, but the ones that have been implemented have generally been very successful.¹⁷⁷ For example, in 2014, the U.S. Conference of Catholic Bishops incorporated a community-based program and provided a small group with case management aid and legal services, among other forms of aid.¹⁷⁸ Other examples include a program with the Catholic Charities of New Orleans and another program with Lutheran Immigration and Refugee Services.¹⁷⁹ Both programs cost taxpayers very little (compared to detention) and resulted in over ninety percent of migrants appearing for their court dates.¹⁸⁰

Community-based programs are an inexpensive and more humane method of housing migrants and refugees. Although the programs have not been used much in the United States, they have been very effective in Australia, Sweden, the Netherlands, Belgium, Hong Kong, Thailand, and Indonesia.¹⁸¹ It would greatly benefit the United States to further fund these alternatives.¹⁸²

174. *Id.*

175. Jason Fernandes, *Alternatives to Detention and the For-Profit Immigration System*, CTR. FOR AM. PROGRESS (June 9, 2017), <https://www.americanprogress.org/article/alternatives-detention-profit-immigration-system> [perma.cc/G6TQ-QFN2].

176. Some estimates put daily costs for community-based programs from \$0.70 to \$17 per day per person, compared to \$126–\$182 per day per person for immigration detention. *Id.*; see also Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2165 (2017) (noting how a community-based program in New Orleans only cost taxpayers \$1430 per year per person).

177. Marouf, *supra* note 176.

178. *Unlocking Human Dignity: A Plan to Transform the U.S. Immigration Detention System*, U.S. CONF. OF CATH. BISHOPS & CTR. FOR MIGRATION STUD. 13, <https://www.usccb.org/about/migration-and-refugee-services/upload/unlocking-human-dignity-report.pdf> [perma.cc/WW6F-EVPB] (last visited Apr. 15, 2023).

179. Marouf, *supra* note 176.

180. *Id.*

181. ROBYN SAMPSON ET AL., *THERE ARE ALTERNATIVES: A HANDBOOK FOR PREVENTING UNNECESSARY IMMIGRATION DETENTION* 10–11 (Int'l Det. Coal. rev. ed. 2015), <https://idcoalition.org/wp-content/uploads/2016/01/There-Are-Alternatives-2015.pdf> [https://perma.cc/K9QS-CMUG].

182. Note that programs like the Intensive Supervision Appearance Program (ISAP) are not community-based programs (even though they are alternatives to detention). These programs use a lot of the same extremely dehumanizing and unethical practices as detention but do so outside of a detention center. *What are the Alternatives to Detention*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/alternatives-to-detention> [https://perma.cc/W7VQ-HVYB] (last visited Apr. 16, 2023).

CONCLUSION

This Comment looked at the ways in which U.S. environmental law could prevent construction of or close immigration detention centers. First, this Comment discussed the Freedom of Information Act, the National Environmental Policy Act, the Endangered Species Act, and environmental torts (negligence) to uncover any helpful provisions that could delay or close immigration detention centers. Throughout our exploration of these statutes, this Comment used case law, case studies, and hypotheticals to understand in more detail the ways these laws could be helpful. Afterwards, this Comment discussed the importance of acknowledging the United States' role in forced migration, and possible alternatives to immigration detention. In the end, this collection of environmental statutes is not a cure-all method of slaying the monster that is immigration detention.¹⁸³ However, my hope is that this Comment may serve as a guide or a starting point for detention abolitionists, and that environmental law becomes one of thousands of tools in an immigration advocate's belt.

183. In fact, these environmental statutes work most effectively when employed in tandem, not piecemeal (see the Glades County example).

