ENTER AT YOUR OWN RISK: CRIMINALIZING ASYLUM-SEEKERS

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ABSTRACT

In nearly three years in office, President Donald J. Trump's war against immigrants and the foreign-born seems only to have intensified. Through a series of Executive Branch actions and policies rather than legislation, the Trump Administration has targeted immigrants and visitors from Muslim-majority countries, imposed quotas on and drastically reduced the independence of Immigration Court Judges, cut the number of refugees admitted by more than 80%, cancelled DACA (Deferred Action for Childhood Arrivals), and stationed Immigration Customs and Enforcement ("ICE") agents at state courtrooms to arrest unauthorized immigrants, intimidating them from participating as witnesses and litigants. Although initially saying that only unauthorized immigrants convicted of serious crimes would be prioritized for deportation, the Trump Administration has implicitly given ICE officers *carte blanche* to arrest unauthorized immigrants anytime, anywhere, creating a climate of fear in immigrant communities.

Particularly disturbing is the targeting of asylum-seekers, employing the criminal justice system and the illegal entry statute in

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the "zero tolerance policy." Under this policy, children, including toddlers, are seized and languish for months and years separate from their families, many of whom are seeking asylum. Directly contrary to federal statute and international law, another policy makes anyone who enters the country without inspection ineligible for asylum. Kirstjen Nielsen, Trump's second Secretary of the Department of Homeland Security ("DHS"), ordered asylum applicants to await the lengthy processing of their claims in cartel-ruled border areas of Mexico, with no realistic safe shelter and deprived of all meaningful opportunity to exercise their statutorily-guaranteed right to access to counsel—a necessity, given today's convoluted asylum law.

Trump's first Attorney General, Jefferson Sessions, largely disqualified as grounds for asylum even the most brutal and terroristic persecution of women and violence perpetrated by inescapable quasi-state gang actors. Customs and Border Protection ("CBP") officers mislead asylum-seekers at the southern border, telling them they don't have the right to apply for asylum or saying yes, they may apply, but admitting only a minute fraction of those who present themselves for processing at ports of entry. President Trump's Administration refuses to grant parole or reasonable bond even to those asylum-seekers who establish a credible fear of persecution, frequently resulting in long-term detention, and forcing on detained asylum-seekers the Hobson's choice of lengthy incarceration in terrible conditions in the United States or the risks of persecution and death in their countries of origin.

International law prohibits using the criminal justice system or prolonged administrative detention to deter and discourage *bona fide* asylum-seekers from asserting and proving their claims. We suggest two remedies: Federal courts should enforce article 31 of the 1951 Refugee Convention (1) by prohibiting criminal charges of unlawful entry against *bona fide* asylum-seekers until they complete the asylum application process and are denied asylum; and (2) by requiring parole or reasonable bond for asylum-seekers who pass fair credible fear interviews. The article argues that *bona fide* asylum-seekers should be kept in detention only for a short period, if at all, to determine whether they have a credible fear of persecution.

Article 31 of the Refugee Convention, made binding on the United States through our accession to the 1967 Refugee Protocol, generally prohibits "impos[ing] penalties, on account of their illegal entry or presence, on refugees . . . where their life or freedom was threatened." "Penalties" clearly must include not only criminal prosecution and prison, but also prolonged immigration detention and

the seizure of children from parents without good cause, for "deterrence" purposes. We argue also that customary international law and human rights treaties support the recommended remedies and stand squarely against the Trump Administration's policies. Federal courts may utilize customary international law directly or through the *Charming Betsy* canon.

Not only do the Trump Administration's harsh immigration policies and practices violate international law and American values, but also foretell a government tending toward exclusion, racism, nationalism, parochialism, authoritarianism, and disregard of the rule of law. The parallels between the Trump Administration and Hungary's autocratic, essentially one-party, state, are chilling. *See* Patrick Kingsley, *He Used to Call Victor Orban an Ally. Now He Calls Him a Symbol of Fascism,* N.Y. TIMES (Mar. 15, 2019), https://www.nytimes.com/2019/03/15/world/europe/viktor-orban-hungary-ivanyi.html (on file with the *Columbia Human Rights Law Review*).

Federal courts, however, have both the authority and the responsibility to enforce the 1951 Refugee Convention and the 1967 Refugee Protocol as well as international human rights norms to protect asylum-seekers from criminal prosecution and from prolonged detention. The Framers of the United States Constitution and its key amendments envisioned that federal courts would apply treaties as the rule of decision to protect foreigners and would serve as a check upon an Executive that tramples on individual rights, particularly the rights of a vulnerable minority. Given the outlandish behavior of this Administration, federal courts must live up to that vision.

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INTRODUCTION

Led by authoritarian Prime Minister Viktor Orbán, Hungary has virtually closed its border to asylum-seekers from Syria, Sudan, and other countries. The few who are admitted to Hungarian "transit zones" generally are denied asylum and are given only three days to appeal, which they must do themselves in written Hungarian without a lawyer.[1] In June 2018, the Hungarian Parliament enacted a statute making it a criminal offense punishable by up to one year in prison for any person to "'enable[] illegal immigration . . .' defined [as] . . . helping asylum-seekers who are 'not eligible for protection. . . .' includ[ing] [prohibiting any person from] 'border monitoring,' producing and disseminating information [about the asylum process], or 'network building.'"[2]

In November 2018, U.N. inspectors went to Hungary to ensure that its immigration centers met international standards. The Hungarian government refused them access. Mr. Orbán also refused to comply with the European Union's order to admit 2,000 refugees as part of Hungary's obligation as an EU member.[3] An imposing Hungarian-built barbed wire fence, reinforced with drones and heat sensors, traverses the entire border between Hungry and Serbia. The state-controlled Hungarian media refers to immigrants, including

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1. *See* Elisabeth Zerofsky, *Viktor Orbán's Far-Right Vision for Europe*, NEW YORKER (Jan. 14, 2019), https://www.newyorker.com/magazine/2019/01/14/viktor-orbans-far-right-vision-for-europe [https://perma.cc/9JHL-C9HS].

2. *Hungary: Bill Makes Aiding Migrants a Crime*, HUMAN RIGHTS WATCH (May 31, 2018), https://www.hrw.org/news/2018/05/31/hungary-bill-makes-aiding-migrants-crime [https://perma.cc/K468-XUG4] ("[I]f committed 'regularly,' or with the aim of 'help[ing] several persons,' the offense would be considered aggravated."). (second alteration in original); *see also* Patrick Kingsley, *Hungary Criminalizes Aiding Illegal Immigrants*, N.Y. TIMES (June 20, 2018), https://www.nytimes.com/2018/06/20/world/europe/hungary-stop-soros-law.html (on file with the *Columbia Human Rights Law Review*) (discussing statute criminalizing aid to undocumented migrants).

3. James Kanter, *E.U. Countries Must Accept Their Share of Migrants, Court Rules*, N.Y. TIMES (Sept. 6, 2017), https://www.nytimes.com/2017/09/06/world/europe/eu-migrants-hungary-slovakia.html (on file with the *Columbia Human Rights Law Review*); European Court of Justice Press Release No 91/17, Judgment in Joined C-643/15 and C-647/15, Slovakia and Hungary v. Council (Sept. 6, 2017), https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf [https://perma.cc/U9LE-P2NE].

asylum-seekers, as undesirables and criminals.[4] The Parliament, dominated by Orbán's Fidesz party, enacted a statute to detain asylum-seekers, including children, during the entire course of the asylum procedure.[5]

Aside from its anti-immigration policies, the Fidesz party pushed through a new constitution, gerrymandered election districts, virtually eliminated the independent judiciary, took over the state media, and enabled large portions of the private media to be "bought up by pro-Orbán oligarchs."[6] These disturbing policies have effectively made Hungary a one-party state[7] and an example of new authoritarianism in Europe.[8]

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4. A young immigrant girl came home from her Hungarian public school, crying because a banner had been displayed in her school, saying, "No Refugees." *See* Zerofsky, *supra* note 1; *see also* Zach Beauchamp, *It Happened There: How Democracy Died in Hungary*, VOX (Sept. 13, 2018), https://www.vox.com/policy-and-politics/2018/9/13/17823488/hungary-democracy-authoritarianism-trump [https://perma.cc/VJB5-655H] (describing how Orbán and Fidesz used anti-democratic tactics to consolidate power).

5. *See* HUMAN RIGHTS WATCH, *supra* note 2.

6. *Hungary's Viktor Orban Condemns EU 'Blackmail', Vows to Block Illegal Migrants*, FRANCE 24 (Nov. 9, 2018), https://www.france24.com/en/20180911-hungary-viktor-orban-european-union-migrants-corruption-media-soros [https://perma.cc/KP4F-7X5S].

7. *See* Zack Beauchamp, *Hungary's Leader Is Waging War on Democracy. Today, He's at the White House*, VOX (May 13, 2019), https://www.vox.com/policy-and-politics/2019/5/13/18564378/donald-trump-viktor-orban-white-house-visit-2019 [https://perma.cc/HJ6L-RAGS] (providing a step-by-step description of how Orbán and Fidesz rapidly transformed Hungary from a strong democracy into an avowedly "illiberal," "Christian" autocracy, and describing implications of President Trump's and the Republican Party's adoption of similar systematic tactics and enthusiastic endorsement of Orbán). The European Parliament has imposed sanctions on Hungary "for flouting EU rules on democracy, civil rights and corruption." Alistair MacDonald, *EU Parliament Pushes Hungary Sanctions over Orban Policies*, REUTERS (Sept. 12, 2018), https://www.reuters.com/article/us-eu-hungary/eu-parliament-pushes-hungary-sanctions-over-orban-policies-idUSKCN1LS1QS [https://perma.cc/9G39-4RB9].

8. *See The Situation in Hungary*, Resolution on Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded, EUR. PARL. DOC. P8_TA(2018)0340 (2018), http://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.pdf [https://perma.cc/EPF3-WFQ2]. Notably, Orban was the first world leader to publicly support Mr. Trump's 2016 Presidential Campaign *see also* Kingsley, *supra* note 2.

Hungary is not the only government to use criminal law and prolonged detention against the foreign-born. United States President Donald J. Trump has likewise demonized immigrants.[9] Although all

9. *See* Susan F. Martin, *Trump's Asylum Policy Is Eerily Similar to America's During the Holocaust*, FORTUNE (June 19, 2018), https://fortune.com/2018/06/19/refugees-asylum-seekers-separation-families-children-border-holocaust/ [https://perma.cc/P2Z9-P9VE]. It is not hyperbole to state that from the moment of his inauguration, the Trump Administration has metaphorically gone to war against immigrants, both lawful and undocumented. *See, e.g.*, Bob Hennelly, *What if Trump's War on Immigrants Is Not Just Cruel and Lawless But Is a Dead End for the Economy?*, SALON (Apr. 14, 2019), https://www.salon.com/2019/04/14/what-if-trumps-war-on-immigrants-is-not-just-cruel-and-lawless-but-is-a-dead-end-for-the-economy/ [https://perma.cc/WU3D-WBDY] (explaining the economic impacts of reducing immigration); Matt Ford, *Trump's War on the Rule of Law Is Reaching the Breaking Point*, NEW REPUBLIC (Apr. 9, 2019), https://newrepublic.com/article/153536/trumps-war-rule-law-reaching-breaking-point [https://perma.cc/4WUD-Q2ZP] ("There's a disturbing cycle to Donald Trump's war on immigrants."); Chas Danner, *The Long-Term Damage of Trump's War on Immigrants,* NEW YORKER (Apr. 7, 2019), http://tiny.cc/bmj85y [https://perma.cc/GL35-8SPH]; Masha Gessen, *Trump's New War on Immigrants*, NEW YORKER (Aug. 10, 2018), https://www.newyorker.com/news/our-columnists/trumps-new-war-on-immigrants [https://perma.cc/5J8P-PYDH] Juan Escalante, *2018 Was The Year Donald Trump Declared Total War on Immigrants*, HUFFINGTON POST (Dec. 26, 2018), http://tiny.cc/5pj85y [https://perma.cc/XT7A-FJBL]. For an overview of how and why Trump can use his executive authority to wage this war, *see* Kimberly J. Winbush, Annotation, *Issuance of Presidential Executive Orders Concerning Immigration or Immigrants*, 25 A.L.R. Fed. 3d Art. 2 (2017).

A necessarily incomplete list of this Administration's attacks on immigrants, compiled by co-author Vanessa Merton, is appended as "The Trump Administration's Policies and Practices Toward Asylum Applicants and Refugees" and will be posted at a URL available by email to vmerton@law.pace.edu. It is difficult to keep it up to date, because almost every week new policies are promulgated (often in violation of Administrative Procedure Act requirements) that are designed to make it more difficult and expensive to apply for any type of lawful entry or status, to get accurate and timely decisions on those applications, and to appeal or challenge incorrect decisions. *See infra passim*. The American Immigration Lawyers Association (AILA), a membership organization joined by most expert immigration lawyers who represent immigrants, has found an artful metaphor for the massive policy changes under this Administration: the "Invisible Wall." *See* AM. IMMIGRATION LAWYERS ASS'N, DECONSTRUCTING THE INVISIBLE WALL: HOW POLICY CHANGES BY THE TRUMP ADMINISTRATION ARE SLOWING AND RESTRICTING LEGAL ADMINISTRATION (Mar. 19, 2018); *see also Featured Issue: Changes in USCIS Policy Under the Trump Administration*, AM. IMMIGRATION LAWYERS ASS'N (Sept. 2020, 2019), https://www.aila.org/advo-media/issues/all/featured-issue-changes-in-uscis-policy-under [https://perma.cc/62HY-ZMSL] (collection of news articles about changes in U.S. Citizenship and Immigration Services policy).

reliable studies demonstrate that immigrants commit fewer crimes per capita than native-born American citizens and many studies indicate that immigrants significantly help the economy,[10] the Trump

10. *See* the recent review of decades of academic expert studies issued by the highly conservative Cato Institute, which found "All immigrants have a lower criminal incarceration rate and there are lower crime rates in the neighborhoods where they live, according to the near-unanimous findings of the peer-reviewed evidence. . . . Illegal immigrant incarceration rates are about half those of native-born Americans in 2017. In the same year, legal immigrant incarceration rates are then again half those of illegal immigrants. . . . crime along the Mexican border is much lower than in the rest of the country, homicide rates in Mexican states bordering the United States are not correlated with homicide rates here, El Paso's border fence did not lower crime, Texas criminal conviction rates remain low (but not as low) when recidivism is factored in, and that police clearance rates are not lower in states with many illegal immigrants—which means that they don't escape conviction by leaving the country after committing crimes. . . . [H]igher illegal immigrant populations [are correlated with] large and significantly associated reductions in drug arrests, drug overdose deaths, and DUI arrests with no significant relationship between increased illegal immigration and DUI deaths." Alex Nowrasteh, *Illegal Immigrants and Crime—Assessing the Evidence*, CATO INST.: CATO AT LIBERTY (Mar. 4, 2019), https://www.cato.org/blog/illegal-immigrants-crime-assessing-evidence [https://perma.cc/76JV-GHLW]; *The Effects of Immigration on the United States' Economy*, PENN WHARTON BUDGET MODEL (June 27, 2016), https://budgetmodel.wharton.upenn.edu/issues/2016/1/27/the-effects-of-immigration-on-the-united-states-economy [https://perma.cc/7XMM-DT5W] (finding immigration does not slow wage growth for native-born workers); Gretchen Frazee, *4 Myths About How Immigrants Affect the Economy*, PBS NEWS HOUR (Nov. 2, 2018), https://www.pbs.org/newshour/economy/making-sense/4-myths-about-how-immigrants-affect-the-u-s-economy [https://perma.cc/AH9G-2P3Q] (refuting misconceptions about economic impacts of immigration); Ryan Nunn, Jimmy O'Donnell & Jay Shambaugh, *Economic Facts: A Dozen Facts About Immigration*, THE HAMILTON PROJECT (Oct. 9, 2018), https://www.hamiltonproject.org/papers/a_dozen_facts_about_immigration [https://perma.cc/6369-MX4T] (noting output in U.S. economy is higher and grows faster with more immigrants; small impact of immigration on low-skilled native-born wages; and immigration to the United States does not increase crime rate); Alexia Fernández Campbell, *These Immigrants Contribute $4.6 Billion in Taxes. Trump's Trying to Strip Their Legal Status*, VOX (Apr. 17, 2019), https://www.vox.com/policy-and-politics/2019/4/17/18411975/tps-immigrants-pay-billions-in-taxes [https://perma.cc/SXE7-24H3] (demonstrating that President Trump is trying to terminate Temporary Protected Status (TPS) for thousands of immigrants who pay taxes, mortgages, rents, and contribute to the economy); Nina Roberts, *Undocumented Immigrants Quietly Pay Billions into Social Security and Receive No Benefits*, AMERICAN PUBLIC MEDIA: MARKETPLACE (Jan. 28, 2019), https://www.marketplace.org/2019/01/28/undocumented-immigrants-quietly-pay-billions-social-security-and-receive-no/ [https://perma.cc/YLS9-YKZ7] (noting that in one year, undocumented immigrants contributed $13 billion to Social Security and $3 billion to Medicare).

campaign portrayed immigrants as largely criminal, labelling Mexican immigrants as "rapists."[11] As President, Mr. Trump has continued to highlight immigrant crime all out of proportion to reality.[12]

Mr. Trump appointed as his first Attorney General the most conservative and anti-immigrant sitting Senator, Jefferson Sessions.[13] Mr. Sessions, and his anti-immigration counterparts the Secretaries of State and Homeland Security, pressured if not ordered the Departments of State, Justice, Homeland Security—and their subsidiary agencies, including Customs and Border Protection ("CBP"), Immigration and Customs Enforcement ("ICE"), and the Executive Office of Immigration Review, which includes the Board of Immigration Appeals ("BIA") and Immigration Court Judges ("IJs")—to harshly enforce immigration laws.[14] At times, these laws

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11. Anthony Rivas, *Trump's Language About Mexican Immigrants under Scrutiny in Wake of El Paso Shooting*, ABC NEWS (Aug. 4, 2019), https://abcnews.go.com/US/trumps-language-mexican-immigrants-scrutiny-wake-el-paso/story?id=64768566 [https://perma.cc/47XF-9FPR].

12. *See* Lomi Kriel, *Trump Presses Border Crisis in McAllen, but Reality Is Different*, HOUSTON CHRONICLE (Jan. 10, 2019), https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-presses-border-crisis-in-McAllen-but-13525102.php [https://perma.cc/F5D8-MUMG] (noting that, contrary to President Trump's rhetoric, official sources report that majority of drugs, criminals, and suspected terrorists entering United States arrive by air or through ports of entry; the current wave of family migrants seek out U.S. officials to surrender and seek asylum, rather than evade capture); *IntelBrief: Terrorism in the West: Comparing the Threat in Europe and the U.S.*, SOUFAN CENTER (Jan. 9, 2019), https://thesoufancenter.org/intelbrief-terrorism-in-the-west-comparing-the-threat-in-europe-and-the-u-s/ [https://perma.cc/6S62-EJF3] (finding in 2018 just one death in the United States as result of jihadi-linked terrorism, while native-born right-wing terrorists killed fifteen Americans; terrorism threat in Europe qualitatively different from threat posed to the United States).

13. Eric Lichtblau & Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General, Capping Bitter Battle*, N.Y. TIMES (Feb. 8, 2017), https://www.nytimes.com/2017/02/08/us/politics/jeff-sessions-attorney-general-confirmation.html (on file with the *Columbia Human Rights Law Review*).

14. Mr. Trump also appointed people with strong anti-immigrant and anti-immigration views to head the key Cabinet departments that control and implement immigration policy: the Departments of State, Justice, and Homeland Security. *See, e.g.*, Peter Baker, *Pitched as Calming Force, John Kelly Instead Mirrors Boss's Priorities*, N.Y. TIMES (Oct. 25, 2017), https://www.nytimes.com/2017/10/25/us/politics/trump-kelly.html (on file with the *Columbia Human Rights Law Review*) (reporting that former Department of Homeland Security ("DHS") Secretary Kelly said, "If it were up to him, . . . the number [of refugees admitted into the United States] would be between zero and one."); *see also* Bill Chappell &

Jessica Taylor, *Defiant Homeland Security Secretary Defends Family Separations*, NPR (June 18, 2018), https://www.npr.org/2018/06/18/620972542/we-do-not-have-a-policy-of-separating-families-dhs-secretary-nielsen-says [https://perma.cc/K6WC-CE5K] (reporting that DHS Secretary Kirstjen Nielsen, who succeeded Kelly, defended the policy of separating immigrant children from their parents and claimed that the children were not to be used as "a pawn"). Secretary Nielsen initially denied the existence of the policy to Congress but later began defending it. *See* Brian Tashman, *ACLU Report: Kirstjen Nielsen Continues to Insist That There Is No Family Separation Policy*, https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/kirstjen-nielsen-continues-insist-there-no [https://perma.cc/G5JA-8CMM]. Despite her unstinting loyalty to Mr. Trump's war on immigrants, he still fired Secretary Nielsen for failing to be tough enough. *See* Zolan Kanno-Youngs et al., *Kirstjen Nielsen Resigns as Trump's Homeland Security Secretary*, N.Y. TIMES (Apr. 7, 2019), https://www.nytimes.com/2019/04/07/us/politics/kirstjen-nielsen-dhs-resigns.html (on file with the *Columbia Human Rights Law Review*) (indicating that DHS Secretary Nielsen's willingness to cage children and authorize turning away asylum-seekers, contrary to national and international law, was insufficiently aggressive for Mr. Trump because she advised against closing entire border with Mexico); Jamelle Bouie, *Who Is Left to Say No to Trump?*, N.Y. TIMES (Apr. 8, 2019), https://www.nytimes.com/2019/04/08/opinion/kirstjen-nielsen-trump-border.html (on file with the *Columbia Human Rights Law Review*).

The most notoriously extremist anti-immigrant power broker in the federal government is Presidential Senior Staff Stephen Miller, whose ties to white supremacist and nationalist organizations have been manifest. *See* Mike DeBonis, Rachael Bade & Felicia Sonmez, *Democrats Take Aim at Miller as Questions Persist About 'Sanctuary City' Targeting*, WASH. POST (Apr. 14, 2019), https://www.washingtonpost.com/powerpost/democrats-take-aim-at-miller-as-questions-persist-about-sanctuary-city-targeting/2019/04/14/61824ef4-5ed5-11e9-9ff2-abc984dc9eec_story.html (on file with the *Columbia Human Rights Law Review*) (identifying Miller as the "common thread" in Trump Administration's most controversial immigration policies and "[seemingly] the boss of everybody on immigration"); Abigail Tracy, *"He Actually Prefers the Chaos": Stephen Miller, Immigration Warlord, Emerges from the Shadows*, VANITY FAIR (Apr. 14, 2019), https://www.vanityfair.com/news/2019/04/stephen-miller-dhs-purge-kirstjen-nielsen-immigration [https:// perma.cc/J6KK-NBFX] (noting the dividing line in Trump Administration is between immigration officials who respect the law and those willing to break it); Kim Belware, *Leaked Stephen Miller Emails Suggest Trump's Point Man on Immigration Promoted White Nationalism*, WASH. POST (NOV. 12, 2019), https://www.washingtonpost.com/politics/2019/11/12/leaked-stephen-miller-emails-suggest-trumps-point-man-immigration-promoted-white-nationalism/ (on file with the *Columbia Human Rights Law Review*); Michael Edison Hayden, Report: *Stephen Miller's Affinity for White Nationalism Revealed in Leaked E-mails,* SOUTHERN POVERTY LAW CENTER (NOV. 12, 2019) https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails [https://perma.cc/BB37-EP2C] (content analysis of more than 900 emails Miller sent to Breitbart News during 2015-2016 period; more than 80% focus on race and/or immigration issues with extensive

are used to retaliate against activists, journalists, and even IJs who express the slightest resistance to, or merely report on, his policies. This type of wholesale hijacking of legal authority to marginalize opposition was not seen in the United States even during the Holocaust era of abandonment of refugees.[15]

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reference to the supposed evils of nonwhite immigration and apprehension about nonwhite crime).

15. Holocaust Memorial Museum, Voyage of the St. Louis, Holocaust Encyclopedia, https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267 [https://perma.cc/4LMB-DJJA] (describing the voyage of the St. Louis, a ship that in 1938 travelled from Hamburg, Germany, with over 900 Jewish refugees, almost all of whom were denied entry in Havana, Cuba; the St. Louis was not allowed to dock in Miami, and was compelled to return to Europe. Over 250 of the Jewish passengers were killed in the Holocaust.). *See 'Saving Lives Is Not a Crime': Politically Motivated Legal Harassment of Migrant Human Rights Defenders by the USA*, AMNESTY INT'L (July 2, 2019), https://www.amnestyusa.org/reports/saving-lives-is-not-a-crime-politically-motivated-legal-harassment-of-migrant-human-rights-defenders-by-the-usa/ [https://perma.cc/634Z-K647] (reporting that U.S. authorities have unlawfully targeted human rights defenders, that the DHS has violated domestic and international law, and that the United States and Mexico have collaborated in their abuses); Sam Knight, *Pattern of Deportation as Retaliation Emerging in Trump Era*, DISTRICT SENTINEL (Mar. 22, 2017), https://www.districtsentinel.com/pattern-deportation-retaliation-emerging-trump-era/ [https://perma.cc/62SD-R8AD]; Max Rivlin-Nadler, *Journalists, Lawyers, Volunteers Face Increased Scrutiny By Border Agents*, NPR (Feb. 15, 2019), https://www.npr.org/2019/02/15/695164916/journalists-lawyers-volunteers-face-increased-scrutiny-by-border-agents [https://perma.cc/NX2R-ESBF]; COMMITTEE TO PROTECT JOURNALISTS, *Nothing to Declare: Why U.S. Border Agency's Vast Stop and Search Powers Undermine Press Freedom* (Oct. 22, 2018) https://cpj.org/reports/2018/10/nothing-to-declare-us-border-search-phone-press-freedom-cbp.php [https://perma.cc/PA6Q-PVAN]; Julia Ainsley, *U.S. Officials Made List of Reporters, Lawyers, Activists to Question at Border*, NBC NEWS (Mar. 6, 2019), https://www.nbcnews.com/politics/immigration/u-s-officials-made-list-reporters-lawyers-activists-question-border-n980301?fbclid=IwAR2SPKjoPYuwVPn0Fgf3gpCmujnkSN9kn2oSX6uGvwokfQKhsJCFq-gpZFc [https://perma.cc/NE8R-7839] (list includes ten journalists, seven of them U.S. citizens, a U.S.-based attorney, and others labeled as organizers and "instigators," 31 of whom are U.S. citizens; by the time the list was compiled, 12 had already been subject to additional questioning during border crossings and nine had been arrested); Michelle Chen, *Trump's Crackdown on Immigrant Activists Is an Attack on Free Speech*, NATION (Oct. 30, 2018), https://www.thenation.com/article/ravi-ragbir-deportation-free-speech/ [https://perma.cc/RT4L-D6JQ]; Maria Sacchetti & David Weigel, *ICE Has Detained or Deported Prominent Immigration Activists*, WASH. POST (Jan. 19, 2018), https://www.washingtonpost.com/powerpost/ice-has-detained-or-deported-foreigners-who-are-also-immigration-activists/2018/01/19/377af23a-fc95-11e7-a46b-a3614530bd87_story.html (on file with the *Columbia Human Rights Law Review*).

The Trump Administration's harsh immigration policies and practices violate international law generally, international human rights and refugee law more specifically, and basic norms of morality and humanity.[16] This Article analyzes only one aspect of the Trump Administration's breaches of international law: its policies and practices that penalize asylum-seekers in contravention of the 1951 Refugee Convention and the 1967 Refugee Protocol.[17]

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16. *Cf.* Robert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT'L REV. RED CROSS 125, 128–29 (1997) (noting that while international humanitarian law is developing, populations "remain under the protection . . . of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience").

17. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter "1951 Refugee Convention"]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter "1967 Refugee Protocol"].

In July 2019, the Trump Administration issued perhaps its most restrictive order against asylum-seekers yet, precluding them from even applying for asylum if they have travelled through another country before reaching the southern land border with the United States—i.e., if they are not able to arrive by boat or airplane—and did not apply for asylum in the countries of transit. *See* Michael D. Shear & Zolan Kanno-Youngs*, Most Migrants at Border with Mexico Would Be Denied Asylum Protections Under New Trump Rule*, N.Y. TIMES (July 15, 2019), https://www.nytimes.com/2019/07/15/us/politics/trump-asylum-rule.html (on file with the *Columbia Human Rights Law Review)*.

This purported rule directly contradicts not only the international law incorporated into domestic law, but a Congressional statute: Immigration and Nationality Act (INA) § 208(a)(1) (emphasis added) ("Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section.") as well as the Congressionally crafted scheme defining "firm resettlement" as a bar to asylum claims, *see* 8 U.S.C. §§ 1158(a)(2)(A) and 1158(b)(2)(A)(vi) (noncitizen ineligible for asylum in the United States only if "firmly resettled in another country prior to arriving in the United States."). Related provisions of the INA were at issue in another Interim Final Rule issued in November 2018, which sought to prevent asylum-seekers who enter the United States other than through a Port of Entry from qualifying for asylum. *See infra* note 60 and accompanying text. The U.S. Circuit Court of Appeals for the Ninth Circuit in December 2018 issued a preliminary injunction against that regulation, *see* East Bay Covenant Sanctuary, et. al. v. Trump, 3:18-cv-6810-JST (N.D Cal. November 19, 2018) (Motion for Temporary Restraining Order), application for stay pending appeal denied sur nom. Trump v. East Bay Sanctuary Covenant, 139 S.Ct. 782 (Mem) (2018).

Part I of this article extensively details the Trump Administration's policies toward immigrants generally and more specifically toward asylum-seekers, and briefly contrasts those policies and practices with those of his predecessors. Part II analyzes the relevant articles of the 1951 Refugee Convention and the 1967 Refugee Protocol, including their historical context and various interpretations. Part II analyzes analogous customary international law governing refugees and discusses the practice of states. Part III argues that Articles 31(1) and 33(1) of the 1951 Refugee Convention are self-executing and, consequently, should be the rule of decision when processing asylum-seekers. Since Article 31(1) expressly forbids imposing "penalties" on refugees for their unlawful presence, the United States Justice Department may not criminally prosecute individuals with a *prima facie* case for asylum until the asylum case

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On July 16, 2019, the ACLU, Southern Poverty Law Center, and the Center for Constitutional Rights filed a legal challenge to this latest Rule, seeking a preliminary and permanent injunction against its implementation, in the Northern District Court of California: East Bay Sanctuary et al. v. Barr, 3:19-cv-04073 (N.D. Cal. July 16, 2019)(Complaint for Declaratory and Injunctive Relief) ("as part of our nation's commitment to the protection of people fleeing persecution and consistent with our international obligations, it is longstanding federal law that merely transiting through a third country is not a basis to categorically deny asylum"), https://www.dropbox.com/s/4wckd0ol9hhusb8/1-main.pdf?dl=0. *See also* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Capital Area Immigrants' Rights Coalition v. Donald J. Trump, cv 1:19-02117 (D. D.C. July 16, 2019) (challenging this IFR as contrary to both international law and the *Charming Betsy* canon, as well as the INA), https://www.scribd.com/document/417970461/7-16-19-Capital-Area-Immigrants-Rights-Coalition-Motion-for-TRO#download [https://perma.cc/3C7X-U8SL].

As trenchantly put by ACLU attorney Lee Gelernt, "This is the Trump administration's most extreme run at an asylum ban yet. It clearly violates domestic and international law, and cannot stand." *SPLC Sues Trump Administration Over New Rule That Makes Migrants Who Pass Through Other Countries Ineligible For Asylum* (July 16, 2019), https://www.splcenter.org/news/2019/07/17/splc-sues-trump-administration-over-new-rule-makes-migrants-who-pass-through-other [https://perma.cc/P9AL-B5EV]. However, in September 2019, the injunctions against the so-called "Third Country Rule" were stayed by the Supreme Court. Barr v. East Bay Sanctuary Covenant, 588 S.Ct. ----, 2019 WL 4292781 (Mem) (September 11, 2019) (district court's July 2019 preliminary injunction against enforcement of the Rule, and September 2019 order restoring the nationwide scope of that injunction, stayed pending disposition of government appeal in the Ninth Circuit and government's petition for writ of certiorari, if one is filed).

is concluded.[18] The article concludes with the argument that Article 31(1) and customary international human rights law permit at most brief detention of *bona fide* asylum seekers and unquestionably prohibit the seizure of infants and children from their parents or lawful guardians.

I. THE TRUMP ADMINISTRATION'S POLICIES AND PRACTICES TOWARD ASYLUM-SEEKERS

According to the U.N. High Commissioner for Refugees ("UNHCR"), there are over sixty-seven million refugees, stateless persons, returnees, and internally displaced persons around the world.[19] Over 70.8 million people have been forced from their homes—the highest number of displaced people ever recorded, substantially exceeding the number after World War II.[20] The most obvious causes of this huge number include war and internal conflict;

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18. 1951 Refugee Convention, *supra* note 17, art. 31(1). The U.N. High Commissioner for Refugees' authoritative refugee handbook identifies the "core principles" of the 1951 Convention as "non-discrimination, *non-refoulement*, *nonpenalization for illegal entry or stay*, and the acquisition and enjoyment of rights over time." U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION 8 (re-issued Feb. 2019) (emphasis added), http://www.unhcr.org/en-us/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html [https://perma.cc/B2UX-JCB4].

19. UNHCR, UNHCR GLOBAL APPEAL 2018-2019 14, https://www.unhcr.org/en-us/publications/fundraising/5a0c05027/unhcr-global-appeal-2018-2019-full-report.html?query=refugees%20in%20the%20world [https://perma.cc/J2TM-WZAQ].

20. *Figures at a Glance*, UNHCR (June 19, 2019), https://www.unhcr.org/en-us/figures-at-a-glance.html [https://perma.cc/B4GJ-WMYG]; *see also* Adrian Edwards, *Forced Displacement at Record 68.5 Million*, UNHCR (June 19, 2018), http://www.unhcr.org/en-us/news/stories/2018/ 6/5b222c494/forced-displacement-record-685-million.html [https://perma.cc/W5GG-S8A8] (reporting that global trends show 68.5 million refugees at the end of 2017). Concerning the number of refugees during and immediately after World War II, *see* Lydia DePillis, Kulwant Saluja & Denise Lu, *A Visual Guide to 75 Years of Major Refugee Crises Around the World,* WASH. POST (Dec. 21, 2015), https://www.washingtonpost.com/graphics/world/historical-migrant-crisis/ (on file with the *Columbia Human Rights Law Review)* (reporting that World War II displaced approximately 40 million Europeans between 1940 and 1945, and that post-World War II conflicts displaced approximately 1 million Russians, Ukrainians, and Belarusians between 1948 and 1950 and approximately 13 million Germans from the Soviet Union, Czechoslovakia, and Poland between 1940 and 1950).

climate change; gross human rights violations; organized crime proto- and quasi-states; and severe economic exploitation—principally in the Global South. This unprecedented wave of refugees has coincided with tectonic political and economic shifts following the 9/11 attacks; the United States' involvement in wars and failed states in Iraq, Afghanistan, Libya, Syria, Yemen, and other Islamic countries; the 2008 worldwide economic crisis; increasing globalization; and the digitizing and growing automation of the economies of developed countries. Prompting steep increases in perceived economic and military insecurity, these events, together with the increasing realization by white Americans that they will be in the minority in the next decade or so,[21] seem to have contributed to the ever more vehement opposition by many Americans to immigration and immigrants from certain countries.[22]

Elected in part by promoting and riding this burgeoning anti-immigrant and white nationalist sentiment, [23] President Trump

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21. *See* William H. Frey, *Less than Half of US Children Under 15 Are White, Census Shows*, BROOKINGS INST. (June 24, 2019), https://www.brookings.edu/research/less-than-half-of-us-children-under-15-are-white-census-shows/ [https://perma.cc/N6KB-6YTH]; Thomas B. Edsall, *Who's Afraid of a White Minority?*, N.Y. TIMES (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/opinion/america-white-minority-majority.html (on file with the *Columbia Human Rights Law Review*) (showing the perception versus the reality of the coming white minority predicted by Census Bureau).

22. *See* Stef W. Kight, *America's Majority Minority Future*, AXIOS (Apr. 29, 2019), https://www.axios.com/when-american-minorities-become-the-majority-d8b3ee00-e4f3-4993-8481-93a290fdb057.html [https://perma.cc/89J5-LLK9]; Ryan W. Miller, *46% of Whites Worry Becoming a Majority-Minority Nation Will 'Weaken American Culture,' Survey Says*, USA TODAY (Mar. 21, 2019), https://www.usatoday.com/story/news/nation/2019/03/21/pew-survey-whites-fearful-minority-country-will-weaken-american-culture/3217218002/ [https://perma.cc/S542-EZKJ] (reporting that a Pew Research national survey on perceptions of USA future "speaks for itself . . . suggests concern broadly held by whites about a majority-minority country").

23. It is indisputable that President Trump has singled out immigrants from Latino and Muslim countries. *See, e.g.*, Clyde Haberman, *Trump's Argument Against Immigrants: We've Heard It Before*, N.Y. TIMES (Oct. 9, 2017), https://www.nytimes.com/2017/10/09/us/retro-anti-immigration.html (on file with the *Columbia Human Rights Law Review)* (comparing nineteenth-century treatment of Chinese and Irish immigrants, early twentieth-century treatment of Eastern European Jewish and Southern Italian immigrants, World War II treatment of Japanese-Americans, and California's Proposition 187 to current treatment of Latinos and Muslims); *see also* Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 197 (Mar. 2019), https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/02/71-

promptly adopted harsh policies and practices against both unauthorized and legal immigration. In 2018, President Trump's Justice Department imposed quotas on immigration judges, requiring them to complete 700 cases a year and ensure that fewer than 15% of their decisions are remanded on appeal;[24] cut the number of refugees

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Stan.-L.-Rev.-Srikantiah-Sinnar.pdf [https://perma.cc/YT46-JPX8] (providing exhaustive catalogue of Mr. Trump's racially disparaging statements or actions); David Leonhardt & Ian Prasad Philbrick, *Donald Trump's Racism: The Definitive List, Updated*, N.Y. TIMES (Jan. 15, 2018, updated July 2019), https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html (on file with the *Columbia Human Rights Law* Review) (listing examples of Donald Trump's racist statements and actions), culminating in Mr. Trump's embrace of the traditional chant of racial hatred and "ugly, lawless, racist sentiment": "Send her back!" by an adoring crowd that had been whipped into a frenzy with his denunciations of four Congresswomen of color, see David Leonhardt, *So This Is Where We Are*, N.Y. TIMES (July 18, 2019), https://www.nytimes.com/2019/07/18/opinion/trump-ilhan-omar-rally.html (on file with the Columbia Human Rights Law Review).

Political, social, and media leaders condemned Mr. Trump's initial "why don't you go back [where you came from]" "tweet" addressed to the same Congresswomen, with the exception of almost any Republican politician, as evinced in the vote on a censure resolution in the House of Representatives, Read the House Resolution Condemning 'Trump's Racist Comments Directed at Members of Congress, H. RES. 489 (July 15, 2019), N.Y. Times (July 16, 2019), https://www.nytimes.com/2019/07/16/us/politics/house-resolution-trump.html (on file with the Columbia Human Rights Law Review). *See also* Lara Takenaga and Aidan Gardiner, *16,000 Readers Shared Their Experiences of Being Told to 'Go Back.' Here Are Some of Their Stories*, N.Y. TIMES (July 19, 2019); Bruce Haring, *Hollywood, Politicians, Media Defend 'The Squad' After Trump "Go Home" Remarks*, DEADLINE (July 14, 2019) https://deadline.com/2019/07/hollywood-politicians-media-defend-the-squad-after-trump-go-home-remarks-1202646116/ (on file with the Columbia Human Rights Law Review).

24. The quotas are constantly updated in red-yellow-green "dashboards" that automatically appear on judges' computer screens, resembling the way piecework is tracked. For a comprehensive description of how Trump Administration policies are curtailing genuine judicial independence in the Immigration Courts, perhaps the current best source is the continuing blog, "Opinions/Analysis on Immigration Law," of former Immigration Court Judge and BIA Senior Staff Advisor Jeffrey S. Chase. *See, e.g.,* the transcript of his March 28, 2019 lecture at Cornell Law School, *The Immigration Court: Issues and Solutions*, OPINIONS/ANALYSIS ON IMMIGRATION LAW (Mar. 28, 2019), https://www.jeffreyschase.com/blog/2019/3/28/i6el1do6l5p443u1nkf8vwr28dv9qi [https://perma.cc/L7AR-ER4U] (transcript of lecture). *See also* Laura Meckler, *New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations*, WALL ST. J. (Apr. 2, 2018), https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158 (on file with the *Columbia Human Rights Law Review*).

admitted by almost 80%;[25] cancelled DACA (Deferred Action for Childhood Arrivals),[26] authorized ICE agents to arrest immigrants who are using the court system affirmatively or defensively;[27]

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25. Michael J. Shear and Zolan Kanno-Youngs, *Trump Slashes Refugee Cap to 18,000, Curtailing U.S. Role as Haven*, N. Y. Times (Sept. 26, 2019), https://www.nytimes.com/2019/09/26/us/politics/trump-refugees.html (on file with the *Columbia Human Rights Law Review*) (reduction to 18,000 is staggering when compared to the Obama Administration's cap in the 2016 fiscal year of 110,000 refugees).

26. DACA was instituted by the Obama Administration in 2012 to enable qualified children involuntarily brought to the USA to apply for temporary deferral of deportation as a matter of prosecutorial discretion. Cancelling DACA eliminated legal protection for about 700,000 children and youth. *See Deferred Action for Childhood Arrivals (DACA) Data Tools*, MIGRATION POLICY INST. (Aug. 2018), https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles [https://perma.cc/GC2P-DTJY]; Adam Edelman, *Trump Ends DACA Program, No New Applications Accepted*, NBC NEWS (Sept. 5, 2017), https://www.nbcnews.com/politics/immigration/trump-dreamers-daca-immigration-announcement-n798686 [https://perma.cc/D3UG-VRPW].

Implementation of this Draconian measure was temporarily limited by a complex set of legal actions in multiple jurisdictions, ultimately consolidated before the Supreme Court. Dept. of Homeland Security v. Regents of Univ. of CA., consolidating Trump, President of U.S v. NAACP and Mcaleenan, Sec. of Homeland Security v. Vidal, https://www.supremecourt.gov/grantednotedlist/19grantednotedlist [https://perma.cc/U889-V4R6]. For a description of the Supreme Court argument on November 12, 2019 (and of Mr. Trump's Tweet that morning, claiming with either profound ignorance or cynical mendacity that "Many of the people in DACA . . . are far from 'angels'. Some are very tough, hardened criminals," although DACA status is precluded by or revocable for any significant criminal record or perceived threat to national security or public safety. S*ee* DHS Memorandum*, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/4F9W-D44G]); *see also* Adam Liptak, *Supreme Court Appears Ready to Let Trump End DACA Program*, N.Y. TIMES (Nov. 12, 2019) https://www.nytimes.com/2019/11/12/us/supreme-court-dreamers.html (on file with the *Columbia Human Rights Law Review*).

27. *See generally* Michelle Chen, *Kicking ICE out of the Courthouses,* NATION (Sept. 5, 2018), https://www.thenation.com/article/kicking-ice-out-of-the-courthouses/ [https://perma.cc/EL2N-53Y8] (reporting on the significant rise in immigration arrests at local and state court houses). In response to the disruptive effect of this practice on the ability of both lawful and unauthorized immigrants to participate in the judicial system as crime victims, witnesses, or litigants, the New York State Unified Court System's Office of the Chief Administrative Judge issued a new court rule prohibiting federal immigration officials from arresting individuals inside New York state court buildings without a federal judicial arrest warrant for a specific individual. Office of the Chief Admin. Judge, N.Y. State

militarized the southern—and only the southern—border with thousands of deployed troops and combat equipment,[28] in keeping with his troubling reference to immigrants as an invasion;[29] employed administrative removals to summarily deport immigrants; [30] and

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Unified Court Sys., *Protocol Governing Activities in Courthouses by Law Enforcement Agencies*, https://www.immigrantdefenseproject.org/wp-content/uploads/OCA-ICE-Directive.pdf [https://perma.cc/P9X7-YQLD]. *See also* Immigrant Defense Project, The New York Protect Our Courts Act, https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Courthouse-Model-Guide.pdf.

In June 2019, in a case brought by state prosecutors alleging that ICE activity was causing major disruption of the state criminal justice system, a federal judge enjoined ICE from making arrests for civil immigration violations in Massachusetts courts, on courthouse steps, and in courthouse parking lots. These state prosecutors have been viciously attacked, by name, by Mr. Trump, who called them "people that [sic] probably don't mind crime." *See* Alanna Durkin Richer, *Judge Halts Immigration Arrests at Massachusetts Courts*, ASSOCIATED PRESS (June 20, 2019), https://www.apnews.com/4826abde814749bd9bc54119037263c5 [https://perma.cc/C2QS-3HZ2] *See also* Akliah Johnson, *ICE Arrests at Courthouses Disrupt Justice, Lawsuit Claims*, BOSTON GLOBE (Mar. 16, 2018), https://www.bostonglobe.com/metro/2018/03/15/ice-arrests-courthouses-are-disrupting-justice-two-lawsuits-claim/N7IhXiHlEuw3Qdz1XDlt4I/story.html (on file with the *Columbia Human Rights Law Review*) ("According to the suit, ICE has been arresting immigrants—both those in the country legally and illegally—at state courthouses in Massachusetts with increasing frequency since President Trump took office."). *See also* Jeff Gammage, *ICE to Cease Arrests In Philly Courthouses, Agree to New Rules of Conduct, Says Sheriff's Department*, PHILADELPHIA INQUIRER (Apr. 5, 2019), https://www.inquirer.com/news/ice-immigration-immigrants-courts-arrests-sheriffs-department-20190405.html?__vfz=medium%3Dsharebar.

The right of concerned citizens to document the behavior of ICE officers engaging in this abusive practice has also been sharply challenged. *See* Media Lab, "Eyes on Courts," https://lab.witness.org/eyes-on-courts-documenting-ice-arrests/ [https://perma.cc/97DC-8HKV].

28. *See Moving People and Materials: CBP and DoD Unite to Tackle Logistics of Operation Secure Line*, U.S. CUSTOMS & BORDER PROTECTION (Nov. 26, 2018), https://www.cbp.gov/newsroom/spotlights/moving-people-and-materials-cbp-and-dod-unite-tackle-logistics-operation-secure [https://perma.cc/QN8L-3LAF].

29. *See, e.g.*, Kathryn Krawczyk, *Trump Just Called Immigration an 'Invasion.' So Did the New Zealand Shooter*, WEEK (Mar. 15, 2019), https://theweek.com/speedreads/829486/trump-just-called-immigration-invasion-did-new-zealand-shooter [https://perma.cc/E4ES-XFR5] (comparing Donald Trump's use of the word "invasion" to the New Zealand shooter's rhetoric).

30. *See* Daniella Silva, *Trump Calls for Deporting Migrants 'Immediately' Without a Trial*, NBC NEWS (June 24, 2018), https://www.nbcnews.com/politics/immigration/trump-calls-deporting-migrants-immediately-without-trial-n886141 [https://perma.cc/XQS2-35Y3] (reporting that Mr. Trump tweeted, "when

ordered cancellation of Temporary Protected Status ("TPS") for residents of six countries.[31] Although the Trump Administration

somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came").

31 . The Trump Administration ordered termination of Temporary Protected Status for U.S. residents from the countries of El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan. *See* Alan Gomez, *Trump Orders 200,000 Salvadorans to Leave U.S.*, USA TODAY (Jan. 8, 2018), https://www.usatoday.com/story/news/world/2018/01/08/reports-trump-order-200-000-salvadorans-leave-u-s/1012345001/ [https://perma.cc/2A8U-GXNT]; Jonathan Blitzer, *The Battle Inside the Trump Administration Over T.P.S.*, NEW YORKER (May 11, 2018), https://www.newyorker.com/news/daily-comment/the-battle-inside-the-trump-administration-over-tps?reload=true [https://perma.cc/V24X-7QXB]; David Leblang et al., *By Ending 'Temporary Protected Status' for Half a Million People, Trump Has Probably Increased Illegal Migration*, WASH. POST (Aug. 7, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/07/by-ending-temporary-protected-status-for-half-a-million-people-trump-has-probably-increased-illegal-migration/ (on file with the *Columbia Human Rights Law Review*).

For the current status of litigation temporarily protecting TPS beneficiaries, *see* Ramos v. Nielsen, No. 18-cv-01554 (N.D. Cal. Oct. 3, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/ramos-v-nielsen-order-granting-preliminary-injunction-case-18-cv-01554-emc.pdf [https://perma.cc/6EXJ-HUZS] (preliminary injunction halting enforcement based on sufficient evidence that discriminatory purpose motivated decisions to terminate the TPS designations of Sudan, Haiti, Nicaragua, and El Salvador, indicating that (1) DHS Acting Secretary was influenced by President Trump and/or White House officials such as Stephen Miller in TPS decision-making; and (2) President Trump's expressed animus against non-white, non-European immigrants); Saget v. Trump, No. 18-cv-1599 (E.D.N.Y. Apr. 11, 2019), http://nipnlg.org/PDFs/practitioners/our_lit/impact_litigation/2019_12Apr_tps-haiti-prelim-injunt.pdf [https://perma.cc/HQH5-FM45] (holding that plaintiffs are likely to succeed on merits of claim that DHS Secretary did not conduct good-faith, evidence-based factual review when determining whether to extend Haitian TPS, but was instead improperly influenced by White House officials' political motivations, in violation of Administrative Procedures Act); Bhattarai v. Nielsen, No. 19-cv-731 (N.D. Cal. Mar. 12, 2019), https://www.aclusocal.org/sites/default/files/aclu_socal_bhattarai_20190312_stipulation_stay.pdf [https://perma.cc/FS6X-CURX] (stipulating stay maintaining TPS for Nepal and Honduras pending resolution of Ramos v. Nielsen); *see generally Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status [https://perma.cc/5PXP-89A2] (providing information on current TPS administrative stances and ongoing litigation).

In September 2019, the Trump administration concluded a so-called "safe third country agreement" with El Salvador, requiring migrants travelling through El Salvador to first seek asylum in that cartel-riven country. Zolan Kanno-Youngs & Elisabeth Malkin, *U.S. Agreement With El Salvador Seeks to Divert Asylum Seekers,* N.Y. TIMES (Sept. 20, 2019), https://www.nytimes.com/2019/09/20/us/

initially said that only unauthorized immigrants convicted of serious crimes would be prioritized for deportation,[32] it has implicitly given ICE officers *carte blanche* to arrest unauthorized immigrants anytime, anywhere, creating a climate of fear in immigrant communities, and, somewhat ironically, substantially reducing the deportation of people actually convicted of significant crimes.[33]

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politics/us-asylum-el-salvador.html (on file with the *Columbia Human Rights Law Review*. As part of the accord, the Trump Administration (reversing its previous position) agreed to extend TPS to Salvadorans until January 4, 2021. Miriam Jordan & Kirk Semple, *U.S. Extends Temporary Work Permits for El Salvador Immigrants,* N.Y. TIMES (Oct. 28, 2019), https://www.nytimes.com/2019/10/28/us/el-salvador-temporary-protected-status-tps.html (on file with the *Columbia Human Rights Law Review*).

32. In 1996, Congress enacted a statute changing the word for deportation to "removal." *See Deportation*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/tools/glossary/deportation. In this article, however, we use the word "deportation" instead of "removal" because the former term is more readily and easily understood.

33 . Alan Gomez, *ICE Arresting More Non-Criminal Undocumented Immigrants*, USA TODAY (May 17, 2018), https://www.usatoday.com/story/news/nation/2018/05/17/ice-arresting-more-non-criminal-undocumented-immigrants/620361002 [https://perma.cc/JV7G-7WEN] (noting that, during the Trump Administration, ICE agents have arrested on average 4,143 undocumented immigrants without a criminal record each month, whereas in the last two years of the Obama administration, agents averaged 1,703 a month); American Immigration Council, *The End of Immigration Enforcement Priorities Under the Trump Administration* (Mar. 7, 2018), https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration [https://perma.cc/7EWM-CRAB] (indicating that the Trump Administration has broadened enforcement priorities to afford ICE officers greater power to remove unauthorized immigrants than exercised in other administrations); *see also ICE Focus Shifts Away from Detaining Serious Criminals*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (June 25, 2019), https://trac.syr.edu/immigration/reports/564/ [https://perma.cc/CN6R-3H5W] (stating that the number of ICE detainees was up 22% from September 2016; the most striking change over the 27-month period was a dramatic drop in the number of detainees who had committed serious crimes); *Profiling Who ICE Detains—Few Committed Any Crime*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Oct. 9, 2018), https://trac.syr.edu/immigration/reports/530/ [https://perma.cc/WS4Z-B8ES] (stating that 58% of individuals in ICE custody had no criminal record; four out of five either have no record or committed only a minor offense such as traffic violation).

In June 2019, Mr. Trump announced—on Twitter—the impending arrest of "millions" of immigrants, not at or near the border but in several major metropolitan areas—apparently more retaliation for the "sanctuary" policies often denounced by President Trump, then-Attorney General Jeff Sessions, and other Administration officials. *See, e.g.,* Mike DeBonis, Rachael Bade & Felicia Sonmez,

A. Treating All Irregular Immigrants as Criminals

Attorney General Sessions initiated the policy of criminally prosecuting all immigrants, including first-time entrants, who entered the United States without inspection.[34] On April 6, 2017, Mr. Sessions formally declared his "zero tolerance" policy—every person who crossed the "Southwest" border (but not the Canadian border) without inspection would be "criminally prosecuted for illegal entry or illegal reentry."[35] Sessions directed all U.S. Attorneys to prioritize prosecuting noncitizens for smuggling (broadly defined[36]) and illegal

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Democrats Take Aim at Miller as Questions Persist About 'Sanctuary City' Targeting, WASH. POST (Apr. 10, 2019) at https://www.washingtonpost.com/powerpost/democrats-take-aim-at-miller-as-questions-persist-about-sanctuary-city-targeting/2019/04/14/61824ef4-5ed5-11e9-9ff2-abc984dc9eec_story.html (on file with the *Columbia Human Rights Law Review*); Nick Miroff & Maria Sacchetti, *Trump Vows Mass Immigration Arrests, Removals of 'Millions of Illegal Aliens' Starting Next Week*, WASH. POST (June 17, 2019), https://www.washingtonpost.com/immigration/trump-vows-mass-immigration-arrests-removals-of-millions-of-illegal-aliens-starting-next-week/2019/06/17/4e366f5e-916d-11e9-aadb-74e6b2b46f6a_story.html (on file with the *Columbia Human Rights Law Review*).

Three days after announcing the threatened mass arrests of undocumented immigrants, the President began his re-election campaign. *Trump, at Rally in Florida, Kicks Off His 2020 Re-election Bid*, (June 18, 2019), https://www.nytimes.com/2019/06/18/us/politics/donald-trump-rally-orlando.html (on file with the *Columbia Human Rights Law Review*). Within a matter of days Mr. Trump delayed his directive, stating that Democrats had two weeks to change the asylum law. National Public Radio, *Trump Delays Immigration Raids, Giving Democrats 'Two Weeks' To Change Asylum Laws* (June 22, 2019) at https://www.npr.org/2019/06/22/735083190/trump-delays-immigration-raids-giving-democrats-two-weeks-to-reform-asylum-laws [https://perma.cc/QR7K-LCTM].

After the Democrats repudiated Mr. Trump's demand, the massive raids still did not materialize, but nonetheless spread fear in immigrant communities. *See* Joseph Zeballos-Roig, *ICE Arrested Only 35 Migrants in Trump-Announced Immigration Sweep Targeting Thousands of People*, BUSINESS INSIDER (July 23, 2019), https://www.businessinsider.com/ice-arrested-dozens-trump-announced-immigration-sweep-targeting-thousands-2019-7 [https://perma.cc/MN4C-RTS9].

34. *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry*, U.S. DEP'T OF JUSTICE (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/8KVS-UQZ3].

35. Memorandum from the Attorney Gen. to Fed. Prosecutors Along the Southwest Border (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download [https://perma.cc/54UM-5D99].

36 . On February 20, 2017, the Trump Administration released a memorandum directing DHS to take action against parents, family members, and any other individual who "directly or indirectly . . . facilitates the illegal

entry.[37] His policy included asylum-seekers and families with children—no exceptions. A month later, he explained what "zero tolerance" meant:

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smuggling or trafficking of an alien child into the United States." Memorandum from Sec'y John Kelly, Sec'y of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs and Border Prot., et al., ¶ M (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [https://perma.cc/FLF5-98LF]; *see also* Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (ordering the detention and removal of individuals apprehended at the southern border).

This provision is so broad that it could include persons who help to arrange a child's travel to the United States, help pay for a guide for the child's journey to the United States, or otherwise encourage the child to enter the United States. The memorandum directs that enforcement against parents, family members, or other individuals involved in the child's unlawful entry into the United States could include (but is not limited to) placing such person in removal proceedings if they are removable, or referring them for criminal prosecution.

As of June 29, 2017, ICE confirmed that it has begun targeting individuals in the United States who may have paid a guide to smuggle children into the United States. Although ICE has failed to disclose details regarding the scope or length of this enforcement action, its apparent focus is on "sponsors" (individuals, often parents or other close family members, who agree to provide a safe appropriate home for children awaiting immigration processing). This means that individuals who sponsor a child to facilitate the child's release from immigration detention are likely themselves at increased risk. ALISON KAMHI & RACHEL PRANDINI, ALIEN SMUGGLING: WHAT IT IS AND HOW IT CAN AFFECT IMMIGRANTS (July 18, 2017), https://www.ilrc.org/sites/default/files/resources/alien_smuggling_practice_advisory-20170728.pdf [https://perma.cc/5RM2-SUAL].

The 1996 Immigration Act had expanded the definition of smuggling to remove the requirement of financial gain, and technically include helping one's own accompanying minor child or relative to enter the country without inspection. Immigration and Nationality Act, 8 U.S.C.A. §§ 1182, 1227(a)(1)(E)(i) (2018); H.R. Rep. No. 104-828 (1996) (Conf. Rep.). However, this interpretation had rarely been utilized in previous administrations. *See* PUBLIC COUNSEL & CATHOLIC LEGAL IMMIGRATION NETWORK, INC., PRACTICE ADVISORY: WORKING WITH CHILD CLIENTS AND THEIR FAMILY MEMBERS IN LIGHT OF THE TRUMP ADMINISTRATION'S FOCUS ON "SMUGGLERS" 5–6 (July 2017), https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Working-with-Child-Clients-and-Their-Family-Members-in-Light-of-the-Trump-Administrations-Focus-on-Smugglers.pdf [https://perma.cc/YHZ5-GEBR].

37. Memorandum from Attorney Gen. Jeff Sessions to United States Attorneys (Apr. 8, 2017), https://www.justice.gov/opa/speech/file/956856/download [https://perma.cc/S7LF-7MKR] (encouraging greater enforcement of 8 U.S.C. § 1324 ("[b]ringing in and harboring certain aliens") and 8 U.S.C. § 1325 (unlawful entry into the United States, "[i]mproper entry by alien," and other offenses)). This memorandum ordered the U.S. Attorneys to prioritize felony illegal entry (entry after two or more prior illegal entries). Later Sessions' policy

> I have put in place a "zero tolerance" policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It's that simple. If you smuggle illegal aliens across our border, then we will prosecute you. If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law. If you make false statements to an immigration officer or file a fraudulent asylum claim, that's a felony. If you help others to do so, that's a felony, too. You're going to jail. So if you are going to come to this country, come here legally. Don't come here illegally.[38]

B. Employing the Pretext of Criminality to Take More than 5000 Children from Their Parents

The Trump Administration seized on the so-called nuclear option of "zero tolerance"[39] to deliberately separate noncitizens from their children on the theory that such violent disruption of people's lives would deter other would-be immigrants from coming to the United States.[40] Former DHS Secretary and then-Presidential Chief

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directives focused on first-time entrants. *See* Sarah N. Lynch & Mica Rosenberg, *U.S. Attorney General Renews Calls to Prosecute First-time Border Crossers*, REUTERS (Apr. 6, 2018), https://www.reuters.com/article/us-usa-immigration/u-s-attorney-general-renews-calls-to-prosecute-first-time-border-crossers-idUSKCN1HD2VM [https://perma.cc/E2Q8-N598].

38. Attorney General Jeff Sessions, U.S. Dep't of Justice, Remarks Discussing the Immigration Enforcement Actions of the Trump Administration, (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions [https://perma.cc/A6NW-EBDJ].

39. *See* Julie Hirschfeld Davis & Michael D. Shear, *How Trump Came to Enforce a Practice of Separating Migrant Families*, N.Y. TIMES (June 16, 2018), https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html (on file with the *Columbia Human Rights Law Review*). *See generally* JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, BORDER WARS: INSIDE TRUMP'S ASSAULT ON IMMIGRATION (published October 8, 2019) (reviewed at Joe Klein, *How Donald Trump's Obsession with Immigrants Has Shaped His Presidency*, N.Y TIMES (Oct. 8, 2019), https://www.nytimes.com/2019/10/08/books/review/border-wars-julie-hirschfeld-davis-michael-d-shear.html (on file with the *Columbia Human Rights Law Review*)). For a good summary of the legal history of this policy, *see* Shane Dizon & Pooja Dadhania, Immigr. L. Serv. § 2:154.50: Inspection and Admission of Persons Seeking Entry to the United States (2d ed. 2018–19).

40. *See* Chappell & Taylor, *supra* note 14; *see also* L. v. United States Immigration & Customs Enf't, 302 F. Supp. 3d 1149, 1166–67 (S.D. Cal. 2018)

of Staff John Kelly said, "a big name of the game is deterrence . . . [F]amily separation would be a tough deterrent."[41] In prior administrations, first-time entrants were usually placed in administrative (civil immigration) detention.[42] In civil detention, unlike federal penal custody, children can stay with their parents.[43]

(holding that the Trump Administration's zero tolerance policy involving the separation of families as a means of deterrence is a violation of the constitutional protection of family integrity); Tal Kopan, *Exclusive: Trump Admin Thought Family Separations Would Deter Immigrants. They Haven't.*, CNN (June 18, 2018), https://www.cnn.com/2018/06/18/politics/family-separation-deterrence-dhs/index.html [https://perma.cc/E7NT-JYGN] (writing that Mr. Trump's zero-tolerance policy was intended to deter illegal entry into the United States by promising prosecution and potential family separation); Miriam Jordan, *More Migrants Are Crossing the Border This Year. What's Changed?*, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/us/crossing-the-border-statistics.html (on file with the *Columbia Human Rights Law Review*) (stating that the zero-tolerance policy is not deterring families fleeing violence and corruption, although fewer single males seeking employment are being apprehended).

41. Chappell & Taylor, *supra* note 14; *see also* Julia Ainsley, *Trump Admin Weighed Targeting Migrant Families, Speeding up Deportation of Children*, NBC (Jan. 17, 2019), https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811 [https://perma.cc/6QQG-WY8E] (examining a 2017 draft of the Trump Administration's family separation policy).

42. *See* Linda Qiu, *Fact-Checking Trump's Family Separation Claim About Obama's Policy*, N.Y. TIMES (Apr. 9, 2019), https://www.nytimes.com/2019/04/09/us/politics/fact-check-family-separation-obama.html (on file with the *Columbia Human Rights Law Review*) ("[T]op [Trump Administration] officials countered that Mr. Trump's predecessors had also separated families at the border. That is misleading. While previous administrations did break up families, it was rare. . . . Neither former Presidents George W. Bush nor Barack Obama had a policy that had the effect of widespread family separation . . . . Nothing like what the Trump administration is doing has occurred before."); *see also* Salvador Rizzo, *The Facts About Trump's Policy of Separating Families at the Border*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/ (on file with the *Columbia Human Rights Law Review*) (noting that in past administrations immigrants seeking asylum were "were released and went into the civil court system, but now the parents are being detained and sent to criminal courts . . . .").

43. *See* Seung Min Kim, *7 Questions About the Family-Separation Policy, Answered*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/politics/q-and-a-understanding-the-controversy-over-separating-families-at-the-border/2018/06/19/8a61664a-73fb-11e8-be2f-d40578877b7b_story.html (on file with the *Columbia Human Rights Law Review*). *See also* Salvador Rizzo, *supra* note 42.

It is critical to stress that, despite obfuscation to the contrary, the Trump Administration is not *required* by any law to separate young children from their families:

> The president and top administration officials say U.S. laws or court rulings are forcing them to separate families that are caught trying to cross the southern border. These claims are false. Immigrant families are being separated primarily because the Trump administration in April began to prosecute as many border-crossing offenses as possible. This "zero-tolerance policy" applies to all adults, regardless of whether they cross alone or with their children. The Justice Department can't prosecute children along with their parents, so the natural result of the zero-tolerance policy has been a sharp rise in family separations. . . . *The Trump administration implemented this policy by choice and could end it by choice. No law or court ruling mandates family separations*.[44]

After nation-wide outcry, President Trump stated that he halted this program, but, as of late 2019, thousands of children are still separated from their parents or close relatives, whose whereabouts are essentially unknown. [45] According to the

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44. Salvador Rizzo, *supra* note 42 (emphasis added). "Administration officials have pointed to "the law" as the reason why undocumented children are being separated from their parents. But there's no such law. . . . There is no law that requires migrant children who arrive at the border to be separated from their parents. The separation practice began in earnest when Attorney General Jeff Sessions announced in early May that the departments of Justice and Homeland Security would work together to criminally prosecute everyone who crosses the border illegally—the "zero tolerance" policy. "If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law," Sessions said in Scottsdale, Ariz., on May 7. That tactic, in effect, directly leads to migrant children being separated from their parents; kids cannot be held in criminal jails alongside their mother or father." Seung Min Kim, *supra* note 44.

45. In January 2019, the Inspector General of the Department of Health and Human Services identified 2,737 immigrant children whom the government had separated from their parents, but noted that there may have been "thousands" more. U.S. DEP'T OF HEALTH AND HUMAN SERVS. OFFICE OF INSPECTOR GENERAL, OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (Jan. 2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf [https://perma.cc/5DSV-6V23]. Recently, the true number of

Administration itself, in court filings, it may take at least a year and potentially two years before these children can be reunited with their families because the government made no effort to keep track of information about either the children or their relatives prior to April 2018.[46] Advocates were reduced to recommending that the names, birthdates, and, when known, "Alien Numbers" of parents or siblings be written in indelible ink on the backs of children, with the thought that children would be less likely to wash ink off their backs.[47] Before Mr. Trump ostensibly stopped the policy, hundreds of immigrant parents had been deported to their countries of origin without their children.[48] The young sons and daughters of these immigrants were left in locked residential facilities or in foster care to fend for themselves.[49] No proceeding determined that their parents were unfit

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children separated from family at the border since July 2017 has been revealed to be almost double that number, at least 5400. *See, e.g.*, ASSOCIATED PRESS, *More than 5,400 Children Split at Border, According to New Count* (Oct. 25, 2019), https://www.nbcnews.com/news/us-news/more-5-400-children-split-border-according-new-count-n1071791 [https://perma.cc/38X9-WTUY].

46. *See* Julia Jacobs, *U.S. Says It Could Take Two Years to Identify up to Thousands of Separated Immigrant Families*, N.Y. TIMES (Apr. 6, 2019), https://www.nytimes.com/2019/04/06/us/family-separation-trump-administration.html (on file with the *Columbia Human Rights Law Review*).

47 . Lorelei Williams, Esq., Chair, New York City AILA Chapter, Presentation (Apr. 9, 2019) (notes on file with author) (describing her multiple trips to asylum-seeker border camps and caravans and working with NGOs trying to provide food, water, clothing, and minimal shelter and protection to the refugees).

48. *See* John Bacon, *Are Immigrant Family Reunions Likely? 463 Parents May Have Been Deported Without Kids*, USA TODAY (July 24, 2018), https://www.usatoday.com/story/news/nation/2018/07/24/immigration-parents-mayhave-been-deported-without-kids/824904002/ [https://perma.cc/NF4K-GS58]; *see also New Details on Border Patrol Arrests*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (June 27, 2018), http://trac.syr.edu/immigration/reports/518/ [https://perma.cc/M5ZR-RPFP] (finding "[a] total of 1,060 out of the 4,537 adults arrested in April 2018 with children already had been deported."); Miriam Jordan, *'I Can't Go Without My Son,' a Mother Pleaded as She Was Deported to Guatemala*, N.Y. TIMES (June 17, 2018), https://www.nytimes.com/2018/06/17/us/immigration-deported-parents.html (on file with the *Columbia Human Rights Law Review*); Graham Kates, *Migrant Children at the Border—The Facts*, CBS NEWS (June 20, 2018), https://www.cbsnews.com/news/migrant-children-at-the-border-by-the-numbers/ [https://perma.cc/8N5E-AYZF].

49. *See* Emily Atkin, *The Uncertain Fate of Migrant Children Sent to Foster Care*, NEW REPUBLIC (June 20, 2018), https://newrepublic.com/article/149161/uncertain-fate-migrant-children-sent-foster-care [https://perma.cc/57VW-QT6Z]. At the more than one hundred federally contracted "shelters," children are not free to leave. The large, understaffed facilities have been denounced as hotbeds of

illness and danger by Congressional leaders and criticized even by the Inspector General of the Department of Health and Human Services ("HHS"). As of December 2018, the shelters were at 92% capacity with about 15,000 children detained, despite the fact that sponsors (usually family members residing in the United States) have applied for the release of thousands of the children pending resolution of their immigration proceedings. Release to sponsors is taking far longer than in prior administrations, in part because HHS now fingerprints sponsors to conduct a subsequent criminal background check. In contrast, staffers at the "shelter" facilities do not undergo the same kinds of background checks, and a horrifyingly high incidence of sexual assault on children has been documented by HHS and reported to Congress. *See* John Burnett, *Almost 15,000 Migrant Children Now Held at Nearly Full Shelters*, NPR (Dec. 13, 2018), https://www.npr.org/2018/12/13/676300525/almost-15-000-migrant-children-now-held-at-nearly-full-shelters [https://perma.cc/BAH3-GKHU]; Miriam Jordan, *Thousands of Migrant Children Could Be Released After Sponsor Policy Change*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/migrant-children-release-policy.html (on file with the *Columbia Human Rights Law Review*); Michael Grabell, Topher Sanders & Silvina Sterin Pensel, *In Immigrant Children's Shelters, Sexual Assault Cases Are Open and Shut*, PROPUBLICA (Dec. 21, 2018), https://www.propublica.org/article/boystown-immigrant-childrens-shelter-sexual-assault [https://perma.cc/V4GE-PPH2]; Kristen Martinez-Gugerli, *Reported Sex Abuse of Migrant Children in U.S. Custody Highlights Inadequacies in Immigration System*, PANORAMAS, UNIV. OF PITT. (Mar. 18, 2019), https://www.panoramas.pitt.edu/news-and-politics/reported-sex-abuse-migrant-children-us-custody-highlights-inadequacies-immigration [https://perma.cc/N4BC-QGRP].

HHS has also deliberately discouraged eligible sponsors from coming forward to claim children by reporting sponsors' background information to ICE; at least 170 potential sponsors who appeared to be undocumented have been targeted and arrested by ICE. *See* Brian Tashman, *ACLU Report: Kirstjen Nielsen Continues to Insist that There Is No Family Separation Policy*, https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/kirstjen-nielsen-continues-insist-there-no [https://perma.cc/G5JA-8CMM].

Finally, in an apparent attempt to hide the truth, ICE has sought permission from the National Archives and Records Administration ("NARA") to destroy the records of physical and sexual abuse of immigrants in its custody, which have been widely reported and the subject of federal civil rights action. *See* Records Schedules; Availability and Request for Comments, 82 Fed. Reg. 32,585, 32,586 (July 14, 2017); *see also* Victoria López, *ICE Plans to Start Destroying Records of Immigrant Abuse, Including Sexual Assault and Deaths in Custody*, ACLU (Aug. 28, 2017), https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/ice-plans-start-destroying-records-immigrant [https://perma.cc/C7ZV-DFDH] (reporting that "NARA has provisionally approved ICE's proposal" to destroy "11 kinds of records, including those related to sexual assaults, solitary confinement and even deaths of people in its custody"); *CIVIC Files Civil Rights Complaint on Rising Sexual Abuse in U.S. Immigration Detention Facilities*, CIVIC: BLOG (Apr. 11, 2017), http://www.endisolation.org/blog/archives/1221

or were otherwise abusive or neglectful. Even at the time that the program was formally and grudgingly disbanded—although it now appears DHS continues a *de facto* separation policy by claiming migrant parents present a risk to their children[50]—ICE and CBP had little information they could use to comply with the court-ordered reunification of the thousands of children whom the agencies had separated from their parents.[51]

[https://perma.cc/HA5M-G4JE] (detailing CIVIC's civil complaint against DHS regarding reported abuse and harassment at immigration detention facilities).

50. Lomi Kriel & Dug Begley, *Trump Administration Still Separating Hundreds of Migrant Children at the Border Through Often Questionable Claims of Danger*, HOUSTON CHRONICLE (June 22, 2019), https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-administration-still-separating-hundreds-of-14029494.php [https://perma.cc/DE8G-TDTU] (reporting that in 2018 "a federal judge ordered the government to reunify more than 2,800 children it had removed from their parents," but "the judge allowed [DHS] to continue separating families if the parent posed a danger to the child or had a serious criminal record or gang affiliation. . . . More than 700 children were taken from their parents or, in a few cases, from other relatives between June 2018 and May 2019").

51. Tal Kopan & Catherine E. Shoichet, *Only 54 Children To Be Reunited by Court Deadline, but Judge Praises 'Progress,'* CNN (July 9, 2018), https://www.cnn.com/2018/07/09/politics/family-separations-reunification-hearing/index.html [https://perma.cc/3DPZ-4A4D]; *see also* Catherine E. Shoichet, *Why It's Taking So Long for the Government to Reunite the Families It Separated*, CNN (July 10, 2018), https://www.cnn.com/2018/07/09/politics/family-separation-reunion-hurdles/index.html [https://perma.cc/NG7D-Y643] (reporting that the delay in reuniting separated families is due to: officials' failure to have a plan for reunification in place when the practice began, the fact that some parents had already been released from ICE custody and others deported, DHS' attempts to confirm parentage by using DNA testing, and the agency's lengthy process for releasing children from custody, including background checks and "suitability" determinations); Michael D. Shear, Zolan Kanno-Youngs & Maggie Haberman, *Trump Signals Even Fiercer Immigration Agenda, With a Possible Return of Family Separations*, N.Y. TIMES (Apr. 8, 2019), https://www.nytimes.com/2019/04/08/us/politics/trump-nielsen-family-separation.html (on file with the *Columbia Human Rights Law Review*) (reporting on a proposed Trump Administration policy called "binary choice," which would involve giving migrant parents "a choice of whether to voluntarily allow their children to be separated from them, or to waive their child's humanitarian protections so the family can be detained together, indefinitely, in jail-like conditions").

C. Radical Attempts to Sharply Reduce Asylum-Seekers' Rights to Assert Their Claims

1. Denying Bond (Bail) and Making "Detention" Intolerable

Almost as disquieting as the Trump Administration's child separation policy are its actions targeting asylum-seekers and refugees.[52] President Trump's first executive order called on the U.S. Department of Justice to make prosecutions of illegal entrants a "high priority," even though such cases already accounted for more than half of federal prosecutions.[53] Besides prosecuting first-time border entrants—including asylum-seekers—for illegal entry,[54] the

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52. Under the binding *Flores* settlement, the DHS "shall release a minor from its custody without unnecessary delay." Stipulated Settlement Agreement ¶14, Reno v. Flores, No. CV 85-4544 (C.D. Cal. Jan. 17, 1997). Rather than challenging the settlement, the Trump Administration is seeking to undermine it—and bypass a federal court finding that the settlement prohibits detention of children for more than twenty days—by issuing an interim regulation that permits DHS to detain immigrant children with their parents indefinitely during their immigration proceedings. *See* Dean DeChiaro, *Trump Administration Moves to Detain Immigrant Children Longer*, ROLL CALL (Sept. 6, 2018), https://www.rollcall.com/news/politics/trump-administration-detain-immigrant-children-longer [https://perma.cc/MFA3-F9TQ]. As the U.N. High Commissioner for Human Rights noted, "[c]hildren should never be detained for reasons related to their own or their parents' migration status. Detention is *never* in the best interests of the child and *always* constitutes a child rights violation." Press Release, United Nations Office of the High Commissioner for Human Rights, Briefing Note on Egypt, United States and Ethiopia (June 5, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/Display/News.aspx?NewsID=23174&LangID=E [https://perma.cc/6BM6-TBHC] (emphasis added).

53. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

54. Corinne Duffy, *New Analysis Reveals Increase in Prosecution of Asylum-seekers Under Trump Admin*, HUMAN RIGHTS FIRST (July 20, 2017), https://www.humanrightsfirst.org/press-release/new-analysis-reveals-increase-prosecution-asylum-seekers-under-trump-admin [https://perma.cc/TKJ6-BG2C] (finding that prosecutions for illegal entry, illegal reentry, and other immigration-related violations constituted 52% of federal prosecutions in 2016—these prosecutions increased by 27% from April to May 2017 when federal prosecutors began criminally prosecuting first-time entrants for illegal entry); *see also* Lisa Riordan Seville & Hannah Rappleye, *Trump Admin Ran 'Pilot Program' for Separating Migrant Families in 2017*, NBC NEWS (June 28, 2018), https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616 [https://perma.cc/8X67-UJX4] (reporting that prior to the Trump Administration's "zero-tolerance" policy, the government had separated at least 2,342 migrant children from their parents in a "pilot program" in El Paso, Texas due to criminal prosecutions).

Trump Administration had denied virtually all asylum-seekers parole or reasonable bond (that is, bail or some other form of release from detention) in their noncriminal immigration cases, regardless of the strength of their claims.[55] The Trump Administration kept asylum-seekers locked up in immigration detention until the ACLU obtained a district court order in July 2018 to stop the blanket denial of parole.[56] Despite the court order, ICE has reportedly rejected 75 percent of requests for parole made by asylum-seekers deemed to have a credible fear of persecution (often referred to as "passing the credible fear interview").[57] In comparison, the Obama Administration granted over 90 percent of such requests.[58]

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55. The practice of denying parole for asylum-seekers who passed their credible fear interviews became most salient in 2017 when the Administration departed from the 2009 directive requiring ICE officials to make individualized determinations for parole. Damus v. Nielsen, 313 F. Supp. 3d 317, 339 (D.D.C. 2018) (finding that from February to September of 2017, three field offices *denied 100% of parole applications* and two other field offices *denied 92 to 98% of parole applications*, as compared to previous years where ICE granted more than 90% of parole applications) (emphasis added). For particularly vivid and egregious examples of the detention of more than 100 Cuban asylum-seekers (who used to be greeted with open arms when allegedly fleeing from Castro) languishing for years in detention despite having passed credible fear interviews, *see Cuban Men Thrown into Louisiana Prisons Despite Legal Asylum Requests*, SOUTHERN POVERTY LAW CENTER, (Apr. 10, 2019), https://www.splcenter.org/news/2019/04/10/cuban-men-thrown-louisiana-prisons-despite-legal-asylum-requests [https://perma.cc/6CFY-C7DQ].

56. *Damus*, 313 F.Supp.3d at 323 (noting that the rate of parole grants "plummeted from over 90% [under the Obama Administration] to nearly zero" and entering a preliminary injunction on July 2, 2018 against the Department of Homeland Security to cease its wholesale denials of parole to asylum-seekers who passed credible fear interviews).

57. *See* Julián Aguilar, *ACLU Claims ICE Still Detaining Some Asylum-Seekers for No Reason Despite Court Order,* TEXAS TRIBUNE (Aug. 28, 2018), https://www.texastribune.org/2018/08/28/aclu-ice-still-detaining-some-asylum-seekers-no-reason/ [https://perma.cc/ZK8Z-KV4R] (noting that after a July 2018 federal court order, ICE began granting parole to only about 25 percent of those asylum-seekers demonstrating credible fear, as compared to 90 percent under the Obama Administration); *see also* Will Weissert & Emily Schmall, *'Credible Fear' for U.S. Asylum Harder to Prove Under Trump*, ASSOCIATED PRESS (July 16, 2018), https://www.apnews.com/a7c571cce7f94880816f2bb0e434ae80 [https://perma.cc/HFS2-N2S7] (noting that the Obama administration "allow[ed] many immigrants passing credible fear interviews to remain free while their asylum cases progressed"). President Trump and other members of his Administration have pejoratively characterized prior policies, which would allow most who pass a credible fear interview to qualify for bond, as "catch and release" (as if immigrants, including asylum-seekers, were some sort of gamefish or animal).

A recent decision of Attorney General William Barr will presumably enable ICE to deny bond to almost all asylum-seekers. On April 16, 2019, Mr. Barr overruled a George W. Bush-era Board of Immigration Appeals decision and codified ICE's bond denial practice with a directive to Immigration Judges that will further reduce meaningful access to asylum. Again exercising the unique power in our system of unilateral reversal of selected Board precedent, with no hint of deference to *stare decisis*, the Attorney General found that, except in extraordinarily limited cases, asylum-seekers who demonstrate a credible fear of persecution are no longer eligible for parole or reasonable bond.[59] By requiring asylum-seekers to remain incarcerated pending adjudication of their asylum claims, a process that now averages nearly two years,[60] the Trump Administration has

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See, e.g., Rafael Carranza, *Trump Administration Announces the End of 'Catch And Release'*; USA TODAY (Sept. 24, 2019), https://www.usatoday.com/story/news/nation/2019/09/23/trump-administration-announces-end-catch-and-release-kevin-mcaleenan/2425679001/ [https://perma.cc/K3UR-MC3L].

58. Aguilar, *supra* note 57.

59. *See* Matter of M-S-, 27 I. & N. Dec. 509, 518–19 (A.G. 2019) (holding that noncitizens initially placed in expedited removal proceedings are statutorily subject to mandatory detention during full removal proceedings, even when found to have a credible fear of persecution); *see also* Michael D. Shear & Katie Benner, *In New Effort to Deter Migrants, Barr Withholds Bail to Asylum Seekers*, N.Y. TIMES (Apr. 16, 2019), https://www.nytimes.com/2019/04/16/us/politics/barr-asylum-bail.html (on file with the *Columbia Human Rights Law Review*). In July 2019, a federal district court judge issued a decision in a class action reversing the Attorney General's ruling in *Matter of M-S-*, finding instead that the government must provide reasonably prompt bond hearings to asylum-seekers in Immigration Court and requiring Immigration Judges to grant bond unless the Department of Homeland Security can demonstrate good cause to keep the asylum-seeker in detention. *See* Noah Lanard, *Judge Blocks Trump Administration's Attempt to Subject Thousands of Asylum Seekers to Indefinite Detention*, MOTHER JONES (July 2, 2019), https://www.motherjones.com/politics/2019/07/judge-blocks-trump-administrations-attempt-to-subject-thousands-of-asylum-seekers-to-indefinite-detention/ [https://perma.cc/PV84-WMPH]; Padilla v. U.S. Immigration & Customs Enforcement, 379 F. Supp. 3d 1170, 1228 (W.D. Wash. 2019).

For an explanation of the Attorney-General's special prerogative to select and overrule or modify any decision of the Board of Immigration Appeals, and its prolific use in this Administration, *see* Jeffrey S. Chase, *The AG's Certifying of BIA Decisions,* OPINIONS/ANALYSIS ON IMMIGRATION LAW (Mar. 29, 2019), and references cited therein, https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions [https://perma.cc/MH54-REN4].

60. From the time President Trump took office in January 2017 through May 2018, Immigration Courts experienced a 32% increase in backlog, causing waiting times before an Individual Merits Hearing (fact-finding and decision proceeding) to vary enormously, depending on location. *See Immigration Court*

Backlog Jumps While Case Processing Slows, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (June 8, 2018), http://trac.syr.edu/immigration/reports/516/ [https://perma.cc/5LTE-M8QE]. Overall, the Immigration Court backlog (exacerbated by a five-week federal government shutdown precipitated by the President's attempt to force Congress to fund his obsession with a border wall) has ballooned by a stunning 49% during the first two years of the Trump Administration, surpassing one million pending cases for the first time. *See Immigration Court Backlog Surpasses One Million Cases*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Nov. 6, 2018), https://trac.syr.edu/immigration/reports/536/ [https://perma.cc/BDP8-YZLQ]; *Immigration Court Workload in the Aftermath of the Shutdown*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Feb. 19, 2019), https://trac. syr.edu/immigration/reports/546/ [https://perma.cc/5W46-R876] (providing data on immigration backlog in February 2019). In some locations such as Houston, the wait averages 1,751 days; in other locations such as Dilley, Texas, 266 miles away, the wait may be only one to two months. *Id.*

The location of the detainee and thus the venue of the proceeding are initially entirely up to the DHS officer who issues the I-862 Notice to Appear advising the recipient of the location, date and time of the removal proceeding. Although generally cases are located near the place of arrest or apprehension, a DHS officer can make a case returnable in whatever Immigration Court s/he selects. Amer. Imm. Council, Practice Advisory, *Notices To Appear: Legal Challenges And Strategies* (updated Feb. 27, 2019) at 8-9, https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/notices_to_appear_practice_advisory.pdf [https://perma.cc/LC5L-AD29]. Detainees also can be transferred at will anywhere within the United States, which can result in a change of venue to a different Immigration Court. Since the issuing DHS officer largely determines where an asylum claim will be heard, the agency in turn controls the applicable legal standards that will be applied, because Immigration Courts follow precedent set by the Circuit Courts with jurisdiction over their geographic locations, and also the type of Immigration Court Judge likely to be assigned, which asylee advocates agree is perhaps the single most important factor (next to having counsel) in predicting the outcome of a claim. Roger Grantham, Jr., *Detainee Transfers and Immigration Judges: ICE Forum-Shopping Tactics in Removal Proceedings* (Feb. 18, 2019).53 GEORGIA L. REV. 281 (2018); *see also* TRAC, *Asylum Decisions by Custody, Representation, Nationality, Location, Month and Year, Outcome* (May 31, 2019), https://trac.syr.edu/phptools/immigration/asylum/; *Findings of Credible Fear Plummet Amid Widely Disparate Outcomes by Location and Judge* (July 30, 2018), https://trac.syr.edu/immigration/reports/523/; *Asylum Outcome Continues to Depend on the Judge Assigned* (Nov. 20, 2017) (odds of asylum denial range from, e.g., 10.9 percent to 98.7 percent depending upon the judge assigned), https://trac.syr.edu/immigration/reports/490/; *see also* SOUTHERN POVERTY LAW CENTER, *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool* (June 25, 2019) (impact on decision-making of highly politicized hiring and firing in Executive Office of Immigration Review, along with many other factors that contribute to random and arbitrary outcomes), https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool [https://perma.cc/Z3VZ-8JTS];

forced many *bona fide* asylum-seekers to give up their asylum claims. In effect, the Administration compels them to make the Hobson's choice between lengthy immigration detention in the United States or "voluntary" deportation with the risk of persecution and death in their countries of origin.[61] Despite continuing publicity and protest

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Gabriel Thompson, *Your Judge Is Your Destiny: The Immigration Court Judge Who Has Rejected Every Asylum Seeker*, TOPIC (July 2019) (example of IJ who has denied every single asylum case of over 200 heard during past five years), https://www.topic.com/your-judge-is-your-destiny?fbclid=IwAR1KJ6Z9aJg15TIh_Bcfflo4rnIiogIb0WVqMB3WgtRJ0NhWfZeD1WbDxGQ [https://perma.cc/AT5L-4R87]

As of September 2019, the average wait time for an Immigration Court proceeding has reached 696 days. *Average Time Pending Cases Have Been Waiting in Immigration Courts as of September 2019,* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php [https://perma.cc/7FRH-4CJ3]; *see also*, Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?*, MIGRATION POLICY INSTITUTE (Oct. 3, 2019), https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point [https://perma.cc/M76L-RKWU] (noting that average wait times for current open cases in Immigration Court surpass 700 days; yet, since the decision can mean life or death for those fleeing violence and persecution, growing backlog and pressure to expedite decisions, combined with pre-existing disparities in asylum grant rates, may result in insufficient due process for those who need it most).

61. In a classic example of this phenomenon, one co-author consulted with an asylum applicant with a textbook religious persecution claim who had been detained for seven months in an isolated facility in Georgia awaiting his individual hearing. He had never been accused of any crime and there was no reason to suspect, with his strong asylum claim, that he would not appear for his hearing. Because he was incarcerated, he was forced to appear pro se before one of the notorious Atlanta Immigration Judges who virtually never grant asylum (*see* GAO-17-72, *Asylum Variation Exists in Outcomes of Applications Across Immigration Courts and Judges* (Nov. 2016) (grant rate of 52 percent (defensive)-66 percent (affirmative) in New York Immigration Court and less than 5 percent (affirmative and defensive) in Atlanta Immigration Court, https://www.gao.gov/assets/690/680976.pdf [https://perma.cc/T7X4-RTWN]). This judge refused to allow him representation by someone of his own choosing, even though the representative was qualified by statute and regulation. *See* 8 C.F.R. § 1292.1(a)(3) (2011). After a cursory hearing and the subsequent denial, this immigration judge misinformed the respondent about the length of time an appeal to the Board of Immigration Appeals would likely take. In despair at the thought of years more in detention, he was persuaded to give up, irrevocably waive his right to appeal, and accept immediate removal to the country where he had been repeatedly physically harmed and threatened with death for carrying out his evangelical duties to resist the actions of local *maras*.

The U.N. Committee Against Torture has specifically concluded that this practice violates the Convention, stating that "[s]tates parties should not adopt

about the conditions in which asylum-seekers are held, the Administration has descended to new lows in its treatment of detained children, at a cost to the U.S. taxpayer of about $775 per child, per day.[62] Terrified toddlers, who were promptly separated from their parents or guardians upon entering the United States, are confined with no understanding of why or for how long they will be detained without their parents, or whether or when they will ever see their parents again, and often with no supervision but that of other children.[63] Most recently, the Trump Administration announced that it would no longer provide any opportunity for sports, English classes, or the general know-your-rights legal orientation programs that have long been offered to detained, unaccompanied children.[64]

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dissuasive measures or . . . policies, *such as detention in poor conditions for indefinite periods*, [or] refusing to process claims for asylum or prolonging them unduly, or cutting funds for assistance programmes for asylum seekers, . . . which would compel persons in need of protection under article 3 of the Convention . . . to return to their country of origin in spite of their personal risk of being subjected to torture or other cruel, inhumane or degrading treatment or punishment there." U.N. Comm. Against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, 3, CAT/C/GC/4 (Sept. 4, 2018) (emphasis added).

62. Emily Atkin, *The Mind-Boggling Cost of Breaking up Migrant Families*, NEW REPUBLIC (June 2018), https://newrepublic.com/minutes/149220/mind-boggling-cost-breaking-migrant-families [https://perma.cc/QBB7-6B2Q].

63. *See* Cedar Attanasio, Garance Burke & Martha Mendoza, *Attorneys: Texas Border Facility Is Neglecting Migrant Kids*, ASSOCIATED PRESS (June 21, 2019), https://www.apnews.com/46da2dbe04f54adbb875cfbc06bbc615 [https://perma.cc/RH7J-ANTW]; Isaac Chotiner, *Inside a Texas Building Where the Government Is Holding Immigrant Children: Interview of Prof. Warren Binford, Willamette University School of Law*, NEW YORKER (June 22, 2019), https://www.newyorker.com/news/q-and-a/inside-a-texas-building-where-the-government-is-holding-immigrant-children [https://perma.cc/442A-MVV7]; Associated Press, *DOJ Lawyer: Sanitary Conditions for Detained Migrant Children Doesn't Necessarily Mean Providing 'Toothbrush and Soap'*, KQED NEWS (June 19, 2019), https://www.kqed.org/news/11755713/doj-lawyer-sanitary-conditions-for-detained-migrant-children-doesnt-necessarily-mean-providing-toothbrush-and-soap [https://perma.cc/V34S-BTJQ]. Many blame the profit-making model of immigrant detention for the unacceptable conditions of confinement. *See, e.g.*, Keramet Reider, *Paying to Be Locked Up*, AMERICAN SCHOLAR (Dec. 3, 2018), https://theamericanscholar.org/paying-to-be-locked-up/ [https://perma.cc/CPF9-ZBWD] (arguing that corporations governing private detention centers "reap huge profits" from holding immigrant detainees, who are treated "like convicted criminals").

64. *See* Maria Sacchetti, *Trump Administration Cancels English Classes, Soccer, Legal Aid for Unaccompanied Child Migrants in U.S. Shelters*, WASH. POST (June 5, 2019), https://www.washingtonpost.com/immigration/trump-

No one should even purport to decide whether the "temporary detention of asylum-seekers" constitutes a "penalty" within the meaning of international refugee and human rights law without first reading these truly shocking accounts by law professors and reputable journalists of the "detention centers".[65]

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administration-cancels-english-classes-soccer-legal-aid-for-unaccompanied-child-migrants-in-us-shelters/2019/06/05/df2a0008-8712-11e9-a491-25df61c78dc4_story.html (on file with the *Columbia Human Rights Law Review*).

65. Some have called the detention centers "concentration camps"—a term that has occasioned much controversy, but is defended as appropriate by a leading historian of mass incarceration. *See* Andrea Pitzer [author of ONE LONG NIGHT: A GLOBAL HISTORY OF CONCENTRATION CAMPS (2017)], *An Expert on Concentration Camps Says That's Exactly What the U.S. Is Running at the Border*, ESQUIRE (June 21, 2019), https://www.esquire.com/news-politics/a27813648/concentration-camps-southern-border-migrant-detention-facilities-trump/ [https://perma.cc/VM5N-DUUL]; *How the Trump Administration's Border Camps Fit into the History of Concentration Camps,* GQ (June 19, 2019), https://www.gq.com/story/us-border-concentration-camps [https://perma.cc/LD24-TMTE] ("We tend to think of Nazi death camps as defining the term 'concentration camp.' But before World War II, this phrase was used to describe the detention of civilians without trial based on group identity. . . . A camp in a country in which the leader openly expresses animosity toward those interned, in which a government detains people and harms them by separating children from their parents or deliberately putting them in danger through neglect, is much closer to a concentration camp than a refugee camp. Nothing we are doing is likely to repeat Auschwitz, or to come anywhere close to it. But the history of concentration camps shows us that when it comes to this kind of detention, even when a government isn't plotting a genocide, shocking numbers of people can still end up hurt—or dead.")

See also Masha Gessen, *The Reality of American Concentration Camps*, NEW YORKER (June 21, 2019), https://www.newyorker.com/news/our-columnists/the-unimaginable-reality-of-american-concentration-camps; Paul Krugman, *Trump and the Merchants of Detention*, NY TIMES (July 8, 2019)(ICE detention centers meet historical definition of concentration camps), https://www.nytimes.com/2019/07/08/opinion/trump-migrants-detentioncenters.html (on file with the *Columbia Human Rights Law Review*); Peter Irons, *'Concentration Camps'? What History Instructs [:] Consider Whether Term Applies to U.S. Migrant Detention Centers [;] Be Careful What You Call a Concentration Camp*, SAN FRANCISCO CHRONICLE (2019 WLNR 2237119 (July 20, 2019) (noting that term originated with Britain's war with the Boers).

But see Aaron Bandler, *Wiesenthal Center Calls AOC's Concentration Camp Remarks 'Insult to Victims of the Shoah'*, JEWISH JOURNAL (June 18, 2019), https://jewishjournal.com/news/nation/300186/wiesenthal-center-calls-aocs-concentration-.camp-remarks-insult-to-victims-of-the-shoah/. Rabbi Abraham Cooper, Associate Dean of the Simon Wiesenthal Center, stated, "It's an insult to the victims of the Shoah to make blatant false comparisons. . . . Stop casting Trump as a latter-day Nazi scheming to build concentration camps. AOC and all

2. Prohibiting Asylum-Seekers Who Entered Without Inspection from Applying for Asylum

The day after the 2018 midterm elections, the Secretary of Homeland Security and the Acting Attorney General jointly issued an interim rule purporting to prohibit immigrants who entered without inspection from applying for asylum.[66] Such a regulation is without precedent and underscores not only the Administration's disregard of American law and traditions, but, as this article shows, our international obligations and the rights of refugees. The stated purpose of the proposed rule is to funnel asylum-seekers to the U.S. ports of entry. Yet reliable reports have indicated that under this Administration many CBP officers first began telling asylum-seekers at the border ports of entry that they no longer have a right to asylum, dissuading them from filing asylum claims.[67] Later, the CBP, claiming a lack of capacity, appears to have changed its policy to interview many fewer applicants at the ports of entry.[68] Meanwhile,

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Congressmen from both parties have a moral obligation to fix the humanitarian disaster at the border."

66. *See* Memorandum from President Donald J. Trump to the Att'y Gen. and the Sec'y of Homeland Sec. (Apr. 29, 2019), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/ [https://perma.cc/4KYB-L7FQ]; *see also* Memorandum from L. Francis Cissna, Director of United States Citizenship and Immigration Services, to USCIS Employees (Nov. 9, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-11-09-PM-602-0166-Procedural_Guidance_for_Implementing_Regulatory_Changes_Created_by_Interim_Final_Rule.pdf [https://perma.cc/5P54-5HAT] (disqualifying those who enter without inspection from applying for asylum).

67. *See* AMNESTY INT'L, FACING WALLS: USA AND MEXICO'S VIOLATIONS OF THE RIGHTS OF ASYLUM-SEEKERS 1, 19–20 (2017), https://www.amnestyusa.org/wp-content/uploads/2017/06/USA-Mexico-Facing-Walls-REPORT-ENG.pdf [https://perma.cc/G2M7-AE2Z] (reporting that between December 2015 and April 2017, nearly 71 asylum-seekers at the San Diego-Tijuana border crossing were told by CBP officers that they could not seek asylum or were given incorrect instructions on the procedures to follow, such as where to go to seek asylum); Zachary Mueller, *Members of Congress Waited with Migrants Seeking Asylum. It Took Them 20 Hours and a Cold Wait Overnight*, AMERICA'S VOICE EDUC. FUND (Dec. 18, 2018), https://americasvoice.org/blog/reps-barragan-and-gomez-asylum/ [https://perma.cc/35V5-5RDL] (video of Rep. Nanette Barragan confronting CBP officers who were rebuffing asylum-seekers at a port of entry).

68. Kate Smith, *The Country's Busiest Border Crossing Will Allow 20 People to Claim Asylum a Day. They Used to Take Up to 100*, CBS (Jan. 25, 2019), https://www.cbsnews.com/news/tijuana-port-of-entry-san-ysidro-allows-20-immigrants-claim-asylum-immigration-advocates-2019-01-25/ [https://perma.cc/Z3GE-H7P5].

the rest of the applicants must remain in Mexico, trapped in an extralegal process called "metering" that is often controlled by corrupt Mexican law enforcement who make the destitute migrants bid with whatever they have for higher "numbers" on an unofficial list that is, nonetheless, enforced by the CBP.[69] Given the resources of CBP and ICE, one has to wonder whether this is a deliberate policy to discourage asylum applicants from claiming asylum at the ports of entry.

3. Requiring Asylum-Seekers to "Remain in Mexico"

The Trump Administration's euphemistically-named Migration Protection Protocols ("MPP") force asylum-seekers to remain in Mexico while their asylum claims are pending in the

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69. One non-governmental organization has sued the DHS Secretary, alleging that this "lack of capacity" is a deliberate governmental policy:

> [B]eginning around 2016, high-level CBP officials, under the direction or with the knowledge or authorization of the named Defendants (the "Defendants"), adopted a formal policy to restrict access to the asylum process at POEs ["Ports of Entry"] by mandating that lower level officials directly or constructively turn back asylum-seekers at the border (the "Turnback Policy") contrary to U.S. law. In accordance with the Turnback Policy, CBP officials have used and are continuing to use various methods to unlawfully deny asylum-seekers access to the asylum process based on purported—but ultimately untrue—assertions that there is a lack of "capacity" to process them. These methods include coordinating with Mexican immigration authorities and other third parties to implement a "metering," or waitlist, system that creates unreasonable and life-threatening delays in processing asylum-seekers; instructing asylum-seekers to wait on the bridge, in the preinspection area, or at a shelter until there is adequate space at the POE; or simply asserting to asylum-seekers that they cannot be processed because the POE is "full" or "at capacity."

See First Amended Complaint at 29, Al Otro Lado v. Nielsen, No. 3:17-cv-02366-BAS-KSC (S.D. Cal. Oct. 12, 2018); *Al Otro Lado v. Nielsen*, CTR. FOR CONSTITUTIONAL RIGHTS (July 30, 2019), https://ccrjustice.org/home/what-we-do/our-cases/al-otro-lado [https://perma.cc/HFA4-63QC]; *see also* Stephanie Leufert, *What 'Metering' Really Looks Like in South Texas*, LAWFARE (July 17, 2019), https://www.lawfareblog.com/what-metering-really-looks-south-texas [https://perma.cc/W73D-6R63] (providing first-hand description by the Director of the Mexico Security Initiative at the University of Texas-Austin of the operation and effects of "metering" on the ability of asylum-seekers to present their cases at points of entry without delay).

United States.[70] This policy geometrically magnifies the long-term practice of placing immigration detention centers in isolated areas of the United States, far from the media and, more importantly, far from attorneys who could represent those seeking refuge from systematic violence in their countries of origin.[71] Rather than protecting asylum-seekers, this radical policy makes it all but impossible for asylum-seekers to obtain counsel while they wait for months, if not years, in the impoverished, cartel-ruled Mexican border cities. Not only does this policy deprive asylum-seekers of their right to obtain effective assistance of counsel, but the DHS memorandum establishing the "Remain in Mexico" policy also impermissibly imposed a much higher bar for asylum.[72]

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70. *See Migrant Protection Protocols (MPP),* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Feb. 13, 2019), https://www.ice.gov/factsheets/migrant-protection-protocols-mpp [https://perma.cc/QBN3-D2WP].

71. *See United States Commission on Civil Rights, Trauma at the Border: The Human Cost of Inhumane Immigration Policies* (Oct. 4, 2019), https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf ("As of the end of June 2019, a total of 1,155 MPP cases had already been decided but asylum seekers were represented in only 14 of those cases—only 1.2 percent had legal representation."). LEIDU PEREZ-DAVIS & KATE VOIGT, AM. IMMIGRATION LAWYERS ASS'N, POLICY BRIEF: "REMAIN IN MEXICO" PLAN RESTRICTS DUE PROCESS, PUTS ASYLUM-SEEKERS AT RISK 1, 3 (Feb. 1, 2019);); Michelle Chen, *Trump's 'Remain in Mexico' Policy Is Illegal Under International Law*, NATION (Mar. 7, 2019) https://www.thenation.com/article/trump-border-mexico-international-law-human-rights/ [https://perma.cc/SY3L-5C76]; *see also* Bill Frelick, *U.S. Detention and Asylum Seekers*, MIGRATION POL'Y INST. (Mar. 1, 2005), https://www.migrationpolicy.org/article/us-detention-asylum-seekers-and-human-rights [https://perma.cc/5MEJ-7YKC] (discussing how detention impedes the right to seek asylum).

72. Perez-Davis & Voigt, *supra* note 1, at 2. A federal district court issued a preliminary injunction halting the program, Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110 (N.D. Cal. 2019), but the injunction was stayed by the Ninth Circuit, which authorized DHS to resume the practice while its legality is litigated, and more than 50,000 asylum-seekers have been relegated to Mexico. Dept of Homeland Sec., Assessment of the Migrant Protection Protocols (MPP), at 2 (Oct. 28, 2019), https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf (DHS has returned more than 55,000 aliens to Mexico under MPP); Mihir Zaveri, *Rule Keeping Asylum Seekers in Mexico Can Temporarily Proceed, Court Says,* N.Y. TIMES (Apr. 17, 2019), https://www.nytimes.com/2019/04/12/us/trump-asylum-seekers-mexico.html (on file with the Columbia Human Rights Law Review); *see* Katie Shepherd, *Federal Court Allows Controversial 'Remain in Mexico' Policy to Continue, Immigration Impact* (May 15, 2019), http://immigrationimpact.com/2019/05/15/federal-court-allows-remain-in-mexico-policy-continue/ [https://perma.cc/H4UP-QRDD].

After being returned to Mexican border cities, which are completely unequipped to provide refugees any services or support, and among the most criminally violent and dangerous places on the globe, thousands of asylum-seekers have found it virtually impossible to participate in developing the necessary evidence for their asylum claims.[73] They are mostly homeless and unemployed, and the Mexican

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Migrants forced to remain in Mexico face violence and kidnappings as well as deprivation of the means for health and well-being. For a stunning description of the actual operation and impact of this program, please listen to the recordings of interviews of Asylum Officers and MPP-returned kidnapping victims at NPR, *This American Life: The Out Crowd*, (Nov. 15, 2019) https://www.thisamericanlife.org/688/the-out-crowd [https://perma.cc/KG48-3HDY]. One study found that between 21% and 24% of migrants in the Remain in Mexico program report receiving threats of violence while in Mexico, and of those, over 50% report that the threats turned into actual violence, including beatings, robbery, and extortion. Tom K. Wong, U.S. Immigration Policy Ctr., *Seeking Asylum: Part 2* (2019), https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf [https://perma.cc/9PSF-VVNE]. Journalistic accounts and the State Department's own Travel Advisory indicate that asylum-seekers face an even more frightening rate of violence, especially in Northern Mexican cities along the Texas border where kidnappings are rampant. *See, e.g.*, Gus Bova, *Nuevo Laredo Shelter Director Reportedly Kidnapped After Protecting Cuban Migrants*, TEXAS OBSERVER (Aug. 11, 2019), https://www.texasobserver.org/nuevo-laredo-shelter-director-reportedly-kidnappedafter-protecting-cuban-migrants/ [https://perma.cc/X9DA-H8MU]; Mexico Travel Advisory, U.S. Dep't of State (Apr. 9, 2019), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html [https://perma.cc/CN5L-B4BS] ("violent crime, such as murder, armed robbery, carjacking, kidnapping, extortion, and sexual assault, is common"). On the "higher burden of proof" required to demonstrate the risk of danger in Mexico, *see This American Life*, *supra*. *See also* McAleenan v. Innovation Law Lab, Case No. 19-15716, Brief of Amicus Curiae Local 1924 in Support of Plaintiffs-Appellees' Answering Brief and Affirmance of the District Court's Decision (MPP violates non-refoulement obligation because Mexico is not safe for most asylum-seekers from Central America, and not necessary to handle influx at border).

73. *See After Observing Asylum Hearings, Amnesty International Calls to Stop Illegal Pushbacks of Asylum Seekers to Mexico*, AMNESTY INT'L (Apr. 11, 2019), https://www.amnestyusa.org/press-releases/after-observing-asylum-hearings-amnesty-international-calls-to-stop-illegal-pushbacks-of-asylum-seekers-to-mexico/ [https://perma.cc/JXS9-XXZT] (discussing the violation of American and Mexican asylum law). As the Trump Administration is well aware, drug cartels function with impunity throughout Mexico. *See, e.g.*, Dave Graham, *Cartel Gunmen Terrorize Mexican City, Free El Chapo's Son*, REUTERS (Oct. 17, 2019), https://www.reuters.com/article/us-mexico-violence-sinaloa/cartel-gunmen-terrorize-mexican-city-free-el-chapos-son-idUSKBN1WW34M [https://perma.cc/SFX9-9K7G] (explaining how heavily armed fighters overpowered Mexican security forces and freed son of drug lord Joaquin 'El Chapo' Guzman; the capture triggered hours of gun battles and deaths of eight bystanders); David Brennan,

government does not issue them work permits. They have no addresses or ways to communicate with Immigration Courts or with lawyers. The CBP or ICE often keeps their precious identification documents—*e.g.*, birth, marriage, and death certificates—and other necessary original documents making it difficult for them to navigate any Mexican governmental systems.[74] But they have no choice: if they are to pursue their asylum cases, they must remain close to the border, able to attend their scheduled and rescheduled court appearances.

Observers of the massive "MPP dockets" describe the San Diego Immigration Court as a chaotic epicenter of "aimless docket reshuffling."[75] Below are a few examples from a collection of near-transcripts by attorneys and advocates at the Court that seem to strongly corroborate that image:

Police Officer Involved In Operation Against El Chapo's Son Shot at More Than 150 Times In Daylight Assassination, NEWSWEEK (Nov. 8, 2019), https://www.newsweek.com/police-officer-operation-el-chapo-son-shot-150-daylight-assassination-sinaloa-culiacan-1470568 [https://perma.cc/853B-DDWD] (high-level Sinaloa State Preventive Police officer who had participated in response to escape of drug lord Joaquin "El Chapo" Guzman's son was ambushed and killed by hail of bullets in about 30 seconds). *See also U.S. 'Remain in Mexico' Policy Endangers Lives of Asylum Seekers in Tamaulipas State*, MEDECINS SANS FRONTIERES/DOCTORS WITHOUT BORDERS (Sept. 5, 2019), https://www.doctors withoutborders.org/what-we-do/news-stories/news/us-remain-mexico-policy-endangers-lives-asylum-seekers-tamaulipas [https://perma.cc/8SJL-ML4A].

74. Tens of thousands of asylum-seekers live in street encampments, with no reliable sources of food, potable water, or sanitation, despite the best efforts of faith-based and civic organizations. HUMAN RIGHTS WATCH, "WE CAN'T HELP YOU HERE": U.S. RETURNS OF ASYLUM SEEKERS TO MEXICO 18–20 (2019). *See* Zolan Kanno-Youngs & Maya Averbuch, *Waiting for Asylum in the United States, Migrants Live in Fear in Mexico*, N.Y. TIMES (Apr. 5, 2019) (outlining that twenty shelters and churches in Tijuana are housing around 3,000 migrants forced to remain in Mexico, with next to no room for future migrants; unable to find U.S. lawyers and are repeatedly robbed and kidnapped); *Remain in Mexico Updates*, HOPE BORDER INSTITUTE (last updated June 13, 2019), https://www.hopeborder.org/remain-in-mexico-052219 [https://perma.cc/CN2M-GFPS].

75. Former Immigration Court Judge Paul Schmidt seems to have coined the term in his blog: see Cruel, Yet Really Stupid: Trump's "Remain in Mexico Policy" Denies Due Process While Creating Court Chaos—Enfeebled Judges Fume as "Aimless Docket Reshuffling" Bloats Backlogs!—Article IIIs Complicit!, IMMIGRATION COURTSIDE (June 6, 2019), https://immigrationcourtside.com/2019/06/06/cruel-yet-really-stupid-trumps-remain-in-mexico-policy-denies-due-process-while-creating-court-chaos-enfeebled-judges-fume-as-aimless-docket-reshufflin/ [https://perma.cc/HG7K-YXR3].

> (Baby crying during Immigration Court hearing for a mother and child forced to "Remain in Mexico")
> **Immigration Judge**: Ma'am, didn't I tell you that you didn't need to bring your child to Court for this hearing[?]
> **Mother with nursing baby**: It's just that . . . I don't have any family. I don't know anyone in Mexico.
> **Immigration Judge**: Okay, but you are going to need to be able to concentrate at your hearings so that you can provide the best testimony in your case.
> **Mother with nursing baby**: But if I have to stay in Mexico and come the United States for [C]ourt . . . where am I supposed to leave my baby?
> **Immigration Judge**: Ok[ay]. I just don't want your baby to distract you.
> **Immigration Judge to ICE Trial Attorney**: Since you didn't provide me with the brief I requested at the last hearing, what would you like me to do?
> **ICE Trial Attorney**: I'm sorry your [H]onor. I'm having trouble thinking over the crying baby.
> **Immigration Judge**: Well what exactly would you like me to do about it?[76]

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76. Brianna Rennix, *This Week in Terrible Immigration News*, CURRENT AFFAIRS (June 10, 2019), https://www.currentaffairs.org/2019/06/this-week-in-terrible-immigration-news [https://perma.cc/7VXC-MD5M] (quoting Innovation Law Lab, FACEBOOK (June 6, 2019), https://www.facebook.com/innovationlawlab/posts/2408081462758045 [https://perma.cc/X8AK-QTXF]); *see also* Taylor Levy (@taylorklevy), TWITTER (June 18, 2019), https://twitter.com/taylorklevy/status/1141129449972408321 [https://perma.cc/4NEC-3G2V] ("A Honduran woman sent back to Mexico under Migrant Protection Protocol was kidnapped and raped in Juarez. The #MigrantPersecutionProtocols are directly at fault for this woman's kidnapping & rape by men wearing Mexican Federal Police Uniforms. She had been returned to Mexico after having court in El Paso . . . .") (citing Bob Moore (@BobMooreNews), TWITTER (June 18, 2019); Taylor Levy (@taylorklevy), TWITTER (June 12, 2019, 3:24 AM), https://twitter.com/taylorklevy/status/1138708709025222656 [https://perma.cc/H8ML-WJN7] ("Today in #MigrantPersecution Protocols court; a crying, shaking mom showed off her 7[-year-old] daughter's bloody scab from where she bumped her head while escaping armed attackers who broke into their migrant shelter in the middle of the night. [E]ven the judge looked shook."); Bob Moore (@BobMooreNews), TWITTER (May 9, 2019), https://twitter.com/BobMooreNews/status/1126608592822579201[https://perma.cc/T7B7-LFCR] ("Rene, a man from El Salvador, said on March 29 he was robbed and stabbed in Ciudad Juarez. He went to the police but was told that they couldn't help him because he wasn't Mexican. . . . Esdras, a man from Guatemala, was robbed twice at a church shelter. . . . Elvia, also from Guatemala, said she

Can one truthfully declare that this practice comports with human rights and the United States' international obligations toward refugees and asylum seekers or that it does not amount to a "penalty" within the meaning of Article 31 of the 1951 Refugee Convention?[77]

4. Charging Desperate Asylum-Seekers Filing Fees While Denying Work Authorization

In a less cruel but counterproductive move, the Trump Administration is in the process of imposing new filing fees on asylum-seekers. At the same time, the Administration has revoked eligibility for work permits from asylum-seekers who either enter, or try to enter, the United States in a way other than through a port of entry, even as CBP continues to block attempts to enter at those

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was robbed at a church shelter. Altogether, 9 of the 20 people in court told the judge they had a fear of returning to Mexico.").

One asylum officer eloquently described the Remain in Mexico policy and practice as follows: "People don't have a right to asylum, sight unseen, but under international human rights law and our own immigration laws, they have the right to seek it. They have the right to knock on the door and say, "Help, a wolf is chasing me, let me in!" When that happens, we're supposed to give them food and drink, and to let them sit by the fire and tell their story — and if it's true that they're in danger, we are supposed to give them shelter. It's wrong to block their way and force them to wait on the front step, while we decide if we're ready to listen." Charles Tjersland Jr., *I became an asylum officer to help people. Now I put them back in harm's way.* WASH. POST (July 19, 2019), https://wapo.st/33Pmvxq (on file with the *Columbia Human Rights Law Review*).

77. The former DHS Secretary's rationale for how this policy manages not to violate the principle of *non-refoulement*, which she acknowledged might seem applicable, appears in a paragraph of her January 25, 2019 Policy Guidance Memorandum to the then-Directors of ICE, CBP, and USCIS. *See* Memorandum from Kirstjen Nielsen, Sec'y of Homeland Sec., to L. Francis Cissna, Director of U.S. Citizenship and Immigration Servs., et al. (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/GF76-GUYT]; *see also Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*, U.S. DEP'T OF HOMELAND SEC. (Jan. 19, 2019), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf [https://perma.cc/JJ7M-JM4V]; Memorandum from Ronald Vitiello, Deputy Dir. and Acting Dir. of U.S. Immigration and Customs Enforcement, to Executive Associate Directors (Feb. 12, 2019), https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf [https://perma.cc/XK8R-ZBD4].

ports.[78] Very recently, this constriction has been augmented with a broader range of disqualifications for employment authorization aimed specifically at asylum-seekers. [79]

5. Politically Interfering in the State Department's Human Rights Reports

The Trump Administration has deliberately falsified through omission information in what had been the gold standard for factual claims about persecution in other countries: the State Department's annual *Country Reports on Human Rights Practices*. These Reports are the bedrock documentation that asylum-seekers must both rely on and counter during the adjudication of their claims. They are utilized by United States Citizenship and Immigration Services ("USCIS") asylum officers, ICE and CBP officers at the border, Immigration Court Judges, the BIA, and by State Department officers in embassies and consulates abroad to test and evaluate the credibility, persuasiveness, and reliability of asylum-seeker accounts of persecution, as well as to establish, or controvert, whether individual reports of abuse are isolated criminal acts or governmental policies—a crucial distinction that makes or breaks almost every asylum claim.[80]

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78. *See* Zolan Kanno-Youngs & Caitlin Dickerson, *Asylum Seekers Face New Restraints Under Latest Trump Orders*, N.Y. TIMES (Apr. 29, 2019), https://www.nytimes.com/2019/04/29/us/politics/trump-asylum.html (on file with the *Columbia Human Rights Law Review*) ("The entire idea of asylum is that it's something that you need because you are fleeing some sort of violence or persecution," said Michelle Brané, director of migrant rights and justice at the Women's Refugee Commission, adding "to then say that it's only accessible to people who can pay a fee doesn't make sense. . . . There's a reason that we give people work permits while they are waiting for asylum, so that they can support themselves and don't have to be depending on government assistance during that time." Speaking of the Trump administration's broader approach to asylum, Ms. Brané said, "All of it has been aimed at reducing the number of people who can access the system as opposed to reducing the need for asylum by addressing root causes.").

79. *See* discussion and authorities *infra* note 107.

80. *See generally* DREE K. COLLOPY, *Chapter 6: Proving the Case: Burdens, Standards, and Evidence*, *in* AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 545–6 (8th ed. 2019); *see also* DEBORAH E. ANKER, *Chapter 3: Evidence: Country Conditions and Human Rights Documentation*, *in* THE LAW OF ASYLUM IN THE UNITED STATES (2018 ed.) (country conditions are perhaps the single most important factor in determining asylum applications, essential to explaining why asylum-seekers cannot safely relocate within their

For the vast majority of asylum-seekers who are unrepresented (and who often lack English proficiency and literacy, access to computerized resources or even books and newspapers, and increasingly are detained in remote facilities or now, cabined in Mexico), these official publications, routinely entered into evidence at asylum hearings, may be their sole means to corroborate the torture and persecution they have suffered or fear. In a campaign worthy of the Orwellian term "memory hole,"[81] State Department compilers obviously are being ordered to eliminate information specifically about the oppression of female and LGBTQ residents[82] including

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country of origin and escape persecution that way, and essential to establishing the validity, social distinction, and particularity of particular social groups, a necessary element for all asylum claims that are not based on racial, religious, ethnic or nationality discrimination, or political opinion).

81. George Orwell, Nineteen Eighty-Four (first published by Martin Secker & Warburg, London, 1949) (concept of and term "memory hole" a central feature of this dystopian and prophetic novel, in which the omnipresent, omniscient, omnipotent and monopolistic Party systematically and constantly destroys and re-creates all documents, official and otherwise, to comport with the oft-changing current government propaganda—re-writing history and current events to match the official version, no matter how contrary to reality, and often entirely contradictory to the preceding version).

82. For example, in 2018, Attorney General Jeff Sessions unilaterally overruled a BIA decision and decreed that women fleeing intimate partner violence would no longer be recognized as a "Particular Social Group" and therefore a protected category. *See* Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018). *But see* Grace v. Whitaker, 344 F. Supp. 3d 96, 105 (D.D.C. 2018) (permanently enjoining Attorney General from effectuating his decision, albeit with respect solely to credible fear and reasonable fear interviews); *see also* Theresa A. Vogel, *Critiquing* Matter of A-B-*: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 343, 373 (2019); Testimony of Prof. Karen Musalo, Director, Ctr. for Gender and Refugee Studies, before Canadian Parliament Standing Committee on Citizenship and Immigration (May 8, 2019) (contrasting President Trump's attempted elimination of protection for survivors of gender-based violence with Canadian recognition of gender-based persecution as basis for asylum). For the most compelling account to date of the nearly inconceivable level of perversely vicious violence against women in Honduras, clearly tantamount to persecution, let alone torture, *see* Jill Filipovic, *I Can No Longer Continue to Live Here*, POLITICO (June 7, 2019), https://www.politico.com/magazine/story/2019/06/07/domestic-violence-immigration-asylum-caravan-honduras-central-america-227086 [https://perma.cc/LVF8-ZXL9]. As the epigraph puts it, "What's driving so many Honduran women to the U.S. border? The reality is worse than you've heard." For an equally graphic, comparable article about El Salvador, see Tristan Clavel, Extortion and Sexual Violence: Women's Unspoken Suffering, INSIGHT (Apr. 26, 2019) at https://www.insightcrime.org/investigations/extortion-sexual-violence-womens-

governmental policies that deprive women of reproductive rights (not only the right to abortion, but also to contraception, to freedom from domestic violence, and access to health care).[83] In 2019, as observed by many advocates and NGOs:

> [T]he Trump Administration released its annual Country Reports on Human Rights Practices without information on the full range of abuses and violations of reproductive rights experienced by women, girls and others around the world. The reports focus solely on coerced abortion or involuntary sterilization. These violations represent only a narrow slice of the coercive and harmful policies and other systemic challenges that women and girls face when trying to exercise their reproductive rights, including a lack of access to contraceptives and other sexual and reproductive health services.[84]

In response, the "Reproductive Rights are Human Rights Act," bicameral legislation that would require the United States to report on the full range of reproductive rights in the annual Country Reports on Human Rights Practices, has been introduced and is cosponsored by 126 members of the House of Representatives and thirty Senators.[85]

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unspoken-suffering/?fbclid=IwAR3UE_yROPX-4eQc90YfIoO4NMNLdDmAdls uzmS02xUqvJo0PtzR-LoMssY

83. *See also* Press Release, PAI, *Trump Administration Erases Women in State Department Human Rights Report Once Again* (Mar. 13, 2019), https://pai.org/press-releases/trump-Administration-erases-women-in-state-department-human-rights-report-once-again/ [https://perma.cc/GDG3-6GKR]; *State Department Human Rights Reports Selectively Criticize Abuses*, HUMAN RIGHTS FIRST (Apr. 25, 2018), https://www.humanrightsfirst.org/press-release/state-department-human-rights-reports-selectively-criticize-abuses [https://perma.cc/EGV4-3D7K] (noting that the preface to Trump's Department of State *Country Reports on Human Rights Practices* criticize the human rights record of its enemies instead of "highlighting wider concerns at a time in which adherence to universal human rights is in retreat around the world").

84. PAI Press Release, *supra* note 82.

85. *See* Reproductive Rights are Human Rights Act of 2019, H.R. 1581, 116th Cong. (2019). *See Congresswoman Clark, Senator Menendez, Colleagues Announce Bicameral Reproductive Rights are Human Rights Act*, KATHERINE CLARK, FIFTH DISTRICT OF MASSACHUSETTS (Mar 7, 2019), https://katherineclark.house.gov/2019/3/congresswoman-clark-senator-menendez-colleagues-announce-bicameral-reproductive-rights-are-human-rights-act [https://perma.cc/PNZ6-DUST] (quoting Amanda Klasing from Human Rights Watch) ("We all have universal human rights, which include deciding when to become parents, how

6. Drastically Reducing the Number of Refugees and Their Capacity to Present and Prove Their Claims

President Trump's original January 2017 executive order suspended the worldwide refugee program for 120 days and indefinitely halted the admission of Syrian refugees.[86] The United States is now admitting refugees again but at numbers among the lowest in decades. President Trump cut the refugee allocation from 110,000 in Fiscal Year ("FY") 2017 to 45,000 in FY 2018.[87] Given all the additional restrictions imposed on migrants, the number of refugees actually admitted in 2018 was 22,491—less than half those allocated. [88] Secretary of State Michael Pompeo subsequently announced a further reduction to 30,000 for FY 2019, then the lowest on record. Recently, the Trump Administration announced that the allocation would be cut in the current fiscal year to 18,000.[89]

In suspending the refugee program, President Trump principally argued that terrorists posing as refugees would come into the country. This was essentially the same argument that the United States raised against Jewish refugees in World War II.[90] This fear

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many children to have and surviving childbirth. When governments limit women's reproductive rights they also restrict their economic, social and political rights.");

86. From February 2017 to September 2017, the Trump Administration admitted 21,268 refugees in total, including 1,673 from Syria. *See* DEP'T OF STATE, REFUGEE PROCESSING CENTER, REFUGEE ADMISSIONS REPORT (July 31, 2018). In the 2018 fiscal year, 18,214 refugees in total were admitted, but only 62 were from Syria. *Id*. In contrast, during the 2016 fiscal year, the Obama administration admitted 84,994 refugees in total, including 12,587 Syrian refugees, with another 4,884 Syrians admitted through the end of his term on January 20, 2017. *Id.*

87. Julie Hirschfeld Davis, *Trump to Cap Refugees Allowed into U.S. at 30,000, a Record Low*, N.Y. TIMES (Sept. 17, 2018), https://www.nytimes.com/2018/09/17/us/politics/trump-refugees-historic-cuts.html (on file with the *Columbia Human Rights Law Review*).

88. S*ee* DEP'T OF STATE, *supra* note 4; *see also* DEP'T OF STATE, REFUGEE PROCESSING CENTER, REFUGEE ADMISSIONS REPORT (June 30, 2018).

89. Davis, *supra* note 87; Michael D. Shear & Zolan Kanno Youngs, *Trump Slashes Refugee Cap to 18,000, Curtailing U.S. Role as Haven*, N.Y. TIMES (Sept. 26, 2019), https://nyti.ms/2OgF2w9 (on file with the *Columbia Human Rights Law Review*).

90. Radley Balko, *The United States Also Denied Refuge to Jews Fleeing Hitler, Fearing They Might Be Nazis*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/01/25/the-united-states-also-denied-refuge-to-jews-fleeing-hitler-fearing-they-might-be-nazis/ (on file with the *Columbia Human Rights Law Review*) (identifying the similarities between the Trump Administration's claim that terrorists could pose as refugees and the

during World War II proved largely unfounded,[91] just as the President's argument is now. As many have noted, none of the immigrants and visitors coming from the Muslim-majority countries designated in the Executive Orders[92] has been found to have committed any terrorist offenses in the United States.[93]

Another approach to reducing the number of refugees who reach the United States to claim asylum is to deter and prevent U.S. citizens from assisting them, whether by intimidation, surveillance, and harassment[94] or by criminal prosecution. Attacks against all

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Roosevelt Administration's claim that Jewish refugees could be coerced spies for the Nazis).

91. *Id.* (finding that most of the concern about Jewish refugees entering as Nazi spies stemmed from a single story of an alleged Jewish refugee that after intense questioning admitted he was a Nazi spy).

92. Kyle Blaine & Julia Horowitz, *How the Trump Administration Chose the 7 Countries in the Immigration Executive Order*, CNN (Jan. 30, 2017), https://www.cnn.com/2017/01/29/politics/how-the-trump-Administration-chose-the-7-countries/index.html [https://perma.cc/K9FL-8WS9] (finding that the Obama Administration had imposed restrictions on Iran, Iraq, Sudan, Syria, Libya, Somalia, and Yemen in 2011 by eliminating the visa-waiver program that allowed dual citizens of these countries to travel back and forth without a United States visa whereas the Trump Administration's order is broader by initially banning entry from Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen).

93. Alex Nowrasteh, TERRORISM AND IMMIGRATION: A RISK ANALYSIS, CATO INSTITUTE 1, 13 (Sept. 13, 2016), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_2.pdf [https://perma.cc/38EQ-C37S] (finding that of the refugees admitted into the United States between 1975 and the end of 2015, 0.00062% were terrorists and only three ever succeeded in an attack; no other murders were recorded after the Refugee Act of 1980 implemented rigorous screening measures); *see also* Uri Friedman, *Where America's Terrorists Actually Come from*, ATLANTIC (Jan. 30, 2017), https://www.theatlantic.com/international/archive/2017/01/trump-immigration-ban-terrorism/514361/ [https://perma.cc/R9BV-J469] ("Nationals of the seven countries singled out by President Trump have killed zero people in terrorist attacks on U.S. soil between 1975 and 2015."); *see also IntelBrief*, *supra* note 12 (finding in 2018 just one death in the United States as result of jihadi-linked terrorism, while native-born right-wing terrorists killed fifteen Americans).

94. *See supra* note 15; *see also* Jefferson Sessions, Attorney General, Dep't of Justice, *Remarks to the Executive Office for Immigration Review* (Oct. 12, 2017) https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review [https://perma.cc/63TV-69SW] (Attorney General Sessions referred to asylum lawyers as "dirty immigration lawyers"); *see also* Nicole Lewis, *Sessions' Claim That 'Dirty Immigration Lawyers' Encourage Clients to Cite 'Credible Fear*,*'* WASH. POST (Oct. 26, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/10/26/sessionss-

kinds of efforts to aid migrants, primarily asylum-seekers, have stepped up in both the United States and Mexico. Many appear to involve collusion between corrupt Mexican officials and Border Patrol officers, a constant problem since the CBP's creation in 2003.[95] For example, Scott Warren, a volunteer for the humanitarian organization No More Deaths, was prosecuted (but not convicted by the jury) for "harboring" in violation of 8 U.S.C. § 1324. CBP agents set up surveillance at a humanitarian station and arrested Mr. Warren, a thirty-six-year-old geography teacher, on three felony charges because he helped a pair of migrants from Central America who were hungry, dehydrated, and struggling to walk on blistered feet.[96] At the same time, vigilante groups such as the United

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claim-that-dirty-immigration-lawyers-encourage-clients-to-cite-credible-fear/ (on file with the *Columbia Human Rights Law Review*) (demonstrating that former Attorney General Jeff Sessions' claim that immigration attorneys are responsible for the increase in credible fear asylum cases is unsubstantiated). Authoritative commentators on the professional ethics of the immigration bar have expressed serious concern that this Administration may seek to prosecute lawyers under the "harboring doctrine" for "encourag[ing] . . . an alien to reside in the United States . . . in violation of law." CYRUS MEHTA & ALAN GOLDFARB, EXECUTIVE DISORDER: ETHICAL CHALLENGES FOR IMMIGRATION LAWYERS UNDER THE TRUMP ADMINISTRATION (2017), https://www.houstonimmigration.org/wp-content/uploads/2017/04/Ethics-under-Trump.pdf [https://perma.cc/CV45-B7MM]; *see also* 8 U.S.C. § 1324 (a)(1)(A)(iv) (2018) (harboring statute); United States v. Lopez, 590 F.3d 1238, 1243 (11th Cir. 2009) (upholding conviction of defendant charged under 8 U.S.C. § 1324 (a)(1)(A)(iv) with "encouraging or inducing . . . aliens to enter the United States").

95 . AMNESTY INT'L, SAVING LIVES IS NOT A CRIME: POLITICALLY MOTIVATED LEGAL HARASSMENT OF MIGRANT HUMAN RIGHTS DEFENDERS BY THE USA (2019), https://www.amnestyusa.org/reports/saving-lives-is-not-a-crime-politically-motivated-legal-harassment-of-migrant-human-rights-defenders-by-the-usa/ [https://perma.cc/Y5DN-E8YL]) (USA authorities unlawfully targeting human rights defenders; DHS violations of domestic and international law; collaboration in abuses by USA and Mexican governments); *see also* NARCOS OVER THE BORDER: GANGS, CARTELS, AND MERCENARIES 226 (Robert J. Bunker ed., 2011); Jeremy L. Neufeld, *Extreme Vetting Needed for Border Patrol Agents*, NISKANEN CENTER (Apr. 24, 2017), https://niskanencenter.org/blog/extreme-vetting-needed-new-border-patrol-agents/ [https://perma.cc/3VUU-SEMW].

96. Scott Warren, *I Gave Water to Migrants Crossing the Arizona Desert. They Charged Me with a Felony*, WASH. POST (May 28, 2019), https://www.washingtonpost.com/outlook/2019/05/28/i-gave-water-migrants-crossing-arizona-desert-they-charged-me-with-felony/?utm_term=.28913cc994f2 (on filed with the *Columbia Human Rights Law Review*).

The United States is still largely a Christian country, and often proclaimed as such by members of the Trump Administration, including the Secretary of State. *See* Michelle Boorstein, *State Department's First-Ever Employee Christian Faith*

Constitutional Patriots, with no legal basis whatsoever, roam the border in full combat gear, intimidating, threatening, and even detaining large numbers of people whom they believe to be immigrants.[97]

Group Underscores Mike Pompeo's Influence, WASH. POST (Nov. 1, 2019) https://www.washingtonpost.com/religion/2019/11/01/highlighting-value-christians-state-departments-first-ever-employees-faith-group-underscores-mike-pompeos-influence/ (on file with the *Columbia Human Rights Law Review*) (Pompeo posts about being a "Christian Leader" on the State Department website, founded a Christian affinity group within the Department, etc.) But the prosecution of those who try to prevent unnecessary migrant deaths in this way seems to fly in the face of the Last Judgment, From the Gospel According to St. Matthew, Matthew 25:31-46:

> 'Come, you that are blessed by my Father, inherit the kingdom prepared for you from the foundation of the world; for I was hungry and you gave me food, I was thirsty and you gave me something to drink, I was a stranger and you welcomed me**,** I was naked and you gave me clothing, I was sick and you took care of me, I was in prison and you visited me.'
> Then the righteous will answer him, 'Lord, when was it that we saw you hungry and gave you food, or thirsty and gave you something to drink? And *when was it that we saw you a stranger and welcomed you*, or naked and gave you clothing? And when was it that we saw you sick or in prison and visited you?' And the king will answer them, 'Truly I tell you, *just as you did it to one of the least of these who are members of my family, you did it to me*.'

Id. (emphasis added).

97. Simon Romero, *Militia in New Mexico Detains Asylum Seekers at Gunpoint*, N.Y. TIMES (Apr. 18, 2019), https://www.nytimes.com/2019/04/18/us/new-mexico-militia.html (on file with the *Columbia Human Rights Law Review*); Sarah Lynch Parker, *Armed Vigilantes Unlawfully Detaining Migrants Near U.S.-Mexico Border, ACLU Says*, CBS NEWS (Apr. 19, 2019), https://www.cbsnews.com/news/united-constitutional-patriots-aclu-says-armed-vigilantes-unlawfully-detaining-migrants-near-u-s-mexico-border/ [https://perma.cc/LH5X-KKDA].

For more on the analogous broad policy initiative of the Trump Administration, first announced on January 25, 2017 in Section 9 of the Executive Order "Enhancing Public Safety in the Interior of the United States," to defund federal grants for so-called "sanctuary cities," municipalities that have adopted perfectly lawful ordinances to minimize diversion of local law enforcement resources to federal immigration enforcement. This policy has been largely repudiated by the federal courts. *See* City & Cty. of San Francisco v. Trump, 897 F.3d 1225, 1234–35 (9th Cir. 2018) (based on the principle of Separation of Powers and the Spending Clause, which vests exclusive power in Congress to impose conditions on federal grants, the Executive Branch may not refuse to disperse the federal grants in question without congressional authorization); *see also* Priscilla Alvarez, *Trump Cracks Down on Sanctuary Cities*, ATLANTIC (Jan. 25, 2017),

Perhaps the most preposterous, yet alarming, policy adopted by the Trump Administration is the initiative to substitute ICE and CBP officers for trained, experienced asylum officers to conduct reasonable and credible fear interviews.[98] These interviews determine the crucial question of whether an asylum-seeker is eligible for bond, and if so, whether she or he will have to await a full Immigration Court hearing in Mexico. From our own experience as volunteer lawyers at the detention facilities in Dilley, Texas, and Folkston, Georgia, the authors are painfully aware of how difficult and delicate a challenge it is to build a modicum of trust that will enable these highly traumatized women, children, and men to reveal their most painful, frightening, and sometimes shameful secrets about the events and people who made them give up everything at home to make the long dangerous trek across the border. Asylum-seekers cannot be expected to achieve even that inadequate level of rapport and communication (setting aside language and cultural barriers for the moment) with uniformed officers under no obligation of confidentiality, and with only a cursory knowledge of the multilayered, nuanced, immensely complex body of relevant asylum,

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https://www.theatlantic.com/politics/archive/2017/01/trump-crack-down-sanctuary-city/514427/ (on file with the *Columbia Human Rights Law Review*); Laure Meckler, *Sanctuary Cities to Be Barred from Justice Department Funds, Sessions Says*, WALL ST. J. (Mar. 27, 2017), https://www.wsj.com/articles/sanctuary-cities-to-be-barred-from-justice-department-funds-sessions-says-1490637493 (on file with the *Columbia Human Rights Law Review*); s*ee generally* Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 162 (2016) (explaining how 'dog-whistle' politics has contributed to the coded racial narratives within debates about sanctuary cities); Elizabeth McCormick*, Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165 (2016)(arguing that anti-sanctuary approach to immigration enforcement is a failed strategy which diverts attention from seeking comprehensive immigration reform).

98. Molly O'Toole, *Border Patrol Agents, Rather than Asylum Officers, Interviewing Families for 'credible fear,'* WASH. POST (Sept. 19, 2019), https://lat.ms/2qRjVbG (on file with the *Columbia Human Rights Law Review*); Victoria Neilson & Anna Gallagher, *Trump Administration Makes a Mockery of Asylum System*, HILL (May 11, 2019), https://thehill.com/opinion/immigration/443200-trump-administration-makes-a-mockery-of-asylum-system [https://perma.cc/WYL2-D5CA] (reporting that the Trump Administration is seeking to remove asylum officers from their core duties because they have been correctly applying the law: allowing those who have a credible fear of persecution to pursue protection in the United States, in accord with our international treaty obligations).

immigration, and international human rights law. [99] As one commentator noted, assigning Border Patrol agents to this duty is like asking the security guard in a hospital to triage incoming patients in an emergency ward.[100] It is, in fact, worse because many CBP agents view their jobs as arresting undocumented immigrants, including those with valid asylum claims, who have crossed without inspection; and because some of these "security guards" are already

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99. We do not mean to suggest that every CBP official, including Border Patrol agents, attempts to deny immigrants and asylum-seekers their rights or treats them inhumanely. However, one cannot ignore the revelation that at least 9500—a very significant percentage—current and former CBP officers subscribe to and post on a secret, exclusive Facebook group page that is rife with revolting misogynistic, racist, and callous comments, expressing indiscriminate contempt and hatred for immigrants. This does nothing to enhance confidence in their ability to conduct effective threshold interviews of asylum-seekers. *See* A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, PROPUBLICA (July 1, 2019), https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes [https://perma.cc/6WN4-2A67] (detailing derogatory comments about, among others, Latina lawmakers published in secret Facebook group by current and former CBP officers). What is worse, CBP leadership had known for at least three years about the site, which included graphic images of agents simulating sexual acts with a training mannequin, defecating, and smiling at a human skull, but did nothing. Ted Hesson & Cristiano Lima, *Border Agency Knew About Secret Facebook Group for Years*, POLITICO (July 3, 2019), https://www.politico.com/story/2019/07/03/border-agency-secret-facebook-group-1569572 [https://perma.cc/XR6K-TE3B].

For interesting discussion of the tension when self-styled devout Christians engage in work that seems antithetical to Jesus' explicit teachings -- for example, separating and imprisoning children—see these articles, including most saliently the essay by former Border Patrol Agent Montoya: Julie Zauzmer and Keith McMillan, *Sessions Cites Bible Passage Used to Defend Slavery in Defense of Separating Immigrant Families*, WASH. POST (June 15, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/06/14/jeff-sessions-points-to-the-bible-in-defense-of-separating-immigrant-families/ (on file with the *Columbia Human Rights Law Review*); Ulrike Elisabeth Stockhausen, *Evangelicals and Immigration: A Conflicted History*, PROCESS: AMERICAN HISTORY (Mar. 18, 2019), http://www.processhistory.org/stockhausen-immigration/; Christopher Montoya [retired Border Patrol Agent], *Between the Sacred and the Profane: The Border as a Contested Space*, HARVARD DIVINITY SCHOOL BULLETIN (Spring/Summer 2018 - Vol. 46, Nos. 1 & 2), https://bulletin.hds.harvard.edu/articles/springsummer2018/between-sacred-and-profane; Kristin Kobes Du Mez, *Understanding White Evangelical Views on Immigration: For This Cultural Group, Militant Masculinity Trumps the Bible*, HARVARD DIVINITY SCHOOL BULLETIN (Spring/Summer 2018 - Vol. 46, Nos. 1 & 2), https://bulletin.hds.harvard.edu/articles/springsummer2018/understanding-white-evangelical-views-immigration.

100. Neilson & Gallagher, *supra* note 95.

being sued for illegally repulsing and misinforming the exact people whose asylum claims they will now be screening.[101]

As Julie Veroff of the American Civil Liberties Union's Immigrant Rights Project stated, "Credible fear interviews involve

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101. For another example of the type of behavior that suggests it is very unlikely that an asylum-seeker could ever communicate openly with these officers, *see, e.g.*, the conduct alleged in the civil legal action Mejia Rios v. GEO Group, 5:19-cv-00552 (W.D. Tex. May 24, 2019). *Raices, Arent Fox LLP, and Aldea PJC Sue the GEO Group for Forcefully Re-separating Immigrant Families*, RAICES (May 28, 2019), https://www.raicestexas.org/2019/05/28/raices-arent-fox-llp-and-aldea-pjc-sue-the-geo-group-for-forcefully-re-separating-immigrant-families/ [https://perma.cc/9SRE-85CG] (alleging that GEO sanctioned unlawful separation of thirteen children from their fathers):

> The [court] issued a nationwide preliminary injunction prohibiting the US Department of Homeland Security from separating families and requiring reunification of families previously separated. . . . Two months after the federal court injunction, and in direct violation of that order, [defendant] sanctioned the unlawful separation of these thirteen children from their fathers. With no prior notice, [defendant] permitted armed men to forcibly remove the fathers of these thirteen children from their rooms at the Karnes Detention Center by using bulletproof vests, shields, knee pads, boots, helmets, tear gas equipment and guns . . . ; loaded the fathers without their children onto buses and transported them . . . nearly two hours away . . . Fathers screamed and cried loudly for their children. Others vomited blood and shook uncontrollably.
>
> Because [defendant] told the fathers that they would never see their sons again and again all of the circumstances appeared to confirm it, one father attempted suicide. [Defendant] refused to inform the fathers where they were being taken, why they were again being separated from their children, where their children were located, whether their children were safe, and who would care for them. [Defendant] also told the fathers that they would be deported without their children, that their children would be adopted by families living in the United States, and that they would never again see their children. . . . [Defendant] intentionally traumatized families who came to the United States seeking refuge . . . When [defendant] received these fathers and children, they did so fully aware of the deep traumatization these families experienced as a result of their initial separation. They knew the separation was illegal. They knew these children were extremely fragile, and their fear of permanent separation was still very real. Then [defendant] violently separated them again, showing callous disregard for the law and the families' mental and physical health.

Id.

the discussion of sensitive, difficult issues. . . . Federal law thus requires that credible fear interviews be conducted in a '*nonadversarial manner*.' . . . Credible fear interviews have always been conducted by professionals who specialize in asylum adjudication, not immigration enforcement.[102] The Administration's radical proposal is antithetical to principles of elemental fairness and due process and violates our obligations under international human rights and refugee law.

To evaluate the extent to which the U.S. asylum process complies with the commitment not to "penalize" asylum-seekers, it is important to look to its overall functionality, reliability, and insulation from political pressure. The U.S. Immigration Courts and Board of Immigration Appeals have failed to fulfill the constitutional and statutory promise of fair and impartial case-by-case review, according to a report by the Innovation Law Lab, the largest network of pro bono-based immigrant defenders, and the Southeast Immigrant Freedom Initiative of the Southern Poverty Law Center.[103] Entitled *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, the Report begins:

> The nation's immigration courts have been dysfunctional since their inception. Today, the system

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102. Nick Miroff, *U.S. Asylum Screeners to Take More Confrontational Approach as Trump Aims to Turn More Migrants Away at the Border*, WASH. POST (May 7, 2019), https://www.washingtonpost.com/immigration/us-asylum-screeners-to-take-more-confrontational-approach-as-trump-aims-to-turn-more-migrants-away-at-the-border/2019/05/07/3b15e076-70de-11e9-9eb4-0828f5389013_story.html (on file with the *Columbia Human Rights Law Review*) (in response to pressure and comments from President Trump such as "the asylum program is a scam," John Lafferty, director of the USCIS asylum division, sent all asylum officers a memorandum requiring them to adopt a much more challenging and adversarial approach to asylum-seekers; this memorandum is "among the most significant steps the administration has taken to limit access to the country for foreigners seeking asylum").

103. *Southeast Immigrant Freedom Initiative*, SOUTHERN POVERTY LAW CENTER (June 21, 2018), https://www.splcenter.org/our-issues/immigrant-justice/southeast-immigrant-freedom-initiative-en [https://perma.cc/H8AT-F2T7] (noting that only one in six immigrants detained in the Southeast has access to an attorney in removal proceedings; for an immigrant in detention, legal representation means the difference between staying safe with his/her family and being forced to return to a place that is no longer home).

We recognize the many courageous and reputable Immigration Court Judges and the many fair and reasonable ICE trial counsel, but the policies that the Trump Administration has compelled them to implement undermine due process and fundamental fairness of these courts.

> has effectively collapsed. The attorneys general appointed by President Trump have used their authority over the immigration courts to weaponize them against asylum seekers and immigrants of color in support of Trump's anti-immigrant policies. This report examines the system's collapse and explains why it cannot be salvaged in its current form.[104]

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104. INNOVATION LAW LAB & SOUTHERN POVERTY LAW CENTER, THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 1 (2019), https://innovationlawlab.org/reports/the-attorney-generals-judges/ (on file with the *Columbia Human Rights Law Review*).

This is only one of several fierce critiques of the Trump Administration's blatant politicization of what should be a system of apolitical adjudicators. *See* Aaron Reichlin-Melnick, *Immigration Judges and Advocates Criticize Immigration Court System for 'Propaganda'*, American Immigration Council (May 16, 2019) (politicization of court system demonstrated by the Executive Office of Immigration Review's sending to all Immigration Court Judges a fallacious, distorted document entitled "Myths vs. Facts About Immigration Proceedings," plainly "aimed directly at opponents of the Trump administration's crackdowns on asylum seekers"), http://immigrationimpact.com/2019/05/16/judges-criticize-immigration-court-system-propaganda/#.XTD2cPJKjiw.

The "Myths vs. Facts" pastiche was denounced as raw propaganda by a group of 27 former Immigration Court Judges/BIA members known as the Round Table, which has taken issue with several of the changes in Immigration Court structure and practice instituted by the Trump Administration, but never before this strongly. Round Table Letter to James McHenry, Director of Executive Office of Immigration Review, dated May 19, 2019 ("issuance of such a document can only be viewed as political pandering, at the expense of public faith in the immigration courts" "nothing short of judicial independence, neutrality, and fairness is acceptable for courts that make life and death determinations"), https://drive.google.com/file/d/0B_6gbFPjVDoxSmZaaWw0ODctMkRZaTIyZWlpam5URDJmZDI4/view [https://perma.cc/4XBY-L8HB].

See also AMERICAN BAR ASSOCIATION, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (March 2019) (discussing major systemic issues facing the immigration courts such as political interference, lack of judicial independence, a chronic lack of resources, and "policies and practices that threaten due process," as well as disparities in how and when Immigration Court judges grant asylum; lack of independence and politicized hiring practices in the immigration court so problematic that the ABA calls for suspension of hiring of new immigration judges until the immigration courts become more independent, even in light of historic backlogs; best solution is to make immigration courts an "Article I" court, similar to federal tax or bankruptcy courts, which would insulate the judges from the Attorney General's current authority to directly overrule them, to create new precedent, and to discipline judges for failing to meet case completion quotas), https://www.americanbar.org/content/dam/aba/publications/commission_on_immig

In a final example of political interference with the adjudication of asylum claims, in June 2019 the newly appointed Acting USCIS Director, Kenneth Cuccinelli (widely touted as likely to become Trump's "immigration czar" and an official with extreme anti-immigrant views),[105] emailed asylum officers, telling them to do a better job of rejecting asylum-seekers during their initial screenings at the border and noting USCIS needs to do its "part to help stem the crisis and better secure the homeland."[106]

The Acting Director (whose appointment without Senate confirmation attracted broad bipartisan opposition and was criticized by legal scholars as unconstitutional and illegal)[107] cited grossly false

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ration/2019_reforming_the_immigration_system_volume_1.pdf [https://perma.cc/G8HD-4J5Q].

105. Eli Stokols, *Trump Expected to Pick Hard-Liner Ken Cuccinelli for New Post of 'Immigration Czar,'* L.A. TIMES (May 22, 2019), https://www.latimes.com/politics/la-na-pol-trump-cuccinelli-immigration-czar-20190522-story.html [https://perma.cc/KR42-5W7W]. Mr. Cuccinelli, who has no professional background or experience in immigration law, later gained some notoriety when he rewrote Emma Lazarus's famous poem on the Statue of Liberty to say, "[g]ive me your tired and your poor who can stand on their own two feet and who will not become a public charge." *Cuccinelli Rewrites Statute of Liberty Poem to Defend Immigration Stance,* N.Y. TIMES POST (Aug. 13, 2019), https://nytimespost.com/cuccinelli-rewrites-statue-of-liberty-poem-to-defend-immigration-stance/ [https://perma.cc/HYU9-6HPT].

106. Hamid Aleaziz, *A Top Immigration Official Appears to Be Warning Immigration Officials About Border Screenings*, BUZZFEED (June 18, 2019), https://www.buzzfeednews.com/article/hamedaleaziz/uscis-director-asylum-officers-email [https://perma.cc/NMW3-WGYN].

107. *See also* Devan Coles & Geneva Sands, *Union Chief Blasts Trump Pick to Lead Citizenship Agency, Says Choice Signals 'End Of Legal Immigration'*, CNN (May 27, 2019), https://www.cnn.com/2019/05/27/politics/danielle-spooner-ken-cuccinelli-uscis/index.html [https://perma.cc/F6P6-B7Y6]; Dominique Mosbergen, *Trump Gives Hard-Liner Ken Cuccinelli Top Immigration Job Despite Bipartisan Opposition,* HUFFINGTON POST (June 11, 2019), https://www.huffpost.com/entry/ken-cuccinelli-citizenship-and-immigration-services-director_n_5cff6895e4b06d839dc4799e; Mark Scarcella*, Trump Picks Cuccinelli, Former Virginia Attorney General, for Immigration Post,* NATIONAL LAW JOURNAL (June 10, 2019), https://www.law.com/nationallawjournal/2019/06/10/trump-picks-cuccinelli-former-virginia-attorney-general-for-immigration-post/; Raul Reyes*, Ken Cuccinelli Neither Deserving nor Qualified to Play Any Role in Immigration Policy*, THE HILL (May 29, 2019) https://thehill.com/opinion/immigration/445910-ken-cuccinelli-neither-deserving-nor-qualified-to-play-any-role-in [https://perma.cc/23P5-3DD8]. On November 13, 2019, Mr. Cuccinelli was elevated by Mr. Trump's newest Secretary of Homeland Security, Chad Wolf, to Acting Deputy Director of the Department, despite "profound doubts over Cuccinelli's ability to win a confirmation vote in the Republican-led Senate." Bill Chappell, *Chad Wolf*

statistics about the percentage of asylum-seekers who do not appear in Immigration Court[108] and admonished asylum officers that the gap between the number who pass a Credible Fear Interview and the number who eventually are denied asylum in Immigration Court was wider than the "two legal standards would suggest." [109] Acting Director Cuccinelli's email then stated:

> "Therefore, USCIS must, in full compliance with the law, make sure we are properly screening individuals who claim fear . . . ." He added that officers have tools to combat "frivolous claims" and to "ensure that [they] are upholding our nation's laws by only making

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Becomes Acting Head Of Homeland Security, Names Ken Cuccinelli His Deputy, NPR (Nov. 14, 2019), https://www.npr.org/2019/11/14/779264900/chad-wolf-becomes-homeland-securitys-acting-secretary-and-names-cuccinelli-as-no [https://perma.cc/AV64-VWSG].

This makes Mr. Cuccinelli's active hostility toward asylum-seekers and the U.S. asylum system of even greater concern. He celebrated his new office with a guest op-ed entitled "*We Need to Tighten up Loopholes in Our Asylum Laws"* in which he announced further restrictions on the eligibility of asylum-seekers for employment authorization. *See* THE HILL (Nov. 15, 2019) https://thehill.com/opinion/immigration/470596-ken-cuccinelli-we-need-to-tighten-up-loopholes-in-our-asylum-laws [https://perma.cc/GE7U-33DL]. *See also* Dep't of Homeland Security, Notice of Proposed Rule-Making, Asylum Application, Interview, and Employment Authorization for Applicants, 84 FR 62374 (11/14/2019) (new restrictions would block, with limited exceptions, employment authorization for aliens who entered the United States illegally, who did not meet the one-year deadline for filing an asylum application, or who are convicted of certain offenses).

108. President Trump and his surrogates have been trumpeting (no other word will do, alas) the false statistic, with no source cited, that 90% of asylum-seekers don't show up for Immigration Court. *See, e.g.,* Jack Crowe, *DHS Secretary: 90 Percent of Recent Asylum-Seekers Skipped Their Hearings,* NAT'L REV. (June 11, 2019), https://www.nationalreview.com/news/dhs-secretary-90-percent-of-recent-asylum-seekers-skipped-their-hearings/ [https://perma.cc/NBE7-XZJS] (quoting the DHS Secretary's assertion that 90% of recent asylum-seekers failed to appear in court). The converse reality was investigated and is reported by TRAC. *See, e.g.*, *Most Released Families Attend Immigration Court Hearings*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (June 18, 2019), https://trac.syr.edu/immigration/reports/562 [https://perma.cc/6732-PWQ6] (finding that, from September 2018 to May 2019, based on over 47,000 Immigration Court hearing records, almost 100% of represented families, and about 70%–80% of unrepresented families, attend Immigration Court hearings); Obed Manuel, *Almost 100% of Asylum-Seeking Families with Legal Aid Are Showing up to Court, Analysis Finds*, DALLAS NEWS (June 19, 2019), https://www.dallasnews.com/news/immigration/2019/06/19/almost-100-asylum-seeking-families-legal-aid-showing-court-analysis-finds [https://perma.cc/722G-4QA8].

109. Aleaziz, *supra* note 106.

> positive credible fear determinations in cases that have a significant possibility of success."[110]

Despite the facially innocuous sounding of this language, former immigration officials said in the current political context the email was clearly a threat. "I read this only in one way—a threat. A threat that asylum officers will be blamed by their new boss for the repeated failures of the Trump administration," Ur Jaddou, a former chief counsel at USCIS, told BuzzFeed News. "This is an unbelievable threat and not something a director would normally ever send."[111]

The severe policies of the new Administration are particularly troubling given the human rights catastrophe occurring not only in distant countries such as Syria and Myanmar, but also in Venezuela and the nearby countries in Central America. [112] Extensively networked quasi-governmental entities ("the Maras") have taken on quasi-state authority in Guatemala, Honduras, and El Salvador, often referred to collectively as "the Northern Triangle."[113] Those

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110. *Id.* One official at the Department of Homeland Security—of which USCIS is a part—said the email was "insane." *Id.* Sarah Pierce, a policy analyst at the Migration Policy Institute, stated that Cuccinelli was trying to ramp up the pressure on officers in whatever way he could, and that his understanding of asylum law is at best misguided: "The acting director is trying to place the burden of reducing the difference between the high level of credible-fear acceptances and the low level of ultimate asylum approvals on the shoulders of asylum officers". . . . However, the reason for this difference can be traced back to Congress—which purposefully made a low bar for the credible-fear process—and the failure to provide counsel for asylum-seekers, which all but guarantees the majority will fail in the court system." *Id.*

111. *Id. See also* Nick Miroff, *Chief of U.S. Asylum Office Reassigned as White House Pushes for Tighter Immigration Controls,* WASH. POST. (Sept. 4, 2019), 2019 WLNR 26927891 (Trump administration replacing career official John Lafferty, Asylum Office Director, with an acting director presumably with far more restrictionist views).

112. The authoritarian regime in Venezuela and resulting chaos, violence, and economic distress have also led to increased asylum applications by Venezuelans to the United States. *See* Jens Manuel Krogstad & Gustavo López, *Venezuelan Asylum Applications to U.S. Soar in 2016*, PEW RESEARCH CTR. (Aug. 4, 2016), http://www.pewresearch.org/fact-tank/2016/08/04/venezuelan-asylum-applications-to-u-s-soar-in-2016/ [https://perma.cc/N65D-DMP3]. In the 2016 fiscal year, Venezuelan asylum applications increased 168% compared to the previous year (10,221 versus 3,810). *Id.*

113. UNITED NATIONS, THE GLOBALIZATION OF A CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT 240 (2010) (stating that gangs in the Northern Triangle have corrupted and outgunned civilian police forces); *see also* Nelson Rauda Zablah, *Sala de lo Constitucional declara ilegal negociación con pandillas y las nombra grupos terroristas*, EL FARO (Aug. 25, 2015),

countries have among the highest homicide rates in the world, and their governments are manifestly either unable or unwilling to protect a large proportion of their population from persecution.[114]

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https://elfaro.net/es/201508/noticias/17307/Sala-de-lo-Constitucional-declara-ilegal-negociaci%2525C3%2525B3n-con-pandillas-y-las-nombra-grupos-terroristas.htm [https://perma.cc/ZNT4-84Q5] (El Sal.) (reporting decision of Constitutional Chamber of Supreme Court of El Salvador to declare that MS-13 and Barrio 18 are terrorist organizations wielding political power over people and territory; the decision is available at http://www.csj.gob.sv/Comunicaciones/2015/AGO_15/COMUNICADOS/Sentencia%2022-2007%20versi%C3%B3n%20final.pdf [https://perma.cc/W8VZ-MCU4]). "Mara" is typically translated as "gang" in English, but that is overly simplistic. Numerous experts in Immigration Court hearings and scholarly articles attest that "gang" is a complete misnomer for these entities. "Gang" in no way denotes or connotes these sophisticated, powerful organizations that have seized political power and rule their fiefdoms as warlords, constituting de facto governments not only in their local strongholds, but throughout such extensive regions that no one can hope to escape them anywhere in these countries. *See, e.g.*, MAX G. MANWARING, STRATEGIC STUDIES INSTITUTE, U.S. ARMY WAR COLLEGE, A CONTEMPORARY CHALLENGE TO STATE SOVEREIGNTY: GANGS AND OTHER ILLICIT TRANSNATIONAL CRIMINAL ORGANIZATIONS IN CENTRAL AMERICA, EL SALVADOR, MEXICO, JAMAICA, AND BRAZIL 7 (Dec. 2007), https://ssi.armywarcollege.edu/pdffiles/pub837.pdf [https://perma.cc/H5ZW-VUKD]. Translating "mara" as "gang" may serve the interest of de jure governments that seek to mischaracterize, and thus, minimize, the threat posed by these formidable political opposition forces. For the acknowledgement of this reality by the United States Ambassador to Mexico, *see* "*Parallel Narco-Governments Need to be Stopped, Warns US Ambassador,"* MEXICO DAILY NEWS (Nov. 15, 2019), https://mexiconewsdaily.com/news/narco-governments-power-will-increase-without-action/ [https://perma.cc/W2LZ-MGL6].

114. For extensive documentation of the rampant unpoliced (or perpetrated by law enforcement) violence in the Triangle against distinctive target groups such as women, young men who reject forced induction into Mara service, etc. there are a multitude of sources. For basic data, *see UNHCR Country Conditions Reports*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, https://www.unhcr.org/en-us/country-reports.html [https://perma.cc/FSD9-WWYF]; AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2017/18: THE STATE OF THE WORLD'S HUMAN RIGHTS 156–58, 180–81, 185–87 (2018), https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF [https://perma.cc/Y7P5-FWW8]. For some of the most current and compelling reports, *see, e.g.*, INSIGHTCRIME, https://www.insightcrime.org/ (last visited Sept. 19, 2019) (an organization of journalists and academic researchers seeking to document the phenomenon of political violence in Latin American and the Caribbean); BLOG OF DR. ELIZABETH KENNEDY, https://elizabethgkennedy.com/ (last visited Sept. 19, 2019) (renowned University of San Diego researcher currently living and working in Triangle countries, compiling a report on the number of U.S. deportees murdered by the Mara after their deportation)) ("World Health Organization classifies a homicide rate higher than 10 per 100,000 as an epidemic, every bit as harmful to children, mothers, fathers and their communities as diseases like

II. THE OBLIGATIONS OF THE UNITED STATES TO ASYLUM-SEEKERS UNDER INTERNATIONAL LAW

From the rise of Nazi Germany in 1933 to nearly the end of World War II, most Western nations, including the United States, refused to admit Jewish refugees and others who were attempting to escape the fatal grasp of the Third Reich.[115] The world's failure to provide a safe haven for those facing the Holocaust led to the adoption of the Convention Relating to the Status of Refugees in 1951. The Convention prohibits returning refugees to a country where they might face persecution "for reasons of race, religion,

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Ebola, swine flu, or Zika. El Salvador finished 2015 with a rate of 103, Honduras with a rate of 57, and Guatemala with a rate of 30. Parts of each country have double the national rate. These homicide rates are among the highest in the world—including war zones. El Salvador's rate is second only to Syria's. Honduras' is in the top five, and Guatemala's is in the top 20"), https://elizabethgkennedy.com/. ; *see also* Cinthya Alberto & Mariana Chilton, *Transnational Violence Against Asylum-Seeking Women and Children: Honduras and the United States-Mexico Border*, 20 HUM. RTS. REV. 205 (June 2019), https://link.springer.com/article/10.1007/s12142-019-0547-5 [https://perma.cc/QNZ4-2RHA] (documenting dangers to women and children in Honduras); Karen Musalo, *El Salvador—A Peace Worse Than War: Violence, Gender and a Failed Legal Response*, 30 YALE J.L. & FEMINISM 3, 4-8 (2019)(explaining the high levels of gendered violence in El Salvador and critiquing the laws meant to address them); Thomas Boerman & Jennifer Knapp, *Gang Culture and Violence Against Women in El Salvador, Honduras and Guatemala*, IMMIGRATION BRIEFINGS, March 2017, at 8 (highlighting gang activity as the most extreme risk of violence against women). Presumably as a result of this level of uncontrolled violence, the number of immigrants from the small Triangle countries has rivaled the number from neighboring Mexico. *See* D'vera Cohn, Jeffrey Passel & Ana Gonzales-Barrera, *Rise in U.S. Immigrants from El Salvador, Guatemala and Honduras Outpaces Growth from Elsewhere*, PEW RESEARCH CTR. (Dec. 7, 2017), http://www.pewhispanic.org/2017/12/07/rise-in-u-s-immigrants-from-el-salvador-guatemala-and-honduras-outpaces-growth-from-elsewhere/ [https://perma.cc/C4JA-JC83]. Data from the U.S. Census Bureau shows 115,000 immigrants from the Northern Triangle came to the United States in 2014 as compared to only 60,000 in 2011. *Id.* In comparison, 175,000 immigrants migrated from Mexico in 2011 and that number declined by 10,000 in 2014. *Id.*

115. *See* Laura Tavares, *Text to Text: Comparing Jewish Refugees of the 1930s with Syrian Refugees Today*, N.Y. TIMES (Jan. 4, 2017), https://www.nytimes.com/2017/01/04/learning/lesson-plans/text-to-text-comparing-jewish-refugees-of-the-1930s-with-syrian-refugees-today.html (on file with the *Columbia Human Rights Law Review*) (writing about the similarities between Syrian refugees and Jewish refugees and noting that the United States was unwilling to accept Jewish refugees because of the fear of Nazi spies, economic hardship, and the desire to maintain "American" ethnic identity).

nationality, membership of a particular social group, or political opinion."[116] The Convention also prohibits receiving countries from discriminating among refugees on the basis of their religion.[117] Most saliently, the Convention generally prohibits penalizing a refugee for unlawful presence or illegal entry.[118] The Convention recognizes the extraordinary circumstances refugees may encounter in fleeing a country where they run a high risk of persecution. The Convention plainly contemplates that refugees may have no realistic choice but to enter a country illegally without a visa or passport and requires, at least where certain conditions are met, that the countries that have joined the Convention ("States Parties") forego imposing penalties on such refugees.[119]

In 1967, the international community formed the Refugee Protocol, which expanded both the temporal and geographic scope of the 1951 Convention.[120] In 1968, the United States Senate gave its advice and consent to the Protocol, which President Lyndon B. Johnson subsequently ratified. Although the United States did not originally join the 1951 Convention, the Protocol incorporates all the critical provisions of the Convention, namely, Articles 2 to 34.

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116. 1951 Refugee Convention, *supra* note 17, art. 1.

117. *Id.* art. 4.

118. *Id.* art. 31(1).

119. As the Office of the United Nations High Commissioner for Refugees stated in its introduction to the 1951 Refugee Convention, "The Convention is both a status and rights-based instrument and is underpinned by a number of fundamental principles, most notably *non-discrimination, non-penalization and non-refoulement*." Introductory Note, 1951 UN Convention on Refugees and 1967 Protocol Relating to the Status of Refugees, at 3, UNHCR, http://www.unhcr.org/en-us/3b66c2aa10 [https://perma.cc/EJ2D-ZU9Z] (emphasis added). In 1968, the United States agreed to comply with the substantive provisions of Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees. Protocol Relating to the Status of Refugees, art. 1, 1967, 19 U.S.T. 6223, 6259–6276, T.I.A.S. No. 6577 (1968); *see also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (holding that to show a "well-founded fear of persecution," asylum-seeking aliens need not prove that it is "more likely than not" they will be persecuted in their home country).

120. The 1951 Refugee Convention was limited to events occurring before January 1, 1951, essentially to refugees compelled to flee their countries because of World War II and its aftermath. *See* 1967 Refugee Protocol, *supra* note 17, art. 1. The Protocol eliminated that date restriction and clarified that the key provisions of the 1951 Refugee Convention applied world-wide. *Id.*; *see also* Ira Frank, *Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States*, 11 INT'L LAW. 291, 294 (1977) (asserting the Protocol was designed to remove the time limitation on the Convention).

A. The Plain Meaning of the 1951 Refugee Convention's Articles Prohibiting Non-Refoulement and Penalization of Asylum-Seekers

Two provisions of the 1951 Refugee Convention work in tandem with each other. First, the Convention prohibits *refoulement*—the receiving state's returning the refugee to a country where he or she might be persecuted. Second, the States Parties to the Convention have an obligation generally not to penalize asylum-seekers for entering its country without authorization. The *non-refoulement* obligation is contained in Article 33(1):

> No Contracting State *shall expel or return ("refouler")* a refugee *in any* manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[121]

The wording of Article 33 expresses an intent to protect refugees virtually absolutely from expulsion to a country where their "life or freedom" would be threatened for any of the five given grounds: race, religion, nationality, membership of a particular social group, or political opinion. The words, "No Contracting State shall expel or return ('refouler')," constitute mandatory language prohibiting the return of a refugee. The phrase "in any manner whatsoever" underlines the absolute nature of the prohibition. The only exception is found in subsection 2 of Article 33:

> The benefit of the present provision may not, however, be claimed by *a refugee whom there are reasonable grounds for regarding as a danger to the security of the country* in which he is, or who, having been convicted by a final judgment *of a particularly serious crime,* constitutes a danger to the community of that country.[122]

Note that the language requires a showing that the particular refugee is a danger to the national security or has been so convicted. A receiving state is prohibited from banning classes of refugees, whether on the basis of nationality or religion.[123]

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121. 1951 Refugee Convention, *supra* note 17, art. 33(1) (emphasis added).

122. *Id.* art. 33(2) (emphasis added).

123. *Id.* art. 3 ("The Contracting States shall apply the provisions of this Convention to refugees *without discrimination* as to *race, religion or country of origin*.") (emphasis added).

An exception to Article 32 explains the "national security" rationale, emphasizing that the state may exclude a refugee only for "compelling reasons of national security."[124] Dr. Paul Weis's commentary on the drafting history notes that at the negotiation conference the official representatives wished to impose on receiving states a high bar for excluding refugees on grounds of national security.[125]

To help effectuate this strict prohibition on returning refugees, the Convention imposes a corresponding obligation on receiving states to refrain from penalizing asylum-seekers. Penalizing asylum-seekers would deter them from seeking asylum in the first place, thereby undermining the *non-refoulement* obligation, a fundamental obligation in international refugee and human rights law.[126] Penalizing asylum-seekers by taking their children from them likewise runs afoul of United States human rights obligations under the Convention against Torture ("UNCAT"), the International Covenant on Civil and Political Rights ("ICCPR"), the Convention for the Elimination of Racial Discrimination ("CERD"),[127] the Universal Declaration of Human Rights, the Declaration on the Rights of Man,[128] and customary international law.[129] The spokesperson for the

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124. *Id.* art. 32.

125. THE REFUGEE CONVENTION, 1951, THE TRAVAUX PREPARATOIRES 278–304 (Paul Weis ed., Cambridge University Press 1995) (emphasis added).

126. *Cf.* JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 26 n.56 (2d ed. 2014) (noting that refugee rights including the "right to non-penalization for illegal entry or presence" would be undermined if "a state could avoid its responsibility to protect by the simple expedient of refusing ever to assess a claim.").

127. The International Court of Justice has recently granted precautionary measures to Qatar and ordered the United Arab Emirates "pending the final decision in the case and in accordance with its obligations under CERD [Convention for the Elimination of Racial Discrimination], [to] ensure that families that include a Qatari, separated by the [deportation] measures adopted by the UAE on 5 June 2017, are reunited . . . ." Application of International Convention on Elimination of all Forms of Racial Discrimination (Qatar v. UAE) Request for Provisional Measures, 2018 I.C.J. 172, ¶ 75 (July 23, 2017).

128. *See also* Inter-Am. Comm'n H.R. Res. 63/2018, Vilma Aracely Lopez Juc de Coc and Others Regarding the United States of America (Aug. 16, 2018). There, the Commission noted that "a rupture in the family unit can occur from the expulsion of one or both progenitors [parents] in such a way that separating families due to the violation of immigration laws results in a disproportionate restriction" on the right to family protection under Article 17 of the American Convention on Human Rights and under Article VI of the American Declaration on the Rights of Man. *Id.* ¶ 27 (citing Committee on the Protection of the Rights of

U.N. High Commissioner for Human Rights ("UNHCR") noted, "The practice of separating families amounts to arbitrary and unlawful interference in family life, and is a serious violation of the rights of the child."[130]

Article 31 of the 1951 Convention prohibits States from criminalizing the presence of refugees and prohibits unnecessary

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All Migrant Workers and Members of Their Families, and the Committee on the Rights of the Child, Joint General Comment No. 4 (2017) on State Obligations Regarding the Human Rights of Children in the Context of International Migration, ¶ 29 (Nov. 16, 2017), CMW/C/GC/4-CRC/C/GC/23).

129. *See, e.g.*, Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 45, U.N. Doc. A/HRC/37/50 (Nov. 23, 2018) (describing states' international obligations to uphold the "absolute and non-derogable right of migrants not to be subjected to torture and ill-treatment"). States increasingly subject migrants to unnecessary, disproportionate and deliberately harsh reception conditions designed to coerce them to "voluntarily" return to their country of origin, regardless of their need of *non-refoulement* protection. This approach "may include measures such as the criminalization, isolation and detention of irregular migrants, the deprivation of medical care . . . and adequate living conditions, the deliberate separation of family members and . . . excessive prolongation of status determination . . . Deliberate practices such as these amount to "refoulement in disguise" and are "incompatible with the principle of good faith." *Id.* ¶ 43. President Trump's policy of taking children from their parents also violates the Convention on the Rights of the Child ("CRC") and the American Convention on Human Rights ("ACHR"). Because the United States Senate attached an understanding to both the UNCAT and the ICCPR making most, if not all of their provisions, non-self-executing, because the United States is not a party to the CRC or the ACHR, and because the UDHR is a UN General Assembly resolution, not a treaty, federal courts cannot rely on these instruments as the rule of decision. All these instruments are, however, strong evidence of customary international law, and federal courts can invoke them as such or do so under the *Charming Betsy* canon discussed *infra* at notes 229–245 and accompanying text. *See* Paquete Habana, 175 U.S. 677 (1900); Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 229–58 (2002); *see also* Nick Cumming-Bruce, *Taking Migrant Children from Parents Is Illegal, U.N. Tells U.S.*, N.Y. TIMES (June 5, 2018), https://www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html (on file with the *Columbia Human Rights Law Review*) (quoting Ravina Shamdasani, spokeswoman for the Office of the United Nations High Commissioner for Human Rights: "The U.S. should immediately halt this practice of separating families and stop criminalizing what should at most be an administrative offense—that of irregular entry or stay in the U.S.").

130. Office of the U.N. High Comm'r for Human Rights, Press Briefing Note on Egypt, United States and Ethiopia (June 5, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174&LangID=E [https://perma.cc/3243-NGYY].

restrictions on refugees' free movement. The Refugee Convention of 1951 is official in both English and French. The English version of Article 31 provides:

> The Contracting States *shall not impose penalties, on account of their illegal entry or presence,* on refugees who, coming directly[131] from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[132]

The French version adds the word "pénales" to modify "sanctions"—or "penalties" in English in the first part of Article 31. Thus, in French, Article 31 reads, "Les Etats Contractants n'appliqueront pas de *sanctions pénales,* du fait de leur entrée ou de leur séjour irréguliers aux réfugiés."[133] The Council of Europe's

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131. For the interpretation of the term "directly" as it may be applied in the case of refugees who traverse Mexico or other countries to reach the United States, *see infra* text accompanying notes 167–170.

132. Subsection 2 of Article 31 of the 1951 Refugee Convention attempts to limit restrictions on the movement of refugees once they enter the receiving country:

> 2. The Contracting States *shall not apply to the movements of such refugees restrictions other than those which are necessary* and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

1951 Refugee Convention, *supra* note 17, art. 31(2) (emphasis added).

133. Convention et Protocole Relatifs au Statut des Réfugiés, art. 31, http://www.unhcr.org/fr/4b14f4a62 (emphasis added). The full French text of article 31 is as follows:

> 1. Les Etats Contractants n'appliqueront pas de *sanctions pénales,* du fait de leur entrée ou de leur séjour irréguliers aux réfugiés qui, arrivant directement du territoire où leur vie ou leur liberté était menacée au sens prévu par l'article premier, entrent ou se trouvent sur leur territoire sans autorisation, sous la réserve qu'ils se présentent sans délai aux autorités et leur exposent des raisons reconnues valables de leur entrée ou présence irrégulières.
>
> 2. Les Etats Contractants n'appliqueront aux déplacements de ces réfugiés d'autres restrictions que celles qui sont nécessaires; ces restrictions seront appliquées seulement en attendant que le statut de ces réfugiés dans le pays d'accueil ait été régularisé ou qu'ils aient réussi à se faire admettre dans un autre pays.

French-English Legal Dictionary defines "pénale" as "criminal, penal."[134] The dictionary defines "sanction" as relevant here as "penalty."[135] Google Translate gives the first line of Article 31 in French as meaning, "The Contracting States shall not apply penal sanctions . . ."[136] Others have argued that reading the English and the French versions of Article 31 together along with ICCPR's ban on "arbitrary detention" requires a broader meaning, namely, to include not only criminal penalties but civil ones as well.[137] Nevertheless, under either interpretation, criminal prosecution is definitely barred.[138]

> En vue de cette dernière admission les Etats Contractants accorderont à ces réfugiés un délai raisonnable ainsi que toutes facilités nécessaires.

Id. (emphasis added).

134. F.H.S. BRIDGE, THE COUNCIL OF EUROPE FRENCH-ENGLISH LEGAL DICTIONARY 230 (1994).

135. *Id.* at 280; *see also* Sanction, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/sanction [https://perma.cc/VX2C-V6YE].

136. Translation of First Line of French Version of Article 31 of the 1951 Refugee Convention, GOOGLE TRANSLATE, https://translate.google.com/?um=1&ie=UTF-8&hl=en&client=tw-ob#auto/en/Les%20Etats%20Contractants%20n%E2%80%99appliqueront%20pas%20de%20sanctions%20p%C3%A9nales [https://perma.cc/BMW8-V4MB].

137. *See* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 248 (2d ed. 1996). ("[A]ll detention must be in accordance with and authorized by law; . . . detention should be reviewed as to its legality and necessity, according to the standard of what is reasonable and necessary in a democratic society. *Arbitrary embraces not only what is illegal, but also what is unjust*.") (emphasis added) (citing U.N. Comm'n on Human Rights, Study on the right of everyone to be free from arbitrary arrest, detention, and exile, UN Doc. E/CN.4/826/Rev.1. (1964)); *see also* U.N. International Covenant on Civil and Political Rights, art. 9.1, *opened for signature* Dec. 9, 1966, 999 U.N.T.S 171 (entered into force Mar. 23, 1976; adopted by the United States, Sept. 8, 1992, 6 I.L.M. 368) ("No one shall be subjected to arbitrary arrest or detention."); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 9 (Dec. 10, 1948) ("No one shall be subjected to arbitrary arrest, detention or exile.").

138. Under the Vienna Convention on the Law of Treaties, the interpreter of co-official texts in two or more languages should do as follows when the meanings differ in the two (or more) texts: "[W]hen a comparison of the authentic texts discloses a difference in meanings which the application of Articles 31 and 32 [governing treaty interpretation generally] does not remove, the *meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted*." Vienna Convention on the Law of Treaties, art. 33(4), May 23, 1969, 1155 U.N.T.S. 331 (emphasis added). Subsection 1 of Article 33 notes an exception to the above rule, namely, where a treaty provides that in case

B. Drafting History (*Travaux Préparatoires*) of the *Non-Refoulement* and No Penalty Provisions of the 1951 Refugee Convention

In drafting Articles 31 and 33, the framers of the Refugee Convention intended to ensure that states parties would not return refugees to a country where they might be persecuted. The framers also intended that asylum-seekers would generally not be penalized for entering a country illegally. The first draft of what is now Refugee Convention Article 31 captures the latter theme:

> The *penalties enacted against foreigners entering the territory of the Contracting Party without prior permission shall not be applied to refugees* seeking to escape from persecution, provided that such refugees present themselves without delay to the authorities of the reception country and show good cause for their entry.[139]

The official commentary on this draft explained its purpose:

> A refugee whose *departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa)* into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum and is recognized as a *bona fide* refugee.[140]

The original draft was modified only slightly. As noted above, the French representative proposed the term "sanctions pénales" for "penalties." According to the French representative, the penalties in subsection 1 meant judicial, not administrative, penalties:

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of "divergence, a particular text shall prevail." *Id.* art. 33(1). No such provision is present in the 1951 Convention on Refugees. In addition, Article 33(3) provides that '[t]he terms of the treaty are presumed to have the same meaning in each authentic text.'" *Id.* art. 33(3).

139. Weis, *supra* note 125 at 278 (emphasis added). The first draft was proposed by the U.N. Secretariat. *Id. See also* GOODWIN-GILL, *supra* note 137, at 305 ("Such refugees are not to be subjected to 'penalties', which appear to comprehend prosecution, fine, and imprisonment, but not administrative detention.") (citing travaux préparatoires).

140. Weis, *supra* note 125 at 279 (emphasis added).

> The French representative said that *the penalties mentioned should be confined to judicial penalties only*. But in so far as non-admission or expulsion had to be regarded as sanctions, they were in the vast majority of cases *administrative measures*, especially where they were applied at very short notice.[141]

There can be no doubt that the states parties at the conference did intend to impose a legal obligation on states to refrain from penalizing asylum applicants. Taking the opposite position, Pakistan proposed that states should have the right to determine whether to impose penalties:

> The Contracting States *may at their discretion exempt* from penalties on account of his illegal entry or presence a refugee who enters or who is present in their territory without authorization, and who presents himself without delay to the authorities and shows good cause for his illegal entry or presence.[142]

In the first line of its proposal, Pakistan attempted to give states parties the unfettered discretion whether to penalize asylum-seekers. Pakistan's proposed language, however, was rejected. Article

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141. *Id.* at 294 (emphasis added). At the negotiation conference, the Belgian representative and the French representative engaged in a colloquy on this issue. The Belgian representative stated:

> With regard to the presence of a refugee in a given territory, a case might arise of a refugee who had been on foreign soil for a certain length of time being discovered by the authorities. The moment he was discovered he could present himself to the local authorities, explaining the reasons why he had taken refuge in that territory. In such cases, the text would not necessarily cover the case of prolonged illegal presence.

Id. The French representative responded, "The first paragraph of the Article involved a voluntary act. A person who presented himself to the authorities after he had been discovered could no longer benefit by the provisions of Article 26 [Article 31 in the final act]." *Id.* at 295. *But see* Kriel, *supra* note 12 (noting that a wave of immigrants at their first opportunity have surrendered to the United States immigration or other U.S. officials).

So, for example, an asylum-seeker would be protected under Article 31 where he or she has entered the receiving state without inspection but sees an immigration officer or other law enforcement official and voluntarily surrenders to that person. On the other hand, an asylum-seeker who enters without inspection and attempts to evade immigration or other law enforcement would presumably have a more difficult case under Article 31. Note, however, that the UNHCR calls for a more nuanced interpretation of this language of Article 31. *See infra* notes 157, 165, 175, and accompanying text.

142. Weis, *supra* note 125 at 295.

31 (and Article 33 and the Convention as a whole) was enacted to protect asylum-seekers from being returned to the country of persecution and from being mistreated by the receiving state.[143]

As noted above, many scholars have argued that Article 31(2) should be interpreted to bar extended incarceration of asylum-seekers in administrative detention.[144] The French representative, whose language was adopted in the co-official French version of the Convention, asserted that the Convention only bars criminal penalties imposed by a court, not administrative ones imposed by immigration control bodies.

The English version of Article 31, however, makes no mention that only "penal" or "criminal" penalties are prohibited. While a reasonably brief period of administrative detention may be required to determine whether the asylum seeker can make out a *prima facie* case of asylum, lengthy or indefinite detention of asylum-seekers certainly constitutes a penalty.[145] Such detention, or the threat of such lengthy detention, may not only effectively punish the asylum-seeker, but it may also coerce a great many asylum-seekers to

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143. In this regard, note that Article 33(2) attempts to prevent receiving states from overly restricting the movement of refugees. As observed above, the Convention expressly prohibits discrimination in the asylum procedural and substantive processes on the basis of race, religion or country of origin. *See* 1951 Refugee Convention, *supra* note 17, art. 3.

144. *See* GOODWIN-GILL, *supra* note 137, at 248; *see also* UNHCR, SUMMARY CONCLUSIONS: ARTICLE 31 OF THE 1951 CONVENTION ¶ 11 (November 8–9, 2001), http://www.unhcr.org/419c783f4.pdf [https://perma.cc/B6T4-9PZ7] (finding that Article 31(2) intended that detention should not be extended for the purpose of punishment or deterrence). *See also* Anita Sinha, *Defining Detention: The Intervention of the European Court of Human Rights in the Detention of Involuntary Migrants*, 50.3 COLUM. HUM. RTS. L. REVIEW 176 (2019) (comprehensive analysis of the post-crisis migrant detention decisions of the European Court of Human Rights reveals that the Court has upheld the applicability of the prohibition of deprivation of liberty in the European Convention of Human Rights to migrant detention).

145. Of course, the authorities can continue to detain individuals with serious criminal records or those who pose a definite national security risk. Even such individuals, however, should have a bond hearing at which the immigrant may contest the government's arguments for keeping the individual detained. Sajous v. Decker, No. 18-cv-2447, 2018 U.S. Dist. LEXIS 86921, at *1–47, *25–26 (S.D.N.Y. May 23, 2018) (holding that prolonged detention without a bond hearing would violate due process protections). *But see infra* note 158 on Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

relinquish their asylum claims and "accept" deportation.[146] Such coercion undermines the receiving state's obligation of non-refoulement and the general obligation of receiving states to protect refugees—the central purposes of the 1951 Refugee Convention and 1967 Protocol.

In case of conflict between two or more official languages (versions of a treaty), the Vienna Convention on the Law of Treaties instructs that "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."[147] In addition, Article 31 of the Vienna Convention on the Law of Treaties states that the interpreter should consider "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its *object and purpose*."[148]

The purpose of the Refugee Convention is to protect refugees from persecution and "to assure refugees the widest possible exercise of [their] fundamental rights and freedoms."[149] Since the plain meaning of "penalties" in English includes both criminal and civil sanctions, and because the central purpose of the 1951 Refugee Convention and the 1967 Protocol is to protect refugees, the two official versions are best reconciled by reading "penalties" not only to include criminal prosecution and punishment, but also lengthy civil incarceration.[150] Thus, the ordinary meaning of "penalties"

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146. *See supra* note 61 (relating co-author's experience with this phenomenon).

147. Vienna Convention on the Law of Treaties, *supra* note 138, art. 33(4).

148. *Id.* art. 31(1) (emphasis added).

149. 1951 Refugee Convention, *supra* note 17, pmbl. ¶ 2.

150. The UNHCR has noted, "The national laws in Argentina, Bolivia, Brazil, Chile, Costa Rica, and Nicaragua [among others] specify that protections against penalization applies as regards both 'criminal and administrative sanctions.'" Cathryn Costello et al., *Article 31 of the 1951 Convention Relating to the Status of Refugees*, U.N. Doc. PPLA/2017/01, at 33 (July 2017), https://www.refworld.org/docid/59ad55c24.html (on file with the *Columbia Human Rights Law Review*) (citing Argentina, Ley General de Reconocimiento y Protección al Refugiado (2006), art. 40; Bolivia, Ley de Protección a Personas Refugiadas (2012), art. 7; Brazil, Ley No. 9.474 (22 July 1997), art. 10; Chile, Ley No. 20.430 (2010), art. 8; Costa Rica, Reglamento de Personas Refugiados (2011), art. 137; Nicaragua, Ley No. 655 de la Protección a Refugiados (2008), art. 10; Uruguay, Ley del Refugiado, art. 15. *But see*, GOODWIN-GILL, *supra* note 137, at 305 ("Such refugees are not to be subjected to 'penalties', which appear to comprehend prosecution, fine, and imprisonment, but not administrative detention.") (citing travaux préparatoires).

contemplates both civil and criminal ones.[151] The U.N. agency responsible for monitoring compliance with the Convention and the Protocol, the UNHCR, has reached the same conclusion.[152]

Weighing against that interpretation, the *travaux préparatoires* shows that "sanctions pénales" in the French version referred only to criminal penalties and none of the representatives at the conference argued against that view. If, however, the parties at the conference intended to endorse the French version, they could have simply inserted "criminal" before "penalties." The proponents of the French interpretation do have a second argument: the parties must have considered temporary administrative detention necessary so that authorities could have a reasonable opportunity to determine whether a given immigrant is a *bona fide* or a *prima facie bona fide* refugee.[153] Both of these arguments are valid. Nevertheless, looking

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151 . *See Penalty Definition*, MERRIAM-WEBSTER'S LAW DICTIONARY, https://www.merriam-webster.com/dictionary/penalty [https://perma.cc/K2JS-YSYZ] (defining penalty as including "the suffering or the sum to be forfeited to which a person agrees to be subjected in case of nonfulfillment of stipulations. ['] A *penalty* was imposed on the contractor for breach of contract.[']"). Anglo-Saxon law is replete with statutes and regulations that impose civil penalties. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc. 528 U.S. 167, 209 (2000) (Scalia, J., dissenting) ("The Court . . . has promulgated a revolutionary new doctrine of standing that will permit the entire body of public *civil penalties* to be handed over to enforcement by private interests") (emphasis added); U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 633 (1992) ("Certainly this special definition [of the citizen suit provision] applies to the *civil penalty* enforcement provisions it incorporates.") (emphasis added).

152. *See also* UNHCR, GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION, ¶ 31 (2012) [hereinafter UNHCR Detention Guidelines], https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html (on file with the *Columbia Human Rights Law Review*) ("[d]etention as a penalty for illegal entry and/or as a deterrent to seeking asylum" is arbitrary and thus unlawful).

153. *See id.* ¶ 24 ("Minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks."). In the United States, a *prima facie* showing of asylum status is made through the "credible fear" interviewing process. Jason Boyd, *The President's Proposal to Eliminate Due Process at the Border*, THINK IMMIGRATION (July 16, 2018), http://thinkimmigrationorg/blog/2018/07/16/the-presidents-proposal-to-eliminate-due-process-at-the-border/ [https://perma.cc/3KYT-JCBE] (writing that Congress created the credible fear interviewing process in 1996 as a low-threshold, preliminary screening process to ensure *bona fide* claims to asylum); 8 C.F.R. § 208.30 (2019); *see also* Alvaro Peralta, *Bordering Persecution: Why Asylum*

at the *purpose* of the Convention, from its constant theme of protecting refugees from discrimination, expulsion, and other violations of international human rights law,[154] one has to conclude that administrative detention at some point undermines the fundamental purpose of the Convention and crosses the line into a "penalty" within the meaning of Article 31(1).

The Trump Administration intended to deter and possibly to punish asylum-seekers by keeping them in prolonged immigration (administrative) detention (as well as by criminal prosecution and punishment). While the Administration may continue trying to deny its intentions, it cannot credibly deny that its interwoven criminal prosecution/prolonged detention imperative and concomitant family separation policy have the effect of coercing asylum-seekers to give up their asylum claims, however strong.[155] The Administration's "Remain in Mexico" policy, distortion of Human Rights Reports, and political interference with and retaliation against advocates and adjudicators render it nearly impossible for any asylum-seeker to meet the high burden of proof required by the Real ID Act of 2005.[156] When one adds

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Seekers Should Not Be Subject to Expedited Removal, 64 AM. U. L. REV. 1303, 1313–14 (2015) (arguing that credible fear interviews have become "cursory in nature" thus preventing proper screening of asylum screeners while "imped[ing] asylees' statutory, regulatory, and constitutional rights to a fair and meaningful hearing"); Dree K. Collopy, *Crisis at the Border, Part II: Demonstrating a Credible Fear of Persecution or Torture*, 16–04 IMMIGR. BRIEFINGS 1 (2016) (explaining that credible fear interviews are not meant to be full asylum interviews but are intended to prevent asylum seekers from being returned to places where they may be subjected to persecution or torture); Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT'L L.J. 243, 305–306 (2013) ("Detention under expedited removal for a brief . . . time is likely not itself incompatible with . . . standards relation to immigration detention. . . . [E]ven the UNHCR standards permit detention of asylum seekers for the brief period necessary to confirm identity and initially screen the claim, which is essentially what the credible fear interview does.").

154. *See, e.g.*, ICCPR, *supra* note 137, art. 9 (requiring habeas corpus); UN Human Rights Committee General Comment No. 35, ¶ 18, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) (noting that article 9 applies to asylum-seekers); Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21 ¶¶ 191–198 (Aug. 13, 2014); Council Directive 2013/33, art. 9, 2013 O.J. (L. 180) 96, 102 (EU) (requiring speedy judicial review of detention).

155. *See supra* note 61 (discussing co-author's observation of this type of coercion).

156. Real ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 302.

substandard conditions in the immigrant detention facilities, including inadequate food, housing, medical care, and the failure of ICE to stop private detention personnel from subjecting immigrants to the risk of sexual assault, one could conclude that immigration detention beyond a short period does indeed constitute a penalty within the meaning of Article 31.

Although brief detention of asylum-seekers is permissible, it should be avoided except in the case of a threat to "public order, public health or national security."[157] Even in one of those cases, detention should be relatively short and should only occur to ensure the asylum-seeker is not a threat. Generally, twenty days should be more than enough to conduct credible fear interviews or their equivalent. Six months unquestionably constitutes "prolonged" immigration detention.[158] Six months is more than adequate for the

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157. Costello et al., *supra* note 150, ¶ 21.

158. *See, e.g.*, Abdi v. Duke, 280 F. Supp. 3d 373, 411 (W.D.N.Y. 2018) (ordering ICE to provide members of putative class of immigrant detainees who had been detained for six months or more with individualized bond hearings); Lora v. Shanahan, 804 F.3d 601, 616 (2d Cir. 2015) (holding that an immigrant detained pursuant to INA § 236(c) [8 U.S.C.A. § 1226(c)], which requires mandatory detention of certain aliens awaiting removal proceedings, has a right to a bail hearing before an immigration judge within six months of his or her detention), *vacated*, 138 S. Ct. 1260 (2018); Reid v. Donelan, 819 F.3d 486, 498–99 (1st Cir. 2016) (finding that the Due Process clause imposes an implicit reasonableness limitation on the statute that requires mandatory detention of certain criminally convicted aliens in removal). *But see* Jennings v. Rodriguez, 138 S. Ct. 830, 846 (2018) (applying INA provisions primarily to detention of aliens seeking entry to United States and defining narrow conditions under which the Attorney General may release on bond aliens in removal proceedings (based on criminal offenses or terrorist activities) preclude the provision from being plausibly interpreted as placing an implied six-month limit on detention or as requiring periodic bond hearings); Shanahan v. Lora, 138 S. Ct. 1260, 1260 (2018) (vacating Lora v. Shanahan, 804 F.3d 601, 601 (2d Cir. 2015); Reid v. Donelan, 2018 WL 4000993 (1st Cir. 2018) (opinion below withdrawn on reconsideration); Matter of M-S-, 27 I. & N. Dec. 509, 518–19 (A.G. 2019) (AG withdrawing Matter of X-K-, 23 I. & N. Dec. 731 (B.I.A. 2005), holding that noncitizens initially placed in expedited removal proceedings who establish credible fear of persecution (i.e., significant possibility that the noncitizen is eligible for asylum, withholding of removal or protection under the Convention Against Torture, 8 C.F.R. § 208.30, § 1208.30) are statutorily subject to mandatory detention throughout proceedings—without addressing constitutional limits). *Contra* Jennings, 138 S. Ct. at 860 (Breyer, J., dissenting) (criticizing the majority for upholding denial of bond hearings for noncitizens held beyond six months and finding such denial unconstitutional for treating them worse than individuals charged with major crimes). *See also* Shanahan v. Lora, 138 S. Ct. 1260, 1260

government to provide an appropriate credible fear interview and allow an appeal to an immigration court. Immigrants have the right to make an asylum claim. Lengthy incarceration of asylum-seekers undermines that right. Even under United States law, a first-time illegal entrant is at most criminally responsible for committing a misdemeanor, a minor offense. Incarcerating such an individual for a lengthy period—including in immigration detention—violates the principle of proportionality.[159]

It is difficult to imagine anything more inherently punitive than forcible removal of children from their families that was concealed until it was useful to be publicized as an explicit deterrent to asylum-seekers. These actions are compounded by the Administration's failure to keep track of the whereabouts and condition of the children so that reunification is not readily possible.[160] Any parent who has lost her child for five minutes in a benign and secure department store or mall has experienced a depth of terror and wretched, self-blaming panic, an absolute inability to concentrate on or attend at all to anything else but the missing child that is hard to match. How then should we characterize that agony when it is coupled with the knowledge that as parents are helplessly incarcerated, their children are suffering from extreme distress,

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(2018) (vacating Lora v. Shanahan, 804 F.3d 601, 601 (2d Cir. 2015); Reid v. Donelan, 2018 WL 4000993 (1st Cir. 2018) (opinion below withdrawn on reconsideration); Matter of M-S-, 27 I. & N. Dec. 509, 518–19 (A.G. 2019) (AG withdrawing Matter of X-K-, 23 I. & N. Dec. 731 (B.I.A. 2005), holding that noncitizens initially placed in expedited removal proceedings who establish credible fear of persecution (i.e., significant possibility that the noncitizen is eligible for asylum, withholding of removal or protection under the Convention Against Torture, 8 C.F.R. § 208.30, § 1208.30) are statutorily subject to mandatory detention throughout proceedings—without addressing constitutional limits).

159 . *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 263 (2005) ("In doctrinal contexts other than criminal sentencing, proportionality is frequently used as a mechanism of judicial review to prevent legislative encroachments on individual rights and other exercises of excessive power.").

160. For a stunning illustration of how forcible separation and the inability to determine the whereabouts of a five-year-old put one young immigrant mother in the hospital and led to the child's uncounseled "waiver" of her right to a bond hearing, *see* Sarah Stillman, *The Five-Year-Old Who Was Detained at the Border and Persuaded to Sign Away Her Rights*, NEW YORKER (Oct. 11, 2018), https://www.newyorker.com/news/news-desk/the-five-year-old-who-was-detained-at-the-border-and-convinced-to-sign-away-her-rights (on file with the *Columbia Human Rights Law Review*).

loneliness, depression, and fear of physical and sexual abuse? Their children may be kept in isolation or thrown together with strangers of all ages, with no guarantee of communication or contact with counsel and family, in substandard and unacceptable detention facilities.

Furthermore, the refusal to release detained children to potential sponsors—usually other relatives—leaves children questioning whether their loved ones are jailed, safe, or deported. Any other potential sponsors who step forward to provide the children with a home while they seek asylum might be prevented from doing so, or may be targeted and be deported themselves. The wholesale cover-up, denial, and attempt to ascribe blame for this shameful policy to the Obama Administration by Trump officials further highlights the hypocrisy of the Trump Administration's defense of this harmful treatment, or, at the very least, its willful blindness.

As the UNHCR notes, "The term 'penalties' includes, *but is not limited to*, prosecution, fine, and imprisonment."[161] Article 1 of the Convention against Torture prohibits meting out not only severe physical pain, but also "severe . . . *mental pain or suffering* . . . intentionally inflicted . . . for any reason based on discrimination of any kind."[162] ICE and CBP officials separated children from their parents because of their parents' immigration status or nationality, which falls within "discrimination of any kind." The severe mental pain or suffering must be committed by a "public official or at the instigation of or with the consent or acquiescence of a public official"—unquestionably satisfied here. Government officials deliberately took children from their parents to deter asylum-seekers, anticipating the mental pain and suffering their premeditated policy would cause both the children and their parents. Inflicting pain to deter immigrants from coming to the United States was the goal, thus satisfying both the "intentionality" element of the UNCAT and also the "specific intent" element of the understanding that the U.S. Senate attached to the UNCAT.[163] Amnesty International, whose major mission is to prevent torture in all parts of the world, stated,

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161. *Advisory Opinion on Criminal Prosecution of Asylum-Seekers for Illegal Entry*, UNHCR (Mar. 2, 2006), https://www.refworld.org/docid/4721ccd02.html (on file with the *Columbia Human Rights Law Review*) (emphasis added).

162. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 1 S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987) (emphasis added).

163. *See supra* notes 38–51 and accompanying text.

"[T]his is a spectacularly cruel policy, where frightened children are being ripped from their parents' arms . . . . This is nothing short of torture. The severe mental suffering that officials have intentionally inflicted on these families for coercive purposes means that these acts meet the definitions of torture under both US and international law."[164] Is it even possible to claim that such treatment does not constitute a "penalty?"

C. Presenting Oneself to Authorities Without Delay and Showing Good Cause for Entering Without Inspection

Article 31(1) prohibits imposing penalties on refugees, but only "provided that such refugees *present themselves without delay* to the authorities and *show good cause* for their illegal entry or presence."[165] For example, Canadian courts have stressed the concern about protecting refugees and have refused to penalize immigrants in such situations:

> It does not stand to the applicant's credit that, after entering Canada as visitors, they illegally obtained Canadian social security cards, worked illegally for approximately a year before they were found out and arrested, and then claimed refugee status. Nevertheless, since the law allows them to apply as refugees even in such circumstances, we must conclude that it does not intend that their refugee claims should be determined on the basis of these extraneous considerations.[166]

Similarly, a British court stated that it has long been settled that "those fleeing from persecution or threatened persecution . . . may have to resort to deceptions of various kinds

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164. Nick Cumming-Bruce, *U.N. Rights Chief Tells U.S. to Stop Taking Migrant Children from Parents*, N.Y. TIMES (June 18, 2018), https://www.nytimes.com/2018/06/18/world/europe/trump-migrant-children-un.html (on file with the *Columbia Human Rights Law Review*).

165. 1951 Refugee Convention, *supra* note 17, art. 31(1) (emphasis added); Weis, *supra* note 125, at 278. The first draft of the Convention was proposed by the U.N. Secretariat. *Id.*

166. HATHAWAY & FORSTER, *supra* note 126, at 29 n.77 (quoting Surujpal v. Canada (Minister of Employment and Immigration), [1985] 60 NR 73 (Can. FCA) at 73–74, per MacGuigan J. (in *obiter*)); *see also* GOODWIN-GILL, *supra* note 137, at 305 ("Such refugees are not to be subjected to 'penalties', which appear to comprehend prosecution, fine, and imprisonment, but not administrative detention.") (citing travaux préparatoires).

(possession and use of false papers, forgery, misrepresentation, etc.) in order to make good their escape."[167] The obligation not to impose penalties on refugees who present themselves without delay and show good cause "is perhaps the most contentious element of Article 31"[168] as the grant of protection is contingent on qualifying conditions: directness, promptness, and good cause.[169] As to "directness," refugees are afforded asylum protection after "coming directly from a territory where their life or freedom was threaten[ed]."[170] But, as Britain's High Court of Justice concluded, a "short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article."[171]

With respect to "promptness," the 2001 Expert Round Table, organized by the UNHCR and the Migration Institute, and composed of governmental officials, scholars, and NGO representatives, explained that it is "a matter of fact and degree" that "depends on the circumstances of the case[.]"[172] Moreover, the UNHCR has stressed that "no strict time limit" should be applied to the "without delay" language.[173] Noting that an asylum seeker may have many reasons for not immediately going to the receiving state's authorities, the UNHCR stated:

> [Asylum-seekers] may fear authority figures because of the persecution they have suffered or because of a language barrier. They may have been advised not to come forward immediately or fear immediate removal to the country of feared persecution. They may wish to

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167. R v. Asfaw [2008] UKHL 31[9].

168. Costello et al., *supra* note 150, at 17.

169. *See* SXH v. CPS, [2014] EWCA Civ 90 [¶ 16, n. 26] (appeal taken from Eng.) (quoting speech of Lord Bingham of Cornhill explaining the application of article 31 of the Refugee Convention as not "limited to offences attributable to a refugee's entry into or presence in this country, but should provide immunity, if the other conditions are fulfilled, from the imposition of criminal penalties [for] offences attributable to the attempt of a refugee to leave the country in the continuing course of a flight from persecution even after a short stopover in transit").

170. 1951 Refugee Convention, *supra* note 17, art. 31(1).

171. R v. Uxbridge Magistrates' Court and Another, *ex parte* Adimi [1999] EWHC (Admin) 765 [para. 18] (Lord Justice Simon Brown), https://www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.html [https://perma.cc/N6UJ-APP2].

172. UNHCR, *supra* note 144.

173. Costello et al., *supra* note 150, at 19. *See also* Kriel, *supra* note 12 (noting that a wave of immigrants have, at their first opportunity, surrendered to United States immigration or other U.S. officials).

> first consult with an attorney or organization familiar with the country's asylum laws. Trauma victims may be particularly fearful of revealing themselves immediately. Some asylum-seekers may wish to reunite with family members in the country of asylum before approaching the authorities.[174]

To the extent a refugee must show "good cause," the 2001 Expert Round Table concluded that having a well-founded fear establishes this requirement:

> Having a well-founded fear of persecution is recognized in itself as 'good cause' for illegal entry. To 'come directly' from such a country or countries in which s/he is at risk or in which generally no protection is available, is also accepted as 'good cause' for illegal entry. There may, in addition, be *other factual circumstances* which constitute 'good cause.'[175]

The United States has adopted a catch-22 immigration policy: a refugee is faced with the choice either to cross the border without inspection and be subject to an inevitable criminal prosecution or to attempt admission "the right way" through a port of entry and encounter CBP officers who "don't tell the [refugee] they can't apply for asylum, just that they cannot apply right now because the port of entry is at capacity."[176] Eleanor Acer, Senior Director of Refugee Protection for Human Rights First, cautions that the United States "has increasingly illegally turned away refugees at official border points, driving them to make the dangerous crossing between points."[177] The Trump Administration's policies of largely rejecting

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174. *Advisory Opinion on Criminal Prosecution of Asylum-Seekers for Illegal Entry*, *supra* note 161.

175. UNHCR, *supra* note 144, at 10(e); *see also R v. Zanzoul* [2006] CA297/06 (N.Z.) (holding that applicant "was not in the situation of many refugee claimants who . . . travel[led] on false documentation because their country of origin would not issue passports. On the facts, his possession . . . of a false Australian passport was completely irrelevant to any genuine belief he may have had a claim of refugee status.").

176. Robert Moore, *At the U.S. Border, Asylum-Seekers Fleeing Violence Are Told to Come Back Later*, WASH. POST (June 13, 2018), https://www.washingtonpost.com/world/national-security/at-the-us-border-asylum-seekers-fleeing-violence-are-told-to-come-back-later/2018/06/12/79a12718-6e4d-11e8-afd5-778aca903bbe_story.html (on file with the *Columbia Human Rights Law Review*).

177. *Statement in Response to President Trump's Attacks on Refugees*, HUMAN RIGHTS FIRST (Nov. 1, 2018), https://www.humanrightsfirst.org/press-release/statement-response-president-trumps-attacks-refugees [https://perma.cc/HDC9-KTEW].

presumptive asylum-seekers at its ports of entry, separating families, and indefinitely detaining refugees, raise the question: might refugees have *good cause* for not presenting themselves *without delay* to obviously adverse authorities eager to impose harsh punishments?

III. THE SELF-EXECUTING NATURE OF KEY ARTICLES OF THE 1951 REFUGEE CONVENTION AND 1967 PROTOCOL

The Framers of the United States Constitution intended treaties to be the supreme law of the land, to supersede inconsistent state statutes and state court rulings, and, when applicable, to be a state or federal court's rule of decision. The Framers were particularly concerned that states would violate the rights of British nationals and other foreigners, and specifically would refuse to ensure that British nationals would be paid in pound sterling for debts that American nationals owed them. Article IV of the 1783 Treaty of Peace with Britain required such payment: "It is agreed that creditors on either side, *shall meet with no lawful impediment to the recovery of the full value in sterling money,* of all *bona fide* debts *heretofore* contracted."[178]

During the Revolutionary War, several of the newly declared independent states printed their own currency and permitted Americans to use such currency (generally with little actual value) to pay off their mortgages and other debts owed to British nationals. For example, the Virginia Legislature during the War of Independence passed a statute "contemplating to prevent the enemy [the British and British creditors] [from] deriving strength by the receipt of [payments of debts]."[179] The statute provided that if any debtor "pa[id] his debt into the [Virginia] Loan Office, obtain[ed] a certificate and receipt as directed, he shall be discharged from so much of the debt."[180] After the war ended in 1781 and the Treaty of Peace was signed in 1783, the State of Virginia did nothing to ensure that the British creditors' debts were paid in pound sterling as the Treaty of Peace required. Virginia's and other states' failure to abide by the

178. Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, Gr. Brit.–U.S., art. IV, Sept. 30, 1783, 8 U.S.T. 80 [hereinafter The Paris Peace Treaty] (emphasis added).

179. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) (Cushing, J.).

180. *Id.* at 281–82.

Treaty threatened to unravel the hard-won victory by the fledgling United States over the then-superpower British.[181]

To address these and related issues, the Constitutional Convention convened in Philadelphia in 1787, and ultimately crafted Article 6, section 2 of the Constitution—the Supremacy Clause:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and *all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land*; and *the judges in every state shall be bound thereby*, anything in the Constitution or laws of any State to the contrary notwithstanding.[182]

Correspondingly, the Constitutional Convention expressly granted federal courts jurisdiction over treaty claims. "The judicial power shall extend to all cases, in law and equity, *arising under* this Constitution, the laws of the United States, and *treaties made, or which shall be made*, under their authority. . . ."[183]

In 1796, the Supreme Court had its first opportunity to interpret a treaty of the United States, namely, the Treaty of Peace with Britain. In *Ware v. Hylton*, the Court held that Article IV of the Treaty provided a remedy to the British creditor for money owed but denied by the Virginia sequestration statute discussed above.[184] Supreme Court Justice Cushing noted that Article IV was definite and mandatory: "The provision, that 'Creditors shall meet with no lawful impediment,' etc (*sic*) is as absolute, unconditional, and peremptory, as words can well express, and made not to depend on

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181. *See* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty* Power, 98 MICH. L. REV. 1075, 1115–16 (2000) (discussing states' reticence to pay British creditors their owed debt, leading to severe tensions and the possibility of war); Colin G. Calloway, *Suspicion and Self-Interest: The British-Indian Alliance and the Peace of Paris*, 48 HISTORIAN 41, 54 (1985) (discussing how Britain justified its refusal to turn Northwest frontier posts over to the United States by pointing to its failure to pay British debts). The Framers were also concerned with foreign powers playing one American state off another leading to a resultant weak, balkanized foreign policy. Golove, *supra*, at 1128–30.

182. U.S. CONST. art. VI, § 2. (emphasis added).

183. *Id.* art. III, § 2 (emphasis added).

184. *Ware*, 3 U.S. at 284 (pointing out that the new nation, in exchange for its promises to pay debts in pound sterling, got much from the British with the 1783 Treaty of Peace).

the will and pleasure, or the optional conduct of any body of men whatever."[185]

Justice Cushing, however, went on to imply that Article V of the treaty might not have established a legally enforceable obligation. That article states in relevant part, "It is agreed that the Congress *shall earnestly recommend* it to the legislatures of the respective states, to provide for the restitution of all [confiscated] estates, rights, and properties . . . ."[186] The words "shall earnestly recommend" are plainly hortatory and strikingly contrast with "[c]reditors shall meet with no lawful impediment." A party receiving a recommendation implicitly has the right to reject it. Article IV, on the other hand, is more than sufficiently definite to require the party or parties to whom it is directed to comply.

The Court's first treaty case thus clarifies perhaps the most important strand of what became known as the self-executing treaty doctrine. That strand presumes that treaty provisions are self-executing and may therefore serve as the rule of decision, but makes an exception for a treaty provision that is insufficiently definite. By framing Article V in the Treaty of Peace as a recommendation, the parties did not create nor intend to create a legally binding obligation. Consequently, the Court implied that Article V was not enforceable.

Like Article IV of the Treaty of Peace, the relevant treaty articles of the 1951 Convention impose definite legal obligations. Article 31(1), for instance, uses mandatory language and is stated in the negative. "The Contracting States *shall not impose penalties, on account of their illegal entry or presence* . . . ."[187] Negatively stated treaty provisions are more readily found to be self-executing, probably because "negatively drafted provisions are often more precise than are affirmative ones[188] and [because] the negative nature of such a

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185. *Id*. at 284.

186. The Paris Peace Treaty, *supra* note 178, art. V (emphasis added).

187. 1951 Refugee Convention, *supra* note 17, art. 31(1) (emphasis added).

188. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111, reporter's note 5 (AM. LAW INST. 1987) ("Obligations not to act, or to act only subject to limitations, are generally self-executing."). *See* Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts*, 37 WM. & MARY L. REV. 1401, 1428 n.126 (citing Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702 (1878); Blandford v. State, 10 Tex. App. 627, 640–41 (1881)); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 674 n.228 (1986) (citing *Ware*, 3 U.S. at 244–45).

treaty term implicitly eliminates the need for implementing legislation."[189]

Article 33 of the Refugee Convention likewise uses mandatory language, imposes a negative obligation, and is similarly precise and definite:

> *No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories* where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[190]

The highlighted language is specific and expressly prohibits the expulsion or return of refugees. The Supreme Court itself has contrasted this language with other articles in the Refugee Convention that do not create a legally binding obligation. "In contrast [to Article 33], Article 34 provides that contracting states '*shall as far as possible* facilitate the assimilation and naturalization of refugees.'"[191] The Court characterized this provision of Article 34 as "precatory."[192] It bears an uncanny resemblance to Article V of the Treaty of Peace with Britain. The language "shall as far as possible" suggests that if it is not possible, then it does not have to be done, just

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189. *See* McDonnell, *supra* note 188, at 1428 n.128 (noting that the Supreme Court considered *Hawes*, 76 Ky. (13 Bush) 697, a "very able" opinion. United States v. Rauscher, 119 U.S. 407, 427–28 (1886)); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 reporter's note 5 (AM. LAW INST. 1987). The court in *Hawes also* explained that negative treaty provisions are self-executing. *Hawes*, 76 Ky. (13 Bush) at 702–03.

190. 1951 Refugee Convention, *supra* note 17, art. 33 (emphasis added).

191. McDonnell, *supra* note 188, at 1423 (citing Refugee Convention, *supra* note 17, art. 34).

192. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 441 (1987). The Court properly recognized this as creating something less than a legally binding obligation, a hortatory provision. The Court, however, went on to assert that Article 34 made granting asylum (rather than withholding deportation) a discretionary rather than a legally binding obligation—a characterization that does not fit with the plain meaning nor the purpose of Article 34. Article 34 calls for receiving states to "as far as possible facilitate the assimilation and naturalization of refugees." 1951 Refugee Convention, *supra* note 17, art. 34. It exhorts states to "make every effort to expedite naturalization proceedings," but does not clearly require the states parties to do so. *Id.* The article does not deal with asylum *per se* except to call upon states to provide for naturalization of refugees. So the Court's conclusion regarding discretion in asylum adjudication is a little baffling.

as Article V's "shall earnestly recommend" language carries with it the right of states to reject the recommendation.

A. Clarifying the Roberts Court's Confusion about the Self-Executing Treaty Doctrine

The Framers intended that treaties, like federal statutes, be the law of the land. But courts have often ignored or misunderstood this command of the Supremacy Clause. Such courts have typically relied on an 1829 case that was overruled just four years later. In *Foster & Elam v. Neilson*, the Court interpreted the treaty between Spain and the United States regarding the U.S. purchase of Florida.[193] The treaty stated that previous Spanish land grants "shall be ratified and confirmed." [194] Apparently, the Court took this language to mean that such grants *will* be ratified and confirmed *in the future*, and believed that the treaty provided only an executory right.[195] The Court held this treaty provision unenforceable.[196]

Four years later, however, the Court in *United States v. Percheman* overruled *Foster.* In *Percheman*, the Court again analyzed whether the same treaty language was sufficiently definite to state a

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193. 27 U.S. 253 (1829), *overruled by* United States v. Percheman, 32 U.S. 51 (1833).

194. The full text of the relevant article of the Treaty states as follows:

> All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, *shall be ratified and confirmed to the persons in possession of the lands*, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty; in default of which the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal, on the part of His Catholic Majesty, for the cession of the Floridas was made, are hereby declared and agreed to be null and void.

Treaty of Amity, Settlement, and Limit Between the United States and His Catholic Majesty, Spain-U.S., art. 8, Feb. 22, 1819, 8 U.S.T. 252.

195. *Foster*, 27 U.S. at 254.

196. *Id.*

legal obligation, but, apparently for the first time, examined the Spanish version of the treaty. The Spanish version of the Treaty of Amity between the United States and Spain used the phrase "quedaran (*sic*) ratificados," which is translated "[the grants] shall *remain* ratified [and confirmed] . . . ."[197] A treaty can include definite future obligations, so the futurity or lack thereof should not have made a difference. Apparently, the *Foster* Court saw the treaty language as referring to a future event without indicating who would "ratify and confirm" or when such ratification or confirmation would happen, thus rendering that treaty term indefinite.[198] Regardless, the Court relatively quickly overruled *Foster,* perhaps recognizing that besides the Spanish version of the relevant treaty term, the Court's original decision contained strained analysis. After all, "shall" in this context generally denotes and connotes a present, mandatory norm; a legal obligation, not future tense.[199]

Unfortunately, some federal courts, instead of seeing the *Foster* case for what it was—an overruled opinion of little or no precedential value—relied on *Foster* as if it were controlling precedent. This practice reached its zenith in *Medellín v. Texas*.[200] In an admittedly hard case, the *Medellín* majority nevertheless distorted the doctrine of self-executing treaties, displaying an ignorance of both international and domestic law on the subject. In *Avena and other Mexican Nationals (Mexico v. United States)*, the International Court of Justice ("ICJ") ruled that United States violated the Vienna Convention on Consular Relations ("VCCR"), noting that Texas officials failed to timely inform capital defendants, all of whom were Mexican nationals, of their right to consult with the Mexican consul.[201] The ICJ rejected the argument that such VCCR claims were

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197. Tratado de Amistad, Arreglo de Diferencias y Límites entre S. M. Católica y los Estados Unidos de América [Treaty of Amity, Settlement, and Limit Between the United States and His Catholic Majesty], art. 8, Feb. 22, 1819; *Percheman*, 32 U.S. at 52 (emphasis added).

198. *See Foster*, 27 U.S. at 254 ("By whom shall they [the land grants] be ratified and confirmed?").

199. In this regard, the *Percheman* Court noted, "Although the words 'shall be ratified and confirmed,' are properly the words of contract, stipulating for some future legislative act; they are *not necessarily so*. *They may import that they 'shall be ratified and confirmed,' by force of the instrument itself.*" *Percheman*, 32 U.S. at 89 (emphasis added).

200. Medellín v. Texas, 552 U.S. 491 (2008).

201. Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12 (Mar. 31).

procedurally defaulted.[202] The ICJ reasoned that internal rules of a state may not be raised to defeat VCCR treaty obligations.[203] The ICJ ruled that the United States was obligated "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals . . . ." [204] Presumably, the ICJ expected that the United States Executive, or federal or Texas courts, would determine whether any of the defendants had been prejudiced by Texas's failure to inform the defendants of their consular rights.

In rejecting the Mexican defendants' arguments, the *Medellín* majority misunderstood how international law works in tandem with domestic law in determining how a country carries out its treaty obligations. International law does not care *how* a country carries out its treaty obligations as long as the country carries them out. Article 26 of the Vienna Convention on the Law of Treaties provides, "Every treaty in force is binding upon the parties to it and *must be performed by them in good faith*."[205] Noticeably absent from this fundamental article in this foundational treaty is any indication of how a state must "perform" its treaty obligations. A given country may use its courts to carry out its treaty obligations (via a self-executing treaty), or use its executive to do so (by issuing executive orders), or its legislative branch (by enacting implementing legislation). [206] No matter the method used, the doctrine of self-execution rests on a state's *domestic law*.[207] One can consider the mode of performance of a treaty (unless the states parties otherwise specifically agree) a matter solely within a state's sovereignty.

Certain states, such as Britain, can never enter into a self-executing treaty. Under British law, treaties to be effective domestically must be expressly implemented by Parliament.[208] The

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202. *Avena*, 2004 I.C.J. ¶ 112. Defendant Medellín had failed to raise the VCCR claim at trial or on direct review. *Medellín*, 552 U.S. at 501.

203. *Avena*, 2004 I.C.J. ¶ 112.

204. *Id*. ¶ 153(9).

205. Vienna Convention on the Law of Treaties, *supra* note 138, art. 26 (emphasis added).

206. *See* McDonnell, *supra* note 188, at 1404–06, illustrating how either the Executive or the Judiciary can carry out a treaty obligation; *see also* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 159–177 (Cambridge University Press 3d ed. 2013) (discussing how states can implement treaty obligations domestically).

207. McDonnell, *supra* note 188, at 1404–1406.

208. Carlos Manuel Vazquez, *The "Self-Executing" Character of the Refugee Protocol's* Nonrefoulement *Obligation*, 7 GEO. IMMIGR. L.J. 39, 45–46 (1993) ("For

Framers of the United States Constitution were well aware of British practice and adopted a different approach.[209] The relevant domestic law of the United States is contained in Articles 3 and 6(2) of the Constitution. As previously noted, Article 6(2) makes treaties the supreme law of the land, invocable in state and federal courts as the rule of decision.

Perhaps the most grievous error of the *Medellín* majority is to quote with approval a statement from the First Circuit which claims that to be self-executing, treaties have to "convey[] an intent that it be 'self-executing' and is ratified on these terms."[210] As explained above, the question of "self-execution" is a matter of domestic law, not international law. Rarely, then, could one expect states parties with different domestic law traditions to negotiate on the precise manner in which a treaty will be enforced.[211] Therefore, the question is not whether the negotiating parties to a treaty "convey[ed] an intent that it be 'self-executing.'"[212] The question is whether the parties intended to create a legally binding obligation. If so, it is up to the domestic law of the states parties to the treaty to determine how each party is to enforce the treaty. Sometimes the treaty will have a clause requiring states that do not recognize the doctrine on self-executing treaties to enact legislation to bring the treaty into effect by domestic statute.[213]

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example, even if a treaty [entered into by Britain] purported itself to set a tariff at a given level, [British] domestic law-applying officials would collect the tariff as set by prior statutes until Parliament executed the treaty by amending the earlier statute.").

209. *See* Medellín v. Texas, 552 U.S. 491, 543 (2008) (Breyer, J., dissenting) (referring to Justice Iredell in Ware v. Hylton, 3 U.S. 199, 276–77 (1796) discussing the proposition that the Constitution rejected the British approach, noting that "further legislative action in respect to the treaty's debt-collection provision *was no longer necessary* in the United States").

210. *Medellín*, 552 U.S. at 505 (quoting Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc) (Boudin, C. J.)).

211. Justice Breyer was correct in observing, "How could those drafters achieve agreement when one signatory nation follows one tradition and a second follows another?" *Medellín*, 522 U.S. at 548 (Breyer, J., dissenting).

212. *Medellín*, 552 U.S. at 505 (quoting Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc) (Boudin, C. J.)).

213. Because most countries lack constitutional provisions making treaties the supreme law of the land, some multilateral treaties have a domestic implementation clause, requiring states to enact legislation to make the treaty enforceable domestically. Yet depending on the subject matter, countries like the United States that have taken the self-executing approach may not need to enact legislation. *See* Iwasawa, *supra* note 188, at 660; McDonnell, *supra* note 188, at 1428–31.

Generally, however, the states parties leave it up to each individual state to enforce the treaty under the mode that the state itself has chosen to adopt.

The *Medellín* majority's error is egregious. First, the Court looks to find something in the treaty that treaty drafters, for good reason, generally are unlikely to include. It's like telling children to hunt for Easter eggs hidden in the backyard when in reality all the Easter eggs can be found only inside the house. Second, the *Medellín* majority's misinterpretation ignores the plain meaning and the purpose of the Supremacy Clause and the Framers' intent in drafting this critical constitutional provision.[214] The *Medellín* Court never ruled on whether Article 36 of the VCCR is self-executing. The language of that article is as definite as Article IV from the Treaty of Peace. Article 36 requires states to inform foreign detainees of their right to consular assistance. "The [detaining] authorities *shall inform* the person [the foreign detainee] concerned *without delay* of his rights [to request the assistance of a consul from his or her country]" and if the detainee "so requests, the competent authorities of the receiving State *shall, without delay,* inform the consular post of the sending State" of its national's detention.[215] Sometimes called the international Miranda warning, the right to consular notification is stated in mandatory language, "shall inform . . . without delay." The language is as specific as a Miranda warning, and is well within the competence of federal and state courts to apply.

Instead of focusing on the VCCR, the Court directed its attention to Article 94 of the U.N. Charter and held that Article 94(1) is non-self-executing. Article 94 provides in full as follows:

> (1) Each Member of the United Nations *undertakes to comply* with the decision of the International Court of Justice in any case to which it is a party.
> (2) If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party *may have recourse to the Security Council*, which *may*, if it deems necessary, make recommendations or

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214 . For a brief discussion of the Framers' intent in adopting the Supremacy Clause, s*ee* Vazquez, *supra* note 208*,* at 47–48; *see also* McDonnell, *supra* note 188, at 1406–16.

215. Vienna Convention on Consular Relations, art. 36(1)(b)–(1)(c), April 24, 1963, 596 U.N.T.S. 261.

> *decide upon measures to be taken* to give effect to the judgment.[216]

The Court reasoned that the words "undertake to comply" were not sufficiently definite to constitute a self-executing treaty term.[217] Granted, the language might have been stronger, for example, "shall comply." But "[i]n international usage, 'undertaking' is well recognized to be a hard-immediate obligation."[218] As Justice Breyer observed in dissent, "undertake" means to put oneself under a legal obligation.[219] Justice Breyer examined "undertake" and the terms used in the Spanish version of the U.N. Charter to conclude that they mean "become liable."[220] But query whether the Court would have reached the opposite result had Article 94 used the "shall comply" language.

A better argument for the *Medellín* majority's position—one that the majority does make—is in reference to Article 94(2) of the U.N. Charter.[221] That subsection concerns what happens when a state party fails to comply with a decision of the International Court of Justice. Article 94(2) states that "[i]f *any* party to a case *fails* to perform the obligations [under an ICJ judgment], the other party *may have recourse to the Security Council*."[222] One might argue that here the parties to the U.N. Charter specifically agreed that the *only mode*

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216. U.N. Charter, art. 94 (emphasis added).

217. *Medellín*, 552 U.S. at 508–09.

218. Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 661 (2008) (citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 46 I.L.M. 188, 231 (Feb. 26, 2007) (ordinary meaning of the word 'undertake' is "to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties. . . . It is not merely hortatory . . . .")); Restatement (4th) of Foreign Relations, § 301, reporters' note 2 (AM. LAW INST. 2018) (citing as "[a]n example of a nonbinding agreement" an instrument that "avoids words of legal undertaking").

219. Medellín v. Texas, 552 U.S. 491, 553 (2008) (Breyer, J., dissenting).

220. *Id.*

221. *Medellín*, 552 U.S. at 509–10 (arguing that the sole remedy for noncompliance under Article 94(2) was referral to the United Nations Security Council and that this nonjudicial remedy was evidence that ICJ judgements were not meant to be enforceable in domestic courts). The Court also noted that this was not an absolute remedy given that the Security Council would need to effectuate the judgement and given that the United States would retain its ability to veto the Security Council resolution. *Id.*

222. U.N. Charter, art. 94, ¶ 2 (emphasis added).

of enforcement of an ICJ decision is through the U.N. Security Council. Considering the high regard parties have had for state sovereignty and the placement of Article 94(2) in the same article dealing with legal obligation of states to comply with ICJ judgments, such an interpretation is plausible.[223]

Although the state parties usually leave the manner of enforcement to the individual states, the parties can agree to make a treaty provision non-self-executing. A clear example of this is the Mutual Legal Assistance Treaty ("MLAT") between the United States and Switzerland. The MLAT expressly states that no defendant shall be able to invoke the treaty to exclude evidence in United States courts.[224] This is a narrow exception to the general rule that treaties are self-executing.

On the other hand, one could argue that Article 94(2) of the U.N. Charter is not absolute. The subsection says that an ICJ judgment holder "may have recourse to the Security Council . . . ."[225] The subsection does not say that going to the Security Council is the *only* way for the judgment holder to enforce the ICJ judgment. Unlike the MLAT, the treaty language in Article 94 does not clearly make that article non-self-executing.

Powerful states typically resist giving broad jurisdiction to international tribunals. Given the veto power over Security Council resolutions held by the five permanent members, drafting Article 94(2) presumably helped persuade these states—China, France, the United Kingdom, the then-U.S.S.R., and the U.S (and perhaps others)—to accept the establishment of the International Court of Justice. Although imperfect, this argument forms a stronger basis for

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223. One distinguished commentator analyzed Article 94(2) as essentially amounting to a directive to the United States to "make best efforts" to comply. "The Medellín opinion indicates that the Court concluded that ICJ judgments are not directly enforceable in the courts because Article 94, in effect, obligates the United States to do its best to comply with ICJ judgments. . . . This reading is further supported by the Court's interpretation of Article 94(2), in conjunction with the fact that the United States retained a veto in the Security Council, as establishing that the United States had retained 'the option of noncompliance.'" Vazquez, *supra* note 218, at 661. Professor Vazquez argues that *Medellín* should be so interpreted by lower courts. *Id.*

224. McDonnell, *supra* note 188, at 1428 (quoting Cardenas v. Smith, 733 F.2d 909, 918 (D.C. Cir 1984) ("This Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence . . . .").

225. U.N. Charter, art. 94, ¶ 2.

the *Medellín* Court's decision than does misinterpreting the self-executing treaty doctrine.

Medellín exemplifies the truism that hard cases make bad law. It was a hard case because the petitioners were not asking the United States Supreme Court to affirm an international commercial arbitration or to recognize a foreign court's judgment against a private party. Rather, they were asking the most powerful national court on the planet to accede to an order issued by the UN's World Court against the United States itself, on an issue related to the controversial question of capital punishment.

B. Weak Precedent Asserting the Refugee Convention and Protocol are Non-Self-Executing

A few federal courts of appeal have found the 1968 Refugee Protocol non-self-executing. These courts, however, ruled so summarily. At best, one can describe their analysis as conclusory.[226] The Second Circuit, in a one-page 1973 *per curiam* decision, *Ming v. Marks,* adopted the district court's opinion, which relied heavily on some statements in the Senate while debating giving its advice and consent to the Protocol. The district court seemed to cite these statements for the proposition that our immigration laws and regulations already comported with the 1967 Protocol.[227] However,

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226. *See, e.g.,* Al-Fara v. Gonzales, 404 F.3d 733, 743 (3d Cir. 2005); Cuban American Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1425 n.13 (11th Cir. 1995) (asserting that the protocol is not self-executing without any additional legal analysis).

227. Ming v. Marks, 367 F. Supp. 673, 677 (S.D.N.Y. 1973), *aff'd on opinion below*, 505 F.2d 1170, 1172 (2d Cir. 1974) (per curiam). There, the district court quoted the following from the Senate's hearing on the Protocol:

> SENATOR [JOHN] SPARKMAN. Is there anything in here that conflicts with our existing immigration laws?
> MR. DAWSON. I would answer that briefly and then ask Mrs. McDowell [of the Treaty Section, Office of the Legal Advisor, Department of State] to give a more authoritative answer. I would say that Article 32 which prohibits the expulsion of a refugee who is lawfully in this country to any country except on grounds of national security or public order would pose certain questions in connection with section 241 of our Immigration and Nationality Act, which states the deportation provisions. But I do not believe it would be in conflict. We believe most of those grounds in 241 are grounds which can be properly construed as having the basis of national security or public order, and *we also are assured that those relatively limited cases*

the *per curiam* decision itself, while ostensibly adopting the district court's opinion, seems to have applied the 1951 Refugee Convention through the 1967 Protocol as the rule of decision.[228]

The district court opinion upon which the Second Circuit opinion and other Circuit opinions are ultimately based is unsound.[229] First, the *Ming* district court did not undertake an examination to determine if the treaty language created a legal obligation at all, and thus relied on an unfounded assumption.[230] Second, the Supreme Court in *I.N.S. v. Stevic* adopted a far more nuanced analysis of the 1967 Protocol than did the district court in *Ming*.[231] The Court in *Stevic* noted that there was a significant difference between the Protocol and United States domestic law at that time:

> The most significant difference was that Article 33 *gave the refugee an entitlement to avoid deportation to a country in which his life or freedom would be threatened*, *whereas domestic law merely provided the Attorney General with discretion* to grant withholding of deportation on grounds of persecution. The Attorney General, however, could naturally accommodate the Protocol simply *by exercising his discretion to grant such relief in each case in which the required showing was made,* and hence no amendment of the existing statutory language was necessary.[232]

The Court essentially interpreted the 1967 Protocol and Article 33 of the Refugee Convention to mandate the Attorney General to exercise his or her discretion in favor of the asylum applicant "in each case in which the required showing [under the

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> *which perhaps could not be so construed could be dealt with by the Attorney General without the enactment of any further legislation . . . .*

Id. at 678 (emphasis added).

228. Ming v. Marks, 505 F.2d 1170, 1172 (2d Cir. 1974). Unfortunately, the Second Circuit adopted a strained interpretation of Convention Articles 31 and 32.

229. In Bertrand v. Sava, 684 F.2d 204, 218–19 (2d Cir. 1982), the Second Circuit again incorrectly relied on *Ming* for the proposition that the Protocol and the Convention were non-self-executing on the ground that the Refugee Act of 1980 implemented the Protocol.

230. *Ming*, 367 F. Supp. at 678.

231. I.N.S. v. Stevic, 467 U.S. 407, 428 n.22 (1984).

232. I.N.S. v. Stevic, 467 U.S. at 428 n.22 (emphasis added).

Protocol and Convention] was made."[233] So what was once the generally unfettered discretion of the Attorney General was now, because of the Protocol, an almost compelled exercise of discretion to grant withholding of deportation if the immigrant showed that he or she suffered a threat of persecution within the meaning of Article 33 of the 1951 Refugee Convention.[234] By effectively limiting the Attorney General's exercise of discretion, Article 33 of the Refugee Convention (made binding in the United States by the 1967 Protocol) had become the rule of decision.[235]

Ironically, the colloquy in the Senate quoted by the *Ming* district court likewise supports this proposition. Responding to Senator John Sparkman's question, Lawrence Dawson, a State Department official, testified, "We also are assured that those relatively limited cases which perhaps could not be so construed [where then-current immigration law failed to comport with the 1967 Protocol] *could be dealt with by the Attorney General without the enactment of any further legislation . . . .*"[236] In that same colloquy, another State Department official noted two additional ways in which the then-current immigration law and regulations differed from the requirements of the Protocol:

> There are two categories, only two, that we think are not covered, and these are the deportation of an alien for reasons of mental illness or deficiency, where he has become institutionalized for that reason, or deportation on grounds that he has become a public charge. *These two areas would not be enforced against refugees if the protocol were in force*.[237]

Fundamentally, the testimony supports the *Stevic* Court's proposition that the Protocol limits Executive discretion over matters the Protocol prescribes. Specifically, the testimony indicates that the Attorney General has virtually no choice but to comport with the 1967 Protocol and the relevant provisions of the 1951 Refugee Convention.

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233. *Id.* at 428.

234. *See id.*

235. *See* Vazquez, *supra* note *208*, at 51 ("[T]he acknowledgement that no amendment of the statute was required must have been a recognition that Article 33 had domestic legal force and superseded the inconsistent provisions of the immigration law.").

236. Ming v. Marks, 367 F. Supp. 673, 679 (S.D.N.Y. 1973) (quoting S. Rep. No. 14 at 8).

237. *Id*.

Moreover, had the Senate intended to make the 1967 Protocol non-self-executing, it could have attached a reservation, understanding or declaration so saying, during the advise-and-consent process of ratification of the Protocol. The Senate never attached such a reservation, understanding, or declaration.[238] In his memorandum submitting the 1967 Protocol to the Senate, the President never suggested that the Protocol should be considered non-self-executing. To the contrary, the President's memorandum stated, "The Protocol constitutes a comprehensive Bill of Rights for refugees fleeing their country because of persecution on account of their political views, race, religion, nationality, or social ties."[239]

One might argue that the Refugee Act of 1980 suggests that Congress believed that the 1967 Protocol was non-self-executing and that implementing legislation was required. The Senate Committee Report on the bill that later became the Refugee Act notes, however, that the bill "improves and clarifies" asylum procedures, but *continues* the substantive standards of the 1967 Protocol and the relevant 1951 Refugee Convention articles:

> [T]he bill establishes an asylum provision in the Immigration and Nationality Act for the first time by improving and clarifying *the procedures* for

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238. The Senate attached reservations to Articles 24 and 29 of the Convention, but made no reservation or understanding applicable here. *See Declarations and Reservations to the Protocol Relating to the Status of Refugees*, UN TREATY SERVICE, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en#EndDec [https://perma.cc/5KZS-E67R]. The Senate has attached "non-self-executing" clauses in "understandings or declarations" to the Convention against Torture, the International Covenant on Civil and Political Rights, and the Convention for the Elimination of Racial Discrimination. *See United States Reservations, Understandings, and Declarations to Human Rights Treaties*, UNIVERSITY OF MINNESOTA LIBRARY, http://hrlibrary.umn.edu/usdocs/usres.html [https://perma.cc/2L68-6R4F]. Some commentators question whether including a non-self-executing clause in a reservation, understanding, and declaration document should have any legal effect given the command of the Supremacy Clause that 'all treaties' are the supreme law of the land. *See, e.g.*, Jordan Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1264–68 (1993) (detailing the legal and policy rationale for finding these clauses to be without legal effect). Because there is no such clause in the Protocol, that issue is inapplicable here.

239. Special Message to the Senate Transmitting the Protocol Relating to the Status of Refugees, 1 PUB. PAPERS 868 (Aug. 1, 1968); *see also* Vazquez, *supra* note 208, at 58 (quoting same language). The authors are indebted to Professor Vazquez for his deep and penetrating scholarship on these issues.

> determining asylum claims filed by aliens who are physically present in the United States. *The substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees*, to which the United States acceded in November 1969.[240]

Professor Carlos Manuel Vazquez further refutes that argument:

> As the House Judiciary Committee Report states, and as the Supreme Court made clear in *Stevic*, this change [the Refugee Act of 1980] was made '*for the sake of clarity.*' . . . The amendment to the statute, which removed the discretion that the statute appeared to give the Attorney General, could have "clarified" existing law only if Article 33 itself served to limit the discretion that the Attorney General enjoyed before accession to the Protocol.[241]

Although *Stevic* concerns the *non-refoulement* obligation under Article 33 of the Convention, the same reasoning applies to Article 31 of the Convention.[242] Article 31 is equally definite, containing mandatory language and stated in the negative.[243] Because Article 31 as well as Article 33 is self-executing, and for all the reasons set forth above, federal courts should enjoin the Administration from prosecuting asylum-seekers who make out a *prima facie* asylum case and who satisfy Article 31 until their asylum claims are adjudicated. On the same basis, federal courts should enjoin the Administration from indefinitely detaining asylum-seekers

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240. S. REP. NO. 96-256, at 9 (1979) (emphasis added).

241. Vazquez, *supra* note 208, at 52. *See also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 428 n.8 (1987) (emphasis added) ("While the *Protocol constrained the Attorney General with respect to § 243(h)* (withholding of deportation) *between 1968 and 1980*, the Protocol does not require the granting of asylum to anyone, and hence does not subject the Attorney General to a similar constraint with respect to his discretion under § 208(a).").

242. Articles 3 and 4 of the Convention prohibiting discrimination on the basis of race, religion, and national origin are likewise more than adequately definite.

243. For similar reasons, Article 3 of the Refugee Convention is likewise self-executing: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." 1951 Refugee Convention, *supra* note 17, art. 3.

who likewise make out a *prima facie* asylum case and who satisfy Article 31.

C. Interpreting Federal Statutes to Comply with International Refugee Law and International Human Rights Law

The Supreme Court has long held that international law is "part of our law." [244] Aside from directly enforcing the Refugee Convention, federal courts are generally obligated to interpret federal statutes to avoid violating international law. Chief Justice John Marshall declared in *Murray v. Schooner Charming Betsy*[245] that a statute "ought never to be construed to violate the law of nations if any other possible construction remains." [246] The American Law Institute's Restatement (Fourth) of Foreign Relations Law of the United States follows this canon: "Where fairly possible, courts in the United States construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe." [247] Courts should find a later federal statute to supersede "an earlier rule of international law or a provision of an international agreement as law of the United States *if the purpose of the act to supersede the earlier rule or provision is clear* or if the act and the earlier rule or provision *cannot be fairly reconciled*."[248]

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244. Hilton v. Guyot, 159 U.S. 113, 163 (1895) ("International law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation . . . duly submitted to their determination."); *see* Paquete Habana, 175 U.S. 677 (1900).

245. 6 U.S. (2 Cranch) 64, 118 (1804).

246. *Id.*

247. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 406 (AM. LAW INST. 2018); *see also* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 136 (2005) ("If . . . [the statute] were not to take conflicts with international law into account, it would lead to [an] anomalous result. . . . [that] Congress could not have intended. . . ."); Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (applying this "maxim of statutory construction" to employment law on military bases); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21–22 (1963) (requiring clear congressional intent before sanctioning a potential conflict with international law); Clark v. Allen, 331 U.S. 503, 508–11 (1947) (distinguishing the ability for statutes to conflict with international law from the judicial assumption that they do not); Cook v. United States, 288 U.S. 102, 118–20 (1933) (appealing to this assumption when a statute's legislative history makes no reference to a particular treaty).

248. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 115(1)(a) (AM. LAW INST. 1987) (emphasis added).

Here there is little, if any, evidence of a Congressional purpose for the illegal entry statute to supersede the Refugee Convention or the Refugee Protocol.[249] The undisputed purpose of the Refugee Act of 1980 was to bring U.S. law into harmony with international refugee law:

> If one thing is clear from the legislative history of the new definition of 'refugee,' and *indeed the entire 1980 Act*, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees [and hence with the Refugee Convention of 1951]. . . .[250]

As discussed above, Article 31 of the Refugee Convention generally prohibits the criminal prosecution of refugees for illegal entry or presence. The current Justice Department has adopted a policy of criminally prosecuting for illegal entry virtually everyone suspected of crossing the border without inspection.[251] The Justice Department and the Department of Homeland Security have done little to ensure that valid asylum-seekers are protected from such prosecutions. Consequently, the United States is violating this article of the Convention, and thereby transgressing an international law obligation.

The Refugee Convention does permit some initial administrative detention of *bona fide* asylum-seekers.[252] However, the States Parties Executive Committee of the U.N. High Commissioner of Refugees, charged with monitoring compliance with the Convention, notes detention's limits:

> *[D]etention should normally be avoided.* If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the

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249. *See* H.R. REP. NO. 104-828 (1996) (Conf. Rep.).

250. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) (emphasis added). The United States acceded to the Protocol in 1968. Protocol Relating to the Status of Refugees, Feb. 9, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577.

251. *See supra* notes 34–50 and accompanying text.

252. *Id.*

> State in which they intend to claim asylum; or to protect national security or public order. . . .[253]

There is considerable authority for the proposition, however, that prolonged administrative detention of refugees and *bona fide* asylum-seekers violates international law.[254]

Nothing in the legislative history of the criminal statute penalizing illegal entry suggests that either the Congress or the President were made aware that prosecuting refugees for illegal entry or presence in the United States violated international law.[255] Nothing in the Congressional Record, Committee Reports, or other evidence of legislative history shows that Congress intended to abrogate Article 31 of the Refugee Protocol. Absent clear congressional intention to abrogate an international law obligation, a court should "fairly reconcile" the treaty and the congressional statute to construe them as consistent with one another to the extent possible.[256] Thus, federal courts should dismiss *without prejudice* any charges against asylum-seekers who have passed fair credible fear interviews—that is, asylum-seekers who have demonstrated a *prima facie* case of asylum eligibility, for example with a finding of credible fear. Should the asylum-seeker ultimately be unsuccessful in the pursuit of asylum, then the criminal charges can be reinstated against him or her.[257]

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253 . Executive Committee of the High Commissioner of Refugees, Conclusions No. 41 (XXXVII) Detention of refugees and asylum-seekers ¶ b, 1986 Y.B. on Hum. Rts. 204, U.N. Sales No. E.91.XIV.4 (1986). *But see* Anita Sinha, *Defining Detention: The Intervention of the European Court of Human Rights in the Detention of Involuntary Migrants*, 50 COLUM. HUM. RTS. L. REV. 176, 220–26 (2019) (noting the increased use of detention of "involuntary migrants" in Europe and the unwillingness of the European Court of Human Rights to stop at least short-term detention).

254. *See, e.g.*, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *supra* note 129, ¶¶ 25–28 (emphasizing the compounding effect of unnecessary, disproportionate, and prolonged detention). Aside from detention itself are the exacerbating factors of conditions in detention, deliberate family separation, and interference with the right to counsel.

255. *See, e.g.*, H.R. REP. NO. 104–828 (1996) (Conf. Rep.) (showing that the legislative history lacks a reference to any intention to supersede or conflict with international law).

256. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 248, § 115(1)(a).

257. That is not to say the criminal prosecution of first-time unauthorized entrants is either necessary or fair. The United States had more than a century of open borders. Criminal prosecution of immigrants entering illegally was only

In any event, criminal prosecution of migrants for "improper entry," whether they are eligible or ineligible for asylum, is generally neither necessary nor compatible with international human rights law. Immigration into the United States was essentially unrestricted until 1875.[258] Prosecution of individuals for what is largely a status offense is disfavored and often unconstitutional.[259] Before the current Administration, few first-time unauthorized entrants were ever prosecuted for such entry. Prosecuting individuals who are fleeing persecution not only violates international law, but also elemental justice.

CONCLUSION

In the past two decades, a series of cataclysmic events has created a "perfect storm" resulting in social and economic upheaval that has led millions of people to cross international borders. These events include the 9/11 attacks, the widespread incidence of insurgencies, terroristic occupation and devastation of societies, and the emergence of brutal, corrupt, autocratic dictatorships, often theocratic or grounded in ethnic division. Violent conflict and outright civil and transnational wars have broken out in Iraq, Afghanistan,

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adopted in 1929. *See* Kelly Lytle Hernandez, *How Crossing the US-Mexico Border Became a Crime*, CONVERSATION (Apr. 30, 2017), http://theconversation.com/how-crossing-the-us-mexico-border-became-a-crime-74604 [https://perma.cc/4H6S-8ADK]. Hernandez further notes:

> It was not always a crime to enter the United States without authorization. In fact, for most of American history, immigrants could enter the United States without official permission and not fear criminal prosecution by the federal government. . . . With few exceptions, prosecutions for unlawful entry and reentry remained low until 2005. . . . By 2015, prosecutions for unlawful entry and reentry accounted for 49 percent of all federal prosecutions and the federal government had spent at least U.S. $7 billion to lock up unlawful border crossers.

Id.

258. Kleindienst v. Mandel, 408 U.S. 753, 761 (1972) (noting that "[t]he Act of March 3, 1875, 18 Stat. 477, barred convicts and prostitutes [and that] [s]even years later Congress passed the first general immigration statute. Act of Aug. 3, 1882, 22 Stat. 214").

259. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (prosecution of defendant for "being an addict" violates due process and the Eighth Amendment). Here, the noncitizen is essentially prosecuted for "being a foreigner" and entering the United States without being inspected.

Syria, Libya, Nigeria, the Democratic Republic of Congo, Yemen, the Philippines, Kashmir, Ukraine and the Crimea, Myanmar, Haiti, Sudan and South Sudan, Somalia and Somaliland, El Salvador, Honduras, Guatemala, Nicaragua, Colombia, and now Venezuela and perhaps Brazil. Financial insecurity has spread throughout the international community with the devastating worldwide economic recession/depression of 2008, the revolutionary technological advances in communication and resulting digitization and robotic automation of the workplace and world economies displacing hundreds of thousands, if not millions of workers; climate change pushing multitudes in the Global South from ruined farms and villages; and the rise of civil strife in many other parts of the world, but again especially in the Global South. In many receiving countries, this perfect storm has simultaneously fueled virulently intense hostility, often tinged with violence, toward immigrants, even between communities that have peacefully cohabited for generations.[260]

Instead of standing as a bulwark against these pressures, which ultimately amount to fearing and blaming the foreigner—the "other"—the United States has not merely given into them but has exacerbated and exploited them for political gain. Since the end of World War II, the United States has generally seen itself as the undisputed world leader in human rights, known, among other things, for one of the most generous refugee programs in the world. A "Nation of Immigrants," as this country has boasted for at least a century (until last year when USCIS removed that sobriquet from its Mission Statement),[261] the United States has taken full advantage of

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260. *See Staff of Reuters, with Notable Contributions from Wa Lone and Kyaw Soe Oo*, THE PULITZER PRIZES, https://www.pulitzer.org/winners/staff-reuters-notable-contributions-wa-lone-and-kyaw-soe-oo [https://perma.cc/5YVW-N7KE] (excerpt from Pulitzer citation: "For expertly exposing the military units and Buddhist villagers responsible for the systematic expulsion and murder of Rohingya Muslims from Myanmar, courageous coverage that landed its reporters in prison."); *Facing Myanmar's Brutal Persecution, Rohingya Refugees Still Can't Return Home*, PBS NEWS HOUR (Apr. 24, 2019), https://www.pbs.org/newshour/show/facing-myanmars-brutal-persecution-rohingya-refugees-still-cant-return-home [https://perma.cc/5Z2M-JU34]; *Myanmar*, THE INTERNATIONAL CRISIS GROUP (Mar. 2019), https://www.crisisgroup.org/asia/south-east-asia/myanmar [https://perma.cc/LG6V-TMDA].

261 . Abigail Hauslohner, *Nation of Immigrants? According to U.S. Citizenship and Immigration Services, Not So Much*, WASH. POST (Feb. 22, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/22/nation-of-immigrants-according-to-u-s-customs-and-immigration-services-not-so-much/ (on

the remarkable contributions of successive waves of newcomers who continually reinvigorate both our economy and our democracy. The current Administration has turned its back on these ideals, using its vast discretionary power over immigrants to harshly enforce and often violate our immigration laws, undermining American values and staining our country's international reputation.

Federal courts, however, have both the authority and the responsibility to enforce the 1951 Refugee Convention and the 1967 Refugee Protocol as well as international human rights norms to protect asylum-seekers from criminal prosecution and from prolonged immigration detention. The Framers of the United States Constitution and its key amendments envisioned that federal courts would apply treaties as the rule of decision to protect foreigners and would serve as a check on an Executive that tramples on individual rights, particularly the rights of a vulnerable minority. To fulfill their constitutional obligations, federal courts must live up to that vision and stand up against a rogue Administration tilting towards authoritarianism and willfully disregarding the rule of law—both domestic and international.

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file with the *Columbia Human Rights Law Review*). Compare the original Mission Statement with the update. The original version was:

> USCIS secures America's promise *as a nation of immigrants* by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system.

Id. (emphasis added). The new version is:

> U.S. Citizenship and Immigration Services administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.

Id.