Immigration

Reimagining Rights & Responsibilities in the U.S.
Reimagining Rights & Responsibilities in the United States: Immigration

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Overview

The United States is a nation of immigrants. For centuries, waves of migrants and refugees have arrived in America seeking economic opportunity or religious freedom. While many have found what they desired, and assimilated into American culture, many others have encountered persecution, resentment, and xenophobia. As the third rail of American politics, immigration has long been a source of controversy, with policy split between two competing visions of what the country could be: on the one hand, a rights-oriented, humanitarian vision that imagines open doors to opportunity and shelter; on the other hand, an exclusionary and Ameri-centric vision that imagines protected, walled-off borders. Recently, our politics and media have been flooded with images of the latter: children piled into cages at detention camps, migrant caravans “invading” the southern border, endless fights in the courts over walls and travel bans. These images did not originate with the Trump administration—previous presidents have also pursued anti-immigration policies on asylum and deportations—though the current administration has greatly exacerbated them.

Tensions over competing visions of immigration mark most of America’s history. The late-nineteenth century and first half of the twentieth saw laws that actively discriminated against Asian immigrants, favored literate Western European nationals, and numerically restricted the number of individuals who could seek refuge here. In the decades that followed World War II and the Holocaust, an international human rights movement led to changes in U.S. law and policy, including ratification of international agreements protecting asylum seekers from persecution, ending quotas based on nationality, and affirming constitutional protections for migrants seeking entry. At the same time, however, exclusionary xenophobia continued to find purchase in the public sphere, with new caps instituted on immigration from Mexico and Latin America. Today, U.S. laws guarantee due process rights for immigrants and follow international treaty obligations to secure the safety of refugees, reflecting a legal basis for a rights-oriented vision, despite current political attacks and efforts to disregard it.

The Fifth and Fourteenth Amendments to the U.S. Constitution provide safeguards against arbitrary abridgement of fundamental rights to life, liberty, and property without due process of law, a principle that at its core ensures individuals can contest arbitrary or wrongful acts by the government through the judicial process. On issues of immigration, the Supreme Court has established in the last century that procedural due process protections extend to foreign migrants seeking entry to the U.S. Moreover, commitment to the 1951 United Nations Refugee Convention binds the U.S. Government to international treaty obligations to secure the rights and safety of asylum seekers. Under international law, the U.S. must guarantee protection from being returned to conditions of persecution (“non-refoulement”), as well as access to courts and the possibility of assimilation under refuge.

Amplifying the exclusionary vision of America, however, the Trump administration has sought to overturn and override advances made by the rights-oriented approach to immigration, particularly as it applies to protections for refugees. Beginning in 2016, the administration embarked on an operation to dismantle and erode the constitutional and international rights of immigrants and asylum-seekers. During his presidential campaign, Donald Trump routinely used dehumanizing and racist rhetoric to describe immigrants (see “Hate Crimes”), and openly encouraged law enforcement to violently beat immigrants suspected of crime. Since his inauguration, President Trump has attempted to ban refugees from what he terms “shithole countries” and declared the arrival of Central American asylum-seekers a violent “invasion” of the country. He has either introduced or vastly expanded measures to expedite deportation proceedings without appeal, illegally restrict asylum availability, recklessly endanger asylum-seekers, and inhumanely separate children from their parents at the border. With the COVID-19 pandemic, Trump has further exploited public fear in order to wall off all asylum-seekers in third countries, in violation of domestic and international asylum law. These actions violate the legal standards demanded by both constitutional due process and international law, and are a threat to the security of human rights and fundamental liberties that underpin American democracy.

Trump represents the exclusionary and discriminatory vision of America in its most extreme form. While many of the policies he has expanded to curtail the rights of immigrants predate his entrance into politics, Trump has gone to unprecedented lengths to fully dismantle rights-based protections for migrants and refugees. This chapter will review some of the most egregious violations of legal process and protections for immigrants. Building on the well-established legal foundation for a rights-based vision of immigration, the chapter articulates the need for comprehensive reform in due process and humanitarian protections for those arriving at our borders.

6. Ibid.
U.S. Constitutional Law

Over the course of the nineteenth through twenty-first centuries, the U.S. Supreme Court has recognized executive and legislative discretion in matters of immigration, where national sovereignty is concerned. Yet even under this degree of deference, the Court has consistently held that immigration policies, such as deportation procedures, are subject to constitutional scrutiny. Measures such as indefinite detention without recourse to judicial or administrative review are unconstitutional regardless of the legal status of the individuals detained. In Yamataya v. Fisher (1903), a case reviewing the U.S. Government’s deportation authority, the Supreme Court recognized that procedures for deporting immigrants within the country or at the border require a hearing of some kind. In its ruling, the Court rejected the position that the executive branch “may disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.” In other words, executive discretion cannot justify the denial of a fundamental liberty such as due process of law.

The century-old precedent set out in Yamataya was reaffirmed and strengthened in Reno v. Flores (1993), which addressed the detention and release of unaccompanied minors. In this case, the Supreme Court held that detained children have “a constitutionally protected interest in freedom from institutional confinement,” and they may be released only to a parent or guardian, or otherwise guaranteed “a suitable placement...to meet specified care standards.” In the words of Supreme Court Justice Antonin Scalia, “It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” The decision reinforced the principle that immigrants are entitled to procedural fairness in asylum proceedings and to substantive rights in their treatment, on account of their personhood and human dignity, once inside the U.S.

In the more recent case of Zadvydas v. Davis (2001), addressing the government’s assertion of power to detain immigrants indefinitely under order of deportation, the Supreme Court held that indefinite detention was unconstitutional and ruled that the Fourteenth Amendment’s due process protection applies to all individuals “whose presence may be or is unlawful, involuntary or transitory.” Furthermore, the Court acknowledged that while Congress and the President may exercise discretion over matters of immigration, they “must [still] choose a constitutionally permissive means of implementing that power,” which involves due process limitations. The decision reaffirmed the due process safeguards for all persons on U.S. soil regardless of their immigration status.

International Law

The 1951 Refugee Convention and the subsequent 1967 Protocol Relating to the Status of Refugees set out binding obligations requiring nations to protect refugees seeking asylum. The Protocol defines a refugee as an individual who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,” is “unable or unwilling” to avail himself of the protection of their country or to return to it. The prevailing obligation of the international community, then, is to ensure “the protection of [these] persons from political or other forms of persecution.” As the 2011 foreword to the Convention from the United Nations High Commissioner for Refugees (UNHCR) explains, the standard

12. Ibid.
14. Ibid.
16. Ibid.
18. Ibid.
ABUSES AND IMPUNITY

Due Process at the Border

Since the creation of U.S. Customs and Border Protection (CBP) in 2003, serious problems have emerged in accountability for due process violations at the border. Between 2009 and 2014, at least 214 complaints were filed against agents for abusing or mistreating migrant children. However, according to Department of Homeland Security (DHS) records, only one employee faced disciplinary consequences as a result of a complaint. In a broader range of abuse cases adjudicated between 2012 and 2015, 96% of the 1,255 abuse complaints resulted in a decision of “no action” against the agent accused of misconduct. These cases involved reports of physical abuse, sexual abuse, theft of property, and verbal abuse.

The Trump administration has further enabled this climate of impunity and abuse by granting CBP more powers that further shield it from public scrutiny. In January 2020, the administration designated all of CBP a “Security Agency,” which places it on par with intelligence agencies and curtails its transparency. Effectively, the new classification exempts the names of all CBP employees from Freedom of Information Act requests or other public disclosures, limiting the ability of the media and citizens to gauge the full scope of misconduct within the agency or challenge misconduct by Border Patrol agents. Serious allegations against CBP have continued to surface under the Trump Administration—including sexual assault of children, trafficking of firearms, and targeting of border crossers with moving vehicles.

The U.S. acceded to the Protocol in 1968, binding U.S. law to the responsibilities it sets forth. Under the Supremacy Clause of the U.S. Constitution, international treaties made pursuant to the Constitution’s procedures are part of the “supreme Law of the Land.” Accordingly, the U.S. has a constitutional obligation to secure the rights of asylum seekers as articulated by the Refugee Protocol. One of the most crucial rights, affirmed as a cornerstone of international refugee law, is the right of refugees not to be returned to a country where they face serious threats to their lives or freedom.

SUMMARY REMOVAL PROCEDURES

Beyond the lack of accountability for Border Patrol officials, summary removal procedures at the border undermine due process and unlawfully curtail the rights of asylum seekers and migrants. The Trump administration has expanded these procedures, which allow for the deportation of migrants without a hearing before an immigration judge.

One type of summary removal procedure, expedited removal, allows immigration officers to deport non-citizens who are undocumented or suspected of fraud or misrepresentation with virtually unchecked authority—with the burden of proof on a suspected individual to demonstrate innocence. According to the Department of Justice, so long as a DHS officer “believes that someone is trying to enter the country either by fraud or without proper documents, the officer can refuse the person’s entry and order him or her immediately removed from the U.S.”

for persecution is not limited to “a threat to life or freedom” but also includes “serious violations of human rights” based on one’s identity or beliefs.

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The “decision is final and generally there is no right to speak with an Immigration Judge.” Effectively, immigration officers serve as both prosecutors and judges who investigate, charge, and make decisions, often within a single day.

Given this rushed timeline, there are few opportunities, if any, for individuals to collect evidence or consult with an attorney or friends and family before a decision is made. According to the American Immigration Council, which provides pro-bono legal services to immigrants, individuals subject to expedited removal are rarely informed of their right to counsel or given the chance to contact counsel. In such cases, expedited removal often fails to account for whether suspected individuals are eligible to apply for lawful status or to seek asylum. As a result, the procedures for deporting noncitizens in such a summary manner, without proper documentation or higher-level oversight, can lead to arbitrary or erroneous deportations. Furthermore, noncitizens have no avenue to appeal an official’s decision to deport via expedited removal.

Prior to the Trump administration, the use of expedited removal was limited to border regions, broadly defined as within 100 miles of any U.S. border, and to individuals apprehended within 14 days of entering the country. In January 2017, the new administration dramatically expanded the scope of expedited removal by decreeing through executive order that the procedure could be applied to all individuals, anywhere in the United States, who cannot prove they have been continuously present in the U.S. for at least two years. The executive order was implemented as an interim final rule (IFR) in July 2019, which made it effective immediately upon publication. This procedure has placed numerous undocumented individuals in a fast-track deportation process, without the opportunity to plead their case in front of an immigration judge or to seek help from an attorney. That has created a “very truncated, streamlined process where very important decisions are made by Border Patrol agents with little training in the law,” according to Kara Hartzler, a federal defender in San Diego, who is among the many lawyers who have expressed concerns about the expansion of expedited removal.

Errors in decision-making, Hartzler told the press, “are just going to be multiplied thousands of times across the country and lead to a lot of wrongful removals.” In 2020, the Trump administration introduced two new expedited removal programs, the Prompt Asylum Case Review (PACR) program and the Humanitarian Asylum Review Program (HARP). Respectively targeted at Central American migrants and Mexican migrants, these two similar programs are aimed at adjudicating any humanitarian claims and removing those who do not meet standards within ten days—precluding time for detailed screenings and the arrangement of legal counsel. Individuals placed in either program are held in CBP custody for the duration of their detention.

30. Ibid.
32. Ibid.
33. Ibid.
35. Ibid.
38. Ibid.
of their proceedings, whereas asylum seekers had previously been transferred to Immigration and Customs Enforcement (ICE) custody. Because CBP facilities have stricter visitation limitations, migrants are less able to place phone calls or access legal counsel, and therefore less likely to establish legitimate claims for asylum. In February, shortly after the new programs had been introduced, CBP reported that a total of more than 1,200 migrants had been placed in HARP and nearly 2,500 in PACR. A lawsuit against the programs revealed that more than 700 migrants had already been removed from the U.S.

Another type of summary removal procedure, a reinstatement of removal, has allowed DHS to deport noncitizens previously deported without any consideration of their current circumstances, reasons for returning, or the presence of flaws in their original removal proceedings. This procedure has precluded individuals who were erroneously deported and denied asylum from returning to the U.S. to seek legal status again, even if they are eligible under international law.

In June 2020, the Supreme Court ruled against a challenge to expedited removal brought by a Sri Lankan man who was apprehended at the Mexican border in 2017. In the case, he argued that he faced risk of persecution based upon his Tamil heritage, but was unable to clearly express those concerns during the removal process due to poor translation. In a 7-2 ruling, the Court denied his argument that the right of habeas corpus, which guarantees a hearing to determine whether a detention is lawful, applied in the case.

CREDIBLE FEAR SCREENING

Under international law, refugees have to prove a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” in order to be entitled to asylum. Modeled after this standard, U.S. immigration law requires asylum seekers to establish a credible fear of returning to their home country in order to advance their asylum claims. When asylum seekers first enter the U.S., they are guaranteed the right to a credible fear interview with a trained asylum officer from the U.S. Citizenship and Immigration Services (USCIS); this interview offers the first screening of asylum claims at the border, and passing the screening allows immigrants to continue pursuing their claims before a judge.

41. Ibid.
42. Ibid.
Historically, credible fear interviews have high rates of positive determinations, as they grant migrants the benefit of the doubt in trying possible claims to refuge from violence and persecution. Codified in 1996, the credible fear process sought to carve out a step to prevent people from being deported quickly after entry. Its threshold is relatively low because Congress wrote the regulation to protect bona fide asylum seekers and grant them the time to prepare complex and difficult cases. Under the Trump administration, however, standards of assessing credible fear have been significantly heightened.

In 2017, USCIS removed previous guidance that in cases of “reasonable doubt” about a credible fear determination, a migrant would still be eligible to proceed with an asylum claim. In place of this language, USCIS instead added that reasonable doubt could preclude any opportunity to further pursue an asylum claim. In 2018, then-Attorney General Jeff Sessions further reversed a longstanding immigration court opinion granting asylum to victims of domestic violence, and declared the need for stricter scrutiny of credible fear claims at the border. In response, USCIS issued further guidance to its officers to comply with Sessions’ unprecedented interpretation, requiring migrants who often lack formal education and knowledge of U.S. law to present complete legal claims immediately upon reaching the border. This increases the risk of erroneously deporting asylum seekers back to situations in which they face physical harm or death.

The overall rate of positive determinations has decreased dramatically in certain localities, highlighting the arbitrary nature of decision-making by border agents. At the Dilley family detention center in Texas, for example, rates of positive determinations for women and children fleeing violence have decreased from 97% to fewer than 10%. The decision to exempt claims of domestic violence has been particularly problematic. U.S. asylum protections have historically accommodated victims of domestic violence, even if gender is not a clearly protected characteristic. In the Matter of A-B-, Attorney General Sessions ruled that domestic violence alone is “too diffused” to establish a “particular social group” that warrants protection from persecution. Sessions’ reinterpretation contradicts not only longstanding precedent, but also the spirit of international humanitarian law, which—in the words of the UN General Assembly—is intended to serve as a “living and dynamic instrument, covering persons fleeing a wide range of socio-political events.”

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**Returning Refugees to Conditions of Serious Danger: Violations of Non-Refoulement**

The Trump administration has flagrantly violated the international legal principle of non-refoulement—preventing the return of refugees fleeing persecution to conditions of serious danger. Through a complex series of interlocking policies and programs over the last several years, the administration has severely limited the ability of immigrants to seek asylum at the southern border, cutting refugee admissions to a trickle.

**“TURN BACK” OR METERING POLICY**

In a move contrary to U.S. and international asylum law, a so-called “metering” policy introduced by President Trump in 2017 restricted the number of individuals who can make asylum claims at any port of entry along the U.S.-Mexico border crossing each day. Anyone who sets foot in the U.S. is by law guaranteed the ability to request asylum. However, as a result of the metering policy, asylum-seekers are forced to put their names on a waitlist and return to Mexico to wait indefinitely until they are granted a hearing with a judge about their asylum case.

In August 2019, University of Texas researchers documented 26,000 people who were turned away and placed on waitlists across the border. The Ninth Circuit U.S. Court of Appeals upheld an injunction against the policy in March 2020, rejecting the

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48. Ibid.


54. Ibid.

U.S. government’s argument that spending additional resources and time for every credible fear screening caused it “irreparable harm.” The court further affirmed the right of non-citizens arriving at the border to apply for asylum and be interviewed by an asylum officer.

**MIGRANT “PROTECTION” PROTOCOLS**

At the end of 2018, the Trump administration further limited entry by asylum seekers through its Migrant Protection Protocols (MPP). MPP has required nearly 60,000 migrants from Central American countries seeking asylum near highly transited parts of the southwestern border to wait in Mexico in dangerous conditions while their cases are processed in the United States. The policy was first implemented in San Diego at the end of 2018, and has since been expanded to border sectors near Calexico, California and the Texas border communities of El Paso, Laredo and Brownsville, applying to all migrants from Spanish-speaking countries (except Mexico) and Brazil.

While waiting for a chance to be heard in immigration court, these mostly Central American migrants struggle to find shelter and employment in Mexico and face dangerous conditions of persecution and extortion. Approximately only 1% of people returned to Mexico under MPP have been able to find legal representation in their court cases and the program regularly results in family separations. This initiative further violates the non-refoulement clause of international refugee law by sending asylum seekers to places where they face high risks of violence, exploitation, and death.

**ASYLUM BANS**

In November 2018, the Trump administration issued a presidential proclamation banning individuals who do not present themselves at a point of entry from applying for asylum. This decision renders any noncitizen who enters the U.S. without inspection at the border ineligible for asylum, even if they may have legitimate credible fear claims. The ban emerged in the aftermath of groups of asylum seekers arriving from Central America in October 2018. The caravan of migrants from Honduras, Guatemala, Nicaragua, and El Salvador attempted to reach the U.S. to escape conditions of violence, poverty, and repression. In response to news of its approach, the Trump administration immediately instituted the new asylum ban—targeting migrants arriving at the southern border—and threatened to send military forces in response. The ban was implemented through another interim final rule (IFR) allowing for immediate implementation without the regular notice and comment period usually mandated for significant regulatory changes.

This restriction on asylum eligibility imposes an arbitrary limitation to refuge rights that violates both domestic and international law. As the American Civil Liberties Union (ACLU) has documented,...

57. Ibid.
59. Ibid.
64. Ibid.
68. Ibid.*
many people seeking refuge cannot reasonably arrange to arrive at a port of entry as they lack formal education and are unaware of designated locations for crossing. Furthermore, they often feel compelled to reach safety as quickly as possible to escape persecution on the other side of the border. The Ninth Circuit U.S. Court of Appeals upheld an injunction against the ban in February 2020 in *East Bay Sanctuary Covenant v. Trump,* on grounds that DHS had unlawfully overstepped its authority and "encroached upon Congress's legislative prerogative" in the Immigration and Nationality Act (INA). Under the INA, any undocumented migrant is entitled to the opportunity to apply for asylum when she is "physically present in the United States" or "arrives in the United States (whether or not at a designated port of arrival)." Therefore, the government’s ban unlawfully precludes migrants who use an explicitly authorized method of entry from asylum.

In July 2019, the administration introduced yet another IFR banning all individuals, including children, who have traveled through another country to reach the United States from applying for asylum. This transit-country rule is, in effect, an asylum ban for all non-Mexican asylum seekers seeking to enter the U.S. through the southern border, without having had the opportunity to present their claims. The administration’s rationale is driven by the notion that the U.S. cannot be legally compelled to be the first provider of refuge to asylum-seekers, if there are closer countries that may offer protection.

This rationale flies in the face of the reality confronted by migrants from Central America, who do not often have safe proximate countries where they can seek safety from the violence and repression. The ban is now in full effect, and those who transit through another country and cannot demonstrate they were threatened with persecution are considered to fail the credible fear determination and are deported at once. After the ban’s implementation, the approval rate for credible fear interviews, or the initial stage of the asylum process, plummeted from 80% in June 2019 to 45% in December 2019. (Since then, the number has continued to fall due to new restrictions placed on asylum in the midst of the COVID-19 pandemic; see below.)

The total number of refugee arrivals in the U.S. has also dropped dramatically. Trump has slashed U.S. refugee openings by nearly half—reducing the limit from 30,000 to 18,000. This cap is the lowest ceiling for refugee admissions that the U.S. has seen since it began setting caps in 1980. Yet even this low figure overstates the number of slots available for refugees fleeing unforeseen circumstances, as the Trump administration has designated the majority of openings for individuals fleeing religious persecution or coming from specific regions like Iraq.

**ASYLUM COOPERATION AGREEMENTS**

In order to further tighten the transit-country rule, the Trump administration started in 2019 to push for “Safe Third Country” or asylum cooperation agreements with Mexico and Central American countries to preclude asylum applications in the United States from refugees who transited through those countries to reach the U.S. border. By designating neighboring states as “safe third country,” the Trump administration has sought to use them as buffer zones against unwanted flows of asylum-seekers. According to U.S. law, the elements of a “safe third country” are that a bilateral or multilateral agreement must exist; the lives and freedom of refugees would not be threatened there on account of “race, religion, nationality, membership of a particular social group, or political opinion.” Migrants deemed ineligible to apply for asylum under this new ban are considered to fail the credible fear determination and are deported at once.

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The total number of refugee arrivals in the U.S. has also dropped dramatically. Trump has slashed U.S. refugee openings by nearly half—reducing the limit from 30,000 to 18,000. This cap is the lowest ceiling for refugee admissions that the U.S. has seen since it began setting caps in 1980. Yet even this low figure overstates the number of slots available for refugees fleeing unforeseen circumstances, as the Trump administration has designated the majority of openings for individuals fleeing religious persecution or coming from specific regions like Iraq.

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group or political opinion”; and refugees would have “access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.”

While Mexico rejected such an asylum cooperation agreement, the Trump administration succeeded in entering into agreements with Guatemala in July 2019, and El Salvador and Honduras in September 2019. The agreements require all asylum seekers arriving at the southern border who passed through any of these countries to be transferred there to pursue asylum. Human rights advocates, however, contend that these countries are not only incapable of protecting their own citizens from persecution but also lack adequate systems for adjudicating asylum claims. Ironically, while the Department of Homeland Security touts El Salvador as a safe third country with ample opportunities to seek asylum, the State Department asks potential visitors to El Salvador to reconsider travel because “[v]iolent crime, such as murder, assault, rape, and armed robbery is common,” and “[g]ang activity, such as extortion, [and] violent street crime . . . is widespread.”

Taken as a whole, the administration’s actions demonstrate clear disregard for the overwhelming evidence supporting the reasons why many Central Americans flee their home countries, many of which suffer from gang violence, gender-based violence, and abject poverty. Moreover, these are conditions that have historically been exacerbated by U.S. policies in the region, including engineering political coups that heavily destabilized Central America during the Cold War era. At the very least, the U.S. has a moral and legal responsibility to provide refuge to victims fleeing threats of violence that it has historically helped to instigate, if not the further burden of providing aid to remove the causes of instability.

**FAMILY SEPARATION**

The most notorious of President Trump’s immigration policies has been the separation of migrant children from their parents and caregivers at the border. As undocumented asylum-seekers have been prosecuted and imprisoned at arrival, their accompanying children under the age of 18 have been handed over to the U.S. Department of Health and Human Services (HHS), which has shipped them miles away from their parents and scattered them among 100 Office of Refugee Resettlement shelters and other sites across the country.

Effectively, the Trump administration has forced migrants to choose between leaving the country with their children or leaving without them, disincentivizing families with children from requesting asylum where they have legitimate claims of persecution. Internal government memos have shown that this policy was explicitly intended to deter asylum seekers. Alone in detention facilities, young children were barred from having comfort toys or even touching their own siblings. Such long-term separation can create toxic stress leading to lifelong trauma in some circumstances, according to Julie Linton, a co-chair of the American Academy of Pediatrics’ Immigrant Health Special Interest Group.

Following nationwide criticism, the Trump administration signed an executive order officially ending the family separation policy in June 2018, except in cases where there is concern that the parent...
represents a risk to the child.91 However, since the official end of the separation policy, more than a thousand additional children have been separated from their parents, according to an October 2019 report by the House Committee on Oversight and Reform.92 In addition, Border Patrol agents have continued to justify and enforce separation, often using vague or unproven allegations of nonviolent criminal offenses, such as decades-old DUI charges, that normally would not lead to a loss of parental custody.93 According to the ACLU, at least half of the children separated after the official end of the policy have been under 10, while 20 percent have been under five.94

The total number of children separated from their families since the early implementation of family separation in July 2017 is estimated to be more than 5,400.95 Disconcertingly, DHS itself does not have an accurate database for tracking children whom officials have separated from their parents, which makes mitigating the effects of this policy all the more difficult. In April 2018, DHS reportedly lost track of the whereabouts of 1,475 migrant children and in September 2018, they were unable to account for at least 1,500 migrant children.96 Nongovernmental organizations such as the Texas Civil Rights Project have worked to track down separated migrant children, relying on sparse documentation and independent investigation, such as interviews with parents.97

While in detention facilities, separated children and unaccompanied minors are often subject to rampant abuse, according to reports during and predating Trump’s separation policy. The federal government has received more than 4,500 complaints about the sexual abuse of detained immigrant children by both staff and fellow detainees from October 2014 to July 2018, with an increase since the Trump administration’s family separation policy. Of the 1,303 cases considered the gravest, 178 included accusations of sexual assault by adult staff members, including allegations of kissing, fondling, and rape.98

**Due Process in Court and Asylum Proceedings**

**ACCESS TO LEGAL COUNSEL**

Access to legal counsel significantly alters outcomes for immigrants, increasing their likelihood of applying for and attaining relief to which they are entitled. However, the vast majority of immigrants facing removal do not have access to court-appointed legal counsel. Even young children are expected to shoulder the cost of counsel or represent themselves in immigration court. As a result, only 37% of all immigrants are able to secure legal representation in their removal cases.

Unsurprisingly, immigrants with legal counsel fare significantly better in courts,99 and are 4 times more likely to be released from detention after a custody hearing than those without.100 Furthermore, represented immigrants are nearly 11 times more

100. Ibid.
likely to seek relief such as asylum than those who do not have representation.\textsuperscript{101} Such disparities imply that there are many individuals who are erroneously denied entry or summarily deported due to lack of assistance of counsel in navigating immigration procedures.

In March 2018, Attorney General Sessions eviscerated asylum seekers’ due process rights in immigration courts by vacating the Board of Immigration Appeals’ decision in the \textit{Matter of E-F-H-L} (2014), which ensured that all asylum seekers were entitled to a court hearing. In doing so, Sessions declared that immigration judges can deny applicants asylum without a hearing if they find that their written asylum submissions do not demonstrate prima facie eligibility for asylum.\textsuperscript{102} This runs contrary to longstanding precedent that asylum seekers have a due process right to a hearing. The vast majority of asylum seekers are not able to secure legal counsel to assist them in filing detailed applications, and many of them do not speak English. It is unrealistic to expect them to know which of the many details of their persecution are most relevant to complex U.S. asylum laws.

**JUDGE SHORTAGE AND CASE BACKLOGS**

An additional problem that confronts due process in immigration courts is the severe shortage of immigration judges. The underfunding of immigration courts throughout the country has limited the number of judges hearing cases and has resulted in backlogs of cases, with average hearing delays of over a year and a half.\textsuperscript{103} Between 2003 and 2015, for example, immigration court backlogs increased by 163% as more cases were filed than could be completed.\textsuperscript{104} This trend has become steeper since 2015, as immigration court backlogs have risen to unprecedented levels—doubling in 5 years from 400,000 to 800,000 by 2019.\textsuperscript{105} As immigration judges become overworked, their ability to give every case due diligence is hindered. Furthermore, as immigrants wait for their cases to be processed, many remain in detention, separated from family members. According to the American Immigration Council, which provides pro bono legal services to migrants, some with valid claims ultimately give up their right to a hearing due to prolonged delay.\textsuperscript{106}

Beginning under Attorney General Sessions, the Department of Justice (DOJ) announced new evaluations of immigration judges based on how many cases they close and how fast they hear cases. These evaluations now require finishing cases within 3 days when an immigrant is in detention, or within 10 days when the immigrant is not detained.\textsuperscript{107} That arbitrary timetable can present problems in cases in which asylum seekers are frequently psychologically traumatized by their experiences and unfamiliar with English and the nuances of U.S. law. In addition, they often lack the level of education or the ability necessary to quickly secure legal representation, let alone to quickly produce evidence and witnesses. By prioritizing quantity over quality, this policy violates the due process right of immigrants to have a fair and reasonable hearing in court.

**“ROCKET” DOCKETS**

Since September 2019, the Trump administration has introduced accelerated dockets—so-called rocket dockets—in 10 cities to handle the rising number of cases involving families in immigration court.\textsuperscript{108} At least 17,000 cases have been completed on the accelerated dockets and 80% have resulted in \textit{in absentia} removal orders, meaning the vast majority of migrant families were not in court when a judge ordered them deported.\textsuperscript{109} By contrast, only 51% of cases resulted in \textit{in absentia} removal orders under the previous policy between 2014 to 2017.\textsuperscript{110} Rocket dockets exacerbate the breakdown of due process and increase the chances of individuals being sent back to conditions of danger.

**PROLONGED AND INDEFINITE DETENTION**

In July 2017, ICE ended the Family Case Management Program, which allowed certain asylum seekers to remain in the community during their asylum proceedings while receiving case

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101. Ibid.


104. Ibid.


109. Ibid.

110. Ibid.
management services. In doing so, the Trump administration effectively introduced a de facto measure that prolongs the detention of asylum seekers for as long as their cases are being processed. This policy violates ICE’s own directive requiring the release of asylum seekers on humanitarian parole if they pose no community safety risk and have a sponsor. By mid-2019, data from ICE revealed the current detention of 9,000 immigrants who were found to have a credible or reasonable fear of persecution or torture.

**REDUCED PROTECTIONS FOR UNACCOMPANIED CHILDREN**

In May 2019, USCIS issued a new policy to undercut protections provided to unaccompanied children during the asylum process. By law, unaccompanied children are defined as persons under 18 years old who have no parent or legal guardian in the United States available to provide care and physical custody. Measures implemented under the new policy strip away the few but essential protections to unaccompanied children, including their prior exemption from the one-year filing deadline for asylum cases and non-adversarial asylum interviews with asylum officers. The new policy also requires immigration adjudicators to continually re-adjudicate a child’s designation as unaccompanied by conducting “independent factual inquiries.”

Requiring asylum officers to continually investigate a parent or guardian’s “availability” may likely result in children who are in custody being detained for longer periods or being exposed to heightened risk of trafficking, as family members may fear coming forward as the child’s sponsor. This fear is exacerbated by the Trump administration’s record of targeting sponsors for immigration enforcement, such as ICE’s arrest of 170 potential sponsors from July to November of 2018. Furthermore, the targeted interrogation of children about the availability of their parents during asylum interviews may lead to psychological re-traumatization and inhibit children’s ability to testify about their own asylum claims.

**Accountability for Private Actors**

**PRIVATE PRISONS**

Private businesses and corporations are implicated in the U.S. immigration system in a myriad of ways, from operating detention centers to conducting surveillance of asylum-seekers at the border. Because these private actors often operate in the shadow of state agencies and officials, they are held to low levels of scrutiny and oversight, and their complicity in matters of due process is often overlooked. Private prisons, for example, have become the federal government’s default detention facilities for undocumented immigrants, housing more than three-quarters of the average daily immigration detainee population. Private prison contractors reap significant profits from the detention of migrants at the border, asylum-seekers awaiting immigration court, and individuals in deportation proceedings. Between January 2017 and June 2019, ICE spent a combined $800 million in contracts with the two largest prison companies, CoreCivic and GEO Group, accounting for 25% and 20% of company profits for FY 2018, respectively. In December 2019, ICE signed new contracts for detention facilities, with a 5-year contract with CoreCivic worth $2.1 billion, and a 15-year contract with GEO Group worth $3.7 billion.

Private prisons now house over 80% of immigrants in detention, and their emphasis on maximizing profit and lack of accountability

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115. Ibid.


make them particularly prone to abuse, according to human rights organizations. A 2020 report by the American Civil Liberties Union, Human Rights Watch, and the National Immigrant Justice Center found that these newly built private facilities were more likely to be located in remote locations, leading to decreased access to attorneys and increased likelihood that immigrants lose their cases. In addition, the report found sordid, unhygienic conditions, with inadequate food and water, overcrowding, physically violent staff, and lack of medical and mental health treatment. Among the more than 220 detainees in ICE custody who died between 2004 and 2020, at least 15 were housed in 1 private detention center, the CoreCivic-operated Eloy Federal Contract Facility in Arizona.

At another private detention facility run by LaSalle Corrections in Georgia, a nurse alleged in September 2020 that a doctor performed hysterectomies on numerous immigrant women without their consent. The allegations, which ICE and the facility deny, were filed as part of a whistleblower complaint with the assistance of several human rights organizations. It also included charges of unsanitary conditions and substandard medical care, including significant delays in receiving essential medications. The complaint has spurred investigations by members of Congress and the Department of Homeland Security.

**TECH COMPANIES**

Under the Trump administration, technology companies have been increasingly contracted to surveil, investigate, and arrest undocumented migrants, with virtually no oversight over their invasive mass data collection. Palantir Technologies, a $20 billion data-analytics firm, has implemented a program since 2017 to target smugglers who help unaccompanied minors cross the border into the United States. The “Unaccompanied Alien Children Human Smuggling Disruption Initiative” is a plan for “identification, investigation, and arrest of human smuggling facilitators, including, but not limited to, parents and family members.” Under the program, once an unaccompanied minor is located by an ICE investigator, immigration agents can log to the arrival in the Investigative Case Management (ICM) system. Within this system, agents can access intelligence from the Drug Enforcement Agency, the FBI, law enforcement agencies, and information on criminal records and work histories.

Previously, after minors arrived at the border unaccompanied, immigrants would be able to come forward and claim their children, be reunited, and then go through the immigration process. Now, under the Palantir-supported program, ICE conducts background checks through ICM on family members claiming children, which often deters them from doing so, and consequently results in longer periods of detention for children. Whenever an unaccompanied child is apprehended, agents investigate suspected family members and “seek charges against the individual(s) and administratively arrest the subjects and anybody encountered during the inquiry who is out of status.”

Perhaps most disconcertingly, through Palantir, ICE is able to scan a person’s biometrics to compile profiles connecting associates, use fingerprints collected through ICM to organize raids, and extract data from smartphones, even if the data has been previously deleted.

**DNA TESTING**

Beginning in 2019, private companies have been assisting DHS in DNA testing at the border to investigate familial ties and relationships. DHS has begun a DNA testing program to identify and prosecute groups of individuals posing as families in an effort to target human smuggling. Rapid DNA testing involves a cheek

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122. Ibid.
127. Ibid.
128. Ibid.
swab and can, on average, provide results in about 90 minutes.\textsuperscript{130} Since 2019, border agents have interviewed 101 supposed families who were referred for suspected fraud and of those, DHS reported identifying 29 fraudulent families. Additionally, the agency referred 45 cases for prosecution, 33 of which were accepted.\textsuperscript{131} Although the DNA testing is represented as “voluntary,” families are presented with consent forms stating that opting out of the rapid DNA testing could factor into ICE’s decision to separate families in immigration detention.\textsuperscript{132} This practice is obviously coercive, and moreover, the testing does not take into account families with children who are not biologically connected to parents, such as adopted children and stepchildren.\textsuperscript{133} The process of DNA testing also undermines procedural due process by offering no opportunity for immigrants to review or challenge the accuracy of their tests.

\section*{COVID-19 and The Erosion of Due Process}

In the midst of the global pandemic, the Trump administration has exploited the public fear surrounding COVID-19 to further wall off asylum seekers in violation of domestic and international law. In March 2020, the administration began expanding travel restrictions, slowing visa processing, closing the U.S. border with Canada and Mexico, and moving to bar asylum seekers and undocumented immigrants from entering the country.\textsuperscript{134} President Trump continued to cite public health reasons for immediately turning back all asylum seekers and migrants from Mexico—without any due process—who appear at the southwestern border. His claims of migrants from Mexico spreading the novel coronavirus are unfounded in the face of evidence showing that the pandemic bears no connection to migration from the U.S.-Mexico border—particularly as the number of U.S. viral infections far exceed those of its southern neighbors, as the U.S. currently leads the world in the number of confirmed cases and deaths from COVID-19.\textsuperscript{135} Trump has even ordered the State Department to issue visa sanctions against any country that refuses to accept the immigrants that his administration has sought to deport.\textsuperscript{136}

The immediate and blanket denial of asylum to migrants from Central America constitutes a violation of both U.S. law and international human rights protections and reveals the racism and xenophobia underlying the administration’s policies.

Furthermore, detention centers that currently house migrants in the middle of a frozen asylum process are breeding grounds for contracting sickness and disease. By July 1, 2020, at least 2,700 immigrants and 45 guards have tested positive for COVID-19 while in ICE custody.\textsuperscript{137} More than 150 of these individuals contracted coronavirus at the Otay Mesa Detention Center, which has been home to the largest single outbreak of the disease in the immigrant detention system.\textsuperscript{138} Locked up within the walls of detention centers and denied parole requests, many of these immigrants and asylum seekers are made especially vulnerable to health risks.

In June 2020, President Trump announced his most wide-ranging attempt to seal America off from the world. In an executive order, he formally barred the issuance of new green cards and temporary work visas through the end of the year.\textsuperscript{139} With some key exceptions such as agricultural and health workers, the Trump administration is no longer approving applications from foreigners to live and work in the U.S. for an indefinite period of time, essentially shutting down the legal immigration system. The proposal appears to stem from beliefs about foreign-born workers reducing employment opportunities for Americans rather than any real concern about public health.\textsuperscript{140,141}

At the same time, the Trump administration released proposed new rules on asylum, curtailing the categories of immigrants who could qualify for “credible fear,” raising the burden of proof for

\begin{enumerate}
\item[	extsuperscript{131}]{Ibid.}
\item[	extsuperscript{132}]{“EFF Sues DHS to Obtain Information About the Agency’s Use of Rapid DNA Testing on Migrant Families at the Border.” EFF, 12 Nov. 2019, https://www.eff.org/press/releases/eff-sues-dhs-obtain-information-about-agencys-use-rapid-dna-testing-migrant-families.}
\item[	extsuperscript{133}]{Ibid.}
\item[	extsuperscript{135}]{Ibid.}
\item[	extsuperscript{136}]{Ibid.}
\item[	extsuperscript{138}]{Ibid.}
\item[	extsuperscript{140}]{Ibid.}
\end{enumerate}
asylum claims, and granting new authority to judges to dismiss cases at their discretion. If the new rule goes into effect, it would be particularly damaging to gender-based asylum claims, including domestic violence and genital mutilation, which would be “virtually eliminated” according to one legal analysis.

The administration claimed that the changes were intended to “streamline” the asylum process and limit “frivolous” claims. Immigration advocates, however, see the changes as an end-run around the asylum process. “The administration believes they found the silver bullet with the public health laws where they can just simply bypass the entire asylum system,” said Lee Gelernt, deputy director of the American Civil Liberties Union’s Immigrants’ Rights Project. The number of credible fear interviews and decisions has continued to fall since April 2020. In September there were fewer than 500 decisions, with a positive finding rate of 38%, compared to more than 8,500 decisions with a 60% positive finding rate in the same month in 2019.

Policy Recommendations

HOW TO REIMAGINE RIGHTS AND RESPONSIBILITIES

- **Secure Due Process at the Border.** Reform the border control system: Mandate accountability and transparency of Customs and Border Protection; issue broad “credible fear” guidance for assessing asylum claims; require asylum claims raised in removal proceedings to be fully reviewed and, if plausible, to be referred to an immigration judge for determination; curtail expedited removal at the border; and, reopen the green card renewal process and temporary work visas.

- **Secure Humanitarian Protections.** Reform the asylum and refugee processing system: Bar the separation of migrant children from their families; prohibit the return of refugees to conditions of persecution; end the ban on asylum claims of refugees coming through transit countries; overturn the designation of Guatemala, El Salvador and Honduras as “safe third countries”; establish federal court review of “safe third country” designation procedures; reinstate the Temporary Protected Status (TPS) program for refugees fleeing war, famine or natural disasters; reinstate the Deferred Action for Childhood Arrivals (DACA) program; and, provide pathways to citizenship for TPS and DACA recipients.

- **Secure Due Process in Immigration Proceedings.** Reform the immigration court system: Increase the number of immigration judges; transfer immigration courts from the federal executive to the judicial branch; implement a right to government-funded counsel for indigent noncitizens eligible for relief from removal, and unaccompanied children and migrants with mental disabilities; provide access to qualified interpreters to facilitate communication with immigrants who have difficulty understanding procedures; end the detention of immigrants charged with non-felony crimes; and, end the expedited removal of immigrants already in the US, unaccompanied minors, and the mentally ill.

- **Establish Accountability for Private Contractors.** Provide congressional oversight of private contractors performing immigration functions; ban private detention facilities; and, end private contractors’ DNA testing and surveillance of asylum seekers.

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Reimagining Rights & Responsibilities in the United States

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