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The Immigration Crisis Under the Trump Administration

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The Immigration Crisis Under the Trump Administration

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by
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I have always been interested in immigration issues because my family immigrated to the U.S. from El Salvador when I was young. I wanted to understand my own experience as a migrant. Furthermore, while interning for U.S.-based humanitarian organizations over the past two years, I got a closer look at the legal process that asylum seekers have to navigate to receive asylum in the U.S. I wanted to bring that experience to my Senior Project to understand and provide examples of how the immigration system has changed under the Trump Administration. Whereas asylum and refugee policies are often hidden in complex, purposely difficult, ever-evolving immigration laws and policies, I wanted to focus on this humanitarian protection that has always been precarious and never assured. In recent years, there has been a shifting opposition towards newcomers who require humanitarian protection, as asylum and refugee laws and policies have become increasingly demonized and undermined by different administrations. The United States has gradually moved away from a humanitarian approach to dealing with immigration issues. Words like “amnesty” in immigration reform have been removed from the political norm and replaced with terms like “heightened border security” and “enforcement.” Thus, it is essential to look at how past laws and regulations have helped shape current asylum law and policy. It is important to say that while asylum and refugee laws have always been precarious, what is different about the Trump administration is his clear disregard of and hostility towards the international legal apparatus that governs asylum and refugee policies.

Refugees and asylum seekers are among the world’s most vulnerable populations. They have been pushed out of their homes by forces beyond their control: natural disasters, war, political persecution, gang violence, gender-based violence, and femicides. Despite the continuous need for international protection, the rhetoric of welcome, and the humanitarian

tradition it embodies, there is an unprecedented change in U.S. asylum and refugee policy under the Trump administration. Trump is not just attacking the immigration system (whether authorized or unauthorized); he is also attacking asylum law and policy, under which historically there has been a sense of obligation or effort to admit and act as a sanctuary to some refugees.

In my research, I will examine the humanitarian crisis at the Southern border and Trump's deployment of radicalizing U.S. asylum law. In Chapter One, I will analyze the political exploitation of a 'crisis' and its ramifications. The Trump administration is correct in his discourse that there is a "crisis" at the border, but the response to that crisis has not been a humanitarian one, but a securitization one. In Chapter Two, I examine the history of asylum and refugee law in the United States to show that asylum seekers and refugees have always been politicized. There is a tension between the rhetoric of welcome and acceptance towards refugees and the politicized and calculated nature in which refugees and asylum seekers are admitted into the United States. I look at how past laws and regulations helped shape the current asylum law and policy and examine what is new and distinctive about the Trump administration's current asylum process. In Chapter Three, I carry out an in-depth examination of the Migrant Protection Protocols (MPP), an unprecedented change in U.S. asylum policy. I will explore how it works to control migration, undermine asylum law, violate international law, and deter asylum seekers from exercising their legal right to seek humanitarian protection in the United States. Lastly, in chapter four, I explore the militarization and securitization of the Southern border, recent policy changes in the Mexico-Guatemala region and the rise in detention centers in the U.S. under the Trump administration.

Chapter 1: Political Discourse and the Exploitation of “Crisis”

In this chapter, I will explore, in both a theoretical and practical way both, from a theoretical and practical way, the hyperbolized political uses that a “crisis” serves and how it affects the most vulnerable populations. The particular “crises” I address here is associated with U.S. border control, and asylum policies, and immigration law enforcement. I am specifically interested in how Trump used the rhetoric of nativism and nationalism to legitimize his unprecedented policies against refugees and asylum seekers. Furthermore, I will examine the rhetoric of Trump’s campaign speeches, his presidential speeches, conferences and interviews.

A crisis is an event that produces or leads to a dangerous situation affecting a community, society, or nation, often a natural disaster or a pandemic. This perilous situation triggers a plan of action to contain or get rid of the threat. Those who speak of a crisis use a modifier to clarify its context. For example, a “personal crisis,” “humanitarian crisis,” or an “environmental crisis.” By classifying the type of crisis, the speaker ensures that the critical elements of the perceived risks are conveyed and the audience fully understands the extent of the event or message.¹ In some cases, a “crisis” stems from deliberate actions by political actors. The logic of these crises is distinct from those initiated by external or unintended causes. The strategic approach of political actors often results in a “fake crisis,” one that is not exogenous in nature. These crises are unique in that they are avoidable and are exploited by actors following deliberate political agendas. They are distinct from the political norm and enable a vertical form of politics that deviates from the organizational hierarchy working collaboratively towards a common outcome.²

¹ Hahn, “Crisis.”

² (“Prem Kumar Rajaram: Beyond Crisis: Rethinking the Population Movements at Europe’s Border” n.d.)

Factors such as a shifting in political leaders, the rise of anti-immigrant sentiments, restrictive laws and policies that call for the idealized “watertight” security of the border create the capabilities to transform events into crises. These transformations result in massive consequences for the most vulnerable populations. They are deliberately being carried out far away from us, “disordered by design” to create evidence of a “problem” and a justification. In every case, leaders reference and exploit real fears: criminality, invasion, possession of nuclear weapons by other nations, exploitation of resources, job scarcity, and so on. Leaders create an “alert,” and that is where the urgency of a crisis comes into play. This framing enables policy-makers to treat this “crisis” as a condition that must be addressed urgently. In this case, the state acts as a protector in the face of danger or threat and uses extreme policies that are excused in the name of protection and security.

Nations have used the rhetoric of “a crisis” prodigiously when talking about migration and border security. Defining a complex situation like migration and refugee movements as a crisis, and therefore as exceptional, creates a justification for unprecedented actions that may serve to magnify the conditions that have led to the alleged emergency in the first place³ and allow for the heightened border anxieties and the legitimization of violence towards asylum seekers. In this case, the depiction of a “crisis” is an anxious one, based on fear. It is about the states’ capacity to protect their territory, and this urgent responsibility legitimizes morally and ethically questionable decisions. The strategically fabricated forms of intervention, addresses a “problem” that does not exist outside of these frames of representation and intervention. The “chaotic movement” of people through illegalized migration challenges the more orderly

³ Luthi, pg 7

visa-enabled or “legal” forms of migration that separates those deemed desirable from those deemed undesirable.

The Trump administration elected to operate outside the boundaries of U.S. identity (its historical representation of itself as welcoming) by making the claim that exceptional circumstances necessitated the shifting in U.S. policies towards asylum seekers. Trump’s efforts were directed at securing the state from a perceived threat, and orchestrated a “crisis” that required an adjustment to the state’s traditional boundaries. While Trump’s deployment of a crisis has been especially detrimental to the U.S. asylum system, he is far from alone in doing so. The Clinton administration declared an immigration crisis in 1994, which sought to securitize the border with the implementation of *Prevention through Deterrence* (See Chapter 4). Obama also declared a humanitarian crisis in 2014 that resulted in the further criminalization and deportation of migrants, with great consequences to unaccompanied minors. This manufactured sense of urgency is frequently used by political actors to advance a particular agenda.

Trump has spent his entire presidency building upon the rhetoric he put forth during his presidential campaign. He regularly labeled asylum seekers from Central America as criminals, gang members with face tattoos who look fearsome enough to be “fighting for the UFC... [s]ome of the roughest people you’ve ever seen,” who game the system.⁴ He has talked about the asylum process as a “hoax” or “a con” job, that individuals from Latin America come in with fake asylum claims, and then, once in the United States, they never show up for their day in court.⁵ However, Central Americans are not committing fraud. They have legitimate claims to

⁴ Nakamura, “Trump Says the Border Crisis Is about Criminals and Gangs. His Administration Says It Is about Families and Children.”

⁵ “President Donald J. Trump Is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis.”

seek asylum. His rhetoric purposely ignores the fact that recent arrivals from the Northern Triangle are families escaping persecution, torture, and even death. The idea that asylum seekers are committing fraud and gaming the system is a strategy designed to justify his extreme policies and discourage individuals from seeking asylum in the United States.

Gregory Chen, director at the American Immigration Lawyers Association, stated that “Trump’s continued portrayal of the asylum seekers as somehow gaming the system is completely inaccurate... [i]n fact, most of the people who come here have very little, if any, knowledge of our legal system and what asylum even is.”⁶ That is because asylum is very complicated and extremely difficult to obtain. Even before Trump took office, less than 15% of all individuals per year received asylum.⁷ There are many reasons why, but most people do not meet the precise criteria in the law, do not have enough evidence, do not have legal representation, or sometimes asylum seekers face the toughest immigration judges in the country.⁸ (See Chapter 2, which analyses the history of refugee and asylum law.) Thus, his political discourse serves to desensitize Americans and places asylum seekers outside of the political norm, enabling his claim for securitizing the border. Trump has created the narrative of a “crisis” that calls for strategies and policies meant to deal with this threat. This distorted idea as to why an increased number of families and children are seeking protection in the United States serves to frame them in a particular way-- as a threat to the U.S.

The Trump administration and the media alike have fanned these fears about the almost “apocalyptic surge” of Central Americans coming into the United States, invoking a language of

⁶ Nakamura, “Trump Says the Border Crisis Is about Criminals and Gangs. His Administration Says It Is about Families and Children.”

⁷ “688: The Out Crowd.” This American Life.

⁸ See: “The Immigration Court Judge Who Has Rejected Every Asylum Seeker” n.d. “Your Judge Is Your Destiny, whether a person is deported or not, depends largely on who hears the case and where.”

a “national emergency” or “crisis” which must be addressed. In 2018, as Central American migrants made their way to the Southern border to seek asylum, Trump tweeted, “This is an invasion of our Country and our Military is waiting for you!”⁹ In May 2019, while speaking of migrants during a rally in Panama City Beach, Florida, he asked, “How do you stop these people? You can’t.”¹⁰ Then a woman in the audience yelled out: “Shoot them!”¹¹ Trump found the suggestion amusing. This “spectacle,” represented through political discourse, images, and narratives, frames migrants as a danger and a security threat, bringing crime, violence, and incongruent values into the United States. It creates and promotes fear among Americans and encourages them to cling to their idealized American identity or hegemony. While it is true that there has been a rise in asylum seekers from the Northern Triangle (Honduras, Guatemala, and El Salvador), the number of asylum requests from this area is rising because the Northern Triangle is experiencing record levels of violence (see chapter 3).

There is a sharp dichotomy between Trump’s rhetoric against asylum seekers and what is happening at the Southern Border. Throughout his years in office, Trump has cast a continuous spotlight on the border and has manufactured a crisis to justify his hard-line immigration policies. He ran on a platform dominated by language about expelling, controlling, and vilifying asylum seekers and migrants already in the U.S. (both authorized and unauthorized). His political discourse surrounding these groups has focused mainly on describing them in non-human terms, such as ‘savages,’ assigning criminality and portraying them as a threat to American identity and its values. Analyzing Trump’s political discourse is essential, as it facilitates our understanding

⁹ “<https://twitter.com/Realdonaldtrump/status/1056919064906469376>.” *Twitter*, <https://twitter.com/realdonaldtrump/status/1056919064906469376>. Accessed 14 Dec. 2020.

¹⁰ Rugar, Aaron. “Trump Turns Shooting Migrants into a Punchline at Florida Rally.”

¹¹ *Id.*

of the state, and it is therefore understood as the representation and constitution of the state. Trump has exploited cultural fears and nationalistic sentiments, and for Americans who voted him into office, this language was compelling, impactful, and representative of something that resonated with them.

Trump has further strategically exploited the anger and prejudices of men and women who feel like their cultural hegemony, economic livelihoods, and security are at risk due to asylum seekers coming into the United States. He sees minority ethnic, racial, religious, and other identity groups as a threat. His infamous political campaign slogan “Make America Great Again” resonated with those who wanted to return to an idealized image of the past, identified by its ethnic homogeneity and social cohesion. In his first weeks in office, he issued orders that had a more stringent approach to asylum seekers. Since then, his policies on immigration have only gotten more anti-immigrant. His administration promised to build a wall from the Pacific Coast to the Gulf of Mexico to keep asylum seekers out of the country, whom he refers to as “rapists, drug dealers, and criminals.”¹² His nativist and nationalist sentiments were of central relevance for understanding his campaign and his base. Nationalism is the one feature in his presidency that has been consistent over time and therefore worth exploring.

During Trump’s State of the Union Address in 2018, he further expressed fears about the ominous surge of Central Americans arriving at the Southern border by describing them as “well-organized caravans of migrants marching to the United States. It’s like an invasion; they have violently overrun the Mexican Border.”¹³ Trump defined a threat that needed a state-led force to defend its territory and bureaucratic measures to stop those who managed to enter the

¹² “Donald Trump’s False Comments Connecting Mexican Immigrants and Crime - The Washington Post.”

¹³ “President Donald J. Trump’s Address to the Nation on the Crisis at the Border.”

U.S. In all of his speeches, he assigns criminality to asylum seekers, but he also speaks of the southern border as a war-zone that leads to a false state of emergency and the need for intervention. Trump created a “crisis” and a justification for his policies as he called for the permanent detention of asylum seekers: “We’re going to catch; we’re not going to release. They’re going to stay with us until the deportation hearing or the asylum hearing takes place. So we’re not releasing them into the community.” This speech allowed for a vertical form of politics and the immediate detention of the most vulnerable populations. Equally important is the willingness of American citizens to relinquish their right to decide on moral and ethical behavior to the state that leads to state-centered politics of intervention toward asylum seekers.

In 2019, during his Address to the Nation on the Crisis at the Border , Trump spoke of a compassionate action---that he was taking a stand on behalf of the U.S. public and even migrants (women and children) in response to what he called “a humanitarian and security crisis.”¹⁴ However, the humanitarian crisis he referred to did not imply that the government had the responsibility to take action in favor of the asylum-seeking population and grant it protection in the United States. The crisis he speaks of called for the securitization of the border as it hurt Americans, strained public resources, drove jobs down, and limited opportunities for Americans. Trump, therefore, portrayed Americans as victims” He vowed to secure the border, stop criminal gangs, drug smugglers, and human traffickers to “keep America safe, safer than ever before.”¹⁵ In his speech, he talked about protecting migrant children and women. Children are brought to the United States by “vicious coyotes and ruthless gangs,”¹⁶ while women are sexually assaulted on the dangerous trip through Mexico. When Trump talked about the “humanitarian crisis” at the

¹⁴“President Donald J. Trump’s Address to the Nation on the Crisis at the Border.”

¹⁵ Id.

¹⁶ Id.

border, he was not invoking a humanitarian approach to dealing with asylum seekers-- they are perceived as a threat to state sovereignty. Instead, he called for a physical wall between the U.S. and Mexico, the closing of “border security loopholes to return illegal immigrant children safely and humanely back home,” and further securitization and militarization of the Southern border. However, children were arriving in the United States because they experienced persecution in their home countries, and if sent back, they would likely continue to experience violence and even death. This urgent state responsibility to address the “humanitarian crisis” at the border legitimized the limited ethical and moral bases from which the United States made decisions about its responsibilities. The crisis narrative created and maintained specific ideas about what is politically possible, who can and should receive humanitarian protections, and what or whom Americans should fear. In this case, the crisis is nationalistic in nature: state-led intervention centered on border control and security to contain a threat to state sovereignty and society itself.

The state of emergency at the border has resulted in the legitimization of state violence towards asylum seekers, while employing a language of human rights, and has created an actual humanitarian crisis. In announcing the MPP, Kirstjen Nielsen said that “this humanitarian approach”¹⁷ would address the urgent humanitarian and security crisis at the border. However, as examined in Chapter 3, MPP is far from “humanitarian.” Under MPP, the Department of Homeland Security has knowingly sent vulnerable asylum seekers across the border where violent criminal organizations have targeted and kidnapped them, essentially violating the Non-refoulement principle in international law (See Chapter two). In this case, employing a language of human rights has enabled state-sponsored violence. The crisis allows for vertical

¹⁷ <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>

policies and no accountability that would not have been possible outside of this framing. As soon as a “crisis” is declared, the government has a lot more flexibility to decide on what to do with the perceived threat. In the following chapters, I explore the Migrant Protection protocols (MPP), the securitization of the Southern border and the increased detention of asylum seekers that, rather than address real problems, have created, or at best exacerbated, the “humanitarian crisis” at the border. I will also explore the technical or administrative approach to refugee status decisions that prioritizes speedy, cost-effective, and deterring procedures while restricting the right to legal recourse that will have long-lasting consequences.

Chapter Two: Refugee and Asylum Law

The evolution of immigration policy in the broader arena of the United States is a complex story formed by the ambivalent historical attitudes toward newcomers. Refugee policies are the product of deeply held and conflicting strands of American identity: nativism, the political instrumentalization of refugees, the rhetoric of welcome, and the ethical responsibilities towards vulnerable populations. Refugee and asylum policy development has been driven by the rise of legal institutions representing a commitment to international human rights and the consequent emergence of a conservative backlash that has created a struggle between territoriality and humanitarianism. For most of its history, the United States has proclaimed rhetoric of welcome towards refugees. In 1783, George Washington declared the United States a land whose “bosom is open to receive the persecuted and oppressed of all nations.”¹⁸ Later in 1885, the famous Statue of Liberty further reproduced the ideology of welcome with the very famous “Give me your tired, your poor, Your huddled masses yearning to breathe free...” quote. However, for each statistic of welcome, there is another of exclusion.¹⁹ In this chapter, I will explore how past patterns of exclusionary refugee admissions and policies helped shape similar patterns in the present, and the politicized and calculated way in which refugees and asylum seekers are admitted into the United States. To understand contemporary asylum and refugee policies, one must go back and look at their history to explore whether Trump’s attack on the asylum and refugee system is distinctive of his administration or if we are merely entering another restrictionist era of territoriality.

¹⁸ Bon Tempo, *Americans at the Gate*.

¹⁹ Loescher, 209

Before 1891, immigration laws did not restrict the number of migrants the U.S. accepted, and did not create separate laws for refugees and asylum seekers. However, in 1891 Congress created the Bureau of Immigration to oversee the admission of immigrants, including those considered “refugees.” The Immigration Act of 1920, closed the “open door” to immigration, by enacting a national origins quota and the Immigration Act of 1924, reduced the number of visas allocated to migrants from 165,000 to 150,000 annually.²⁰ These two laws served to restrict the number of individuals entering the U.S. from Southern and Eastern Europe, as some believed in a “supposedly scientific hierarchy of races and ethnicities in which genetically blessed Anglos had secured the highest rung.”²¹ Particular visions of nationality and ethnicity drove migration policies, which also explained why the United States failed to admit refugees.

Because the Immigration Act of 1924 did not include specific provisions for refugees, it was up to Congress to approve specific programs in response to global crises. Over the next decades, a few laws and programs that provided non-quota immigrant visas were periodically considered but never approved. Congress did, however, provide a workable definition of a “refugee.” This definition was very restrictive in that a person had to be from a specific country to qualify for admission, and it was inherently political as the United States did not want persons leaving their country due to economic reasons to be considered refugees. For example, in 1923, the Senate only recognized Armenian refugees and defined them as a “homeless” Armenian “who shows that he has fled from his home in reasonable apprehension of death or bodily injury at the hands of Turkish troops or the Turkish civilian population...”²² Then, in 1926, the League of Nations defined a refugee as a person of “Russian origin” or “Arminian origin” who had lost

²⁰ Bon Tempo, *Americans at the Gate*.

²¹ Id.

²² Id.

the “protection of the government” of his or her country and had yet to acquire another nationality. The Senate first highlighted what made a refugee, Armenians fleeing state persecution or at the hands of another ethnic group.

In the 1930s, Germans, both Jewish and political opponents of Nazism, began fleeing immediately after Hitler took power in January 1933. As more of Europe welcomed Nazism in the late 1930s, more and more individuals sought to escape. The United States and other countries closed their doors to the majority of refugees. International efforts to admit refugees were ineffective; indifference and nationalistic opposition characterized efforts to help these refugees. Restrictionist ideologies in the United States capitalized on the xenophobic anti-immigrant hysteria, antisemitism, and economic problems of the era and stymied reform efforts in immigration and refugee movements. Furthermore, fears arose that migrants and refugees from Germany retained their loyalties to Nazi Germany and actively worked to harm the United States.²³ Concerns of national security also drove migrant and refugee admissions and policy; thus the U.S. failed to provide refuge to this population. The State Department argued that helping German Jewish refugees by participating in international efforts to expedite their entry through immigration procedures would damage U.S. relations with Germany. President Roosevelt also claimed that it was in the United States’ foreign policy and diplomatic interests not to help refugees fleeing Germany.²⁴ The small portion of refugees who did manage to enter the U.S. did so via regular immigration quotas. However, their admission into the United States was met with a variety of bureaucratic and administrative obstacles that delayed their entrance. President Roosevelt deployed the strict enforcement of the “likely to become a public charge”

²³ Bon Tempo, *Americans at the Gate*.

²⁴ *Id*

clause in immigration law, which suppressed admissions by permitting government officials to deny entry to individuals they believed would not be able to support themselves in the U.S. and would become a public charge, taking economic and social resources from the U.S.

During World War II, the United States passed a series of laws allowing for the admission of limited categories of refugees, while still employing a very restrictive framework. German refugees who had fled to France were again in need of international protection following the fall of France in June 1940. The U.S. admitted 2,000 persons who were “political and intellectual” refugees from Germany who had to flee due to Nazi takeover.²⁵ Then, in 1948, displaced individuals from refugee camps in Europe were admitted to the United States as part of a broader policy of assisting in the political and social stabilization of the U.S. Western Allies. The 1950s-1970s were a major turning point in the United States, not only due to the Civil Rights Movement, but also for asylum and refugee policy. The experience of the Second World War and the Holocaust, as well as the failure of the United States and other developed countries to help those trying to escape Nazism resulted in a revival of the rhetoric of welcome.²⁶ Moreover, it became clear that the “refugee problem” was not going to subside. In 1955, the Vietnam War caused hundreds of thousands of Vietnamese and Cambodians to flee the political chaos and danger in their home countries. Between 1975 and 1979, some 300,000 of these refugees were admitted to the United States through Presidential action. Furthermore, refugee reform gained momentum in the U.S., as it spurred international outrage that stimulated the development of human rights norms, including the international protection for refugees. During this period, the United States attempted to build alliances with Third World countries in the

²⁵ Bon Tempo, *Americans at the Gate*.

²⁶ ANKER, “U.S. Immigration and Asylum Policy.”

international arena, which resulted in a more humanitarian conception of immigration policy. In 1968, the United States finally ratified the United Nations Protocol, the updated version of the 1951 Refugee Convention.²⁷ The 1951 United Nations Refugee Convention had defined the term “refugee,” and for the first time, outlined the rights of displaced individuals, as well as the legal obligations of states to protect them. The emergence of universalistic rules and conceptions regarding the rights of the individual became formalized and legitimized by international codes and laws. These conventions ascribed universal rights to persons regardless of their membership or status in a particular state.”²⁸ This is the language that is cited when migrants fight for fundamental human rights in their adopted homes. They invoke a language of human rights to persuade their adopted nations to recognize them as residents, even if their legal status is precarious. Over time, these rights have been expanded to include entry and residence, the right to choose and be secure in employment, working conditions, collective bargaining rights, family reunification, and education of migrant children. Moreover, the new definition of “refugee” paved the way for a progress of legal and bureaucratic mobilization that led to refugee law reform and laid the groundwork for the legal community to interpret the law.

The 1968 United Nations Protocol was of particular significance. As the outcome of one of the first human rights conventions, it replaced the Cold War-influenced, anticommunist-centered definition of “refugee” and laid the foundation against which the U.S. Refugee Act of 1980²⁹ was enacted. The ideological definition of a refugee was eliminated and replaced with the nondiscriminatory United Nations’ definition which stipulated that the refugee definition was meant as “a standard applied equally to all applicants regardless of country of

²⁷ Id

²⁸ Soysal, 145

²⁹ Id

origin.”³⁰ The Refugee Act of 1980 provided “a permanent and systematic procedure for the admission of refugees of special humanitarian concern to the United States and provide[d] comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who [were] admitted.”³¹

It amended the Immigration and Nationality Act to define a “refugee” as any person who is

Outside his country of nationality (or in the case of a person having no nationality, is outside any country in which he last habitually resided), and who is unable or unwilling to return to such country because of persecution or a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group. Excluded from the definition of "refugee" is any person who ordered, incited, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

The withholding of deportation and nonrefoulement provision was made mandatory as per the language of the U.N. Protocol. One of its core principles is *non-refoulement*, which prohibits states from expelling or returning a refugee “in any manner whatsoever” to a state where “his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”³² This obligation bars removal, *directly* or *indirectly*, to a place where a refugee’s life or freedom would be threatened because of a protected ground. This principle is now considered a rule of international law.³³ Refugee status was discretionary, but it was for the first time given a statutory foundation codified and incorporated into U.S. domestic law. Under the 1980 Refugee Act, the number of refugees admitted to the United States are determined by the President, in consultation with Congress.³⁴ The State Department and the

³⁰ “STATUTE-94-Pg102.Pdf.”

³¹ (Kennedy 1980)

³² 1951 Convention art. 33(1)

³³ Id.

³⁴ “STATUTE-94-Pg102.Pdf.”

Department of Homeland Security work together to assess the viability of different refugee populations for admission, as well as the capacity of U.S. government officials to process them. After the Refugee Act of 1980, more and more refugees were admitted to the United States, not only from European countries but also from Asia, Latin America, the Caribbean, Middle East, and Africa. By the 1990s, and over the course of the decade, the United States admitted nearly 1 million refugees.³⁵ For the first time, the Refugee Act explored the definition of asylum, a protection granted to someone who is outside of his/her home country due to a protected ground. Asylum policy since then has remained linked to foreign policy. Individuals attempting to flee governments that are friendly to the United States have had an impossible time getting asylum.³⁶ Thus, despite the important legal changes to refugee law and the renewed rhetoric of welcome, a restrictionist politics of limits gained an important role in the U.S. response to refugees and asylum seekers.

In the United States, refugee and asylum law has always operated within a restrictionist framework and has battled with the political instrumentalization of asylum seekers and the ethical and legal humanitarian framework which it presumes to follow. There has never been a golden age where everyone fleeing their home countries was granted protection in the U.S. However, what is unique about the Trump administration is its abandonment of the humanitarian accountability that refugee and asylum law instills, and the values and legal ideals under which the United States has operated historically. Under the Trump administration, anti-refugee and anti-immigrant policies have had a significant impact in mobilizing public opinion in favor of more restrictive asylum policies. Although obtaining asylum is very difficult, the perception

³⁵ Bon Tempo, *Americans at the Gate*.

³⁶ ANKER, "U.S. Immigration and Asylum Policy."

remains strong that asylum is an easy vehicle for admission to the U.S. Trump has repeatedly argued that the current system is too generous and that fraudulent claims discredit and overwhelm the asylum and refugee system. However, as a signatory to the 1951 UN Protocol and under U.S. immigration law, the United States has a legal obligation to hear asylum claims and provide protection to those who qualify as refugees. The 19980 Refugee Act established two pathways to obtaining refugee status: either from abroad as a resettled refugee or in the United States as an asylum seeker. The main difference is that an asylum seeker has to step foot on U.S. soil first and then ask for asylum.

The elements which must be established to show eligibility for asylum were originally set forth by the U.S. Board of Immigration Appeals (BIA), in the decision of *Matter of Acosta*, and which have remained substantially unchanged. Under the Acosta test, the applicant must prove: (1) a well-founded fear, (2) persecution, (3) perpetrated by the government or an entity the government cannot or will not control, (4) on account of, (5) one or more of the five protected grounds. An applicant has to also demonstrate a fear of future persecution on account of one of the five protected grounds and that relocating to another part within the country they are fleeing is impossible.³⁷ An asylum grant largely depends on the applicant's ability to recount their experiences completely, consistently, and persuasively. Asylum seekers rely on legal representation to help them with their case as asylum is extremely difficult to obtain.

The Migrant Protection Protocols (MPP), which I analyze at length in chapter 3, is just one example of Trump's continuous attacks on the asylum and refugee system: it is violent and shocking. However, several final regulations have sought to make asylum -- an already very

³⁷ NIJC Asylum Manual_2018

difficult process -- even more burdensome.³⁸ Throughout Trump's presidency, he has made policy changes and amendments to asylum law that are more damaging to the immigration system. However, these changes are less visible, more constant, and equally confusing as other administrations.³⁹ Trump has proposed to impose fees on asylum seekers, charging them for their I-589 (Application for Asylum and for Withholding of Removal) and for their initial work authorization. Asylum seekers come to the U.S. fleeing persecution in their home countries. Sometimes their only possessions are the clothes they come with, as they have spent all of their money en route or have been robbed by transnational criminal organizations along the way. Another finalized amendment to immigration law bars asylum seekers from applying for employment authorization if they filed their asylum claim past the one-year deadline. Another proposed amendment to asylum law would add new, mandatory criminal bars to receiving asylum. Using fraudulent documents--necessary to flee--would bar migrants from getting asylum.

In June 2018, the Trump administration also moved to eliminate categories such as gender from being considered "a part of a particular social group" for asylum purposes. Women and girls fleeing forms of extreme abuse such as rape, female genital mitilation (FGM), forced child marriage, human trafficking, severe domestic violence, and gang violence have faced difficulty obtaining asylum in the United States.⁴⁰ After decades of litigation, in recent years, women have made important legal gains. Moreover, courts have construed persecution on account of membership in a particular social group to mean persecution directed toward an

³⁸ "Comment on Proposed Changes to Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear." *Human Rights Watch*, 15 July 2020, <https://www.hrw.org/news/2020/07/15/comment-proposed-changes-procedures-asylum-and-withholding-removal-credible-fear>.

³⁹ "Asylum under Siege."

⁴⁰ *Id.*

individual who is a member of a group of persons, all of whom share a common, immutable characteristic. For example, *Matter of A-R-C-G-*, held that Guatemalan “married women who are unable to leave their relationship” constituted a protected social group under asylum law. Other court orders have sought to add women who suffer from gang violence as a particular social group. New rules under the Trump administration eliminate legal protections for the majority of women fleeing gender-based persecution. Thus, these legal changes were designed to eliminate gender-based persecution claims and further dismantle the asylum system. Over the past four years, the Trump administration has made many policy changes, some so technical that the public is likely to miss them. These changes work to simultaneously slow down and speed up the immigration process. For example, while working for a U.S.-based humanitarian organization I saw these changes taking place first hand. The Department of Homeland Security (DHS) updated its I-765 application (Employment Authorization) back in August 2020. I essentially had to redo some of the applications that had not been sent out to DHS yet, and in one case, we had to resubmit an application because DHS added three additional questions to the application. Just like the MPP, these regulations serve the administration’s end goal to end the asylum system by making it easier than ever to deny asylum claims and by making the process so burdensome.

Chapter 3: The Migrant Protection Protocols (MPP), also known as “Remain in Mexico” policy.

“We have implemented an unprecedented action that will address the urgent humanitarian and security crisis at the Southern border. This humanitarian approach will help to end the exploitation of our generous immigration laws. The Migrant Protection Protocols represent a methodical commonsense approach, exercising long-standing statutory authority to help address the crisis at our Southern border.”⁴¹ – Secretary of Homeland Security, Kirstjen M. Nielsen

Growing numbers of Central Americans are forced to leave their homes. According to the UN Refugee Agency, there are around 400,200 refugees and asylum-seekers from El Salvador, Guatemala, and Honduras worldwide. Most are fleeing from gang-violence, threats, extortion, forced-recruitment into gangs or prostitution, sexual and gender-based violence (SGBU), and persecution due to sexual orientation.⁴² An exploited and ineffective justice system and corrupt security forces in Central America also allow these criminal groups to operate with impunity. This “new reality” has significantly changed the push-factors affecting migration patterns in the Central America-Mexico-U.S. region. This section will carry out an in-depth examination of the Migrant Protection Protocols (MPP), which constitutes an unprecedented change in U.S. asylum policy. I will explore how it works to control migration, undermine asylum law, violate international law, and deter asylum seekers from getting humanitarian protections in the U.S.

According to the 2014 UN Refugee Agency Report, women traveling alone or together with their children or other family members flee the increasing violence in the Northern Triangle. The 160 women interviewed in the report account being raped, assaulted, extorted, and

⁴¹ <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>

⁴² (Refugees n.d.)

threatened by members of heavily-armed, transnational criminal groups. They described seeing family members murdered or abducted and watching their children forcibly recruited by those groups. Even after paying a “coyote,” many women will be beaten, raped, and often killed along the way. UNHRC found these individuals “faced startling degrees of violence presenting a clear need for international protection.”⁴³

The Trump administration was not the first to implement policies that discourage refugees and asylum seekers from entering the U.S. from Mexico. Policy changes, in recent years, dramatically affect single parents who cross with their children and unaccompanied minors who cross to reunite with a family member, and are often fleeing violence in the Northern Triangle. During Obama’s eight-year term, he deported more undocumented migrants, including unaccompanied minors, than any other president before him.⁴⁴ Obama also further criminalized migrants and created policies that weaponized the Southern border, making it extremely dangerous for asylum seekers to gain protections within the U.S. In 2014, due to the growing number of unaccompanied minors arriving at the southern border, the Obama administration declared an immigration “crisis” which justified the “priority juvenile docket.” Before the priority docket was created, minors seeking immigration relief had 12 months to find a lawyer to represent their case and put all the necessary evidence for their claim together before their first court hearing. The priority docket reduced that window to twenty-one days. It accelerated deportation proceedings against these minors, created a backdoor to avoid dealing with migrant children, resulting in a bigger backlog of immigration cases in court.⁴⁵ In 2014, the Obama

⁴³ Refugees, “Claims from Central America.” Also see: Refugees, “Women on the Run.”

⁴⁴ News, A. B. C. “Obama Has Deported More People Than Any Other President.” *ABC News*, <https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661>. Accessed 14 Dec. 2020.

⁴⁵ Luiselli, 39-41

administration also created the CAM program (Central American Minor Program) to provide certain minors from the Northern Triangle the opportunity to be considered for refugee resettlement in the United States, thus not risking their lives crossing the border.⁴⁶ On the one hand, Obama accelerated deportation proceedings for undocumented children already in the U.S. On the other, he created a program that would admit certain minors seeking protections. However, the CAM program did not provide a pathway to citizenship, similar to the DACA program. In August 2017, the Trump Administration terminated this program, forcing unaccompanied minors to continue risking their lives to enter the U.S.⁴⁷ As previously mentioned, Trump's strategy at the southern border is a securitization one, not a humanitarian one. The termination of the CAM program also explains why the number of unaccompanied minors has begun to rise again since 2017. The CAM Parole program's implementation was part of an integrated strategy to address factors contributing to increases in migration from Central America to the United States, but it failed to address the underlying causes of migration.⁴⁸

Even before Obama, the political response to the purported immigration "crisis" was to dissuade Latin Americans and those from the Caribbean from seeking asylum in the United States. These harmful immigration policies with massive consequences started long before Trump was elected, and they are not unique to the Trump administration. However, Trump's current immigration policies are, by far, the most extreme. Furthermore, what is distinctive about the Trump administration is its abandonment of the international responsibility to Human Rights and the asylum system. In his first weeks in office, he issued executive orders that had a more stringent approach to asylum seekers. Since then, his policies have only gotten more

⁴⁶ International Rescue Committee Internship notes

⁴⁷ "Central American Minors (CAM)."

⁴⁸ *Id.*

anti-immigrant. For example, Mr. Trump banned nationals from eight majority-Muslim countries, reduced refugee admissions to the lowest level since the 1980s, canceled Deferred Action for Childhood Arrivals (DACA),⁴⁹ later repealed by a judge, and attempted to end Temporary Protected Status (TPS) for nationals of Nicaragua, Haiti, El Salvador, and Sudan.⁵⁰ In fact, Mr. Trump ran his 2016 presidential campaign on anti-immigrant rhetoric, instilling fear, resentment, and anger within his conservative followers. He, then, won the election by making immigration his top priority. These unprecedented actions have significantly restricted individuals' access to asylum and other humanitarian protections in the United States.

On May 7, 2018, the Trump administration dramatically stepped up its prosecutions against asylum seekers who crossed the southern border without authorization. The “Zero Tolerance” also known as “Family Separation” policy was one of the toughest policies by the administration to stem the numbers of asylum seekers entering the country. While the family separation policy received an enormous amount of backlash and public outcry that eventually led to its termination, the underlying crisis, and the abuses accompanying the mass criminal prosecutions of asylum seekers, received less attention, and they continue to be persecuted today.

The latest example of the Trump administration's anti-refugee agenda is the “Migrant Protection Protocols” (MPP) policy, also known as the “Remain in Mexico” policy. It is a U.S. Government action that forces certain asylum-seekers looking for admission to the U.S. from the Mexico/U.S. border without proper documentation to return to Mexico and wait outside of the U.S. while their cases are pending in U.S. immigration court. MPP was announced in January 2019 by former Secretary of Homeland Security Kirstjen M. Nielsen, and it is still active as of

⁴⁹ (“Leading Fight to Stop Illegal Immigration | Federation for American Immigration Reform” n.d.)

⁵⁰ (“Trump Has Ended Temporary Protected Status for Hundreds of Thousands of Immigrants. Here's What You Need to Know” 2019)

November 2020. According to the U.S. Government, the country faces a security and humanitarian “crisis” at the Southern Border. Thus, MPP addresses the ‘crisis,’ secures the border, enforces immigration laws, and limits illegal contraband, including drugs. DHS claimed that MPP would also restore “a safe and orderly immigration process, decrease the number of those taking advantage of the immigration system, and the ability of smugglers and traffickers to prey on vulnerable populations, and reduce threats to life, national security, and public safety, while ensuring that vulnerable populations receive the protections they need.”⁵¹ Under the “guiding principles” for MPP, certain groups are considered exempt from the process and allowed entrance to the U.S.: unaccompanied children, citizens or nationals of Mexico, individuals processed for expedited removal, and those in particular circumstances (known physical or mental health issues). However, the Department of Homeland Security confirmed that only about 960 people interviewed have not been sent back to Mexico. Of the 47,000 MPP cases registered back in October 2019, with about 37,000 of those still pending, only eleven people have been granted asylum or relief in the United States since its implementation.⁵²

Asylum-seekers returned to Mexico are placed in the most impoverished towns or cities, often the most dangerous ones.⁵³ These cities, mainly controlled by organized crime and cartels, also have the highest levels of travel warnings for U.S. citizens -- because rape, murder, kidnapping, sexual violence, and extortion are common.⁵⁴ Under MPP, asylum seekers await their immigration hearings in underfunded shelters in Tijuana, Matamoros, Nuevo Laredo, or overcrowded tents in Ciudad Juarez. According to the 2019 Crime and Safety Report, “[a]rmed

⁵¹ U.S. Department of Homeland Security

⁵² “688: The Out Crowd.” This American Life.

⁵³ “Mexico 2019 Crime & Safety Report.”

⁵⁴ (“You Can Help Stop MPP” n.d.)

criminal groups target public and private passenger buses, as well as private automobiles traveling through Tamaulipas, northeastern Mexico, often taking passengers hostage and demanding ransom payments. Federal and state security forces have limited capabilities to respond to violence in many parts of the state.”⁵⁵ Therefore, these cities are not safe for anyone, but Central American asylum seekers are particularly vulnerable.

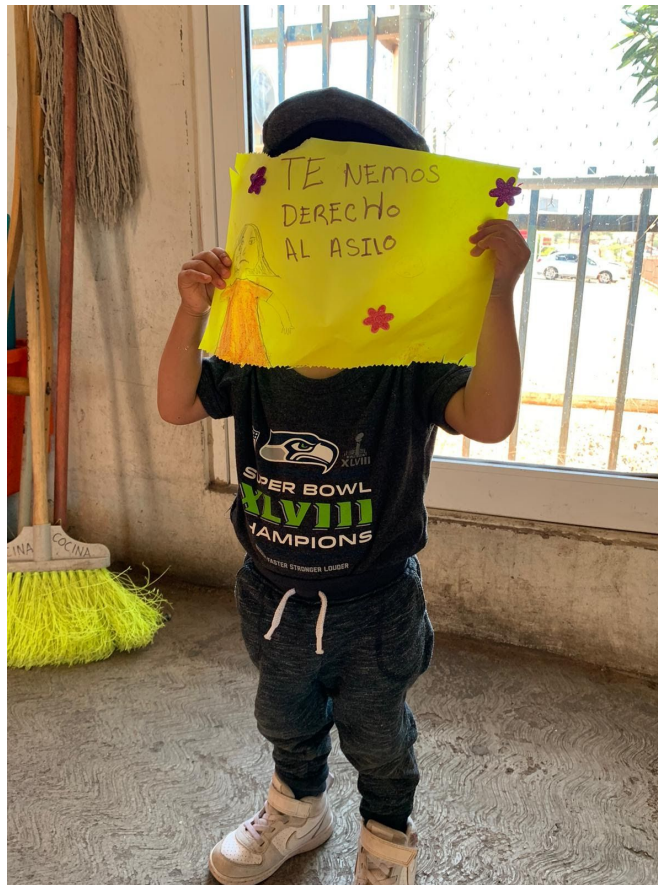


Figure 1: We Have a Right to Asylum⁵⁶

The Mexican government, to avoid tariffs threatened by the Trump Administration, agreed to increase immigration enforcement in Mexico, and allow migrants to wait for their U.S.

⁵⁵ (“Mexico 2019 Crime & Safety Report: Matamoros” n.d.)

⁵⁶ Photo taken from activist facebook page created to bring awareness to the Migrant Protection Protocols. Children Seeking Asylum March in which they will lead the crowd from downtown Nogales, Sonora by the port of entry and to the border wall where they will be received by a group of advocates and supporters. (We have a right to asylum)

asylum proceedings in Mexico. Since April 2019, Mexican President Andrés Manuel López Obrador (AMLO) has taken a more stringent approach toward migration, as he faced pressure from the United States to reduce the number of migrants entering Mexico.⁵⁷ President Trump stated that he would impose a 5 percent tariff on all goods coming from Mexico until AMLO agreed to take steps to curb migration to the U.S. He then said that the tariffs would gradually increase to 10 percent on July 1; 15 percent on August 1; 20 percent on September 1; and 25 percent on October , 2019, until “the problem is remedied.”⁵⁸ Mexico is the United States’ second largest trading partner and second-largest export market (after Canada). In 2019 alone, two-way trade in goods totaled \$614.5 billion. Its exports heavily rely on supplying the U.S. market. In 2019, Mexico was also the second-largest supplier of foreign crude oil to the United States, as well as the largest export market for U.S. refined petroleum products and U.S. natural gas.⁵⁹ Trump accused the Mexican government of failing to do enough to stop migration from Latin America and the Caribbean as he runs for reelection on a record that includes little of what he promised in his 2016 anti-migrant campaign.

President López Obrador ran his presidential campaign on the promise that he would protect the human rights of migrants and vowed not to do the “dirty work” of the United States after Trump demanded Mexico to stop migrants before they reach the Southern Border. However, he ultimately acceded to implementing MPP, as Trump used the International Emergency Economic Powers Act, which gives the president the authority to regulate commerce during a national emergency, to place a 25 percent tariff on Mexico until it substantially halted

⁵⁷ Seelke, “Mexico’s Immigration Control Efforts.”

⁵⁸ “U.S. Relations With Mexico.”

⁵⁹ “U.S. Relations With Mexico.” Also see: “Trump Announces Tariffs on Mexico over Immigration - POLITICOBack ButtonSearch IconFilter Icon,” “Trump Threatens Mexico with Tariffs over Immigration.”

migration from the Southern Border. López Obrador has denied being “complicit” with Trump’s anti-immigration policies and his human rights abuses. In fact, Mexican president has repeatedly argued that his administration seeks to protect “Human Rights, offer refuge even if it seems contradictory”⁶⁰ and has shifted blame to Trump by arguing that MPP was a unilateral decision made by Trump.

During my internship with a U.S.-based humanitarian organization in 2020, I had the opportunity to chat with Central American asylum seekers about their long and dangerous journey to the United States. However, I did not formally interview them. Everything that I discuss here is conversational and I did not press for more information than what they were willing to share with me. I have also changed names and locations to ensure anonymity. Nevertheless, Pablo’s recount of his experience in Mexico is crucial because it shows the radical nature of the unprecedented change in asylum policy in the United States, and its violence:

Pablo came to the United States with his wife, and 10-year-old child, after fleeing political persecution in Honduras. While he and his family were stuck in Mexico under MPP awaiting their credible fear interview with an USCIS officer, he was kidnapped by Mexican cartels for weeks. In recounting his experience with the Mexican cartels, he said “all I can tell you is that in Mexico, they see you as a commodity. María and their 10-year-old son were allowed to enter the United States. Once Pablo’s family paid the ransom, he was also allowed to reunite with his family in the U.S. They let me pass [ICE] because I think that they saw in our eyes the fear and trauma that we suffered in Mexico.”

Unfortunately, due to a family dispute, Pablo’s wife Maria, was detained by U.S. Immigration and Customs Enforcement (USCIS), and has remained in a U.S. detention center as of October 2020.⁶¹ Maria could be sent back to Honduras, meanwhile Pablo and their child are still waiting

⁶⁰ Gonzalez, “Is Mexican President Andres Manuel Lopez Obrador Helping Donald Trump?” Also see, *Gobierno Frena a Migrantes Para Protegerlos, Dice AMLO*.

⁶¹ Pablo. *International Rescue Committee Internship 2020*. 2 Oct. 2020.

for their court hearing to determine whether they will receive asylum. Unfortunately, Pablo's recount is just one of the many personal narratives that speak to the horrors of MPP .

The Mexican government cannot take care of the refugees arriving in these cities (Tijuana, Matamoros, Nuevo Laredo, and Ciudad Juarez), even if the U.S. government says it is. Non-profit shelters in Mexico are overwhelmed, many people under MPP are essentially homeless in Mexico, have no real access to healthcare, education, or vital legal aid. According to the Department of Homeland Security, there are now tens of thousands of people stranded under this policy, in shelters, on the streets, and in encampments.



Figure 2: Improvised camp in Matamoros, Mexico.⁶²

⁶² Photo taken from activist facebook page (https://www.facebook.com/migrantes.matamoros.5/photos_all) created to bring awareness to the Migrant Protection Protocols and its Human Rights abuses. (Image #1 Improvised camp in Matamoros, Mexico.)

In an episode of *This American Life*, “The Out Crowd,” a nurse named Helen described one camp in Matamoros:

When I first saw it, I was literally just dumbfounded, because I've seen refugee situations like this. I've been to Bangladesh. I've seen Cox's Bazar. I've been to Iraq. I've seen the IDP camps. I've seen the refugee camps from Syria. I'd say this was the worst. Yeah, I would definitely say that this is the worst, if at a bare minimum for a lack of humanitarian accountability for what's happening to these people.

The camp Helen described is improvised, 700 tents meant for weekend camping, not designed for rain and direct sun or cold, donated by groups and churches. There's no proper sanitation, just five toilets for 2,500 individuals, who get very sick from bathing in the Rio Grande or drinking dirty water.⁶³ While Helen and other volunteers are trying to come up with a water purification system, this camp is just one of the many in which asylum seekers have been forced to stay under MPP.

The unsanitary living conditions in encampments such as the one in Matamoros have left asylum seekers, including small children, vulnerable to the spread of serious illness. One of the consequences of these unsanitary living conditions has been that asylum seekers who fell sick in the camps are being blocked by U.S. Customs and Border Protection (CBP) agents from attending their scheduled court hearings in the United States. CBP officials are conducting medical screenings before allowing asylum seekers to cross into the United States. Individuals who were sick were returned to Mexico where they would continue to lack adequate medical care, with new and later court dates.⁶⁴ Migrants with disabilities have also been denied access to basic needs like medication. Neither the camps nor the migrant shelters can meet the accessibility standards for persons with disabilities.

⁶³ *The Out Crowd*, *This American Life*.

⁶⁴ Avenue, York, and t 1.212.290.4700, “Q&A.”

In its essence, MPP is about creating as much danger as possible for asylum seekers in the interest of deterrence, and it seems to be working. According to Noticias Telemundo, Mexico, in Ciudad Juárez, because asylum seekers are unable to work, suffer from targeted violence, and are penniless, they have been forced to return to their home countries as their asylum interviews are scheduled for 2021. Reporter Victor Silva said, “in the absence of support from the Mexican government, non-governmental charitable organizations have stepped in to support refugees with transportation, and food expenses to travel back to their home countries safely.” For those who have stayed in Mexico, MPP could mean years of waiting.

Aside from the dangerous conditions asylum seekers face every day while in Mexico, they also run the risk of being deported back to their home countries by Mexican Migration authorities or ICE, essentially violating the *non-refoulement* principle --- a binding pillar of international U.S., and Mexican law that prohibits the return of individuals who will experience persecution or other serious human rights violations back home. Amnesty International found that 40% of the responses of 297 people who had been detained by the INM (Instituto Nacional de Migración) gave solid indications that *refoulement* had occurred. These testimonies involved people who were explicitly seeking asylum in the United States, yet were ignored by the INM and deported. Amnesty International also found that 75% of asylum seekers detained by the INM were not informed of their right to seek asylum in Mexico, despite the fact that Mexican law expressly requires it.⁶⁵

MPP is also legally problematic: it violates the obligations under the Refugee Act of 1980, the protocol of the Refugee Convention, and the UN Convention Against Torture, which

⁶⁵ (“Overlooked, Under-Protected: Mexico’s Deadly Refoulement of Central Americans Seeking Asylum” n.d.)

requires the U.S. not to return individuals to countries where they will face continuous or future persecution or torture.⁶⁶ In announcing MPP, Nielsen stated that this policy would allow for more resources to be dedicated to individuals who “legitimately” qualify for asylum. However, this policy undermines due process for asylum seekers by imposing barriers to legal representation and violating their right to counsel.⁶⁷ According to independent analysis data from the Executive Office for Immigration Review, less than 5% of asylum seekers under MPP have legal representation. At the end of December 2019, about 2,765 out of 59, 241 individuals under MPP had secured lawyers.⁶⁸ Pro-bono immigration organizations, such as Raíces, TX have provided pro-bono counsel and services, but the high demand for representation and its isolated location makes it almost impossible for asylum seekers to retain counsel.

An episode of *This American Life*, “Where Goes The Neighborhood,”⁶⁹ illustrates the story of Nicaraguan asylum seekers who were deported under MPP in 2019:

Moises and Jessica are political activists against the Nicaraguan regime that sought to limit freedom of expression. When the Nicaraguan government started kidnapping its opponents, Moises was grabbed by four or five men in an unmarked car and was taken to “El Chipote”- a state-run torture site where he was tortured with electric shocks and beaten. Moises was released but he knew that Nicaragua was no longer safe as the torturers told him that they were going to kill him. Moises, his wife Jessica who was also an activist, and their daughter fled to the United States to seek asylum based on political persecution. Moises believed that their asylum case would be winnable because he spoke fluent English, had plenty of proof of their persecution, it was well documented and public, and their activism overlapped with U.S. interest. When the family arrived at the border, Moises took off his backpack full of evidence that supported their asylum claim, told border patrol agents that they were seeking asylum, and were afraid to go back to Nicaragua. After 12 days of being detained in small, crowded tents, Moises and his

⁶⁶ (“Refugee Protection at Risk: Remain in Mexico and Other Efforts to Undermine the U.S. Asylum System (Harvard Law Review) | For the Past Year, the Trump Administration Has Been Hard at Work Trying to Unilaterally Rewrite Asylum Law. Its Latest Attempt, the so-Called Migrant Protection Protocols, Informally Known as Remain in Mexico, Is yet Another Unlawful Gambit. Announced in January by Former Secretary of Homeland Security Kirstjen M. Nielsen, “Remain in Mexico Requires That Certain...” n.d.)

⁶⁷ Id.

⁶⁸ (“Policies Affecting Asylum Seekers at the Border” 2019)

⁶⁹ “Where Goes The Neighborhood.”

family got deported back to Nicaragua where soldiers and police waited for them. The family remains in hiding.

Prior to MPP, asylum seekers apprehended at or near the border pursued their asylum claims from inside the United States. Those who arrived without documents at the border or port of entry were given a “credible fear” screening or interview. This interview was conducted by a trained asylum officer who determined if the person was likely to face harm or persecution back home. An asylum applicant needed only to show a reasonable possibility of harm or persecution.⁷⁰ Then, if an asylum officer determined that this was the case, they were placed in regular removal proceedings and allowed to pursue their asylum applications within one year of their initial arrival in the United States. The “one-year filing deadline” allowed asylum seekers to retain counsel, and prove that they had a legitimate claim to asylum before an immigration judge who would make the final decision.⁷¹ Under regular circumstances, Moises and his family would have been let into the United States, and would have most likely won their asylum case.

Even before MPP, establishing eligibility for asylum was already extremely difficult to do. Asylum seekers leave their home countries in a hurry, with little or no proof of what they have experienced. In some U.S. immigration courts, grant rates were as low as two percent. Asylum is granted to people who are fleeing persecution or who have a fear of future persecution based on their race, religion, nationality, political opinion, or a particular social group. Under normal circumstances, with an immigration lawyer, research on country conditions, and interviews with clients, it is difficult to be granted asylum. It is not enough that asylum seekers have clearly suffered harm in their home countries, or that they will continue to suffer from

⁷⁰ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)

⁷¹ (Rabinovitz et al., n.d.)

targeted violence. The harm or persecution must be proved to be because of at least one of those five classifications.⁷² See chapter 1: for further in-depth analysis of Refugee and Asylum Law in the United States.

Now under MPP, individuals who arrive at the southern border and ask for asylum are given a “Notice to Appear,”⁷³ and sent back to Mexico to wait. Migrants who have their immigration court hearings are allowed to enter the U.S. to attend their hearing, and those given a “credible fear interview” have to prove that they are afraid to go back to Mexico, not their home country, to be allowed in the U.S. to pursue their asylum claims. First, they have to show that they have been harmed or will be harmed because of one of the five categories laid out in U.S. asylum law in Mexico. Second, they have to show that the Mexican government is unable or unwilling to protect them, and lastly, they have to show evidence that what they are saying actually occurred.

In January 2020, the *Los Angeles Times* reported stories about what the process has been like for asylum seekers a year after MPP was implemented: a Nicaraguan man with a black eye, and a bandage over his forehead sat across from Immigration Judge Philip Law of San Diego. The man, who was not represented by a lawyer, tried to tell the judge that he had been attacked in Mexico and that he was afraid to return. “I have no jurisdiction in that regard,” Law said, and encouraged the man to speak to United States Immigration and Customs Enforcement. In another case, “Al Otro Lado,” an organization in Tijuana that helps returned asylum seekers, recently had to provide support to a 13-year-old girl, who was left alone in the border city after her father “disappeared” while the family waited for their subsequent hearing in front of an immigration

⁷² Luiselli, 60

⁷³ NTA, the charging document that signals the initiation of removal proceedings. This document also instructs migrants to appear before an immigration judge on a certain date.

judge, according to Nicole Ramos, director of the group's Border Rights Project, MPP has also generated new scenarios of family separation, where one or both parents may “disappear” in Mexico. Another woman named Gabriela shared her story as her young child clung to her side. Gabriela tearfully recalled how difficult life had been in Tijuana, as she waited for her asylum claim to be processed in the United States. She had to rely on the kindness of others for food and a place to sleep. “When you are a part of MPP, you have no money, you have no food, and nothing else,”⁷⁴ Gabriela said.

The Department of Homeland Security argued that MPP would speed up immigration benefits to those whom the law is supposed to protect, while filtering out those who abuse the system. As of January 2020, only 187 of the nearly 30,000 asylum seekers have completed their procedures and less than 1% have obtained asylum.⁷⁵ Even in the best of cases, such as Moises and his family, who speak English, and had plenty of proof of their persecution in Nicaragua, refoulement occurred. MPP is not about protecting migrants or making the asylum system more efficient, it is about dismantling it. The Trump administration is reframing how the nation admits refugees, reducing who can enter, and making it tougher to apply for protection. While MPP is violent, shocking and visible, the bureaucratic assault on asylum through policy tweaks and guidelines is equally, if not more damaging to the international legal apparatus governing asylum claims. Under MPP, migrants are forced to await their immigration proceedings in Mexico as a deterrence mechanism to halt the number of individuals crossing the border. However, even before they reach the Southern border, migrants experience state-violence en route that is not

⁷⁴ Id

⁷⁵ “Policies Affecting Asylum Seekers at the Border | American Immigration Council.”

random, as the U.S. and Mexico have deliberately increased their securitization of the border to dissuade migrants from attempting the journey in the first place.

Chapter 4: State-Sponsored Violence: The Militarization and Securitization of the Border, and the Rise in Detention Centers

For most of the twentieth century, borders were only heavily guarded when nations were at war with their neighbors. The militarized and securitized Southern border between the United States and Mexico is a modern phenomenon, one with violent and deathly consequences for migrants. This chapter begins by briefly surveying past U.S. policies that have led to the current militarization and securitization of the Southern border. I then consider recent policy changes in the Mexico-Guatemala region that complemented the initiative of the Obama and Trump administrations to prevent migrants from seeking asylum in the U.S. Finally, I examine the rise in detention centers in the U.S. under the Trump administration. This history is important for two reasons. It tells the story of increasing state-sponsored violence against asylum seekers, and it provides a historical context for the implementation of the Migrant Protection Protocols (MPP).

In 1924, the United States created the Border Patrol Agency as Congress passed restrictionist legislation on Asian and Southern European migration. Border Patrol agents were, for the most part, stationed at the Canadian border. However, in the years following 1924, Border Patrol started focusing on the U.S./Mexico border as a response to increased migration.⁷⁶ During World War II, the United States was confronted with a labor shortage that was dealt with by creating the Bracero Program under the Kennedy administration. After negotiating a basic labor contract that satisfied the requirements established by the Mexican Constitution of 1917, both the U.S. and Mexico agreed to participate in a bilateral system of state-managed labor

⁷⁶ Note: The Immigration Acts of 1921 and 1924, placed numerical limits on immigration to the U.S. Border enforcement received new attention from the government, as the numerical limitations resulted in people attempting to enter through the Southern Border.

migration.⁷⁷ World War II directly linked Mexico's national security and economic development to the United States. Mexican President Manuel Avila Camacho (1940-1946), hoped to strengthen Mexico's economy through industrialization.⁷⁸ During this time, Mexico was also experiencing extreme economic hardship with a large portion of the population living in deplorable conditions. Over the period from 1942 to 1964, an estimated two million Mexican workers came to the United States on short-term labor contracts to work on U.S. farms and railroads.⁷⁹ At the same time, migrant workers from other countries and Mexican workers who did not qualify to become Braceros began crossing the border with the help of coyotes without authorization to work in farms. U.S. farmers soon realized that using undocumented labor was more profitable. For one, these laborers were highly exploitable because of their deportable status, and two, they were often willing to work for less money. Opposition by both Mexican farmers who experienced a shortage of laborers and activists who saw the exploitation of Braceros and undocumented workers mobilized for its ending, and in 1964, it was officially terminated.⁸⁰ Furthermore, the immediate need for laborers subsided in the United States as the war had ended. However, economic problems in Mexico did not. Mexican workers began crossing to the United States as undocumented migrants and found jobs in farms, and, later on, in the restaurant industry. The Bracero experience is crucial because it tells a story of exploitation, the emergence of a new industry of smugglers or coyotes, the subsequent securitization of the Southern border, and the criminalization of migrants including refugees and asylum seekers.

⁷⁷ Id.

⁷⁸ Hernández, "A New Beginning."

⁷⁹ Aviva Chomsky

⁸⁰ Hernández, "A New Beginning."

The Hart-Celler Immigration Act of 1965, for the first time, restricted immigration from the Western Hemisphere and created legal systems of border enforcement to deal with a new threat -- unauthorized Mexican migration. The later amended 1976 immigration law, which issued a quota of 20,000 on individual countries of the Americas, made Mexican and other Latin American entrants migrate to the United States without permission.⁸¹ By drastically restricting the possibility of legal migration, the amended law created and reproduced undocumentedness. These laws also served to stigmatize and criminalize undocumented Mexican migrants who became the scapegoats of American society, although the continuous arrival of Mexican workers to the U.S. had very little to do with “stealing” American jobs and more to do with survival.

By the 1990s, due to the increased demonization of migrants, economic shifts in Mexico,⁸² and U.S. ideological and cultural changes, Mexican, and other Latinx groups were singled out for mass deportations. In 1993, Border Patrol heightened security in the urban port of entry in El Paso. The idea was to force undocumented migrants to cross through more rural areas that were easier for law enforcement to monitor. This initial strategy called “Operation Blockade” was not officially sanctioned or evaluated by The United States Immigration and Naturalization Service (INS). However, due to its “promise,” it was soon adopted as part of a new federal plan. Then, the Border Patrol officially implemented the deterrence approach; Operations “Hold the Line” in El Paso and “Gatekeeper” in San Diego essentially changed how the border was understood. Whereas previous policies had focused on finding and deporting undocumented migrants who

⁸¹ Price, “Mae M. Ngai, Impossible Subjects.”

⁸² The North American Free Trade Agreement (NAFTA) created in 1994, was a trade pact signed by the United States, Canada, and Mexico, which made it easier for companies in those three countries to move goods and supplies across North American borders. The United States promised economic prosperity for Mexico if it would only open up its ports of entry and take shipment of cheap goods. Soon after Mexico entered NAFTA, it found itself drowning in subsidized corn that crashed their economy and put millions of peasant farmers out of work. Impoverished Mexican workers started migrating to the U.S. for survival.

had already crossed the border, the new plan focused on intercepting and preventing entrance in the first place.⁸³ In an effort to bring “control,” operation “Hold the Line” was established in 1993. It increased the number of Border Patrol agents deployed on the ground, created interior checkpoints, and built walls and other infrastructure where there had been none. The drastic reduction in apprehensions prompted the Border Patrol to undertake a similar effort in San Diego. Operation “Gatekeeper” was then implemented in 1994 and reduced unauthorized entries by more than 75% over the next few years.⁸⁴ These preventative measures fenced critical sections of the border, deployed four hundred agents and vehicles at every 100 yards from one side of El Paso to the other; similar measures were taken in San Diego. Comparable blockade attempts had been experimented with before but failed due to the expensive nature of such a preventative measure.⁸⁵ Operations “Hold the Line” and “Gatekeeper” were the first “successful” operations of their kind and represented a shift in ideology in policing unauthorized migration. They dramatically reduced the number of crossings in the targeted areas of El Paso and San Diego and most importantly, established the idealized “watertight security” at the border. Border patrol recognized that they still would not have enough resources to implement deterrence tactics on the entire border, thereby focusing their efforts on heavily populated areas to discourage crossings by forcing migrants into the remote and dangerous desert.

The Border Patrol used several strategies to deter migrants from entering the United States. The implementation of infrared night-vision scopes, seismic sensors, and modern computer processing systems helped agents locate, apprehend, and process those crossing into the U.S. without authorization more efficiently. At the same time, Border Patrol established

⁸³ Jones, *Violent Borders*.

⁸⁴ *Id.*

⁸⁵ “History of the Border Fence | National Border, National Park: A History of Organ Pipe Cactus National Monument.”

anti-smuggling units, search and rescue teams (BORSTAR), and created the Border Safety Initiative (BSI) in 1998 that, in theory, minimized injuries and deaths associated with border crossings alongside the Mexican government.⁸⁶ These securitization practices and the subsequent fear of terrorism produced by 9/11 justified the creation of new institutions like the Department of Homeland Security (DHS) in 2003, which made the U.S. Border Patrol a component of a large department responsible for stopping illegalized migration and securing the border.⁸⁷ While the 9/11 attacks further fuelled sentiments that promoted nationalism, patriotism, Islamophobia, racism, the criminalization of migration, and heightened deportations, the killing machine⁸⁸ was already set in motion by deliberate, purposely invisible, state-sponsored deterrence mechanisms at the border.

Over the past thirty years, the Southern border has been transformed into a militarized security space through increased funding, deployment of border guards, construction of walls, and the increased use of technology and surveillance infrastructure. The hardening of the U.S. southern border has resulted in both direct and structural violence against migrants. The state purposely makes it dangerous to cross as part of a strategic federal plan that funnels migrants through violent and deadly routes across the desert. By 2010, the Border Patrol had more than 20,000 agents, and over the years both its funding and agents increased as deterrence policies moved to fence and securitize more areas along the border. New and innovative technological mechanisms such as drones and surveillance systems known as “smart borders” that use sensors

⁸⁶ “Border Patrol History.”

⁸⁷ Id.

⁸⁸ Note: Jason De Leon, in *The Land of Open Graves: Living and Dying on the Migrant Trail* argues that the terrible things people experience en route to the U.S. are neither random nor senseless, but part of the killing machine “that simultaneously uses and hides behind the viciousness of the Sonoran desert...redirected blame, and “natural” environmental processes that erase evidence of what happens in the most remote parts of southern Arizona.

and cameras to monitor movement also emerged.⁸⁹ As the border became more militarized and securitized, migration became more dangerous and even deadly. The hot and arid climate, wild animals, difficult terrain, drug dealers, and bandits participate in endangering the lives of people attempting the dangerous journey to the United States. Even those who die en route are reduced to scattered unidentifiable bones as the desert's hot climate decomposes bodies swiftly and corpses are scattered to the winds or eaten by scavengers. These deaths have been made invisible, but they're not blameless.⁹⁰ They are part of a deliberate U.S. Border Patrol strategy established to police migration in urban areas, prompting migrants to risk their lives in the desert.

While there is extensive research on the current U.S./Mexico border securitization efforts and its massive consequences, less research has been done on Mexico's continuous role in deterring migration from Central America by employing the same tactics as the U.S. on the Mexico-Guatemala border. The border area is formed by the states of Chiapas, Tabasco, and Campeche on the Mexican side, and the Petén department on the Guatemalan side. This area had been distinguished by its jungle geography, low population density, and the scarce presence of state-institutions. Before 2010, both Guatemalans and Mexicans crossed the border with frequency and ease through irregular crossings to carry out their daily activities.⁹¹ Mexico and Guatemala did not exercise real control over the border. In 2014, under the Obama administration, the United States started to use the strategy of *Border Externalisation*⁹² as an instrument through which the U.S. seeks to stop migration from Central America.

⁸⁹ Jones, *Violent Borders*.

⁹⁰ De León, *The Land of Open Graves*. Note: The United States government has claimed no responsibility for the countless deaths in the desert. It has labelled them "an act of nature" that is a convenient way to leave it unaddressed. The killing machine was purposely created twenty years ago and continues to kill today.

⁹¹ Locas, "An(Other) History of the US-Mexico Border."

⁹² Border externalization, the transfer of border controls to foreign countries, has also been largely used by the European Union to stop refugees from coming into Europe.

The contemporary control towards securitization enables nations to restrict the mobility of unwanted asylum seekers through intervention practices that work to stop movement prior to their arrival at the state's physical border. In the case of the United States, Mexico is enlisted in the prevention of onward movement of asylum seekers. Mexico is explicitly or implicitly encouraged to prevent asylum seekers from entering their territories or to apprehend and return those who do. Under the Obama administration, externalization policies were pursued with the "intended" goal of assisting Mexico with migration control and management. In 2014, the United States invested resources and money to bring "control" to the border between Mexico and Guatemala. It created policies and practices through logistical, financial, and political support, or directly in exchange for aid, that encouraged migrant apprehensions (interdictions, interceptions, or "turn-backs"). Interestingly all nations involved in border externalization invoke a language of human rights to justify this strategy of control. They claim to be discouraging transnational crimes like human trafficking and smuggling, and to be protecting migrants from the dangerous journey. However, border externalization is doing the exact opposite -- preventing freedom of movement, and the right to seek asylum.

In agreement with Enrique Peña Nieto, then Mexican President (2012-2018), the State Department under the Obama administration allocated over \$200 million in funding to support Mexico's immigration control and border/port-of-entry security efforts. Along with funding, the U.S. provided inspection equipment, mobile Kiosks, canine teams, vehicles, as well as training for Mexican immigration enforcement officers. Mexico also implemented naval bases on its river, security cordons north of its borders with Guatemala and Belize, Honduras, implemented drone surveillance programs, and assigned agents to monitor the train tracks of the cargo trains

that run throughout Mexico, colloquially known as “La Bestia.”⁹³ The border has become increasingly militarized as unarmed agents from the Mexican National Migration Institute (NMI) are stationed along train routes and bus stations, leading to more apprehensions of migrants. Obama argued that these practices would “deter migration; improve the ability of Mexico and Guatemala to interdict migrants; enhance the Centra’s ability to receive and reintegrate repatriated migrants; and address the underlying causes of migration.”⁹⁴ However, Obama’s deterrence policies in the Mexico-Guatemala region resulted in more dangerous crossing points for children and women because these practices do not work to stop asylum seekers from attempting the journey.

Despite Trump’s claims that Mexico does not stop Central American migration, Mexico is still employing deterrence practices at the border created under ex-President Peña Nieto. In 2018 Mexican president-elect López Obrador said that Mexico would no longer help enforce the immigration laws of the U.S. He criticized Trump’s policy of separating migrant families, calling it “arrogant, racist and inhumane.”⁹⁵ Although López Obrador, during his presidential campaign, accused the Mexican government of committing human rights violations against migrants, he has essentially become an ally to Trump’s extreme policies after Trump threatened Mexico with crippling tariffs and the closure of the U.S.-Mexico border. In 2019, during a press conference, Lopez Obrador assured that his border enforcement policies, established with the U.S., seek to

⁹³ Rodrigo Dominguez Villegas, “Central American Migrants and ‘La Bestia’: The Route, Dangers, and Government Responses,” [migrationpolicy.org](https://www.migrationpolicy.org/article/central-american-migrants-and-%E2%80%99La-bestia%E2%80%9D-route-dangers-and-government-responses), September 10, 2014, <https://www.migrationpolicy.org/article/central-american-migrants-and-%E2%80%99La-bestia%E2%80%9D-route-dangers-and-government-responses>. Note: migrants hop aboard trains colloquially known as “La Bestia,” or the beast, on their journey to the United States. The cargo trains, which run along multiple lines, carry products north for export. As there are no passenger railcars, migrants are forced to ride atop the moving trains, facing physical dangers that range from amputation to death if they fall or are pushed. Under the Obama administration, due to the U.S. push to increase enforcement, the Mexican government ordered an increase in the speed of the trains. This resulted in more deaths but did not stop migration.

⁹⁴ Norte, “Obama Administration Considers Plan to Bolster Mexico’s Southern Border.”

⁹⁵ “Mexico Elects a Leftist President Who Welcomes Migrants.”

avoid migrant deaths during their journey north. He further stated that his policies would offer migrants protection, improve shelter conditions, and medical care.⁹⁶ However, the new border security infrastructure has not stopped migration, but forced migrants through more remote and potentially deadly areas across the Usumacinta River.⁹⁷ As Trump has intensified his crackdown on migration from Central America, shelters along the Guatemala border have been forced to close their doors due to overcrowding and lack of funding. Migrants are forced to sleep on sidewalks or on the street, often with their children, making them vulnerable to violence and extortion by powerful criminal organizations. Both Mexico and Guatemala have significantly less capacity to ensure human rights, protect migrants, and process asylum claims in accordance with international standards.⁹⁸

In 2017, due to the extreme dangers of travelling through Guatemala and Mexico alone, asylum seekers, most of them women and children, started to organize to travel in groups. The emergence of “migrant caravans,” while a safer alternative to travel through Guatemala and Mexico without the need for a coyote, quickly became exploited by the Trump administration. Trump argued that the “caravans” heading to the Southern border were comprised of criminals, gang members, and undercover ISIS fighters. As a response, Mexico deployed its security forces, dressed in riot gear and pepper sprayed migrants who attempted to get past them. These tactics drew criticism from migrant advocates and Mexican officials who accused López Obrador of

⁹⁶ *Gobierno Frena a Migrantes Para Protegerlos, Dice AMLO.*

⁹⁷ The Usumacinta River serves as a border between Mexico and Guatemala, it enters Mexican territory in the state of Tabasco and across the Usumacinta Canyon ecological reserve.

⁹⁸ “Washington Office on Latin America: Civil Society Organizations Denounce DHS Border Externalization in Guatemala, Call for Immediate Investigation.” <https://advance.lexis.com/document/?pdmfid=1516831&crd=e6683f67-2e29-4c9c-a81e-2c4a79117dd5&pdcontentcomponentid=299219&pdteaserkey=sr0&pditab=allpods&ecomp=dzx2k&earg=sr0&prid=4f212e0b-e549-4aa4-8cff-2818abf52c6b>.

“The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants.”

committing human rights violations by using excessive force.⁹⁹ President López Obrador has essentially become Trump's watchdog and has repeatedly argued that his security forces have always respected human rights and acted with professionalism.

Asylum seekers who survive the dangerous journey and manage to enter the United States under the Migrant Protection Protocols, like Pablo and his family (Chapter 3), are vulnerable to a new threat--- the possibility of being incarcerated in a U.S. detention center. The history of mandatory detention, a relatively recent phenomenon, and the formalized and institutionalized criminalization of migration came after the *The Illegal Immigration Reform, and Immigrant Responsibility Act of 1996 (IIRIRA)*, which first criminalized the act of entering or reentering the country without authorization. In recent years, the number of migrants in detention has proliferated, in no small part due to policy changes that prioritize detention as a means of deterring individuals from entering the U.S. and seeking asylum. The modern camps, detention centers, and jails are spaces of banishment, and mechanisms for segregating people who have been deemed ineligible for international protection, people with no rights. In 1980, there were only fourteen immigration detention centers nationwide, according to the *Freedom for Immigrants* interactive map (see figure 1). In 1995, that number grew noticeably to 125 detention centers, with an average daily population of 7,475 (see figure 2), and after the implementation of (IIRIRA), the detention of migrants has seen an exponential rise with an equal rise in detention centers.

In recent years, the expansion of U.S. immigration detention has increased exponentially to an average daily population of 32,098 and an annual total detained population of 383,524 in

⁹⁹ "Mexico Breaks Up a Migrant Caravan, Pleasing White House."

2009. Equally important, the allocated budget for custody operations for 2009 was \$1,721,268,000 (See figure 3).¹⁰⁰ In 2017, while the average daily detained population only increased to 38,106, the allocated budget for custody operations doubled to \$2,705,412,000 (see figure 4 for 2017).¹⁰¹

In 2016, the Obama administration with the former *Deputy Attorney General Sally Q. Yates* directed the Justice Department to decrease the use of privately owned prisons that also house the migrant detained population. “[When] each private prison contract reaches the end of its term, the bureau should either decline to renew that contract or substantially reduce its scope in a manner consistent with law and the overall decline of the bureau’s inmate population. This is the first step in the process of reducing—and ultimately ending—our use of privately operated prisons...” Yates said.¹⁰² The announcement prompted an immediate drop in the stock prices of the two largest private prison operators in the U.S., Corrections Corp. of America (CCA) and GEO group. The Justice Department’s plan to end its use of private prisons was an important step in the right direction, not only for prison reform but also for immigration reform, as these prisons have higher reports of mistreatment and human rights abuse. CCA’s profits largely came from immigration detention centers in Texas, along the border.¹⁰³ The Department of Homeland Security was also considering curbing the use of privately owned immigration detention facilities, following the DOJ’s plan to “reduce and eventually eliminate” these facilities and created a special counsel to determine whether the use of these prisons was necessary.¹⁰⁴ The

¹⁰⁰ “Immigration Detention Map.”

¹⁰¹ Id.

¹⁰² “Phasing Out Our Use of Private Prisons.” <https://www.justice.gov/archives/opa/blog/phasing-out-our-use-private-prisons>. Also see: Gerstein, “Justice Department to Phase out Use of Private Prisons.”

¹⁰³ Id.

<https://www.politico.com/story/2016/08/private-immigration-detention-homeland-security-227507>.

¹⁰⁴ Id.

move away from private prisons was one of a series of late-second-term policy initiatives by the Obama administration seeking to set default rules for the next administration.

In the 2016 election cycle, private-prison companies contributed a record \$1.6 million to candidates, parties, and outside spending groups. GEO Group, one of the largest for-profit prisons, gave \$1,292,726 to Super PACs backing Republican presidential candidates, including Donald Trump. CoreCivic, formally known as Corrections Corporation of America (CCA) donated \$303,638 to Republican candidates in 2016 as the industry attempted to fight back against Obama's efforts to stop the usage of their facilities.¹⁰⁵ It was therefore not surprising that in 2017, when Donald Trump was elected president, his administration reversed many policy initiatives passed under Obama. On February 21, 2017, Attorney General Jeff Sessions announced that the Justice Department would "rescind" the department's previous directive to scale back the use of private prisons. Sessions argued that Obama's policy initiative impaired the bureau's ability to meet the "future needs of the federal correctional system."¹⁰⁶ However, the move towards increased use of private prisons was also politically motivated, as these corporations had invested hundreds of thousands of dollars in Trump's presidential campaign. His new policies have allowed private prisons to make profits by building more prisons and keeping disproportionate amounts of black and brown bodies in jail. Furthermore, attaching a profit motive to the imprisonment of migrants has resulted in further criminalization, incarceration, and deportation.

The United States is home to the world's largest immigration detention system in the world. It is legally classified as a civil rather than a criminal institution, and therefore

¹⁰⁵ "For-Profit Prisons: Background | OpenSecrets," accessed November 11, 2020, <https://www.opensecrets.org/industries/background.php?cycle=2016&ind=G7000>.

¹⁰⁶ *Id.*

non-punitive.¹⁰⁷ Detainees do not have, by law, access to lawyers. Thus, they heavily rely on pro-bono representation or non-profit organizations that charge low to zero fees. Yet, the immigration detention system works and acts like the criminal incarceration system and holds the detained population in punitive prison-like conditions. ICE has argued that migrant detention facilities are different from federal prisons in that they only hold detained migrants temporarily until their cases are resolved in court or until their deportation procedures are finalized. However, a pending asylum case can take years to be resolved. The current growth in detention centers is largely driven by corporation shareholders that invest in prisons, the for-profit prison industry, and elected officials who push for tougher and criminalized immigration policies.

¹⁰⁷ SAADI et al., “Understanding US Immigration Detention.”

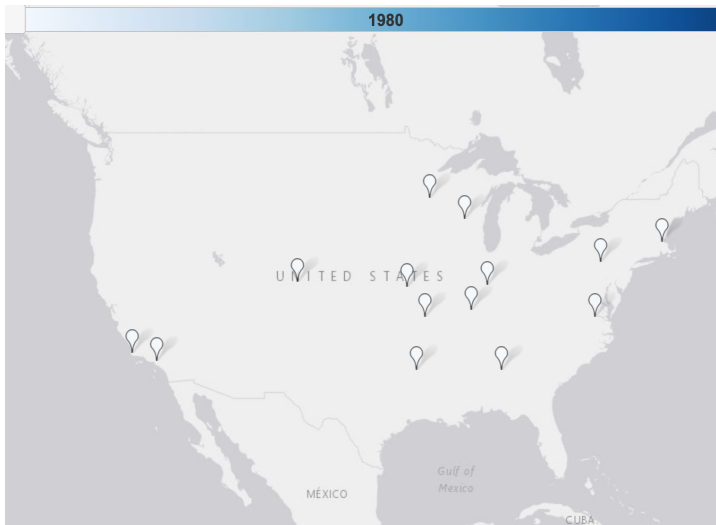


Figure 1: Detention Centers in 1980

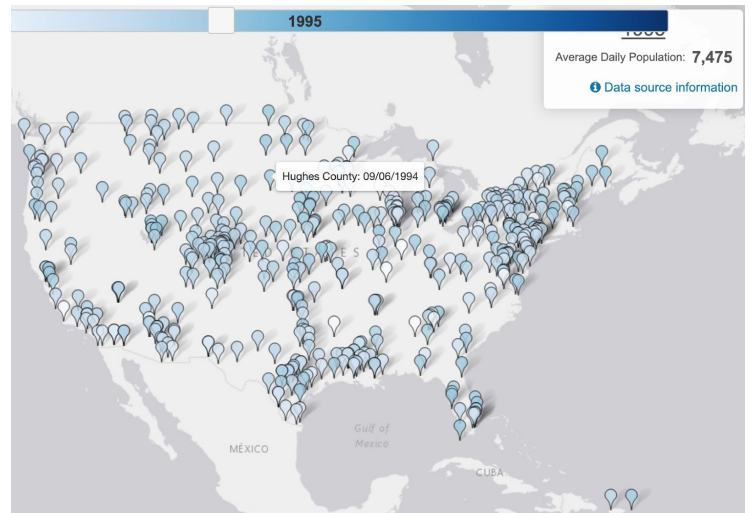


Figure 2: Detention Centers in 1995



Figure 3: Detention Centers in 2009

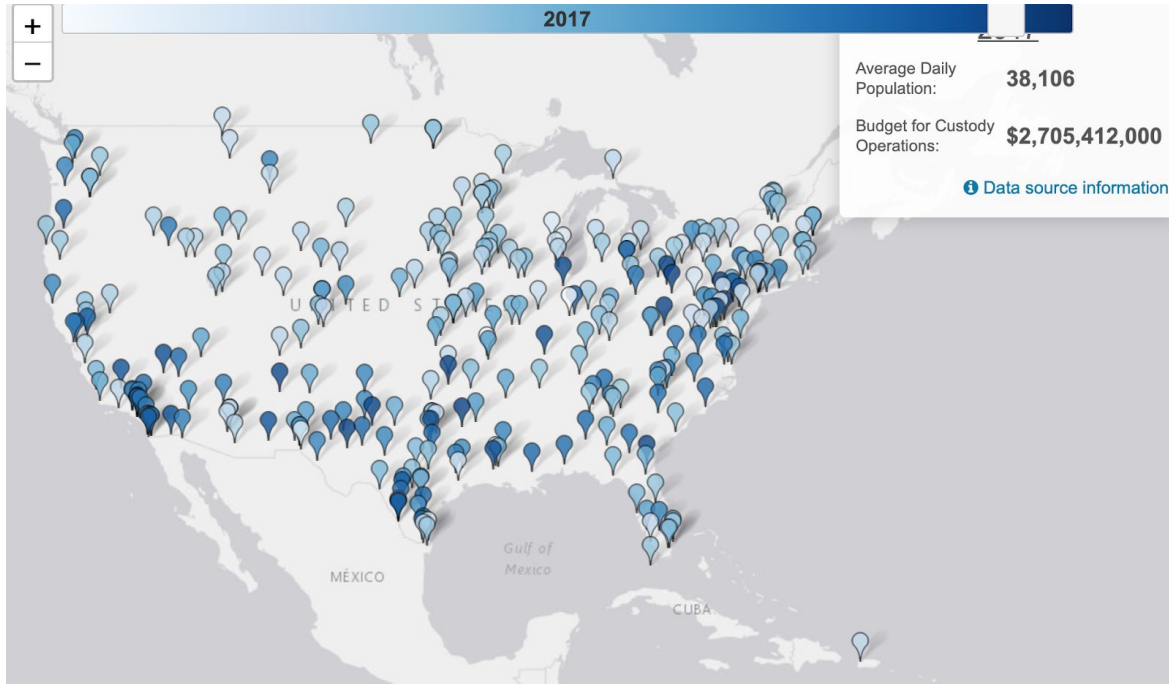


Figure 4: Detention Centers in 2017

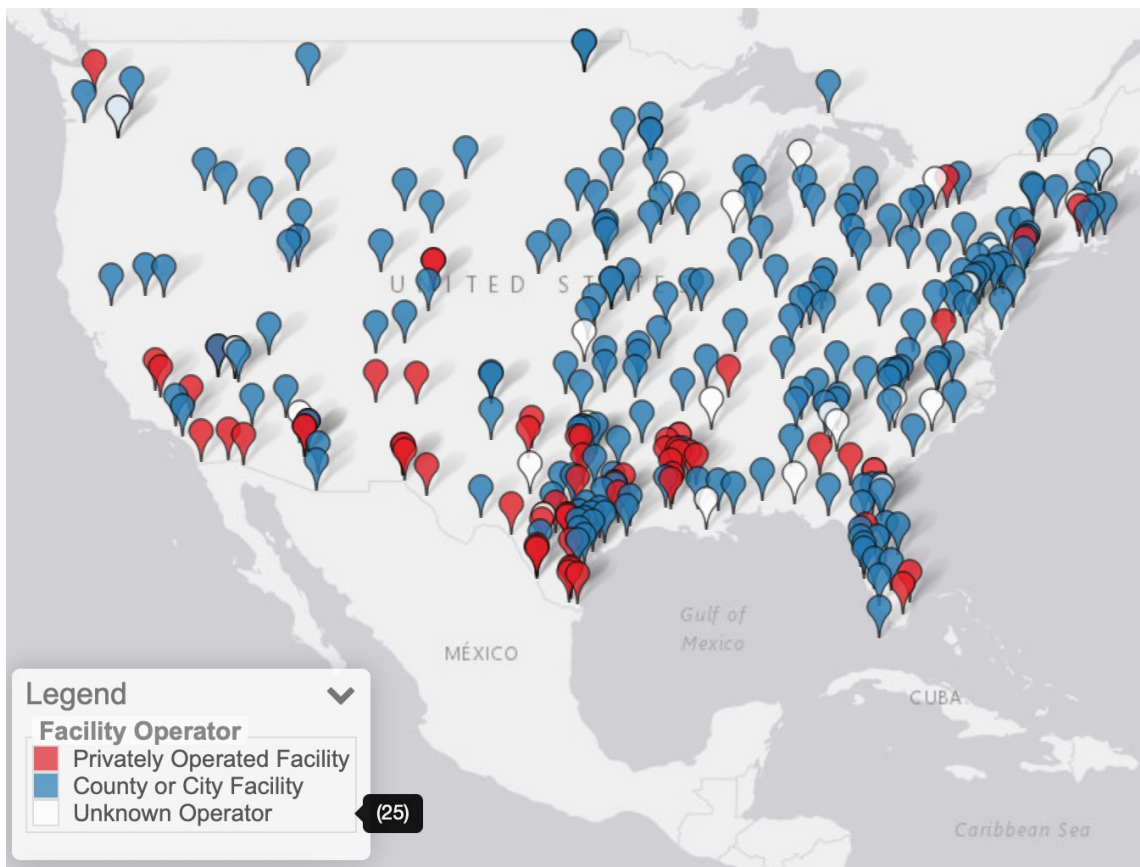


Figure 5: Detention Centers in 2018

The Trump administration has expanded the use of private prison companies (see figure 5) for detaining migrants. These detention centers have operated with no accountability; there have been increased deaths, increased patterns of mistreatment and abuse, medical and mental health neglect, and forced or overly pressured hysterectomies for detained migrant women.¹⁰⁸ Detention centers opened after 2017, operated by private prison companies, are located hours away from the nearest metropolitan area and have been dedicated to incarcerating prisoners with criminal convictions. Obama's move to sentencing reform reduced the number of criminally convicted prisoners, and so these companies sought new opportunities to fill empty beds--asylum seekers. In 2019, U.S. Immigration and Customs Enforcement (ICE) detained, on average, over 50,000 persons per day. Since 2017, ICE has opened more than 40 new detention facilities, both privately and government owned, totaling 229 detention centers nationwide.

Detained asylum seekers are isolated from legal counsel, remain in detention without the opportunity for release, and are more likely to lose their cases. Due to the current global pandemic, these challenges have only intensified, as detained asylum seekers are cut off from any legal or social resources. In the Spring of 2020, while interning for an U.S.-based humanitarian organization, I was in charge of conducting "Detained Screening Interviews." I screened detained asylum seekers to determine if they were eligible for release.¹⁰⁹ Most of the individuals I interviewed were arrested for misdemeanors, like driving without a license (DWL), minor fights, or domestic disputes. The most serious offence I encountered was driving under the influence (DUI). In one particular case, a detained individual had not received a criminal charge, he was on his way to his second court hearing when he was apprehended by ICE outside of the

¹⁰⁸ "Women Allege Medical Abuse in Georgia Immigration Detention - Los Angeles Times," accessed November 9, 2020, <https://www.latimes.com/politics/story/2020-10-22/women-allege-medical-abuse-georgia-immigration-detention>.

¹⁰⁹ "Migration Podcast ICE Detention. Wav."

courthouse and was taken to the detention center. The presence of ICE officers at criminal and civil courts has increased under the Trump administration and has created fear and insecurity among the migrant community. Detained migrants I spoke with reported unsanitary conditions and said they were given rotten food which they were forced to eat, even though they got seriously ill afterward. The conditions in this detention center only deteriorated after COVID-19 started: they were not given masks, could not socially distance themselves from others, and did not receive adequate medical care. Those who were feeling ill were only given Tylenol and told to “stop complaining.” While protestors and pro-bono lawyers have fought for their release, many detainees will likely stay at these detention centers for years, without real opportunity for release.

An ACLU Research Report named *Justice-Free Zone: U.S. Immigration Detention Under the Trump Administration* affirms that U.S. immigration detentions in private, for-profit prisons have grown exponentially under the Trump administration. As of January 2020, a record high of 81 percent of the migrant ICE detainee population are held in private prisons, and 91 percent of detainees held in detention centers operated or owned by private prison corporations opened after 2017 when Trump was elected.¹¹⁰ Under the Trump administration ICE order priorities shifted to “removing all migrant violators.”¹¹¹ In Burlington, Vermont, for example, ICE arrested a dairy worker who was married to a U.S. citizen and the father to two young children as he was arriving at the courthouse to appear on charges for a DUI; the DUI charges

¹¹⁰ “New Report Shines Spotlight on Abuses and Growth in Immigrant Detention Under Trump,” American Civil Liberties Union, accessed November 9, 2020, <https://www.aclu.org/press-releases/new-report-shines-spotlight-abuses-and-growth-immigrant-detention-under-trump>. Read full ACLU report here: https://www.hrw.org/sites/default/files/supporting_resources/justice_free_zones_immigrant_detention.pdf

¹¹¹ “Justice-Free Zones.”

were dismissed. In a family court in Oakland County, Michigan, an undocumented father was arrested by Customs and Border Protection agents when he appeared at a hearing to request custody of his children, who he believed were in danger from his ex-wife's violent boyfriend.¹¹²

Trump has essentially expanded a system based on aggressive enforcement and apprehension of migrants in the United States. In February 2020, he requested another massive increase in funding for ICE. He asked Congress to spend \$10.4 billion on the agency in FY 2021. This request includes \$4.1 billion for custody operations, with the intent to expand ICE's detention system even more to hold 60,000 people each day. His plan includes even more aggressive apprehensions of migrants within the U.S., double the use of family detention, and the application of more stringent parole criteria to people eligible for release from detention.

Given that we have now entered a new phase of unprecedented growth in the immigration detention system in the United States, it is worth asking why asylum seekers are increasingly held in prisons while they go through the process of asylum.¹¹³ Perhaps Trump's dehumanizing rhetoric against asylum seekers has made the indefinite detention of migrants possible, as Americans have become desensitized. Asylum seekers are seen as a threat to be dealt with or removed from the United States. Furthermore, imprisonment has become the first response to deal with the U.S. social "problems" that burden society, thus asylum seekers are bodies destined for profitable punishment. Equally important is asking why, if mass incarceration of asylum seekers already in the U.S., is a lucrative business that benefits the Trump Administration and private prisons, when why create the migrant protection protocols (MPP) that significantly halts the number of asylum seekers coming into the United States. On the one hand,

¹¹² Id.

¹¹³ "Asylum under Siege."

the Trump Administration knows that these deterrence policies do not actually stop migration, even if that is the intention. Asylum seekers will always try to flee violence in their home countries and as long as they do, these detention centers will always profit from them. On the other hand, Trump was not successful in his promise to build the wall. He ran for reelection on a record that included little of what he promised during this 2016 presidential campaign, and MPP may have been the last resort to deliver to his base. If he could not physically build a wall at the Southern border, then he could create policies that would significantly deter migrants from coming in to seek protection.

In conclusion, Trump's policies have resulted in the dismantling of the asylum system in the United States. These changes have impacted the lives and health of the most vulnerable populations attempting to seek safety from persecution. The politicized and manufactured state of emergency at the border that allowed and justified the Migrant Protection Protocols (MPP) and the bureaucratic legal amendments to asylum law have resulted in the legitimization of state-sponsored violence towards asylum seekers. Although the Trump administration invoked the language of human rights in defense of his policies, they actually created an actual humanitarian crisis at the border that is unlikely to go away even after Trump leaves office. The Trump administration has attacked the asylum system and has completely ignored the humanitarian ideals that have historically informed it. Furthermore, he labeled asylum seekers from Central America as "criminals" and framed them as a threatening and violent group. Such framings allowed the state to position itself as a cohesive institution with the authority and responsibility to remedy those threats and consequently to stage an intervention centered around

border security and control.¹¹⁴ This “crisis” at the U.S./Mexico border that threatens the idealized national identity that Mr. Trump is nostalgic for is not humanitarian. It has led to children being separated from their parents and shut in cages, women and men being deemed superfluous and discarded, with no rights, and the drownings and deaths of those whose only crime was seeking protection within the United States. Just as important is the willingness of Americans to allow the state to decide on what is morally and ethically possible. In recent years, different administrations have behaved as if they believed in asylum law, while they have tried to undermine it subtly or have made it more restrictive. When the United States has seen that no essential interests will be met by welcoming refugees, its generosity has been very limited, as explored in Chapter Two. Asylum seekers and refugees have always been politicized and while the United States has certainly entered another restrictionist era, the Trump administration does not believe in the international legal apparatus governing asylum claims and human rights. Furthermore, there is something inherently wrong with the asylum system if a president can work to dismantle it in four years.

¹¹⁴ (“Prem Kumar Rajaram: Beyond Crisis: Rethinking the Population Movements at Europe’s Border” n.d.)

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