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## Vanishing Protection: Access to Asylum at the Border

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# VANISHING PROTECTION: ACCESS TO ASYLUM AT THE BORDER

*B. Shaw Drake & Elizabeth Gibson*<sup>†</sup>

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## INTRODUCTION

Since the election of Donald J. Trump as the President of the United States, immigrant communities - and the advocates and legal professionals who serve them - have been thrust into a state of fear and uncertainty. Policy changes have already begun to tighten access to legal protections for immigrants, including asylum seekers,<sup>1</sup> proving that campaign rhetoric targeting immigrants and refugees was more than just empty election-season promises.<sup>2</sup> Law and policy makers seem intent on limiting vulnerable populations' access to humanitarian protection.<sup>3</sup> As a result, immigration lawyers representing asylum seekers are likely to find that their advocacy is needed at every stage of the asylum process, even in ensuring that those traveling to the U.S. border have access to the asylum adjudication system.

In addition, immigration attorneys have long struggled with a string of precedent-setting cases limiting due process at the border and have fought as officials created broadly-defined enforcement tools without sufficient forethought on how subsequent administration could use those programs. Although advocates have never stopped their efforts to fix a broken system, now more than ever is the time to push back, disrupt, and rethink ways to reopen ongoing issues.

On January 25, 2017, President Trump signed two executive orders, entitled "Border Security and Immigration Enforcements" and "Enhancing Public Safety in the Interior of the United States," and on February 20, 2017, the U.S. Department of Homeland Se-

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<sup>1</sup> See Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 06, 2017); Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017) [hereinafter Kelly, *Implementing*], <https://perma.cc/3H39-7JHS>; Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017) [hereinafter Kelly, *Enforcement*], <https://perma.cc/U22P-CPAN>; Julia Edwards Ansley, *Exclusive: Trump Administration Considering Separating Women, Children at Mexico Border*, REUTERS (Mar. 3, 2017, 3:13 PM), <https://perma.cc/PX3M-52CX>; Chris Hayes & Brian Montopoli, *Exclusive: Trump Admin. Plans Expanded Immigrant Detention*, MSNBC (Mar. 3, 2017, 8:13 PM), <https://perma.cc/7T3N-2FLE>.

<sup>2</sup> See Jamie Winders, *Immigration and the 2016 Election*, 56 SOUTHEASTERN GEOGRAPHER 291 (2016), for a brief description of the 2016 U.S. presidential candidates' attitudes toward immigration.

<sup>3</sup> See Asylum Reform and Border Protection Act of 2017, H.R. 391, 115th Cong. (2017); see also Eleanor Acer & Tara Magner, *Restoring America's Commitment to Refugees and Humanitarian Protection*, 27 GEO. IMMIGR. L.J. 445 (2013); Kelly, *Implementing*, *supra* note 1.

curity (“DHS”) issued two memoranda describing the orders’ implementation.<sup>4</sup> Multiple provisions in these orders and memoranda exacerbate challenges refugees already faced when seeking asylum in the United States, lay the groundwork for procedures that could turn asylum seekers away at the border altogether, and send a clear message of acquiescence towards abuse by frontline officers.<sup>5</sup>

The ability to seek protection in the United States is a right enshrined in international law and codified in U.S. statute.<sup>6</sup> While all who claim a fear of return to their home country are not necessarily entitled to relief from removal,<sup>7</sup> the baseline right to apply for protection and have that claim considered is at the core of a legal regime established to protect those fleeing persecution. Yet, the United States continues to erect barriers to those seeking asylum – apart from, and much more consequential than – a physical wall.

Thousands of families and children fleeing extreme violence and instability in Guatemala, Honduras, and El Salvador – known as the Northern Triangle – as well as other countries, continue to arrive at the U.S.-Mexico border.<sup>8</sup> The United Nations High Commissioner for Refugees (“UNHCR”), a United Nations (“U.N.”) agency mandated to protect refugees, and others, have found this

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<sup>4</sup> Exec. Order No. 13767, *supra* note 1; Exec. Order No. 13768, *supra* note 1; Kelly, *Implementing*, *supra* note 1; Kelly, *Enforcement*, *supra* note 1.

<sup>5</sup> See HUMAN RIGHTS FIRST, ASYLUM UNDER THREAT (2017), <https://perma.cc/6S8J-KWTT> (“[T]he executive order and the DHS memoranda appear to subject asylum seekers to even tougher initial screenings, lengthy periods in immigration detention, expanded summary processing, and some kind of rocket docket asylum adjudications.”).

<sup>6</sup> See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Protocol Relating to Refugees], <https://perma.cc/522Y-2Q67>.

<sup>7</sup> Under current statutory and regulatory provisions, individuals may be granted asylum if they meet the definition of “refugee” or qualify for protection under the Convention Against Torture. See 8 U.S.C. §§ 1158(b)(1)(A), 1101(a)(42) (2017); 8 C.F.R. § 208.18 (2017).

<sup>8</sup> 41,435 “unaccompanied alien children” (“UACs”) were apprehended at the border during Fiscal Year (“FY”) 2017, and 75,622 family units during the same period, nearly 30% fewer UACs and 3% fewer family units than were apprehended during FY 2016. Compare *Southwest Border Migration*, U.S. CUSTOMS & BORDER PROTECTION (Nov. 3, 2017) [hereinafter CBP, *FY 2016*], <https://perma.cc/NR6L-QB26>, with *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS & BORDER PROTECTION (last visited Dec. 7, 2017), <https://perma.cc/3LF5-GJ46> (showing that in FY 2016, 59,692 UACs and 77,674 family units crossed the U.S. southwest border).

Central American population to be largely protection seeking.<sup>9</sup> While more Mexicans are leaving the United States than coming, and have been for some time,<sup>10</sup> Central Americans fleeing violence and unrest continue to arrive,<sup>11</sup> as do albeit in lower numbers, Mexican asylum seekers fleeing persecution in Mexico.<sup>12</sup> In fiscal year 2016, over 77,000 families and over 59,000 unaccompanied children arrived at the border to seek asylum.<sup>13</sup> While data on how many people requested protection when encountering U.S. border authorities is unavailable, about 18,500 persons were referred from ports of entry for initial protection screening interviews by asylum officers in Fiscal Year 2017.<sup>14</sup> While numbers dropped in June 2017, thousands continue to seek protection at the U.S. border.<sup>15</sup> As discussed in detail below, asylum seekers arriving at ports of entry and along the border have the right to present themselves to border officers to seek protection,<sup>16</sup> and their reception at the border and referral to asylum proceedings is the essential step in giving that right meaning.

Unfortunately, the door to the U.S. asylum system has already begun to close, and the policy changes detailed by President Trump's executive orders and DHS's memoranda threaten to slam it shut. In response to a growing number of asylum-seeking migrants at its southern border, the United States under the Obama Administration, funded greater efforts to externalize the U.S. bor-

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<sup>9</sup> See UNHCR., CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 4-5 (2014), <https://perma.cc/F7SE-NZQH>; UNHCR, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO 2-3 (2015), <https://perma.cc/QTZ4-Q45S>; see also MICHAEL GARCIA BOCHENEK, HUMAN RIGHTS WATCH, CLOSED DOORS: MEXICO'S FAILURE TO PROTECT CENTRAL AMERICAN REFUGEE AND MIGRANT CHILDREN 2 (2016), <https://perma.cc/88K6-ZRTJ>.

<sup>10</sup> Ana Gonzalez-Barrera, *More Mexicans Leaving Than Coming to the U.S.*, PEW RES. CTR. HISP. TRENDS (Nov. 19, 2015), <https://perma.cc/CNH3-3H48>.

<sup>11</sup> See CBP, *FY 2016*, *supra* note 8.

<sup>12</sup> See SARA CAMPOS & JOAN FRIEDLAND, AM. IMMIGRATION COUNCIL, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS 1-2 (2014) [hereinafter AM. IMMIGRATION COUNCIL], <https://perma.cc/7EVY-U4UW>.

<sup>13</sup> CBP, *FY 2016*, *supra* note 8.

<sup>14</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., CREDIBLE FEAR STATISTICS AND NATIONALITY REPORT (2017), <https://perma.cc/L2K6-PNW5>.

<sup>15</sup> Between October 2016 and June 2017 (the last month for which statistics were available at the time of publication) USCIS received 61,063 credible fear interview requests, 18,533 of which came from ports of entry. See *id.*

<sup>16</sup> The Immigration and Nationality Act provides, "Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title." 8 U.S.C. § 1158(a)(1) (2017); see also 8 U.S.C. § 1225(b)(1) (2017).

der through increased Mexican enforcement along Mexico's southern border;<sup>17</sup> failed to refer all those expressing a fear of return to an initial protection interview, or turned them away completely;<sup>18</sup> and ignored unlawful turn-back of asylum seekers altogether.<sup>19</sup> Many of these policies and practices are being adopted and expanded under the Trump Administration.<sup>20</sup>

Moreover, the Trump Administration has sought to "enhance" protection screening interviews,<sup>21</sup> called credible fear and reasonable fear interviews.<sup>22</sup> Through adjustments to training materials, DHS appears to be raising the bar for what asylum seekers must prove to asylum officers at preliminary screening interviews.<sup>23</sup> Furthermore, even these interviews are only available to those asylum seekers whom U.S. Customs and Border Protection ("CBP") officers appropriately refer for further screening upon their expression of fear at the border.<sup>24</sup>

This paper will examine the increased need to protect the right to seek protection in the United States, focusing on the rights of those presenting themselves to U.S. authorities at ports of entry and along the U.S. border. Through an examination of the barriers that asylum seekers face in reaching the U.S. border and seek-

<sup>17</sup> GEORGETOWN LAW HUMAN RIGHTS INSTITUTE, *THE COST OF STEMMING THE TIDE: HOW IMMIGRATION ENFORCEMENT PRACTICES IN SOUTHERN MEXICO LIMIT MIGRANT CHILDREN'S ACCESS TO INTERNATIONAL PROTECTION* 14 (2015), <https://perma.cc/NB9K-B8SN>.

<sup>18</sup> See ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, *BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL* 21-23 (2016), <https://perma.cc/BJ6K-AW2Z>; ACLU, *AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM* 37-40 (2014), <https://perma.cc/LUE9-9MSD>.

<sup>19</sup> See AMNESTY INT'L, *FACING WALLS: USA AND MEXICO'S VIOLATIONS OF THE RIGHTS OF ASYLUM-SEEKERS* 19-22 (Jun. 15, 2017) <https://perma.cc/H34V-ML65>; HUMAN RIGHTS FIRST, *CROSSING THE LINE: U.S. BORDER AGENTS ILLEGALLY REJECT ASYLUM SEEKERS* (2017), <https://perma.cc/R7E8-DSM8>; Letter from American Immigration Council et. al to Meghan H. Mack, Officer of Civil Rights & Civil Liberties, Dep't of Homeland Sec., John Roth, Inspector Gen., Dep't of Homeland Sec. (Jan.13, 2017) [hereinafter Letter from American Immigration Council], <https://perma.cc/4AHK-ZM29>.

<sup>20</sup> See Exec. Order No. 13767, *supra* note 1; Exec. Order No 13768, *supra* note 1; HUMAN RIGHTS FIRST, *supra* note 19.

<sup>21</sup> See Letter from Eleanor Acer, Senior Director, Refugee Protection, Human Rights First, to Lori Scialabba, Acting Dir., U.S. Citizenship & Immigration Servs., John Lafferty, Chief, Asylum Div., U.S. Citizenship & Immigration Services (Mar. 10, 2017), <https://perma.cc/99JG-R5CF>.

<sup>22</sup> See 8 C.F.R. §§ 1208.16, 1208.17, 1208.18 (2017).

<sup>23</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., *CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS* 13-42 (2017) [hereinafter 2017 CREDIBLE FEAR LESSON PLAN], <https://perma.cc/2X6E-5REC>.

<sup>24</sup> See 8 C.F.R. § 253.3(b)(4) (2017).

ing asylum there, the paper will provide a framework for legal practitioners to understand asylum seekers' rights when arriving at the border and seeking protection in the United States, as well as the limitations on restricting access to those rights.

Section I will summarize the history and intent behind the development of asylum protection, examining both domestic and international commitments of the United States. Section II will examine attempts to limit access to protection and undermine the rights of those seeking protection at the U.S.-Mexico border. This section will address: efforts to externalize the border and construct barriers to prevent access to the U.S. border; CBP's role in referring protection seekers to screening interviews and the due-process "black hole" that results from a lack of safeguards; the credible and reasonable fear interview standards; and the limited due process protections at this stage of the asylum system. Finally, the paper will examine efforts to summarily deny access to the United States' protection system, including analysis of the safe-third country concept, its limitations and due process requirements, and recent proposals to turn migrants back to Mexico pending adjudication of their cases before a U.S. immigration court. Throughout each section, the paper will discuss the role of attorneys in protecting the right to seek protection and the growing need for intervention at every stage of the process.

#### I. ACCESS TO PROTECTION IN CONSTITUTIONAL AND INTERNATIONAL LAW

Migration as an element of human existence on the planet is as old as history itself. Tracking the first migrants requires anthropological analysis into the very origins of humanity. In comparison, the concept of refugees – those fleeing persecution based on five narrowly tailored protected grounds – is a recently constructed category of people on the move who are afforded certain additional rights,<sup>25</sup> derived from nation states' commitments, enshrined in international and domestic law, to protect those who flee a recognized form of persecution. "Access to asylum," or "access to protection," as used throughout this paper, refers not solely to the granting of permanent status within a host country (generally called asylum or refugee status) but rather to the initial access

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<sup>25</sup> For a complete distillation of the rights international law affords to all migrants, and the additional rights granted to those meeting the definition of a refugee, see The IMBR Initiative, *International Migrants Bill of Rights, with Commentary*, 28 GEO. IMMIGR. L.J. 23 (2013).



upon arrival to a potential host State's system for adjudicating protection claims. In this case, we examine the United States' international and domestic commitments to ensure no migrant is denied appropriate adjudication of his or her protection claim or precluded access to such protection mechanisms through other means, as a threshold matter underpinning all refugee law.

#### A. Access to Protection in International Refugee Law

A refugee, as currently defined by the 1951 Convention Relating to the Status of Refugees ("1951 Convention"), is someone unable to return to his or her country due to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . . ."<sup>26</sup> Tracing the development of the 1951 Convention and the establishment of international legal norms demonstrates that individuals have a right to seek asylum, derived from nations' responsibility to not only refrain from returning them to persecution, but to ensure access to their territory and protection mechanisms to justly consider their claim. For, as stated by leading international law scholar James Hathaway, "[t]he most urgent need of refugees is to secure entry into a territory in which they are sheltered from the risk of being persecuted."<sup>27</sup> Failure to ensure such shelter, in many circumstances, amounts to a violation of international law in the same way the deportation of a refugee directly to their country of origin infringes on the duty of the State to adhere to the core refugee law principle, *non-refoulement*.<sup>28</sup>

In 1921, the League of Nations, with the election of Dr. Fridtjof Nansen as the inaugural High Commissioner for Russian refugees, first recognized that certain categories of people required international legal structures to ensure protection.<sup>29</sup> The League of Nations went on to support international protection for Armenians in 1924 and Turkish refugees in 1928, and in 1933 it drafted the Convention Relating to the International Status of Refugees, which recognized the need for the international community

<sup>26</sup> Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention], <https://perma.cc/7FLY-HYFA>.

<sup>27</sup> JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 279 (2005).

<sup>28</sup> *Id.* at 317. *Refoulement*, taken from French, refers to the return of a person to a country where they have reason to fear persecution based on a protected ground. See 1951 Convention, *supra* note 26, at art. 33.

<sup>29</sup> See Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. U. J.L. & POL'Y, 129, 130 (2001).

to protect those fleeing persecution in their homelands.<sup>30</sup> On May 13, 1939, nine-hundred and thirty-seven passengers, mostly Jews fleeing Hitler's Third Reich, departed Europe on the *St. Louis* transatlantic liner following visa petitions made to the United States.<sup>31</sup> The United States did not have a system for evaluating refugee claims, nor had international law yet established the definition of a refugee or the various commitments that would later govern the nation's evaluation of such claims under binding treaties.<sup>32</sup> In 1939, the United States had a quota of 27,370 Germans and Austrians a year that had already been filled by the time the *St. Louis* refugees arrived in Cuba to await word from the United States.<sup>33</sup> Eventually, the ship was forced to return to Europe. Five-hundred-and-thirty-two Jewish passengers were trapped in Western Europe when Hitler invaded – almost half died in the Holocaust.<sup>34</sup>

In the aftermath of World War II, it was clear the world required an international legal system to set standards to hold governments accountable and codify individual rights beyond those afforded by any one nation to its peoples. The Universal Declaration of Human Rights (“UDHR”), proclaimed by the newly minted United Nations General Assembly in 1948,<sup>35</sup> unequivocally stated “everyone has the right to seek and to enjoy in other countries asylum from persecution.”<sup>36</sup> An array of additional instruments—United Nations, regional, and national commitments—have further elaborated this concisely declared right and illuminated the requirements for adequately effectuating this core element of international human rights protections.<sup>37</sup>

The 1951 Convention grew from this global recognition that

<sup>30</sup> *Id.*; see Convention Relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 3663 [hereinafter Convention of 1933], <https://perma.cc/R7R4-2RSM>.

<sup>31</sup> *Voyage of the St. Louis*, U.S. HOLOCAUST MEMORIAL MUSEUM: HOLOCAUST ENCYCLOPEDIA (last visited Dec. 9, 2017), <https://perma.cc/MBN6-ZJXC>.

<sup>32</sup> See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.); Protocol Relating to Refugees, *supra* note 6.

<sup>33</sup> *Voyage of the St. Louis*, *supra* note 31.

<sup>34</sup> *Id.*

<sup>35</sup> See U.N. Charter preamble, <https://perma.cc/3QHQ-7QMP>; G.A. Res. 217 (III) A, art. 14, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights], <https://perma.cc/FFP5-YEXT>.

<sup>36</sup> Universal Declaration of Human Rights, *supra* note 35.

<sup>37</sup> See, e.g., GRUNDGESETZ [GG] [BASIC LAW], art. 16a (Ger.), translated at <https://perma.cc/MU9X-DVCN>; Immigration and Asylum Act 1999, c. 33 (UK); G.A. Res. 39/46, art. 3, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984); see also Carol Batchelor, *The 1954 Convention Relating to the Status of Stateless Persons: Implementation Within the European Union*

prevention of future atrocities required a system to ensure those seeking protection were afforded “the widest possible exercise of [their] fundamental rights and freedoms . . . .”<sup>38</sup> The 1951 Convention established the “enduring foundations of refugee protection by setting baseline principles on which the international protection of refugees was to be built.”<sup>39</sup> These core principles include, among others:<sup>40</sup>

- Refugees should not be returned to face persecution or the threat of persecution—the principle of *nonrefoulement*;<sup>41</sup>
- Protection must be extended to all refugees without discrimination;<sup>42</sup>
- The problem of refugees is social and humanitarian in nature, and therefore should not become a cause of tension between states;<sup>43</sup>
- Persons escaping persecution cannot be expected to leave their country and enter another country in a regular manner, and accordingly should not be penalized for having entered into, or for being illegally in, the country where they seek asylum.<sup>44</sup>

The principle of *non-refoulement*, enshrined in Article 33 of the 1951 Convention,<sup>45</sup> forms the very core of international refugee law. Yet, cursory examination of the principle may unduly lead States to the conclusion that such a prohibition is limited to the removal of those already physically present in the State’s territory. This presumption is wrong and carries with it devastating consequences.<sup>46</sup> *Non-refoulement* is a rare right that is not predicated on the arrival of a refugee at a State’s territory, nor on the formal adjudication of their status.<sup>47</sup> In fact, the duty of *non-refoulement* prohibits *any* measure that results in refugees being “pushed back into the arms of their persecutors,” whether or not the measure in

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*Member States and Recommendations for Harmonization*, REFUGE, Summer 2004, at 31, <https://perma.cc/7TWA-W7YT>.

<sup>38</sup> 1951 Convention, *supra* note 26, at preamble.

<sup>39</sup> Feller, *supra* note 29, at 131-32.

<sup>40</sup> *Id.*

<sup>41</sup> See 1951 Convention, *supra* note 26, at art. 33.

<sup>42</sup> *Id.* at art. 3.

<sup>43</sup> *Id.* at preamble.

<sup>44</sup> See *id.* at art. 31.

<sup>45</sup> *Id.* at art. 33.

<sup>46</sup> See HATHAWAY, *supra* note 27, at 280-83 (citing examples of *St. Louis* during WWII; Vietnamese pushed back by Thai; Tibetans denied entry to Nepal; turn-back policies in Africa; Colombians into Venezuela; and, Haitians by the United States); see also, e.g., CTR. FOR MIGRATION STUDIES & CRISTOSAL, POINT OF NO RETURN: THE FEAR AND CRIMINALIZATION OF CENTRAL AMERICAN REFUGEES (2017).

<sup>47</sup> HATHAWAY, *supra* note 27, at 304.

question is undertaken by a State against those currently in its territory.<sup>48</sup> A State's *non-refoulement* commitment, it can be argued, was always understood to preclude "non-admittance at its frontiers" as well as non-return of those within its borders.<sup>49</sup>

The first codification of the *non-refoulement* principle, from which the duty of *non-refoulement* later enshrined in the 1951 Convention was derived, can be found in the 1933 League of Nations' Convention Relating to the International Status of Refugees.<sup>50</sup> Article 3 of the 1933 Convention described the *non-refoulement* principle as a responsibility "not to remove or keep [refugees] from its territory by application of police measures, such as expulsions or *non-admittance* at the frontier (*refoulement*) . . ." and under no circumstances "refuse entry to refugees at the frontiers of their countries of origin."<sup>51</sup>

Furthermore, during the negotiation and drafting of the 1951 Convention, delegates expressed the understanding that the core *non-refoulement* principle encompassed both non-return and non-admittance protections.<sup>52</sup> Louis Henkin,<sup>53</sup> the United States representative to the convention drafting conference, explicitly stated:

Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened.<sup>54</sup>

In 1977, the United Nations General Assembly reaffirmed "the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State – of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees."<sup>55</sup> In 1980 and 1981, UNHCR con-

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<sup>48</sup> *Id.* at 301 (internal quotations omitted) (citing U.N. ESCOR, 1st Sess., 21st mtg. at ¶ 26, U.N. Doc. E/AC.32/SR.21 (Feb. 2, 1950), <https://perma.cc/J7GU-8HAT>).

<sup>49</sup> *Id.* at 315.

<sup>50</sup> Convention of 1933, *supra* note 30; HATHAWAY, *supra* note 27, at 315.

<sup>51</sup> Convention of 1933 *supra* note 30, at art. 3 (emphasis added).

<sup>52</sup> See U.N. ESCOR, 1st Sess., 21st mtg., U.N. Doc. E/AC.32/SR.20 (Feb. 1, 1950) [hereinafter U.N. Ad Hoc Committee on Refugees and Stateless Persons, Twentieth Meeting], <https://perma.cc/7539-HPT7>.

<sup>53</sup> Agnes Hurwitz, *UNHCR Mourns Death of an Architect of the 1951 Refugee Convention*, UNHCR (Oct 19, 2010), <https://perma.cc/WRG9-RUGG>.

<sup>54</sup> U.N. Ad Hoc Committee on Refugees and Stateless Persons, Twentieth Meeting, *supra* note 52.

<sup>55</sup> Addendum to the Report of the United Nations High Commissioner for Refu-

cluded that, “[i]n all cases the fundamental principle of *non-refoulement* - including non-rejection at the frontier - must be scrupulously observed,”<sup>56</sup> and, even in “case[s] of large-scale influx, persons seeking asylum should always receive at least temporary refuge . . . .”<sup>57</sup>

Today, legal scholars concur that the obligation of *non-refoulement* encompasses a prohibition against return “*in any manner whatsoever* to countries where they may face persecution,”<sup>58</sup> that “Article 33(1) is applicable to rejection at the frontier of a potential host State,”<sup>59</sup> and that the concept of *non-refoulement* “now encompasses both non-return *and* non-rejection.”<sup>60</sup> Therefore, the analysis required to determine if a State is in violation of its *non-refoulement* obligation turns solely on whether the State action presents *any chance* that a denial of protection will result in the return of the individual to persecution, *not* whether the individual in question is in the State’s territory, in transit to the State’s territory, or yet determined to meet the Refugee definition through an adjudicatory process.<sup>61</sup>

Furthermore, an array of international law provides migrants the right to due process.<sup>62</sup> The international community understands the right to due process as an important check on limitations to seeking protection,<sup>63</sup> a right commonly undercut by government attempts to stem the number of migrants granted permanent status in their country. The right to due process recognizes

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gees, U.N. Doc. A/32/12/Add.1 (Oct. 31, 1977), <https://perma.cc/WUE8-9G9J> (emphasis added).

<sup>56</sup> Addendum to the Report of the United Nations High Commissioner for Refugees, U.N. Doc. A/36/12/Add.1 (Oct. 21, 1981), <https://perma.cc/YS37-K4ZY>.

<sup>57</sup> Addendum to the Report of the United Nations High Commissioner for Refugees, U.N. Doc. A/35/12/Add.1 (Nov. 3 1980), <https://perma.cc/FLZ8-UKWN>.

<sup>58</sup> Mark R. von Sternberg, *Reconfiguring the Law of Non-Refoulement: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection*, 2 J. ON MIGRATION & HUM. SECURITY 329, 331 (2014) (quoting GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 143 (2d ed. 1996) (emphasis in original)).

<sup>59</sup> *Id.* (citing Gregor Noll, *Seeking Asylum at Embassies: A Right to Enter Under International Law*, 17 INT’L J. REFUGEE L. 542, 549 (2005)).

<sup>60</sup> GOODWIN-GILL, *supra* note 58, at 124 (emphasis added).

<sup>61</sup> *See* HATHAWAY, *supra* note 27, at 302.

<sup>62</sup> *See* Universal Declaration of Human Rights, *supra* note 35, at arts. 10-11; International Covenant on Civil and Political Rights, arts. 14, 16, *adopted* Dec. 19, 1966, 999 U.N.T.S. 172; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(a), *adopted* Dec. 21, 1965, 660 U.N.T.S. 195; Convention on the Rights of the Child, arts. 12(2), 40(1), *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, *open for signature* Nov. 4, 1950, E.T.S. No. 5; *see also* The IMBR Initiative, *supra* note 25, at 57.

<sup>63</sup> *See* The IMBR Initiative, *supra* note 25, at 57.

that access to a State's territory is of little import if lack of procedural protections result in *refoulement* of refugees. As detailed below in Section II(B)(1) and (2), inadequate screening interviews can result in the improper return of legitimate refugees. Several instruments have been developed to outline appropriate interviewing procedures that comply with the 1951 Convention, and protect against the wrongful *refoulement* of refugees.<sup>64</sup>

When combined with States' *non-refoulement* obligation, international law deliberately sets up a legal system aimed at ensuring all migrants seeking protection are, at a minimum, afforded temporary shelter and adequate adjudication of their protection claim.<sup>65</sup> Only following open receipt and fair consideration of a person's asylum claim can a State be sure its actions do not run afoul of its international legal obligations. In some countries, such as the United States, these principles have been enshrined in statute – further recognition of the importance of refraining from their derogation.

#### B. Domestic Assurance of Access to Protection Mechanisms

The heart of U.S. asylum law rests in the Refugee Act of 1980 (hereinafter referred to as “the Refugee Act”), which was intended to bring domestic law into conformity with the 1951 Refugee Convention and 1967 Protocol.<sup>66</sup> The United States had acceded to the Protocol in 1968 and the Refugee Act codified the customs that had developed in the interim.<sup>67</sup> The Refugee Act adopted a definition of refugee,<sup>68</sup> mirroring that in the Protocol, and it enshrined the right to apply for asylum. Pursuant to 8 U.S.C. § 1158,

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port

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<sup>64</sup> See, e.g., U.N.H.C.R., FAIR AND EFFICIENT ASYLUM PROCEDURES: A NON-EXHAUSTIVE OVERVIEW OF APPLICABLE INTERNATIONAL STANDARDS (2005), <https://perma.cc/2BL3-VSTM>; Global Consultations on International Protection, *Agenda for Protection*, U.N. Doc. A/AC.96/965/Add.1 (June 26, 2002), <https://perma.cc/7TK4-LD89>; see also G.A. Res. 51/75, at ¶ 4 (Feb. 12, 1997), <https://perma.cc/2BDF-WJXP> (urging States to ensure access, consistent with relevant international and regional instruments, for all asylum-seekers to fair and efficient procedures for the determination of refugee status and the granting of asylum to eligible persons).

<sup>65</sup> See The IMBR Initiative, *supra* note 25, at 68.

<sup>66</sup> See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.); see also 1951 Convention, *supra* note 26; Protocol Relating to Refugees, *supra* note 6.

<sup>67</sup> See S. REP. NO. 96-256, at 1 (1979), as reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 141.

<sup>68</sup> Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 102-03 (1980) (codified as amended in scattered sections of 8 U.S.C. § 1101(42) (2017)).

of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum . . .<sup>69</sup>

Subsequent case law has firmly upheld the right to apply for asylum.<sup>70</sup> However, ensuring meaningful access to the right has been and continues to be a significant challenge. The current statutory and regulatory framework for applying for asylum at the border is the result of efforts intended to reduce alleged fraudulent asylum claims as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").<sup>71</sup> Since then, numerous publications have suggested that IIRIRA has done a great deal of harm to people in need of protection.<sup>72</sup> However, the rhetoric of cracking down on immigration has long been politically expedient. As such, the current screening process at the border, in practice, facilitates the rejection of arriving immigrants, including asylum seekers, as quickly as possible.

### 1. How Asylum Works at Ports of Entry

To understand this system, it is first important to provide an overview of how people enter the U.S. asylum system at ports of entry along the border. Although it might seem obvious, the initial step of the process is reaching a U.S. port of entry or border. Once at a port of entry or having crossed the border, certain categories of inadmissible noncitizens are subject to "expedited removal" pro-

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<sup>69</sup> 8 U.S.C. § 1158 (a)(1) (2017).

<sup>70</sup> *E.g.*, *Jean v. Nelson*, 727 F.2d 957, 982 (11th Cir.1984) (en banc) (affirming that section 1158 confers upon all aliens the right to apply for asylum), *aff'd as modified*, 472 U.S. 846 (1985); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1038–39 (5th Cir. 1982) (detailing the existence of a statutory right to apply for asylum). *But see* *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993) (finding no extraterritorial obligation under the Refugee Convention and Protocol in the case of Haitians interdicted on the high seas).

<sup>71</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546 (1996).

<sup>72</sup> *See generally* ANDREW I. SCHOENHOLTZ ET AL., LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY 41–48 (2014) (discussing the effect of the one-year filing deadline on meritorious cases); Lindsay M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 WIS. L. REV., 1185, 1196–1200 (2016); Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167 (2006); Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 117 (2001); *US: 20 Years of Immigrant Abuses*, HUM. RTS. WATCH (Apr. 25, 2016, 8:00 AM), <https://perma.cc/Y3PG-TZYL>.

ceedings,<sup>73</sup> the legacy of IIRIRA.<sup>74</sup> In short, expedited removal is a form of administrative proceeding that authorizes individual CBP officers to bypass the immigration court system and issue deportation orders to individuals who arrive at the border without permission to enter or who are arrested within 100 miles of the border and within fourteen days of an unauthorized entry.<sup>75</sup> While expedited removal was originally limited in use and applied only at ports of entry,<sup>76</sup> it has now dramatically expanded and could be expanded further.<sup>77</sup>

However, CBP is required to screen and refer anyone who expresses a fear of returning to his or her country, or intent to apply for asylum, to the Asylum Office (AO) for a Credible Fear Interview (CFI).<sup>78</sup> If an asylum officer then finds that an individual has established a “significant possibility” of establishing eligibility for asylum,<sup>79</sup> that person will be referred to the immigration court for a full hearing on the claim before an immigration judge.<sup>80</sup> Limits on meaningful access to counsel, appeals, and oversight at various stages in this process have been of great concern to advocates and will be discussed in Section II. These concerns, however, lead to an important issue: although the United States has a mechanism to seek asylum at the border, as implemented, this mechanism does not provide meaningful access to protection mechanisms.

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<sup>73</sup> Expedited removal cannot be used on returning U.S. citizens, Lawful Permanent Residents, and people with existing refugee or asylee status. 8 U.S.C. § 1225(b)(1)(A)(i) (2017). Expedited removal generally applies to people attempting to enter without a valid visa or suspected of fraud or misrepresentation, or those within the United States without having been admitted or paroled. *Id.*

<sup>74</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302, 110 Stat. 3009-546, 3009-579 to 3009-584 (1996).

<sup>75</sup> Until recently, U.S. policy was to limit expedited removal to immigrants who have been in the United States for less than fourteen days and were within 100 miles of an international land border. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48880 (2004). Statute permits the use of expedited removal anywhere in the United States within two years of entry, and President Donald Trump has indicated an intent to use the statute as broadly as possible moving forward. See 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (2009) (limiting expedited removal to those who cannot establish two years of continuous physical presence); Exec. Order No. 13767, *supra* note 1.

<sup>76</sup> 62 Fed. Reg. 10311, 10352 (Mar. 6, 1997).

<sup>77</sup> See Exec. Order No. 13767, *supra* note 1.

<sup>78</sup> 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B) (2017); 8 C.F.R. § 235.3(b)(4) (2017).

<sup>79</sup> 8 C.F.R. § 208.30(e)(3) (2017). A credible fear requires a “significant possibility” that the individual could establish eligibility for asylum or protection under the Convention Against Torture. G.A. Res. 39/46, art. 3, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984). For a discussion of this burden and possible changes, see discussion *infra* Section II.B.2.

<sup>80</sup> See 8 U.S.C. § 1225(b)(1)(B)(ii) (2017); 8 C.F.R. § 208.30(f) (2017).



## 2. Due Process and the Troubling History of the Plenary Power Doctrine

Thus, it is important to address that crucial right that gives all other rights meaning – due process.<sup>81</sup> There is great tension between CBP’s desire to deport people as quickly as possible and the due process owed to asylum seekers under international, constitutional, and statutory protections. First, as discussed *supra*, the right to due process is enshrined in international human rights law.<sup>82</sup> A person’s immigration status does not lessen a government’s duty to treat an individual with dignity and to adjudicate claims in a manner that preserves fairness and justice. Due process is not a burden; it is a human right. Second, due process for asylum seekers is required by the U.S. Constitution; the Fifth Amendment states that “No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .”<sup>83</sup>

Over time, the U.S. courts have attempted to qualify this protection, suggesting that “person” does not mean any person. However, even accepting this proposition *in arguendo*, it can be argued that the Constitution and the Immigration and Nationality Act protect the due process rights of asylum seekers, and those rights extend along the border and at ports of entry. The question of which categories of immigrants are guaranteed due process according to U.S. courts is complex.<sup>84</sup> Although it is well established that Consti-

<sup>81</sup> This paper focuses on due process and the right to petition for asylum. However, while it is beyond the scope of this paper, it is important for advocates to remember that courts may be more willing to afford constitutional rights to immigrants at the border in other types of proceedings. For example, it is well established that immigrants are entitled to constitutional rights in criminal and property proceedings. *See Wong Wing v. United States*, 163 U.S. 228 (1896) (finding that a sentence of imprisonment and hard labor could not be imposed for the crime of illegal entry into the United States without a jury trial); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (The United States cannot expropriate an alien’s property without just compensation). The justification often used for distinguishing immigration proceedings is Congress’ broad powers in controlling admissions at the border, discussed *infra* Section I.B.2.

<sup>82</sup> “Every migrant has the right to due process of law before the courts, tribunals, and all other organs and authorities administering justice, as well as those specifically charged with making status determinations regarding migrants.” The IMBR Initiative, *supra* note 25, at 57; *see also* Universal Declaration of Human Rights, *supra* note 35; International Covenant on Civil and Political Rights, *supra* note 62; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 62; G.A. Res. 40/144, art. 5(1)(c), Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (Dec. 13, 1985).

<sup>83</sup> U.S. CONST. amend. V.

<sup>84</sup> *See* Kendall Coffey, *The Due Process Right To Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL’Y REV. 303 (2001), for a discussion of the history of due process and asylum.

tutional due process extends to deportation hearings,<sup>85</sup> the extent to which due process applies at ports of entry remains unresolved when it comes to asylum. In some circumstances, those who are seeking entry into the United States at ports of entry have been granted less due process than those who have already entered the country. Indeed, the U.S. Supreme Court in 1950 stated, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."<sup>86</sup> This line of case law is so bafflingly at odds with the rule of law that immigration law scholar T. Alexander Aleinikoff once opened an article discussing the 1950 decision with the line, "Occasionally, the Supreme Court makes a statement about the Constitution that simply cannot be true."<sup>87</sup> The idea that Congress can limit due process however it likes for those seeking entry, has in part been justified by the premise that admission to the country is a privilege not a right and the federal government has plenary power over who enters the country.<sup>88</sup> After a long period asserting the plenary power of Congress over immigration law, often tinged with discriminatory undertones,<sup>89</sup> courts began to suggest that due process may attach in circumstances where there is a liberty or property interest.<sup>90</sup> Then, Congress largely reset the rules with the creation of expe-

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<sup>85</sup> See *INS v. St. Cyr*, 533 U.S. 289, 305 (2001); see also *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50–51, *modified*, 339 U.S. 908 (1950) ("A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.").

<sup>86</sup> *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

<sup>87</sup> T. Alexander Aleinikoff, *Aliens, Due Process and 'Community Ties': A Response to Martin*, 44 U. PITT. L. REV. 237, 237 (1983).

<sup>88</sup> See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (citing *Knauff*, 338 U.S. at 542; *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-60 (1892)).

<sup>89</sup> See, e.g., *Knauff*, 338 U.S. at 544; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). See Brief of Amici Curiae Members of Asian Americans Advancing Justice in Support of Respondents, *Jennings v. Rodriguez*, 136 S.Ct. 2489 (No. 15-1204), for a general overview of the controversial and racially charged history of plenary power doctrine.

<sup>90</sup> See *INS v. St. Cyr*, 533 U.S. 289, 306 (2001) (citing cases establishing the right to habeas corpus at ports of entry); *Selgeka v. Carroll*, 184 F.3d 337 (4th Cir. 1999); *Campos v. Nail*, 43 F.3d 1285 (9th Cir. 1994); *Maldonado-Perez v. I.N.S.*, 865 F.2d 328, 332 (D.C. Cir. 1989); *Augustin v. Sava*, 735 F.2d 32, 36-37 (2d Cir. 1984); *Landon v. Plasencia*, 459 U.S. 21, 35 (1982) (noting that courts should not impose specific procedures, but may assess whether the minimum requirements of procedure have been met at ports of entry for returning immigrants); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1034-38 (5th Cir. 1982).

dited removal and a new procedural framework in 1996.<sup>91</sup>

Since then, legal challenges have been stymied by restrictions codified in 8 U.S.C. § 1252(e)(2)-(3). Congress included a provision in IIRIRA stating that any challenges to the expedited removal statute and regulations must be brought within the United States District Court for the District of Columbia within sixty days of implementation.<sup>92</sup> In the case of the original statute, this means the deadline was May 31, 1997. Despite advocates rushing to challenge the law within this time frame, the brief window made it difficult to find plaintiffs with standing on asylum matters. The D.C. Circuit abided by the sixty-day time limit as a jurisdictional restriction, noting that the questions of due process for asylum-seekers would not be reached on the merits due to a lack of third-party standing.<sup>93</sup> This created an absurd result: challenges that did not conveniently manifest themselves during a 60-day window in 1997 have been difficult to raise twenty years later absent any future regulatory changes which would permit a renewed challenge on the validity of the system.<sup>94</sup> This jurisdictional problem has largely shifted the conversation into the realm of challenges regarding failure to comply with those procedures outlined in the statute and regulations, as well as cases involving habeas corpus,<sup>95</sup> a writ that can be used to challenge the legality of an arrest or detention before a judge. In this context, recent case law addressing the plenary power doctrine has not been favorable for asylum seekers. In 2016, the Court of Appeals for the Third Circuit accepted the plenary power doctrine as a foregone conclusion and summarily found that admission is a privilege in the context of asylum.<sup>96</sup> In *Castro v. U.S. Department of Homeland Security*, the court determined that the Suspension Clause, which states that the writ of habeas corpus may only be suspended in times of rebellion or invasion,<sup>97</sup> did not apply to asylum seekers who have not been legally admitted into the United

<sup>91</sup> See *supra* note 74.

<sup>92</sup> 8 U.S.C. § 1252(e)(3)(B) (2017).

<sup>93</sup> *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1357 (D.C. Cir. 2000).

<sup>94</sup> *But see Delgado-Arteaga v. Sessions*, 873 F.3d 553 (7th Cir. 2017) (finding that the petitioner suffered injury in fact when he was denied opportunity to apply for asylum on basis that he was subject to reinstated order for his removal, and thus had standing to challenge statute preventing him from applying for asylum on that basis).

<sup>95</sup> See 8 U.S.C. § 1252(e)(2).

<sup>96</sup> See generally *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016). Prior to *Castro*, the Third Circuit had found that asylum safeguards were necessary for due process, although with a statutory as opposed to constitutional basis. See *Chi Thon Ngo v. INS*, 192 F.3d 390, 395 (3d Cir. 1999); *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996).

<sup>97</sup> U.S. CONST. art. I, § 9, cl. 2.

States, even when they are already on U.S. soil.<sup>98</sup> This decision was a substantial departure from precedent.<sup>99</sup> Immigration law often distinguishes between those who have legally been admitted into the country and those who have physically entered the country for purposes of determining eligibility for immigration benefits, relief, removability, and criminal prosecution for illegal entry. *Castro*, however, conflates legal admission with attachment of constitutional rights. Previously, the Supreme Court has stated that noncitizens in the United States have a right to habeas corpus regardless of their status, and even sometimes outside the United States.<sup>100</sup> *Castro* tried to circumvent this by saying that there is a difference between noncitizens without status and those who are lawful permanent residents, but this inherently implies that the court is engaging in some sort of balancing of interests in determining which immigrants merit habeas without making a full analysis of the interests of asylum seekers. Furthermore, the two cases that *Castro* most relies upon, as examples of people denied rights because they had not made a legal entry, both involved exclusion based on specific national security concerns, distinguishing them from ordinary noncitizens at ports of entry and along the border.<sup>101</sup>

### 3. Defending Due Process in the Context of Asylum

Thus, the debate arrives at the ultimate issue: The Supreme

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<sup>98</sup> *Castro*, 835 F.3d 553.

<sup>99</sup> Although *Castro* relied on two Supreme Court cases regarding the “commitment to the full breadth of the plenary power doctrine,” it neglected to address that one of these cases distinguished illegal entries as entries and that both cases involved exclusion on national security grounds. See *Castro* 835 F.3d at 443 (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). But see *Mezei* 345 U.S. at 212 (“It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”). More recent Supreme Court precedent has expanded on this distinction. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (finding that noncitizens detained at Guantanamo Bay were entitled to habeas corpus); *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) (“Once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent.”); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.”).

<sup>100</sup> See *INS v. St. Cyr*, 533 U.S. 289, 300-01, 305-306 (2001).

<sup>101</sup> *Mezei*, 345 U.S. at 216 (“An exclusion proceeding grounded on danger to the national security, however, presents different considerations.”); *Knauff*, 338 U.S. at 540 (addressing the use of habeas corpus to challenge the Attorney General’s right to exclude petitioner for security reasons without a hearing).

Court has never reached the question of due process or habeas corpus for asylum seekers at ports of entry. *Castro* concluded that asylum seekers who have not been admitted to the United States have no constitutional rights on the assumption that the plenary power is absolute for arriving noncitizens without analyzing any of the special circumstances associated with asylum. As such, it is worth taking a fresh look at due process at ports of entry, especially in light of the Supreme Court's recent denial of the petition for writ of certiorari to review *Castro*.<sup>102</sup>

However, before diving into arguments supporting due process for asylum seekers, it is important to pause and remember that international law and the U.S. Constitution protect the due process rights of *all* people by virtue of their humanity, and the efforts of U.S. jurisprudence to create categories of people who are not guaranteed full protection under the law is a violation of human rights and an attack on the rule of law.<sup>103</sup> Therefore, while it is necessary to advocate for due process within the domestic legal framework, it is important to recall that ultimately the courts should be pushed to extend due process to all people regardless of their immigration status.

In the context of domestic law, the Supreme Court has never reached the issue of due process for asylum seekers at ports of entry, and the privilege-versus-right and plenary power argument does not hold up in the context of asylum. There is a statutory *right* to apply for asylum and that right explicitly applies at ports of entry and regardless of immigration status.<sup>104</sup> This right constitutes a substantial liberty interest, triggering the attachment of due process rights.<sup>105</sup> The question of asylum as a liberty interest similarly has never landed squarely before the Supreme Court.<sup>106</sup> In *Jean v. Nelson*, the Eleventh Circuit found that asylum seekers have no lib-

<sup>102</sup> *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017).

<sup>103</sup> See The IMBR Initiative, *supra* note 25; see also Universal Declaration of Human Rights *supra* note 35; International Covenant on Civil and Political Rights *supra* note 63; International Convention on the Elimination of All Forms of Racial Discrimination *supra* note 62; G.A. Res. 40/144, art. 5(1)(c), Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (Dec. 13, 1985).

<sup>104</sup> See 8 U.S.C. § 1158(a)(1) (2017).

<sup>105</sup> See *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1039 (5th Cir. 1982); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1504 (C.D. Cal. 1988), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990). *But see Jean v. Nelson*, 727 F.2d 957, 957 (11th Cir. 1984) (distinguishing which types of statutory provisions regarding immigrants to which due process attaches).

<sup>106</sup> See *Jean v. Nelson*, 472 U.S. 846, 855 (1985) (choosing to rely on statutory inter-

erty interest because asylum is discretionary and there is only a right to apply, not to asylum itself, and the First Circuit has come to a similar conclusion.<sup>107</sup> However, it is inaccurate to state that the law only provides discretionary relief. U.S. immigration law includes nondiscretionary relief in the form of withholding of removal and protection under the Convention Against Torture for those who may not be eligible for asylum, but who would more likely than not face persecution or torture if returned to their country of origin.<sup>108</sup> Furthermore, as explained by the Fifth Circuit, the right to petition in the case of asylum must qualify as a liberty or property interest sufficient to invoke due process if asylum is to have any meaning at all.<sup>109</sup> The Ninth Circuit also has at least found some circumstances where an asylum seeker at the border would be entitled to due process safeguards.<sup>110</sup> Indeed, the Ninth Circuit noted that there can hardly be any greater liberty interest than escape from persecution and possible death.<sup>111</sup>

Under U.S. law, the courts should weigh the private interest at stake, the likelihood of error, and the government's interest to determine the level of process due pursuant to the balancing test established in *Mathews v. Eldridge*.<sup>112</sup> First, in the case of asylum, the private interest is uniquely powerful – a liberty interest tied to a right to petition combined with a liberty interest based on the threat to life and security that is intrinsic in asylum claims. Second, the likelihood of error in the absence of due process is high and well-documented.<sup>113</sup> People escaping persecution have suffered se-

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pretation in order to avoid the constitutional due process and equal protection questions).

<sup>107</sup> See *Jean*, 727 F.2d at 981–82 (“[T]he Refugee Act does not create an entitlement to asylum.”); *Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987).

<sup>108</sup> See 8 U.S.C. § 1231(b)(3) (2017); 8 C.F.R. § 1240.8(d), 1208.16, 1208.17, 1208.18 (2017); see also *Osorio v. INS*, 18 F.3d 1017, 1032 (2d Cir. 1994) (finding that a noncitizen denied asylum as a matter of discretion remains eligible for withholding).

<sup>109</sup> *Haitian Refugee Ctr.*, 676 F.2d at 1039.

<sup>110</sup> In reviewing the treatment of Salvadorans seeking asylum in the United States, the Ninth Circuit upheld a judge's finding that one “cannot overstate the dire consequences attending an erroneous deprivation of these rights. Removal to a country overrun with civil war, violence, and government-sanctioned terrorist organizations may lead to the most serious of deprivations.” *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1504 (C.D. Cal. 1988), *aff'd sub nom.* *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

<sup>111</sup> *Id.*

<sup>112</sup> See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>113</sup> See, e.g., CASSIDY & LYNCH, *supra* note 18; ACLU, *supra* note 18; AM. IMMIGRATION COUNCIL, *supra* note 12, at 9–10; Joshua Partlow, *U.S. Border Officials Are Illegally Turning Away Asylum Seekers*, *Critics Say*, WASH. POST (Jan. 16, 2017), <https://perma.cc/BSJ6-ZNKS>.

vere trauma, often distrust authority figures because of past abuse, have had very little time to prepare their cases given the urgency of their flight, and are seldom well-educated in the intricacies of asylum law.<sup>114</sup> For example, a gay man raped and tortured by uniformed police officers in his home country because of his sexual orientation may be hesitant to present the details of his life story to an imposing, uniformed stranger at the U.S. border without substantial safeguards in place. Furthermore, unlike a court, border officers are ill-equipped, and, in fact, not allowed to deal with the complex factual and legal determinations that are central to asylum claims.<sup>115</sup> Third, while the government interest in controlling admissions into the country is well established, that control still must comport with the rule of law.<sup>116</sup>

Furthermore, border control is not the government's *sole* interest. The United States has a substantial humanitarian interest in ensuring the protection of asylum seekers, and the 1967 Protocol and the Refugee Act of 1980 are at their hearts a categorical declaration that this humanitarian interest is more important than ordinary immigration controls. While the government often cites its interest in preventing crime, terrorism, and fraud, as reasons to maintain tight controls over border security, the INA addresses these issues in the asylum adjudication process. Thus, granting asylum seekers due process does not threaten these government interests.

Therefore, the balancing test shows a strong liberty interest, a high risk of error, and a strong government interest in, not against, due process. As such, asylum seekers merit substantial due process even under this test.<sup>117</sup>

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<sup>114</sup> See Declaration of Stuart L. Lustig, M.D., M.P.H., on behalf of the Center for Gender & Refugee Studies, University of California Hastings College of the Law (Mar. 2, 2017) (on file with the CUNY Law Review).

<sup>115</sup> 8. U.S.C. § 1225(b)(1)(A)(ii) (2017) (stating that immigration officers must refer asylum seekers to an interview conducted by an asylum officer).

<sup>116</sup> "Although the Executive and Legislative branches have the power to make foreign policy determinations, it is the responsibility of this Court to ensure that the due process rights of persons within the United States are respected."

*Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1503 (C.D. Cal. 1988), *aff'd sub nom.* *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990). See Lenni B. Benson, *Immigration Adjudication: The Missing "Rule of Law,"* 5 J. MIGR. & HUM. SEC. 331 (2017), for an interesting discussion of the hallmarks of justice and rule of law and their absence in the U.S. immigration system.

<sup>117</sup> It is also worth noting that separate from a general right to due process, the Administrative Procedure Act, Pub. L. No. 79-404, § 6, 60 Stat. 237, 240 (1946), arguably creates a statutory right to counsel for persons "compelled to appear in person before an agency or representative" of the government, including the Department of Homeland Security. See also Emily Creighton & Robert Pauw, *Right to Counsel Before*

In addition, courts have carved out distinctions between challenging the practical application of the expedited removal process to asylum seekers as opposed to the statute itself. This is an area that remains ripe for litigation and advocacy.<sup>118</sup> As noted by the Eleventh Circuit, “the existence of this protected right to apply for asylum bars government officials from adopting policies that conflict with the terms of the statute, applicable regulations, and their own announced operating procedures.”<sup>119</sup> For example, despite repeated challenges over more than two decades, the Ninth Circuit has upheld a permanent injunction setting out specific procedures for immigration officers to screen Salvadoran immigrants for potential asylum claims, finding that modern procedures had not cured the original concerns about abuse.<sup>120</sup> In the initial decision in 1982, a district judge found that Salvadorans with legitimate asylum claims were being summarily removed from the United States through coercion, misrepresentation, and misunderstanding.<sup>121</sup> The judge also noted that the design of the interview process worked against asylum seekers because they were likely to be hesitant to share their trauma with a uniformed U.S. official when they were aware that the U.S. government supported the Salvadoran government that had been complicit in their persecution.<sup>122</sup> As such, the court ruled that due process required notice, access to counsel, and other safeguards. Furthermore, in later challenges by the government, the Ninth Circuit found that this ruling still applied under the expedited removal regime.<sup>123</sup> The plenary power doctrine is not invulnerable.

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DHS, 32ND ANNUAL IMMIGRATION LAW UPDATE SOUTH BEACH, 2011 Edition, <https://perma.cc/W4SW-VUHD>.

<sup>118</sup> Litigation challenging the use of expedited removal at the Artesia family detention center to deny asylum seekers a meaningful opportunity to apply for asylum was voluntarily dismissed after the facility closed. *See* Plaintiffs’ Notice of Voluntary Dismissal, *M.S.P.C. v. Johnson*, No. 1:14-cv-01437-ABJ (D.D.C. voluntarily dismissed Jan. 30, 2015).

<sup>119</sup> *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir.1984).

<sup>120</sup> *Orantes-Hernandez v. Holder*, 321 F. App’x 625, 629 (9th Cir. 2009) (upholding denial of motion to dissolve the injunction); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1504 (C.D. Cal. 1988), *aff’d sub nom.* *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

<sup>121</sup> *See Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 372-74 (C.D. Cal. 1982).

<sup>122</sup> *Id.* at 373, n. 25. The Court states that the evidence before them establishes that Salvadorans are often frightened and confused at the time of their arrest and interrogation, and points to language barriers and general misunderstanding of the court system. *Id.* at 373.

<sup>123</sup> *Orantes-Hernandez v. Holder*, 321 F. App’x 625, 629 (9th Cir. 2009) (upholding denial of motion to dissolve the injunction).



#### 4. Considerations for Advocates

Thus, while jurisdictional regulations and some recent case law have sought to limit rights, advocates should remain aggressive in their efforts to challenge both laws and practices that limit access to asylum. As the new administration considers changes to the expedited removal process, advocates should vigilantly watch for new regulations that restart the clock for jurisdiction, potentially providing openings to challenges based on overarching constitutional grounds. This is especially true if the administration expands expedited removal to encompass any noncitizen anywhere in the United States who has been present for fewer than two years without having been admitted or paroled into the United States.<sup>124</sup> Such changes would only strengthen the argument that due process applies to all asylum seekers. It is far harder to argue that a family living in the heartland of the United States for more than a year does not have substantial property and liberty interests justifying the attachment of due process. Also, an expanded expedited removal program would need sufficient due process to ensure that it is not inadvertently sweeping up citizens and lawful residents.<sup>125</sup>

Furthermore, even without any changes in the system, there is plenty of work to be done in pushing the courts toward full recognition of due process. As the world's view of individual rights has expanded, the plenary power doctrine has increasingly left a bad taste in the mouth of those who utter the phrase to justify the callous mistreatment of immigrants. Indeed, it is of note that instead of arguing that the plenary power doctrine is a blank check to discriminate in immigration, the Trump Administration has gone to great lengths to defend its Muslim "travel ban" as constitutional through other means.<sup>126</sup>

Ultimately, without due process, including notice of the right to seek asylum, a full and fair hearing, and access to counsel, the United States cannot fulfill its obligation to ensure it does not return people to persecution.

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<sup>124</sup> See textual footnote, *supra* note 75.

<sup>125</sup> See, e.g., ACLU, *supra* note 18 (documenting examples of U.S. citizens erroneously deported under expedited removal, including the deportation of people with mental disabilities).

<sup>126</sup> See Margo Schlanger, *Symposium: Could This Be the End of Plenary Power?*, SCOTUSBLOG (Jul. 14, 2017, 9:45 AM), <https://perma.cc/6YNR-DA48>.

## II. LIMITING ACCESS TO PROTECTION AT THE U.S. - MEXICO BORDER

As detailed in Section I, the United States is obligated, under both domestic and international law, to respect the principle of *non-refoulement*, as defined to preclude any measure that may result in refugees being “pushed back into the arms of their persecutors.”<sup>127</sup> Yet, meaningful access to asylum in the United States is under threat at many levels: before reaching the border, at the border, and even while proceedings are pending. In an effort to reduce migration, the United States is at risk of sacrificing careful review of humanitarian claims in the name of speed. It is important to remember that speed and convenience are not the same as efficiency; efficiency implies some level of accuracy. Efforts to more quickly exclude those who ultimately might be ordered removed jeopardizes those with legitimate claims – a substantial number. From 2005 to 2015, the United State granted an average of 24,397 asylum cases a year.<sup>128</sup> Also, although asylum is just one of many types of immigration relief raised in removal proceedings, there are even more asylum claims awaiting adjudication amidst the more than half a million removal cases pending in the immigration court system’s backlogs.<sup>129</sup> It is not “efficient” to prioritize excluding those who may not be eligible at the expense of those who are. Rather, efforts should focus on fully assessing claims to make sure that decisions on eligibility are not made rashly. In addition, even those claims that are ultimately denied in immigration court should not be conflated with fraud. Asylum law is complex and full of unsettled areas of law, and families may have genuine fears of persecution worth adjudicating even if they are ultimately unable to meet their burden or to fit their case within a legal theory. A failed claim is not the same as a frivolous claim.<sup>130</sup>

Keeping the importance of meaningful access to the right to asylum in mind, this section will discuss several actual and proposed obstacles to asylum at the border: barriers to physically ap-

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<sup>127</sup> See HATHAWAY, *supra* note 27, at 301.

<sup>128</sup> See DEP’T OF HOMELAND SEC., 2015 YEARBOOK OF IMMIGRATION STATISTICS 43 (2016), <https://perma.cc/5V92-GVAM>.

<sup>129</sup> See *Immigration Court Backlog Tool*, TRACIMMIGRATION (last visited Dec. 10, 2017), <https://perma.cc/Z3L6-EQ8V> (showing a total of 650,411 pending immigration court cases as of October 2017).

<sup>130</sup> “Frivolous” is a term of art in immigration law. See 8 C.F.R. § 1208.20 (2017) (“[A]n asylum application is frivolous if any of its material elements is deliberately fabricated.”). If an immigration judge makes a finding that an applicant knowingly made a frivolous claim, that immigrant is permanently barred from any immigration benefit, including asylum. See 8 U.S.C. § 1158(d)(6) (2017).

proaching the border, procedural and practical limits on due process at the border, and proposals to return asylum seekers to Mexico while proceedings are pending.

*A. Access to the Border: Border Externalization Undermines the Right to Asylum*

The world faces historic numbers of people moving across international borders, driven by political unrest, conflict, climate change, globalization, and other factors.<sup>131</sup> This increase in migration has also coincided with rising xenophobia in many countries and efforts to reduce both legal and illegal immigration.<sup>132</sup> Public conversation often focuses on dramatic gestures like President Trump's proposed wall,<sup>133</sup> or increases in deportation.<sup>134</sup> However, countries increasingly have attempted to quietly divert asylum seekers by stopping people long before they reach a border or port of entry.<sup>135</sup>

1. When States Conspire to Keep Migrants at a Distance

State efforts to prevent people from reaching their territories, collectively referred to as "border externalization," are not novel tactics. Systems to stop migration flows have often been justified as

<sup>131</sup> As of 2015, there were an estimated 244 million international migrants in the world, up from 173 million in 2000. UNITED NATIONS, INTERNATIONAL MIGRATION REPORT 2015 1 (2016), <https://perma.cc/7G2B-CF8Z>. About 54 million immigrants were hosted in North America, lower than in Europe and Asia. *Id.* However, the single largest host country was the United States with 47 million immigrants or about one in every five migrants in the world. *Id.* Meanwhile, UNHCR estimates that there are now 65.6 million forcibly displaced people worldwide and 22.5 million refugees. UNHCR, GLOBAL TRENDS 2 (2017), <https://perma.cc/GS6M-GDHN>.

<sup>132</sup> The world has seen a sharp increase in anti-immigrant sentiment in recent years, and governments have not sufficiently addressed it, according to the Organization for Economic Co-operation and Development. OECD, International Migration Outlook 2016 7-8 (2016), <https://perma.cc/Z92G-SEVD>; see also Bill Frelick, *Dispatches: Tone Down the Scaremongering Over Migrants*, HUM. RTS. WATCH (Aug. 10, 2015, 10:32 PM), <https://perma.cc/W6PT-NNKD>.

<sup>133</sup> Exec. Order No. 13767, *supra* note 1 ("It is the policy of the executive branch to (a) secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism . . .").

<sup>134</sup> Under the Obama administration, the United States saw a dramatic increase in deportations. From 2006 to 2015, just over 3.7 million people were removed from the United States, compared with roughly 1.8 million in the previous ten years. DEP'T OF HOMELAND SEC., *supra* note 128, at 103.

<sup>135</sup> See Bill Frelick et al., *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. MIGR. & HUM. SEC. 190 (2016), for a general overview of border externalization in the context of international law.

efforts to ensure national security, to prevent migrants from making dangerous journeys, to crack down on international human trafficking enterprises, and to aid transit countries in developing their own migration controls.<sup>136</sup> The extent to which border externalization serves these purposes has always been questionable. Turning away a mother and child less than a mile from the U.S.-Mexican border does little to promote any of these goals. Rather, being turned away is likely to make families consider dangerous, desperate, and irregular options for entering the United States.<sup>137</sup> Furthermore, it is important to remember that the question is not whether the United States will be required to admit every person arriving at the border, but merely whether the nation will provide them with a meaningful opportunity to seek humanitarian protection. Despite these limitations, border externalization appears to be growing increasingly bold and increasingly difficult to justify as anything beyond an effort to escape obligations to provide humanitarian protection.

Unfortunately, U.S. courts upheld border externalization in the infamous case of the interdiction on the high seas of Haitian asylum seekers.<sup>138</sup> In *Sale v. Haitian Centers Council, Inc.*, Justice John Paul Stevens stretched semantics to hold that there is no extraterritorial obligation under the Refugee Convention and Protocol.<sup>139</sup> Despite the Convention clearly stating that “[n]o contracting State shall expel or return (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened,” Stevens found that no return “whatsoever” “in any manner” was designed to be read narrowly and must refer only to the return of people already in the United

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<sup>136</sup> See *Home and Away: DHS and the Threats to America, Remarks Delivered by Secretary Kelly at George Washington University Center for Cyber and Homeland Security*, DEP’T OF HOMELAND SEC. (Apr. 18, 2017), <https://perma.cc/KBP2-3G8N>.

<sup>137</sup> See, e.g., Paulina Villegas & Randal C. Archibold, *Mexico Makes Route Tougher for Migrants*, N.Y. TIMES, Sept. 21, 2014, <http://perma.cc/J6XL-SMC7>; Aaron Nelsen & Julysa Sosa, *Mexico: Mothers Searching for Life on Roads of Death*, PULITZER CTR. (Dec. 18, 2016), <https://perma.cc/RKZ8-R63T>; Nina Lakhani, *Central American Migrants Desperate to Reach US Risk New Dangers at Sea*, GUARDIAN (Sept. 15, 2016, 6:00 AM), <https://perma.cc/6DWT-9U9S>.

<sup>138</sup> See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993) (“In sum, all available evidence about the meaning of § 243(h)—the government official at whom it is directed, its location in the Act, its failure to suggest any extraterritorial application, the 1980 amendment that gave it a dual reference to “deport or return,” and the relevance of that dual structure to immigration law in general—leads unerringly to the conclusion that it applies in only one context: the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States.”).

<sup>139</sup> *Id.* at 180-83.

States.<sup>140</sup> He latched onto half of a generic French translation of the term “*refoulement*,” ignoring that the French and Belgian delegates involved in the formation of the Convention, presumably comfortable with their own language and a concept originating from their countries, had made it clear that as a legal term of art “*refoulement*” included efforts to trap people outside a State.<sup>141</sup> Furthermore, Stevens’ interpretation makes the Convention’s use of the phrasing “expel or return,” rather than just “expel,” redundant. Stevens suggested that the drafters of the Convention may simply have never contemplated the idea of States keeping asylum seekers from their borders,<sup>142</sup> ignoring the fact that the Convention was a product of World War II and countries like the United States having done exactly that. In *Sale*, the United States invited destination States to close their doors, and UNHCR and international rulings condemned the decision.<sup>143</sup> Now, as the United States pushes its virtual border further and further out from its physical border, advocates should consider new attempts to overturn *Sale*. Otherwise, the Convention has little point unless it was meant to reward slipping into the country without inspection or based on false pretenses.

Border externalization can take many forms, including interdiction, visa regimes, or agreements directing third parties to block movement through transit countries. When the U.S. Coast Guard intercepted hundreds of thousands of Haitians fleeing the violent fallout of a 1990 political coup, later detaining many of them in Guantanamo Bay, that was border externalization.<sup>144</sup> When the United States sent the Coast Guard to stop any of the 930 primarily Jewish refugees from Nazi Germany aboard the *St. Louis* from swimming ashore, that was border externalization.<sup>145</sup> When airlines are required to screen passengers to prevent Syrians from boarding flights headed to the United States, that is border

<sup>140</sup> *Id.* at 188, 191.

<sup>141</sup> U.N. ESCOR, 1st Sess., 21st mtg. at ¶¶ 12-15, U.N. Doc. E/AC.32/SR.21 (Feb. 2, 1950), <https://perma.cc/J7GU-8HAT>.

<sup>142</sup> See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 183 (1993).

<sup>143</sup> See *Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 57; *Regina v. Immigration Officer at Prague Airport* [2005] 1 All Eng. Rep. 527 (appeal taken from [2003] 4 All Eng. Rep. 247) (UK); Decision of the Commission as to the Merits of, Case 10.675, Inter-Am. Comm’n H. R., Report No. 51/96 (1997).

<sup>144</sup> Haitian interdiction schemes go back much further to a 1981 agreement between Haiti and the United States. Interdiction Agreement Between the United States of America and Haiti, Haiti-U.S., Sept. 23, 1981, 33 U.S.T. 3559, 3559-60.

<sup>145</sup> See RICHARD BREITMAN & ALAN M. KRAUT, AMERICAN REFUGEE POLICY AND EUROPEAN JEWRY, 1933-1943, 70-73 (1987); see also Tara Magner, *A Less Than ‘Pacific’ Solution for Asylum Seekers in Australia*, 16 INT. J. REFUGEE LAW 53 (2004).

externalization.<sup>146</sup>

Border externalization is a longstanding, inglorious tradition, and the externalization of the U.S.-Mexico border is no exception. As early as 1989, the Immigration and Naturalization Service sought Mexican and Central American cooperation in reducing immigration through the interception and deportation of people heading north.<sup>147</sup> American policy makers have sought to turn Mexico into a buffer in hopes that Mexico's 500-mile southern border could be an easier defensive position than the 2,000-mile U.S.-Mexico border. In 2008, the U.S. Congress appropriated almost \$2.8 billion for the Mérida Initiative, a bilateral agreement meant to improve security in Mexico, including the creation of a twenty-first century border structure with increased security at Mexico's southern border and efforts to interdict people traveling north with increased patrols and checkpoints along known migration routes.<sup>148</sup> These programs have been widely criticized by human rights advocates for not sufficiently protecting migrants and refugees' rights and failing to screen for those in need of protection.<sup>149</sup> These campaigns to discourage further immigration appear to have largely failed with tens of thousands of immigrants still making the journey every year.<sup>150</sup> Ten of thousands of others have been

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<sup>146</sup> See Victoria Bryan & Alexander Cornwell, *Airlines Complain of Confusion, Costs of U.S. Immigration Order*, REUTERS (Jan. 30, 2017, 12:12 PM), <https://perma.cc/GH72-8LN4>; see also Exec. Order No. 13780, *supra* note 1 (limiting entry to the United States for nationals of Syria, Iran, Libya, Somalia, Sudan and Yemen); 49 U.S.C. § 44901 (2017) (requiring the Transportation Security Administration to oversee passenger screening).

<sup>147</sup> Bill Frelick, *Running the Gauntlet: The Central American Journey through Mexico*, 3 INT'L J. REFUGEE L. 208, 208-09 (1991).

<sup>148</sup> See U.S. EMBASSY - MEXICO, THE MÉRIDA INITIATIVE - AN OVERVIEW (2014), <https://perma.cc/P9W3-VWNU>; CLARE RIBANDO SEELKE & KRISTIN FINKLEA, CONG. RESEARCH SERV., R41349, U.S.-MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND (2017), <https://perma.cc/R7L3-AWZ2>.

<sup>149</sup> See CLARE RIBANDO SEELKE & KRISTIN FINKLEA, CONG. RESEARCH SERV., R41349, U.S.-MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND 29 (2017) ("Human rights conditions in Mexico, as well as compliance with conditions on Mérida assistance, are also likely to continue to be important oversight issues. Along with consideration of providing funds to help secure Mexico's southern border, Congress may consider how to help mitigate concerns about migrants' rights in Mexico."); CTR. FOR MIGRATION STUDIES & CRISTOSAL, *supra* note 46; JESUIT CONFERENCE OF THE U.S. & CAN. & WASH. OFFICE OF LATIN AM., U.S. SUPPORT AND ASSISTANCE FOR INTERDICTIONS, INTERCEPTIONS, AND BORDER SECURITY MEASURES IN MEXICO, HONDURAS, AND GUATEMALA UNDERMINE ACCESS TO INTERNATIONAL PROTECTION (2014) (presenting written testimony to the Inter-American Commission on Human Rights), <https://perma.cc/LN6W-P7GX>.

<sup>150</sup> See Karen Musalo & Eunice Lee, *Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 "Surge" of Central American Women and Children at the US-Mexico Border*, 5 J. ON MIGRATION & HUM. SECURITY 137, 138-39 (2017); see also

subjected to abuses and violations at the hands of government officials in the region.<sup>151</sup>

Deterrence plans ignore the reality that for many people the dire circumstances in their country of origin are far worse than the perilous journey north. Essentially, people are trapped in a burning house, and the United States is hoping that locking the front door will discourage them from trying to escape the flames. Until the root humanitarian crises are addressed, forced migration will continue.

Increasingly, people who have reached northern Mexico face additional barriers when approaching the U.S. border.<sup>152</sup> While the Trump Administration's stated objective of turning immigrants back into Mexico while they await U.S. adjudication of their cases is still taking shape,<sup>153</sup> reports indicate asylum seekers are already facing challenges near the U.S. border.<sup>154</sup> Indeed, many such barriers were already in place under the Obama administration.<sup>155</sup> Barriers include the use of Mexican officials or private contractors to patrol the Mexican side of the border and to pre-screen people for valid entry documents before they are permitted to approach a port of entry.<sup>156</sup> One port adopted an appointment system where asylum

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David Nakamura, *Flow of Central Americans to U.S. Surging, Expected to Exceed 2014 Numbers*, WASH. POST (Sept. 22, 2016), <http://perma.cc/3ZT6-V2VD>. While very early signs showed a decrease in border apprehensions in the month after Trump's inauguration, it is difficult to know whether this will have any long-term effect. Nicholas Kulish & Fernanda Santos, *Illegal Border Crossings Appear to Drop Under Trump*, N.Y. TIMES (Mar. 8, 2017), <http://perma.cc/K4FR-P64C>. It also is worth noting that a decrease in apprehensions does not necessarily mean that there are fewer people in need of protection.

<sup>151</sup> See AMNESTY INT'L, *supra* note 19; CTR. FOR MIGRATION STUDIES & CRISTOSAL, *supra* note 46; see also AMNESTY INT'L, HOME SWEET HOME? HONDURAS, GUATEMALA AND EL SALVADOR'S ROLE IN A DEEPENING REFUGEE CRISIS (2016), <https://perma.cc/2GKB-4ES9>.

<sup>152</sup> See Letter from Jamil Dakwar, Director, Human Rights Program, ACLU, et al., to Paolo Abrão, Exec. Sec'y, Inter-Am. Comm'n on Human Rights (Jan. 15, 2017), <https://perma.cc/RYP6-WMH6>.

<sup>153</sup> See Exec. Order No. 13767, *supra* note 1; Kelly, *Implementing*, *supra* note 1.

<sup>154</sup> AMNESTY INT'L, *supra* note 19; HUMAN RIGHTS FIRST *supra* note 19; see also Letter from Jamil Dakwar, Director, Human Rights Program, ACLU, et al., to Paolo Abrão, Exec. Sec'y, Inter-Am. Comm'n on Human Rights (Jan. 15, 2017).

<sup>155</sup> See, e.g., *Abuse By Private Security Agents at U.S.-Mexico Border Denounced*, SAN DIEGO UNION-TRIB. (Aug. 6, 2013, 5:03 PM), <https://perma.cc/A8SF-8PR7>.

<sup>156</sup> Roque Planas & Elise Foley, *Trump Officials Credit Him For Fewer Border Crossings. It's Not That Simple*, HUFFINGTON POST (Mar. 9, 2017, 8:43 PM), <https://perma.cc/6QC9-3253> (noting that private security guards and CBP agents have more recently directed migrants toward a Mexican branch of the immigration system called Grupos Beta, such practices appear to be becoming more common); see also Partlow, *supra* note 113 (noting the story of a Guatemalan ex-police officer who approached U.S. private security guards and explicitly stated that he had survived two attempts on his

seekers approach Mexican officials to obtain a date and time to present themselves to U.S. authorities at the port of entry.<sup>157</sup> Meanwhile, at other ports of entry, asylum seekers have stated that U.S. and Mexican officials have stopped them from approaching the port of entry because they had improper documentation, the port holding cells were full, there was no asylum available, or simply that United States officials would be upset if patrols let them approach the border.<sup>158</sup>

These practices are deeply concerning because they run against the humanitarian spirit of asylum law and ultimately diminish access to asylum worldwide. If countries able to offer protection collectively close their doors, access to asylum ceases to exist. Indeed, if the United States seeks to help Mexico *refoule* these people to the countries from which they have fled, the United States is responsible for *refoulement*.<sup>159</sup>

Furthermore, beyond the right to seek asylum, these externalization regimes endanger other rights, especially in the case of vulnerable migrants. The movement of people should never be thought of solely as a matter of immigration and refugee law. Each individual is owed the full spectrum of human rights, regardless of his or her location by the simple fact of his or her humanity.<sup>160</sup> Women, children, persons with disabilities, and other groups of migrants may be owed additional rights by virtue of their special legal status under international law.<sup>161</sup> For example, the fundamental

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life, but was told to seek out Mexican immigration officials who summarily refused to assist him).

<sup>157</sup> HUMAN RIGHTS FIRST, *supra* note 19; Sandra Dibble, *Immigration Appointments Renewed for Haitians at San Ysidro*, SAN DIEGO UNION-TRIB. (Sept. 12, 2016, 10:10 PM), <http://perma.cc/7H96-R9RZ>; see also Eliot Spagat, *Haitians Mass at US-Mexico Border Despite Deportation Policy*, ASSOCIATED PRESS (Oct. 7, 2016), <https://perma.cc/9FRG-RH2M>.

<sup>158</sup> See HUMAN RIGHTS FIRST *supra* note 19; BORDERLAND IMMIGRATION COUNCIL, DISCRETION TO DENY (2017), <https://perma.cc/FBS9-T9Q6>; see also Letter from American Immigration Council, *supra* note 19.

<sup>159</sup> See Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, at 160, U.N. Doc. A/56/10 (2001) <https://perma.cc/NE6C-4WE3> ("A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.").

<sup>160</sup> See The IMBR Initiative, *supra* note 25; Universal Declaration of Human Rights, *supra* note 35, at preamble ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .").

<sup>161</sup> See Convention on the Rights of the Child, *supra* note 62 (although the United States remains the only State not to ratify the Convention on the Rights of the Child, it is still obligated not to undermine the treaty as a signatory); International Conven-



principle that should be applied when dealing with a child is the best interests of the child.<sup>162</sup> Single-minded deportation from Mexico to the south neglects the question of what it means to deport children from Mexico to a country where they have no parents when they are attempting to reunify with family in the United States.<sup>163</sup> In addition, the militarization of immigration often creates situations that are inappropriate for children, and children should never be subject to the substantial harm that can be caused by detention.<sup>164</sup> Circumstances that arise during migration may increase an individual's vulnerability and call for a proportional increase in State protections. For example, special precautions should be taken to protect the victims of human trafficking instead of criminalizing their trauma. As these examples illustrate, the United States cannot ignore the other rights that are implicated when it engages in border externalization.

## 2. Considerations for Advocates

Advocates should seek to hold the U.S. and regional governments accountable for rights violations and for undermining access to asylum. For this reason, it is important for advocates to think not just about the border, but about Mexico and other transit States. Building relationships with Mexican counterparts and helping de-

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tion on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *adopted* Dec. 13, 2006, 2515 U.N.T.S. 3 (as a signatory, the United States is obligated not to undermine the treaty); G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>162</sup> “The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, takes into account the child's view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated.” Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin on Its Thirty-Ninth Session, ¶¶ 1, 79, U.N. Doc. CRC/GC/2005/6 (2005), <https://perma.cc/2GN8-UYT5>.

<sup>163</sup> According to Mexico's National Commission of Human Rights, 38 percent of unaccompanied children encountered by Mexican authorities are seeking to reunite with relatives in the United States. See COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS MEXICO, <https://perma.cc/EZ5F-Y4VM>.

<sup>164</sup> See Jorge Bustamante (Special Rapporteur on the Human Rights of Migrants), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/11/7 (May 14, 2009), <https://perma.cc/CPA5-BHWN>; U.N. Secretary-General, *Note to the General Assembly*, U.N. Doc. A/64/213 (Aug. 3, 2009), <https://perma.cc/3AZC-WQBA>; see also INT'L DET. COAL., CAPTURED CHILDHOOD 58-95 (2012), <https://perma.cc/7G4F-Y5WW>; Brief of Amici Curiae Youth Advocacy Organizations in Support of Jenny Lisette Flores, Et Al., Plaintiffs-Appellees, *Flores v. Sessions*, No. 17-55208, 2017 WL 957660 (9th Cir. July 5, 2017).

velop resources in Mexico will better ensure that asylum seekers have access to meaningful protection. Also, support for immigration control programs should be conditioned on the development of, training in, and compliance with better humanitarian screening mechanisms. As the United States, abdicates leadership in protecting migrants' rights, advocates also should encourage other States in the region to step up to promote positive norms in the Americas. Moreover, government leaders and officers must constantly be reminded of the human toll and inappropriateness of externalization policies.<sup>165</sup>

*B. Applying for Protection at Ports of Entry: Efforts to Quickly Remove or Bar Immigrants Create Barriers to Meaningful Access*

1. Screening by Customs and Border Protection

For those who make it to a port of entry, the next step is for asylum seekers to present themselves to a CBP officer for referral to a protection screening or directly to asylum proceedings.<sup>166</sup> This is made challenging by the degree to which it depends on CBP officers, with little oversight, to identify and refer asylum seekers to credible fear interviews. CBP's role is to flag potential asylum seekers, not to assess the merits of a claim.<sup>167</sup> Both statute and regula-

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<sup>165</sup> In response to an executive order seeking to limit the flow of refugees, UNHCR reminded the United States: "Americans have long played a crucial role in promoting global stability while simultaneously exemplifying the highest humanitarian ideals, from support for refugee emergencies overseas, to welcoming some of the most vulnerable refugee families in the United States to rebuild their lives in safety, freedom and dignity. This is the gold standard in refugee protection and a powerful model for all countries. At a time of record-high levels of forced human displacement, this kind of humane leadership is needed more than ever." See Press Release, UNHCR, UNHCR Underscores Humanitarian Imperative for Refugees as New U.S. Rules Announced (Mar. 6, 2017), <https://perma.cc/XUB8-R6A6>.

<sup>166</sup> See 8 U.S.C. §§ 1225(b)(1)(A)-(B), 1158 (2017); 8 C.F.R. § 235.3(b)(4) (2017).

<sup>167</sup> CBP officers have neither the time, training, or legal authority to adjudicate asylum claims, although that does not necessarily stop officers from overstepping their role. Such potential for abuse has become even more concerning in light of recent congressional efforts to lower CBP hiring standards because of difficulty finding enough eligible candidates. See *Legislative Efforts to Lower CBP Hiring Standards*, AM. IMMIGR. LAWS. ASSOCIATION (June 9, 2017), <https://perma.cc/3LS8-2P6Y>. AILA issued a particularly poignant reminder of why lowering hiring standards is dangerous: "Congress should not be weakening hiring standards for CBP when they have a long-standing history with corruption, excessive force, and misconduct. Border patrol agencies worldwide are prone to corruption, and CBP has been no exception. Agents brought on during a hiring surge in the 2000's were frequently corrupt and prone to misconduct. According to the Government Accountability Office, there were 2,170 reported incidents of CBP employees arrested for misconduct between 2005 and 2012. Almost 200 current or former CBP employees were arrested or indicted since October 2004 for corruption-related activities." AILA, AILA RECOMMENDS VOTE NO

tion indicate that a person arriving at a port of entry should be referred to the asylum office if the immigrant indicates an interest in applying for asylum or a fear of persecution.<sup>168</sup> CBP must read a series of statements advising immigrants of these rights and of a screening for fear.<sup>169</sup> There is no formal requirement that the asylum seeker express fear in a particular manner. This is a significant point since it protects those who are afraid but who may not have previously received any legal advice on the protections that might be available to them in the United States. The sufficiency of non-verbal clues is also important since many asylum seekers may be hesitant to speak openly about their fear of persecution or their best language may be one for which interpreters are not readily available, such as one of Central America's many indigenous languages.<sup>170</sup> It can be difficult to revisit a traumatic experience, and a person may be even more nervous to speak up about issues like gender identity or sexual abuse when traveling with a family member, when accompanied by a human trafficker, or simply when being questioned by a stranger through an interpreter. In short, CBP officers have historically been encouraged at this initial stage to "apply the criteria generously."<sup>171</sup>

While this identification and referral might seem like a relatively straightforward duty, the challenge is that because this is seen as an administrative function as opposed to an evaluation of a protection claim, there is very little oversight or due process.<sup>172</sup> In addition, the D.C. District Court has held that immigrants in expedited removal do not have a right to counsel at this stage.<sup>173</sup>

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ON H.R. 2213, "ANTI-BORDER CORRUPTION REAUTHORIZATION ACT" (2017), <https://perma.cc/3GBJ-G8QV>.

<sup>168</sup> See 8 U.S.C. § 1225(b)(1)(A)(ii) (2017); 8 C.F.R. § 235.3(b)(4) (2017).

<sup>169</sup> See 8 C.F.R. § 235.3(b)(4)(i) (2017).

<sup>170</sup> See Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 484-90 (2016); Declaration of Stuart L. Lustig, M.D., M.P.H., *supra* note 114.

<sup>171</sup> 2017 CREDIBLE FEAR LESSON PLAN, *supra* note 23.

<sup>172</sup> See Letter from American Immigration Council et. al to Meghan H. Mack, Officer of Civil Rights & Civil Liberties, Dep't of Homeland Sec., John Roth, Inspector Gen., Dep't of Homeland Sec. (Nov. 13, 2014), <https://perma.cc/6YDU-VPVY>; see also *United States v. Peralta-Sanchez*, 847 F.3d 1124, 1144 (9th Cir. 2017) (Pregerson, J., dissenting) ("There is no hearing, no neutral decision-maker, no evidentiary findings, and no opportunity for administrative or judicial review. This lack of procedural safeguards in expedited removal proceedings creates a substantial risk that noncitizens subjected to expedited removal will suffer an erroneous removal." (footnote omitted)).

<sup>173</sup> See *Am. Immigration Lawyers Assoc. v. Reno*, 18 F. Supp. 2d 38, 55 (D.D.C. 1998), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000) ("[Banning] an alien's access to counsel during the secondary inspection stage is reasonable in view of Congress's dual pur-

Although the CBP officer's decision is reviewed by a supervisor, this review is done without any opportunity for asylum-seekers to advocate for themselves.<sup>174</sup> Furthermore, concerns arise when this initial screening is placed in the hands of officers who in many ways operate day to day with a mindset that they are at war with irregular immigration.<sup>175</sup> As such, if a CBP officer says that a deportee never expressed fear and the deportee states that she repeated over and over again that she was afraid to return, the only people who know the truth of what was actually said are the officer and the asylum seeker. In one particularly worrying example, CBP records indicate that only 1.9 percent of 42,093 Hondurans were referred to a credible fear interview from 2011 to 2012.<sup>176</sup> This statistic seems implausible given that Honduras is one of the most dangerous countries in the world.<sup>177</sup> A Human Rights Watch report detailed interviews with several Hondurans and found that they had been turned away at the border even though they were fleeing for their lives.<sup>178</sup> Several indicated that they were discouraged from applying for asylum and officers attempted to coerce them into signing forms they did

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poses in providing fair procedures while creating a more expedited removal process."); see also 2017 CREDIBLE FEAR LESSON PLAN, *supra* note 23 ("No applicant for admission, either during primary or secondary inspection has a right to be represented by an attorney - unless the applicant has become the focus of a criminal investigation and has been taken into custody. An attorney who attempts to impede in any way your inspection should be courteously advised of this regulation. This does not preclude you, as an inspecting officer, to permit a relative, friend, or representative access to the inspectional area to provide assistance when the situation warrants such action.").

<sup>174</sup> CASSIDY & LYNCH, *supra* note 18, at 23, 39 ("CBP has not implemented USCIRF's 2005 recommendations to videotape interviews for quality assurance purpose and use testers. CBP does subject all secondary inspection decisions to two levels of supervisory review, but this consists of reviews of the file and conversations with the officer, not observing the interview.").

<sup>175</sup> The union that represents CBP's officers has stated that U.S. "political leaders try to keep us from doing our jobs" and that "[t]here is no greater physical or economic threat to Americans today than our open border." *National Border Patrol Council Endorses Donald Trump for President*, NAT'L BORDER PATROL COUNCIL, <https://perma.cc/M79A-MZAY>.

<sup>176</sup> HUMAN RIGHTS WATCH, "YOU DON'T HAVE RIGHTS HERE": US BORDER SCREENING AND RETURNS OF CENTRAL AMERICANS TO RISK OF SERIOUS HARM 23 (2014), <https://perma.cc/QW54-JZKD>.

<sup>177</sup> See HUMAN RIGHTS WATCH, WORLD REPORT 309 (2017) ("Rampant crime and impunity for human rights abuses remain the norm in Honduras. Despite a downward trend in recent years, the murder rate is among the highest in the world."), <https://perma.cc/T6SF-99B2>; OVERSEAS SEC. ADVISORY COUNCIL, U.S. DEP'T OF STATE, HONDURAS 2017 CRIME & SAFETY REPORT (2017), <https://perma.cc/39GP-8F2V>; BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, HONDURAS 2016 HUMAN RIGHTS REPORT (2017), <https://perma.cc/M7QG-K4M4>.

<sup>178</sup> See HUMAN RIGHTS WATCH, *supra* note 176, at 26.

not understand.<sup>179</sup> “The officers don’t pay attention to you. If you say you are afraid they say they ‘can’t do anything,’” one deported Honduran told Human Rights Watch.<sup>180</sup> These concerns are supported by a growing number of complaints by asylum seekers stating that they have presented themselves at a port of entry and declared that they are seeking asylum, sometimes on multiple occasions, only for CBP to promptly turn them away.<sup>181</sup>

The American Immigration Council and the American Civil Liberties Union filed a complaint with DHS calling for an investigation into reports of numerous people being turned away at the border despite expressing a fear of return.<sup>182</sup> In one of the cases summarized in the complaint, a Salvadoran woman fleeing political persecution with her three-year-old child was laughed at by a CBP officer and sent back to Mexico when she expressed a fear of return to her home country.<sup>183</sup> When she came back the next day and pleaded that she was fleeing for her life based on death threats and an attack on her brother because of her political ties, she was yelled at and once again returned to Mexico.<sup>184</sup> Seeing no other option, she then crossed the Rio Grande River and was caught and detained.<sup>185</sup> When a different CBP officer screened her and referred her to a credible fear interview, an asylum officer determined that she indeed had a credible fear and referred her to an immigration court.<sup>186</sup> Cases like this are a disturbing trend suggesting that the CBP referral process is not appropriately protecting asylum seekers.

In May 2017, Human Rights First published a report documenting 125 incidents where CBP officers illegally turned away asylum seekers at seven major ports of entry along the border between late 2016 to April 2017. The cases included asylum seekers from Central America, Colombia, and Turkey, among others. These individuals were fleeing persecution for reasons ranging from trans-

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<sup>179</sup> *Id.* at 27.

<sup>180</sup> *Id.*

<sup>181</sup> See HUMAN RIGHTS FIRST, *supra* note 19; Press Release, Human Rights First, Audio Recording Reveals Border Agents Turning Back Asylum Seekers (July 13, 2017), <https://perma.cc/RR9A-L2U6>; AMNESTY INT’L, *supra* note 19; CTR. FOR MIGRATION STUDIES & CRISTOSAL, *supra* note 46; see also ACLU, *supra* note 18; HUMAN RIGHTS WATCH, *supra* note 176; Campos & Friedland, *supra* note 12; Letter from American Immigration Council, *supra* note 19.

<sup>182</sup> Letter from American Immigration Council, *supra* note 19.

<sup>183</sup> *Id.* at 2-3.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

gender identity to a role as a major political opposition leader.<sup>187</sup> The American Immigration Council, the Center for Constitutional Rights, and Latham & Watkins LLP have filed a lawsuit to explicitly challenge these unlawful turnarounds on the grounds that they violate the statutory right to apply for asylum, the Administrative Procedure Act regarding unlawfully withholding agency action, procedural due process, and the principle of non-refoulement.<sup>188</sup> Unfortunately, the gravity of these abuses is not a new revelation. A 2005 study conducted by the U.S. Commission of International Religious Freedom reported that for each question about fear asked, the likelihood of referral to a credible fear interview doubled.<sup>189</sup> This study described more than 400 secondary inspections and found great variation in whether immigration officials read the required advisals in Form I-876A to border crossers.<sup>190</sup> One of the more upsetting findings was that at the San Ysidro port of entry only 9.7% of immigrants were read a particular paragraph regarding asylum that was supposed to be mandatory.<sup>191</sup> The study also found that the reading of that same paragraph made an immigrant seven times more likely to be given a referral to a credible fear interview.<sup>192</sup>

The Commission revisited this issue in 2016, and among the key findings in its updated report were “continuing and new concerns about CBP officers’ interviewing practices and the reliability of the records they create, including: flawed Border Protection internal guidance that conflates CBP’s role with that of USCIS; certain CBP officers’ outright skepticism, if not hostility, toward

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<sup>187</sup> See HUMAN RIGHTS FIRST, *supra* note 19.

<sup>188</sup> Complaint for Declaratory and Injunctive Relief, *Al Otro Lado, Inc. v. Duke*, No. 3:17-cv-02366-W-KSC (S. D. Cal. filed July 12, 2017) (Bloomberg Law, Court Dockets).

<sup>189</sup> U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: VOLUME II: EXPERT REPORTS 17-18 (2005) <https://perma.cc/3UZW-LYP5>.

<sup>190</sup> See *id.* at 8, 13-19.

<sup>191</sup> *Id.* at 14 tbl.2.2. The CBP was supposed to read the following statement: “U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.” *Id.* at 13.

<sup>192</sup> *Id.* at 17; see also *Orantes-Hernandez v. Gonzales*, 504 F. Supp. 2d 825, 858-61 (C.D. Cal. 2007), *aff’d sub nom.* *Orantes-Hernandez v. Holder*, 321 F. App’x 625 (9th Cir. 2009) (expressing deep concern based on this study and finding that it justified, in part, an injunction to ensure sufficient humanitarian screening).

asylum claims; and inadequate quality assurance procedures.”<sup>193</sup> Similarly, a report by Appleseed found that the United States failed to appropriately screen unaccompanied children for asylum and other protections as required under the Trafficking Victims Protection and Reauthorization Act of 2008.<sup>194</sup> Furthermore, the report determined that the United States repatriated children to Mexico without ensuring that they would be cared for in a safe environment.<sup>195</sup>

## 2. Credible Fear Interviews

Beyond the initial stage of CBP referral, there are also several other limitations in the credible fear process that make meaningful access to asylum difficult. These limitations include an ambiguous burden of proof and persuasion, limits on access to counsel, and restricted opportunities for appeal. Credible fear interviews (“CFIs”) are conducted by asylum officers trained in immigration law, although they are not required to be attorneys, in contrast with immigration judges.<sup>196</sup> The interviews may be as short as thirty to sixty minutes. They also are often performed telephonically, sometimes on a three-way call with an interpreter, and they generally occur very quickly after the CBP referral, a period during which the immigrant is detained.<sup>197</sup> As such, an asylum seeker has very little opportunity to prepare a case, consult with an attorney, and convey a story to the asylum officer. In one particularly interesting study, a researcher found:

Comparing the outcomes of televideo and in-person cases in federal immigration courts, it reveals an outcome paradox: detained televideo litigants were more likely than detained in-person litigants to be deported, but judges did not deny respondents’ claims in televideo cases at higher rates. Instead, these inferior results were associated with the fact that detained litigants assigned to televideo courtrooms exhibited depressed engagement with the adversarial process—they were less likely

<sup>193</sup> CASSIDY & LYNCH, *supra* note 18, at 2.

<sup>194</sup> See generally APPLESEED, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS 31-45 (2011), <https://perma.cc/FGH8-JHCV>.

<sup>195</sup> See generally *id.*

<sup>196</sup> See SCHOENHOLTZ ET AL., *supra* note 72, for an interesting look at how determinations vary based on an asylum officers’ backgrounds, including whether they are a lawyer.

<sup>197</sup> See 8 C.F.R. § 235.3(b)(4)(ii) (2017) (requiring detention until the credible fear determination); CASSIDY & LYNCH, *supra* note 18, at 36, 38 n.53 (reporting that most CFIs occurred telephonically as of 2014 and interviews occurred within nine days of referral).

to retain counsel, apply to remain lawfully in the United States, or seek an immigration benefit known as voluntary departure.<sup>198</sup>

In addition, asylum officers are now being advised in a revised Credible Fear Lesson Plan to make full credibility determinations,<sup>199</sup> which is exceptionally difficult to do telephonically with limited ability to assess the immigrant's demeanor.

Another significant challenge to meaningful access to asylum through the CFI process is the vagueness of the burden of proof used in CFIs. Officially, the burden is a "significant possibility" of eligibility for asylum, which translates to a significant possibility of a reasonable probability of persecution.<sup>200</sup> Neither the CFI standard nor the asylum standard is a traditional or well-defined burden of proof, although asylum's reasonable possibility standard is less than "more likely than not,"<sup>201</sup> and a significant possibility is less than a reasonable possibility. Still, the breadth of the ambiguity leaves a great deal of room for discretion and abuse. However, there are early indications that the Trump Administration is seeking to take a harsher approach. For example, DHS made substantial changes to the Credible Fear Lesson Plan for asylum officers in February of 2017.<sup>202</sup> Among the changes was the removal of a section advising that "[w]hen there is a reasonable doubt regarding the outcome of a credible fear determination, the applicant likely merits a credible fear determination."<sup>203</sup> Instead of advising officers to err on the side of referring people for a full hearing, the new lesson plan simply states that reasonable doubt may be a factor to consider.<sup>204</sup> In addition, the changes also removed references to the fact that it is not the asylum officer's job to make a final determination as to whether the applicant is credible, and they replace references to

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<sup>198</sup> Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 933 (2015).

<sup>199</sup> 2017 CREDIBLE FEAR LESSON PLAN, *supra* note 23, at 18-23.

<sup>200</sup> See 8 C.F.R. § 208.30(e)(2) (2017) (stating the burden for credible fear); 8 C.F.R. § 208.13(b)(2) (2017) (stating the burden for asylum). It also is worth noting that Convention Against Torture protection relies on a higher burden— "more likely than not." See 8 C.F.R. § 1208.16(b) (2017). As such, the standard at the credible fear stage is a significant possibility that someone more likely than not would be tortured.

<sup>201</sup> 8 C.F.R. § 1208.16(b) (2017). Although there is no clear demarcation of what constitutes a well-founded fear, it is often referred to as low as 10 percent risk based on oft-cited dicta in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

<sup>202</sup> 2017 CREDIBLE FEAR LESSON PLAN, *supra* note 23.

<sup>203</sup> Compare 2017 CREDIBLE FEAR LESSON PLAN, *supra* note 23, at 17, with U.S. CITIZENSHIP & IMMIGRATION SERVS., CREDIBLE FEAR 16 (2014) [hereinafter 2014 CREDIBLE FEAR LESSON PLAN], <https://perma.cc/NM7B-93R4> [hereinafter U.S.C.I.S. 2014].

<sup>204</sup> 2017 CREDIBLE FEAR LESSON PLAN, *supra* note 23, at 17.



the “significant possibility” standard with a totality of the circumstances analysis.<sup>205</sup> Other revisions also appear to be setting the stage for more adverse credibility determinations, including a greater focus on records of previous statements to CBP.<sup>206</sup> This is deeply concerning because written records of CBP interviews should not be considered fully reliable because they are not verbatim transcripts even though they are written to appear as though they are.<sup>207</sup> In an amicus brief, the American Immigration Lawyers Association (AILA) cited the example of an interview where a noncitizen stated that he was coming to the United States to look for work.<sup>208</sup> AILA noted that the interview “almost certainly never happened” as transcribed, given that the interviewee was a three-year-old child.<sup>209</sup> Taken as a whole, these changes to the lesson plan suggest an effort to treat the credible fear interview like a full adjudication with a higher burden rather than the initial screening that it is meant to be.

Even prior to these changes, the U.S. Commission on International Religious Freedom had found that the CFI lesson plan had moved too far toward a full adjudication when it was meant to be merely a screening interview prior to a full immigration court hearing.<sup>210</sup>

In addition, asylum seekers have been given limited access to counsel during these proceedings. Regulations provide for an asylum seeker to “consult with any person or persons of his or her choosing” prior to the interview, but the regulations do not provide for representation at the interview.<sup>211</sup> Instead, an attorney or representative is allowed to observe and may make a statement at

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<sup>205</sup> Compare 2017 CREDIBLE FEAR LESSON PLAN, *supra* note 23, at 18, with 2014 CREDIBLE FEAR LESSON PLAN, *supra* note 203, at 17.

<sup>206</sup> Compare 2017 CREDIBLE FEAR LESSON PLAN, *supra* note 23, at 18-19, with 2014 CREDIBLE FEAR LESSON PLAN, *supra* note 203, at 18. In addition, initial numbers show a recent drop in credible fear findings at CFIs, although it is too early to tell the cause with any certainty. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 14.

<sup>207</sup> See *Lin Lin Tang v. U.S. Attorney General*, 578 F.3d 1270, 1279-81 (11th Cir. 2009); *Moab v. Gonzales*, 500 F.3d 656, 660-61 (7th Cir. 2007); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) (“The airport interview is an inherently limited forum for the alien to express the fear that will provide the basis for his or her asylum claim, and the BIA must be cognizant of the interview’s limitations when using its substance against an asylum applicant.”); see also *Balasubramaniam v. INS*, 143 F.3d 157 (3d Cir. 1998) (recognizing challenges presented by language barriers).

<sup>208</sup> See Brief of Amicus, American Immigration Lawyers Association, at 3-5, *Matter of M-R-R- (BIA)* (discussing the unreliability of CBP interview records for purposes of impeachment), <https://perma.cc/A3VF-5G8G>.

<sup>209</sup> *Id.* at 5.

<sup>210</sup> CASSIDY & LYNCH, *supra* note 18, at 36.

<sup>211</sup> 8 C.F.R. § 235.3(b)(4)(ii) (2017).

the end of the interview at the discretion of the asylum officer.<sup>212</sup> Also, even at stages where they are permitted counsel, applicants often struggle to find and communicate with lawyers while held at remote rural detention facilities.<sup>213</sup> This is a serious challenge given the dramatic difference that counsel can make in asylum proceedings. For example, in one government study, applicants found to have a credible fear won asylum in 25% of cases with representation and 2% of cases without representation.<sup>214</sup>

These problems are further compounded by limitations on the right to appeal erroneous decisions. If someone is found not to have a credible fear, they may appeal the decision to an immigration judge for a *de novo* hearing,<sup>215</sup> but there is no further formal appeal, no right to counsel during the hearing, no opening or closing statements, and no more than seven days from the asylum office interview to the court hearing.<sup>216</sup> If the trial-level immigration judge misapplies the law or makes an error, the asylum applicant is statutorily barred from any further appeal or habeas review.<sup>217</sup>

The lack of oversight and appeal also leads to additional complications when an asylum seeker is erroneously removed and then tries to reenter the United States because he is still afraid of returning to his country of origin. When a person with a preexisting removal order enters the United States, that order is reinstated.<sup>218</sup> If someone with a reinstated order expresses a fear, she is referred to a Reasonable Fear Interview (“RFI”) instead of a CFI.<sup>219</sup> This severely limits eligibility for relief even though someone may have the exact same claim as a person in a CFI. In an RFI, the immigrant must show a reasonable possibility of persecution, which is described as equivalent to the burden in a full immigration court hearing, as opposed to the lower burden in a CFI.<sup>220</sup> If someone passes an RFI at the asylum office, they are referred to immigration

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<sup>212</sup> See 8 C.F.R. § 208.30(d)(4) (2017).

<sup>213</sup> CASSIDY & LYNCH, *supra* note 18, at 52-53.

<sup>214</sup> U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *supra* note 189, at 239.

<sup>215</sup> 8 U.S.C. §§ 1225(b)(1)(B)(iii)(III) (2017); 8 C.F.R. §§ 208.30(g), 1003.42(d), 1208.30 (2017).

<sup>216</sup> 8 C.F.R. § 1003.42 (2017).

<sup>217</sup> See 8 U.S.C. § 1252(a)(2)(A), (e) (2017); see *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 431-34 (3d Cir. 2016) (finding that 8 U.S.C. §§ 1252(a)(2)(A), (e) prohibited review of an expedited order of removal); *Shunaula v. Holder*, 732 F.3d 143, 145-47 (2d Cir. 2013); *Khan v. Holder*, 608 F.3d 325, 328-330 (7th Cir. 2010); *Brumme v. INS*, 275 F.3d 443, 446-49 (5th Cir. 2001); *Meng Li v. Eddy*, 259 F.3d 1132 (9th Cir. 2001), *vacated as moot*, 324 F.3d 1109 (9th Cir. 2003).

<sup>218</sup> 8 U.S.C. § 1231(a)(5) (2017); 8 C.F.R. § 1241.8 (2017).

<sup>219</sup> 8 C.F.R. § 1208.31(b) (2017).

<sup>220</sup> See 2017 CREDIBLE FEAR LESSON PLAN, *supra* note 23, at 13.

court for withholding-only proceedings.<sup>221</sup> This means that they must meet a substantially higher burden of proof, and, even if successful, they will be unable to petition on behalf of a spouse or children, they will never be able travel outside the U.S. and they will forever live in legal limbo, under the cloud of a removal order, and without a path to lawful permanent residence.<sup>222</sup> Given the due process concerns previously mentioned, there are serious risks that people with legitimate asylum claims will be erroneously removed and then placed into withholding only proceedings when they attempt to enter the United States a second time. These factors further limit meaningful access to asylum.

### 3. Considerations for Advocates

Additional measures to ensure accountability are necessary if the United States is going to live up to its asylum obligations. Mechanisms should exist to review the cases of people who present themselves at the border seeking asylum and state that they previously were removed from the United States despite expressing a fear of return. Currently, there is no clear way to verify these claims.<sup>223</sup> As a result, many of these people are placed into withholding-only proceedings, a more limited form of relief than asylum for people with prior removal orders.<sup>224</sup> CBP officers should be further trained in the importance of protecting potential asylum seekers and the breadth of conduct that is sufficient for a referral. Resources also should be allocated to create a protection corps within CBP that would help monitor and review credible fear referrals.<sup>225</sup> In addition, advocates must push back against “reforms” that seek to blur the line between CBP referrals, CFIs, and full asylum hearings. With these policies in flux, it is important that advocates keep abreast of changing standards and that they watch for inconsistent or improper implementation that places too great

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<sup>221</sup> 8 C.F.R. § 1208.31(e) (2017).

<sup>222</sup> See 8 CFR § 208.16 (2017). See generally PA. STATE UNIV. DICKINSON SCH. OF LAW CENTER FOR IMMIGRANTS’ RIGHTS & PEA. IMMIGRATION RES. CTR., WITHHOLDING-ONLY PROCEEDINGS TOOLKIT (2014), <https://perma.cc/7U58-AJ4U>.

<sup>223</sup> However, one interesting recent innovation is the use of motions under 8 C.F.R. § 103.5 to reopen CBP decisions. See 8 C.F.R. § 103.5 (2017); *Select Motions to Reopen DHS-Issued Removal Orders*, NAT’L IMMIGR. PROJECT (last visited Dec. 11, 2017), <https://perma.cc/5MWS-JVGS>. Although such motions have traditionally been used to reopen decisions by USCIS and not CBP, the relevant regulations predate the dissolution of the INS and are thus relevant to both subdivisions of the government.

<sup>224</sup> See 8 C.F.R. §§ 208.31, 241.8 (2017).

<sup>225</sup> See, e.g., H.R. 3020, 115th Cong. (2017), <https://perma.cc/DDE6-VW95>.

a burden on asylum seekers prior to their ability to access a full hearing.

In addition to encouraging these improvements, there also are several steps that advocates could take to help ensure that asylum claims are not lost at the CBP referral stage or at CFIs. Attorneys should explore new ways to reach out to asylum seekers before they arrive at ports of entry.<sup>226</sup> Education programs and literature along the border could do more to alert potential asylum seekers of the protections available and their rights and to explain what they should expect at the border. Lawyers will need to continue to build binational relationships and to search for creative solutions to assist immigrants in Mexico, keeping in mind that providing legal services in Mexico is more complex than organizing representation on the U.S. side of the border.<sup>227</sup> Advocates also should work with communities in the United States to share information and resources through international family and community networks. Also, while it is in no way a substitute for the protections discussed *supra*, arriving at the border with a brief, written statement of fear could make it more difficult for CBP to turn people away. However, attorneys should be cautious to ensure that an increase in preparation does not become mandatory. A norm that everyone arrives at the border with a complete asylum application and packet of evidence would ignore the reality that many asylum seekers flee their homes in desperate circumstances and with no access to counsel on either side of the border. They should not be expected, and are certainly not required under the law, to have obtained counsel or familiarized themselves with the intricacies of asylum law before arriving at the border. Furthermore, there is the risk that CBP will accuse anyone who is well prepared of having been coached to memorize a manufactured claim or will suggest that those arriving without pre-prepared evidence do not have bona fide claims.<sup>228</sup>

Finally, even as the administration seeks to reject meritless claims as quickly as possible,<sup>229</sup> it is important to emphasize that

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<sup>226</sup> It is important to remember that there is nothing illegal in presenting oneself at a port of entry, but attorneys should be cautious of the fact that they cannot ethically advise clients to cross the border illegally.

<sup>227</sup> Practically, it may be difficult for U.S. lawyers to obtain the appropriate visa for Mexico if they are not licensed to practice law in Mexico and intend to provide direct services.

<sup>228</sup> HUMAN RIGHTS FIRST, *supra* note 19.

<sup>229</sup> See Kelly, *Implementing*, *supra* note 1. In an earlier draft of this memorandum, the heading "Enhancing Asylum Referrals and Credible Fear Determinations Pursuant to Section 235(b)(1) of the INA" was titled "Restoring Integrity to Asylum Referrals and

initial CBP screening and even CFIs are not the appropriate places to make such determinations. As discussed above, eligibility for asylum is an extremely complex determination under law that requires substantial specialized training for adjudications. There is no way to instantly separate meritorious and non-meritorious claims at the border, and any effort to do so is certain to result in the rejection of legitimate claims. The price of speed should never be human lives.

### C. *Safe Third Country Agreements*

Recent efforts by various nations to curb the flow of migrants, as detailed in Section II(A) above, have been coupled with attempts to deem countries through which asylum seekers transit a “safe third country” or “first country of asylum,” thereby providing legal cover to turn back asylum seekers arriving at their borders.<sup>230</sup> In doing so, asylum seekers are exposed to the possibility of being returned, with only a cursory admissibility determination, to a country through which they transited that has provided or theoretically could have provided protection.<sup>231</sup> *Prima facie* consideration of this concept may lead States to find such a system logical and convenient. If a nation through which an asylum seekers transited has, or could have, provided adequate protection, why should the asylum seeker not be required to return there to seek protection? The answer lies in the rights afforded to asylum seekers, the application of the safe third country concept, and States’ failure to adhere to the procedural protections that attach when attempting to return asylum seekers to a third country. Additionally, because the safe-third country concept provides States a convenient mechanism for summarily turning away unwanted asylum seekers, countries that are, in fact, not safe for migrants may be designated as such,

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Credible Fear Determinations Pursuant to Section 235(b)(1) of the INA” with much harsher rhetoric suggesting that “aliens who file meritless claims should be removed as quickly as possible.” See Unofficial Draft Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., *Implementing the President’s Border Security and Immigration Enforcement Improvements Policies* (Jan. 25, 2017), <https://perma.cc/H9S7-WGT2>. It is unclear whether the administration went with a different version because it decided the language was inappropriate or because it wanted to mask the intent of the memorandum. However, it is worth noting that the memorandum came out just as the administration was struggling with challenges to its “Muslim ban” executive order, with Trump suggesting he could issue a new version with language that would accomplish the same thing but that would be easier to defend in court. See *Trump’s Travel Ban: The Legal Path Ahead for New Executive Order*, VOICE AM. (Feb. 23, 2017, 10:54 PM), <https://perma.cc/4ZV6-MZZZ>.

<sup>230</sup> See Bill Frelick et al., *supra* note 135, at 195.

<sup>231</sup> See *id.*

amounting to *refoulement* in some cases.<sup>232</sup>

Policy and legal experts concur that nothing in international law requires asylum seekers to exercise their right to seek asylum in the first country they enter.<sup>233</sup> UNHCR further determined:

[A]n examination of the internationally accepted principles relating to asylum reveals that none of them suggest—much less prescribe—that the right to seek asylum has to be exercised in any particular country, or that a person who has been forced to escape his country to save his life or freedom would forfeit his right to seek asylum if he does not exercise it in the first country whose territory he has entered.<sup>234</sup>

However, multilateral and bilateral agreements have codified, in certain circumstances, the requirement that asylum seekers apply for asylum in a “safe” third country.<sup>235</sup> For example, in 2002 the United States and Canada signed a safe third country agreement to prevent those in the territory of either country from applying for asylum in the other.<sup>236</sup> Implemented in 2005, the agreement does include exceptions for those with close family ties in the desired destination.<sup>237</sup> However, distinct differences in asylum law, including the United States’ restrictive case law on children seeking protection from criminal gangs, exist between the two countries.<sup>238</sup> As a result, some asylum seekers could expect to receive protection in Canada not afforded to them in the United States. In the wake of President Trump’s restrictive asylum policies, many Canadian organizations have called for the agreement’s suspension.<sup>239</sup>

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<sup>232</sup> See *id.* (discussing Turkey, Indonesia, Sri Lanka and Malaysia as “safe third countries”).

<sup>233</sup> See von Sternberg, *supra* note 58.

<sup>234</sup> *Id.* at 336 (citation omitted).

<sup>235</sup> See Michelle Foster, *Responsibility Sharing or Shifting? “Safe” Third Countries and International Law*, 25 REFUGE 64 (2008) (describing the Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries and the Dublin Regulation II).

<sup>236</sup> Safe Third Country Agreement, Can.-U.S., Dec. 5, 2002, <https://perma.cc/PAT7-VBMH>.

<sup>237</sup> See *id.*

<sup>238</sup> See Lisa Frydman & Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, IMMIGR. BRIEFINGS (Thomas Reuters) Oct. 2012, at 1, <https://perma.cc/NS8W-QHCH>; see also Tobias Gomez v. Canada, [2011] F.C. 1093 (Can. Ont.).

<sup>239</sup> See AMNESTY INT’L CAN. & CANADIAN COUNCIL FOR REFUGEES, *Contesting the Designation of the US as a Safe Third Country* (2017), <https://perma.cc/6EK5-UMZ8>; *Safe Third Country*, CANADIAN COUNCIL FOR REFUGEES, (last visited Nov. 30, 2017) <https://perma.cc/T46X-ASY5> (listing organizations calling for suspension of the Canada-US Safe Third Country Agreement).

Of vital importance to protect against *refoulement*, any “safe third country” designation must include a number of procedural safeguards to ensure that no asylum seeker is turned away without individualized adjudication of their claim.<sup>240</sup> UNHCR explains, “an asylum seeker cannot be removed to a third country in order that he apply for asylum there, *unless that country agrees to admit him to its territory as an asylum seeker and consider his request.*”<sup>241</sup> Outlined by UNHCR in relation to the European Union’s agreement to return refugees to Turkey, procedural safeguards should include: an individual assessment of possible re-admittance into the previous State; access to a fair and efficient determination of protection needs; permission to remain; respect for the standards enshrined in the 1951 Convention and international human rights standards, including protection from *refoulement*; and, where the individual is entitled to protection, a right to legally stay and a timely durable solution are also required.<sup>242</sup> Furthermore, when applying the “safe third country concept” the individual asylum seeker must be guaranteed certain due process rights, principally the right to be heard, and to “rebut the presumption that she or he will be protected and afforded the relevant standards of treatment, in a previous State” based on his or her circumstances.<sup>243</sup> When a decision of inadmissibility is made, the asylum seeker is entitled to appeal that decision before a court or tribunal.<sup>244</sup>

International law also provides another protection against the misuse of the safe third country doctrine – protection against “chain deportation.” For example, the United States would run afoul of their *non-refoulement* obligations by removing a Central American to Mexico if she was likely to subsequently face deportation from Mexico to the country where she faces persecution. UNHCR guidance clearly states that it is *refoulement* to send someone to a “safe” country if that country will then *refoule* the immi-

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<sup>240</sup> See NUALA MOLE & CATHERINE MEREDITH, *ASYLUM AND THE EUROPEAN CONVENTION OF HUMAN RIGHTS*, COUNCIL OF EUROPE (2010), <https://perma.cc/UN2Y-QA52>; UNHCR, *LEGAL CONSIDERATIONS ON THE RETURN OF ASYLUM-SEEKERS AND REFUGEES FROM GREECE TO TURKEY AS PART OF THE EU-TURKEY COOPERATION IN TACKLING THE MIGRATION CRISIS UNDER THE SAFE THIRD COUNTRY AND FIRST COUNTRY OF ASYLUM CONCEPT* (2016) [hereinafter, UNHCR, *LEGAL CONSIDERATIONS*], <https://perma.cc/27VY-9LJC>; JOANNE VAN SELM, *ACCESS TO PROCEDURES ‘SAFE THIRD COUNTRIES’, ‘SAFE COUNTRIES OF ORIGIN’ AND ‘TIME LIMITS’* (2001), <https://perma.cc/ET39-K3UG>.

<sup>241</sup> See MOLE & MEREDITH, *supra* note 240, at 73 (citation omitted).

<sup>242</sup> See UNHCR, *LEGAL CONSIDERATIONS*, *supra* note 240.

<sup>243</sup> *Id.* at 2.

<sup>244</sup> *Id.*

grant to an unsafe country.<sup>245</sup> Any link in the chain, from first removal to the last, violates *non-refoulement* if the ultimate result is return to a country where the individual faces persecution.

As detailed in Section I above, the United States' Immigration and Nationality Act ("INA"), explicitly provides for the right to seek asylum in the United States.<sup>246</sup> One of the enumerated exceptions to this right is, however, a "safe third country" provision. In full, the statute reads:

(A) Safe third country. Paragraph (1) [the right to seek asylum] shall not apply to an alien if the Attorney General determines that the alien may be removed, *pursuant to a bilateral or multilateral agreement*, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and *where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection*, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.<sup>247</sup>

This statutory provision provides that any removal of an asylum seeker to a third country must be undertaken "pursuant to a bilateral or multilateral agreement."<sup>248</sup> Therefore, absent explicit acquiescence by a third country through such an official agreement, the Attorney General may *not* remove an asylum seeker to a third country pursuant to this provision. Furthermore, the statute requires that any such bilateral or multilateral agreement ensure that the individual will not suffer further persecution and will have access to a full and fair procedure in the third country.<sup>249</sup> U.S. regulation also provides for judicial review of any decision to remove an individual pursuant to an established bilateral or multilateral agreement, thereby affording asylum seekers due process in the United States prior to removal.<sup>250</sup> Unaccompanied children are ex-

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<sup>245</sup> States may not send any asylum seeker to a country that will refole them to a third country. See UNHCR, ADVISORY OPINION ON THE EXTRATERRITORIAL APPLICATION OF NON-REFOULEMENT OBLIGATIONS UNDER THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 10 (2007), <https://perma.cc/3DJZ-JL53>; see also von Sternberg, *supra* note 58.

<sup>246</sup> 8 U.S.C.A. § 1158(a)(1) (2017).

<sup>247</sup> 8 U.S.C. § 1158(a)(2)(A) (2017) (emphasis added).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> 8 C.F.R. § 1240.11(g) (2017).



plicitly exempt from the safe third country provision.<sup>251</sup>

While current U.S. law requires a bilateral or multilateral agreement to effectuate a safe third country agreement, legislative proposals have been put forth that would change that requirement. In January 2017, former Representative Jason Chaffetz (R-UT-3) reintroduced the Asylum Reform and Border Protection Act.<sup>252</sup> The proposed legislation would have, among other troubling changes, amended the safe third country provision of the INA to allow the Secretary of Homeland Security to unilaterally declare a country a safe third country, thereby blocking access to the U.S. asylum system.<sup>253</sup> Due process and requirements as to what constitutes a “safe third country” currently in the INA would presumably remain. However, the ability to unilaterally declare a safe third country, for example Mexico,<sup>254</sup> creates the possibility that the political appeal of making such a declaration could override an objective determination as to the country’s suitability to receive and protect refugees.

#### *D. Turning Back Asylum Seekers at Ports of Entry*

Citing Section 235(b)(2)(C) of the INA, President Trump and DHS have directed ICE and CBP officers, “to the extent appropriate and reasonably practicable,” to return some arriving individuals to contiguous territories (Mexico and Canada) while they await removal proceedings before a U.S. immigration judge.<sup>255</sup> Without explanation of how such a system would comply with U.S. and international law, the inclusion of the instruction may be interpreted as a tacit approval of officers to turn back and discourage refugees from seeking asylum.

While the President and DHS appear committed to pursuing an official border policy to turn immigrants back into Mexico, the legal complications of establishing and implementing such a scheme officially, without blatantly violating U.S. law and treaty ob-

<sup>251</sup> 8 U.S.C. § 1158(a)(2)(E) (2017).

<sup>252</sup> Asylum Reform and Border Protection Act of 2017, H.R. 391, 115th Cong. (2017), <https://perma.cc/6JFE-EG84>.

<sup>253</sup> *Id.* at § 12; *see also* Press Release, Human Rights First, House Should Reject Bills that Undermine U.S. Protection of Refugees (Jan. 11, 2017), <https://perma.cc/KQ5V-R7YH>.

<sup>254</sup> Migrants face extreme dangers in Mexico, and the Mexican asylum system is inadequate to screen and adjudicate all asylum seekers from Central America. *See* Maureen Meyer, *Migrants in Transit Face Crimes and Human Rights Abuses*, W.O.L.A., (Nov. 15, 2016), <https://perma.cc/QB5F-PBPQ>.

<sup>255</sup> Kelly, *Implementing*, *supra* note 1, at 7; *see also* Exec. Order No. 13767, *supra* note 1.

ligations, may result in a de facto, unofficial policy of turning back asylum seekers. Based on reports from the past year, such de facto unofficial policy does, in fact, already exist. Beginning under the Obama administration, exacerbated by the election of Donald Trump and continued under his administration, asylum seekers have been turned back at multiple ports of entry across the entire U.S. border with Mexico.<sup>256</sup> Thus, it is vital that advocates understand the legal limitations, challenge every incident of such turn backs, and question the legality of any proposed system to turn asylum seekers away at the border.

Following President Trump's executive order, DHS issued an implementation memorandum. Section H of the memorandum states:

[S]ubject to the requirements of section 1232, Title 8, United States Code, related to unaccompanied alien children and *to the extent otherwise consistent with the law and U.S. international treaty obligations*, CBP and ICE personnel shall, to the extent appropriate and reasonably practicable, return aliens described in section 235(b)(2)(A) of the INA, who are placed in removal proceedings under section 240 of the INA - and who, consistent with the guidance of an ICE Field Office Director, CBP Chief Patrol Agent, or CBP Director of Field Operations, pose no risk of recidivism - to the territory of the foreign contiguous country from which they arrived pending such removal proceedings.<sup>257</sup>

As explained by Human Rights First:

If Section H of this memorandum were applied to asylum seekers, the United States would adopt a policy of turning asylum seekers away to face danger, persecution, torture and potential trafficking in Mexico, and would put non-Mexican asylum seekers at grave risk of onward *refoulement* to their countries of persecution. Such a system, applied to Mexican and/or non-Mexican asylum seekers would violate U.S. domestic law and treaty obligations, place already vulnerable refugees in grave peril, further erode U.S. global leadership and encourage other countries to shirk their responsibilities under international law and treaties.<sup>258</sup>

It also would result in a logistical nightmare for U.S. immigration advocates who likely would struggle to reach clients in Mexico.

As detailed in Section I above, U.S. law and treaty obligations

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<sup>256</sup> See HUMAN RIGHTS FIRST, *supra* note 19; see also Letter from American Immigration Council, *supra* note 19.

<sup>257</sup> Kelly *Implementing*, *supra* note 1, at 7 (emphasis added).

<sup>258</sup> HUMAN RIGHTS FIRST, *supra* note 5.

restrict the administration's ability to carry out this order. Furthermore, while the memorandum is clearly aimed at the U.S.-Mexico border, given the U.S.-Canada safe third country agreement, it would be impossible to apply the order to Mexican nationals, as there is no doubt such action would constitute direct *refoulement* of Mexican asylum seekers to Mexico. Therefore, the legal question, presented by the Trump Administration's proposal to rely on Section 235(b)(2)(C) of the INA, is whether Central Americans and other non-Mexican nationals can be forced to wait in Mexico after expressing a fear to U.S. officials at a port of entry.

DHS memorandum provides for the return to contiguous territories for "aliens described in Section 235(b)(2)(A) of the INA."<sup>259</sup> Section 235(b)(2)(A) indicates that any "alien seeking admission" who is not entitled to admission be detained for a proceeding under Section 240.<sup>260</sup> However, asylum seekers arriving to a port of entry and otherwise inadmissible are generally processed under Section 235(b)(1)(A), the expedited removal provision, requiring that any individual found inadmissible "shall [be] order[ed] . . . removed from the United States without further hearing or review *unless* the alien indicates either an intention to apply for asylum . . . or a fear of persecution."<sup>261</sup> Therefore, because Section 235(b)(2)(C),<sup>262</sup> the provision allowing for removal to contiguous territories, by its terms only applies to "aliens" described in Section 235(b)(2)(A), any inadmissible individual would have to be provided a judicial proceeding under Section 240 and *not* subjected to the expedited removal process. Given DHS's simultaneous push to expand the use of expedited removal and its perceived effectiveness at removing large numbers of inadmissible immigrants, it is unclear whether or not DHS would trade in use of expedited removal to take advantage of Section 235(b)(2)(C).

At first glance, the required substitution of Section 235(b)(2)(C) for the distinctly problematic expedited removal process may appear to provide asylum seekers with a greater level of due process through the appearance before an immigration judge. However, advocates should proceed with caution. While the statute requires granting of proceedings under Section 240, it is not at all clear that such a newly established system would, in fact, provide greater due process. Those subjected to Section

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<sup>259</sup> Kelly *Implementing*, *supra* note 1, at 7; 8 U.S.C. § 1225(b)(2)(A) (2017).

<sup>260</sup> 8 U.S.C. § 1225(b)(2)(A) (2017).

<sup>261</sup> 8 U.S.C. § 1225(b)(1)(A)(i) (2017) (emphasis added).

<sup>262</sup> 8 U.S.C. § 1225(b)(2)(C) (2017).

235(b)(2)(C) would be forced to await their hearing in Mexico, where access to counsel, ability to collect evidence, security, and assurances against onward deportation are lacking.

In addition, Section 235(b)(2)(C) of the INA applies only to those “arriving from a contiguous territory” and Central Americans arrive *through* a contiguous country, rather than *from* a contiguous country.<sup>263</sup> Consider it analogous to the idea that a person flying to the United States cannot simply be returned to a third country where they landed for a layover. Under this interpretation, Section 235(b)(2)(C) applies only to the nationals of contiguous countries, but also cannot be used for asylum seekers originating from these countries because that would amount to *refoulement*.

Even if DHS foregoes the expedited removal procedure and files all arriving asylum cases with the immigration courts before turning non-Mexican national back into Mexico to await future proceeding, or if CBP officers simply refuse to acknowledge individuals’ intention to seek asylum, the Mexican government would have to either explicitly agree to receive the non-Mexican nationals, or unofficially acquiesce to the practice. Following the United States’ proposal of such a border system, Mexico’s interior secretary, Miguel Angel Osorio Chong, stated, “our legal framework doesn’t allow this . . . . We told [the U.S.] it is impossible. There is no way, legally, nor is there capacity.”<sup>264</sup> Yet, given the documented cases of non-Mexican nationals already being turned back into Mexico, and the Mexican government’s inaction to challenge such cases, it remains highly concerning that while the United States’ objective to legally turn back immigrants at its border may be stymied by legal and political realities, the unofficial practice continues unchallenged.

#### CONCLUSION

The current assault on immigrants and their rights has been both shocking and unsurprising. Only sixty-six years ago, still reeling from the deaths of millions of people unable to find refuge,

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<sup>263</sup> 8 U.S.C. § 1225(b)(2)(C) (2017). Support for this argument can be found in the fact that the INA has at times distinguished between arriving from and through countries. *See, e.g.*, *Pan American Airways, Inc. v. United States*, 135 F.2d 51, 53 (5th Cir. 1943) (“The Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall have power to enter into contracts with transportation lines for the entry and inspection of aliens coming to the United States from or through foreign contiguous territory.”).

<sup>264</sup> Patrick J. McDonnell, *Mexico Rejects U.S. Plan to Deport Central Americans to Mexico*, L.A. TIMES (Feb. 24, 2017, 6:56 PM), <https://perma.cc/4X7A-5KG2>.

the world decided that States could not keep turning their backs on people in need of protection. Thus, the 1951 Refugee Convention was born, and the reminder to abide by its core humanitarian principles remains far too relevant today. The Trump Administration has already signaled where its priorities lie regarding immigration policy. On March 8, 2017, in a premature exalting of new enforcement methods, then Secretary of Homeland Security John Kelly, now Trump's chief of staff, emphasized the administration's commitment to restrictive policies, stating, "enforcement matters, deterrence matters, and that comprehensive immigration enforcement can make an impact."<sup>265</sup> This shift from comprehensive immigration reform to comprehensive immigration enforcement may have ridden into U.S. policy on a wave of politically expedient fear mongering, but it is fated to crash into an already constructed wall – the law.

The U.S. asylum system is grounded in international and domestic law, fortified by advocates and scholars intent on protecting the rights of the most vulnerable and upholding the rule of law. The resistance to abusive policies and practice must be constant and must be comprehensive from the time an asylum seeker begins their journey. Advocates must engage policymakers and Americans of all backgrounds, and immigration lawyers, the frontline of human rights protection, must expand their role in defending and empowering immigrants while also holding the government accountable.

This paper aims to call the attention of this growing movement of advocates to a threshold issue – initial access to protection. As immigration judges are sent to the U.S. immigration detention centers and the Southern border,<sup>266</sup> and thousands of enforcement officers are hastily hired,<sup>267</sup> immigration lawyers and advocates across the United States will be needed to ensure asylum seekers are able to access the U.S. protection system. As detailed in this paper, asylum seekers have the right to pursue protection in the United States, and the law requires their reception and the robust consideration of their claim. Critical debate over every step in the U.S. asylum system can, and must, continue. Faced with an ad-

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<sup>265</sup> Press Release, U.S. Dep't of Homeland Sec., *Statement by Secretary of Homeland Security John Kelly on Southwest Border Security* (March 8, 2017), <https://perma.cc/E48W-3ETX>.

<sup>266</sup> Julia Edwards Ainsley, *Trump Administration Sends Judges to Immigration Detention Centers – Sources*, REUTERS (Mar. 10, 2017, 4:49 PM), <https://perma.cc/GF3T-DXH8>.

<sup>267</sup> Eric Katz, *Trump Wants DHS to Hire 15,000 for Border Security? Not So Fast*, DEF. ONE (Jan. 28, 2017), <https://perma.cc/K9CF-ZNGP>.

ministration intent on scapegoating immigrants and capitalizing on border security fearmongering, those committed to the rule of law must remain steadfast in their belief that the United States will not be converted into a nation ruled by demagoguery. Advocates must mobilize to ensure that individual rights and American ideals are not the victim of this new American zeitgeist.