Refoulement as Pandemic Policy

Haiyun Damon-Feng

University of Washington

Follow this and additional works at: https://digitalcommons.law.uw.edu/wilj

Part of the Immigration Law Commons, and the International Law Commons

Recommended Citation

Haiyun Damon-Feng, Refoulement as Pandemic Policy, 31 Wash. Int’l L.J. 1 (2022). Available at: https://digitalcommons.law.uw.edu/wilj/vol31/iss2/4

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.
Refoulement as Pandemic Policy

Cover Page Footnote
J.D., Yale Law School. Administrative Law Fellow, ABA Section of Administrative Law & Regulatory Practice; Director, Adelante Pro Bono Project; Assistant Director, W.H. Gates Public Service Law Program, University of Washington School of Law. Haiyun is grateful to the librarians of the Gallagher Law Library for their excellent research support and to the editors of the Washington International Law Journal for their thoughtful comments and feedback.
REFOULEMENT AS PANDEMIC POLICY

Haiyun Damon-Feng*

Abstract: COVID-19 restrictions on access to asylum likely violate non-refoulement obligations under international and federal law, and while they are extreme, they are not unique. There is a small but growing body of scholarly literature that rightly argues that such policies are pretextual covers used to enact restrictive immigration policy goals, but these arguments generally arise from an ahistorical perspective. This article positions restrictive COVID immigration policies in a broader historical context and argues that the United States has a long history of weaponizing fear of disease and contagion from migrants to justify restrictive immigration policies. The article offers a historical view both to demonstrate and question this long pattern of dangerous, xenophobic behavior, and to caution against using such blunt and sweeping policies in the future. Part I describes various COVID-19 border closure policies and the ongoing public health and refugee policy discussions surrounding such policies, with a particular focus on United States law. Part II then provides an account of international and United States non-refoulement obligations. Part III situates the current policies within a broader historical framework, providing examples of earlier proposed and enacted immigration policies that sought to restrict migration into the United States on public health grounds.

INTRODUCTION.................................................................................................................................................. 186
I. A GLOBAL PANDEMIC MEETS A GLOBAL REFUGEE CRISIS .......................................................................................................................... 187
   A. COVID, Border Closures, and Impact on Asylum Seekers... 188
   B. Asylum Seekers Expelled Under Title 42.............................. 190
II. NON-REFOULEMENT IN THEORY, REFOULEMENT IN PRACTICE ........................................................................................................ 194
   A. Non-refoulement Obligations under International Law........ 195
   B. Non-refoulement Obligation under United States Law ....... 197
III. CASTING BLAME AND CLOSING BORDERS: WEAPONIZING PUBLIC HEALTH FEARS TO RESTRICT MIGRATION .......... 203
   A. The Politicization of COVID.................................................. 204
   B. Sanitary Reform and Chinese Exclusion ............................... 206
   C. Detention, Toxic “Disinfection” and Typhus ........................... 207
   D. Proposed Border Closures and Swine Flu (H1N1).............. 209

* J.D., Yale Law School. Administrative Law Fellow, ABA Section of Administrative Law & Regulatory Practice; Director, Adelante Pro Bono Project; Assistant Director, W.H. Gates Public Service Law Program, University of Washington School of Law. Haiyun is grateful to the librarians of the Gallagher Law Library for their excellent research support and to the editors of the Washington International Law Journal for their thoughtful comments and feedback.
INTRODUCTION

The global COVID-19 pandemic exposed significant tensions between protectionist and nationalist policies predicated on preserving the health and safety of a nation’s citizens, on the one hand, and domestic and international law obligations undertaken by a nation to receive asylum seekers and refugees, on the other. During the COVID-19 pandemic, over ninety-one percent of the world’s population lived in a country with some sort of COVID-related travel restriction, including border closures that functionally blocked people fleeing persecution from entering a country in order to seek asylum. At the same time, COVID-19 served as a “threat multiplier” to asylum seekers, compounding the effects of poverty, lack of healthcare, and violence, and resulting in an increase in the number of the world’s refugees and asylum seekers. This led to a significant asymmetry in the need for, and accessibility of, asylum. The United Nations High Commissioner for Refugees estimated that about 1.5 million refugees and asylum seekers were unable to pursue international protection because they were stranded by COVID-related border closures in 2020. In March of 2020, the United States effectively closed its borders to asylum seekers through a controversial policy known as “Title 42.”

Immigrant rights advocates and scholars decried these border closures as violative of the non-refoulement principle of international law, which prohibits the expulsion or return of individuals to a territory where their life or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group. There is a small but growing body of scholarly literature that rightly argues that such policies are pretextual covers for enacting restrictive immigration policy goals, but these arguments generally arise from an ahistorical perspective. This article expands upon that literature and argues that while COVID-19 restrictions impacting access to asylum are extreme, they are not uniquely reactionary to the COVID-19 pandemic. This article positions these COVID policies in a broader historical context and argues that the United States has a long history of weaponizing fear of disease and contagion from migrants to justify restrictive immigration policies. It offers this historical view to illuminate a long pattern of dangerous, xenophobic behavior resulting in harsh and often inhumane treatment of migrants, and to caution against using such blunt and sweeping policies in the future.
Part I describes various COVID-19 border closure policies and the ongoing public health and refugee policy discussions surrounding such policies, with a particular focus on United States law. Part II then provides an account of international and United States non-refoulement obligations. Part III situates the current policies within a broader historical framework, providing examples of earlier proposed and enacted immigration policies that sought to restrict migration into the United States on public health grounds.

I. A GLOBAL PANDEMIC MEETS A GLOBAL REFUGEE CRISIS

Border closure policies during the pandemic have severely restricted access to asylum, resulting in widespread humanitarian abuses. A year and a half into a near-total shutdown of the United States border to asylum seekers, United States Border Patrol agents were recorded riding on horseback, swinging whips in the faces of Haitian refugees, and beating them back across the border into Mexico from Del Rio, Texas.1 The refugees were fleeing political instability and forced displacement—in July of 2021, Haitian President Jovenel Moise was assassinated,2 and a month later, a devastating earthquake killed thousands of people and destroyed 53,000 homes.3 Upon arriving in the United States, instead of being granted temporary refuge, the asylum seekers were forced to live in encampments along the United States-Mexico border, waiting and hoping for an opportunity to make their case for asylum—an opportunity that would never come.4 Many of them were expelled from the United States en masse before they were ever able to ask for asylum, and thousands more were left in limbo in Mexico.5

---


During this humanitarian crisis, Department of Homeland Security (“DHS”) Secretary Alejandro Mayorkas issued a warning to Haitians: “If you come to the United States illegally, you will be returned. Your journey will not succeed, and you will be endangering your life and your family’s life.” Further defending the country’s treatment of Haitians and other asylum seekers entering through the southern border, Mayorkas said, “illegal entry in between ports of entry in a time of pandemic when we have been quite clear, explicit, for months now that this is not the way to reach the United States. And it will not succeed.”

Secretary Mayorkas’ comments ignore a fundamental tenet of domestic and international law: seeking asylum is legal, no matter how or where you enter. The right to do so is enshrined in United States domestic law, and the United States’ duty to receive asylum seekers is enshrined in its international treaty obligations. Nevertheless, the United States has used the COVID-19 pandemic to transform the act of seeking asylum into an illicit and impermissible one. This article will show that this is not the first time the United States has castigated migrants as vectors of disease transmission in order to control and restrict migration.

A. COVID, Border Closures, and Impact on Asylum Seekers

On December 31, 2019, China reported the first cases of what would soon be recognized as the novel coronavirus COVID-19. On January 21, 2020, the United States Centers for Disease Control (“CDC”) confirmed the first United States COVID case, which originated from a person who had traveled to Washington state from Wuhan, China. In early February, the United States and other countries formally imposed global air travel and quarantine restrictions. On March 11, the World Health Organization (“WHO”) officially declared COVID-19 to be a global pandemic, and by mid-March 2020, U.S. states and localities began widely issuing stay-at-home

---

6 Lozano et al., supra note 4.
orders to slow the spread of the disease.\textsuperscript{11} Across the globe, nations closed their borders to human migration and movement. A Pew Research Report found that, by April of 2020, 91\% of the world’s population was living in a country with some sort of COVID travel restriction.\textsuperscript{12} Canada closed its borders to foreign tourism.\textsuperscript{13} The European Union restricted incoming non-essential travel\textsuperscript{14} and many member states banned entry from countries with high rates of COVID infection, such as India.\textsuperscript{15} The United States banned entry for non-essential travelers from the European Union and the United Kingdom.\textsuperscript{16}

The most devastating consequences of border closures, though, have been for asylum seekers and refugees. At the height of the pandemic, at least 168 nations had closed or restricted their borders and around 90 countries had closed their borders to those seeking asylum.\textsuperscript{17} Simultaneously, COVID-19 served as a “threat multiplier,” compounding the effects of poverty, lack of healthcare, and violence affecting refugees and displaced people.\textsuperscript{18} There were 82.4 million forcibly displaced people in the world at the end of 2020, 18.4 million of whom were refugees, and only five in ten were able to access basic services.


\textsuperscript{12} Phillip Connor, More than nine-in-ten people worldwide live in countries with travel restrictions amid COVID-19, PEW RSCH. CTR. (Apr. 1, 2020), https://www.pewresearch.org/fact-tank/2020/04/01/more-than-nine-in-ten-people-worldwide-live-in-countries-with-travel-restrictions-amid-covid-19/. At least ninety-one percent of the world’s population, or 7.1 billion people, lives in countries with restrictions on people arriving from other countries who are neither citizens nor residents, such as tourists, business travelers and new immigrants. Roughly three billion people, or thirty-nine percent, live in countries with borders completely closed to noncitizens and nonresidents, according to a Pew Research Center analysis of border closure announcements and United Nations population data.


\textsuperscript{14} Council Recommendation on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, 2020 O.J. (L 208/1) 1.

\textsuperscript{15} Majority of EU Countries Refuse to Lift Entry Ban for Indian Travelers, SCHENGEN VISAINFO NEWS, https://www.schengenvisainfo.com/news/majority-of-eu-countries-refuse-to-lift-entry-ban-for-indian-travellers/.


the highest number ever recorded, but fewer refugees were resettled in 2020 than any year in the previous two decades. The United Nations High Commissioner for Refugees (“UNHCR”) estimated that about 1.5 million refugees and asylum seekers were unable to seek international protection because they were stranded by these border closures in 2020.

Border closures are particularly harmful to asylum seekers, who rely on the ability to cross borders to seek safety and refuge. Asylum seekers, by definition, have been displaced from their homes, and they rely on access to territory outside of their country of origin to seek protection from persecution. United States law explicitly recognizes this and permits people to seek asylum regardless of how or where they enter—even if that entry is without authorization and between ports of entry. However, policy changes during COVID have all but eliminated that ability, leaving countless asylum seekers in dangerous and inhumane conditions that likely violate United States and international law.

B. Asylum Seekers Expelled Under Title 42

On March 20, 2020, the United States announced that, pursuant to a controversial and unprecedented exercise of the CDC’s emergency powers, it would limit all non-essential travel across its land borders. There are two critical points to note with respect to the CDC order, often referred to as “Title

---


22. Id. at 6 (“Measures implemented by governments to limit the spread of COVID-19, including restricting freedom of movement and closing borders, made it considerably harder for people fleeing war and persecution to reach safety.”).


42” because it is premised on the CDC’s authority under Title 42 of the United States Code. First, there is no exception for asylum seekers—in fact, Title 42 has been primarily applied to restrict asylum and summarily expel asylum seekers from the United States without the procedural and substantive protections that would ordinarily apply. Second, the CDC opted to ban only non-essential travel by certain noncitizens—specifically, asylum seekers and those arriving without prior authorization—arriving through a land or coastal border. The CDC did not issue a blanket ban on non-essential travel, suggesting that the concern was not one of non-essential travel generally, but of who was coming, how they were arriving, and from where they were arriving. Title 42 has had a devastating effect on asylum seekers and has severely limited the ability for migrants, particularly those from Mexico, Central and South America, and the Caribbean, from accessing asylum in the United States These border closures were made indefinite in May 2020, and despite federal court orders questioning the legality of Title 42 as applied to certain groups, the policy continues today. To date, it has resulted in over one million expulsions of individuals from United States territory.

News reports indicate that the CDC issued its Title 42 order only under pressure from the White House and then-Vice President Michael Pence, and that the public health justification mandating Title 42 expulsions was pretextual. According to news reports, Stephen Miller, President Donald Trump’s senior advisor and the architect of many restrictive Trump-era

27 Id.; see Ashley Binetti Armstrong, Co-Opting Coronavirus, Assailing Asylum, 35 GEORGETOWN IMMIGR. L.J. 361 (2021).
immigration policies, pushed for the order despite initial resistance from the Trump administration’s Coronavirus Task Force. The CDC likewise resisted the idea, and in early March 2020, Dr. Martin Cetron, head of the CDC’s Division of Migration and Quarantine, “refused to support [Title 42] because there was not a strong public health basis for such a drastic move.”31 However, the White House—specifically Vice President Pence—and DHS continued to pressure the CDC to issue the order, and the CDC eventually relented. One former health official involved in the process said, “[t]hey forced us. It is either do it or get fired.”

Legal scholars and advocates have also argued that Title 42 was largely pretextual,33 and public health experts have questioned the policy’s relationship to, and efficacy in, stopping the spread of COVID-19 in the United States34 Other policies, such as the ongoing detention of noncitizens in crowded and unhygienic immigration processing and detention facilities, may contribute more to COVID-19 spread than the mere entry of people through United States land borders.35 Further, CBP has, in many cases, mandated COVID-19 tests for people granted humanitarian parole. Public health experts have suggested that limiting detention and using vaccination programs, testing, social distancing and outdoor processing, masking, and other measures to limit the spread among asylum seekers would be more effective at mitigating the risk of COVID-19 and would not impose undue humanitarian

31 Id.
32 Id.
33 See generally Gilman, supra note 26; Armstrong, supra note 27.
hardship. However, the federal government has nevertheless insisted on the continued application—and expansion—of Title 42.

The impact of Title 42 has been devastating. Migrants have been exploited, kidnapped, raped, assaulted, and killed. From January to August 2021, there were more than 6,300 reported kidnappings and other violent attacks against asylum seekers subject to Title 42 expulsions. In Mexico, the attacks on migrants are often brutal and carried out with impunity. Litigation documents reveal that one Salvadoran woman expelled to Mexico under Title 42 was “then kidnapped, raped, and dumped in the desert, before Mexican police told her that ‘migrants like to be raped’ when she tried to report it; she then discovered she was pregnant from the rape and suffered a forced abortion while seeking prenatal care at a public hospital.”

Kidnappers in Mexico target migrants, particularly Black migrants, because they are easily identifiable. The violence toward migrants has been exacerbated by the United States’ execution of Title 42 expulsions. Sometimes, migrants are flown from one border sector to another, where they are unfamiliar with the territory and have no resources—leaving them particularly vulnerable to kidnapping and exploitation—before being expelled. Through my work directing the Adelante Pro Bono Project, which provides rapid response humanitarian legal services to vulnerable asylum seekers at the border, I have represented numerous clients who were immediately kidnapped after being expelled to Mexico. One Salvadoran mother was kidnapped within minutes of being expelled to Mexico and was held captive for weeks, during which time the mother was brutally and repeatedly gang raped. When she was eventually released, she was bound up and left for dead in the desert. A Nicaraguan

36 Id. ¶¶ 13–28.
40 Id.
42 Id.
43 Id. at 28–33.
mother was kidnapped with her young child hours after being expelled to Mexico. When her family was unable to pay the full ransom demanded by the kidnappers, her child—just ten years old—was released by himself and was eventually found by a Border Patrol agent, wandering the desert, alone.44

The United States has also begun expelling people under Title 42, directly or indirectly, to the countries from which they are fleeing. Groups of Central American asylum seekers have been expelled to southern Mexico and then forced by Mexican authorities to cross the border into Guatemala.45 Others, including Haitian asylum seekers, have been flown from the United States directly back to their country of origin.46 Filippo Grandi, the United Nations High Commissioner for Refugees, has denounced this practice—along with mass and summary expulsions under Title 42 generally—as “inconsistent with international norms” and has suggested that such practices “may constitute refoulement.”47

II. NON-REFOULEMENT IN THEORY, REFOULEMENT IN PRACTICE

In recognition of the worldwide need to offer humanitarian protection to those fleeing persecution, 149 nations, including the United States, have undertaken non-refoulement obligations, prohibiting the forced return of individuals to territories where their life or freedom would be threatened.48 The United States has also codified non-refoulement obligations under domestic law, but subsequent Executive Orders and the United States Supreme Court have narrowed the scope of the obligation. This section traces through the history and origination of the international non-refoulement obligation and the ways in which the United States’ interpretation of the obligation has developed and departed from international law principles.

44 Kevin Sieff & Ismael López Ocampo, Migrant boy found wandering alone in Texas had been deported and kidnapped, WASH. POST (Apr. 9, 2021), https://www.washingtonpost.com/world/2021/04/09/migrant-boy-found-wandering-alone-texas-had-been-deported-kidnapped/.
45 See HUM. RTS. FIRST, supra note 39.
46 Id.
A. Non-refoulement Obligations under International Law

Non-refoulement is an international law principle that prohibits the *refoulement*, or the expulsion or return, of individuals to a territory where their life or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group.\(^{49}\) The principle of non-refoulement is enshrined in Article 33 of the United Nations 1951 Convention on Refugees and was discussed at length during the Convention’s negotiations.\(^{50}\) Following the atrocities of World War II and the global refugee crisis that ensued, the newly formed United Nations convened a Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.\(^{51}\) A question of critical importance was how the United Nations and global community could affirm and uphold the “principle that human beings shall enjoy fundamental rights and freedoms without discrimination.”\(^{52}\) Member nations recognized “the social and humanitarian nature of the problem of refugees” and, after much deliberation, entered into the 1951 Convention relating to the Status of Refugees (the “1951 Convention”).\(^{53}\)

The non-refoulement provision in the 1951 Convention, as drafted, provides a clear and unqualified mandate: “No Contracting State shall expel or return (‘refoule’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”\(^{54}\) The Drafting Committee and the member states at the Conference discussed the language of the non-refoulement provision at length. The Committee underscored that refoulement “would be tantamount to delivery [of the refugee] into the hands of his persecutors”\(^{55}\) and made clear that the prohibition applied “not only to the country of origin but also to other


\(^{50}\) United Nations 1951 Refugee Convention art. 33. Article 3 of the Convention Against Torture (to which the United States is a party) similarly prohibits the expulsion, return (*refoulement*) or extradition of a person to a state “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 113 [hereinafter Convention Against Torture], implemented by Congress as part of the Foreign Affairs Reform and Restructuring Act of 1998.


\(^{52}\) See 1951 Refugee Convention, supra note 48, pmbl.

\(^{53}\) Id.

\(^{54}\) 1951 Refugee Convention, supra note 48, art. 33, ¶ 1.

\(^{55}\) 1951 Refugee Convention, supra note 48, art. 33.
countries where the life or freedom of the refugee would be threatened for the reasons mentioned.  

Article 33 of the 1951 Convention is clear that admission to the country where the refugee sought protection is not required to avoid being returned. The term “refouler” was added to the final text of the 1951 Convention to clarify that physical presence, not admission, in a territory is what triggers the obligation not to expel or return to a country where the refugee would be threatened or persecuted. The Drafting Committee and member nations discussed and rejected any language limiting the protection to refugees already “residing” in the country. However, it does appear the Drafting Committee agreed that Article 33 was not meant to be interpreted as mandating “any legal obligation in respect of large groups of refugees seeking access to [a nation’s] territory.”  

While the text makes clear that the non-refoulement obligation does not apply to people not yet inside a nation’s territory or borders, that seems to be the textual boundary. Insofar as a limit on the non-refoulement obligation exists, it appears to start and stop at the territorial border.

Member nations also discussed and proposed amendments to Article 33, relating to national security or public safety concerns regarding the ongoing presence of the refugee. The Drafting Committee and member nations eventually adopted language related to this exclusion. During the discussion, the French representative noted that a State did not have the right “to return a refugee without a visa to another country than to his country of origin or of his lawful permanent residence” and noted that such practice “did happen, but the practice was illegal.” Further, the derogation clause of Article 9 of the 1951 Convention, which contemplates the balancing between refugee rights and State sovereignty, allows member states to suspend certain

---

56 Id.
57 Id.
58 Id.
59 Id. During the Conference, the Netherlands representative noted that the Netherlands “could not accept any legal obligation in respect of large groups of refugees seeking access to its territory” and requested that it be “placed on record that the Conference was in agreement with [this interpretation] that the possibility of mass migration across frontiers or of attempted mass migrations was not covered by Article 33.” There was no objection to this interpretation, and the President ruled that such interpretation be placed on record.
61 Weis, supra note 50, at 235; see, e.g., Swedish Amendment. The 1951 Refugee Convention states, “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” 1951 Refugee Convention, art. 33(2).
62 1951 Refugee Convention, supra note 48.
obligations in times of emergency such as “war or other grave and exceptional circumstances” if such provision measures are “essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee.”\textsuperscript{63} However, the language “in the case of a particular person” as well as the Commentary accompanying the provision make clear that this provision is meant to be applied to individual cases and “may not be taken against all or certain categories of refugees.”\textsuperscript{64} States were not permitted to register any reservations as to Article 33.\textsuperscript{65}

It follows that the operation of Title 42—restricting access to asylum and exercising refoulement of all refugees seeking protection in the United States, including those who have entered and were once present in United States territory—is inconsistent with a textual reading of the 1951 Convention, as well as with the history and spirit of the non-refoulement protection.\textsuperscript{66} Human rights non-governmental organizations and scholars agree that Title 42 violates the non-refoulement obligation of Article 33 of the Convention.\textsuperscript{67}

\textit{B. Non-refoulement Obligation under United States Law}

The United States undertook the obligations in the 1951 Convention through its accession to the 1967 Protocol. In debating whether the United States was going to sign onto the 1967 Protocol, the Senate Committee on Foreign Relations discussed the obligations imposed by Article 33. At the time, the United States understood the obligation as broadly “prohibiting the expulsion or return of refugees to territories where their life or freedom would be threatened.”\textsuperscript{68} In his testimony to the Committee, Laurence Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs within the Department of State, noted that both “President [Johnson] and Secretary [of State Dean] Rusk have pointed out that the prohibition against the return of refugees to countries where they would face persecution is of foremost

\begin{footnotes}
\item[63] 1951 Refugee Convention, \textit{supra} note 48; \textit{see} Chetail, \textit{supra} note 47, n. 6.
\item[64] \textit{Id.} 1951 Refugee Convention art. 9, cmt. (“The words ‘in his case’ indicate that such measures may not be taken against all certain categories of refugees but may only be taken on the merits of the individual case.”); \textit{see} Chetail, \textit{supra} note 47.
\item[65] \textit{Id.} S. REP. NO. 14, at 9 (1968).
\item[66] Chetail, \textit{supra} note 47.
\item[67] \textit{Id.} See generally Gilman, \textit{supra} note 26; Armstrong, \textit{supra} note 27.
\end{footnotes}
importance among the Protocol’s provisions.” 69 There was no Senate opposition to the Protocol, and it was ratified by the United States in 1968. 70

The United States later codified the obligation of non-refoulement under domestic law with the passage of the Refugee Act of 1980 (the “Refugee Act”). 71 Before 1980, the Immigration and Nationality Act (“INA”) Section 243(h) permitted, but did not require, the Attorney General to withhold deportation of individuals who would likely be persecuted if deported. 72 The Refugee Act converted this discretionary ability into a non-discretionary mandate. Now, under INA Section 241(b)(3), 73 the Attorney General “may not remove an [individual] to a country if the Attorney General decides that the [individual’s] life or freedom would be threatened in that country because of [their] race, religion, nationality, membership in a particular social group, or political opinion.” 74 The only exceptions to the non-refoulement mandate are for specific, enumerated reasons relating to national security or public safety, mirroring the structure of Article 33 of the 1951 Convention. 75 This provision of the INA is generally referred to as “withholding of removal.” It is notable that the category of individuals eligible for protection from withholding of removal is broader than that of individuals who may be eligible for asylum, again in recognition of the strong commitment of non-refoulement underlying the statute. 76

69 Id.
73 The INA was overhauled and restructured by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (“IIRIRA”) and the protection provided by former Section 243(h) of the INA were moved to INA Section 241(b)(3). Former INA Section 243(h) provided that “The Attorney General shall not deport or return any alien … to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.” Illegal Immigration Reform and Immigration Responsibility Act, 8 U.S.C. § 1253(h)(1) (1988 ed., Supp. IV). Under IIRIRA, what were formally known as deportation and exclusion proceedings were consolidated into omnibus “removal” proceedings. The current withholding of removal provision under INA § 241(b)(3) provides that “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.”
75 Id. See also Barsky, supra note 71 (arguing that the in passing the Refugee Act, Congress adopted the “generous standard” and “spirit and substance” set forth by the 1967 Protocol).
United States courts have explicitly acknowledged that the Refugee Act “mirrors the provisions of the United Nations Protocol Relating to the Status of Refugees, which provided the motivation for the enactment of the Refugee Act of 1980,” which suggests that the scope of the non-refoulement obligation of Article 33 should comport with the obligation adopted under domestic law. However, despite the strong historical commitment to non-refoulement, the United States Supreme Court has limited the country’s non-refoulement obligations to apply only to those already within United States territorial borders. In Sale v. Haitian Centers Council, Inc., the Supreme Court considered the extent of the United States’ non-refoulement obligations as applied to the United States’ ongoing policy of Haitian interdiction and held that non-refoulement obligations do not extend to those who had not yet reached United States territory.

At that time, Haiti had been in a state of political turmoil for over twenty years, and a coup in September 1991 overthrowing Haiti’s first democratically elected president resulted in a mass Haitian refugee crisis. Hundreds of thousands of Haitians were internally displaced, and tens of thousands fled the country to seek protection in the United States. Ten years before the coup, in 1981, the Reagan Administration began the Haitian interdiction program to intercept Haitian refugees on the high seas during their journey to the United States. On September 29, 1981, President Ronald Reagan issued a Proclamation and Executive Order that classified the increased flow of undocumented Haitian refugees as having “threatened the welfare and safety of communities” in the United States and authorized the United States Coast Guard to interdict vessels transporting refugees in order to prevent or suspend their entry into United States territory. Scholars and advocates raised immediate concerns over the potential human rights and non-refoulement violations of the interdiction policy, and a United States federal court and

---

80 Id.
81 Gutekunst, supra note 74, at 151.
83 See United Press International, supra note 82.
UNHCR disagreed as to whether non-refoulement protects refugees in transit, who have not yet reached United States territory.\footnote{Gutekunst, supra note 74, at 151; see Haitian Refugee Center v. Gracey, 600 F. Supp. 1396, 1405 (D.D.C. 1985).}

Following the 1991 coup and subsequent swell of Haitian refugees fleeing political turmoil, President George H.W. Bush revived the interdiction policy.\footnote{While outside the scope of this article, it should be noted that Cubans and Haitians were fleeing their respective countries at the same time, both arriving on the shores of Florida. The treatment of Cubans was notably different from that of Haitians, raising questions of discriminatory treatment of refugees based on factors including race and national origin. See, e.g., Laura Parker, Refugees in Florida: Rescue or Rejection Different Rules Mean U.S. Treatment of Cuban and Haitian Boat People is Poles Apart, WASH. POST (May 26, 1994), https://www.washingtonpost.com/archive/politics/1991/05/26/refugees-in-florida-rescue-or-rejection/2d02e0fb-5dd6-406a-aa3b-d5846a3a0de4/; Bernd Debusmann Jr., Grim echoes of history in images of Haitians at US-Mexico Border, BBC (Sept. 23, 2021), https://www.bbc.com/news/world-us-canada-58654351.} Initially under this policy, Haitians stopped at sea were quickly screened for asylum eligibility. Those who were deemed to be “true” asylum seekers, as opposed to economic migrants, were permitted to enter the United States, while others were forcibly repatriated to Haiti.\footnote{Harold Hongju Koh & Michael J. Wishnie, The Story of Sale v. Haitian Centers Council: Guatánamo and Refoulement, Human Rights Advocacy Stories 385, 386 (Deena R. Hurwitz et al. eds., 2009).} Between October 1991 and May 1992, the Coast Guard interdicted over 34,000 Haitians. Because the high volume of refugees could not be safely processed on the Coast Guard boats, many were sent to facilities on Guantanamo Bay for processing. Those facilities, which had a capacity of around 12,500 people, quickly filled up, and refugees continued to come. On May 22, 1992, the United States Navy determined that it could not safely accommodate additional people on Guantanamo Bay, and the following day, President Bush issued an executive order to interdict and repatriate Haitians without being screened for potential asylum eligibility at all.\footnote{Sale, 509 U.S. 155, 164 (1993).}

In Executive Order 12807, President Bush stated that the non-refoulement obligations of Article 33 of the 1951 Convention “do not extend to persons located outside the territory of the United States,”\footnote{Exec. Order No. 12807, 3 C.F.R § 303.04 (1992), https://www.hsdl.org/?view&did=463032.} laying the groundwork for the government’s claim that interdiction without any screening or possibility of accessing asylum in the United States was not a violation of international or domestic law prohibiting refoulement. The issue was litigated up to the Supreme Court in Sale v. Haitian Centers Council, which ultimately agreed with the government’s interpretation.
In Sale v. Haitian Centers Council, the Supreme Court read a territorial limitation into the non-refoulement obligation and held that Article 33 and the withholding of removal provision provided in the Refugee Act, formerly Section 243(h) of the INA, did not guarantee protection to people who had not yet reached United States territory. The Court relied heavily on the debating history and text of Article 33, which is mirrored, in relevant part, by the withholding of removal provision of the INA, and its prohibition to “return” or “expel.” The prohibition to return or expel, the Court reasoned, necessarily requires an individual to be present on United States territory, and neither Article 33 nor the INA provided protection to people who were interdicted and repatriated before reaching United States territory.

The exclusion of asylum seekers not yet on United States soil creates an odd result when the reason an individual does not reach United States territory—and therefore is prevented from accessing asylum and humanitarian protection—is deliberate United States action that blocks them from accessing the territory. UNHCR has condemned this type of action as violating the obligation of non-refoulement, notwithstanding the Supreme Court’s interpretation in Sale.

Most recently, in Al Otro Lado v. Mayorkas, the United States District Court for the Southern District of California evaluated the question with respect to a policy of “turnbacks” at the border through a practice of “metering,” wherein asylum seekers were turned away from or prevented from accessing United States ports of entry to seek asylum to regulate and artificially slow the flow of asylum seekers into the United States. There, the


90 Id.

91 Scholars have critiqued the Court’s reading of the debating history as well as the Court’s ultimate conclusion and territorial limitation on non-refoulement. See, e.g., Joan Fitzpatrick, International Dimensions of U.S. Refugee Law, 15 BERK. J. INT’L L. 1, 9 (1997).

92 Id. The Court previously held that, for purposes of the prior withholding of removal provision, noncitizens paroled into the United States from detention at the border were not “within the United States” and thus were not afforded the withholding (i.e., non-refoulement) protections provided by the INA. Leng May Ma v. Barber, 357 U.S. 185, 186 (1958). In Justice Blackmun’s dissent in Sale, he noted that the geographic restriction on the withholding provision (“within the United States”) had been removed by Congress when the INA and this provision were amended, such that “the basic prohibition against forced return to persecution applies simply to “any [noncitizen].” Sale, 509 U.S. 155 at 204.


District Court held that the turnback policy violated the government’s inspection and referral duties with respect to the asylum provision of the INA. In so finding, the District Court pointed to the actions United States agents and officials were taking on United States soil to direct turnbacks of asylum seekers and interfere with their ability to access United States territory. Nevertheless, with respect to non-refoulement, the District Court “regrettably” could not hold that the non-refoulement obligation had extraterritorial application and cited the Supreme Court’s interpretation in Sale v. Haitian Centers Council as controlling.95

It should be noted, however, that the District Court, in so holding, did not discuss a key fact that distinguishes Al Otro Lado from Sale—namely, whether actions to block access to United States territory were taken on United States soil. The District Court correctly pointed out that Sale permitted the extraterritorial return of asylum seekers, but certain turnbacks happened after the individual had arrived on United States soil.96 Expulsion of asylum seekers when they are within United States territory appears to clearly violate Article 33 and is on the other side of the boundary of non-refoulement—that is, interdiction and repatriation of asylum seekers before they reach United States territory—established by Sale. Expulsions under Title 42 similarly occur after the individual has reached United States soil and therefore likely violate the non-refoulement obligation.

The precise confines of the non-refoulement obligation remains a contested issue around the world. UNHCR has been steadfast in its interpretation that the obligation applies extraterritorially. Similarly, the European Court of Human Rights and the Inter-American Commission on Human Rights have rejected the idea that the border itself is the boundary triggering the non-refoulement obligation.97 Nevertheless, nations around the world continue to try to interdict or halt asylum seekers from reaching their shores and accessing protection.98

The debate on the scope of the non-refoulement obligation is not new and hearkens back to the debates surrounding the extent to which signatories to the 1951 Convention agreed to extend protection—or access to systems requesting protection—through international human rights accords. Naturally, sovereigns view their primary obligation as owing to their own citizens—to

---

95 Id.
96 Id. at 4.
guard their own resources and to protect their lands and security, broadly defined. A natural and unsettling corollary of this principle is that if a sovereign guards its territory by preventing asylum seekers from accessing territory, land and sea borders can become an absolute wall blocking refugees from even seeking protection. The Supreme Court’s opinion in Sale concluded, “This case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy.”

But these lamentations ring hollow, particularly when we view these derogations of responsibility to asylum seekers in the broader historical context of exclusionary immigration practices, which are often linked to race and “otherness.”

Furthermore, it should be noted that Title 42 applies to people who are seeking entry at ports of entry as well as people who have entered without inspection between ports of entry and are on United States soil. Under Title 42, asylum seekers who are apprehended in the United States are nonetheless expelled out of the country without the opportunity to make any type of claim for asylum and are at risk of violence and persecution in Mexico. At the very least, it seems that, for this large group of people, the United States is expelling them in violation of the non-refoulement obligation.

III. CASTING BLAME AND CLOSING BORDERS: WEAPONIZING PUBLIC HEALTH FEARS TO RESTRICT MIGRATION

Politicizing epidemics leads directly to more exclusionary attitudes toward immigration, a phenomenon observed time and again in the United States and prominently displayed in the COVID context. This section first documents the politicization of the COVID pandemic in the United States. It then provides a historical overview of United States responses to other pandemics and epidemics and the effects the politicization of those episodes had on immigration policy.

---

99 Sale, supra note 60 (quoting Haitian Refugee Center v. Gracey, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., dissenting)).

A. The Politicization of COVID

President Trump politicized COVID as a way to further his anti-immigrant agenda. On June 20, 2020, before a large, closely packed, indoor, and unmasked crowd in Tulsa, Oklahoma, then-President Trump held his first campaign rally since the country was shut down for COVID. Trump was behind in the polls. COVID cases in Tulsa County were steadily increasing. Trump told his crowd of supporters that he directed his administration to deliberately slow down COVID testing in an admitted effort to artificially deflate the number of confirmed COVID cases because case numbers were rising too rapidly. As the crowd behind him chanted, “USA! USA! USA!” Trump referred to COVID as the “kung flu,” resulting in scattered cheers and laughter from the crowd. At a rally in Phoenix three days later, as Trump was gearing up to deliver the racist punchline again, his supporters beat him to it, shouting “kung flu” as Trump repeated the slur back to them several times as the crowd cheered him on.

Trump used anti-Asian rhetoric to refer to COVID throughout the pandemic. In addition to “kung flu,” Trump also repeatedly referred to COVID as the “Chinese virus,” casting blame on China and Chinese people for spreading the disease.

---

103 See e.g., MACAYA, supra note 101.
105 See e.g., MACAYA ET AL., supra note 101.
Trump’s anti-Asian rhetoric around COVID caused a spike in anti-Asian sentiment and anti-Asian hate crime in the United States.\textsuperscript{108}

At the same time, Trump was downplaying the seriousness of the pandemic and sabotaging public health efforts to contain disease spread. Trump flouted mask mandates\textsuperscript{109} and refused to abide by social distancing measures. Instead, Trump hosted “super spreader” events like the Rose Garden reception for Amy Coney Barrett\textsuperscript{110} and suggested that “hit[ting] the body” with a “tremendous” amount of “ultraviolet or just very powerful light” or injecting oneself with bleach and disinfectant “inside, or almost a cleaning…because you see it gets in the lungs and it does a tremendous number on the lungs” might be more effective treatments.\textsuperscript{111}

After Trump contracted COVID, he was hospitalized to receive experimental treatments and life-saving care.\textsuperscript{112} As he recovered, Trump doubled down on messaging that Americans need not worry about the virus, telling them, “Don’t be afraid of COVID. Don’t let it dominate your life…. I feel better than I did 20 years ago!”\textsuperscript{113} When he returned to the White House, while still visibly struggling with the aftereffects of COVID, he immediately removed his mask to speak with the press before going inside.\textsuperscript{114} More than 400,000 Americans died from COVID on Trump’s watch, and the policies


and politics stemming from his politicization of the pandemic continued to cause the deaths of many more.  

B. Sanitary Reform and Chinese Exclusion

The United States has a long history of castigating migrant groups for infectious diseases. An early example is the treatment of Chinese immigrants, large numbers of which lived on the West Coast during the late 1800s. Chinese Exclusion and the restrictive policies targeting Chinese immigrants during that period form the foundations of modern immigration law and policy. During this time, Chinese immigrants were beaten, lynched, and massacred up and down the West Coast. While there is substantial legal scholarship surrounding the plenary power doctrine that arose out of the Chinese Exclusion Case, there has been comparatively little written on the public sentiments, prejudice, and atrocities committed against the Chinese that undoubtedly influenced the harsh immigration doctrine that followed.

In the late 1800s, and in particular the 1880s, the United States was at the height of the “sanitary reform” movement, which generally attributed disease spread and contagion to filth, such as odors from decomposing organic waste, stagnant and dirty water, and lack of sunlight. Public officials sought to improve sewage systems and waste sanitation, and the American public was similarly concerned with filth as a mode of disease spread. At the same time, the United States had been dealing with pandemic and epidemic disease

---


118 Id.

outbreaks throughout the 1800s, including cholera, typhus, typhoid fever, scarlet fever, and yellow fever.\textsuperscript{120}

These conditions sowed the seeds for what historian Joan Trauner calls “medical scapegoatism” against Chinese immigrants, who frequently lived in crowded conditions and were treated with suspicion by public health officials seeking to rationalize the failure of their sanitary programs in controlling disease spread.\textsuperscript{121} Trauner found that whenever there was an epidemic in San Francisco, “health officials descended upon Chinatown with a vengeance.”\textsuperscript{122}

Several forces drove anti-Chinese sentiment at the time, including beliefs that the Chinese were unassimilated and unassimilable, barbaric, and inferior, and the “medical argument, that the Chinese, ignoring all laws of hygiene and sanitation, bred and disseminated disease, thereby endangering the welfare of the state and of the nation.”\textsuperscript{123} These forces produced and stoked political will in support of anti-Asian exclusionary immigration policies, including Chinese Exclusion. The Chinese Exclusion Act of 1882 was the first significant piece of federal legislation restricting immigration into the United States, and in 1902, Chinese immigration was banned permanently.\textsuperscript{124} It was not until forty years later, in 1943, that the Chinese Exclusion Act was finally repealed.\textsuperscript{125}

C. Detention, Toxic “Disinfection” and Typhus

Typhus was a disease of worldwide epidemic concern in the nineteenth century but did not attract much attention in the United States until 1916, when typhus that had been endemic to certain regions in Mexico was reported in the United States near the United States-Mexico border.\textsuperscript{126} Before then, travel across the border was generally unrestricted, and citizens from either nation were free to cross.\textsuperscript{127} In December 1915, three cases of typhus were identified in El Paso, Texas. United States public health officials blamed the novel cases

\begin{thebibliography}{99}
\footnotesize
\item 120 Id. at 75; Walter J. Daly, The Black Cholera Comes to the Central Valley of America in the 19th Century—1832, 1849, and Later, 119 TRANSACTIONS AM. CLINICAL CLIMATOLOGICAL ASSOC. 143 (2008); Cholera, HISTORY (Mar. 24, 2020), https://www.history.com/topics/inventions/history-of-cholera.
\item 121 Trauner, supra note 119, at 70.
\item 122 Id. at 82.
\item 123 Id. at 72.
\item 125 Id.
\item 126 C.C. Pierce, Combating Typhus Fever on the Mexican Border, 32 PUB. HEALTH REP. 426, 426 (1917).
\end{thebibliography}
on the influx of Mexican laborers and migrants coming into the United States through the southern border.\(^\text{128}\) There was an immediate clamp-down on Mexican migration into the United States, and over the next two years, the United States government set up “disinfecting plants” along the southern border at various ports of entry to “de-louse” Mexican nationals entering the United States.\(^\text{129}\) Upon entering the United States, Mexican nationals were taken and quarantined at these stations, where they were detained, stripped naked, inspected, had their heads shaved, and were sprayed down and bathed with kerosene (gasoline) “soap,” which was extremely toxic.\(^\text{130}\) According to the United States Public Health Service, over 12,300 people went through this process at the El Paso quarantine station in a one-month period from January 2 to February 9, 1917.\(^\text{131}\) All told, some 870,000 people were inspected, and nearly 70,000 were disinfected.\(^\text{132}\)

Mexican migration into the United States continued to be inhibited by these types of practices long after the typhus epidemic subsided. As one historian noted, “medical inspections remained in force until the late 1930s; a public health response to a manageable epidemic had metamorphosed into a protracted quarantine along the entire United States–Mexico border.”\(^\text{133}\) After that, for Mexicans entering the United States as part of the Bracero program, the United States set up a similar system wherein Braceros entering the United States were funneled through processing stations and sprayed with DDT, another extremely toxic substance.\(^\text{134}\)

During COVID, noncitizens in immigration custody at various detention centers across the country were sprayed with toxic disinfectants that

\(^\text{128}\) Pierce, supra note 126, at 426.
\(^\text{129}\) Id.
\(^\text{131}\) Pierce, supra note 126, at 429.
\(^\text{132}\) Stern, supra note 130, at 47.
\(^\text{133}\) Markel & Stern, supra note 127, at 765; see Kraut, supra note 127, at 124.
\(^\text{134}\) Photos and oral histories of the Bracero program are maintained as part of the Bracero History Archive, available at braceroarchive.org. For example, Simon Acosta recalls being “fumigated” when he was processed at the El Centro, California, processing center. Herminio Martinez recalls medical exams in which he was fumigated, stripped, laughed at, and taunted. The Bracero History Archive was curated by the Division of Political History at the National Museum of American History, Smithsonian Institution. For additional information on the archive, see Blake Thorkelson, Smithsonian Scholar Examines Legacy of the U.S.-Mexico Bracero Program, YALENEWS (Nov. 18, 2016), https://news.yale.edu/2016/11/18/smithsonian-scholar-examines-legacy-us-mexico-bracero-program.
poisoned their bodies and burned their skin. On May 21, 2020, immigrant rights advocates filed a complaint with the DHS Office of Civil Rights and Civil Liberties alerting DHS to the use of hazardous chemicals on detainees in the Adelanto Detention Facility in Southern California. Detainees testified that guards at Adelanto were spraying a chemical called “HDQ Neutral” constantly throughout the day and night inside the largely unventilated facility, despite warnings that the chemical causes “[i]rreversible eye damage and skin burns.” The warnings further advised: “Avoid breathing. Do not get in eyes or on skin. Wear goggles and face shields.” While the guards were given masks, gloves, and protective gear to shield themselves from the harmful effects of the spray, the detainees were not. Detainees reported suffering severe health effects as a result of the spray: burning skin and rashes, blisters, nose bleeds, burning lungs, nausea, and sneezing and coughing blood. People detained at the Houston Contract Detention Facility in Texas and the Glades County Detention Center in Florida reported similar exposure to disinfectants. Public health experts agree that spraying noxious and poisonous disinfectants that cause health issues, including respiratory issues, was not a safe or appropriate way to prevent COVID in detention facilities. Rather, what would have been effective to combat COVID was the release of people from detention and the use of personal protective equipment (PPE) and social distancing measures within detention facilities.

D. Proposed Border Closures and Swine Flu (H1N1)

A particularly interesting comparator case to COVID is the H1N1 Swine Flu, which was declared to be a global pandemic by the WHO in June


137 Id.

138 Id.


140 Id.
2009 and was the first global flu in forty years.\textsuperscript{141} The first case of H1N1 was detected in California on April 15, 2009.\textsuperscript{142} By the time the WHO declared it to be a pandemic, seventy-four countries and territories around the world had confirmed infections.\textsuperscript{143} It was later determined that the virus’s presence in humans originated in Mexico.\textsuperscript{144} Once again, noncitizens and migrants were targeted as the cause of the disease.\textsuperscript{145}

Immigrants—especially Mexican immigrants—were particularly targeted for racist and xenophobic remarks. Conservative talk show host Michael Savage propagated racist pandemic theories on his talk show. Savage said, “I’m going to talk about the horrible, horrible story of illegal aliens bringing a deadly new flu strain into the United States of America. Make no mistake about it: illegal aliens are the carriers of the [Swine Flu].”\textsuperscript{146} There were conspiracy theories that “it would be easy to bring an altered virus into Mexico, put it in the general population, and have them cross the border.”\textsuperscript{147} Sean Hannity asked his viewers, “Is this [Swine Flu] the latest border crisis?”\textsuperscript{148}

Calls to shut down the border between the United States and Mexico made their way to the Senate floor. In a hearing of the Senate Committee on Homeland Security and Governmental Affairs, Senator John McCain and others questioned Homeland Security Secretary Janet Napolitano and Dr. Anne Schuchat, Interim Deputy Director for the CDC’s Science and Public Health Program, on the possibility of closing the United States–Mexico border.\textsuperscript{149} The idea was met with resistance, as both Napolitano and Schuchat explained that shutting down the border would not effectively contain disease spread.\textsuperscript{150} Ultimately, the border was not shut down. Instead, vaccines were

\textsuperscript{141} Influenza A (H1N1) Outbreak, WHO, https://www.who.int/emergencies/situations/influenza-a-(h1n1)-outbreak (last visited Feb. 4, 2022).


\textsuperscript{143} Influenza A (H1N1) Outbreak, supra note 141.

\textsuperscript{144} Ignacio Mena et al., Origins of the 2009 H1N1 Influenza Pandemic in Swine in Mexico, ELIFE (June 28, 2016), at 2, 4, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4957980/.


\textsuperscript{147} Brian Alexander, Amid Swine Flu Outbreak, Racism Goes Viral, NBC NEWS (May 1, 2009), https://www.nbcnews.com/id/wbna30467300.

\textsuperscript{148} Alterman & Ivory, supra note 146.

\textsuperscript{149} H1N1 Flu—2009: Before the S. Comm. on Homeland Sec. and Governmental Aff., 111th Cong. 12 (2009).

\textsuperscript{150} Id. at 12–13.
developed and made widely available, and on August 11, 2010, the WHO announced the end of the H1N1 pandemic.\footnote{2009 H1N1 Pandemic Timeline, supra note 142.}

One notable difference between the H1N1 and COVID pandemics was the relative severity of the illnesses. COVID has been much more transmissible and much more severe—and deadly—than H1N1.\footnote{Eskild Petersen et al., \textit{Comparing SARS-CoV-2 with SARS-CoV and Influenza Pandemics}, 20 LANCET INFECTION DISEASES e238, e239 (July 3, 2020), https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30484-9/fulltext; Vivaldo Gomes da Costa et al., \textit{Comparative Epidemiology Between the 2009 H1N1 Influenza and COVID-19 Pandemics}, 13 J. INFECTION AND PUB. HEALTH 1797, 1800 (2020).} Another key difference is the way the Obama administration handled the H1N1 pandemic compared with the way the Trump and Biden administrations handled, and continue to handle, the COVID pandemic. In 2009, the pandemic generally was not politicized by those in the administration. Instead, the response typically was to defer to national and international public health experts and to resist drastic measures like wholesale border closures.

By contrast, with respect to COVID, the pandemic was politicized, with those in the highest positions of power stoking anti-Asian and anti-immigrant sentiments. Public health officials were strongarmed into closing the border, even to asylum seekers. This has caused a worsening humanitarian crisis at the southern border, placing vulnerable people in unstable, dangerous, and violent situations, and violating non-refoulement obligations under domestic and international law.

It has been shown that politicizing epidemics results in anti-immigrant sentiment, and in the case of COVID, that seems to have been intentional. Most recently, Texas Governor Greg Abbott issued a directive to state police to pull over civilians transporting recently arrived immigrants and asylum seekers because of their purported risk of carrying COVID.\footnote{Uriel J. Garcia, \textit{Federal Judge Extends Order Blocking Gov. Greg Abbott’s Directive for Law Enforcement to Pull Over Vehicles Transporting Migrants}, TEXAS TRIB. (Aug. 13, 2021), https://www.texastribune.org/2021/08/13/judge-extends-order-blocking-abbotts-directive-on-migrant-transportations/.} The Department of Justice brought suit against Abbott and Texas, challenging the directive as unlawful, and the directive was enjoined by federal court order shortly after it was issued.\footnote{Daniel Wiessner, \textit{ACLU: Texas Migrant Transportation Order Violates Federal Law}, REUTERS (Aug. 5, 2021), https://www.reuters.com/legal/litigation/aclu-texas-migrant-transportation-order-violates-federal-law-2021-08-05/.}
CONCLUSION

Title 42 and the United States’ COVID response has been extreme, but it is not unique. It is the latest in a long line of xenophobic reactions, policies and laws that blame immigrants for disease spread—resulting in restrictive and harsh immigration policies. The restrictive policies are generally overbroad and disproportionately harm immigrants while disconnected from or not tailored to the public health benefits they were purported to achieve. With respect to COVID, public health experts have pointed to limiting the use of detention, social distancing, masking, and COVID testing as ways to process asylum seekers safely and humanely into the country. All of these tools are within the federal government’s toolbox. What is lacking is the political will to use them. Recognition of the history of xenophobic treatment of immigrants in times of epidemic crisis is necessary to understand and reflect on our collective willingness to tolerate such blunt, harmful, restrictive policies, and, hopefully, help us find the collective will to check such impulses now and in the future.