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Refoulement as Pandemic Policy

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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.

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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 Moïse 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

¹ Emily Green, *US Border Agents Are Removing Haitian Migrants Using Horses and Whips*, VICE (Sept. 20, 2021, 9:22 AM), <https://www.vice.com/en/article/k78vdm/us-border-agents-are-removing-haitian-migrants-using-horses-and-whips>; Philip Bump, *What one photo from the border tells us about the evolving migrant crisis*, WASH. POST (Sept. 20, 2021), <https://www.washingtonpost.com/politics/2021/09/20/what-one-photo-border-tells-us-about-evolving-migrant-crisis/>.

² See Anthony Esposito, *Haiti since the assassination of President Moïse*, REUTERS (Aug. 14, 2021, 10:34 AM), <https://www.reuters.com/world/americas/haiti-one-month-without-assassinated-president-jovenel-moise-2021-08-06/>; Lauren Said-Moorhouse et al., *Haiti's president assassinated*, CNN (July 7, 2021, 10:09 PM), <https://www.cnn.com/americas/live-news/haiti-president-assassinated-updates-intl/index.html>.

³ John Bacon, *Haiti earthquake death toll rises to 2,200, more than 300 people still missing*, USA TODAY (Aug. 22, 2021, 12:42 PM), <https://www.usatoday.com/story/news/nation/2021/08/22/haiti-earthquake-2021-death-toll-rises-over-2-200/8235246002/>.

⁴ See Juan A. Lozano et al., *US officials defend expulsion of Haitians from Texas town*, ASSOCIATED PRESS (Sept. 20, 2021), <https://apnews.com/article/health-mexico-texas-caribbean-immigration-56f1f0093039e2a43e128b7ef0015485>.

⁵ See *id.*; see also *U.S. starts mass expulsion of Haitian migrants from Texas border town*, CBS NEWS (Sept. 20, 2021, 7:15 PM), <https://www.cbsnews.com/news/haitian-texas-migrants-mass-expulsion-del-rio-texas/>.

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.”⁶ 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.”⁷

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-19.⁸ 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.⁹ In early February, the United States and other countries formally imposed global air travel and quarantine restrictions.¹⁰ 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.

⁷ *CNN Newsroom* (CNN television broadcast Sept. 19, 2021) (quoting guest Alejandro Mayorkas, Secretary of Homeland Security).

⁸ *Archived: WHO Timeline—COVID 19*, WORLD HEALTH ORG. (Apr. 26, 2020), <https://www.who.int/news/item/27-04-2020-who-timeline---covid-19>.

⁹ Press Release, Ctr. for Disease Control and Prevention, First Travel-related Case of 2019 Novel Coronavirus Detected in United States (Jan. 21, 2021), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

¹⁰ AMJC Staff, *A Timeline of Covid-19 Developments in 2020*, AM. J. MANAGED CARE (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>; Kathy Katella, *Our Pandemic Year—A COVID-19 Timeline*, YALE MED. (Mar. 17, 2021), <https://www.yalemedicine.org/news/covid-timeline>.

orders to slow the spread of the disease.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.¹² Canada closed its borders to foreign tourism.¹³ The European Union restricted incoming non-essential travel¹⁴ and many member states banned entry from countries with high rates of COVID infection, such as India.¹⁵ The United States banned entry for non-essential travelers from the European Union and the United Kingdom.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.¹⁷ Simultaneously, COVID-19 served as a “threat multiplier,” compounding the effects of poverty, lack of healthcare, and violence affecting refugees and displaced people.¹⁸ There were 82.4 million forcibly displaced people in the world at the end of 2020,

¹¹ *Id.*; see also Cal. Exec. Order N-33-20, <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>; Wash. Proclamation No. 20–25 (Mar. 23, 2020) <https://www.governor.wa.gov/sites/default/files/proclamations/2025%20Coronavirus%20Stay%20Safe-Stay%20Healthy%20%28tmp%29%20%28002%29.pdf>; N.Y. State, *Governor Cuomo Issues Guidance on Essential Services Under the ‘New York State on PAUSE’ Executive Order* (Mar. 20, 2020), <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>.

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.

¹³ Press Release, Can. Bd. Servs. Agency, COVID-19: Current border measures and requirements, <https://www.cbsa-asfc.gc.ca/services/covid/menu-eng.html> (last modified Nov. 29, 2021).

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/I) 1.

¹⁵ *Majority of EU Countries Refuse to Lift Entry Ban for Indian Travelers*, SCHENGENVISAINFO NEWS, <https://www.schengenvisa.info/news/majority-of-eu-countries-refuse-to-lift-entry-ban-for-indian-travellers/>.

¹⁶ Megan Specia, *What You Need to Know About Trump's European Travel Ban*, NY TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/12/world/europe/trump-travel-ban-coronavirus.html>.

¹⁷ Press Release, U.N. Refugee Agency, UNHCR's Gillian Triggs warns COVID-19 severely testing refugee protection (Oct. 7, 2021), <https://www.unhcr.org/en-us/news/press/2020/10/5f7de2724/unhcrs-gillian-triggs-warns-covid-19-severely-testing-refugee-protection.html>.

¹⁸ U.N. HIGH COMM'R FOR REFUGEES, UNHCR'S GLOBAL COVID-19 NEEDS (2021), <https://reporting.unhcr.org/sites/default/files/UNHCR%20COVID-19%20appeal%202%20pager%20-%2017%20February%202021.pdf>; see INTERNATIONAL CRISIS GROUP, VIRUS-PROOF VIOLENCE: CRIME AND COVID-19 IN MEXICO AND THE NORTHERN TRIANGLE (2020), <https://www.crisisgroup.org/latin-america-caribbean/83-virus-proof-violence-crime-and-covid-19-mexico-and-northern-triangle>.

the highest number ever recorded,¹⁹ but fewer refugees were resettled in 2020 than any year in the previous two decades.²⁰ 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 2020.²¹

Border closures are particularly harmful to asylum seekers, who rely on the ability to cross borders to seek safety and refuge.²² 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.²³ 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.²⁴

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.²⁵ There are two critical points to note with respect to the CDC order, often referred to as “Title

¹⁹ U.N. HIGH COMM’R FOR REFUGEES, GLOBAL TRENDS IN FORCED DISPLACEMENT—2020 6 (2021), <https://www.unhcr.org/60b638e37/unhcr-global-trends-2020> [hereinafter Forced Displacement Trends]. Joanna Kakissis & Abu Bakr Bashir, *Asylum-Seekers Make Harrowing Journeys in Pandemic, Only to Be Turned Back*, NPR (Feb. 13, 2021, 7:00 AM), <https://www.npr.org/2021/02/13/949182773/the-harrowing-journeys-to-safety-of-asylum-seekers-during-a-pandemic>.

²⁰ Janice Dickson, *Refugees turned away in record numbers as countries close borders due to COVID-19*, GLOBE MAIL (Jan. 25, 2021), <https://www.theglobeandmail.com/politics/article-refugees-turned-away-in-record-numbers-as-countries-close-borders-due/>.

²¹ Forced Displacement Trends, *supra* note 19, at 5.

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.”).

²³ 8 U.S.C. § 1158.

²⁴ Jaya Ramji-Nogales and Iris Goldner Lang, *Freedom of Movement, Migration, and Borders*, 19 J. HUM. RTS. 593 (2020); MIXED MIGRATION CENTER, THE IMPACT OF COVID-19 ON REFUGEES AND MIGRANTS ON THE MOVE IN NORTH AND WEST AFRICA 12–14 (2021).

²⁵ CTRS. FOR DISEASE CONTROL AND PREVENTION, ORDER SUSPENDING INTRODUCTION OF CERTAIN PERSONS FROM COUNTRIES WHERE A COMMUNICABLE DISEASE, <https://www.cdc.gov/coronavirus/2019-ncov/order-suspending-introduction-certain-persons.html> (last updated Oct. 13, 2020); Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, STAN. L. SCH. BLOG (Apr. 13, 2020), <https://law.stanford.edu/2020/04/15/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>. Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559 (Mar. 24, 2020) (to be codified at 42 C.F.R. pt. 71).

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.²⁶ 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 States²⁷ 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.²⁸ To date, it has resulted in over one million expulsions of individuals from United States territory.²⁹

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.³⁰ According to news reports, Stephen Miller, President Donald Trump’s senior advisor and the architect of many restrictive Trump-era

²⁶ Denise Gilman, *Barricading the Border: COVID-19 and the Exclusion of Asylum Seekers at the U.S. Southern Border*, FRONTIERS HUM. DYNAMICS (Dec. 12, 2020).

²⁷ *Id.*; see Ashley Binetti Armstrong, *Co-Opting Coronavirus, Assailing Asylum*, 35 GEORGETOWN IMMIGR. L.J. 361 (2021).

²⁸ Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31503 (May 26, 2020). Federal courts have questioned the application of Title 42 to unaccompanied children and families. In *P.J.E.S. v. Wolf*, the U.S. District Court for the District of Columbia preliminarily enjoined the application of Title 42 to unaccompanied children. *P.J.E.S. v. Wolf*, 502 F. Supp. 3d 492 (D.D.C. 2020). That injunction was stayed pending appeal before the D.C. Circuit, but the Biden administration has confirmed that it will not apply Title 42 to unaccompanied children. Notice of Temporary Exception From Expulsion of Unaccompanied Noncitizen Children Pending Forthcoming Public Health Determination, 86 Fed. Reg. 30 (Feb. 17, 2021). In *Huisha-Huisha v. Mayorkas*, the U.S. District Court for the District of Columbia preliminarily enjoined the application of Title 42 to families. *Huisha-Huisha v. Mayorkas*, No. 1:21-CV-1000-EGS, 2021 WL 4206688 (D.D.C. Sept. 16, 2021). That injunction was stayed by the D.C. Circuit pending appeal, and the Biden administration has continued to apply Title 42 to expel families. *What is Title 42 and How Does It Impact Children and Families?*, YOUNG CENTER FOR IMMIGRANT CHILDREN’S RTS. (Oct. 12, 2021), <https://www.theyoungcenter.org/stories/2021/10/12/what-is-title-42-and-how-does-it-impact-children-and-families>. Oral arguments were held on January 19, 2022, and as of the date of this writing, that case remains pending before the Court of Appeals.

²⁹ See Haiyun Damon-Feng, *Asylum, Interrupted*, HARV. L. & POL. REV. BLOG, n.34 (2021), <https://harvardlpr.com/2021/09/16/asylum-interrupted/>.

³⁰ Jason Dearen & Garance Burke, *Pence Orders Borders Closed after CDC Experts Refused*, ASSOCIATED PRESS (Oct. 3, 2020), <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ac>.

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."³²

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.

³⁴ *Public Health Experts Issue Recommendations to Protect Public Health and Lives of Asylum Seekers*, COLUM. MAILMAN SCH. OF PUB. HEALTH (Dec. 21, 2020), <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-issue-recommendations-protect-public-health-and-lives-asylum-seekers>; *Public Health Recommendations for Processing Families, Children and Adults Seeking Asylum or Other Protection at the Border*, COLUM. MAILMAN SCH. OF PUB. HEALTH (Dec. 2020), <https://www.publichealth.columbia.edu/research/program-forced-migration-and-health/public-health-recommendations-processing-families-children-and-adults-seeking-asylum-or-other>; Title 42 Border Expulsions: How Biden and the CDC's Misuse of Public Health Authority Expels Asylum Seekers to Danger, PHYSICIANS FOR HUM. RTS. (May 20, 2021), <https://phr.org/our-work/resources/title-42-border-expulsions-how-biden-and-the-cdcs-misuse-of-public-health-authority-expels-asylum-seekers-to-danger/>; *Public health experts push CDC to end Title 42 for migrants, asylum-seekers*, THE WORLD (Mar. 25, 2021) <https://www.pri.org/file/2021-03-25/public-health-experts-push-cdc-end-title-42-migrants-asylum-seekers>; Rachel M. Pearson, Alejandro Moreno & Ruth Berggren, *No Sound Public Health Justification For Biden's Migrant Expulsions*, HEALTH AFFAIRS (July 12, 2021) <https://www.healthaffairs.org/doi/10.1377/hblog20210712.68756/full/>

³⁵ Declaration of 32 Medical & Public Health Experts at ¶¶ 8–28, *Huisha-Huisha v. Mayorkas*, No. 1:21-CV-00100-EGS (D.C. Cir., Aug. 11, 2021), ECF No. 118-9.

hardship.³⁶ However, the federal government has nevertheless insisted on the continued application—and expansion—of Title 42.³⁷

The impact of Title 42 has been devastating. Migrants have been exploited, kidnapped, raped, assaulted, and killed.³⁸ 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.³⁹ In Mexico, the attacks on migrants are often brutal and carried out with impunity.⁴⁰ 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.”⁴¹ Kidnappers in Mexico target migrants, particularly Black migrants, because they are easily identifiable.⁴²

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.⁴³ 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.

³⁷ *Id.*; see also Notice of Appeal at 54, *Huisha-Huisha v. Mayorkas*, No. 1:21-CV-00100-EGS (D.C. Cir., Jan. 12, 2021). On January 31, 2022, news broke that the government had expanded Title 42 to include the transport of Venezuelan nationals to Colombia after the government was unable to return Venezuelans to their home country. Priscilla Alvarez, *U.S. Begins Quietly Flying Venezuelan Migrants to Colombia Under Controversial Border Policy*, CNN (Jan. 31, 2022), <https://www.cnn.com/2022/01/31/politics/border-venezuela-colombia/index.html>.

³⁸ Adam Isacson, *Weekly U.S.-Mexico Border Update: Title 42’s Gradual Loosening*, WASH. OFF. ON LATIN AM. (May 21, 2021), <https://www.wola.org/2021/05/title-42-weekly-border-update-isacson-update-border-mexico-us/>.

³⁹ Press Release, New Report Finds Biden Administration’s Embrace of Title 42 Expulsions Leading to Human Rights Travesty, HUM. RTS. FIRST (Aug. 24, 2021) (<https://www.humanrightsfirst.org/press-release/new-report-finds-biden-administration-s-embrace-title-42-expulsions-leading-human>).

⁴⁰ *Id.*

⁴¹ Supplemental Declaration of Taylor Levy at 4, *Huisha-Huisha v. Mayorkas*, No. 1:21-CV-00100-EGS (D.C. Circuit, Aug. 11, 2021).

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.*

⁴⁷ Press Release, News Comment by UN High Commissioner for Refugees Filippo Grandi on conditions and expulsions at US Border, The U.N. Refugee Agency (Sept. 21, 2021), <https://www.unhcr.org/news/press/2021/9/614a27324/news-comment-un-high-commissioner-refugees-filippo-grandi-conditions-expulsions.html>; see also Armstrong, *supra* note 27; Gilman, *supra* note 26; Vincent Chetail, *Crisis Without Borders: What Does International Law Say About Border Closure in the Context of COVID-19*, 2 FRONT. POLIT. SCI. 1 (2020); Lindsay Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOY. L. REV. 121, 153 (2020).

⁴⁸ Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention], <https://www.unhcr.org/en-us/1951-refugee-convention.html#:~:text=The%201951%20Refugee%20Convention%20and,of%20States%20to%20protect%20them>.

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

⁴⁹ 1951 Refugee Convention art. 33; Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

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.

⁵¹ *The History of the United Nations*, UNITED NATIONS, <https://www.un.org/en/about-us/history-of-the-un> (last visited Feb. 4, 2022).

⁵² See 1951 Refugee Convention, *supra* note 48, pmb1.

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.⁵⁶

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.⁵⁷ The Drafting Committee and member nations discussed and rejected any language limiting the protection to refugees already “residing” in the country.⁵⁸ 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.”⁵⁹ 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.⁶⁰

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.⁶¹ 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.”⁶² 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.

⁶⁰ See, e.g., the Supreme Court’s interpretation of non-refoulement obligations in *Sale v. Haitian Ctr. Council, Inc.*, 509 U.S. 155, 158–59, 179–88 (1993).

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.”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.”⁶⁴ States were not permitted to register any reservations as to Article 33.⁶⁵

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.⁶⁶ Human rights non-governmental organizations and scholars agree that Title 42 violates the non-refoulement obligation of Article 33 of the Convention.⁶⁷

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 “prohibit[ing] the expulsion or return of refugees to territories where their life or freedom would be threatened.”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

⁶³ 1951 Refugee Convention, *supra* note 48; *see* Chetail, *supra* note 47, n. 6.

⁶⁴ *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.”); *see* Chetail, *supra* note 47.

⁶⁵ *Id.* S. REP. NO. 14, at 9 (1968).

⁶⁶ Chetail, *supra* note 47.

⁶⁷ *Id.* *See generally* Gilman, *supra* note 26; Armstrong, *supra* note 27.

⁶⁸ S. REP. NO. 14, at 1 (1968).

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.*

⁷⁰ Senate Consideration of Treaty Document 90-27, Protocol Relating to the Status of Refugees, 90TH CONG., 2D SESS. (1968), <https://www.congress.gov/treaty-document/90th-congress/27>.

⁷¹ Robert F. Barsky, *What does the 1967 Protocol have to say about the Legal Obligations that the United States Owes to Asylum Seekers?*, YALE J. ON REGUL. (Mar. 20, 2019), <https://www.yalejreg.com/nc/what-does-the-1967-protocol-have-to-say-about-the-legal-obligations-that-the-united-states-owes-to-asylum-seekers-by-robert-f-barsky/>.

⁷² Paul H. Ode Jr., *Section 243(h) of the Immigration and Nationality Act of 1952 as Amended by the Refugee Act of 1980: A Prognosis and a Proposal*, 13 CORNELL INT'L L. J. 291, 291 (1981).

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."

⁷⁴ Immigration and Nationality Act, 8 USC § 1231(b)(3)(A); *see also* Claire P. Gutekunst, *Interdiction of Haitian Migrants on the High Seas: A Legal and Policy Analysis*, 10 YALE J. INT'L L. 151 (1984).

⁷⁵ Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B).

⁷⁶ *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,”⁷⁷ 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.⁷⁸

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.⁷⁹ Hundreds of thousands of Haitians were internally displaced, and tens of thousands fled the country to seek protection in the United States.⁸⁰ 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.⁸¹ 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.⁸² Scholars and advocates raised immediate concerns over the potential human rights and non-refoulement violations of the interdiction policy,⁸³ and a United States federal court and

⁷⁷ *INS v. Cardoza-Fonesca*, 480 U.S. 421, 424 (1987).

⁷⁸ *Sale*, 509 U.S. 155, 155 (1993).

⁷⁹ Patrick Gavigan, *Migration Emergencies and Human Rights in Haiti*, ORG. OF AM. STATES (1997), <https://www.oas.org/juridico/english/gavigane.html>.

⁸⁰ *Id.*

⁸¹ Gutekunst, *supra* note 74, at 151.

⁸² *Id.* Proclamation No. 4865, 46 Fed. Reg. 48107 (Oct. 1, 1981); Exec. Order No. 12324, 46 Fed. Reg. 48109 (Oct. 1, 1981). Operationally, the Executive Order authorized the Secretary of State to enter into bilateral agreements with foreign governments allowing for the interdiction of their vessels, which the United States did with the Haitian government, under the control of the Haitian dictator and then-President-for-Life Jean-Claude Duvalier. *See also* United Press International, *Reagan Orders Aliens Stopped on the High Seas*, THE NEW YORK TIMES (Sept. 30, 1981), <https://www.nytimes.com/1981/09/30/us/reagan-orders-aliens-stopped-on-the-high-sea.html>.

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.⁸⁴

Following the 1991 coup and subsequent swell of Haitian refugees fleeing political turmoil, President George H.W. Bush revived the interdiction policy.⁸⁵ 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.⁸⁶ 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.⁸⁷

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,”⁸⁸ 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.

⁸⁴ Gutekunst, *supra* note 74, at 151; *see Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396, 1405 (D.D.C. 1985).

⁸⁵ 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-5dd6-40e6-aa3b-d5846a3a0dc4/>; 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>.

⁸⁶ 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).

⁸⁷ *Sale*, 509 U.S. 155, 164 (1993).

⁸⁸ Exec. Order No. 12807, 3 C.F.R. § 303.04 (1992), <https://www.hsdl.org/?view&did=463032>.

In *Sale v. Haitian Centers Council*,⁸⁹ 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.⁹⁰ 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.”⁹¹ 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.⁹²

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*.⁹³

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 States⁹⁴ There, the

⁸⁹ For a history of the litigation, see Harold Hongju Koh, *The Enduring Legacies of the Haitian Refugee Litigation*, 61 N.Y. L. SCH. L. REV. 31, 31–66 (2017), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1210&context=nyls_law_review.

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.

⁹³ *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, ¶ 27, U.N. HIGH COMM’R FOR REFUGEES (Jan. 26, 2007), <https://www.unhcr.org/4d9486929.pdf>. See also GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 121–24 (2d ed. 1996) for a discussion on the controversy surrounding the confines and borders of the non-refoulement obligation.

⁹⁴ Summary Judgment Order, *Al Otro Lado v. Mayorkas*, No. 3:17-CV-02366-BAS-KAS (S.D. Cal. Sept. 2, 2021), ECF No. 742.

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 harkens 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.

⁹⁷ In particular, *Hirsiijamaa and Others v. Italy*, Application No. 27765/09, Eur. Ct. Hum. Rts. (Feb. 23, 2012); *Coard v. United States*, Report No. 109/99, Case No. 10.951, Inter-Am. Comm. on Hum. Rts. ("IACHR") (Sept. 29, 1999).

⁹⁸ NAT'L IMMIGR. JUST. CTR., *Pushing Back Protection How Offshoring and Externalization Imperil The Right To Asylum* (Aug. 3, 2021), <https://immigrantjustice.org/research-items/off-shoring-asylum>.

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."⁹⁹ 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,¹⁰⁰ 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)).

¹⁰⁰ CLAIRE L. ADIDA ET. AL., *EBOLA, ELECTIONS, AND IMMIGRATION: HOW POLITICIZING AN EPIDEMIC CAN SHAPE PUBLIC ATTITUDES*, 8 *POLITICS, GROUPS, AND IDENTITIES* 488, 488–504 (2020). <https://www.tandfonline.com/doi/full/10.1080/21565503.2018.1484376?scroll=top&needAccess=true>.

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.¹⁰¹ Trump was behind in the polls.¹⁰² COVID cases in Tulsa County were steadily increasing.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷

¹⁰¹ MELISSA MACAYA ET. AL., *Trump holds rally in Tulsa, Oklahoma*, CNN (June 21, 2020), https://www.cnn.com/politics/live-news/trump-rally-tulsa-oklahoma/h_441e0800ae5f9ebf9812edd5dd862a4b.

¹⁰² MICHAEL WARREN ET. AL., *How Trump plans to turn around his losing campaign*, CNN (June 19, 2020), <https://www.cnn.com/2020/06/19/politics/trump-turn-around-losing-campaign/index.html>.

¹⁰³ See e.g., MACAYA, *supra* note 101.

¹⁰⁴ *Id.*; MAEVE RESTON, *White House officials on the defensive after Trump says he wanted testing slowed down*, CNN (June 21, 2020), <https://www.cnn.com/2020/06/20/politics/tulsa-rally-trump/index.html>.

¹⁰⁵ See e.g., MACAYA ET AL., *supra* note 101.

¹⁰⁶ David Nakamura, *With ‘kung flu,’ Trump sparks backlash over racist language – and a rallying cry for supporters*, THE WASH. POST, (June 24, 2020), https://www.washingtonpost.com/politics/with-kung-flu-trump-sparks-backlash-over-racist-language--and-a-rallying-cry-for-supporters/2020/06/24/485d151e-b620-11ea-aca5-ebb63d27e1ff_story.html.

¹⁰⁷ Lauren Frias, *Trump has a penchant for calling the coronavirus the ‘Chinese Virus’ or ‘Kung Flu.’ Experts on Asian culture said the racist implications of the term divert attention from the disastrous US response*, INSIDER (Jul. 11, 2020, 8:04 AM), <https://www.insider.com/experts-trump-racist-names-for-coronavirus-distract-from-us-response-2020-7>; MELISSA MACAYA ET. AL., *supra* note 101; Alana Wise, *White House Defends Trump’s Use Of Racist Term To Describe Coronavirus*, NPR (June 22, 2020, 3:46 PM), <https://www.npr.org/2020/06/22/881810671/white-house-defends-trumps-use-of-racist-term-to-describe-coronavirus>.

Trump's anti-Asian rhetoric around COVID caused a spike in anti-Asian sentiment and anti-Asian hate crime in the United States.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 mandates¹⁰⁹ and refused to abide by social distancing measures. Instead, Trump hosted "super spreader" events like the Rose Garden reception for Amy Coney Barrett¹¹⁰ 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.¹¹¹

After Trump contracted COVID, he was hospitalized to receive experimental treatments and life-saving care.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!"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.¹¹⁴ More than 400,000 Americans died from COVID on Trump's watch, and the policies

¹⁰⁸ Ylin Hswen ScD, MPH et al., *Association of "#covid19" Versus "#chinesevirus" With Anti-Asian Sentiments on Twitter: March 9-23, 2020*, 111 AM. J. OF PUB. HEALTH 956, 956 (2021); 1A, *The Rise in Anti-Asian Attacks During the COVID-19 Pandemic*, NPR (Mar. 10, 2021), <https://www.npr.org/2021/03/10/975722882/the-rise-of-anti-asian-attacks-during-the-covid-19-pandemic>; CBS, *Asian American Attacks: more Than 9,000 Incidents Reported Nationwide Since Pandemic Began*, CBS (Aug. 12, 2021), <https://sanfrancisco.cbslocal.com/2021/08/12/asian-american-attacks-9000-since-covid-19-pandemic-began/>; Sabrina Tavernise & Richard A. Oppel Jr., *Spit on, Yelled at, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html>; Anh Do, *Asian Americans have been verbally and physically attacked, shunned during pandemic, study shows*, L.A. TIMES, (Mar. 16, 2021), <https://www.latimes.com/california/story/2021-03-16/anti-asian-hate-pandemic>.

¹⁰⁹ Daniel Victor, et al., *In his own words, Trump on the coronavirus and masks*, N.Y. TIMES, (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/us/politics/donald-trump-masks.html>.

¹¹⁰ Dartunorro Clark, *Fauci calls Amy Coney Barrett ceremony in Rose Garden 'superspreader event'*, NBC NEWS (Oct. 9, 2020), <https://www.nbcnews.com/politics/white-house/fauci-calls-amy-coney-barrett-ceremony-rose-garden-superspreader-event-n1242781>.

¹¹¹ William J. Broad & Dan Levin, *Trump Muses About Light as Remedy, but Also Disinfectant, Which is Dangerous*, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/24/health/sunlight-coronavirus-trump.html>.

¹¹² See Steve Herman, *Trump returns to White House after 72 hours in hospital for COVID-19*, VOA NEWS (Oct. 5, 2020), https://www.voanews.com/a/usa_trump-returns-white-house-after-72-hours-hospital-covid-19/6196782.html.

¹¹³ Allan Smith & Daren Gregorian, *Trump returns to White House after leaving hospital, sheds mask for photo opportunity*, NBC NEWS (Oct. 5, 2020), <https://www.nbcnews.com/politics/donald-trump/trump-says-he-s-leaving-hospital-monday-evening-n1242172>.

¹¹⁴ Kevin Liptak & Maeve Reston, *Trump Returns to White House and Removes Mask Despite Having Covid*, CNN (Oct. 5, 2020), <https://www.cnn.com/2020/10/05/politics/donald-trump-covid-condition-walter-reed/index.html>.

and politics stemming from his politicization of the pandemic continued to cause the deaths of many more.¹¹⁵

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.¹¹⁶ 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.¹¹⁷ Public officials sought to improve sewage systems and waste sanitation,¹¹⁸ and the American public was similarly concerned with filth as a mode of disease spread.¹¹⁹ At the same time, the United States had been dealing with pandemic and epidemic disease

¹¹⁵ See Adam Geller & Janie Har, ‘Shameful’: U.S. Virus Deaths Top 400k as Trump Leaves Office, A.P. NEWS (Jan. 20, 2021), <https://apnews.com/article/donald-trump-pandemics-public-health-coronavirus-pandemic-f6e976f34a6971c889ca8a4c5e1c0068>.

¹¹⁶ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). Scholars have disputed the courts’ ongoing adherence and fidelity to the classical plenary power doctrine in modern immigration jurisprudence. For discussion on Chinese Exclusion and the origins of the plenary power doctrine in immigration law, see, e.g., Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255, 255–57; Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 13 (2003); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550–54 (1990); David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 (2015).

¹¹⁷ Jon A. Peterson, *The Impact of Sanitary Reform Upon American Urban Planning*, 13 J. OF SOC. HIST. 83, 92 (1979).

¹¹⁸ *Id.*

¹¹⁹ See Joan B. Trauner, *The Chinese as Medical Scapegoats in San Francisco*, 57 CAL. HIST. 70, 73 (1978).

outbreaks throughout the 1800s, including cholera, typhus, typhoid fever, scarlet fever, and yellow fever.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.¹²¹ Trauner found that whenever there was an epidemic in San Francisco, “health officials descended upon Chinatown with a vengeance.”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.”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.¹²⁴ It was not until forty years later, in 1943, that the Chinese Exclusion Act was finally repealed.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.¹²⁶ Before then, travel across the border was generally unrestricted, and citizens from either nation were free to cross.¹²⁷ In December 1915, three cases of typhus were identified in El Paso, Texas. United States public health officials blamed the novel cases

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>.

¹²¹ Trauner, *supra* note 119, at 70.

¹²² *Id.* at 82.

¹²³ *Id.* at 72.

¹²⁴ U.S. Dept. of State, *Chinese Immigration and the Chinese Exclusion Acts* (last visited Feb. 11, 2022), <https://history.state.gov/milestones/1866-1898/chinese-immigration>.

¹²⁵ *Id.*

¹²⁶ C.C. Pierce, *Combating Typhus Fever on the Mexican Border*, 32 *PUB. HEALTH REP.* 426, 426 (1917).

¹²⁷ See Alan M. Kraut, *Immigration, Ethnicity, and the Pandemic*, 125 *PUB. HEALTH REP.* 123, 125 (2010); Howard Markel & Alexandra Minna Stern, *The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society*, 80 *MILBANK Q.* 757, 765 (2002).

on the influx of Mexican laborers and migrants coming into the United States through the southern border.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.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.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, 1917.¹³¹ All told, some 870,000 people were inspected, and nearly 70,000 were disinfected.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.”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.¹³⁴

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

¹²⁸ Pierce, *supra* note 126, at 426.

¹²⁹ *Id.*

¹³⁰ *Id.* at 427; John Burnett, *The Bath Riots: Indignity Along the Mexican Border*, NPR (Jan. 28, 2006), <https://www.npr.org/templates/story/story.php?storyId=5176177>; Eve Galanis, Student Author, *Borders and Bodies: The El Paso Quarantine and Mexican Women’s Resistance*, 2 CRIMSON HIST. REV. 13, 14 (2020); Alexandra Minna Stern, *Buildings, Boundaries, and Blood: Medicalization and Nation-Building on the U.S.-Mexico Border, 1910–1930*, 79 HISP. AM. HIST. REV. 41, 46 (1999).

¹³¹ Pierce, *supra* note 126, at 429.

¹³² Stern, *supra* note 130, at 47.

¹³³ Markel & Stern, *supra* note 127, at 765; see Kraut, *supra* note 127, at 124.

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.¹³⁵ 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.¹³⁶ 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.”¹³⁷ 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.¹³⁸ People detained at the Houston Contract Detention Facility in Texas and the Glades County Detention Center in Florida reported similar exposure to disinfectants.¹³⁹ 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.¹⁴⁰

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

¹³⁵ Louise Boyle, *Immigrants are Being Doused in Toxic Industrial Disinfectant at Trump-Funded ICE Detention Center Over Covid, Activists Say*, INDEPENDENT (Aug. 13, 2020), <https://www.independent.co.uk/climate-change/news/ice-detention-immigrants-trump-california-toxic-chemicals-covid-a9668716.html>.

¹³⁶ Letter from Rebecca Merton, Dir. Visitation and Indep. Monitoring, Inland Coal. for Immigrant Just. & Lizbeth Abeln, Immigrant Det. Coordinator, Freedom for Immigrants, to U.S. Dept. Homeland Sec. (May 21, 2020), <https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5ecd29d03bbee218edf9a67d/1590503888290/Toxic+Exposure+of+People+in+ICE+Detention+at+Adelanto+to+Hazardous+Chemicals.pdf>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Thomas Blecher, Kathryn Hampton & Ranit Mishori, *In COVID-19 Response, ICE May be Misusing a Common Disinfectant in Detention Facilities*, PHYSICIANS FOR HUM. RTS. (Aug. 10, 2020), <https://phr.org/our-work/resources/in-covid-19-response-ice-may-be-misusing-a-common-disinfectant-in-detention-facilities/>.

¹⁴⁰ *Id.*

2009 and was the first global flu in forty years.¹⁴¹ The first case of H1N1 was detected in California on April 15, 2009.¹⁴² By the time the WHO declared it to be a pandemic, seventy-four countries and territories around the world had confirmed infections.¹⁴³ It was later determined that the virus's presence in humans originated in Mexico.¹⁴⁴ Once again, noncitizens and migrants were targeted as the cause of the disease.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].”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.”¹⁴⁷ Sean Hannity asked his viewers, “Is this [Swine Flu] the latest border crisis?”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.¹⁴⁹ The idea was met with resistance, as both Napolitano and Schuchat explained that shutting down the border would not effectively contain disease spread.¹⁵⁰ Ultimately, the border was not shut down. Instead, vaccines were

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

¹⁴² *2009 H1N1 Pandemic Timeline*, CTNS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/2009-pandemic-timeline.html> (last visited Feb. 4, 2022).

¹⁴³ *Influenza A (H1N1) Outbreak*, *supra* note 141.

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/>.

¹⁴⁵ Sonia Scherr & David Holthouse, *Swine Flu Prompts Anti-Mexican Sentiment*, S. POVERTY L. CTR. INTEL. REP. (Aug. 30, 2009), <https://www.splcenter.org/fighting-hate/intelligence-report/2009/swine-flu-prompts-anti-mexican-sentiment>.

¹⁴⁶ Eric Alterman & Danielle Ivory, *Conservatives Know the Real Origin of Swine Flu*, CTR. FOR AM. PROGRESS (Apr. 30, 2009), <https://www.americanprogress.org/issues/general/news/2009/04/30/5852/think-again-conservatives-know-the-real-origin-of-swine-flu/>.

¹⁴⁷ Brian Alexander, *Amid Swine Flu Outbreak, Racism Goes Viral*, NBC NEWS (May 1, 2009), <https://www.nbcnews.com/id/wbna30467300>.

¹⁴⁸ Alterman & Ivory, *supra* note 146.

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

¹⁵⁰ *Id.* at 12–13.

developed and made widely available, and on August 11, 2010, the WHO announced the end of the H1N1 pandemic.¹⁵¹

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 H1N1.¹⁵² 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.¹⁵³ 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.¹⁵⁴

¹⁵¹ 2009 H1N1 Pandemic Timeline, *supra* note 142.

¹⁵² Eskild Petersen et al., *Comparing SARS-CoV-2 with SARS-CoV and Influenza Pandemics*, 20 LANCET INFECTIOUS DISEASES e238, e239 (July 3, 2020), [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(20\)30484-9/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30484-9/fulltext); Vivaldo Gomes da Costa et al., *Comparative Epidemiology Between the 2009 H1N1 Influenza and COVID-19 Pandemics*, 13 J. INFECTION AND PUB. HEALTH 1797, 1800 (2020).

¹⁵³ Uriel J. García, *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-transport/>.

¹⁵⁴ Daniel Wiessner, *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.¹⁵⁵ 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.

¹⁵⁵ Letter from Michele Heisler, Med. Dir., U. Mich., Paul B. Spiegel, Dir., Johns Hopkins Ctr. for Humanitarian Health, Ronald Waldman, Professor Emeritus of Glob. Health, Geo. Wash. U., & Monette Zard, Dir. Forced Migration and Health Prog., Colum. U. Mailman Sch. Pub. Health, to Xavier Becerra, Sec'y, U.S. Dept. Health Hum. Servs., & Rochelle Walensky, Dir, U.S. Ctrs. For Disease Control & Prevention, (July 1, 2021), http://www.publichealth.columbia.edu/sites/default/files/title_42_public_health_letter_-_july_1.2021.final.pdf