

2023

Making Protection Unexceptional: A Reconceptualization of the U.S. Asylum System

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Making Protection Unexceptional: A Reconceptualization of the U.S. Asylum System

*Denise Gilman**

The United States treats asylum as exceptional, meaning that asylum is presumptively unavailable and is offered only in rare cases. This exceptionality conceit, combined with an exclusionary apparatus, creates a problematic cycle. The claims of asylum seekers arriving as part of wide-scale refugee flows are discounted, and restrictive policies are adopted to block these claims. When asylum claims nonetheless continue to mount, the United States asserts “crisis” and deploys new exclusionary measures. The problems created by the asylum system are not addressed but are instead deepened. This Article encourages a turn away from policies that have led down the same paths once and again.

This Article first describes the development of the modern U.S. asylum system, highlighting data that demonstrates the extent to which exceptionality is a basic feature of the system. In doing so, this Article reconsiders an assumption underlying much scholarship and commentary—that the U.S. asylum system is fundamentally generous even if it has sometimes failed to live up to its promise. This Article then establishes that the emphasis on exceptionality has led to an exclusionary asylum process. Most asylum claims are adjudicated within deportation proceedings, and policymakers have imposed layers of additional procedural barriers. Next, this Article presents the problems created by the system. It documents how the system places genuine asylees in danger while causing violence at the border. Further, embedded bias in the system, resulting from the focus on exceptionality, favors asylum claims from far-flung nations such as China over commonly arising claims from nearby troubled countries. This bias creates a legitimacy problem. The system also violates U.S. law and international human rights and refugee law.

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This Article concludes by offering suggestions for more stable, effective, and humane policies to address asylum seekers in the United States. In addition to eliminating many existing substantive restrictions on asylum, the system should incorporate group-based eligibility for applicants from designated nations or situations that are sending significant refugee flows. Finally, the United States should adopt a specialized non-adversarial asylum system for all cases, apart from the deportation system and with genuine independent review of denials of asylum.

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INTRODUCTION

In June 2022, fifty-three men, women, and children from Mexico, Guatemala, Honduras, and El Salvador perished from the heat in the back of a truck found near San Antonio, Texas.¹ Given stringent controls at the Texas-Mexico border, the migrants undoubtedly relied on smugglers to assist them in crossing the international boundary to seek safety and security in the United States.² The horrific loss of life highlighted the

1. Christine Fernando, Cady Stanton & Jeanine Santucci, *Death Toll Rises to 53 in Suspected Migrant-Smuggling Operation in San Antonio: What to Know*, USA TODAY (June 29, 2022, 9:44 PM), <https://www.usatoday.com/story/news/nation/2022/06/29/san-antonio-tractor-trailer-migrants-death-toll/7765123001/> [<https://perma.cc/7GR8-D7Y3>]. That same month, June 2022, 23 migrants seeking protection in Spain died at the Spanish/Moroccan land border in Melilla, Spain as a result of border enforcement operations. See Guy Hedgcock, *Melilla Migrant Deaths Spark Anger in Spain*, BBC NEWS (June 27, 2022), <https://www.bbc.com/news/world-africa-61956104> [<https://perma.cc/PS5C-GL2P>]. The close timing of these two tragedies, at the respective borders of the United States and Europe, suggests that exclusionary policies impacting asylum seekers are a global phenomenon requiring attention.

2. See Lomi Kriel & Uriel J. García, *Death is a Constant Risk for Undocumented Migrants Entering Texas*, TEX. TRIB. (June 28, 2022, 10:00 AM), <https://www.texastribune.org/2022/06/28/texas-migrant-deaths-smuggling/> [<https://perma.cc/25XJ-J55Z>] (discussing how migrants seek out smugglers for assistance in getting across the border). San Antonio is located in south Texas, about 150 miles from the border, and has been a migration hub and gateway for many years. See Andrea Drusch, *Behind San Antonio's Decision to Open a Migrant Resource Center*, SAN ANTONIO REP. (July 17, 2022), <https://sanantonioreport.org/behind-san-antonios-decision-to-open-a-migrant-resource-center/> [<https://perma.cc/WZM4-56HF>] (explaining how San Antonio has turned into a migrant hub); see *San Antonio, Texas*, ENCYC. BRITANNICA: GEOGRAPHY & TRAVEL (June 26, 2023),

urgency of considering the U.S. approach to its southern border and the treatment of asylum seekers in the United States.

In recent years, policymakers and the press have often labeled wide-scale arrivals of migrants at the U.S. southern border,³ including asylum seekers, as a “crisis” and “disaster.”⁴ This Article urges instead that the

<https://www.britannica.com/place/San-Antonio-Texas> [<https://perma.cc/E4A2-SLFN>] (describing San Antonio’s location in comparison to Mexican border).

3. The terminology used in the refugee/asylum context can be ambiguous and even contentious, particularly given the existence of both international and domestic norms and terms. When addressing global policies and trends, I use the term “migrant” to describe the overarching category of people on the move internationally, and I use the term “refugee” to describe those migrants who fit the international refugee definition, understood generously. Some make a sharp distinction between “migrants,” usually seen as making a voluntary decision to move, and “refugees,” but this distinction is beginning to erode with the understanding that motivations for migration are complex. See T. Alexander Aleinikoff, *Can Refugee Scholars Hold the Line? Why the Theoretical Line that Separates Forced Migrants from Other Persons on the Move May not be Sustainable*, PUB. SEMINAR (June 21, 2021), <https://publicseminar.org/essays/can-refugee-scholars-hold-the-line/> [<https://perma.cc/3ARZ-93C9>] (discussing why, in recent years, the line between migrants and refugees has been difficult to make out); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1275 (1990) [hereinafter *Reforming Asylum Adjudication*] (discussing the difference between the terms refugee and migrant). Distinct terminology applies to the specific process of recognition as a person who meets the refugee definition under domestic or international law procedures. When referencing procedures for recognition as a refugee in the United States, I use terminology relating to “asylum.” The term “asylum seeker” is used in connection with a person who intends to invoke or has invoked the U.S. asylum process, even when impediments make it impossible to access the asylum process effectively and become an official asylum seeker under U.S. law. “Asylee” describes a person who achieves refugee recognition in the asylum process. In the U.S. system, “asylum” is used to describe refugee recognition within the United States, while the term “refugee” is used to describe a person who received such recognition before resettlement from abroad to this country. Both are “refugees,” however, in that the United States has recognized that they meet the refugee definition. See *infra* notes 14–37 and accompanying text (describing the contours of U.S. asylum and refugee resettlement systems and setting forth the U.S. refugee definition that applies in those systems). As further clarification of terminology, international law establishes that an individual is a refugee if the refugee definition is met, regardless of any governmental recognition. See U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION ¶ 28 (2019). It is, therefore, sometimes proper to refer to asylum seekers, those denied refugee recognition, and those prevented from seeking asylum as refugees.

4. Eunice Lee, *Regulating the Border*, 79 MD. L. REV. 374, 375 (2020) (noting the prevalence of “crisis” and “disaster” as terms to denote the arrival of asylum seekers); Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 616–17 (2017) (noting that large-scale arrivals at the U.S. and other borders are regularly labeled as “crises”); Stephen Collinson, *Southwest Border Crisis Leaves Biden Vulnerable on All Sides*, CNN (Mar. 16, 2021, 9:01 AM), <https://www.cnn.com/2021/03/16/politics/joe-biden-immigration-border/index.html> [<https://perma.cc/625N-4YN8>] (discussing migrant arrivals, labeling the phenomenon as a “crisis”); Andrew R. Arthur, *Biden Border Policies Breed Crime and Exploitation in Mexico, Fraud Here*, CTR. FOR IMMIGR. STUD. (Mar. 11, 2021), <https://cis.org/Arthur/Biden-Border-Policies-Breed-Crime-and-Exploitation-Mexico-Fraud-Here> [<https://perma.cc/W9D4-7QLD>] (stating that the border is a “disaster”); Daniel Funke, *Facebook Post Misleads on Number of Border Apprehensions Under Biden, Trump*, POLITIFACT

U.S. asylum system is the real problem and recommends a change of course.

The U.S. asylum system is based on a conception of asylum as exceptional, meaning that asylum is presumptively unavailable and is offered only in rare and unique cases. This exceptionality conceit, combined with an exclusionary apparatus, creates a problematic cycle. The claims of asylum seekers arriving as part of wide-scale refugee flows, particularly from nearby nations in Central America, are discounted in law and practice because they are not exceptional.⁵ Restrictive policies are adopted to block these claims.⁶ These policies have little impact on asylum seeker arrivals but create other significant harms.⁷ When asylum claims continue to mount despite restrictions, the U.S. response is to assert “crisis” and deploy new exclusionary measures.⁸ The problems *created by* the

(Mar. 17, 2021), <https://www.politifact.com/factchecks/2021/mar/17/facebook-posts/facebook-post-misleads-number-border-apprehensions/> [<https://perma.cc/7EEN-XKLA>] (noting that elected officials have called the border a “mess”).

5. See *infra* Section V.B.1 (noting that law and procedures have developed to deny Central American claims based on gang violence and domestic violence). Asylum seekers from the Central American countries of Guatemala, Honduras, and El Salvador (known as the “Northern Triangle” of Central America) have arrived to seek protection at the U.S. southern border in large numbers at various junctures. See, e.g., RYAN BAUGH, OFF. IMMIGR. STATS., U.S. DEP’T OF HOMELAND SEC., FISCAL YEAR 2021 REFUGEES AND ASYLEES ANNUAL FLOW REPORT 9 (Sept. 2022) [hereinafter 2021 REFUGEES AND ASYLEES FLOW REPORT] (Guatemala, Honduras, and El Salvador were among the top 10 countries for asylum applicants in 2021); IMMIGR. & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, ANNUAL REPORT ON ASYLEES, FISCAL YEAR 1997, No. 3, 1 (July 1999), https://www.dhs.gov/sites/default/files/publications/INS_AnnualReport_Asytees_1997_0.pdf [<https://perma.cc/VH5Z-WWLB>] [hereinafter 1997 YEARBOOK] (noting large numbers of asylum applications from Central America between 1991 and 1997). Asylum claims from Nicaragua, also a Central American nation, have also been common during certain periods. See, e.g., Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL’Y INST. (Apr. 1, 2006), <https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era> [<https://perma.cc/4XUH-K4BP>] (during the 1980s and early 1990s “hundreds of thousands of Salvadorans, Guatemalans, and Nicaraguans fled north”). The southern land border of the United States is shared with Mexico, and the countries of Central America lie just south of Mexico. See *Map: North and South America*, LIBR. CONG. (1996), <https://www.loc.gov/resource/g3290.ct003188/> [<https://perma.cc/N63U-RXTJ>] (last visited July 27, 2023). Thus, Central America is quite close to the United States geographically, and the distance can be traversed over land. Concretely, the distance between the U.S. southern border in Texas and the southern border of Mexico connecting with Guatemala is about 1,000 miles. See DISTANCE CALCULATOR, <https://www.distancecalculator.net/> [<https://perma.cc/Q9YD-BY2F>] (last visited July 26, 2023).

6. See *infra* Sections IV.C, IV.D (describing expedited removal proceedings, expanded detention, and restrictive border policies).

7. See *infra* Section V.A (describing harms, including the return of refugees to danger and an increase in violence at the border).

8. See *supra* note 4 (outlining the prevalence of the “crisis” narrative). The language and framing of “crisis” make it more challenging to consider asylum law and policy in a measured and thoughtful manner. This Article uses the language of “crisis” only to point out the ways in which the “crisis” narrative is prevalent and has a negative impact on the U.S. asylum system.

asylum system are not addressed—instead, they deepen. This Article encourages a turn away from policies that have led down the same paths once and again.

In Part I, this Article describes the development of the modern U.S. asylum system, including its foundational exceptionality.⁹ This Article thus reconsiders the assumption underlying much scholarship and commentary—that the modern U.S. asylum system is fundamentally generous even if it has at times failed to live up to its promise.¹⁰ In Part II, this Article demonstrates that the system has exceptionality as a basic feature, utilizing data from its inception in 1980 up to the present. In Part III, this Article explains how asylum exceptionality is implemented, through restrictive substantive law standards and an exclusionary procedural apparatus. Part IV then lays out in detail the development of the exclusionary asylum process, which involves asylum decision-making that largely takes place in the context of deportation proceedings, and the evolution of additional procedural barriers to asylum.

In Part V, this Article identifies the problems resulting from the emphasis on exceptionality and exclusion. The system places genuine asylum seekers in danger while leading to an escalation of violence at the border. In addition, embedded bias in the system against certain nationalities and types of asylum claims, which results from the focus on exceptionality, creates a severe legitimacy problem.¹¹ The system

9. The U.S. asylum system has a longer history, but this Article is focused on the period that follows passage of the 1980 Refugee Act, which marks the modern asylum era. Many of the goals and tensions described here also existed prior to adoption of the 1980 Refugee Act.

10. See generally, e.g., DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* (2022); Charles Shane Ellison & Anjum Gupta, *Dismantling the Wall*, 120 MICH. L. REV. 1 (2022); Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOY. L. REV. 121 (2020); ANDREW I. SCHOENHOLTZ ET AL., *LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY* (2014); DAVID A. MARTIN ET AL., *FORCED MIGRATION LAW AND POLICY* (2d ed. 2013) [hereinafter *FORCED MIGRATION*]; Donald M. Kerwin, *The Faltering US Refugee Protection System: Legal and Policy Responses to Refugees, Asylum Seekers, and Others in Need of Protection*, MIGRATION POL'Y INST. (May 2011), <https://www.migrationpolicy.org/pubs/refugeeprotection-2011.pdf> [https://perma.cc/9KY3-PZAY].

11. Racialization is involved as well. In the asylum context, race discrimination is complex and does not always break down along obvious Black/White lines but rather relies on stereotypes associated with particular races and ethnicities. Thus, Black asylum seekers from African nations may be seen as viable asylum seekers as a result of narratives around the uncivilized nature of government and persecutors in the region. Meanwhile, Latino asylum applicants from Central America are seen as unworthy of asylum because of the association of their race and ethnicity with gang violence and crime. See Cynthia S. Gorman, *Defined by the Flood: Alarmism and the Legal Thresholds of U.S. Political Asylum*, GEOPOLITICS 4, 6 (2019) [hereinafter *Defined by the Flood*] (discussing the ethnicities of migrants at the US-Mexico border and the role played by ethnic identities in the asylum context); Josiah Heyman et al., *Bordering a "Crisis": Central American Asylum*

discredits commonly arising claims originating in nearby nations, especially from Central America, while favoring asylum seekers from distant nations, such as China. Importantly, the system also violates U.S. law and international human rights and refugee law by discriminating among asylum seekers and blocking access to asylum protections, resulting in the unlawful return of asylum seekers to danger.

Finally, in Part VI, this Article urges a reconceptualization of the system toward greater expansiveness to accommodate the reality of refugee flows while strengthening the system's stability and credibility. A change of course is needed to remove the exceptionality conceit and the exclusionary apparatus in order to "normalize" asylum processing. This Article does not offer a new theory of asylum eligibility but insists that principles of exceptionality and exclusion should be stripped away so that they do not limit eligibility or the reach of asylum protection. This Article insists that large-scale arrivals from a particular country signal a refugee flow that should be addressed as such, including through group-based asylum eligibility determinations for applicants fleeing certain countries or situations. In addition—and critically—the U.S. system should adopt a non-adversarial approach to asylum decision-making with specialized and unbiased adjudication and fully independent review with due process, all outside of the deportation apparatus. These important shifts will allow for greater humanity, efficiency, and stability in the asylum system while bringing the United States into compliance with international and domestic legal obligations.

I. U.S. ASYLUM LAW AND THE EXCEPTIONALITY FOUNDATION

Current U.S. asylum law is principally based on the Refugee Act of 1980 adopted during the Carter administration.¹² The Refugee Act of 1980 codified obligations accepted under the United Nations Convention Relating to the Status of Refugees (U.N. Refugee Convention), which became binding on the U.S. when it ratified the United Nations Refugee

Seekers and the Reproduction of Dominant Border Enforcement Practices, 60 J. SW. 754, 764 (2018) (discussing how xenophobia plays into asylum); Karla Mari McKanders, *Decolonizing Colorblind Asylum Narratives*, 67 ST. LOUIS U. L.J. 523, 535 (2023) (discussing race in the context of gender-related asylum claims). While this Article does not delve into the racialization of the asylum system, extensive literature has documented the significant role of race and ethnic discrimination in immigration law and policy. See generally, e.g., DANIEL OKRENT, *THE GUARDED GATE* (2019); Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197 (2019).

12. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

Protocol in 1967.¹³ The adoption of the Refugee Act of 1980 built the foundation for U.S. asylum exceptionality.

A. The Two Paths to Refugee Recognition in the United States

The Refugee Act of 1980 established two pathways to refugee status in the United States: (1) a refugee resettlement system to admit refugees into the United States from abroad; and (2) an asylum system for those already in the United States or at the U.S. border¹⁴ seeking recognition as a refugee and protection once here.¹⁵ In U.S. parlance, the term “refugee” is most often used in connection with persons who have arrived through the refugee resettlement program.¹⁶ “Asylum seeker” is used to describe a person who seeks status through the asylum process and “asylee” for a person who receives a grant of asylum protection.¹⁷ However, the resettlement and the asylum pathways both require recognition as a refugee under the same definition provided in the Refugee Act of 1980.¹⁸ The U.S. refugee definition, which mirrors the definition provided in the U.N. Refugee Convention, requires that an individual have “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁹ Recognition of

13. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter U.N. Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]; *see also* Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) (concluding that the 1980 Refugee Act was intended to bring the United States into conformance with the U.N. Refugee Convention and Refugee Protocol).

14. Specifically, any person “who is physically present in the United States or who arrives in the United States . . . whether or not at a designated port of arrival . . . irrespective of . . . status may apply for asylum.” Refugee Act § 208(a) (codified at 8 U.S.C. § 1158(a)).

15. Refugee Act § 207 (codified at 8 U.S.C. § 1157) (providing for admission of refugees from abroad through refugee resettlement program); Refugee Act § 208 (codified at 8 U.S.C. § 1158) (establishing an “asylum procedure” for the recognition of refugees in the United States).

16. *See* 2021 REFUGEES AND ASYLEES ANNUAL FLOW REPORT, *supra* note 5 (explaining refugee and asylum terminology); *see also supra* note 3 (further explaining the terminology).

17. *See* 2021 REFUGEES AND ASYLEES ANNUAL FLOW REPORT, *supra* note 5 (defining asylum status); Nicole Ward & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POL’Y INST. (June 15, 2023), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states> [<https://perma.cc/CC38-C2S6>] (discussing the major differences between asylees, refugees, and asylum seekers); *see also supra* note 3 (further explaining the terminology).

18. Refugee Act § 201(a) (codified at 8 U.S.C. § 1101(a)(42)(A)) (setting forth the refugee definition); 8 U.S.C. § 1158 (providing for a grant of asylum where U.S. authorities “determine[] that [an] alien is a refugee” under 8 U.S.C. § 1101(a)(42)(A)); 8 U.S.C. § 1157 (providing for resettlement to the United States of certain refugees defined in 8 U.S.C. § 1101(a)(42)(B) who are designated by the President for resettlement); 8 U.S.C. § 1101(a)(42)(A) (setting out the refugee definition in U.S. law).

19. 8 U.S.C. § 1101(a)(42)(A) (U.S. law refugee definition); U.N. Refugee Convention, *supra* note 13, art. 1(A)(2) (international refugee definition).

refugee status through refugee resettlement or asylum leads to the possibility of permanent resident status and, eventually, U.S. citizenship.²⁰

1. Asylum as Refugee Recognition and Protection in the United States

Of the two pathways to refugee status in the United States, asylum is the focus of this Article. The asylum pathway, in turn, includes two distinct processes for recognition as a refugee and the resulting grant of asylum. An application for asylum is adjudicated either: (1) in an “affirmative” process before asylum officers with the Asylum Office of U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security, or (2) in a “defensive” process in removal proceedings before the Immigration Courts of the U.S. Department of Justice (Immigration Courts).²¹

Only a limited category of individuals applying from within the interior of the United States without first being placed in deportation proceedings may have their claims adjudicated affirmatively by the USCIS Asylum Office.²² A claim that is not granted by the USCIS Asylum Office affirmatively may be renewed in proceedings before the Immigration Courts.²³

All other asylum seekers must pursue their asylum claims defensively before the Immigration Courts from the beginning. These cases proceed forward in the context of deportation proceedings.²⁴ Almost all persons who arrive at the U.S. southern border seeking asylum have their cases heard defensively in the Immigration Courts within deportation proceedings.²⁵ Those border arrivals may be required to pass a screening

20. 8 U.S.C. § 1159 (provision providing for adjustment of status to that of a Lawful Permanent Resident for resettled refugees and asylees); 8 U.S.C. § 1427 (provision providing for naturalization of those who have held Lawful Permanent Resident status for five years).

21. 8 C.F.R. § 208.2 (2022) (setting out jurisdiction in asylum proceedings).

22. *See id.* Regulations now provide for a program allowing certain asylum seekers apprehended at the border to have their asylum claims adjudicated by the Asylum Office in the first instance. Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18085 (Mar. 29, 2022) (to be codified at 8 C.F.R. pts. 1003, 1208, 1235, and 1240). As described below, this program does not meaningfully change the existing asylum law procedures and structures. *See infra* notes 348–55 and accompanying text.

23. 8 C.F.R. §§ 208.2, 208.14(c) (2022).

24. Under current law, Immigration Court proceedings to determine whether a migrant will be deported are titled “removal proceedings.” 8 U.S.C. § 1229(a). In common parlance, they are generally still described as deportation proceedings, which is the terminology I use in this Article.

25. *See* 8 U.S.C. § 1225(b) (providing for expedited removal of migrants at the border and requiring screening for asylum seekers at the border who are then placed in deportation proceedings if found to have a credible fear of persecution); 8 C.F.R. § 235.3 (2022) (setting out process for

interview before having the opportunity to present an asylum claim in Immigration Court.²⁶

The relevant adjudicator with USCIS or the Immigration Courts determines on a case-by-case basis whether an asylum seeker meets the refugee definition.²⁷ If so, the adjudicator may grant asylum.²⁸

2. Refugee Resettlement as Refugee Recognition and Protection in the United States

In comparison, the refugee resettlement program—the other path for securing status as a refugee in the United States under the Refugee Act of 1980—is available to persons who are outside of their home countries but not in the United States, nor at the U.S. border.²⁹ The refugee resettlement program is not the focus of this Article; however, a brief recount is provided because it shares a history with asylum and provides a functional point of comparison with the asylum process.³⁰

removal at the border as well as screening of asylum seekers and placement into Immigration Court deportation proceedings for those with a favorable screening result).

26. 8 U.S.C. § 1225(b)(1)(B); *see infra* notes 131–40 and accompanying text (discussing expedited removal procedures and credible fear screening interviews for asylum seekers).

27. 8 U.S.C. § 1158(b)(1)(A).

28. *Id.* In addition to asylum, U.S. law provides two related forms of relief for individuals seeking protection after having arrived in the United States: (1) withholding of removal under 8 U.S.C. § 1231(b)(3); and (2) protection under the Convention against Torture as set out in 8 C.F.R. § 208.18. This Article does not focus separately on those asylum-related forms of protection. However, many of the same considerations regarding exceptionality and exclusion apply to those forms of protection. For this reason and others, the availability of withholding of removal and protection under the Convention against Torture does not fill in the gaps left by a limited asylum system. As a brief description, withholding of removal under 8 U.S.C. § 1231(b)(3) is available to individuals who, like those eligible for asylum, demonstrate a likelihood of persecution on account of one of the five protected grounds. The applicant bears a higher burden of showing a likelihood of harm to obtain withholding of removal, but protection is mandatory if this burden is met. 8 U.S.C. § 1231(b)(3). Protection under the Convention against Torture is grounded in U.S. treaty obligations under the U.N. Convention against Torture. 8 C.F.R. § 208.18 (2022). The protection granted is withholding of removal, which is the same status as statutory withholding of removal protection under 8 U.S.C. § 1231(b)(3). Some individuals with criminal histories receive lesser protection under the Convention against Torture, known as deferral of removal. *Id.* To obtain protection under the Convention against Torture, an applicant bears the burden of showing that it is more likely than not that the person will suffer torture if returned to the home country, at the hands of government agents or with government acquiescence. There is no requirement that the torture be on account of a protected ground. Protection is mandatory if the applicant makes the necessary showings. *Id.*

29. *See* 8 U.S.C. § 1157 (providing for refugee resettlement); *Proposed Refugee Admissions for Fiscal Year 2023*, U.S. DEP'T OF STATE 1, 9 (Sept. 8, 2022), https://www.state.gov/wp-content/uploads/2022/09/FY-2023-USRAP-Report-to-Congress_FINAL_7-Sep-2022.pdf [<https://perma.cc/W68T-4GWW>] [hereinafter *Proposed Refugee Admissions 2023*] (explaining the refugee resettlement process).

30. The U.S. refugee resettlement regime bears many of the same traits of exceptionality and exclusion, as well as bias, as the U.S. asylum process, although the legal obligations owed to

A limited number of persons are designated abroad as refugees, often while staying in refugee camps.³¹ They are brought to the United States after having received a determination of refugee status.³² The United States resettles only a tiny fraction of individuals who would qualify as refugees globally.³³

The U.S. State Department operating in concert with Congress and the president, designates groups of persons and nationalities that may be considered for refugee resettlement.³⁴ U.S. officials screen and interview persons falling within the general priority categories. Those individuals granted refugee recognition then travel to the United States.³⁵

In recent years, the refugee resettlement program has focused on nationals of countries such as Iraq, the Democratic Republic of Congo, Burma, and Bhutan.³⁶ The United States has also settled Russian and Ukrainian religious minorities.³⁷

B. Foundations of Exceptionality in the 1980 Refugee Act and the Modern U.S. Asylum System

The history of the 1980 Refugee Act and the modern U.S. asylum regime that it created is one of tension between various purposes. Importantly, though, limiting the recognition of refugees through asylum has always been a primary goal.

Scholars and commentators often describe the Refugee Act of 1980 as fulfilling a humanitarian promise to refugees.³⁸ They urge that the law

refugees abroad are less well established. There can be no serious argument that refugee resettlement is sufficiently generous to compensate for the shortcomings of asylum.

31. See *Proposed Refugee Admissions 2023*, *supra* note 29, at 14–15 (illustrating the limited number of individuals labeled as refugees abroad).

32. *Id.*

33. See U.N. HIGH COMM’R FOR REFUGEES, PROJECTED GLOBAL RESETTLEMENT NEEDS 2023 18 (June 8, 2022), <https://www.unhcr.org/publications/brochures/62b18e714/2023-projected-global-resettlement-needs.html> [<https://perma.cc/FB5B-Y3DN>] (identifying refugee resettlement needs for approximately 1.44 million refugees in 2021 and noting that the United States received 32,851 referrals for possible resettlement from the United Nations High Commissioner for Refugees).

34. See *Proposed Refugee Admissions 2023*, *supra* note 29, at 5 (detailing this cooperation).

35. *Id.* at 9.

36. 2021 REFUGEES AND ASYLEES FLOW REPORT, *supra* note 5, at 5.

37. *Id.*

38. See, e.g., Deborah Anker, *The Refugee Act of 1980: An Historical Perspective*, 5 IN DEF. OF THE ALIEN 89, 89–91 (1982) [hereinafter *Refugee Act*] (“[The Refugee Act of 1980] was rooted in principles of humanitarianism and objectivity.”); MARTIN ET AL., FORCED MIGRATION, *supra* note 10, at 95 (describing The Refugee Act of 1980 as offering “important improvements respecting asylum”); Kerwin, *supra* note 10, at 1–2 (describing refugee law in the United States as “generous in many respects” and highlighting the “legal imperatives . . . to protect refugees”).

implemented obligations developed internationally after World War II and subsequently accepted by the United States.³⁹ They also describe the Refugee Act of 1980 as a concrete embodiment of a U.S. commitment to no longer turn away refugees—as the nation had shamefully done in 1939 when it refused admission to Jews fleeing the Holocaust aboard the St. Louis German ship when they arrived near Florida.⁴⁰ They further applaud that the legislation formally replaced the prior refugee recognition program, which encompassed only those fleeing Communist-dominated or Middle Eastern nations, with a refugee definition that did not explicitly impose such national origin and political limits.⁴¹

To be sure, the Refugee Act of 1980 took steps toward implementing international obligations.⁴² In addition, the Refugee Act of 1980 built a more organized procedure for admitting refugees.⁴³ In enacting this new procedure, Congress reacted to a prior reliance on ad hoc Executive decisions or group-specific congressional enactments admitting particular

39. See Anker, *Refugee Act*, *supra* note 38, at 89–90 (noting that the Refugee Act of 1980 incorporated the U.N. Refugee Convention refugee definition and was “one of the most carefully considered and constructed pieces of legislation in the post-World War II era.”). The U.N. Refugee Convention itself emphasizes humanitarian and human rights goals but also the importance of alleviating the burden of refugees and international relations purposes relating to the amelioration of tensions in and between states. U.N. Refugee Convention, *supra* note 13, pmbl.

40. See HUMAN RIGHTS FIRST, U.S. SHOULD NOT TURN AWAY ASYLUM SEEKERS AT ITS BORDERS (Jan. 2017) (explaining that the U.S. passed the Refugee Act of 1980 to codify international obligations accepted in the wake of World War II and the rejection of the St. Louis passengers, in an acknowledgment that the United States could not “return refugees to places where their lives or freedom would be threatened or reject potential refugees”); *Holocaust Encyclopedia: Voyage of the St. Louis*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/voyage-of-the-st-louis> [<https://perma.cc/H23W-4Q6Q>] (July 12, 2021) (discussing the St. Louis ship and how the U.S. government denied arrival of 937 passengers fleeing the Holocaust); Carly Goodman, *Between Foreign Policy, Politics, and the Law: The United States Refugee Crises of 1980*, HUMAN ACTION (Oct. 2016), https://www.humanityinaction.org/knowledge_detail/between-foreign-policy-politics-and-the-law-the-united-states-refugee-crises-of-1980/ [<https://perma.cc/F6RU-PX3T>] (describing the backdrop of the decision to turn back the St. Louis and discussing how the Refugee Act of 1980 gave refugees “the right to request asylum”).

41. See Anker, *Refugee Act*, *supra* note 38, at 89–90 (explaining the move from discriminatory refugee admissions to anti-discriminatory policies); John A. Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME L. REV. 618, 619–20 (1981) (explaining that the legislation was enacted “to replace a narrow political and geographical definition of refugee with a broader” definition of refugee); *cf.* Act to Amend the Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911, 913 (1965) (prior provision limiting refugee recognition to those from Communist-dominated countries or nations of the Middle East).

42. See generally Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102; Edward M. Kennedy, *Refugee Act of 1980*, 15 INT’L MIGRATION REV. 141 (1981).

43. See generally Refugee Act §§ 101, 201.

categories of refugees, such as Hungarians fleeing repression after the uprising against the Communist regime.⁴⁴

However, through adoption of the Refugee Act of 1980, Congress also limited the ability of those escaping harm to secure protection in the United States.⁴⁵ Congress provided a specific legalistic definition of the term “refugee” that could be interpreted narrowly so as not to encompass many fleeing danger.⁴⁶

Also, Congress made clear its intention to rein in the large-scale admissions programs that had existed before enactment of the Refugee Act of 1980.⁴⁷ The adoption of the legislation responded to concerns about the hundreds of thousands of Cubans and Southeast Asian refugees permitted to enter the United States in the 1960s and 1970s through various special programs.⁴⁸ The law thus imposed a number of explicit restrictions, such as numerical limits on refugee resettlement and curtailment of Executive parole as a tool for admitting endangered persons.⁴⁹

44. Kennedy, *supra* note 42, at 146; STEPHEN MEILI, THE CONSTITUTIONALIZATION OF HUMAN RIGHTS LAW: IMPLICATIONS FOR REFUGEES 160 (2022).

45. See, e.g., MEILI, *supra* note 44, at 160 (demonstrating how Congress limited asylum protections with the Refugee Act of 1980).

46. See GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 15–16, 35 (3rd ed. 2007) (noting that States have adopted “fairly restrictive criteria” for identifying refugees and describing efforts by United States to ensure that the U.N. Refugee Convention definition of refugee, later adopted into U.S. law, was not “too vague”).

47. See MEILI, *supra* note 44, at 160–61 (“The inclusion of an asylum provision was intended to curtail the Executive branch’s use of the parole power.”); Kennedy, *supra* note 42, at 146 (setting out legislative history of Refugee Act of 1980 and the desire to move away from previous ad hoc policies that led to the admission of large numbers of refugees if only from particular regions and situations); cf., e.g., *Operation Safe Haven: The Hungarian Refugee Crisis of 1956*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Dec. 14, 2022), <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/operation-safe-haven-the-hungarian-refugee-crisis-of-1956> [<https://perma.cc/K3NR-55BN>] (describing use of Executive parole authority to bring 30,000 Hungarian refugees to the United States over an eight-month period); Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (granting Lawful Permanent Resident status to Cubans who had fled the Castro regime); Refugee Act §§ 101, 201 (setting forth limited but uniform provisions for addressing refugee situations).

48. See Ruth Ellen Wasem, *More than a Wall: The Rise and Fall of US Asylum and Refugee Policy*, 8 J. MIGRATION & HUM. SEC. 246, 249–51 (2020) [hereinafter *More than a Wall*] (explaining that the U.S. lacked “a coherent refugee policy” before the Refugee Act of 1980 and that the main push to adopt legislation was driven by large influxes of refugees in the 1960s and 1970s); Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 165, 174 (Juan F. Perea ed., 1996) (asserting that past “overtly racist views” about Asians were reinvigorated during discussion of the Refugee Act of 1980, which came to pass as a response to the admission of large numbers of Southeast Asian refugees).

49. See Anker, *Refugee Act*, *supra* note 38, at 93–94 (providing a discussion on restrictions).

Furthermore, while the Refugee Act of 1980 codified the possibility of seeking asylum once in the United States or at the border, it provided little guidance regarding a process for asylum recognition⁵⁰ and assumed that the number of asylum grants would be small.⁵¹ Thus, for example, the law provided a path to permanent resident status for asylees but only for 5,000 people each year.⁵² Congress later repealed that numerical restriction,⁵³ but it establishes the limiting nature of foundational U.S. asylum law.

This approach reflected an already-established view of asylum seekers in the United States as a burden or even threat, albeit with little to no evidence.⁵⁴ It also codified an improbable understanding that asylum seekers would not arrive in the United States in large numbers and should not be recognized as refugees if they did.⁵⁵ The new law thus insisted that recognition would be granted to asylum seekers only where they were limited in number and fit within a narrow definition.

II. THE EVIDENCE OF ASYLUM EXCEPTIONALITY

This constraining purpose of the Refugee Act of 1980 made the exceptionality of refugee recognition a key feature of the modern asylum system from the beginning.⁵⁶ The system treated strict limits on asylum as

50. Refugee Act § 208; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 40 (1984).

51. See Refugee Act § 209(b).

52. *Id.*

53. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 101(g)(1)(B)(i), 119 Stat. 231, 305 (amending 8 U.S.C. 1159 to repeal annual cap on asylee adjustment to Lawful Permanent Resident status).

54. See, e.g., Kennedy, *supra* note 42, at 146–48 (noting and addressing concerns regarding financial costs of refugee integration at the time of adoption of the Refugee Act of 1980 and also raising potential security issues involved in refugee flows); Daniel A. Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies*, SMITHSONIAN MAG. (Nov. 18, 2015), <https://www.smithsonianmag.com/history/us-government-turned-awaythousands-jewish-refugees-fearing-they-were-nazi-spies-180957324> [https://perma.cc/UH84-XTG3] (describing the rejection of Jewish refugees fleeing the Holocaust on security grounds).

55. See Kennedy, *supra* note 42, at 146 (describing strong desire to avoid the “flood gate issue” in drafting and adopting the Refugee Act of 1980); Ramji-Nogales, *supra* note 4, at 637 (noting that the United Nations Refugee Convention, which serves as the source for U.S. law, also fails to view cases of mass influx as refugee situations).

56. Commentators from multiple perspectives have sometimes suggested that the limiting approach is appropriate, or at least inherent, in the refugee law context on the theory that refugees benefit from exceptions to national sovereignty over borders and the “regular” migration process with its limitations. MARTIN ET AL., FORCED MIGRATION, *supra* note 10, at 78–80 (urging limits on the refugee definition given that refugees are exempt from certain migration limits); *Asylum Has Become a Parallel Immigration System; Here’s How to Fix That*, WASH. POST (Jan. 31, 2023), <https://www.washingtonpost.com/opinions/2023/01/31/asylum-immigration-parallel-system->

appropriate and necessary. Asylum was seen as a “scarce resource”⁵⁷ to be carefully guarded and to be granted only in “extraordinary cases.”⁵⁸

In the months and years following the adoption of the Refugee Act of 1980, the United States emphasized the limiting approach, further entrenching exceptionality. The more generous aspects of the Refugee Act of 1980, particularly the asylum provisions, were deemed altogether inapplicable or made inaccessible in cases of large numbers of arrivals from countries in the Americas during the 1980s.⁵⁹ Even Cubans, who have often received favorable immigration treatment, were processed under non-asylum mechanisms when significant numbers arrived by boat.⁶⁰ Large-scale arrivals were recast as not involving asylum claims in order to avoid applying asylum law. As demonstrated in the remainder of this Part, these tendencies have continued all the way into the present, establishing a longtime pattern of exceptionality.

A review of asylum grants in the United States demonstrates the extent to which the system emphasizes exceptionality. Since 1996, the first year for which full data is available, grants of asylum have never risen above

solutions/ [https://perma.cc/UE5A-Q256] (assuming that asylum is intended to be separate from and more narrow than other migration pathways); Ramji-Nogales, *supra* note 4, at 614 (critiquing refugee law as providing special protections but to only a privileged few). While this Article does not take on these assertions directly, I would note that they cannot justify asylum exceptionality. First, asylum seekers have rarely if ever been exempt from migration control and often enjoy no privileged status or procedure vis-à-vis other migrants; sometimes they are treated worse. Second, national sovereignty over border and migration control, even outside of the refugee context, is not absolute but is limited by human rights norms; refugee law is not a singular narrow exception to migration sovereignty.

57. MARTIN ET AL., FORCED MIGRATION, *supra* note 10, at 78 (in excerpts from a 1991 article by David Martin, who served as General Counsel for the Immigration and Naturalization Service and in other government roles involved with crafting and implementing the Refugee Act of 1980, discussing the need for strict limitations on asylum).

58. RUTH WASEM, CONG. RSCH. SERV., R41753, ASYLUM AND “CREDIBLE FEAR” ISSUES IN U.S. IMMIGRATION POLICY 29 (2011) [hereinafter CRS].

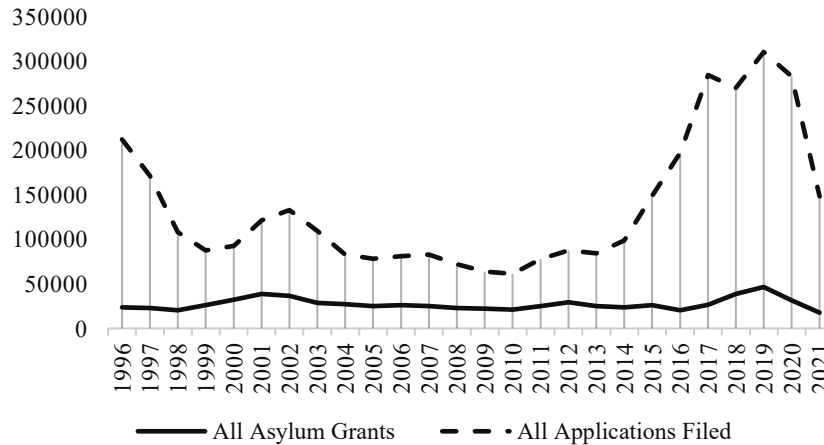
59. See, e.g., Rebecca Hamlin, *Ideology, International Law, and the INS: The Development of American Asylum Politics 1948–Present*, 47 POLITY 320, 327 (2015) (noting that the implementing agency—the Immigration and Naturalization Service—had a “restrictionist outlook” towards asylum after adoption of the 1980 Refugee Act); *infra* notes 107–13 and accompanying text (describing restrictions imposed in early regulatory history after the adoption of the Refugee Act of 1980); Schuck, *supra* note 50, at 41 (describing “mass asylum claims” in the wake of the adoption of the Refugee Act of 1980 as a “serious” problem and noting decision not to use asylum system for many arrivals); BILL FRELICK, REFUGEES AT OUR BORDER: THE U.S. RESPONSE TO ASYLUM SEEKERS 1–2 (1989) [hereinafter REFUGEES AT OUR BORDER] (documenting adoption of strict new measures in 1988 against Central American asylum seekers arriving at the southern border and Haitian asylum seekers arriving by boat).

60. Wasem, *More Than a Wall*, *supra* note 48, at 252–53; Kennedy, *supra* note 42, at 141; Kerwin, *supra* note 10, at 26.

50,000 per year.⁶¹ Effectively, there is a numerical limitation on asylum grants, even though the law includes no such ceiling.⁶²

FIGURE 1: YEARLY ASYLUM APPLICATIONS FILED AND ASYLUM GRANTS⁶³

(Affirmative and Defensive) 1996–2021



61. See Figure 1 (tracking the total yearly asylum applications filed and the yearly number granted from 1996 to 2021).

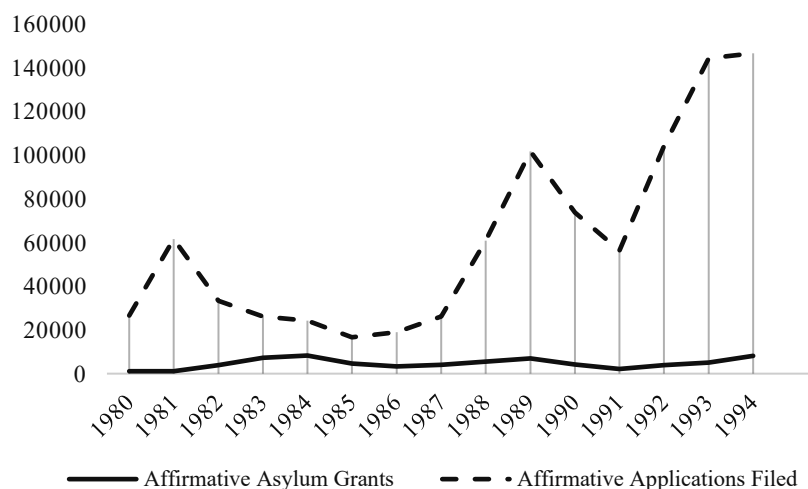
62. 8 U.S.C. § 1158.

63. The “affirmative” and “defensive” grant numbers for the period between 2005 and 2021, the last year for which data is available, are from the Department of Homeland Security (DHS) Refugees and Asylees reports for that period. U.S. DEP’T OF HOMELAND SEC., *Refugees and Asylees*, <https://www.dhs.gov/immigration-statistics/refugees-asylees> [https://perma.cc/2MGQ-DPF9] (last updated Mar. 14, 2023). The affirmative and defensive grant numbers for the period between 1995 and 2004 were obtained from the DHS Statistics Yearbook for 2005, Refugees and Asylees Data Tables, Table 16. U.S. DEP’T OF HOMELAND SEC., *Yearbook of Immigration Statistics*, <https://www.dhs.gov/immigration-statistics/yearbook> [https://perma.cc/7Y6E-WU8W] (last visited Aug. 21, 2023). For the total number of affirmative and defensive applications filed, the DHS Refugees and Asylees reports provided the data for the period from 2015 to 2020. *Refugees and Asylees*, *supra*. The DHS Refugees and Asylees reports did not provide information on applications filed consistently, however. For the period between 1998 and 2014, the number of affirmative applications filed was obtained from the Congressional Research Service, and the number of defensive applications was obtained from the Executive Office for Immigration Review (EOIR) Statistics Yearbooks for that period. CONG. RSCH. SERV., R45539, IMMIGRATION: U.S. ASYLUM POLICY 33 (2019), <https://crsreports.congress.gov/product/pdf/R/R45539/2> [https://perma.cc/83VH-6BXU]; EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T OF JUSTICE, *Statistics Yearbooks FY 2000–2018*, <https://www.justice.gov/eoir/statistical-year-book> [https://perma.cc/8FZB-29PE] (last updated Aug. 30, 2019). For affirmative and defensive applications filed for 1996 and 1997, the DHS Refugees and Asylees report for 1997, regarding affirmative applications filed, was combined with the data obtained from the EOIR Statistics Yearbook for 2000. *Refugees and Asylees*, *supra*, at 7; *Statistics Yearbooks FY 2000–2018*, *supra*, at N1.

Full data on all asylum applications filed and all asylum grants are not available for the earlier period between the adoption of the Refugee Act of 1980 and 1995. However, the limited available data for that period shows similar patterns.⁶⁴ That available data relates only to affirmative asylum applications filed and granted (outside of the Immigration Court context).⁶⁵ Only a very small number of affirmative asylum applications were approved each year between 1980 and 1995, never exceeding 10,000.⁶⁶ The Immigration Courts likely issued some additional number of favorable asylum decisions, but the overall numbers were almost certainly even lower than the period between 1996 and 2021.

FIGURE 2: YEARLY ASYLUM APPLICATIONS FILED AND ASYLUM GRANTS⁶⁷

(Affirmative Only) 1980–1995



The exceptionality demonstrated through these consistently low asylum grant numbers becomes even more apparent when put into the context of other relevant U.S. immigration numbers. The number of

64. See Figure 2 (tracking the total yearly number of affirmative asylum applications filed and the yearly number granted from 1980 to 1995).

65. U.S. DEP'T OF HOMELAND SEC., *Yearbook of Immigration Statistics 1997*, tbl.27 (Mar. 1998), https://www.dhs.gov/immigration-statistics/yearbook/1996_1999 [<https://perma.cc/U37D-AJPH>] (setting out asylum applications filed with the Immigration and Naturalization Service and decisions rendered in those cases, which would be affirmative cases, but not providing data for asylum applications in defensive proceedings in Immigration Court).

66. See Figure 2.

67. U.S. DEP'T OF HOMELAND SEC., *Yearbook of Immigration Statistics 1997*, *supra* note 65, tbl. 27.

individuals granted asylum represents a fraction of the approximately one million persons who receive permanent resident status in the United States each year.⁶⁸ The small annual number of asylum grants is similarly noteworthy when compared to the number of those who secure lawful permanent resident status specifically through family relationships—approximately 700,000 per year.⁶⁹ This 700,000 number includes migrants granted permanent status in the United States through family-based immigration alone and so is comparable to the single category of asylum that results in fewer than 50,000 grants per year.⁷⁰ As with asylum, the overall immigration system in the United States may be seen as a limited or exclusionary system that grants status only to specific migrants who fit within tightly defined categories. However, even within such a system, grants of asylum are notably limited and few in number.

The number of asylum grants is also typically smaller than the number of refugees arriving in the United States from abroad through the resettlement program.⁷¹ As shown in Figure 3, there are ebbs and flows, but the United States has generally resettled refugees each year at levels well above the 50,000 never reached with asylum grants.

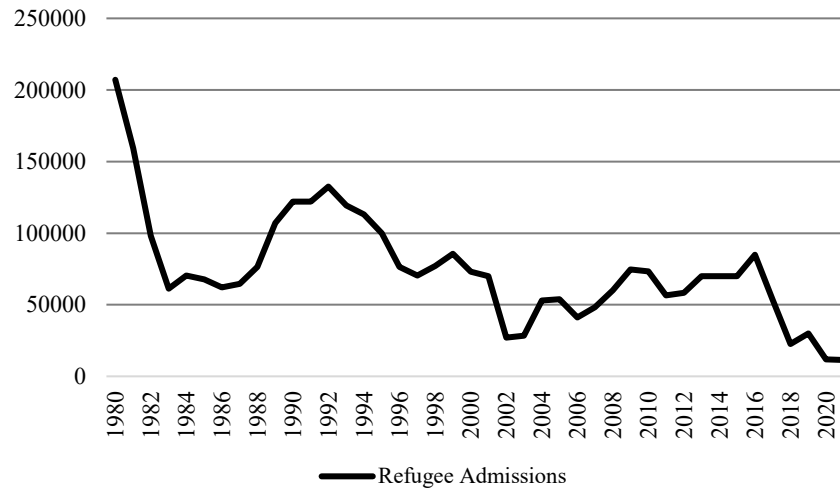
68. See U.S. DEP'T OF HOMELAND SEC., *Lawful Permanent Residents Data Tables*, tbl.7D, <https://www.dhs.gov/immigration-statistics/lawful-permanent-residents> [https://perma.cc/49SL-A89X] (last updated Aug. 21, 2023) (tracking the number of persons obtaining Lawful Permanent Resident Status annually). A small proportion of those granted Lawful Permanent Resident status each year will have done so as a result of a grant of asylum, as asylees can seek Lawful Permanent Resident status one year after the grant of asylum. 8 U.S.C. § 1159(b). To compare grants of asylum to those granted Lawful Permanent Resident status through other means, it would be necessary to subtract those cases of asylees securing Lawful Permanent Resident status. However, the comparison does not change meaningfully.

69. *Lawful Permanent Residents Data Tables*, *supra* note 68, tbl.7D.

70. *Id.*

71. See Figure 3 (tracking the yearly admission of refugees through refugee resettlement from 1980 to 2020).

FIGURE 3: YEARLY ADMISSION OF REFUGEES THROUGH REFUGEE RESETTLEMENT 1980–2020⁷²



Importantly, asylum grants remain at a low level without regard to the numbers of applications filed or the likelihood of expanded need for protection. This reality strongly suggests that exceptionality is a feature of the system rather than a reflection of the number of viable asylum seekers in the United States.

As noted in Figures 1 and 2, while asylum applications have increased and decreased over time, asylum grants have remained largely stagnant and low. For example, between 1980 and 1995, there were only minimal changes in grants of asylum even when applications increased significantly, likely due to large numbers of Central American asylum applications triggered by significant human rights violations and conflict in the region.⁷³

72. U.S. DEP'T OF STATE, BUREAU OF POPULATION, REFUGEES AND MIGRATION, *Refugee Admissions by Region Fiscal Year 1975 Through September 30, 2022*, WRAPSNET (Oct. 5, 2022), <https://www.wrapsnet.org/documents/Refugee%20Admissions%20by%20Region%20since%201975%20as%20of%2030%20Sep%202022.pdf> [<https://perma.cc/RA25-DTZ4>].

73. 1997 YEARBOOK, *supra* note 5, at 3 (noting large numbers of asylum applications from Central America between 1991 and 1997); Gzesh, *supra* note 5 (during the 1980s and early 1990s Salvadorans, Guatemalans, and Nicaraguans fled north from “civil war, repression, and economic devastation”); John Ward Anderson, *Pact Signing Ends War in Guatemala*, WASH. POST (Dec. 30, 1996), <https://www.washingtonpost.com/archive/politics/1996/12/30/pact-signing-ends-war-in-guatemala/401f0215-af19-4634-b6a4-a0e8b6b28b05/> [<https://perma.cc/57P3-4HL4>] (reporting that civil conflict in Central America ended in 1996). There were also procedural reasons why the numbers of asylum applications increased during certain periods. In the 1990s, many Central Americans had new opportunities to seek asylum because of litigation challenging unfair treatment in the 1980s. See 1997 YEARBOOK, *supra* note 5 (discussing the procedural changes). This reality

While there may be multiple explanations for increased numbers of asylum applications during certain periods, expanding need for asylum protection is undoubtedly among those explanations.⁷⁴ Thus, even if a portion of the additional applications were not viable, at least some would be expected to present valid asylum claims. Nevertheless, the number of applications granted barely budges in times of increased applications and a likely increased need for protection.⁷⁵ To the extent that there is a small upward movement in grants at times of significantly increased applications, an immediate correction usually follows to bring grants back down.⁷⁶ These shifts further underline the exceptionality built into the system, which ensures that asylum grants do not ever significantly fluctuate upward.

International refugee patterns further confirm the exceptionality in the system demonstrated by low asylum grant numbers. The United Nations High Commissioner for Refugees has documented dramatic increases in the number of persons needing refugee protection worldwide, particularly in the last twenty years.⁷⁷ This is not surprising given that the world's population nearly doubled in size from 1980 to the present, alongside the

does not suggest that the increased application numbers corresponded with a significant increase in non-viable claims.

74. See WASEM, CRS, *supra* note 58, at 20 (considering ebbs and flows of asylum applications from top asylum-sending countries and concluding that “data analysis suggests that conditions in the major source countries—whether economic, environmental, political, religious or social—were likely the driving force behind asylum seekers”); Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 AM. U. INT’L L. REV. 43, 61 (1994) (noting that asylum applicants in the 1990s largely came from nations with unstable situations).

75. See Figures 1 and 2 (presenting data suggesting that asylum grants remain largely stagnant despite increases in asylum applications during certain years).

76. See Figures 1 and 2. For example, after a slight rise in asylum grants in 2019, the Trump administration adopted measures in 2019 and 2020 that brought down grant rates, and even applications. These measures included the Migrant Protection Protocols (“Remain in Mexico”) program and expulsions under Title 42. See *infra* Section IV.D (exploring the exclusionary measures implemented under the Trump administration).

77. See U.N. HIGH COMM’R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2020 12 (2021), <https://www.unhcr.org/60b638e37/unhcr-global-trends-2020> [<https://perma.cc/324D-7UDB>] (in 2010, there were approximately 10 million persons displaced across borders and by 2020 there were almost 25 million); Adrian Edwards, *Forced Displacement Worldwide at its Highest in Decades*, U.N. HIGH COMM’R FOR REFUGEES (June 19, 2017), <https://www.unhcr.org/news/stories/forced-displacement-worldwide-its-highest-decades> [<https://perma.cc/NXV6-QPCT>] (asserting in 2017, before recent increases in displacement, that forced displacement was at its highest level since United Nations High Commissioner for Refugees was founded in 1950 in the aftermath of World War II); *Refugee Data Finder*, U.N. HIGH COMM’R FOR REFUGEES (June 14, 2023), <https://www.unhcr.org/refugee-statistics/> [<https://perma.cc/CYT9-TXJ9>] (providing similarly high calculations).

emergence of new forced displacement situations.⁷⁸ However, when additional asylum seekers have applied under the U.S. system as a result of these patterns, the grant rate has not increased.⁷⁹

III. THE METHODS OF ASYLUM EXCEPTIONALITY

Exceptionality is reflected in both substantive and procedural limitations on access to asylum. U.S. asylum procedures interact with substantive standards in mutually justifying and supporting ways to ensure exceptionality overall. Narrow substantive standards justify a restrictive procedural apparatus, and the procedures filter out claims in support of an exceedingly limited view of asylum eligibility.

A. Substantive Law Limitations

Substantive asylum law has developed to limit the types of recognizable claims.⁸⁰ A sampling of substantive limits follows, but there are many other legal restrictions on asylum eligibility as well.

First, the United States' narrow interpretation of the requirements for asylum based on membership in a "particular social group" has made it challenging to win such a claim.⁸¹ The initial interpretation of the particular social group category, issued five years after adoption of the 1980 Refugee Act, required a showing of common immutable characteristics to establish a legally cognizable particular social group.⁸² Then, between 2006 and 2014, case law imposed additional requirements, including that a social group must be socially distinct and sufficiently "particular" to qualify for recognition.⁸³ These substantive law interpretations make obtaining asylum for persecution on "particular social group" grounds difficult.

78. See GLOBAL TRENDS: FORCED DISPLACEMENT IN 2020, *supra* note 77, at 6 (describing new situations of forced displacement, such as in Afghanistan and the Democratic Republic of Congo); *World Population Prospects 2022*, U.N. (2022), <https://population.un.org/wpp/Graphs/Probabilistic/POP/TOT/900> [<https://perma.cc/2QRD-6T8J>] (chart showing growth in world population).

79. See Figures 1 and 2 (data demonstrating that asylum grants remain largely stagnant year over year).

80. See Gorman, *Defined by the Flood*, *supra* note 11, at 9 (noting that the refugee definition can be modified to exclude certain groups, particularly Central Americans).

81. As described above, there are five protected grounds in asylum law. See *supra* note 9 and accompanying text. Membership in a particular social group is one such ground; race, religion, nationality, and political opinion are the others. 8 U.S.C. § 1101 (a)(42)(A).

82. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

83. See generally *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (citing *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006)); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007).

Second, legal interpretations offer a narrow understanding of what constitutes persecution on account of the separate ground of “political opinion.” For example, the case law generally excludes those who have faced harm because of a refusal to join the ranks of armed forces, guerrilla groups, or gangs.⁸⁴ The standards also preclude political opinion claims from those who may have been deemed to have “assumed the risk” of persecution, making it nearly impossible for applicants to gain asylum due to persecution based on their professional identity or social roles.⁸⁵

Third, in 1996, Congress imposed a one-year filing deadline on the presentation of asylum claims, after arrival in the United States.⁸⁶ This short deadline serves to exclude many applicants since: (1) asylum seekers may not be aware of the deadline, and the authorities do not provide clear information about the time limit;⁸⁷ (2) asylum seekers take time to recover from physical and mental health challenges caused by persecution before they can present a claim;⁸⁸ and (3) asylum seekers face challenges in securing counsel to assist in completing the lengthy asylum application in English and presenting a claim under the complicated legal standards.⁸⁹ As a result, the deadline bars genuine refugees from receiving asylum protection for which they would otherwise qualify.⁹⁰

Fourth, the statute requires asylum seekers fleeing persecution to offer corroborating evidence beyond their own testimony in most instances.⁹¹ Simultaneously, it makes credibility a centerpiece of asylum

84. See, e.g., *INS v. Elias-Zacarias*, 502 U.S. 478, 486–87 (1992) (rejecting asylum claim based on guerrilla recruitment); *M-E-V-G-*, 26 I&N Dec. at 250–51 (rejecting asylum claim based on gang recruitment).

85. See, e.g., *Matter of Fuentes*, 19 I&N Dec. 658, 662–63 (BIA 1988) (rejecting asylum claim based on danger due to status as a former police officer).

86. 8 U.S.C. § 1158(a)(2)(B); Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 604(a), 110 Stat. 3009–1, 3009–64 (Sept. 30, 1996).

87. See, e.g., Hurbie Meko & Raúl Vilchis, *New Migrants Have a Year to Apply for Asylum; Many Won't Make It*, N.Y. TIMES (July 3, 2023), <https://www.nytimes.com/2023/07/03/nyregion/migrants-asylum-nyc.html> [<https://perma.cc/HDB4-85ZM>] (documenting that many asylum seekers are unaware of time limitations to submit their applications); *Rojas v. Johnson*, 305 F. Supp. 3d 1176, 1178 (W.D. Wash. 2018) (finding that DHS failed to provide sufficient notice of the one-year filing deadline to asylum seekers).

88. See, e.g., Karen Musalo & Marcelle Rice, *Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 693, 703–06 (2008) (documenting instances in which the one-year deadline led to asylum denials where the asylum applicant suffered from serious mental health disorders).

89. HUMAN RIGHTS FIRST, *DRACONIAN DEADLINE: ASYLUM FILING BAN DENIES PROTECTION, SEPARATES FAMILIES 1* (Sept. 2021); see generally SCHOENHOLTZ ET AL., *supra* note 10 (setting out the reasons that make it difficult to comply with the one-year filing deadline and the harsh consequences for bona fide asylum seekers).

90. See generally SCHOENHOLTZ ET AL., *supra* note 10.

91. 8 U.S.C. § 1158(b)(1)(B)(ii).

adjudications.⁹² It specifically sets out that *any* inconsistencies in testimony may be fatal to credibility.⁹³ The inconsistencies may defeat a favorable credibility finding even when not central to the asylum claim or when the questioned testimony took place in border interviews or other informal rapid proceedings.⁹⁴ These standards are exceedingly difficult to meet for many asylum seekers and thus further limit asylum grants to a select few.

B. Exclusionary Procedures

In addition to the substantive standards limiting asylum, policymakers have adopted increasingly harsh exclusionary procedures over the years, as discussed in Part IV.⁹⁵ The asylum adjudication procedures are set up to reflect a presumption against granting asylum and focus on filtering out all but the most rare and exceptional claims. When the ability of the system to maintain exceptionality comes into doubt by continued arrivals of asylum seekers, policymakers in Congress and the Executive put into place even more exclusionary procedures in an effort to preserve limits on asylum.⁹⁶

For some nations, in contrast to the U.S. system, the existence of *generous* asylum policies for migrants who reach the national territory has inspired procedures that prevent asylum seekers from ever reaching that territory.⁹⁷ The United States system is quite different. Rather than using exclusionary measures to protect against access to a generous asylum system, the exceptionality of the U.S. asylum system at its core has emanated outward, resulting in the deployment of increasingly aggressive exclusionary mechanisms of exclusion within the United States, at the border, and beyond.

92. 8 U.S.C. § 1158(b)(1)(B)(iii).

93. *Id.*

94. *Id.*; see also *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179–81 (2nd Cir. 2004) (noting that airport and border interviews are “limited” in that asylum applicants may not always be forthcoming in such interviews but still assessing credibility based on statements made in airport interview and credible fear interview).

95. See *infra* Part IV (detailing exclusionary asylum adjudication procedures).

96. See *infra* Sections IV.C, IV.D (detailing the expansion of exclusionary mechanisms from 1980 to 2020 and the effect of border exclusions adopted by the Trump administration).

97. DAVID SCOTT FITZGERALD, *REFUGE BEYOND REACH* 6–14, 252–54 (2019); Bill Frelick et al., *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. ON MIGRATION & HUM. SEC. 190, 193–96 (2016).

IV. THE EXCLUSIONARY APPARATUS

This Article focuses significant attention on the exclusionary procedural apparatus. Asylum procedures can be determinative in many cases, and insufficient thought has been given to the overall purpose and impact of the exclusionary procedural apparatus.

A. Adjudication of Asylum Claims in a Defensive Posture in an Adversarial Setting Focused on Deportation

Critically, in the United States, many asylum claims are heard and decided in deportation proceedings before the Immigration Courts of the Department of Justice—a law enforcement entity.⁹⁸ Many more asylum applications are made yearly in the defensive process before the Immigration Courts than in the affirmative process.⁹⁹

These defensive proceedings are adversarial in nature—lawyers with the Department of Homeland Security seek deportation of the asylum seeker in a formal proceeding. The proceedings are focused on the question of deportation not asylum. The Immigration Court first decides that the asylum seeker is deportable, and only afterward can the asylum seeker argue for asylum protection as a defense against actual removal.¹⁰⁰

The non-adversarial affirmative asylum proceeding¹⁰¹ before the specialized USCIS Asylum Office is unavailable to most asylum seekers,

98. See generally ALISON PECK, *THE ACCIDENTAL HISTORY OF THE U.S. IMMIGRATION COURTS: WAR, FEAR, AND THE ROOTS OF DYSFUNCTION* (2021).

99. See, e.g., 2021 REFUGEES AND ASYLEES FLOW REPORT, *supra* note 5, at 8–9 (noting that in 2021, more than 85,000 defensive asylum applications were filed in Immigration Court while under 65,000 asylum applications were filed affirmatively with DHS; in 2020, over 190,000 defensive applications were filed while just over 93,000 affirmative applications were filed; in 2019, just over 213,000 defensive applications were filed while just over 91,000 affirmative applications were filed); see also *supra* notes 24–26 and accompanying text (describing the category of persons in defensive asylum proceedings).

100. See 8 U.S.C. § 1229 (setting out the procedures for Immigration Court deportation proceedings); *The Removal System of the United States: An Overview*, AM. IMMIGR. COUNCIL (Aug. 9, 2022), <https://www.americanimmigrationcouncil.org/research/removal-system-united-states-overview> [<https://perma.cc/CGP3-KGL8>] (explaining Immigration Court procedures, including initial Master Calendar hearings where deportability is decided and merits hearings where asylum and other applications are decided); U.S. DEP'T OF JUSTICE, *ASYLUM AND WITHHOLDING OF REMOVAL RELIEF, CONVENTION AGAINST TORTURE PROTECTIONS 4* (Jan. 15, 2009), <https://www.justice.gov/usdoj-media/eoir/media/1136461/dl?inline> [<https://perma.cc/V7QD-MB8J>] [hereinafter *ASYLUM AND WITHHOLDING OF REMOVAL RELIEF*] (explaining that the asylum process in Immigration Court is called “defensive” because it may “provide relief from being removed”).

101. For the first 20 years after the adoption of the Refugee Act of 1980, even the non-adversarial proceedings available to asylum seekers who were not already in deportation proceedings took place before the Immigration and Naturalization Service within the Department of Justice, which is a law enforcement entity. See, e.g., *Aliens and Nationality; Asylum and Withholding of*

including almost all who arrive at or cross the southern border.¹⁰² Even those asylum seekers who file affirmatively, if unsuccessful initially, must proceed in deportation proceedings before the Immigration Court to continue their quest for protection.¹⁰³

The very structure of the process inherently puts the asylum seeker at a severe disadvantage because it begins in most cases with an Immigration Court deportation decision followed by an asylum claim made defensively in an adversarial proceeding. The adjudication does not begin from a neutral starting place. From the outset, the asylum seeker assumes the burden of proof to overcome a prior negative decision regarding the right to remain in the United States when presenting the asylum claim.¹⁰⁴ The assumption, both formal and practical, is that applicants will be deported, and the exception to deportation applies only where applicants can make a showing that they merit asylum instead.¹⁰⁵

B. Regulatory History of the Exclusionary Apparatus

Nothing in the 1980 Refugee Act specified that asylum procedures should take place in the deportation context and be so focused on exclusion. The legislation did not set out procedures for the adjudication of asylum claims at all.¹⁰⁶ However, the exceptionality focus led to the

Deportation Procedures, 55 Fed. Reg. 30674, 30675–71 (July 27, 1990) (codified as amended at 8 C.F.R. pts. 3, 103, 208, 236, 242, and 253). The affirmative asylum process only moved out of the Department of Justice with the creation of the Department of Homeland Security (DHS) after the 9/11 terrorist attacks. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, § 451(b) (Act passed in the year following 9/11 terrorist attacks). DHS has a national security mission. *See Mission*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/mission> [<https://perma.cc/46C5-CHEM>] (last visited Aug. 1, 2023) (elaborating on DHS goal of “striving to prevent future attacks against the United States” in the aftermath of the 9/11 terrorist attacks). So, even affirmative asylum proceedings have never taken place before a humanitarian agency and have never been independent of law enforcement and national security considerations.

102. *See* 8 C.F.R. §§ 208, 235, 1208 (2022) (providing procedures for asylum and withholding of removal and inspection of persons at the border); *see also supra* notes 22–26 and accompanying text (describing the categories of persons in defensive proceedings and those in affirmative proceedings).

103. 8 C.F.R. § 208.2(b) (2022); 8 C.F.R. § 208.14(c)(1) (2022).

104. 8 C.F.R. § 1208.13(a) (2022) (“The burden of proof is on the applicant for asylum to establish that he or she is a refugee.”).

105. 8 U.S.C. § 1158(b)(1)(B) (setting out the requirements for establishing asylum eligibility).

106. *See, e.g.,* Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. at 30675 (in promulgating asylum processing rule in implementation of the 1980 Refugee Act, finding that “Congress did not legislate any particular method by which claims for asylum or withholding of deportation were to be adjudicated.”); *see also* HAMLIN, *supra* note 59, at 327 (“[The 1980 Refugee Act] says very little about the specific standards and procedures for adjudicating asylum claims.”).

development of an apparatus designed to screen out claims, as is demonstrated by the regulatory history.

The Immigration and Naturalization Service (INS), which was the principal immigration agency at the time, issued the initial regulations implementing the 1980 Refugee Act in that same year of 1980.¹⁰⁷ The regulations created a presumption against asylum by explicitly placing the burden of demonstrating eligibility on the applicant, although Congress made no provision in the Refugee Act of 1980 regarding the burden of proof.¹⁰⁸ The regulations identified the INS and the Immigration Courts, both entities housed within the Department of Justice, as the entities with jurisdiction to process asylum applications.¹⁰⁹ The rules thus set out that law enforcement entities without any expertise in refugee matters would decide asylum cases.¹¹⁰ Under the rules, the INS adjudicated asylum cases except where the person had already been placed in deportation proceedings, in which case the Immigration Courts decided the application in those adversarial proceedings.¹¹¹ The regulations were preoccupied with the rejection of asylum claims, delineating multiple grounds for denial of asylum and termination of asylum status while dedicating only a few lines of text to grants of asylum.¹¹² In 1983, revised regulations reaffirmed that individuals already in deportation proceedings would proceed with their asylum claims in adversarial proceedings before the Immigration Court, despite pressure from advocates for a system that would consider asylum claims in a non-adversarial context in the first instance.¹¹³

In 1987, for the first time, the INS proposed a rule that would have established a specialized asylum corps to adjudicate asylum claims in non-adversarial proceedings, whether or not deportation proceedings had

107. Aliens and Nationality; Refugee and Asylum Procedures, 45 Fed. Reg. 37392 (June 2, 1980) (codified at 8 C.F.R. pts. 207, 208, 209, and 245).

108. *See id.* (lacking a provision placing the burden of proof on the applicant); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, § 101(a)(3), 119 Stat. 231, 302-03 (2005) (placing the burden of proof on the applicant twenty-five years after adoption of the Refugee Act of 1980).

109. *See* Aliens and Nationality; Refugee and Asylum Procedures, 45 Fed. Reg. at 37394.

110. *Id.*

111. *Id.* at 37392, 37394.

112. *See, e.g., id.* at 37392 (providing for denial for failure to meet refugee definition, because of firm resettlement in a third country, or because of inclusion “within one of the undesirable groups,” as well as denial in the exercise of discretion; providing one line regarding ongoing interviews of those who are granted asylum).

113. *See* Aliens and Nationality; Asylum Procedures, 48 Fed. Reg. 5885 (Feb. 9, 1983) (revising Refugee Act of 1980).

been initiated against an applicant.¹¹⁴ However, these proposed regulations cut off the opportunity for review of the decision of the new asylum corps in a second stage before the Immigration Courts in a more formal proceeding with due process guarantees.¹¹⁵ The Immigration Courts were the only forum that used formal procedures, such as cross-examination of witnesses and evidentiary objections, and so advocates insisted that the courts be made available to asylum seekers to ensure a full and fair process.¹¹⁶ Furthermore, the new specialized corps was to be housed within the INS in the Department of Justice, so the proposed process did not meaningfully separate the asylum decision from law enforcement decision-making and the deportation process.¹¹⁷ There was also no guarantee that there would be sufficient expertise and sensitivity within the new unit to handle asylum claims.¹¹⁸ In the end, the proposal sought to substitute one exclusionary process with another one. The failings of the proposal led to its rejection and a return, in large part, to the former model.¹¹⁹

The final regulations adopted in 1990 did create a specialized asylum corps to conduct non-adversarial proceedings but limited that unit's jurisdiction.¹²⁰ As is still the case, only persons inside the United States who had never been placed in deportation proceedings could apply affirmatively with the asylum corps.¹²¹ The asylum claims of all individuals placed in deportation proceedings after apprehension inside the United States or at the border would be heard before the Immigration Court as part of those deportation proceedings.¹²² This system remains almost completely identical today, although policymakers have placed

114. See Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 52 Fed. Reg. 32552 (Aug. 28, 1987) (codified as amended at 8 C.F.R. pts. 3, 208, 236, 242, and 253).

115. See Martin, *Reforming Asylum Adjudication*, *supra* note 3, at 1323–24 (describing the concerns about the quality of decision-making by a centralized corps of asylum adjudicators that would become the sole arbiters).

116. *Id.* at 1324.

117. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 52 Fed. Reg. at 32552, 32554.

118. See Martin, *Reforming Asylum Adjudication*, *supra* note 3, at 1323 (“Opponents of the new regulations were able to collect affidavits with numerous stories of brusqueness, mishandling, errors, and apparent bias.”).

119. *Id.*

120. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674, 30676, 30680 (July 27, 1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, and 253).

121. *Id.* at 30676; *supra* notes 22–26 and accompanying text (outlining procedures).

122. See Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. at 30676, 30681 (requiring the filing of an asylum with the Immigration Court wherever “deportation proceedings have been commenced”); *supra* notes 22–26 and accompanying text (describing which asylum applicants must proceed defensively before the Immigration Courts).

additional procedural restrictions and exclusions on asylum seekers, as described in Section IV.C.

The proposed regulatory regimes thus shifted back and forth between (1) non-adversarial adjudication systems before specialized officers that lacked procedural guarantees and independent review; and (2) adversarial Immigration Court adjudication in the deportation context with no specialized handling of asylum claims.¹²³ Some scholars questioned why attorneys and advocates were perpetually dissatisfied with the proposals, sometimes urging non-adversarial adjudication and then seeking the opportunity for formal Immigration Court proceedings when the proposals offered non-adversarial procedures.¹²⁴ However, these critiques by attorneys and advocates recognized that the various models of asylum adjudication all favored the quick resolution of asylum claims with a presumption against recognizing refugee status and granting asylum.¹²⁵ None of the regulations proposed an adjudication model that included a specialized non-adversarial asylum adjudication system, with the potential for meaningful independent review of a negative decision in formal proceedings, separate from the deportation system. The impact of the exclusionary approach was too great.

C. Expanded Exclusion Mechanisms

The focus on Immigration Court deportation proceedings as the situs for asylum determinations has continued to date. Layered on top of this foundation are procedures that have made the process even more exclusionary.¹²⁶ The principal new exclusionary mechanisms with the greatest

123. Cf. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674 (providing for adjudication of many asylum claims in Immigration Court deportation proceedings); Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 52 Fed. Reg. 32552 (Aug. 28, 1987) (codified as amended 8 C.F.R. pts. 3, 208, 236, 242, and 253) (providing for non-adversarial adjudication of asylum claims without opportunity for Immigration Court review); Aliens and Nationality; Refugee and Asylum Procedures, 45 Fed. Reg. 37392 (June 2, 1980) (codified at 8 C.F.R. pts. 207, 208, 209, and 245) (providing for adjudication of all asylum claims made by persons in deportation proceedings within those Immigration Court proceedings).

124. See Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 AM. U. J. INT'L L. & POL'Y 43, 64–65 (1994) (noting that advocates shifted between positions on asylum processing proposals); see also Martin, *Reforming Asylum Adjudication*, *supra* note 3, at 1323–24 (noting that advocates first sought non-adversarial asylum proceedings but then subsequently opposed regulations that set up such proceedings and denied Immigration Court review).

125. See Martin, *Reforming Asylum Adjudication*, *supra* note 3, at 1323–24 (recognizing that the proposals for a non-adversarial asylum adjudication system had significant limitations).

126. See *infra* notes 128–45 and accompanying text (describing exclusionary practices).

impact are described here, although multiple other measures have affected asylum processing temporarily or permanently as well.¹²⁷

Shortly after the adoption of the 1980 Refugee Act, the Reagan administration adopted a policy of “interdiction”¹²⁸ which prevented Haitians from arriving in the United States and thus blocked their access to the asylum system altogether, even when they were fleeing the brutal dictatorship of Jean-Claude Duvalier in the 1980s and the 1991 violent coup d’état that overthrew democratically elected President Bertrand Aristide.¹²⁹ The Reagan administration also instituted a number of measures, including detention of asylum seekers and restrictions on movement, to limit asylum access for Central Americans arriving at the U.S. southern border upon fleeing authoritarian regimes, civil conflict, and even genocide in the 1980s and early 1990s.¹³⁰

In 1996, again reacting in part to continued Central American arrivals, Congress enacted additional exclusionary measures restricting access to asylum.¹³¹ Congress created an expedited removal process to allow low-level officials to remove migrants without visas at the border summarily

127. See, e.g., Stephanie Leutert & Caitlyn Yates, *Metering Update*, STRAUSS CENTER (May 2022), https://www.strausscenter.org/wp-content/uploads/May_2022_Metering_Final.pdf [<https://perma.cc/Q865-T8WH>] (describing metering, which is the creation of waitlists for those in Mexico seeking access to the asylum process at the border under the Obama and Trump administrations); Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023) (to be codified at 8 C.F.R. pts. 208, 1103, and 1208) (describing the Biden Administration’s presumption of asylum ineligibility for those who did not use the CBP One app to enter the United States and also did not seek asylum in a third country through which they transited); see also *infra* note 156 and accompanying text (describing additional exclusionary measures adopted during the Trump administration).

128. Interdiction refers to actions taken by U.S. authorities, usually the Coast Guard, to stop vessels carrying migrants at sea, and then turn back the vessels and/or their passengers to the country from which they came so that they may not reach the United States. See Exec. Order No. 12324, 46 Fed. Reg. 48109 (Sept. 29, 1981) (allowing the Coast Guard to enforce the suspension of the entry of undocumented persons and the interdiction of any vessel carrying such persons).

129. Wasem, *More Than a Wall*, *supra* note 48, at 252; see also Frelick et al., *supra* note 97, at 199 (describing the deliberate externalization strategies of the United States aimed at preventing migrants and asylum seekers from reaching the country).

130. See Wasem, *More Than a Wall*, *supra* note 48, at 252 (describing trends in Central American asylum seeker arrivals and restrictive U.S. responses); Frelick et al., *supra* note 97, at 199 (same); FRELICK, REFUGEES AT OUR BORDER, *supra* note 59, at 1–14 (describing exclusionary responses of the Reagan administration to asylum seekers at the U.S. southern border); ROBERT S. KAHN, OTHER PEOPLE’S BLOOD (1996) (describing U.S. government exclusionary treatment of asylum seekers and the reasons why asylum seekers sought protection in the United States); see also *supra* note 73 (gathering sources that describe the problematic human rights situations in the Americas that led to asylum seeker arrivals at the U.S. southern border in the 1980s).

131. See 1997 YEARBOOK, *supra* note 5 (making special note of numbers of applications filed by Central Americans and explaining 1996 legislation).

and without any review except in limited circumstances.¹³² The process immediately served to exclude many viable asylum seekers, preventing them from ever having the opportunity to present their asylum claims in the United States.¹³³

This expedited process initially applied only at official border ports of entry, including airports.¹³⁴ However, in the wake of the 9/11 terrorist attacks, the immigration agencies extended expedited removal to migrants arriving by sea and then to migrants arriving at official southern border entry points as well as migrants apprehended within fourteen days of arrival and within one hundred miles of the land border.¹³⁵ This expansive version of expedited removal has remained in place ever since.

Under expedited removal, an asylum seeker receives a removal order at the moment of apprehension at the border.¹³⁶ The asylum seeker must subsequently secure and pass a screening, known as a credible fear interview, to win the right to present an asylum claim defensively in Immigration Court deportation proceedings.¹³⁷

Expedited removal dominated much of the adjudication process for asylum seekers over several decades, until overtaken temporarily by the adoption of even more exclusionary border measures in 2019 and 2020,

132. 8 U.S.C. § 1225(b)(1)(A)(i)–(ii). The statute is so exclusionary that it could be, but has not been, applied to asylum seekers who are far from the border region and who have already been in the United States for some time. It permits application of the expedited removal process to any individual with less than two years' presence in the United States, with the specific parameters of its reach implemented through announcement in the Federal Register. *Id.* at § 1225(b)(1)(A)(iii)(II).

133. See, e.g., MARK HETFIELD ET AL., U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (Feb. 8, 2005), <https://www.uscirf.gov/publications/report-asylum-seekers-expedited-removal> [<https://perma.cc/Y5VE-YRNE>] (detailing the negative impacts on asylum seekers of the establishment of expedited removal).

134. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10355 (Mar. 6, 1997) (codified at 8 C.F.R. pts. 1, 3, 103, 204, 207, 209, 211, 212, 213, 214, 216, 217, 221, 223, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 248, 249, 251, 252, 253, 274a, 286, 287, 299, 316, 318, and 329).

135. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924, 68925 (Nov. 13, 2002); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48880 (Aug. 11, 2004).

136. 8 C.F.R. § 235.3(b)(2) (2022) (providing for issuance of expedited removal order upon determination of inadmissibility); 8 C.F.R. § 1208.30(g)(2)(iv)(B) (2022) (providing for vacating the expedited removal order where an Immigration Judge makes a favorable credible fear finding).

137. See 8 C.F.R. § 208.30(b), (e), (f) (2022) (setting out credible fear process); 8 C.F.R. § 1208.30(g)(2)(iv)(B) (2022) (same); Trina Realmuto & Kristin Macleod-Ball, *Everything Expedited Removal*, NAT'L IMMIGR. LITIG. ALL. (Apr. 20, 2023), <https://immigrationlitigation.org/wp-content/uploads/2023/04/2023.04.20-Everything-Expedited-Removal.pdf> [<https://perma.cc/X7NL-NB8X>] (describing the expedited removal process including the credible fear screening interview); see also *supra* notes 24–26 (describing defensive asylum process).

as described below.¹³⁸ Nearly half of all deportations in 2019 were expedited removals.¹³⁹ The United States has deported numerous asylum seekers to their home countries under expedited removal, even though those asylum seekers might have had viable protection claims.¹⁴⁰ The procedure is an explicit filter that screens out asylum seekers and allows only some exceptional claims to proceed.

The implementation and expansion of expedited removal also coincided with an increase in the use of immigration detention, including for asylum seekers.¹⁴¹ The same legislation that created expedited removal also mandated the detention of asylum seekers during portions of the expedited removal process and required the detention of other migrants who might seek asylum.¹⁴² As a result, the use of immigration detention expanded significantly in 1996 and again in 2006.¹⁴³

138. See *infra* Section IV.D (describing additional border exclusionary mechanisms adopted in 2019 and 2020). Expedited removal began to play an important role again with the repeal of the 2019–2020 measures, beginning in 2023. See *Fact Sheet: Biden-Harris Administration Announces New Border Enforcement Actions*, WHITE HOUSE (Jan. 5, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/> [<https://perma.cc/92JC-SNKR>] (declaring a commitment to “increasing the use of expedited removal”).

139. MIKE GUO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2019, 8 (Sept. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf [<https://perma.cc/H4SC-JQSF>].

140. ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 2–5, 17–23 (2016), <https://www.uscirf.gov/sites/default/files/Barriers%20to%20Protection.pdf> [<https://perma.cc/CQ4L-JB4D>] (governmental study describing large numbers of asylum seekers placed in expedited removal and chronic problems with multiple aspects of the screening process that can lead to improper denial of access to the asylum system); HUMAN RIGHTS WATCH, “YOU DON’T HAVE RIGHTS HERE”: US BORDER SCREENING AND RETURNS OF CENTRAL AMERICANS TO RISK OF SERIOUS HARM (Oct. 2014) [hereinafter “YOU DON’T HAVE RIGHTS HERE”].

141. See *infra* Figure 4 (showing increased use of detention since Congressional enactment of expedited removal in 1996 and its expansions after 9/11); see also HUMAN RIGHTS FIRST, “I’M A PRISONER HERE”: BIDEN ADMINISTRATION POLICIES LOCK UP ASYLUM SEEKERS (Apr. 21, 2022), <https://humanrightsfirst.org/wp-content/uploads/2022/09/ImaPrisonerHere.pdf> [<https://perma.cc/82XU-B673>] (describing expansive detention of asylum seekers).

142. 8 U.S.C. § 1225(b)(1)(B)(ii), (b)(1)(B)(iii)(IV); 8 U.S.C. § 1226(c)(1).

143. See *infra* Figure 4 (showing increased use of detention since Congressional enactment of expedited removal in 1996 and its expansions after 9/11).

Then, in 2014, Central American asylum seekers arrived in large numbers at the U.S. southern border again.¹⁴⁴ Large detention centers sprung up to detain entire families of asylum seekers.¹⁴⁵

Detention of asylum seekers in general became commonplace.¹⁴⁶ Figure 4 shows that detention steadily expanded over the last twenty-five years.¹⁴⁷ There was a drop in the detention numbers beginning in 2020, but that temporary change was attributable to COVID releases and restrictive border policies imposed to block the entry of asylum seekers altogether.¹⁴⁸ U.S. officials have often explicitly justified detention as a deterrence measure targeting asylum seekers.¹⁴⁹ In other words, detention has intentionally served to exclude asylum seekers.

For those asylum seekers who are not deterred, detention still presents a substantial obstacle to winning asylum. For example, migrants in detention struggle to find legal representation.¹⁵⁰ Yet, detained migrants without counsel are much less likely (approximately eleven times less likely) to seek relief from deportation, such as asylum, and detained

144. DENISE GILMAN ET AL., AM. BAR ASS'N COMM'N ON IMMIGR., FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE 7 (July 31, 2015), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/family_detention_report_2015.pdf [<https://perma.cc/W9ZM-6XH8>]; see CNN Staff, *Obama Official Says at Border: 'We'll Send You Back'*, CNN (July 11, 2014, 10:58 PM), <https://www.cnn.com/2014/07/11/politics/immigration-border/index.html> [<https://perma.cc/X7ZQ-VPZ5>] (noting the significant rise in the number of children and families arriving at the southwest border in 2014).

145. Press Release, U.S. Immigr. & Customs Enf't., ICE's New Family Detention Center in Dilley, Texas To Open in December (Nov. 17, 2014), <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december> [<https://perma.cc/JR87-R2P2>]; Press Release, U.S. Dep't of Homeland Sec., South Texas ICE Detention Facility to House Adults with Children (July 31, 2014), <https://www.dhs.gov/news/2014/07/31/south-texas-ice-detention-facility-house-adults-children> [<https://perma.cc/833K-TWSL>].

146. See, e.g., OLGA BYRNE ET AL., HUMAN RIGHTS FIRST, LIFELINE ON LOCKDOWN: INCREASED U.S. DETENTION OF ASYLUM SEEKERS (July 2016), <https://humanrightsfirst.org/wp-content/uploads/2022/04/Lifeline-on-Lockdown.pdf> [<https://perma.cc/2Z8A-MY8Q>] [hereinafter LIFELINE ON LOCKDOWN] (describing that detention has become the default tool of U.S. migration management including for asylum seekers).

147. See *infra* Figure 4 (showing daily detention numbers between 1995 and 2021).

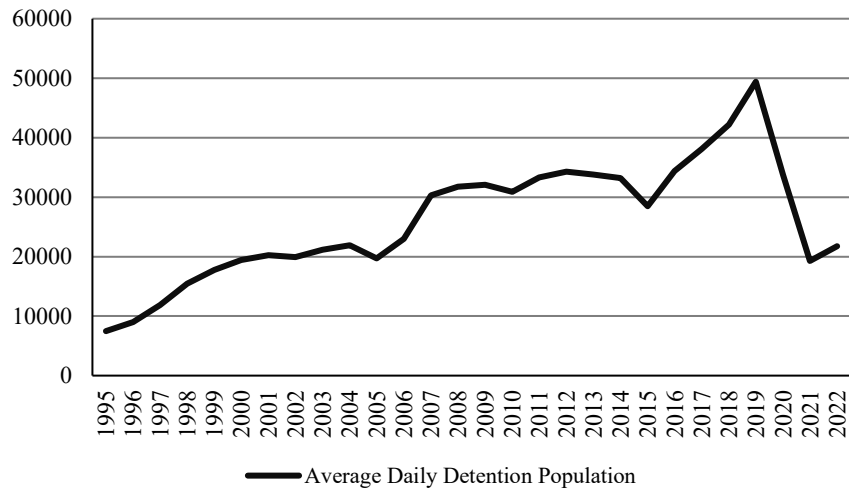
148. See HUMAN RIGHTS WATCH, "YOU DON'T HAVE RIGHTS HERE", *supra* note 140 (noting that the Title 42 policy prevented people from accessing the asylum system).

149. *Id.*; see, e.g., Press Release, U.S. Immigr. & Customs Enf't, *supra* note 145 (acting director of ICE stating, "These facilities help ensure timely and effective removals that comply with our legal and international obligations, while deterring others from taking the dangerous journey and illegally crossing into the United States."); Press Release, U.S. Dep't of Homeland Sec., *supra* note 145 (announcing that the DHS facilities will, among other things, "deter others from taking the dangerous journey and illegally crossing into the United States").

150. See Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL 6 (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [<https://perma.cc/X4KH-E88L>] (documenting that detained migrants are less likely to have legal representation).

individuals without counsel are half as likely to secure the right to remain in the United States if they do apply for relief.¹⁵¹ Other barriers to presenting a strong asylum claim from detention include the inability to secure required corroborating evidence and witnesses as well as harms to mental and physical health that impact the ability of an asylum seeker to testify about the claim.¹⁵² Thus, detention means that accessing the system, much less receiving protection, is again the unusual exception.

FIGURE 4: AVERAGE DAILY DETENTION POPULATION¹⁵³



151. *Id.* at 15–22 (data showing that, at every stage in immigration court proceedings, representation was associated with considerably more successful case outcomes).

152. See, e.g., Zachary Manfredi & Joseph Meyers, *Isolated and Unreachable: Contesting Unconstitutional Restrictions on Communication in Immigration Detention*, 95 N.Y.U. L. REV. 130, 139–45 (2020) (explaining that the geographic isolation of detention facilities impedes reliable telephone access, so detainees often find it challenging to gather evidence and seek out legal representation); M. von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC PSYCH. 1, 15 (2018) (noting that mental health difficulties may contribute to the inability of individuals to self-advocate effectively); Kathryn Hampton et al., *Clinicians' Perceptions of the Health Status of Formerly Detained Immigrants*, 22 BMC PUB. HEALTH 575, 6 (2022) (documenting correlation between reports of abuse in detention facilities and high rates of mental health conditions and a further lack of treatment, specifically post-traumatic stress disorder, anxiety, and depression).

153. Emily Kassie, *Detained: How the United States Created the Largest Immigration Detention System in the World*, MARSHALL PROJECT (Sept. 24, 2019, 1:30 AM), <https://www.themarshallproject.org/2019/09/24/detained> [<https://perma.cc/Z7RS-CXA3>]; Andrew R. Calderon, *DHS Immigration Detention Dataset*, MARSHALL PROJECT (Sept. 23, 2019), https://github.com/themarshallproject/dhs_immigration_detention/blob/master/detention.csv [<https://perma.cc/J9S5-Z5XS>]; *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T. (July 23, 2023), <https://www.ice.gov/detain/detention-management> [<https://perma.cc/VD5Q-Y935>].

D. Recent Border Exclusions

Following the logic of exceptionality that has characterized the modern U.S. asylum system from the beginning and that has led to an exclusionary apparatus, the Trump administration adopted dramatic new exclusionary measures in 2019 and 2020.¹⁵⁴ These measures were not significantly different in kind from earlier mechanisms, however, they were uniquely effective at excluding asylum seekers arriving at the border from U.S. territory and, consequently, the U.S. asylum system.¹⁵⁵ The two main border measures were: the Remain in Mexico program—or the Migrant Protection Protocols (MPP); and the Centers for Disease Control (CDC) orders issued under Title 42 of the United States Code (Title 42), providing for expulsions purportedly to control the COVID-19 pandemic.¹⁵⁶ MPP and Title 42 expulsions have since ended due to policy decisions and litigation.¹⁵⁷ However, it remains essential to consider the

154. See Ellison & Gupta, *supra* note 10, at 2 (asserting that while the Trump Administration mostly failed to deliver on its border wall project, the Trump Administration achieved an “administrative wall” through various policy measures that excluded asylum seekers).

155. See *supra* Figure 1 (showing decreases in both asylum applications and asylum grants with the adoption of these policies); *Nationwide Encounters*, U.S. CUSTOMS & BORDER PROT. (July 18, 2023), <https://www.cbp.gov/newsroom/stats/nationwide-encounters> [<https://perma.cc/GT25-WG7L>] (showing that more than two and a half million expulsions occurred under Title 42 authority between 2020 and 2023).

156. The Trump administration implemented multiple additional measures. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER (2018), <https://www.gao.gov/products/gao-19-163> [<https://perma.cc/SXM2-2XQJ>] (explaining Trump-era restrictions included separation of families as well as accelerated credible fear interviews in the expedited removal process often conducted within Border Patrol facilities, known as PACR (Prompt Asylum Claim Review) and HARP (Humanitarian Asylum Review Process)); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-144, DHS AND DOJ HAVE IMPLEMENTED EXPEDITED CREDIBLE FEAR SCREENING PILOT PROGRAMS, BUT SHOULD ENSURE TIMELY DATA ENTRY (2021), <https://www.gao.gov/products/gao-21-144> [<https://perma.cc/MVG3-GT7F>] (noting the Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP) implemented to accelerate credible fear interviews in the expedited removal process); Paola Nagovitch, *Explainer: U.S. Immigration Deals with Northern Triangle Countries and Mexico*, AMS. SOC'Y/COUNCIL OF THE AMS. (Oct. 3, 2019), <https://www.as-coa.org/articles/explainer-us-immigration-deals-northern-triangle-countries-and-mexico> [<https://perma.cc/J37B-YQ64>] (explaining how the Trump administration reached agreements with several Central American countries that allowed for the removal of asylum seekers from the border to Central America to pursue claims there).

157. *DHS Issues a New Memo to Terminate MPP*, U.S. DEP'T OF HOMELAND SEC. (Oct. 29, 2021), <https://www.dhs.gov/news/2021/10/29/dhs-issues-new-memo-terminate-mpp> [<https://perma.cc/524X-4A32>]; *Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022); *CDC Public Health Determination and Termination of Title 42 Order*, CTRS. FOR DISEASE CONTROL & PREVENTION (April 1, 2022), <https://www.cdc.gov/media/releases/2022/s0401-title-42.html> [<https://perma.cc/C9NR-9GGV>]; *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 722 (D.C. Cir. 2022).

programs because components of the programs may well continue or be revived in the future if the overall approach to asylum does not change.

Beginning in early 2019, MPP trapped asylum seekers physically in Mexico while their asylum claims moved forward slowly in Immigration Courts at the border.¹⁵⁸ Asylum seekers arriving at the U.S. southern border and subjected to MPP were sent back to Mexico for the duration of their U.S. immigration proceedings.¹⁵⁹ The program yet again targeted Central Americans who had continued to arrive to seek asylum, especially families with children, although it did encompass other nationals of Spanish-speaking countries and eventually Brazil.¹⁶⁰ The COVID-19 pandemic made exclusion from the United States through MPP prolonged because the Immigration Courts suspended all hearings in MPP cases indefinitely beginning in March 2020.¹⁶¹

To create MPP, the Trump administration relied on a provision in U.S. immigration law, which allows certain migrants arriving by land “from a foreign country contiguous to the United States” to be returned to that territory pending immigration proceedings.¹⁶² There are strong legal arguments under U.S. law suggesting that the provision may *not* be used against asylum seekers, and it had never been used to return asylum seekers to Mexico until the MPP rollout in 2019.¹⁶³ Nonetheless, as of March 2020, the immigration authorities had sent nearly 65,000 asylum seekers back to Mexico to await their U.S. asylum proceedings under the MPP program.¹⁶⁴ Thousands more were returned to Mexico after a federal district court in Texas declared in 2021 that an attempt to terminate the

158. *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, U.S. DEP’T OF HOMELAND SEC. (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration> [https://perma.cc/V446-ELCT] [hereinafter *Nielsen Announcement*].

159. *Migrant Protection Protocols*, U.S. DEP’T OF HOMELAND SEC. (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [https://perma.cc/7GXQ-KK5Y].

160. *Id.*; *DHS Expands MPP To Brazilian Nationals*, U.S. DEP’T OF HOMELAND SEC. (Jan. 29, 2020), <https://www.dhs.gov/news/2020/01/29/dhs-expands-mpp-brazilian-nationals> [https://perma.cc/CLV7-33AS].

161. *See Joint DHS/EOIR Statement on the Rescheduling of MPP Hearings*, U.S. DEP’T OF HOMELAND SEC. (May 10, 2020), <https://www.dhs.gov/news/2020/05/10/joint-dhseoir-statement-rescheduling-mpp-hearings> [https://perma.cc/6WYR-CCE3] (referencing the postponement of hearings in Immigration Court in MPP cases because of COVID-19).

162. 8 U.S.C. § 1225(b)(2)(C).

163. *See Innovation Law Lab v. McAleenan*, 924 F.3d 506, 513 (9th Cir. 2019) (per curiam) (noting that the Government argued for “an entirely new understanding of the statute”).

164. *See MPP (Remain in Mexico) Deportation Proceedings—All Cases*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, <https://trac.syr.edu/phptools/immigration/mpp/> [https://perma.cc/GLM4-QMQQ] (last visited Jul. 26, 2023).

program was unlawful.¹⁶⁵ It took until 2022 for MPP to end.¹⁶⁶ Those asylum seekers subject to the program suffered a denial of access to the United States and the possibility of asylum protection.

The Trump administration created yet another exclusionary mechanism blocking access to the asylum process when the COVID-19 pandemic broke out, through its deployment of Title 42.¹⁶⁷ Under Title 42, the CDC issued orders providing for the immediate expulsion of asylum seekers arriving at U.S. land borders.¹⁶⁸ The authorities sent asylum seekers expelled under the CDC orders either back to Mexico or to their countries of origin without any immigration process at all.¹⁶⁹ Although they claimed to be a public health measure aimed at controlling COVID-19, the CDC orders never served that purpose and instead functioned to exclude asylum seekers with a focus on those from Central America and other nearby nations.¹⁷⁰ The orders did not originate from the CDC but rather from Trump administration leadership, which was singularly focused on excluding asylum seekers.¹⁷¹ The original CDC order also explicitly mentioned “asylum camps and shelters” in Mexico and the risk of contagion there as part of the justification for blocking entrants

165. See *Texas v. Biden*, 554 F. Supp. 3d 818, 847–52 (N.D. Tex. 2021) (holding that the Biden administration’s termination of MPP was unconstitutional and a violation of the Administrative Procedure Act).

166. See *Statement on U.S. District Court’s Decision Regarding MPP*, U.S. DEP’T OF HOMELAND SEC. (Aug. 8, 2022), <https://www.dhs.gov/news/2022/08/08/dhs-statement-us-district-courts-decision-regarding-mpp> [<https://perma.cc/68D7-WW3F>] (referencing the end of MPP); *Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022) (holding that the government’s rescission of MPP did not violate the immigration statute).

167. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (Mar. 26, 2020); 42 U.S.C. § 265; Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, ASSOCIATED PRESS (Oct. 3, 2020, 8:19 AM), <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae> [<https://perma.cc/ZRG8-JABW>].

168. *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus*, U.S. DEP’T OF HOMELAND SEC. (March 23, 2020), <https://www.dhs.gov/news/2020/03/23/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus> [<https://perma.cc/DMC3-92ZD>].

169. *Id.*

170. See, e.g., Anne G. Beckett et al., *Misusing Public Health as a Pretext to End Asylum—Title 42*, 386 NEW ENGL. J. MED. 16 (2022) (explaining why there is “no public health evidence that singling out asylum seekers or other migrants for exclusion is effective in stemming the spread of Covid-19”); Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SEC. (April 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/> [<https://perma.cc/NS8T-226M>].

171. Dearen & Burke, *supra* note 167.

arriving from Mexico, demonstrating the focus on excluding asylum seekers.¹⁷²

The CDC expulsions superseded the normal asylum processes, including expedited removal, credible fear screening interviews, and Immigration Court deportation proceedings.¹⁷³ Asylum seekers had no means of accessing the asylum process at all. A more draconian exclusionary mechanism—to ensure exceptionality of access to asylum—can hardly be imagined.

There were approximately 2.7 million expulsions under Title 42.¹⁷⁴ The number of individual persons expelled is lower than this figure, because some individuals entered and were removed multiple times.¹⁷⁵ There can be no doubt, though, that the program had a vast exclusionary impact on asylum seekers at the border.

V. THE PROBLEMS WITH EXCEPTIONALITY AND EXCLUSION

The insistence on exceptionality in the U.S. asylum system, with its accompanying exclusionary apparatus, has grave consequences. The system fails by its own measure of minimizing refugee flows to the United States and instead creates other serious problems.

The system does not halt asylum seeker arrivals even when it incorporates continually-expanding restrictions purportedly to address alleged “crises” caused by those arrivals.¹⁷⁶ For example, after the

172. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. at 17064.

173. 8 U.S.C. § 1158; 8 U.S.C. § 1225; 8 U.S.C. § 1229.

174. See *Nationwide Encounters*, *supra* note 155.

175. See *id.* (noting that the Title 42 program has encouraged repeated attempts at entering the United States); see also *Every State is a Border State: Examining Secretary Mayorkas’ border Crisis: Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong., 1st Sess. 34–55 (Feb. 28, 2023) (statement of David J. Bier, associate director of immigration studies at the Cato Institute) <https://www.govinfo.gov/content/pkg/CHRG-118hhrg51887/pdf/CHRG-118hhrg51887.pdf> [<https://perma.cc/8FJZ-MLCP>] [hereinafter Bier Testimony] (noting that Title 42 led to repeated attempts to cross the border irregularly).

176. See, e.g., Emily Ryo, *The Unintended Consequences of US Immigration Policies*, 118 PROC. NAT’L ACAD. SCIS. 1, 9 (2021) [hereinafter *Unintended Consequences*] (demonstrating through an empirical study that immigration detention and rapid removals such as expedited removal “did not have a significant effect on . . . intentions to migrate”); see also HUMAN RIGHTS FIRST, LEADING BY EXAMPLE, HONORING COMMITMENTS: RECOMMENDATIONS FOR THE BIDEN ADMINISTRATION TO UPHOLD REFUGEE LAW AT HOME (Jan. 2023) [hereinafter LEADING BY EXAMPLE] (asserting that border policies have little impact on decisions regarding “the search for protection”); Bier Testimony, *supra* note 175, at 16 (noting that anti-asylum policies have led to more crossings of the U.S. southern border); Gorman, *Defined by the Flood*, *supra* note 11, at 2 (noting that “migrants and the process of migration are frequently described as overwhelming in

implementation of broad detention of asylum-seeking families in 2014 as an explicit effort to deter arrivals at the southern border, the number of asylum applications remained at very high levels and then rose further.¹⁷⁷ Similarly, after the government forcibly separated children from their parents in the summer of 2018 as a deterrence measure, 2019 saw even greater numbers of asylum applications than before the family separation policy.¹⁷⁸ Even where new restrictions temporarily reduce flows of new asylum seekers, those measures are, at best, short-lived. For example, after the implementation of MPP and then Title 42 in 2019 and 2020 respectively, arrivals at the southern border increased significantly in 2021 and 2022.¹⁷⁹ While the territorial blockade temporarily made it physically impossible for many asylum seekers to access the U.S. system, those asylum seekers did not all leave the border area or remain or return home.¹⁸⁰ They continued their efforts to seek asylum in the United States and were joined by new asylum seekers.¹⁸¹

number to stoke fears” in order to legitimize exclusionary practices); *supra* note 41 (describing frequent use of “crisis” and related language to describe the border).

177. See *supra* Figure 1 (documenting a steady increase in number of asylum applications filed between 2014 and 2017); see also *supra* note 145 and accompanying text (detailing the opening of family detention centers for deterrence purposes).

178. See *supra* Figure 1 (documenting an increase in number of asylum applications filed in 2019 after family separation occurred in 2018); *Total Illegal Alien Apprehensions By Month—FY 2000*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Monthly%20Apprehensions%20%28FY%202000%20-%20FY%202019%29_1.pdf [<https://perma.cc/R85T-T69L>] (last visited Aug. 1, 2023) (showing that arrivals and apprehensions at the border in 2019 almost doubled over the number of arrivals in 2018, after family separation occurred in 2018); U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-163, *supra* note 156 (describing family separation in 2018).

179. See *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (May 25, 2022), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [<https://perma.cc/UN2H-WR9S>] (stating that even with adjustments for repeated attempts at border crossings, the numbers of arrivals in 2021 and 2022 were higher than in 2019 and 2020).

180. See Vanessa Romo et al., *Title 42, a COVID-Era Halt on Asylum Applications, Has Ended. Here's What to Expect*, NAT'L PUB. RADIO (May 12, 2023, 12:00 AM), <https://www.npr.org/2023/05/11/1175378000/title-42-expires-asylum-us-border-texas> [<https://perma.cc/3DQX-3DW4>] (reporting that tens of thousands of asylum seekers had been waiting in Mexico near the U.S.-Mexico border in the final days of Title 42); *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810, 2023 WL 4729278 (N.D. Cal. June 16, 2023) (Declaration of Blas Nuñez-Nieto, Assistant Secretary of the U.S. Department of Homeland Security) (anticipating elevated asylum claims with the end of Title 42).

181. Muzaffar Chishti & Kathleen Bush-Joseph, *U.S. Border Asylum Policy Enters New Territory Post-Title 42*, MIGRATION POL. INST. (May 25, 2023), <https://www.migrationpolicy.org/article/border-after-title-42> [<https://perma.cc/6Y89-E986>] (reporting on large numbers of asylum seekers waiting near the U.S. border in northern Mexico and additional asylum seekers making the journey towards the border from South America).

Social scientists have confirmed that restrictions on asylum in the United States do little to stem migration.¹⁸² Deterrence efforts are ineffective because human rights concerns in countries of origin weigh more heavily than U.S. policy restrictions in asylum seekers' decisions to leave their home countries and seek protection in the United States.¹⁸³

While failing to impact asylum seeker arrivals in the United States, the system does cause grave harm, and creates a vicious cycle of ineffective and damaging policy.¹⁸⁴ Exclusionary measures like detention and expedited removal are based on unsubstantiated allegations of a threat presented by refugee flows and further a vision of asylum seekers as problematic.¹⁸⁵ At the same time, substantive law interpretations designed to preserve exceptionality combine with the exclusionary apparatus to ensure low grant rates for asylum seekers, especially those within larger flows from nearby countries.¹⁸⁶ The low grant rates are used to “prove” that the asylum claims presented are specious and should be blocked.¹⁸⁷

182. See Jonathan T. Hiskey et al., *Leaving the Devil You Know: Crime Victimization, US Deterrence Policy, and the Emigration Decision in Central America*, 53 *LATIN AM. RSCH. REV.* 429, 442 (2018) (concluding that many individuals fleeing violence in El Salvador and Honduras are not deterred by U.S. policies because the high levels of violence that they face in their home countries overshadow any fears relating to those policies); see generally Ryo, *Unintended Consequences*, *supra* note 176, at 1.

183. See, e.g., Wasem, *More Than a Wall*, *supra* note 48, at 258 (“Evidence suggests that conditions in the sending countries then and now are the key determinants of the refugee and asylee flows.”); WASEM, CRS, *supra* note 58, at 20 (data analysis suggesting that the conditions in home countries, “whether economic, environmental, political, religious, or social,” were the driving force behind asylum seeker arrivals).

184. See *infra* Section V.A (describing harms, including forcible return to danger and increased violence at the border).

185. See *supra* note 4 and accompanying text (policymakers and the press have often labeled wide-scale arrivals of migrants at the U.S. southern border, including asylum seekers, as a “crisis” and “disaster.”); see also Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, CATO INST. 14 (Sept. 13, 2016), <https://www.cato.org/policy-analysis/terrorism-immigration-risk-analysis> [<https://perma.cc/UTA4-RTVN>] (explaining that asylum seekers present a very low terrorism risk); Michael T. Light et al., *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born U.S. Citizens in Texas*, 117 *PROCS. NAT'L ACAD. SCIS.* 32340, 32342–43 (2020), <https://www.pnas.org/doi/full/10.1073/pnas.2014704117> [<https://perma.cc/R84U-ZNMV>] (showing that “US-born citizens are over 2 times more likely to be arrested for violent crimes, 2.5 times more likely to be arrested for drug crimes,” and “4 times more likely to be arrested for property crimes” than non-citizens).

186. See *supra* Part III (outlining the methods of asylum exceptionality); Part IV (describing the exclusionary procedural apparatus that furthers the exceptionality of the U.S. asylum system).

187. See, e.g., EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUSTICE, ADJUDICATION STATISTICS: TOTAL ASYLUM APPLICATIONS (2023), <https://www.justice.gov/eoir/page/file/1106366/download> [<https://perma.cc/V529-XHKZ>] (exhibiting low grant rates as compared to asylum application receipts for the period from 2008 to 2022); *Department Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020) (majority opinion justifying restrictions on review of asylum claims made at the border by stating that most asylum claims fail and some are fraudulent).

Asylum exceptionality and the exclusionary apparatus thus align to insist that asylum seekers should be blocked. When asylum seeker arrivals inevitably continue undeterred despite the efforts to halt them, the system treats those arrivals as a more serious problem than ever before, justifying additional limitations that fail again to stop arrivals in a never-ending cycle.¹⁸⁸ Little consideration is given to the harm caused to asylum seekers and to system credibility and lawfulness in this cycle.

It is critical to step back from this constant ineffective “crisis” mode to refocus on the serious problems created *as a result of* U.S. asylum exceptionality and exclusion. Once examined, these issues require an urgent reconsideration of the current approach to asylum.

A. Insecurity and Danger

A system that treats eligibility for asylum as exceptional and deploys an exclusionary apparatus results in denials of asylum protection to persons who desperately need it and who would meet the refugee definition if stripped of the exceptionality gloss. As noted previously, unprecedented numbers of individuals have fled their home countries worldwide and need asylum protection, according to the United Nations High Commissioner for Refugees.¹⁸⁹ Many of those seeking asylum in the United States form part of this group.

Nevertheless, when asylum is rigidly restricted, genuine asylum seekers are returned to the countries they fled and face great danger. The likelihood of harm is not hypothetical. There are documented cases of asylum seekers who were murdered or experienced violent threats and attacks after deportation from the United States.¹⁹⁰

The system also imposes other harms on asylum seekers, such as detention or return to Mexico.¹⁹¹ These harms are serious and often

188. *See supra* notes 144–166 and accompanying text (describing buildup of family detention in an attempt to deter Central American migration in 2014 and then the rollout of MPP in 2019 when Central American asylum seekers continued to arrive in large numbers).

189. *See Refugee Data Finder*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/refugee-statistics/> [<https://perma.cc/G2MW-56SA>] (last visited Aug. 1, 2023) (showing that there are currently 62.5 million internally displaced people, 35.3 million refugees, and 5.4 million asylum seekers).

190. *See, e.g.*, HUMAN RIGHTS FIRST, DEPORTED TO DANGER: UNITED STATES DEPORTATION POLICIES EXPOSE SALVADORANS TO DEATH AND ABUSE (Feb. 2020) (showcasing various instances where deportees were subjected to crimes and violence because they were returned to their home countries).

191. *See supra* notes 146–75 and accompanying text (describing detention of asylum seekers and Title 42 programs); *see, e.g.*, Cody Copeland, *Migrant Detention Center Fire Leaves 40 Dead in Juarez*, COURTHOUSE NEWS (Mar. 28, 2023), <https://www.courthouse-news.com/migrant-shelter-fire-leaves-40-dead-in-juarez/> [<https://perma.cc/UZH9-J559>]

unnecessary for any legitimate purpose. They are also inflicted in a manner without regard to the strength of the asylum claim.¹⁹² Thus, even individuals with irrefutable asylum claims who manage to achieve refugee recognition through asylum in the limited U.S. system will suffer during the process, and the needless harm inflicted does not disappear with the grant of asylum.¹⁹³ The harm may impact the asylees and the communities that receive them for years to come.

In addition, restrictive measures adopted in the asylum context, especially at the border, create favorable conditions for violence and exploitation.¹⁹⁴ Greater than any purported threat presented by asylum seekers, ever-changing asylum exclusion policies do lead to danger by creating chaotic situations on both sides of the border.¹⁹⁵ The imposition of barriers preventing access to U.S. territory allows for the involvement of violent actors who exploit migrants desperately in need of reaching the United States.¹⁹⁶ The death of migrants near San Antonio in 2022 is a

(describing deaths of asylum seekers trapped in Juarez, Mexico in a shelter as a result of U.S. border policies).

192. See, e.g., Martin, *Reforming Asylum Adjudication*, *supra* note 3, at 1291 (noting that detention and similar measures are “indiscriminate in their impact” and may have the most severe impact on genuine refugees).

193. See, e.g., Kathryn Hampton et al., *Clinicians’ Perceptions of the Health Status of Formerly Detained Immigrants*, 22 BMC PUB. HEALTH 575 (2022) (finding acute or worsening medical conditions caused by immigration detention that appeared even after release).

194. See, e.g., Steven Dudley et al., *Unintended Consequences: How U.S. Immigration Policy Fosters Organized Crime on the U.S.-Mexico Border*, INSIGHT CRIME (Jun. 2023), <https://insight-crime.org/wp-content/uploads/2023/06/HGBF-US-Policy-OC-and-Migration-Policy-Brief-InSight-Crime-June-2023-FINAL-ENG.pdf> [<https://perma.cc/KJV5-9ZKZ>] (explaining restrictive border policies intended to deter migration bolster criminal organizations along the border and make migrants vulnerable to kidnappings, extortion, and violence).

195. See *id.* at 16 (noting U.S. immigration policy has “driven migrants and asylum seekers into increasingly isolated and dangerous migratory paths between ports of entry”); Bier Testimony, *supra* note 175, at 15 (restrictive border policies are “bad for security”).

196. See Dudley et al., *supra* note 194, at 10 (because of limitations on access to ports of entry, irregular border crossings are the only viable option and have become controlled by networks of smugglers, corrupt officials, and criminal organizations). There is also evidence that the exclusionary asylum apparatus and its dehumanization of asylum seekers is connected to abuses committed by U.S. government authorities at the border. See Daniel E. Martinez et al., *Border Enforcement Developments Since 1993 and How to Change CBP*, CTR. FOR MIGRATION STUD. (Aug. 2020), <https://zoberginstitute.org/wp-content/uploads/2020/08/Border-Enforcement-Developments-Since-1993-and-How-to-Change-CBP.pdf> [<https://perma.cc/ZA3Y-2WU6>] (documenting significant levels of mistreatment of migrants in Border Patrol custody, particularly as restrictive border measures have been implemented); Sarah Decker et al., *Beyond the Bridge: Documented Human Rights Abuses and Civil Rights Violations Against Haitian Migrants in the Del Rio, Texas Encampment*, HAITIAN BRIDGE ALL. & ROBERT F. KENNEDY CTR. FOR HUM. RTS. (Mar. 2022), <https://rfkhr.imgix.net/asset/Del-Rio-Report.pdf> [<https://perma.cc/QX6S-QWJQ>] (documenting mistreatment of Haitian migrants at the border in the context of Border Patrol expulsions under the Title 42 program).

painful example of the consequences.¹⁹⁷ In addition, exclusion policies returning asylum seekers to Mexico place them directly in the path of cartels.¹⁹⁸ The cartels know that they may target and extort these asylum seekers as they cannot seek protection in the United States and fear returning to their home country, leaving them trapped in Mexico. Organizations have documented more than 13,000 cases of murder, kidnapping, rape, or other violent attacks on asylum seekers in Mexico.¹⁹⁹ Overall, restrictive asylum policies at the border have created new profit centers for cartels, thereby strengthening their influence and the security threat they present.²⁰⁰

B. Failure of Legitimacy

The exceptionality approach to asylum, and the corresponding exclusionary apparatus, also negatively impact the legitimacy of the U.S. asylum system. “Legitimacy” refers to an understanding that a system is morally and legally fair and proper and deserving of obedience.²⁰¹ A lack of legitimacy in the asylum system is thus a cause for serious concern.

197. See Fernando et al., *supra* note 1 and accompanying text (in June 2022, fifty-three men, women, and children from Mexico, Guatemala, Honduras, and El Salvador perished from the heat in the back of a truck found near San Antonio, Texas); see also *Mexico: UN Expert Calls for Measures to Stop Kidnappings*, U.N. HUMAN RIGHTS, OFF. HIGH COMM’R. (July 28, 2022), <https://www.ohchr.org/en/press-releases/2022/07/mexico-un-expert-calls-measures-stop-kidnappings-human-rights-defenders-us> [https://perma.cc/QY4L-TXXZ] (denouncing the cartel kidnapping of a shelter director and migrants in Laredo who sought to enter the United States, after the initiation of the MPP program); David Agren et al., *Why Did 10 Migrants Die in this Truck in Texas?*, GUARDIAN (July 30, 2017), <https://www.theguardian.com/us-news/2017/jul/30/texas-san-antonio-migrants-truck-deaths> [https://perma.cc/YV5W-DNBR] (describing migrants who died in 2017 in a truck in San Antonio as a result of a smuggling situation).

198. See generally AZADEH ERFANI ET AL., NAT’L IMMIGRANT JUST. CTR. & FWD.US, PUSHING BACK PROTECTION: HOW OFFSHORING AND EXTERNALIZATION IMPERIL THE RIGHT TO ASYLUM 47 (2021), <https://www.fwd.us/wp-content/uploads/2021/08/Offshoring-Asylum-Report.pdf> [https://perma.cc/P366-UH7W] [hereinafter PUSHING BACK PROTECTION]; Emily Green & Keegan Hamilton, *US Companies Are Helping Mexican Cartels Get Rich Kidnapping Migrants*, VICE NEWS (April 20, 2021, 9:39 AM), www.vice.com/en/article/n7bwdz/us-mexico-cartel-kidnapping-migrant-money [https://perma.cc/U57T-6Y4Z].

199. HUMAN RIGHTS FIRST, HUMAN RIGHTS STAIN, PUBLIC HEALTH FARCE I (Dec. 2022).

200. See, e.g., María Dolores Paris Pombo, *Externalizing Borders and Blocking Asylum Seekers in Northern Mexico*, 30 REMHU: REV. INTERDISCIP. MOBIL. HUM. 101 (Apr. 2022), <https://www.scielo.br/j/remhu/a/JpzSsfbThFPwFDBtyjpBkMk/?format=pdf> [https://perma.cc/BW6M-LCHB] (documenting the means by which cartels have become involved in smuggling and trafficking because of restrictions at the U.S. southern border and the vulnerability they create for migrants); HUMAN RIGHTS FIRST, THE OPPOSITE OF ORDERLY AND HUMANE: USE OF TITLE 42 SPURS DISORDER AND UNDERMINES SECURITY 1, 4 (Feb. 2022) (explaining how restrictive border policies have been a “boon” to cartels in Mexico).

201. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790–91 (2005); Emily Ryo, *Legal Attitudes of Immigrant Detainees*, 51 L. & SOC’Y REV. 99, 104 (2017) [hereinafter *Legal Attitudes*].

In order to maintain the exceptionality of asylum, the U.S. asylum system discredits viable asylum seeker claims and operates with a level of bias that calls into question its fundamental credibility. As will be further explored in this Section, the U.S. asylum system rejects claims from nearby countries that are presented at our borders in large numbers, particularly from Central America, even where every indicator suggests that these claims are part of a genuine refugee flow.²⁰² Interrelatedly, the focus on exceptionality leads policy decision-makers and individual adjudicators to draw up limited images of the types of persons who may be seen as asylees and should therefore be entitled to asylum.²⁰³ As a result, the system has insisted that only unique or “unusual” claims will lead to asylum, focusing on claims presented by individuals from more distant nations.²⁰⁴ The result is bias in the types of claims and nationalities that are recognized for asylum. Claims from Africa and Asia receive more favorable treatment while the asylum system regularly discredits familiar asylum claims from nearby nations in the region.²⁰⁵ Asylum seekers thus

202. See generally, *supra* note 5; see 1997 YEARBOOK, *supra* note 5, at 1 (stating that Central Americans accounted for 67% of asylum applications in 1996); 2021 REFUGEES AND ASYLEES FLOW REPORT, *supra* note 5, at 8–9 (claims from the Northern Triangle of Central America including Honduras, El Salvador, and Guatemala made up 60% of all defensive asylum claims in 2021); see also NADWA MOSSAAD, U.S. DEP’T OF HOMELAND SEC., REFUGEES AND ASYLEES ANNUAL FLOW REPORT: 2015 5 (2016) (noting a strong increase in numbers of affirmative applications filed by nationals of the Northern Triangle countries); Wasem, *More Than a Wall*, *supra* note 48, at 7 (noting periods of high numbers of asylum applications from Central America). At key junctures, policymakers have recognized that large-scale arrivals from Central America represent a refugee flow but then have discredited asylum claims to block access to protection. See Ellison & Gupta, *supra* note 10, at 15–16 (quoting President Trump’s adviser Stephen Miller as saying that he would be “happy if not a single refugee foot ever again touched America’s soil” in connection with highly restrictive asylum regulations proposed in response to Central American arrivals at the southern border); Frelick et al., *supra* note 97, at 200 (quoting President George W. Bush as intending to “turn back any refugee that attempts to reach our shore”).

203. See Martin, *Reforming Asylum Adjudication*, *supra* note 3, at 1273–74 (asylum adjudicators may “retreat into categorical images about safety and danger in foreign countries” and the adjudication process involves a drawing of “pictures inside the adjudicators’ heads” regarding particular countries); see Heyman et al., *supra* note 11, at 763 (stating that Central Americans at the border are conceived as “aspiring ‘illegal’ immigrants who needed to be repelled, and deterred from further entry, not aspirant refugees from intolerable conditions”).

204. See Ian Peacock & Emily Ryo, *A Study of Pandemic and Stigma in Removal Proceedings*, 19 J. EMPIRICAL LEGAL STUD. 560, 568 (2022) (establishing empirical connections between social perceptions of a national-origin group, in this case Asian asylum seekers in the era of COVID, and immigration adjudicator decisions); Hana E. Brown & Michelle S. Dromgold-Sermen, *Borders, Politics, and Bounded Sympathy: How U.S. Television News Constructs Refugees, 1980-2016*, SOC. PROBS. 1, 2 (2022) (noting that U.S. media does not cover Central Americans as refugees and that press coverage portrays refugees sympathetically where they are “geographically distant from the United States”).

205. Claims from Mexico rise and fall in connection with developments in that country, so it is challenging to detect clear patterns for those claims, although grant rates are typically very low.

do not have an equal opportunity to demonstrate an asylum claim, regardless of the targeted danger they have fled and their ability to meet the refugee definition as fairly understood.

1. Bias in Asylum Decision-Making and the Special Impact on Central Americans

Bias was woven into the very fabric of the U.S. asylum system from its inception. Although the 1980 Refugee Act marked the end of formal nationality-based discrimination, foreign policy considerations still determined which limited nationalities would receive asylum and served as the principal filter of exceptionality after the statute's adoption.²⁰⁶ For the most part, only those fleeing Communist regimes and the Middle East received protection.²⁰⁷ Reagan-era Cold War politics in the 1980s also pushed heavily toward adjudications of asylum claims that discriminated between nationalities with a view to geopolitical relations.²⁰⁸ Adjudicators regularly rejected El Salvadoran and Guatemalan claims in light of the Reagan administration's support for the regimes in those countries as bulwarks against Communism.²⁰⁹

See Asylum Filings Through November 2022, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, <https://trac.syr.edu/phptools/immigration/asyfile/> [<https://perma.cc/S7SR-3RPQ>] (Aug. 1, 2023) (showing almost 15,000 claims from Mexico filed in 2002 but only 2000 claims filed in 2006, and then 25,000 filed in 2018). Asylum claims from Haiti are often blocked altogether, so it is also difficult to describe patterns for asylum seekers from Haiti. *See id.* (only about 64,000 claims made in Immigration Court over a 20-year period); Wasem, *More Than a Wall*, *supra* note 48, at 7; *Six Month Anniversary Del Rio Report Details a Living Legacy of Anti-Haitian Discrimination in U.S. Immigration System*, ROBERT F. KENNEDY HUM. RTS. (March 28, 2022), <https://rfkhuman-rights.org/six-month-anniversary-del-rio-report-details-a-living-legacy-of-anti-haitian-discrimination-in-u-s-immigration-system> [<https://perma.cc/N4LE-T33Z>]. Most changes in law and procedure designed to discredit claims from nearby nations have directly targeted Central Americans. This Article, thus, treats Central American claims as a particularly notable example of bias.

206. *See* MARÍA CRISTINA GARCÍA, *THE REFUGEE CHALLENGE IN POST-COLD WAR AMERICA* 15–16 (2017) (describing ongoing influence of national origin and foreign affairs considerations on asylum processing after adoption of the Refugee Act of 1980).

207. *See id.* (stating that immigration from former and remaining communist countries dominated asylum admissions from 1989 to 1992).

208. *See* Wasem, *More Than A Wall*, *supra* note 48, at 253 (noting that foreign policy considerations led to differing treatment for claims from El Salvador and Guatemala, because those countries' governments received support from the United States); Gzesh, *supra* note 5 (noting that during the Reagan administration, asylum policy was often determined by U.S. intervention against socialist movements in Central America so that applicants from countries seen to be defending against socialism, such as El Salvador and Guatemala, were not granted protection).

209. *See* Sarah R. Sherman-Stokes, *Reparations for Central American Refugees*, 96 *DENV. L. REV.* 585, 594–95 (2019) (asylum processing in the 1980s was “tainted by a Cold War legacy of anti-communist rhetoric”); *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (finding discrimination in the negative treatment of Salvadoran and Guatemalan asylum claims based on foreign policy considerations).

Distinctions based on diplomatic strategy eventually waned because of litigation, advocacy, and the end of the Cold War.²¹⁰ Foreign policy undoubtedly still plays a role in the asylum process, but new filters have overtaken international diplomacy considerations to ensure that asylum grants remain exceptional. Now, country-of-origin proximity and the numerosity and familiarity of certain claims lead them to be screened out.²¹¹

Because Central Americans have arrived in significant numbers at different junctures throughout the history of the U.S. asylum system and because they present familiar claims, they have borne the brunt of the exceptionality paradigm.²¹² Central American claims receive unfavorable treatment even though these asylum seekers often flee extreme violence and human rights violations, including gang beheadings and sexual assaults, political repression of protestors, and rampant domestic violence and femicides.²¹³ Some dangers facing Central Americans are not only known to the United States, but have been caused or exacerbated by U.S. involvement in the region. For example, U.S. training of repressive governments and deportations from the United States to Central America of

210. See Wasem, *More Than A Wall*, *supra* note 48, at 252–53, 256–57 (noting shift away from foreign policy considerations, particularly Cold War concerns, in asylum adjudications after 2000).

211. See *infra* notes 223–30 and accompanying text (describing changes in legal standards that make it more challenging for Central Americans to obtain asylum); *infra* Figure 5 (showing that Central American asylum grant rates are much lower than grant rates for cases from African and Asian nations).

212. See *supra* note 5 (citing sources showing that Central American asylum claims have often been presented in high numbers); *infra* Figures 5, 6, and 7 (showing much lower asylum grant rates for asylum seekers from Central America as compared to other nationalities).

213. See, e.g., Diana Roy & Amelia Cheatham, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN REL. (June 22, 2022), <https://www.cfr.org/background/central-americas-turbulent-northern-triangle> [<https://perma.cc/ND9L-MCLK>] (noting that homicide rates are among the highest in the world in certain countries of Central America and that femicide is also prevalent in the region); U.N. HIGH COMM'R FOR REFUGEES, WOMEN ON THE RUN, (2015), <https://www.unhcr.org/media/women-run> [<https://perma.cc/L98U-NP8H>] (first-hand accounts of women fleeing El Salvador, Guatemala, Honduras, and Mexico relating incidents of sexual assault and other violence); U.S. DEP'T OF STATE, NICARAGUA 2022 HUMAN RIGHTS REPORT 1 (2022) https://www.state.gov/wp-content/uploads/2023/03/415610_NICARAGUA-2022-HUMAN-RIGHTS-REPORT.pdf [<https://perma.cc/QA5N-5T8X>] (“President Ortega awarded himself a fourth consecutive term in the 2021 elections after arbitrarily jailing nearly 40 opposition figures.”); *Freedom in the World 2022: Honduras*, FREEDOM HOUSE (Sept. 7 2023), <https://freedomhouse.org/country/honduras/freedom-world/2022> [<https://perma.cc/C2BZ-2SZB>] (documenting violence against women, political activists, and journalists in Honduras); *Guatemala Prison: Inmates Beheaded in Deadly Gang Fight*, BBC NEWS (May 20, 2021), <https://www.bbc.com/news/world-latin-america-57181767> [<https://perma.cc/W35Q-RZHC>] (describing extreme violence in Guatemala).

gang members have led to violence in the region that has caused Central Americans to flee to the United States.²¹⁴

Yet, legal standards and practices delegitimize Central American claims *because of* their numerosity and familiarity, raising questions about the legitimacy of the asylum system. At best, Central Americans are treated as economic migrants rather than asylees.²¹⁵ At worst, they are treated as security threats or as manipulators attempting to game the asylum system.²¹⁶ Thus, for example, in 2014, President Obama's Domestic Policy Council director, Cecilia Muñoz, made categorical statements that unaccompanied children from Central America were "unlikely" to win their asylum claims.²¹⁷ Escalating the rhetoric, President Trump stated in 2019 that Central American asylum seekers arriving at the U.S. southern border were engaging in "a big fat con job."²¹⁸ He also regularly referred to Central American asylum seekers as criminal gang members exploiting "loopholes" in the asylum system.²¹⁹

214. See Sherman-Stokes, *supra* note 209, at 598 (explaining the role the U.S. has played in escalating gang violence in Central America).

215. Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 5, 2021) (describing "economic insecurity" as a primary root cause of migration from Central America to the United States); U.S. Strategy for Addressing the Root Causes of Migration in Central America, NAT'L SEC. COUNCIL (July 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf> [<https://perma.cc/K98V-6MDB>] (same); Kamala Harris Tells Guatemala Migrants: 'Do Not Come to US', BBC NEWS (June 8, 2021), <https://www.bbc.com/news/world-us-canada-57387350> [<https://perma.cc/7ZLY-WFDQ>] (documenting the Biden administration's insistence that Central American migrants will be turned away at the border rather than treated as genuine asylum seekers); Hamlin, *supra* note 59, at 335–36 (describing the history of policymakers casting Central American asylum seekers as "undocumented migrants" rather than refugees).

216. See, e.g., Gregory Korte & Alan Gomez, *Trump Ramps Up Rhetoric on Undocumented Immigrants: 'These Aren't People. These Are Animals.'*, USA TODAY (May 17, 2018, 10:03 AM), <https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002/> [<https://perma.cc/YS8E-BJU7>] (describing the rhetoric former President Trump used to describe migrants from Central America, which necessarily includes asylum seekers, as bringing crime and drugs).

217. Steve Inskeep & Cecilia Munoz, *Administration Moves to Speed Deportations of Unaccompanied Minors*, NAT'L PUB. RADIO (July 9, 2014, 5:06 AM), <https://www.npr.org/2014/07/09/330038061/administration-moves-to-speed-deportations-of-unaccompanied-minors> [<https://perma.cc/UF22-SSTS>].

218. *Transcript Aired March 29, 2019*, CNN (March 29, 2019, 2:00 PM), <http://www.cnn.com/TRANSCRIPTS/190329/cnr.05.html> [<https://perma.cc/6WM8-9LWU>].

219. Miriam Valverde, *Immigration, MS-13 and Crime: The Facts Behind Donald Trump's Exaggerations*, POLITIFACT (Feb. 7, 2018), <https://www.politifact.com/factchecks/2018/feb/07/donald-trump/immigration-ms-13-and-crime-facts-behind-donald-tr/> [<https://perma.cc/4729-PVUR>]. President Trump regularly deployed such xenophobic discourse against migrants, including asylum seekers from Central America. See, e.g., Josh Dawsey, *Trump Derides Protections for Immigrants From "Shithole" Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [<https://perma.cc>

As set out in Part IV, much of the exclusionary procedural apparatus designed to maintain the exceptionality of asylum has targeted Central Americans.²²⁰ The expansion of detention and the evolution of expedited removal responded to Central American refugee flows, for example.²²¹ Similarly, expanded border exclusion measures adopted in recent years have responded to Central American arrivals, seeking to prevent access to the asylum system for nationals of these nearby countries.²²²

U.S. substantive law has also adapted to ensure that Central American claims are not recognized to the same degree as claims from more distant countries, to maintain low overall grants of asylum, and ensure that only “rare” claims are recognized. Many of the restrictive substantive law standards described in Part III came into being as a means of disqualifying Central American asylum claims.²²³ As Central American claims relating to gang violence became more commonplace in the first decades of the twenty-first century, Immigration Courts issued decisions that tightened the standards for claims based on membership in a particular

[G8BZ-8XZ3] (reporting Trump’s statements during a meeting with lawmakers about how some countries like Haiti should be left out of immigration deals); Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants ‘Animals’ in Rant*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html> [<https://perma.cc/UG6W-5TDB>]; *Debate Transcript: Trump, Biden Final Presidential Debate Moderated by Kristen Welker*, USA TODAY (Oct. 23, 2020, 10:02 AM), <https://www.usatoday.com/story/news/politics/elections/2020/10/23/debate-transcript-trump-biden-final-presidential-debate-nashville/3740152001/> [<https://perma.cc/EY8S-27MN>] (reporting on Trump’s statement that the US might allow a “murderer” or a “rapist” into the country if asylum seekers are permitted to seek protection from within the country).

220. See *supra* Section IV.C (noting the timing of expedited removal and detention expansions as responding to increased arrivals from Central America).

221. *Supra* Section IV.C.

222. See *supra* Section IV.D (referring to the exclusionary measures taken by the Trump administration to stop asylum seekers from accessing the U.S. asylum system, particularly Central Americans).

223. See Karen Musalo, *El Salvador: Root Causes and Just Asylum Policy Responses*, 18 HASTINGS RACE & POVERTY L.J. 178, 229 (2021) [hereinafter *Just Asylum Policy*] (“The U.S. has . . . adopted improbable and strained interpretations of key elements of the refugee definition, which have disproportionately impacted Salvadoran asylum seekers as well as asylum seekers from Guatemala and Honduras.”); Gorman, *Defined by the Flood*, *supra* note 11, at 2 (“The dramatic measures taken to undermine Central American asylum seeking in the US are illustrative of how states . . . change legal categories and extend bordering practices . . .”); Cynthia S. Gorman, *Redefining Refugees: Interpretive Control and the Bordering Work of Legal Categorization in U.S. Asylum Law*, 58 POL. GEOGRAPHY 36, 36 (2017) [hereinafter *Redefining Refugees*] (the refugee definition was reinterpreted restrictively to make Central American asylum claims nonviable); Sherman-Stokes, *supra* note 209, at 608 (describing the history of discriminatory treatment towards Central American asylum claims and recent substantive law changes that have made Central American asylum claims generally non-viable).

social group to screen out the claims.²²⁴ The limiting caselaw developed in the specific context of cases involving Central American asylum seekers.²²⁵ Then, in 2014, as unaccompanied children from Central America arrived at the border in greater numbers, immigration agencies issued new interpretations further tightening the substantive standards relating to claims based on gang violence.²²⁶ Meanwhile, during that same period, adjudicators often recognized claims of similar violence at the hands of organized non-state actors in Asia or Africa, such as the Taliban.²²⁷

A similar pattern has occurred with gender-based claims. Domestic violence claims, which are frequently made by women from Central America, still have a highly uncertain foothold in the case law.²²⁸ Over different periods of time, up to the present, the case law has alternated between permitting certain domestic violence claims or essentially foreclosing such claims altogether.²²⁹ The precedent decisions that have denied access to asylum for domestic violence survivors have specifically involved Central American women claimants.²³⁰

Meanwhile, gender-based claims involving female genital cutting, which most frequently are raised by asylum seekers from Africa, have been recognized as valid asylum claims for almost twenty-five years.²³¹ The precedent decision setting out the rule recognizing these claims involved a woman from Togo,²³² and subsequent cases expanding

224. See, e.g., *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008) (rejecting particular social group asylum claim for applicant from Honduras who had resisted gang recruitment); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) (same).

225. *E-A-G-*, 24 I&N Dec. 591; *S-E-G-*, 24 I&N Dec. 579.

226. *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014).

227. See, e.g., *Khattak v. Holder*, 704 F.3d 197, 203 (1st Cir. 2013) (finding viable asylum claim based on fear of returning to Pakistan due to resistance to Taliban control); *Oryakhil v. Mukasey*, 528 F.3d 993, 995 (7th Cir. 2008) (finding viable asylum claim based on likelihood of persecution in Afghanistan by the Taliban before the group's takeover of the government in 2021). This is not to say that such claims are always successful; they may fail on the facts. However, the caselaw has made them viable.

228. See Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States From 1994 to 2012*, 24 HASTINGS WOM. L.J. 107, 122 (2013) (noting that the U.S. does not have clear guidance on how to process domestic violence asylum cases).

229. *Id.*; Musalo, *Just Asylum Policy*, *supra* note 223, at 237, 244 (noting that asylum law has been interpreted inconsistently in connection with gender-based claims and domestic violence claims); *Matter of A-R-C-G- et al.*, 26 I&N Dec. 388 (BIA 2014) (recognizing the possibility of domestic violence claims as a basis for asylum); *Matter of A-B-*, 28 I&N Dec. 199 (AG 2021) (holding that domestic violence claims would generally not be viable).

230. *A-B-*, 28 I&N Dec. 199; *Matter of R-A-*, I&N Dec. 906 (BIA 1999), *remanded*, I&N Dec. 694 (AG 2004).

231. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

232. *Id.*

eligibility further have involved claims from additional African nations such as Mali and Somalia.²³³ In addition, for another gender-based category of claims—forced abortions and sterilization—Congress specifically legislated that coercive population control would qualify as grounds for asylum.²³⁴ This type of claim typically arises in China but not in Central America.²³⁵

2. Patterns of Preference for Claims from Distant Nations

The exceptionality principle, executed through substantive law restrictions and the exclusionary apparatus, plays out in patterns of biased adjudication of asylum claims. For those asylum seekers who manage to gain access to the asylum system and present a claim despite the exclusionary apparatus, adjudication favors unique asylum claims originating in distant countries over common claims from nearby nations. Asylum adjudication is thus determined by the exceptionality principle and functions to preserve that exceptionality.²³⁶

An empirical analysis of available adjudication data confirms these patterns of bias. Beginning with consideration of a single year of asylum adjudication, Figure 5 compares the percentage grant rate for asylum seekers from countries with high numbers of viable asylum claims and finds much lower grant rates for Central Americans as compared to those from more distant nations. Specifically, Figure 5 includes grant rate data relating to asylum applications from those countries with the greatest absolute number of asylum claims granted by Immigration Courts in 2020.²³⁷ In other words, the nationalities displayed here are those already found to have high numbers of viable asylum claims. Among those countries that produce asylum seekers, though, there are important differences in the level of recognition of asylum claims. In 2020, asylum seekers from the nearby Central American countries of El Salvador, Guatemala, and Honduras received grants of asylum in under 20 percent of cases.

233. *Matter of A-T-*, 24 I&N Dec. 617 (AG 2008); *Hassan v. Gonzales*, 484 F.3d 513, 515 (8th Cir. 2007).

234. 8 U.S.C. § 1101(a)(42); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 601(a)(1), Pub. L. No. 104-208, 110 Stat. 3009.

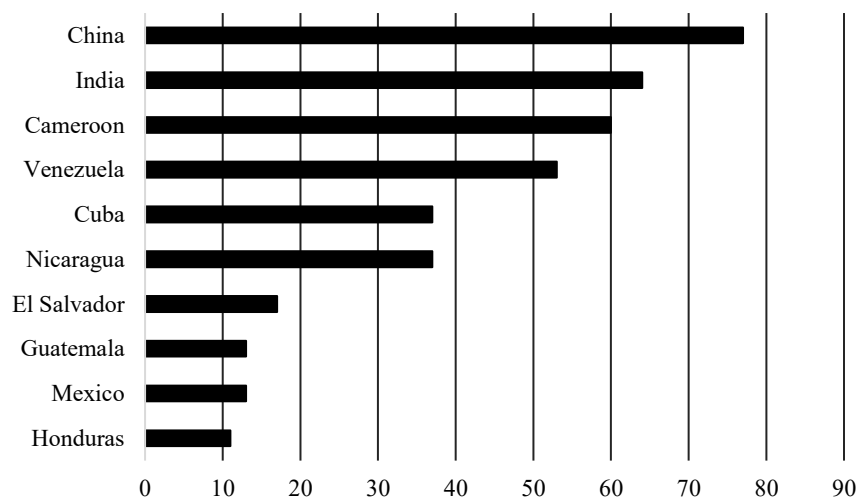
235. See Connie Oxford, *Coercive Population Control and Asylum in the U.S.*, 6 SOC. SCI. 137 (2017) (explaining how women fled China because they were forced to have abortions and sterilization).

236. See *supra* notes 186–88 and accompanying text (explaining how low grant rates for asylum seekers from nearby nations are also then used to justify further substantive and procedural restrictions as against those asylum seekers).

237. See RYAN BAUGH, OFF. IMMIGR. STATS., U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2020 REFUGEES AND ASYLEES ANNUAL FLOW REPORT 16 (Mar. 8, 2022) (data used to determine list of countries with top asylum grant numbers for Figure 5).

Meanwhile, asylum seekers from the Asian and Southeast Asian countries of China and India received asylum in more than 60 percent of cases. Asylum seekers from the African country of Cameroon obtained asylum 60 percent of the time. The Immigration Court data for 2020 analyzed here suggests that the U.S. asylum system discriminates on the basis of country of origin.

FIGURE 5: 2020 IMMIGRATION COURT ASYLUM GRANT RATE²³⁸

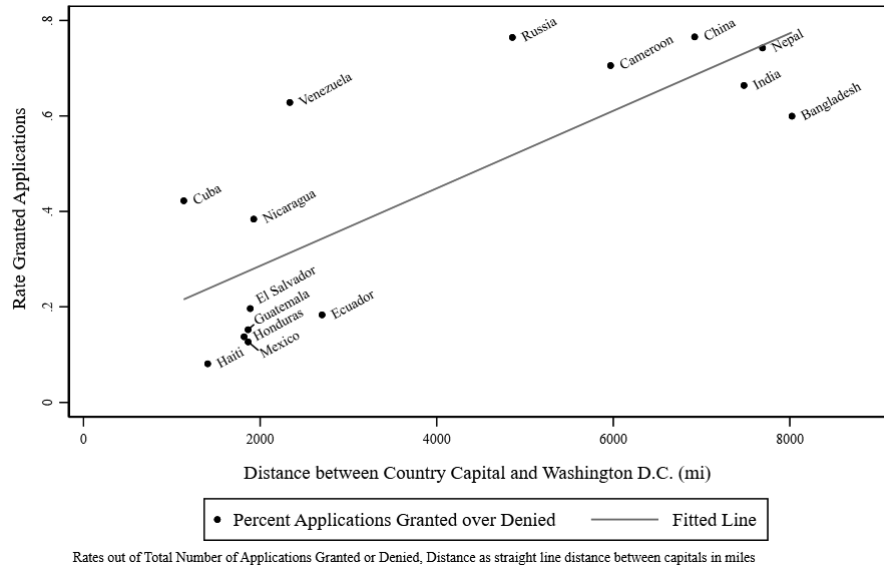


While additional empirical analysis would add nuance, basic correlation and regression studies further support the significance of the relationship between asylum grant rates and the distance of the applicant's country of origin from the United States. Figures 6 and 7 depict the relationship between country-of-origin distance and Immigration Court grant rates during distinct time periods. These graphs use three-year averages

238. The data used (grant rates were calculated as a proportion of total cases granted or denied for each country) was made available by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University. See *Asylum Decisions*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 2023), <https://trac.syr.edu/phptools/immigration/asylum/> [<https://perma.cc/PFK3-AUK5>] [hereinafter TRAC Data]. Only Immigration Court grant percentages were used. Grant and denial numbers disaggregated by country of origin are not publicly available for affirmative asylum applications. The grant percentages likely would not change significantly even if both affirmative cases before USCIS Asylum Office and cases before the Immigration Courts were considered. The year 2020 was chosen for this specific figure as full data is available, and this year predates the full impact of the COVID-19 pandemic that brought changes in immigration policies and migration patterns.

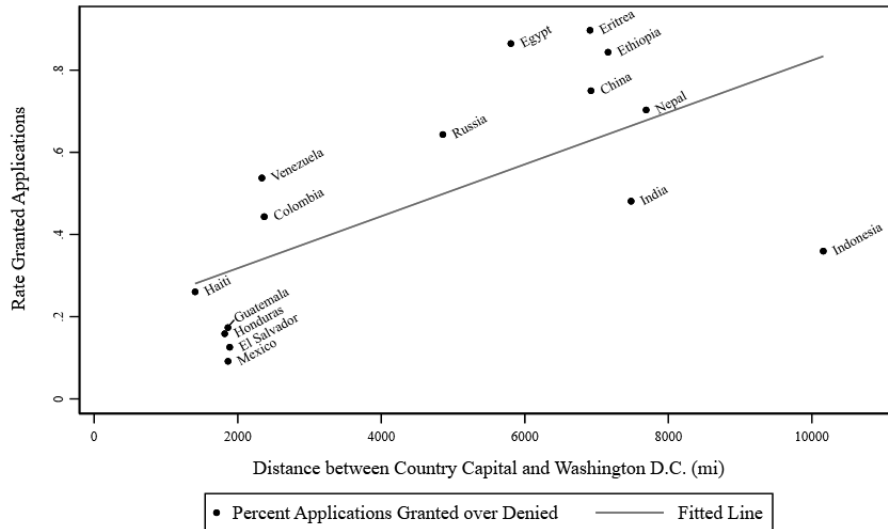
of Immigration Court grant rates for the top fifteen countries during each period, in terms of numbers of asylum grants.²³⁹

FIGURE 6: 2019–2021 AVERAGE RATE OF GRANTED APPLICATIONS OVER DISTANCES BETWEEN CAPITALS FOR THE TOP FIFTEEN COUNTRIES



239. The data used was again made available from TRAC. See TRAC Data, *supra* note 238. The TRAC Data was manually pulled into an Excel spreadsheet used to perform the statistical analyses. See Excel Spreadsheet of TRAC Data on Asylum Decisions (on file with the author). The grant rates were calculated as a proportion of total cases granted or denied by country for a particular year and were then averaged.

FIGURE 7: 2010–2012 AVERAGE RATE OF GRANTED APPLICATIONS OVER DISTANCES BETWEEN CAPITALS FOR THE TOP FIFTEEN COUNTRIES



Rates out of Total Number of Applications Granted or Denied, Distance as straight line distance between capitals in miles

Regression analysis, available in the Appendix, further identifies the relationship between distance from the United States and asylum grant rates for those countries that produce large numbers of viable asylum claims. That analysis uses Immigration Court data for a twenty-year period, reflecting the Immigration Court grant rates per country (grants over grants and denials) for each country that was ever in the top fifteen for the number of raw asylum grants during the twenty-year period.²⁴⁰ The results indicate that the relationship between the distance of a country of origin and the asylum grant rate for applicants from that country is statistically significant, and grant rate increases at greater distance from the United States.²⁴¹ The analysis controls for representation²⁴² and

240. See *infra* Appendix (providing the regression analysis, using Excel Spreadsheet of TRAC Data on Asylum Decisions, *supra* note 239).

241. The coefficients in the regression models are exceptionally small, but this likely has to do with the range of distance as seen in Table 1 under the summary statistics. In other words, it is not surprising that each individual mile of additional distance does not make a great difference in the grant rate. If 1,000-mile segments are used, the grant rate increases by 4.51 to 5.65 percent per 1,000 miles away from the U.S. border, before including relevant effects of representation, year, or detention rate. See *infra* Appendix.

242. The impact of representation may not be fully considered in this analysis, because the data indicates that an applicant was represented if an attorney was involved at any point in the case and

detention rates by country, and the results still suggest that the further the border or capital of a country is from the United States, the higher the Immigration Court grant rate.²⁴³

Undoubtedly, a multitude of factors influence each asylum decision, and these factors interact in infinite ways to determine case outcomes that affect overall patterns. These factors range from ongoing foreign affairs and political considerations, case-specific facts, the background of the adjudicator, to the human rights situation in countries of origin.²⁴⁴ However, this Article insists that the overall patterns identified further establish that the exceptionality approach to asylum pervades every aspect of the U.S. asylum system, leading to bias and a legitimacy problem.

An obvious reaction to the patterns described would be to suggest that the lower grant rates for individuals coming from nearby countries do not reflect bias but rather a response to the large numbers of claims presented and a desire to avoid opening the “floodgates.”²⁴⁵ On this theory, higher grant rates for nationals of more distant countries reflect a calculation that

so does not distinguish those cases where an attorney was available to present the claim at the critical stage of adjudication on the merits.

243. See *infra* Appendix (providing the regression analysis based on Excel Spreadsheet of TRAC Data on Asylum Decisions, *supra* note 239). The analysis is based on country-level grant rates, so it does not show an individual’s chance at asylum but rather an aggregate of the country asylum rate controlling for country representation and detention rates.

244. See, e.g., *The Impact of Nationality, Language, Gender, and Age on Asylum Success*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Dec. 7, 2021), <https://trac.syr.edu/immigration/reports/668/> [<https://perma.cc/S6EW-J6XN>] [hereinafter *Impact of Nationality, Language, Gender, and Age*] (noting that asylum decisions depend on, among other factors, “the underlying strength of each asylum seeker’s case, the process used, prevailing legal standards at the time, and the personal views and judgment that each Immigration Judge brings to the case”); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 299–300 (2007) (identifying predilections and characteristics of asylum adjudicators as highly relevant in outcomes); J. Anna Cabot, *Problems Faced by Mexican Asylum Seekers in the United States*, 2 J. ON MIGRATION & HUM. SEC. 361, 364 (2014) (noting the difficulties faced by nationals of U.S. allies in gaining asylum).

245. See, e.g., Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action*, 14 VA. J. SOC. POL’Y & L. 119, 120 (2007) [hereinafter *Protecting Victims*] (noting concerns about floodgates as a reason why more generous legal standards have not been adopted for Central American asylum claims); Schuck, *supra* note 50, at 40–41 (1984) (expressing fear of the immigration floodgates opening to asylum seekers from places like El Salvador); Jesse Imbriano, *Opening the Floodgates or Filling the Gap: Perdomo v. Holder Advances the Ninth Circuit One Step Closer to Recognizing Gender-Based Asylum Claims*, 56 VILL. L. REV. 327, 350–53 (2011) (noting that resistance to gender-based asylum claims has relied on overblown and legally irrelevant “floodgates” concerns); Eyder Peralta, *Why a Single Question Defines the Fates of Central American Migrants*, NAT’L PUB. RADIO (Feb. 25, 2016, 11:59 AM), <https://www.npr.org/2016/02/25/467020627/why-a-single-question-decides-the-fates-of-central-american-migrants> [<https://perma.cc/EN9E-SDJZ>] (noting that policymakers seeking legal limits on Central American asylum claims have argued that a “broader reading of the law would open the floodgates along the southern border”).

asylum may be granted more readily without overwhelming the system and without fear of encouraging many new asylum seeker arrivals.²⁴⁶ However, if correct, this assertion simply points out the extent to which the U.S. asylum system is guided by exceptionality. Neutral processing would consider the merits of claims under the refugee definition rather than the size of current or future flows.

Furthermore, consideration of the absolute number of cases granted by country suggests that distance from the United States has an impact on asylee recognition beyond just the desire to limit the number of arrivals, asylum applications, and asylum grants. Figure 8 shows that, in a given year such as 2020, the absolute numbers of asylum grants are higher for applicants from some distant nations than for claimants from Central American nations.²⁴⁷ For example, there are comparatively large numbers of asylum *grants* for asylum seekers from China and India as well as high grant *rates* for those countries, as compared to claims from Central American nations.²⁴⁸ In fact, China was included among the top three countries in terms of number of all asylum grants for each year between 2019 and 2021.²⁴⁹ Even more dramatically, over the twenty-year period between 2001 and 2021, nearly one in three defensive asylum grants in Immigration Court went to Chinese nationals.²⁵⁰ Thus, the low percentage grant rates for Central Americans are not simply a means of addressing floodgates concerns and ensuring low asylum grant numbers where

246. See, e.g., *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810, 2023 WL 4729278 at 9–10 (N.D. Cal. June 16, 2023) (Declaration of Blas Nuñez-Nieto, Assistant Secretary of the U.S. Department of Homeland Security) (connecting lower grant rates in credible fear interviews with declines in arrivals of asylum seekers at the border).

247. The numbers of asylum grants displayed in Figure 8 relate only to the year 2020. The numbers vary from year to year. However, it is common for more Chinese nationals to receive asylum than Hondurans, Guatemalans, or El Salvadorans. See TRAC Data, *supra* note 238 (for example, in 2015, there were 4,743 asylum grants for nationals of China and only 1,980 asylum grants for nationals of El Salvador). Furthermore, while the combined asylum grants for all Central American countries for a given year will often exceed grant numbers for China, regional combined grant rates for Asia generally still exceed combined grant rates for the Central America region. *Id.*

248. See *infra* Figure 8 (showing the 2020 Immigration Court asylum grants for various countries, including China, India, and the Central American countries of Honduras, Guatemala, and El Salvador).

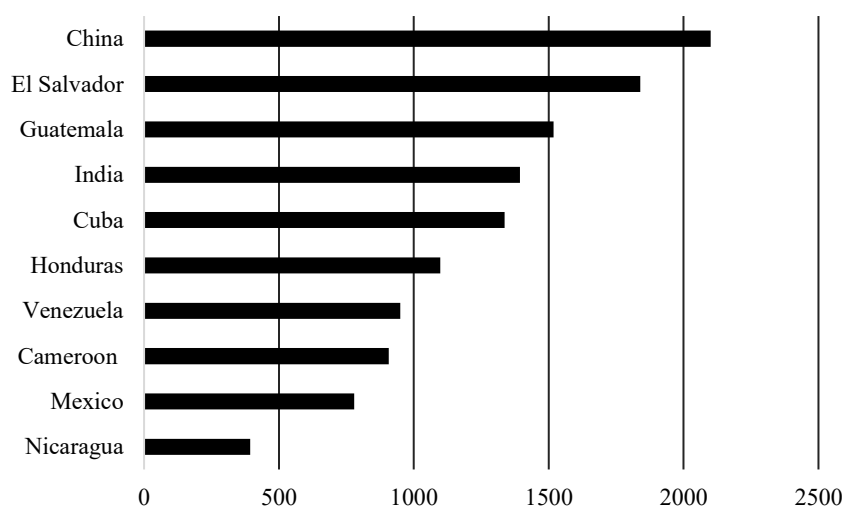
249. See generally 2021 REFUGEES AND ASYLEES FLOW REPORT, *supra* note 5, at 10. This is true even though, in terms of applications filed, China made up only 5.6 percent of the affirmative applications filed and 3 percent of defensive applications filed. In other words, the portion of grants provided to nationals of China (11.2 percent) was not proportional to the number of asylum seekers from China who filed asylum applications in the United States. Similarly, on the other end of the spectrum, Guatemalans filed 10.4 percent of affirmative asylum applications and 17.2 percent of defensive applications but received only 7.6 percent of asylum grants. *Id.* at 9–10.

250. See TRAC, *Impact of Nationality, Language, Gender, and Age*, *supra* note 244 (reaching this conclusion based on its analysis of Immigration Court data).

there are large numbers of applicants from a particular country, as biased as such a response would be.²⁵¹

The comparison of absolute grant numbers, along with percentage grant rates, suggests that the system is instead tilted in favor of asylum seekers from more distant nations who are more readily viewed as refugees. Specifically, asylum adjudicators favor certain *types* of claims that are more likely to originate in distant countries, such as coercive population control or persecution of Christian and Falun Gong religious observers in China.²⁵²

FIGURE 8: 2020 IMMIGRATION COURT ASYLUM GRANTS²⁵³



251. It is worth noting that the differences in grant rates cannot be explained by manner or location of entry in the United States, though that would also be problematic. *See* 8 U.S.C. § 1158 (providing that manner of entry does not impact asylum eligibility). The data used in Figures 5, 6, 7, and 8 relates to claimants who share similar arrival characteristics. *See* TRAC Data, *supra* note 238. All asylum applicants are within the United States rather than seeking resettlement from abroad. Also, only Immigration Court data is used, so all of the claims analyzed were heard defensively, which means that many claims involved asylum applicants at the border. Asylum applicants from India and China arrive at the southern border of the United States through Mexico just as do Central American asylum seekers.

252. *See* 8 U.S.C. § 1101(a)(42) (providing for asylum based on coercive population control through specific congressional enactment); *Zhao v. Mukasey*, 540 F.3d 1028, 1028 (9th Cir. 2008) (approving asylum theory relating to persecution of Falun Gong believers); *Liang v. Att’y Gen. of United States*, 15 F.4th 623, 624 (3rd Cir. 2021) (recognizing asylum for persecution based on the exercise of Christianity).

253. TRAC Data, *supra* note 238.

Nor do genuine differences in the viability of the different types of asylum claims presented explain the negative differential treatment of asylum applicants from nearby nations in the region.²⁵⁴ Differences in the claims presented by different nationalities are almost impossible to study empirically, because the available data generally does not offer insights into the types of claims presented. However, distinctions in the relative *strength* of claims from particular countries do not appear to explain different grant rates nearly as well as factors relating to the proximity of the sending nation and the *familiar nature* of the claims presented. For example, available measures indicate that India is more democratic and less violent than Central American nations.²⁵⁵ As such, Central American asylum seekers could be expected to make claims based on conditions that could more readily entitle them to asylum than Indian asylum seekers. In fact, the United Nations High Commissioner for Refugees has found that many common categories of Central American claims fit within a reasonable interpretation of the refugee definition.²⁵⁶ Yet,

254. Of course, patterns in the types of claims presented by certain nationalities do exist. See *supra* note 252 and accompanying text; TRAC, *Impact of Nationality, Language, Gender, and Age*, *supra* note 244 (noting that asylum decisions depend on many different factors, including nationality). As noted previously, asylum applications from China may involve persecution on account of religion for Falun Gong worshipers and coercive population control whereas asylum applications from Central America may invoke gang violence or domestic violence. See, e.g., REBECCA HAMLIN, LET ME BE A REFUGEE: ADMINISTRATIVE JUSTICE AND THE POLITICS OF ASYLUM IN THE UNITED STATES, CANADA, AND AUSTRALIA 145, 148–50 (1st ed. 2014) (noting that many asylum claims from China are based on the one-child policy or persecution against the Falun Gong religion); *Zhao v. Mukasey*, 540 F.3d 1028, 1029 (9th Cir. 2008) (recognizing asylum eligibility for Chinese Falun Gong adherent); Sherman-Stokes, *supra* note 209, at 613–18 (noting the frequency of Central American claims relating to gang violence and domestic violence); WOMEN ON THE RUN, *supra* note 213 (noting gang and gender violence motivations for flight from Central America). While there are patterns of claims, individual asylum seekers often present claims that are distinct from the claims frequently presented by their co-nationals. Central American asylum seekers may present religion-based claims, and Chinese asylum seekers may present domestic violence claims, for example.

255. *Violent Crime Rates by Country*, WORLD POPULATION REV. (2023), <https://worldpopulationreview.com/country-rankings/violent-crime-rates-by-country> [<https://perma.cc/N87R-7K9M>] (last visited July 30, 2023); *Global Freedom Rankings by Countries and Territories*, FREEDOM HOUSE (2023), <https://freedomhouse.org/countries/freedom-world/scores> [<https://perma.cc/U5TL-GSVV>] (last visited July 30, 2023).

256. See, e.g., *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, U.N. HIGH COMM’R FOR REFUGEES (Mar. 15, 2016), <https://www.refworld.org/docid/56e706e94.html> [<https://perma.cc/RZ42-KFLB>] (setting out multiple categories of common claims arising out of El Salvador that should be recognized under the refugee definition).

asylum grant rates for nationals of India are consistently much higher than for Central Americans.²⁵⁷

Similarly, differences relating to the presence of state-sponsored violence do not explain the varying grant rates for applicants from nearby countries as compared to those arriving from more distant nations. Claims from China often involve state-sponsored religious or political persecution while Central American claims are more likely to involve persecution by private actors such as gangs.²⁵⁸ At first glance, then, the respective grant rates might reflect this difference. However, this logic quickly falls apart upon further scrutiny. Asylum claims from Venezuela and Cuba also frequently involve state-sponsored political persecution.²⁵⁹ Yet, because those claims come from geographically closer countries within the Americas and do not present claims viewed as unique or rare in the United States, they are not deemed sufficiently exceptional. Asylum claims from Cuba and Venezuela thus result in lower grant rates and lower absolute grant numbers than claims from China or India.²⁶⁰

In any case, asylum law does not distinguish between claims involving state violence or non-state violence so long as the refugee definition is met. Claims based on non-state violence should not be on any lesser footing than claims involving state violence since the refugee definition

257. See *supra* Figure 5 (noting the Immigration Court grant rates for applicants from India and for applicants from Central American countries in 2020).

258. See, e.g., HAMLIN, *supra* note 254, at 145 (noting that many Chinese asylum seekers are fleeing political, ethnic, or religious persecution by an autocratic government); Yong Xiong, Selina Wang & Nectar Gan, 'I Want Freedom': One Man's Escape From Zero-Covid China to Seek His American Dream, CNN (Aug. 17, 2022, 10:14 PM), <https://www.cnn.com/2022/08/17/china/china-escape-american-dream-intl-hnk-dst/index.html> [<https://perma.cc/V5SZ-VSXS>] (referencing flight from authoritarianism in China); Sherman-Stokes, *supra* note 209, at 613–18 (explaining that domestic violence forms the basis for many asylum claims from Central America); WOMEN ON THE RUN, *supra* note 213, at 6 (noting that women fleeing Central America to seek asylum often experienced gang or gender-based violence).

259. See, e.g., *Venezuela: UN Report Urges Accountability for Crimes against Humanity*, U.N. HUMAN RIGHTS, OFF. HIGH COMM'R. (Sept. 16, 2020), <https://www.ohchr.org/en/press-releases/2020/09/venezuela-un-report-urges-accountability-crimes-against-humanity> [<https://perma.cc/L88G-RWFH>] (confirming that state-sponsored persecution is occurring in Venezuela); INTER-AMER. COMM. ON HUM. RTS., *The IACHR and Its Special Rapporteurships Condemn State Repression and the Use of Force during Peaceful Social Protests in Cuba, and Call for Dialogue on Citizen Demands*, ORG. AM. STS. (July 15, 2021), https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/177.asp [<https://perma.cc/E2LJ-ZV37>] (describing how during political demonstrations in Cuba, the police violently repressed citizens).

260. See *supra* Figures 5 and 8 (showing respective numbers of Immigration Court asylum grants and grant rates in 2020 for Cuba, Venezuela, China, and India). For many years, Cuban claims were treated favorably, albeit outside of the formal asylum process, even when arriving at the border. That has now changed. See Kerwin, *supra* note 10, at 26 (“Between 1962 and 1979, the United States paroled hundreds of thousands of Cubans into the country.”).

encompasses non-state violence that a government is unable or unwilling to prevent.²⁶¹ Thus, a suggestion that Central American claims are less likely to involve state violence cannot explain away their less preferential treatment.

In other words, the bias in the grant rates in favor of certain types of claims from more distant countries does not comport with the best refugee definition fit—instead, policymakers as well as adjudicators interpret and apply the refugee definition in a way that will ensure the respective grant rates.²⁶² As noted previously, the refugee definition is interpreted to exclude claims commonly brought by Central Americans and to accept those from more distant nations such as China.²⁶³ Meanwhile, Congress specifically mandated through legislation that claims from China based on coercive population control should be treated as valid asylum claims even where viability of these claims under the refugee definition was not immediately obvious.²⁶⁴

Venezuela presents an emblematic case demonstrating these negative impacts of proximity, number, and familiarity of claims on asylum grant rates, regardless of the viability of asylum claims under an unbiased reading of the refugee definition. State-sponsored violence and deprivation of liberty in Venezuela in the last decade is well documented, and the

261. See *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985) (iterating that harm or suffering could be inflicted by “persons or an organization that the government was unable or unwilling to control”); U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 65 (2d ed. 1992, reissued 2011), <http://www.unhcr.org/4d93528a9.pdf> [<https://perma.cc/FT7L-ENUS>] (recognizing that harms inflicted by non-state actors can constitute persecution “if the authorities refuse, or prove unable, to offer effective protection”).

262. See Musalo, *Just Asylum Policy*, *supra* note 223, at 239 (noting that restrictive interpretations of the refugee definition and procedural barriers “were intended to thwart the claims of . . . Central American asylum seekers” and were not an exercise in “principled decision-making”).

263. See *supra* notes 223–35 and accompanying text (referring to developments in asylum law that favor applications from China compared to Central America); Karen Musalo et al., *Deploring the Violence, Abandoning the Victim*, JUST SEC. (Feb. 17, 2022), <https://www.justsecurity.org/80232/deploring-the-violence-abandoning-the-victim/> [<https://perma.cc/D6Q5-5HEB>] [hereinafter *Deploring the Violence*] (urging that a “fair application” of U.S. asylum law informed by international refugee law standards would recognize Central American claims based on gang violence and gender-based violence but that current interpretations preclude most claims).

264. See 8 U.S.C. § 1101(a)(42) (providing explicitly that “a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion”); *cf.* *Matter of Chang*, 20 I&N Dec. 38, 47 (BIA 1989) (prior to adoption of the current version of 8 U.S.C. § 1101(a)(42), holding that application of the coercive population control policy in China did not create grounds for asylum without more).

United States has condemned human rights violations in the country.²⁶⁵ In reflection of this reality, the U.S. asylum system has not completely discredited claims from Venezuela but has put those claims squarely in the middle of the pack in terms of grant rates as compared to claims from other nations.²⁶⁶ Applicants from India and China have higher grant rates than those from Venezuela while nationals of Central American nations and Mexico have lower grant rates.²⁶⁷ It is hard to explain these relative grant rates without considering proximity and familiarity. Venezuela lies geographically in the middle, located closer to the United States than India or China but further than Central America or Mexico.²⁶⁸

As the number of asylum claims from Venezuela mounted significantly in 2022, policy developments further demonstrated the pattern.²⁶⁹ In 2022, the Biden administration began to return Venezuelans arriving at the southern border to Mexico under the Title 42 expulsions program so that Venezuelan asylum seekers would not have access to the asylum system.²⁷⁰ Asylum was cut off yet again for applicants from a country in the Americas where the claims, while valid, had become too numerous and commonplace to comport with the exceptionality conceit.

265. See generally Clare Ribando Seelke, *Venezuela: Overview of U.S. Sanctions*, CONG. RSCH. SERV. (2022); U.N. HUMAN RIGHTS, *supra* note 259 (detailing crimes against humanity in Venezuela and setting out U.S. sanctions policy); INTER-AM. COMM’N ON HUM. RTS., DEMOCRATIC INSTITUTIONS, THE RULE OF LAW AND HUMAN RIGHTS IN VENEZUELA COUNTRY REPORT 13 (2017), <https://www.oas.org/en/iachr/reports/pdfs/Venezuela2018-en.pdf> [<https://perma.cc/K2PR-TQZC>] (documenting extensive human rights abuses in Venezuela).

266. See *supra* Figure 5 (referencing the 2020 Immigration Court grant rate for applications from Venezuela).

267. *Id.*

268. See generally *Political World Map*, LIBR. OF CONG. (Sept. 6, 2020), <https://www.loc.gov/item/00559557/> [<https://perma.cc/54FU-LFFP>] (showing a map of Earth with the different countries).

269. See AUDREY SINGER ET AL., CONG. RSCH. SERV., IN12040, NEW IMMIGRATION POLICIES RELATED TO VENEZUELAN MIGRANTS 1 (2022) (noting that Venezuelan arrivals at the southern border reached record levels in 2022 and that most Venezuelans sought asylum); see also Press Release, U.S. Customs & Border Prot., U.S. Dep’t of Homeland Sec., CBP Releases December 2022 Monthly Operational Update (Feb. 1, 2023) <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-december-2022-monthly-operational-update> [<https://perma.cc/2WA7-FZBC>] (noting high levels of Venezuelan arrivals at the border in 2022 and new policy responses).

270. Press Release, U.S. Dep’t of Homeland Sec., DHS Announces New Migration Enforcement Process for Venezuelans (Oct. 12, 2022), <https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans> [<https://perma.cc/N5FY-H544>]. On October 5, 2023, in the face of additional significant arrivals of Venezuelan asylum seekers, the Biden administration resumed deportations of Venezuelans that had been halted given the negative human rights situation in the country. Press Release, U.S. Dep’t of Homeland Sec., United States to Resume Removals of Venezuelans Who Do Not Have a Legal Basis to Remain in the United States to Venezuela (Oct. 5, 2023), <https://www.dhs.gov/news/2023/10/05/us-resume-removals-venezuelans-who-do-not-have-legal-basis-remain> [<https://perma.cc/95AR-2M63>].

The patterns of bias documented here are strong. They call into question the legitimacy of the U.S. asylum system.

3. The Consequences of the Failure of Legitimacy

In turn, the failure of legitimacy has serious negative consequences. It diminishes the likelihood that migrants will abide by the norms of the U.S. immigration system.²⁷¹ For example, Central Americans and Mexican asylum seekers have little reason to view border policies as fair and appropriate and so may have good reason to evade detection rather than present for asylum at the border or once inside the United States, making it more challenging for the United States to manage interactions in border regions.²⁷² In addition, those who do make it into the United States to present an asylum claim may become unwilling to appear for Immigration Court hearings if they know they will not receive a fair adjudication, although appearance rates currently remain quite high.²⁷³ This lack of trust in the system thus further undermines its legitimacy and ability to function in stable and predictable ways.²⁷⁴ The failure of legitimacy also

271. See generally Arjen Leerkes & Mieke Kox, *Pressured into a Preference to Leave: A Study on the “Specific” Deterrent Effects and Perceived Legitimacy of Immigration Detention*, 51 L. & SOC’Y REV. 895 (2017) (establishing an empirical connection between perceived illegitimacy of immigration detention and likelihood of resistance to removal); Ryo, *Legal Attitudes*, *supra* note 201 (documenting migrants’ diminished willingness to abide by decisions of immigration authorities when faced with unfairness in the system).

272. In practice, asylum seekers have been notably willing to present as promptly as possible to immigration authorities. There have been a few instances, though, where asylum seekers have breached security at ports of entry in response to new restrictions on asylum or have engaged in protest actions at the border itself. See, e.g., *U.S. Fires Tear Gas Across Mexico Border to Stop Migrants*, PBS NEWSHOUR (Jan. 2, 2019, 9:07 AM), <https://www.pbs.org/newshour/nation/u-s-fires-tear-gas-across-mexico-border-to-stop-migrants> [<https://perma.cc/L7G7-GKB5>] (describing an incident in which asylum seekers attempted to breach the border point of entry from Tijuana after the Trump Administration declared that it would not allow asylum seekers to make claims); *Venezuelan Migrants in Mexico Protest New U.S. Border Policy*, VOICE OF AM. (Oct. 15, 2022, 1:40 AM), <https://www.voanews.com/a/venezuelan-migrants-in-mexico-protest-new-us-border-policy-/6791070.html> [<https://perma.cc/U63S-DLRE>].

273. See Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, AM. IMMIGR. COUNCIL 4 (Jan. 2021), <https://www.americanimmigrationcouncil.org/research/measuring-absentia-removal-immigration-court> [<https://perma.cc/TVP8-MF5D>] (“83% of all nondetained immigrants . . . attended all of their court hearings.”).

274. See *supra* notes 194–200 and accompanying text (describing danger that comes with instability at the border and restrictive border policies). There exists general agreement that a more orderly system would be of benefit to all, and that the unjustified harshness of the current system runs counter to that goal. See, e.g., Bier Testimony, *supra* note 175, at 13 (describing the problems that restrictive border policies have created); *Beyond a Border Solution: How to Build a Humanitarian Protection System that Won’t Break*, AM. IMMIGR. COUNCIL (May 2023), <https://www.americanimmigrationcouncil.org/research/beyond-border-solutions> [<https://perma.cc/LP2F-VWDA>] (stating that the current government response to migration is a “dysfunctional system that serves the needs of no one”); *FACT SHEET: The Biden Administration Blueprint for a*

affects the long-term relationship between migrants—some of whom will eventually become U.S. citizens—and the U.S. legal system.²⁷⁵

Finally, and importantly, the lack of legitimacy impacts the perception of the leadership of the United States in global affairs on an important issue such as migration.²⁷⁶ As a result, the United States may lose the opportunity for partnerships with other nations to address refugee flows that might be more effective than the current failed attempts at exceptionality and exclusion.

C. Breaches in the Rule of Law

The narrowness of the U.S. asylum system also weakens the rule of law in the United States.²⁷⁷ In restricting asylum through exceptionality and exclusion, the United States fails to fulfill its domestic and international legal obligations.

The system based on exceptionality and exclusion flouts rather than executes U.S. law as set forth in the Refugee Act of 1980. While the Refugee Act of 1980 incorporated exceptionality goals, it also included concrete provisions allowing access to asylum that cannot simply be ignored in pursuit of exceptionality. The Refugee Act of 1980 provided a refugee definition that purported to eliminate political or nationality-based asylum determinations.²⁷⁸ In addition, the asylum statute includes

Fair, Orderly and Humane Immigration System, THE WHITE HOUSE (July 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/27/fact-sheet-the-biden-administration-blueprint-for-a-fair-orderly-and-humane-immigration-system> [https://perma.cc/7HQA-JVEB] (recognition by the Biden administration that the immigration system needs to be more well-managed).

275. See, e.g., Ryo, *Unintended Consequences*, *supra* note 176, at 1 (referencing how immigration detention may lead migrants to conceive of the United States immigration system as unfair); Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1049–52 (2017) (“[I]mmigration detention might . . . promote or reinforce widespread legal cynicism.”).

276. See HUMAN RIGHTS FIRST, *LEADING BY EXAMPLE*, *supra* note 176, at 8 (“More broadly, the United States must champion asylum and refugee law globally, not subvert it.”).

277. Fundamental rights under the U.S. Constitution apply to asylum seekers at or inside the U.S. border and are relevant to this analysis. See, e.g., *Wong Wing et al. v. United States*, 163 U.S. 228 (1896); *Reno v. Flores*, 507 U.S. 292 (1993). This Article does not go deeply into that terrain, though, since violations of the relevant statute lead to the same conclusion regarding evasion of the rule of law in the U.S. asylum system.

278. Kennedy, *supra* note 42, at 143; Wasem, *More than a Wall*, *supra* note 48, at 251, 256; Briefing Report to the Honorable Arlen Specter U.S. Senate, *Asylum: Uniform Application of Standards Uncertain—Few Denied Applicants Departed*, B-224935, GGD-87-33BR (Comp. Gen. Jan. 1987); Gregg A. Beyers, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 AM. U. INT’L L. REV. 43, 58 n.93 (1994) (“[T]he standard for determining [asylum eligibility] must be applied in the same manner for all nationalities.” (quoting

no limit on the number of asylum seekers who could be granted protection.²⁷⁹ Finally, the law explicitly guarantees the opportunity to seek asylum without regard to location or manner of entry.²⁸⁰

Yet, as described previously, the current system effectively caps grants of asylum and discriminates against applicants from the Americas, especially Central America.²⁸¹ Furthermore, exclusionary measures have prevented access to the asylum system based on seeking protection at the U.S. southern border; these measures mean that asylum is unavailable based on location or manner of entry into the United States in violation of the statute.²⁸²

The system also violates international human rights law principles.²⁸³ The United States has agreed to be bound by the international human rights and refugee law norms implicated by its restrictive asylum policies and practices, including the right to seek asylum, the right of non-refoulement (not to be returned to danger), the right to liberty, and the right to security of the person.²⁸⁴

BASIC ASYLUM LAW MANUAL, OFFICES OF THE GENERAL COUNSEL AND OF ASYLUM, INS HEADQUARTERS, 46–47 (1991)).

279. 8 U.S.C. § 1158; U.S. DEP'T OF JUSTICE, ASYLUM AND WITHHOLDING OF REMOVAL RELIEF, *supra* note 100, at 2 (“[T]here is no limit on the number of asylum grants.”).

280. *See* 8 U.S.C. § 1158; Notice of Motion and Motion of Refugees International and Yael Schacher for Leave to Participate as Amici Curiae and to File Brief as Amici Curiae in Support of Plaintiffs’ Emergency Motion for Preliminary Injunction, *Immigrant Defenders Law Center v. Wolf*, No. 2:20-cv-09893-JGB-SHK, 2021 WL 9181835, at *1 (C.D. Cal. Nov. 20, 2020) (stating the 1980 Refugee Act ended the prior practice of treating asylum applicants differently based on their place of application or immigration status; Congress wanted to make clear that “those at a land border or in unlawful immigration status” could apply for asylum).

281. *See* Part II (exploring the evidence of asylum exceptionality); Section V.B (demonstrating bias against claims made by certain nationalities, especially those from Central America).

282. *See* 8 U.S.C. § 1225 (setting out provisions for expedited removal without access to asylum for those who enter the United States without inspection at the southern border or arrive at a port of entry seeking asylum); *supra* Sections IV.C, IV.D (describing expedited removal, Title 42, and other mechanisms that prevent access to asylum for asylum seekers at the southern border); *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 722 (D.C. Cir. 2022) (finding violations of U.S. law in the implementation of Title 42); *Al Otro Lado v. Wolf*, 952 F.3d 999, 100 (2020) (finding violations of U.S. law in metering practices and in provisions barring asylum for those who have not sought asylum in other countries before reaching the U.S. border).

283. This is true even where it may be difficult to obtain a ruling from a U.S. court finding a violation of the law because of limitations on the ability of courts to intervene in immigration matters and to enforce international refugee and human rights norms. *See, e.g., Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 487 (1999) (recognizing broad Executive authority without robust review in immigration matters); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (holding that the International Covenant on Civil and Political Rights is “not self-executing and [does] not itself create obligations enforceable in the federal courts”).

284. These norms are found in instruments that are binding on the United States, including the International Covenant on Civil and Political Rights, the U.N. Refugee Convention, and the American Declaration of the Rights and Duties of Man. The United States has ratified the International

However, authoritative human rights bodies have repeatedly found that elements of the U.S. asylum system, especially widespread detention and denials of access to asylum at the U.S. southern border, violate those international standards.²⁸⁵ More recently, these bodies have warned that border policies such as MPP and Title 42 deprive asylum seekers of rights guaranteed under international law.²⁸⁶ Thus, the United Nations

Covenant on Civil and Political Rights, which makes that instrument binding if not self-executing. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *ratified* by the United States on Sept. 8, 1992; *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 203 (2d ed. 1996) (noting that, “[w]hether a treaty is self-executing or not, it is legally binding on the United States”). The United States is also bound by the United Nations Refugee Convention. *See* U.N. Refugee Convention and Refugee Protocol, *supra* note 13 (U.N. Refugee Convention entered into force for the United States on November 1, 1968, through accession to the Refugee Protocol). Through its membership in the OAS and ratification of the legally binding OAS Charter, the United States accepted obligations to protect the human rights set forth in the American Declaration. *See* OAS Charter art. 3(1), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, *ratified* by the United States on May 15, 1951; *Workman v. United States*, Case 12.261, Inter-Am. Comm’n Hum. Rts., Report No. 33/06, ¶ 70 (2006).

285. *See, e.g.*, INTER-AM. COMM’N HUM. RTS., REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS 34–40 (2010), <https://www.oas.org/en/iachr/migrants/docs/pdf/migrants2011.pdf> [<https://perma.cc/PR9J-NAS9>] (widespread and categorical detention of asylum seekers violates human rights); Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents at 14–24, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (No. 15–1204) (setting out the interpretation of the United Nations High Commissioner for Refugees, the entity charged with interpreting U.N. Refugee Convention obligations, to the effect that automatic and prolonged detention of asylum seekers violates international obligations); U.N. HIGH COMM’R FOR REFUGEES, GLOBAL STRATEGY BEYOND DETENTION NATIONAL ACTION PLAN: UNITED STATES OF AMERICA (2015) <https://www.unhcr.org/sites/default/files/legacy-pdf/5631ee799.pdf> [<https://perma.cc/5E2H-SYPJ>] (noting the high rate of detention of asylum seekers in the United States and urging an end to the detention of asylum-seekers and refugees in order to comply with international obligations); Press Release, Org. of Am. States, The IACHR Expresses Concern about the Expulsion of People in a Human Mobility Context from the United States and Mexico and Calls on States to Ensure the Effective Protection of Their Rights (Sept. 17, 2021), https://www.oas.org/en/IACHR/jsForm?File=/en/iachr/media_center [<https://perma.cc/6Z5L-6T3N>] (expressing concern about human rights violations implicated in the implementation of measures that authorize the expedited removal of migrants from the United States).

286. *See, e.g.*, Felipe González Morales (Special Rapporteur on the Human Rights of Migrants), *Human Rights Violations at International Borders: Trends, Prevention and Accountability*, 9–10, 17, U.N. Doc. A/HRC/50/31 (April 26, 2022) (noting that the impact of pandemic-related measures on border and immigration governance has implicated violations of the rights of migrants); Brief of the United Nations High Commissioner for Refugees As Amicus Curiae in Support of Respondents at 4, 15–23, *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2021) (No. 19-1212) (listing the ways in which MPP was inconsistent with international law); Press Release, Org. of Am. States, IACHR and UN’s Special Rapporteur Condemn Excessive Use of Force and Deportations of Migrants from Haiti at the United States’ Southern Border (Oct. 4, 2021), <https://www.oas.org/es/cidh/Default.asp> [<https://perma.cc/UWF2-K3KP>] (condemning as a rights violation the use of excessive force to push back Haitian migrants at the border in Texas); Felipe González Morales (United Nations Special Rapporteur on the Human Rights of Migrants), *Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea*, at 10, U.N. Doc. A/HRC/47/30 (May 12, 2021) (outlining the legal obligation to protect the rights

Working Group on Migrants has stated that “the rejection and return at national borders of persons who might require international protection” violates rights against collective expulsion or return to circumstances of danger.²⁸⁷ Similarly, the Inter-American Commission on Human Rights has expressed deep concern about the high likelihood of legally prohibited refoulement to danger as a result of U.S. border policies impacting asylum seekers.²⁸⁸ The same human rights body has noted the negative “combined effect” of policies that lead to a situation of “risks for the human rights of these individuals.”²⁸⁹

When the United States ignores domestic and international law to maintain an asylum system characterized by exceptionality and exclusion, it fails to respect the rule of law. In addition, this failure further calls into question the legitimacy of the system with the resulting negative consequences described previously. A cycle of illegality and illegitimacy is created that must be addressed.

and liberties of migrants and urging the abolishment of immigration detention); U.N. HIGH COMM’R FOR REFUGEES, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response*, at 1–2 (March 16, 2020), <https://www.unhcr.org/cz/wp-content/uploads/sites/20/2020/04/UNHCR-Legal-Considerations-on-Access-to-Territory-in-the-Covid-19-Pandemic-March-2020.pdf> [<https://perma.cc/LVA7-FYQE>] (emphasizing that, under international law, COVID-19 screening measures may not result in denying asylum-seekers effective opportunity to seek asylum or result in refoulement); Press Release, Org. of Am. States, End of Title 42: IACHR Calls on United States to Protect Rights of Migrants and Refugees (May 26, 2023), https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/preleases/2023/099.asp [<https://perma.cc/WF65-U779>] (welcoming the termination of the Title 42 public health order and calling on the United States to “ensure access to asylum” in order to meet international obligations); Press Release, Org. of Am. States, IACHR Concerned about Restrictions of the Rights of Migrants and Refugees in the United States During COVID-19 Pandemic (July 25, 2020), https://www.oas.org/en/iachr/media_center/PReleases/2020/179.asp [<https://perma.cc/EBE6-N9HG>] (noting that migrants in the United States have experienced serious restrictions on their human rights); Press Release, Org. of Am. States, IACHR Conducted Visit to the United States’ Southern Border (Sept. 16, 2019), https://www.oas.org/en/iachr/media_center/PReleases/2019/228.asp [<https://perma.cc/V5W2-G3VV>] (expressing concern about human rights violations implicated by the securitization of the U.S. southern border and criminalization of migration).

287. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *General Comment No. 5 (2021) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights*, at 15, U.N. Doc. CMW/C/GC/5 (July 21, 2022) [hereinafter Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families].

288. See Org. of Am. States, *The IACHR Expresses Concern about the Expulsion of People in a Human Mobility Context from the United States and Mexico and Calls on States to Ensure the Effective Protection of Their Rights*, *supra* note 286; Org. of Am. States, *IACHR Conducted Visit to the United States’ Southern Border*, *supra* note 286.

289. Org. of Am. States, *IACHR Concerned about Restrictions of the Rights of Migrants and Refugees in the United States During COVID-19 Pandemic*, *supra* note 286.

VI. RECONCEIVING THE U.S. ASYLUM SYSTEM

Given the failures of the current U.S. asylum system and the resulting serious problems, a fundamental change of course on asylum is warranted. The system should be re-envisioned to improve effectiveness and stability as well as provide greater protection for those fleeing danger.

The assumption of exceptionality should be eliminated, and the exclusionary apparatus dismantled, so that the United States can administer its asylum system fairly and effectively. There should be a recognition that there will be natural changes over time in refugee flows and that, at times, significant numbers of asylum seekers will reach the United States, including from nearby nations, that will qualify for asylum. The proposal here does not include a recommendation for a new refugee definition. Other scholars have debated the contours of the refugee definition itself, and many have urged amendments or interpretations that would protect more persons fleeing harm of different types.²⁹⁰ I do not delve into that discussion here. Instead, this Article proposes that the exceptionality and exclusionary *restrictions* on asylum in the United States be peeled away so that they do not limit the applicability of asylum protection at the outset. In other words, this Article suggests that the extent of asylum protection should be determined without regard to numerical limits, national origin bias, and narrow expectations regarding the types of claims that may be recognized.

To be clear, the recommendation is that the U.S. asylum system should become significantly more expansive. More asylum seekers would be processed with dignity and in fair proceedings, unencumbered by implicit limitations on the number of asylum grants and on the national origins that may be recognized as meriting protection. More individuals would almost certainly receive a grant of asylum. Far from being a cause for fear, normalization of processing of these increased numbers would align the asylum system to the realities of refugee flows and eliminate much of the chaos that results from crisis-based responses to significant arrivals of genuine asylum seekers. Germany successfully processed almost one

290. See e.g., Elizabeth Keyes, *Environmental Refugees? Rethinking What's in a Name*, 44 N.C. J. INT'L L. 461, 467–77 (2019) (urging broader refugee-related protection for those fleeing environmental change); James Souter, *Towards a Theory of Asylum as Reparation for Past Injustice*, 62 POL. STUD. 326, 328–30 (2014) (urging broader refugee definition that would protect persons fleeing situations caused by refugee-receiving countries); Isabelle R. Gunning, *Expanding the International Definition of Refugee: A Multicultural View*, 13 FORDHAM INT'L. L.J. 35, 81–83 (1989) (recommending the adoption of the broader African refugee definition into the international law definition); Mattie L. Stevens, *Reorganizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179, 214–18 (1993) (proposing that the United States add gender as an explicit ground of refugee protection).

million asylum seekers in 2015 alone.²⁹¹ A similar approach to processing large numbers of migrants seeking asylum could be taken in the United States.

A. *The Proposed Changes*

This new approach would require a reconceptualization of the asylum system. Several specific elements are particularly important in effectuating the proposed systemic shift. These elements are not mutually exclusive, but instead should all be adopted to impart a meaningful change in the asylum system—they are also not entirely dependent on one another so that some proposals can be adopted while others are still under consideration.

1. Abandoning Substantive Restrictions and Adopting Group-Based Eligibility Standards

Under this shift, substantive law restrictions that make asylum exceptional would need to be repealed, particularly those that screen out commonly arising claims from the Americas, especially Central America. For example, as President Biden urged at the beginning of his term, new regulations should be promulgated to bring U.S. law into compliance with international standards regarding gang and domestic violence-based asylum claims.²⁹² These regulations should remove substantive restrictions that have been imposed uniquely in asylum cases involving persecution based on particular social group grounds, often from Central America. Asylum legal standards should serve as a fair guide allowing for asylum recognition in all appropriate cases.

a. Group-Based Asylum Eligibility

In this same vein, the first key recommendation to effectuate a reconceived asylum system is to adopt group-based asylum eligibility for applicants from designated nations or situations sending significant refugee flows.²⁹³ This Article does not detail the specific mechanism for

291. Janne Grote, *The Changing Influx of Asylum Seekers in 2014–2016: Responses in Germany* 15 (Ger. Fed. Off. for Migration and Refugees, Working Paper No. 79, 2018) [hereinafter *Responses in Germany*].

292. See Executive Order 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021) (mandating the promulgation of a regulation to establish the circumstances in which a person should be considered a member of a “particular social group” for asylum purposes).

293. See Philip G. Schrag et al., *The New Border Asylum Adjudication System: Speed, Fairness, and the Representation Problem*, 66 HOWARD L.J. (forthcoming 2023) (manuscript at 56) (on file with SSRN) [hereinafter *Border Asylum Adjudication*] (making a similar recommendation). It may be argued that a model that favors applications from certain countries should also lead to the

implementing this change. However, it could be effectuated through: (1) a burden-shifting structure that creates presumptions of asylum eligibility for certain categories of asylum seekers, or (2) through an even more automatic process that would recognize refugee status for all asylum seekers from a pre-designated nationality or situation upon identification of individuals belonging to the group except where asylum bars apply.²⁹⁴ Regardless, the proposal is to grant asylum promptly to persons who fit a certain nationality or other criteria, without an extensive process meant to delve into individual facts, so long as they do not possess characteristics that would exclude them from asylum.

In other words, the approach should be the exact opposite of what it is now. Rather than seeking to exclude asylum seekers who form part of a larger refugee flow, cases falling within that flow should be dispatched more quickly than others with a presumptively favorable result. This approach would recognize that large-scale arrivals generally serve as an indicator of a refugee situation and do not present a threat but rather a processing challenge that can be addressed with foresight and preparedness.

The obvious current pattern that would be handled in this manner involves the arrival of Central American children and families.²⁹⁵ Venezuelans, Cubans, and Haitians, and other groups might be handled similarly.²⁹⁶

b. Precedents for Group-Based Asylum Eligibility

This model of group-based grants of refugee protection is not entirely without precedent. Existing asylum regulations allow for a presumption

development of a list of countries that should be considered presumptively *not* to send refugees. It is simply not the case that one must follow the other. The current system effectively assumes that asylum applicants from certain countries do not qualify for asylum, so an explicit group-based approach that finds certain nationalities ineligible for asylum would not cause significant further damage. However, such an approach should not and need not be adopted in the course of establishing favorable group-based asylum eligibility determinations for certain nationalities. Even with a group-based determination process, it should be clear that applicants from countries that are not sending large flows should still be recognized as refugees in the U.S. asylum process if they meet the refugee definition individually.

294. As described further in this Section, countries in Europe, Africa, and Latin America have adopted such group-based determinations in their asylum systems in some instances. *See infra* note 304 and accompanying text.

295. *See supra* notes 213–14, 255–56 and accompanying text (discussing strong viability of asylum claims from Central America under a proper understanding of the refugee definition).

296. The United States has already recognized that Venezuelans, Haitians, Cubans, and Nicaraguans present special protection needs, although it has declined to create a system that offers presumptive or streamlined asylum grants. *See* U.S. CITIZENSHIP & IMMIGR. SERV., PROCESSES FOR CUBANS, HAITIANS, NICARAGUANS, AND VENEZUELAN (Sept. 20, 2023), <https://www.uscis.gov/CHNV> [<https://perma.cc/VWG8-ZEXS>].

of persecution that would qualify for asylum where the applicant falls within a group of persons with shared protected characteristics whose members face a “pattern or practice” of persecution.²⁹⁷ This existing rule does not go so far as to allow for a group-based determination of asylum; it simply lessens the burden of proof for those who can show the pattern and practice. It is rarely applied to asylum seekers from the Americas.²⁹⁸ However, the existence of the rule demonstrates the acceptance of the idea that asylum applications might be best considered favorably on a categorical basis in some instances.²⁹⁹

In addition, through the U.S. refugee resettlement program, the State Department makes group-based determinations on the President’s behalf regarding categories of persons who may be admitted to the United States as refugees each year.³⁰⁰ USCIS then interviews individuals from within those pre-determined groups who are referred for resettlement but typically does not engage in the deep level of inquiry that characterizes asylum adjudications in the United States.³⁰¹ The interviews typically focus on security issues and delve less deeply into individual legal theories and facts of persecution.³⁰² In reaching a decision whether to recognize an

297. 8 C.F.R. § 1208.13(b)(2)(iii) (2022).

298. See Adam L. Fleming, *Organized Atrocities: Asylum Claims Based Upon “Pattern or Practice” of Persecution*, 7 IMMIGR. L. ADVISOR 1, 5 (2013) (gathering up cases that found a pattern or practice of persecution and finding no Central American cases); see also *Hernandez v. Holder*, 493 F. App’x 133134 (1st Cir. 2012) (denying pattern and practice asylum claim for ethnic Mayans in Guatemala).

299. Historically, particular groups have been treated as de facto refugees although they have not received asylum, including for example Cubans fleeing the Castro regime. See Kerwin, *supra* note 10, at 26 (noting that the United States admitted 125,000 Cubans who came as part of the Mariel boatlift to enter the United States just in 1980).

300. See *Proposed Refugee Admissions 2023*, *supra* note 29 (for example allowing for group-based processing of ethnic minorities from Burma); OFF. CITIZENSHIP & IMMIGRATION SERVICES OMBUDSMAN, ANNUAL REPORT 2022, 44–45 (2022), https://www.dhs.gov/sites/default/files/2022-06/CIS_Ombudsman_2022_Annual_Report_0.pdf [<https://perma.cc/2YXP-GGB3>] (noting that the refugee resettlement system functions in this way and suggesting that the U.S. asylum process could adopt a similar model).

301. See *Refugee Admissions Program: Overseas Application and Case Processing*, U.S. DEP’T OF STATE, <https://www.state.gov/refugee-admissions/application-and-case-processing/> (last visited Aug 1, 2023) [<https://perma.cc/NQM9-XGP5>] (noting the brief interview process prior to adjudication of refugee claims).

302. See U.S. GOV’T ACCOUNTABILITY OFF., GAO–17–706, REFUGEES: ACTIONS NEEDED BY STATE DEPARTMENT AND DHS TO FURTHER STRENGTHEN APPLICANT SCREENING PROCESS AND ASSESS FRAUD RISKS 23 (2017) (in approximately 89% of cases accepted for referral into the refugee resettlement program and interviewed by USCIS, USCIS approved refugee recognition and resettlement). Officers report that the rigor of the interview varies based on the particular refugee situation in question and is more abbreviated in P2 refugee referral cases (involving referrals of entire groups, such as Somalians in a particular refugee camp in Kenya) as compared to P1 referral cases (individual referrals of persons fitting within the predefined refugee resettlement categories).

individual as a refugee for resettlement purposes, USCIS can rely to some degree on the determination already made by the State Department that certain categories of persons fit the refugee definition.³⁰³ A parallel approach could be used in the asylum system.

Similarly, certain European nations have created presumptions of eligibility for asylum protection as a means of handling large refugee flows in recent years.³⁰⁴ For example, after receiving almost a million asylum applications in 2015, Germany established a process whereby applicants who were likely eligible for relief based on their nationality received asylum or related protection in quicker and less rigorous proceedings.³⁰⁵ The United Nations High Commissioner for Refugees also operates in refugee camps and countries of first asylum in the developing world with a similar model that recognizes the refugee status of certain groups presumptively.³⁰⁶

The efficiencies and cost savings involved in group-based determinations are obvious. Rather than requiring extensive proceedings in each individual case to adjudicate entire factual histories, expedited adjudication could take place for all members of designated groups. Favorable adjudication could move forward quickly, barring any security or related issues, once a basic determination is made regarding inclusion in the group. Group-based determinations would not only provide protection in

303. See *Proposed Refugee Admissions 2023*, *supra* note 29 (explaining the refugee resettlement process).

304. See, e.g., Grote, *Responses in Germany*, *supra* note 291, at 20; see also COMISIÓN ESPAÑOLA DE AYUDA AL REFUGIADO, INFORME 2022: LAS PERSONAS REFUGIADAS EN ESPAÑA Y EUROPA 74–75 (2022), <https://www.cear.es/informe-cear-2022/> [<https://perma.cc/CC83-GRD9>] (noting that Spain adopted a rapid automatic process to grant temporary protected status, although not full refugee recognition, to Ukrainians fleeing the war with Russia); see also Jean-François Durieux, *The Many Faces of “Prima Facie”: Group-Based Evidence in Refugee Status Determination*, 25 REFUGE: CAN. J. ON REFUGEES 151, (2008) (explaining that group-based refugee determinations are common in Africa). Mexico and Brazil have adopted similar group-based asylum practices, including for nationals of certain Central American nations. See RACHEL SCHMIDTKE & DANIELA GUTIÉRREZ ESCOBEDO, REFUGEES INT’L, MEXICO’S USE OF DIFFERENTIATED ASYLUM PROCEDURES: AN INNOVATIVE APPROACH TO ASYLUM PROCESSING 6 (2021), <https://www.refugeesinternational.org/reports/use-of-differentiated-asylum-procedures-an-innovative-approach-to-asylum-processing-> [<https://perma.cc/97SV-M7K2>] (applying rapid favorable processing systems for nationals of Venezuela, Honduras, and El Salvador); UNHCR Welcomes Brazil’s Decision to Recognize Thousands of Venezuelans as Refugees, U.N. HIGH COMM’R FOR REFUGEES (Dec. 6, 2019), <https://www.unhcr.org/news/briefing-notes/unhcr-welcomes-brazils-decision-recognize-thousands-venezuelans-refugees> [<https://perma.cc/BXH6-SQ64>] (describing program under which Brazil recognizes certain Venezuelans as refugees on a prima facie basis without an interview).

305. Grote, *Responses in Germany*, *supra* note 291, at 20.

306. See Goodwin-Gill & McAdam, *supra* note 46, at 29–32 (identifying those who generally “lack protection” in their countries of origin as presumptively provided refugee status in the practice of the United Nations High Commissioner for Refugees).

appropriate cases much more quickly, but it would also eliminate the need for asylum seekers to undergo intensive questioning regarding backgrounds that may be traumatic.

2. A Specialized Non-Adversarial Process with Genuine Independent Review

The second key proposal for a reconceived asylum system urges that the United States should adopt a specialized non-adversarial asylum system apart from the deportation system with genuine independent review of denials of asylum. The current exclusionary apparatus focused on adversarial deportation proceedings simply would not be suitable under an approach to asylum that moves away from exceptionality toward inclusion. Advocates and scholars alike have, over the years, periodically recommended specialized non-adversarial adjudication of asylum claims with independent review.³⁰⁷ The time has come for this model.

This reconceived asylum process is critical even if the group-based determination proposal is adopted. Individualized asylum consideration would still apply for many applicants who do not fit within the designated groups. Additionally, the group-based grants of asylum would still require some determination process even if abbreviated. The shift to a non-adversarial specialized forum would still be critical to avoid the old exclusionary approach.

Under this proposal, the newly-formulated asylum adjudication procedures would apply similarly to all asylum seekers, including those who enter the United States with legal status and come forward affirmatively to apply for asylum, those arriving at the border, and those presenting an asylum claim after being placed in deportation proceedings.³⁰⁸ Measures like detention, expedited removal, and Title 42 expulsions, which have prevented asylum seekers from accessing the U.S. asylum system, might

307. See, e.g., Martin, *Reforming Asylum Adjudication*, *supra* note 3, at 1346 (proposing that asylum determinations be conducted separately from deportation or exclusion proceedings, by an independent adjudicator); DORIS MEISSNER ET AL., MIGRATION POL'Y INSTITUTE, THE U.S. ASYLUM SYSTEM IN CRISIS: CHARTING A WAY FORWARD 3 (2018), <https://www.migrationpolicy.org/sites/default/files/publications/MPI-AsylumSystemInCrisis-Final.pdf> [<https://perma.cc/Z3Q3-YEYL>] (recommending a non-adversarial process after a favorable credible fear screening and suggesting referral into such process without a credible fear screening in appropriate cases).

308. See Yael Schacher, REFUGEES INT'L, ADDRESSING THE LEGACY OF EXPEDITED REMOVAL: BORDER PROCEDURES AND ALTERNATIVES FOR REFORM 18 (2021), <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/60aed211ae956b032f242e94/1622069777656/Expedited+Removal+Brief+Schacher+FINAL.pdf> [<https://perma.cc/L8LK-5ELZ>] [hereinafter ADDRESSING THE LEGACY OF EXPEDITED REMOVAL] (similarly recommending non-adversarial proceedings for all asylum seekers, including those arriving at the border, without distinction between affirmative and defensive cases).

not be utilized under this approach; asylum seekers approaching or arriving in the United States at the border would have full access to the specialized non-adversarial process.³⁰⁹ Exclusionary measures that deny access to the asylum process are incompatible with the proposed change that seeks to eliminate any predisposition toward rejection of asylum claims.³¹⁰ Such mechanisms are also inefficient when deployed in the context of genuine refugee flows, because their use involves significant costs that do not have a payoff in screening out genuinely non-viable claims.³¹¹

Various mechanisms could be developed to determine which migrants should be deemed “asylum seekers” and therefore eligible for these specialized processes.³¹² The presumption, though, should be in favor of treatment as an asylum seeker where there is any indication of that status. Otherwise, the emphasis on filtering out asylum claims in the service of exceptionality will continue its problematic path. Those who claim an

309. *See id.* at 19–20 (similarly urging an end to expedited removal, stating: “[W]e cannot escape the simple reality that expedited procedures, as applied, have not only been of limited effect in deterring non-meritorious claims, but also have almost certainly resulted in the denial of many thousands, if not tens of thousands, of meritorious ones.”). Substantive law bans that limit eligibility for asylum based on manner of entry should also not be utilized. *Cf.* Circumvention of Lawful Pathways, 88 Fed. Reg. 11704 (Feb. 23, 2023) (imposing a ban on asylum eligibility for those who do not use the new CBPOne application to make an appointment to present at a port of entry and also do not seek asylum in a transit country before reaching the United States).

310. *See, e.g.*, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 287, at 53, 73 (detention of those applying for asylum is arbitrary and unlawful under international human rights law; rejection and return at national borders of applicants for international protection violates human rights law); U.N. HIGH COMM’R FOR REFUGEES, DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION 6 (2012) (asserting that detention of asylum seekers should be a “measure of last resort”); HUMAN RIGHTS FIRST, LEADING BY EXAMPLE, *supra* note 176, at 10–19 (urging an end to exclusionary measures at the border impacting asylum seekers, including Title 42 expulsions and MPP).

311. Martin, *Reforming Asylum Adjudication*, *supra* note 3, at 1291.

312. In acknowledgment of the likelihood that many if not most border arrivals are asylum seekers, initial reception of migrants at the border and referral into specialized non-adversarial asylum proceedings should be handled by humanitarian workers (e.g. staff with U.S. Health and Human Services) rather than law enforcement officials (Customs and Border Protection or Immigration and Customs Enforcement). *See* Ari Sawyer, *The U.S. Border Patrol is Broken*, NEWSWEEK (March 2, 2022, 8:00 AM), <https://www.newsweek.com/us-border-patrol-broken-opinion-1683741> [<https://perma.cc/LU2D-SWFU>] (describing interviews with Border Patrol officials in which agents noted that they are trained to treat migrants as a law enforcement problem rather than a humanitarian issue). Accommodations and transportation should also reflect the humanitarian nature of reception at the border. *See, e.g.*, WOMEN’S REFUGEE COMM’N, WELCOMING PEOPLE SEEKING SAFETY: A SAN DIEGO BLUEPRINT FOR HUMANITARIAN RECEPTION (2023), https://www.womensrefugeecommission.org/wp-content/uploads/2023/02/San-Diego-Blueprint-for-Humanitarian-Reception_2.2023.pdf [<https://perma.cc/GK95-KGRU>] (documenting successes of such a program).

intention to seek refugee protection should be immediately treated as asylum seekers. In addition, as with the proposal above regarding the ultimate asylum decision, individuals who form part of known refugee flows should be treated as asylum seekers from the beginning and throughout their interaction with immigration authorities and the asylum system. Under present conditions, Central Americans should generally be deemed asylum seekers, and most arrivals at the southern border should also be deemed as such.

a. Specialized Non-Adversarial Proceedings in the First Instance

Under this proposal, a specialized asylum corps would decide all asylum claims in a non-adversarial proceeding in the first instance.³¹³ Specialized asylum officers would receive regular training on the human rights situations in common refugee-producing countries and trauma-informed interviewing techniques. Training is currently provided to USCIS asylum officers, but it will need to be more robust if the same corps continues to adjudicate claims.³¹⁴ Additionally, concrete steps will

313. This Article does not take up the question of appointed counsel in asylum proceedings. Many commentators have urged reforms that would require the government to pay for legal representation, at least in deportation proceedings in Immigration Court. *See, e.g.*, Schrag et al., *Border Asylum Adjudication*, *supra* note 293, at 57; Berberich, Chen & Tucker, *The Case for Universal Representation*, VERA (Dec. 2018) <https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1> [<https://perma.cc/6WN7-KNM3>]. However, others have posited that broad provision of government-funded counsel would further entrench problematic deportation systems. *See, e.g.*, Angélica Cházaro, *Due Process Deportations*, 98 N.Y.U. L. REV. 407, 407 (2023). This Article urges the development of a non-adversarial adjudication system for all asylum cases before well-trained adjudicators so that the role of counsel should be less critical. There would be additional efficiencies and savings for all if it were not necessary to secure counsel at the initial stage of an asylum case to ensure a likelihood of success. At a minimum, however, a reformed asylum system should avoid any barriers to access to counsel for those who seek to be represented in the proceedings.

314. *See* U.S. CITIZENSHIP & IMMIGR. SERV., ASYLUM DIVISION TRAINING PROGRAMS (Dec. 19, 2016), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-division-training-programs> [<https://perma.cc/A52P-7SGM>] (providing a short overview of the current asylum officer training requirements). Officers participate in a multi-week training at the beginning of their careers, which focuses on general immigration law as well as refugee and asylum law, interviewing skills, decision writing, and special topics such as gender-based claims, children's claims, and fraud detection. *See id.* Individual offices make additional training available for about four hours each week. *See id.* Governmental and non-governmental commentators have noted that the training is insufficient or problematic. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-250, IMMIGRATION: ACTIONS NEEDED TO STRENGTHEN USCIS' OVERSIGHT AND DATA QUALITY OF CREDIBLE AND REASONABLE FEAR SCREENINGS 57 (2020) (finding need for additional specialized training of asylum officers and observations of experienced officers conducting interviews); UNIV. OF ME. SCH. L. REFUGEE AND HUM. RTS. CLINIC ET AL., LIVES IN LIMBO: HOW THE BOSTON ASYLUM OFFICE FAILS ASYLUM SEEKERS 15 (2022), <https://maine-law.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails>

be needed to overcome mixed messaging that has impacted the Asylum Office. While officers have received training regarding the unique needs of asylum seekers, in recent years they have also received strong messages regarding the need to filter out claims except for a unique few.³¹⁵ For example, lesson plans have changed repeatedly to emphasize ever-expanding restrictions on claims.³¹⁶ A culture must be created within the specialized asylum corps that emphasizes the humanitarian nature of asylum adjudication and makes clear that exceptionality and exclusion are not guiding principles.

-Asylum-Seekers-FINAL-1.pdf [https://perma.cc/PUP7-BXDS] [hereinafter UNIVERSITY OF MAINE SCHOOL OF LAW] (training insufficient and focused on screening out claims).

315. See UNIVERSITY OF MAINE SCHOOL OF LAW, *supra* note 314, at 15 (documenting trainings that focus on screening out asylum applicants on fraud and credibility grounds); NAT'L IMMIGR. PROJECT ET AL., COMPLAINT TO DHS OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES: SYSTEMIC DEFICIENCIES AT THE HOUSTON ASYLUM OFFICE 13–14 (2022), https://nirpnl.org/sites/default/files/2023-04/2022_27April-CFI-complaint.pdf [https://perma.cc/D3NH-NANL] (detailing changed guidance documents regarding credible fear screening interviews and insistence of the Houston Asylum Office in following repealed standards); see also Molly O'Toole, *Asylum Officers Receive Last-Minute Guidance on Implementing Sweeping Border Policy Change*, L.A. TIMES (July 15, 2019, 8:54 PM), <https://www.latimes.com/politics/la-na-pol-asylum-rule-trump-border-20190715-story.html> [https://perma.cc/XM5A-4XPU] (detailing Trump administration memos setting standards for denial of asylum claims at the border); Mica Rosenberg & Kristina Cooke, *Exclusive: New Training Document for Asylum Screenings Reflects Tougher U.S. Stance*, REUTERS (May 4, 2019, 12:00 PM), <https://www.reuters.com/article/us-usa-immigration-asylum-exclusive/exclusive-new-training-document-for-asylum-screenings-reflects-tougher-u-s-stance-idUSKCN1SA0LG> [https://perma.cc/G5AM-KVLS] (same).

316. See, e.g., U.S. CITIZENSHIP & IMMIGR. SERV., REFUGEE, ASYLUM AND INTERNATIONAL OPERATIONS DIRECTORATE, COMBINED TRAINING PROGRAM: NEXUS–PARTICULAR SOCIAL GROUP 10–20 (2021) (documenting changes to the training materials); see also U.S. CITIZENSHIP & IMMIGR. SERV., REFUGEE, ASYLUM AND INTERNATIONAL OPERATIONS DIRECTORATE, RELEASE OF UPDATED ASYLUM DIVISION OFFICER TRAINING COURSE LESSON PLAN ON CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS (2014) (setting out stricter requirements for establishing a significant possibility of establishing a claim to asylum in credible fear interviews); Memorandum from John Lafferty, Chief, U.S. Citizenship & Immigr. Serv., to All Asylum Officer Staff on the Updated Asylum Division Officer Training Course Lesson Plan on Credible Fear of Persecution and Torture Determinations (2014), <https://www.uscis.gov/sites/default/files/document/memos/Memorandum-ReleaseofUpdatedADOTCLessonPlan.pdf> [https://perma.cc/BLA9-JXL2] (setting out stricter requirements for establishing a significant possibility of establishing a claim to asylum in credible fear interviews); Dara Lind, *Exclusive: Civil Servants Say They're Being Used as Pawns in a Dangerous Asylum Program*, VOX (May 2, 2019, 11:20 AM), <https://www.vox.com/2019/5/2/18522386/asylum-trump-mpp-remain-mexico-lawsuit> [https://perma.cc/CB73-AKQ2] (describing pressure on asylum officers to exclude asylum seekers from access to U.S. territory in the context of the MPP program); *Asylum Grant Rates Climb Under Biden*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Nov. 10, 2021), <https://trac.syr.edu/immigration/reports/667/> [https://perma.cc/45EL-QBWA] (documenting trend of declining asylum grant rates by the USCIS Asylum Office and highlighting grants in Immigration Court of cases denied in affirmative proceedings before the USCIS Asylum Office).

The proposal is that the asylum process would occur entirely separate from any deportation proceedings. As such, deportation proceedings would not be initiated against an asylum seeker encountered by the authorities, at least until the asylum claim is resolved. If deportation proceedings were already initiated against an individual (for example after an encounter with the criminal legal system) who subsequently indicates an intention to seek asylum, the deportation proceedings would be halted throughout the period that the asylum claim remains pending.³¹⁷

A complete exposition of the exact methods for effectuating a change to non-adversarial specialized adjudication is beyond the scope of this Article, particularly since there are multiple ways to achieve the ultimate goal.³¹⁸ In summary, though, the necessary changes could be made administratively without congressional action. The underlying statute—the Refugee Act of 1980—provides little guidance regarding asylum proceedings and so leaves flexibility for modifications to procedures.³¹⁹ The changes could thus be implemented through policy decisions or new regulations.³²⁰

317. Such a non-adversarial proceeding separate from the deportation process is particularly appropriate for asylum seekers who may be traumatized and who raise issues that require specialized knowledge. However, there are a number of other types of immigration applications (e.g., cancellation of removal for undocumented individuals who have lived in the United States for ten years or more and have close family ties to U.S. citizens or Lawful Permanent Residents who would suffer negative impacts upon deportation of the applicant) that are currently adjudicated before the Immigration Court in deportation proceedings that might best be adjudicated in a separate non-adversarial proceeding. As with asylum, to be given fair consideration on their own merits, these applications should not be heard in the context of adversarial deportation proceedings before courts housed in a law enforcement agency.

318. The principal modalities of change include: (1) adoption of legislation; (2) promulgation of new regulations; (3) development of new caselaw at the BIA or in the federal courts; and (4) executive policy pronouncements. *See* Anker, *supra* note 10, at 14–15 (describing legislation, regulations, caselaw, and policy announcements as the sources of law for asylum procedures and substantive standards).

319. *See supra* note 106 and accompanying text (noting that Congress made no provision in the Refugee Act of 1980 regarding the asylum adjudication process); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (providing no asylum procedure).

320. Administrative changes are subject to reversal under a new presidential administration and thus less permanent. However, given the inability of Congress to make significant changes to immigration law in recent years, administrative change may be the only available route. *See* Will Weissert & Adriana Gomez Licon, *Immigration Reform Stalled after Gang of 8's Big Push*, ASSOCIATED PRESS (April 3, 2023, 7:09 AM), <https://apnews.com/article/immigration-asylum-trump-biden-gang-of-eight-3d8007e72928665b66d8648be0e3e31f> [https://perma.cc/C6CN-LLZK] (pointing to years of congressional inaction on immigration); Claire Klobucista, Amelia Cheatham, & Diana Roy, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELATIONS BACKGROUNDER (June 6, 2023, 1:35 PM), <https://www.cfr.org/backgrounder/us-immigration-debate-0> [https://perma.cc/RV9V-9BNE] (same).

Implementing the proposed changes only through policy (without new regulations) would involve immigration authorities exercising discretion not to initiate or to dismiss deportation proceedings for asylum seekers.³²¹ Policy guidance would be issued to all relevant actors. Under that guidance, for persons apprehended in the interior of the United States who apply or indicate an intention to apply for asylum, immigration authorities would decline to initiate deportation proceedings to allow the asylum claim to proceed in the non-adversarial setting. If an asylum application were not filed within a period established for that purpose, deportation proceedings could be initiated. Alternatively, the authorities could initiate deportation proceedings but then terminate those proceedings upon the filing of an asylum application so that the asylum claim could proceed forward first in the non-adversarial forum.

A similar approach could be used at the border to redirect asylum claims to non-adversarial proceedings. Policy guidance would direct immigration authorities to forgo placing asylum seekers into expedited removal.³²² Then, the authorities could either: (1) process and release

321. The immigration authorities have generally had broad discretion to decline to initiate deportation proceedings, to seek dismissal of such proceedings once initiated, or to agree to dismissal on the request of another party, under the principle of prosecutorial discretion. In recent years, there have been challenges to broad exercise of discretion, but the approach is still legally sound. *See* U.S. v. Texas 143 S. Ct. 1964, 1976 (2023) (reaffirming prosecutorial discretion for immigration arrest and deportation decisions); SHOBA SIVAPRASAD-WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 7–13 (2015) (discussing how prosecutorial discretion is used in the case of deportation decisions); Dep’t of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1916 (2020) (remanding the case because of “doubts about whether the agency appreciated the scope of its discretion”); *In re* S-O-G- & F-D-B-, 27 I&N Dec. 462 (2018) (affirming the possibility of an exercise of discretion by Immigration and Customs Enforcement to agree to a motion to dismiss deportation proceedings).

322. Again, prosecutorial discretion in the immigration context, including regarding the decision to place a migrant in expedited removal, has always existed. *See, e.g.*, 8 U.S.C. § 1225(a)(4) (providing for expedited removal); 8 C.F.R. § 235.4 (providing discretion to immigration authorities in determining whether to pursue expedited removal, deportation proceedings, or a grant of permission to withdraw an application for admission); *In re* E-R-M- & L-R-M-, 25 I&N Dec. 520 (BIA 2011) (explicitly finding that immigration authorities have discretion whether or not to place an individual in deportation proceedings). In addition, the current broad use of expedited removal is based only on announcements in the Federal Register. *See* Notice Designating Aliens Subject to Expedited Removal Under § 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68923 (Nov. 13, 2002) (expanding expedited removal to arrivals by sea); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004) (expanding expedited removal to arrivals at land borders where the migrant is apprehended within 100 miles of the border and within fourteen days after entry); Press Release, U.S. Dep’t of Homeland Sec., Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border (Jan. 30, 2006), <https://www.hsdl.org/c/abstract/?docid=476965> [<https://perma.cc/B5ZC-9TCH>] (expanding expedited removal along entire northern and southern border and coastal areas). These announcements could be rescinded to significantly narrow expedited removal or a new announcement could issue to make expedited removal inapplicable to all or certain categories of asylum seekers or certain nationalities. Prior

asylum seekers arriving at the border into the interior of the United States, without placing them into deportation proceedings at all;³²³ or (2) place asylum seekers arriving at the border into deportation proceedings, rather than expedited removal proceedings, but then terminate deportation proceedings upon the filing of an asylum application.

Under these non-regulatory approaches, the authorities would make the decision not to initiate Immigration Court deportation proceedings or to terminate them. Asylum cases would then proceed through the specialized non-adversarial system.

Alternatively, using the process for unaccompanied children as a template,³²⁴ a regulatory change could instead provide for asylum adjudication in the non-adversarial context, including even during the pendency of Immigration Court deportation proceedings.³²⁵ Under this approach, deportation proceedings might be initiated or remain pending even after a request for asylum is made, but the asylum claim would be adjudicated outside of the deportation proceedings. Other than for unaccompanied

Federal Register announcements and guidance documents have limited expedited removal in this fashion as to certain groups. *See, e.g.*, Memorandum from Paul W. Virtue, Acting Exec. Assoc. Comm'r, Immigration & Naturalization Serv., Unaccompanied Minors Subject to Expedited Removal (Aug. 21, 1997) (establishing that unaccompanied children were generally not subject to expedited removal before the statute explicitly provided for this exemption); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48878 (Aug. 11, 2004) (exempting most Canadian and Mexican nationals from expedited removal and recognizing exemption for unaccompanied children and certain others).

323. 8 U.S.C. § 1182 (offering broad authority at government discretion to “parole” any noncitizen into the United States “temporarily . . . on a case-by-case basis for urgent humanitarian reasons or significant public benefit”).

324. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044 (setting out right of unaccompanied children to a non-adversarial asylum proceeding even after initiation of deportation proceedings before the Immigration Court); U.S. Dep’t of Justice, Administrative Closure Providing Guidance to Adjudicators on Administrative Closure in Light of *Matter of Cruz-Valdez*, DM 22-03 (Nov. 22, 2021) (providing for administrative closure of deportation proceedings to allow applications to proceed affirmatively before other fora); *see also* CATH. LEGAL IMMIGR. NETWORK, FACT SHEET: IMMIGR. CT. CONSIDERATIONS FOR UNACCOMPANIED CHILDREN WHO FILE FOR ASYLUM WITH USCIS WHILE IN REMOVAL PROC., IN LIGHT OF *J.O.P. v. DHS* (March 12, 2021) (describing the process for unaccompanied minors with affirmative asylum applications pending while they are also in Immigration Court deportation proceedings); *Asylum and Related Relief*, KIDS IN NEED OF DEF. (Apr. 2015), <https://supportkind.org/wp-content/uploads/2015/04/Chapter-5-Asylum-and-Related-Relief.pdf> [<https://perma.cc/Y672-HM36>] (same).

325. Some policymakers might prefer this approach as it would make it more straightforward to proceed with deportation proceedings if the asylum seeker does not pursue asylum in the end or does not succeed on the asylum claim. *See infra* note 337 and accompanying text (describing the possibility of renewing deportation proceedings after a failed asylum claim). It also has the potential additional benefit of avoiding the need to use prosecutorial discretion, which has been the subject of litigation in recent years.

children, current regulations provide for exclusive jurisdiction over asylum claims in the Immigration Court during deportation proceedings, but the agencies could modify that rule.³²⁶ Under this proposal, immigration authorities could still initiate Immigration Court deportation proceedings (but forgo expedited removal for those at the border) against asylum seekers. The regulation would then provide jurisdiction to a specialized non-adversarial asylum corps over the asylum claim despite the existence of deportation proceedings; it also would provide for a pause in those deportation proceedings (administrative closure) during adjudication of the asylum claim. The asylum claim would proceed in the specialized non-adversarial context during the halt in the deportation proceedings.

Regardless of how it is accomplished, this move away from adversarial deportation proceedings and expedited removal proceedings for asylum seekers would have multiple benefits. The proceedings would be more efficient and less costly than under current procedures and would also be more likely to protect genuine refugees and thereby enhance the legitimacy of the system.

Efficiency would be gained, because the new process would resolve many cases in less formal proceedings, without the need for the involvement of both a judge and a Department of Homeland Security attorney, as well as multiple hearings.³²⁷ As a result, cases could proceed faster, shortening the current lengthy delays and extensive backlogs in asylum adjudications.³²⁸ Elimination of the use of expedited removal for asylum seekers would be particularly effective at conserving resources. Currently, USCIS Asylum Officers conduct credible fear screenings for asylum seekers put into expedited removal and then, if screened in favorably, those cases are heard again on the merits in adversarial deportation proceedings in Immigration Court. With the end of expedited removal for asylum seekers, specialized non-adversarial asylum adjudicators would no longer need to use their valuable time for this screening purpose. Instead, they could decide cases on the merits in the first instance. In turn, the resources saved by processing most asylum claims in a non-adversarial setting could be utilized to hire additional asylum adjudicators for further efficiency and reduction of the backlog.

326. 8 C.F.R. § 208.2(b).

327. See Schrag et al., *Border Asylum Adjudication*, *supra* note 293, at 57 (laying out the efficiencies of affirmative asylum adjudication).

328. *A Sober Assessment of the Growing U.S. Asylum Backlog*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Dec. 22, 2022), <https://trac.syr.edu/reports/705/> [<https://perma.cc/4SVG-QWX9>] (finding almost 1.6 million asylum cases pending before the Immigration Courts and the USCIS Asylum Office).

In addition, by both removing some of the pressures of the backlog and taking adjudication out of the adversarial deportation context, adjudicators could evaluate claims neutrally without the exceptionality conceit. By specifically ending the use of expedited removal for asylum seekers, specialized asylum adjudicators would no longer be placed in the position of screening out asylum claims through the credible fear interview process. This change in role would likely have benefits in moving away from a culture of asylum exceptionality for those adjudicators as well. They will be better able to decide claims on the merits fairly, granting asylum where needed and without bias.

Finally, once asylum claims are no longer viewed as presumptively invalid or threatening and so are redirected to non-adversarial adjudication, resources would become available for situations that might genuinely require intense attention. For example, focus could be placed on analyzing complex asylum claims or addressing other true law enforcement concerns that might arise in the asylum process in certain cases.

b. Independent Review with Full Due Process

Regardless of how asylum claims make their way to a specialized non-adversarial adjudication in the first instance, this proposal insists that a negative initial decision must be reviewed by a fully independent tribunal also with specialized expertise. That review body would use more formal proceedings than in the first instance non-adversarial proceedings, in order to ensure due process.³²⁹ The review proceeding would consider both facts and law, with the possibility for the submission of new evidence and testimony to allow for full review. Deportation proceedings would not resume, and no decision on deportation would occur, before a decision denying asylum has received such full independent review.

Under the current structure of the immigration system, the Immigration Courts would likely provide this review.³³⁰ If so, judges with training and expertise in asylum should be assigned to review asylum denials.³³¹ In addition, the Immigration Courts should not consider deportability or

329. See *Bridges v. Wixon*, 326 U.S. 135, 154–56 (1945) (procedural due process requirements apply in immigration proceedings); *Bustos-Torres v. Immigr. and Naturalization Serv.*, 898 F.2d 1053, 1054 (5th Cir. 1990) (same); *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) (as amended) (“Immigration proceedings, although not subject to the full range of constitutional protections, must conform to the Fifth Amendment’s requirement of due process.”).

330. See 8 U.S.C. § 1229(a) (establishing the jurisdiction of the Immigration Courts to adjudicate applications for relief from deportation, such as asylum).

331. See Martin, *Reforming Asylum Adjudications*, *supra* note 3, at 1358 (during the early history of the implementation of the 1980 Refugee Act, recommending review by a specialized appellate body).

issue an order of deportation until consideration of the asylum claim has concluded.

As soon as feasible, the Immigration Courts should cease to serve in this role of reviewing negative asylum decisions. As noted previously, the Immigration Courts are administrative bodies housed within a law enforcement agency, and they do not offer a truly independent and unbiased review of asylum claims.³³² Advocates have sometimes insisted on the role of the Immigration Courts in asylum adjudication in the past.³³³ However, they did so when faced with proposals that would have placed exclusive and final jurisdiction over asylum claims with the INS or the Department of Homeland Security, with no detached review by any tribunal.³³⁴ In those instances and given the limited possibilities for any other mechanism for review, advocates insisted on a meaningful role for Immigration Courts to ensure the possibility for greater procedural protections and reversal of improper negative decisions.³³⁵

However, a reconceived asylum system should look to other solutions, such as an independent asylum tribunal outside the Department of Homeland Security and the Department of Justice, possibly in the form of an Article I court similar to the U.S. Tax Court.³³⁶ Alternatively, more automatic recourse to the federal courts, for example, to a U.S. magistrate judge, could be provided given the high stakes of asylum proceedings.

332. See *supra* notes 98–100 and accompanying text (discussing the structure and role of Immigration Courts and deportation proceedings).

333. See *supra* notes 124–25 and accompanying text (describing the position of advocates seeking both non-adversarial adjudication of asylum applications and formal review with due process).

334. See *supra* notes 124–25 and accompanying text (explaining the limits of the various regulatory proposals); Schrag et al., *Border Asylum Adjudication*, *supra* note 293, at 28–29 (explaining why advocates rejected regulatory proposals for non-adversarial proceedings without Immigration Court review in the past).

335. See Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18098 (Mar. 29, 2022) (to be codified at 8 C.F.R. pts. 1003, 1208, 1235, 1240) [hereinafter Procedures for Screening and Consideration] (describing comments opposing a final asylum adjudication by USCIS in certain cases without full immigration court review); Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30673, 30676 (July 27, 1990) (codified at 7 C.F.R. pt. 1) (describing comments opposing regulatory proposals that would leave asylum adjudication exclusively to the INS, an enforcement entity).

336. See Letter from Reginald M. Turner, Jr., President, A.B.A., to Jerrold Nadler, Chairman, H.R. Comm. on the Judiciary (Apr. 5, 2022), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-letter-re-hr-6577.pdf [<https://perma.cc/NM57-66LB>] (supporting creation of Article I Immigration Court); Letter from AILA and Partners to Zoe Lofgren, Chairwoman, Subcomm. on Immigr. & Citizenship, Comm. on the Judiciary (Dec. 14, 2020), <https://www.naij-usa.org/images/uploads/publications/2020.12.14.00.pdf>14 [<https://perma.cc/J4TS-G9YG>] (urging the creation of Article I Immigration Court).

Under this proposal, deportation proceedings could be renewed upon conclusion of the asylum proceedings including review, if the asylum claim was unsuccessful. The deportation process could begin again either in the tribunal reviewing an initial asylum denial (Immigration Courts or other) or before a separate adjudicatory entity. In many instances, there would not be much dispute about deportability once asylum proceedings conclude negatively. Nevertheless, in other cases, there might be meaningful challenges to deportation that would need to be considered before entry of a final order.³³⁷

c. The Proposed Non-Adversarial Model Compared with Other Existing Systems

This proposal for a non-adversarial model of asylum adjudication would bring the U.S. asylum system into line with the systems used in much of the world.³³⁸ To illustrate, the asylum systems of European Union nations have developed in a very different manner than in the United States.

For European Union countries, harmonized European asylum rules require the appointment of specialized asylum adjudication corps to adjudicate asylum claims through non-adversarial interviews in the first instance. The asylum adjudicators must be trained on refugee law and on the situations in countries of origin as well as on the impacts of trauma on asylum seekers.³³⁹ The designated asylum officials must conduct

337. See, e.g., *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1496 (April 29, 2021) (providing possibility of dismissal of deportation proceedings based on faulty charging documents).

338. See, e.g., *infra* notes 342–44 (explaining the contrast between European non-adversarial handling of asylum claims and the existing U.S. asylum system); *Claiming Refugee Protection*, IMMIGR. & REFUGEE BD. OF CAN., <https://www.irb-cisr.gc.ca/en/applying-refugee-protection/Pages/index.aspx> [<https://perma.cc/RAM3-2DEH>] (last updated Dec. 12, 2022) (describing the generally non-adversarial asylum process in Canada before the specialized Refugee Protection Division of the Immigration and Refugee Board); Rachel Schmidtke, *A New Way Forward: Strengthening the Protection Landscape in Mexico*, REFUGEES INT'L (Nov. 12, 2020) (describing the current asylum system in Mexico and its non-adversarial process); Helen Kerwin, *The Mexican Asylum System in Regional Context*, 33 MD. J. INT'L L. 290, 290 (2018) (same).

339. Directive 2013/32/EU, arts. 4, 14–15, 2013 O.J. (L 180) 67, 70–71 (EU) (listing common procedures for granting and withdrawing international protection); see also David A. Martin, *Report to the Administrative Conference of the United States*, ADMIN. CONF. OF THE U.S. at 36–69 (May 1989) (noting that European countries already had specialized asylum corps in the 1980s, when the modern U.S. asylum system was just getting off the ground, and that these countries often designated specialists to consider claims from certain countries or regions of the world). Of course, the individual nations of the European Union may not always comply fully with the legal standards that set out these procedural requirements. See, e.g., European Commission Press Release IP/21/5801, *Migration: Commission Refers Hungary to the Court of Justice of the European Union over its Failure to Comply with Court Judgment* (Nov. 12, 2021) (stating that rules and practices of Hungary in processing asylum seekers at the border violated European Union law).

personal interviews of asylum seekers “under conditions which allow applicants to present the grounds for their applications in a comprehensive manner.”³⁴⁰ To meet this standard, asylum officials must conduct interviews taking into account gender, age, and other factors.³⁴¹ In the European Union, if deportation proceedings are initiated before an asylum claim is made, then they must be paused for separate consideration of the asylum claim in this specialized interview procedure.³⁴²

Non-adversarial adjudications by the specialized asylum officers are subject to review before an independent tribunal with opportunity to introduce new testimony and evidence.³⁴³ Consideration of removal may only take place after a denial of the asylum claim at all levels.³⁴⁴

The European model contrasts significantly with the existing U.S. model of adjudication within adversarial Immigration Court deportation proceedings, but it is certainly not perfect. Over the last decade and a half especially, European Union countries have begun restricting access to asylum, at least partly in response to large-scale arrivals and threat narratives similar to those seen in the United States.³⁴⁵ Among other measures, European Union countries have adopted rules allowing for an expedited cursory review of asylum applications presented at their borders and in airports.³⁴⁶ However, for those who do make it onto the territory of a European Union country, the procedures continue to dictate specialized non-adversarial handling of asylum claims, with the

340. Directive 2013/32/EU, art. 15, 2013 O.J. (L 180) 71.

341. *See id.*

342. *See* Directive 2013/32/EU, arts. 9, 15, 2013 O.J. (L 180) 68, 71 (describing the requirement of a personal interview not in the context of deportation proceedings and the requirement that an applicant for protection be allowed to remain on State territory during adjudication of the application); Case C-601/15, *J.N. v. Staatssecretaris van Veiligheid en Justitie*, 2016 E.C.J. paras. 70–75 (holding that a deportation proceeding initiated before the filing of a refugee claim, and then paused for a decision on the refugee claim, could be resumed once there was a final negative determination on the refugee claim).

343. Directive 2013/32/EU, art. 46, 2013 O.J. (L 180) 84.

344. *See id.*; *Staatssecretaris van Veiligheid en Justitie*, 2016 E.C.J. para. 9 (execution of a return decision only permissible after a final decision on the refugee protection claim with review).

345. *See, e.g.*, HELEN O’NIONS, *ASYLUM – A RIGHT DENIED: A CRITICAL ANALYSIS OF EUROPEAN ASYLUM POLICY* 58–71, 165–90 (1st ed. 2014) (discussing and questioning the legality of ways that European countries undermine access to refugee protections); ERFANI ET AL., *PUSHING BACK PROTECTION*, *supra* note 198 (discussing increased efforts by the European Union to disallow asylum claims for border arrivals).

346. *See* Directive 2013/32/EU, arts. 31(8), 33, 43, 2013 O.J. (L 180) 78–79, 82–83 (providing for accelerated procedures and rejection of admissibility of claims in certain instances, including in connection with irregular arrival on the territory of a European Union country); *see also* Grote, *Responses in Germany*, *supra* note 291, at 22–26 (describing the hotspot approach that assists European Union nations in rapidly processing cases for return where they are impacted by a large influx of migrants).

opportunity for full and independent review, outside of the context of a return or deportation procedure.³⁴⁷ The experience thus serves as a useful reference point for the U.S. asylum system.

In comparison, regulations issued by the Biden administration in 2022 to pilot new procedures for asylum seekers at the border do not embody the proposal urged here for specialized non-adversarial adjudication with review, separate from deportation proceedings. The Biden asylum regulations facially appear to make some of the changes proposed in this Article.³⁴⁸ They allow for adjudication in the first instance by the specialized USCIS Asylum Office for certain limited cases of asylum seekers arriving at the southern border.³⁴⁹ The regulations thus recognize that asylum claims are best heard in non-adversarial proceedings before specialized officers, as does this Article.

However, the Biden asylum regulations fall short because they fail to address the exceptionality and exclusionary elements of the current asylum system. Importantly, the regulations set out strict time limits for adjudication.³⁵⁰ Given the complexity of asylum cases, these timelines do not promote fair adjudication of claims—instead, the system is yet again set up to filter out and deny most asylum claims.³⁵¹

Even more fundamentally, these regulations continue to place asylum seekers arriving at the southern border in expedited removal proceedings and detention, at least initially.³⁵² The proceedings set out in the Biden

347. See Grote, *Responses in Germany*, *supra* note 291, at 26–28 (discussing Germany’s processing of refugee protection claims); Directive 2013/32/EU, arts. 15, 46, 2013 O.J. (L 180) 71, 84 (providing the right to remain on the territory during a full asylum proceeding); Directive 2008/115/EC, 2008 O.J. (L 348) 99 (“[A] third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application . . .”).

348. Procedures for Screening and Consideration, 87 Fed. Reg. 18078, 18085, 18088 (Mar. 29, 2022) (codified at 8 C.F.R. pts. 1003, 1208, 1235, 1240).

349. *Id.* at 18081, 18085 (providing for non-adversarial interviews for some asylum applicants arriving at the border in a phased implementation).

350. See Schrag et al., *Border Asylum Adjudication*, *supra* note 293, at 39 (explaining how the expedited timelines lead to denials of claims and noting that government authorities stated that they expect only fifteen percent of asylum seekers to succeed in the non-adversarial interviews); 87 Fed. Reg. at 18216 (requiring an asylum interview on the merits within 45 days of a favorable credible fear screening determination).

351. See HUMAN RIGHTS FIRST, INADEQUATE ACCESS TO LEGAL REPRESENTATION, RUSHED TIMELINES IMPEDE MEANINGFUL OPPORTUNITY TO SEEK ASYLUM UNDER NEW ASYLUM PROCESSING RULE (Sept. 2022) (explaining that government data revealed that many individuals seeking asylum under the non-adversarial procedures were not able to obtain legal representation for their final asylum interviews, significantly decreasing the likelihood that they successfully receive asylum).

352. See *id.* (explaining that asylum seekers processed under the rule are first subject to expedited removal proceedings and then given a non-adversarial asylum merits interview only if they

asylum regulations thus take place from within the existing exclusionary framework. Rather than replacing the exclusionary apparatus, these regulations layer a new purportedly non-adversarial process on top of that system. The process begins with an expedited removal process that assumes that most claims are invalid and must be screened out. Only exceptional cases are screened in through a credible fear interview to receive non-adversarial adjudication.³⁵³ The regulations also fail to achieve the efficiencies that would come with eliminating the need for expedited removal credible fear screenings. Instead, asylum officers are charged with conducting those screenings *and* adjudicating claims on the merits for border arrivals in addition to deciding merits cases for traditional affirmative applicants.³⁵⁴

Finally, the Biden asylum regulations still place asylum seekers in deportation proceedings before the Immigration Court as the next step when claims do not receive a favorable adjudication by the USCIS Asylum Office.³⁵⁵ Recourse to the Immigration Courts, within a law enforcement agency, as a means to prevent the execution of a deportation order does not constitute a genuinely independent review of the asylum claim. A much more significant change is needed than the reform envisioned by these regulations.

B. Addressing Objections

An expansive approach to asylum, as proposed here, has never been implemented because policymakers have insisted on a discourse that treats asylees as a threat and problem.³⁵⁶ This Article has urged a

first pass a credible fear screening interview); Procedures for Screening and Consideration, 87 Fed. Reg. at 18085, 18088 (providing that asylum seekers subject to expedited removal who make a claim based on fear will be referred for a credible fear interview to determine whether they will be deported or allowed to make a full asylum claim in the new non-adversarial merits interview).

353. See *Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions> [<https://perma.cc/N3QY-U27Z>] (in September 2022, for example, fewer than 50 percent of claimants passed an initial credible fear screening interview that allowed for the opportunity to leave expedited removal and proceed in the new affirmative merits proceedings or before the Immigration Court).

354. Procedures for Screening and Consideration, 87 Fed. Reg. at 18085, 18088.

355. *Id.* (describing the procedures following the USCIS non-adversarial merits interview if the asylum seeker is not granted asylum at that stage).

356. See *supra* note 4 and accompanying text. This discourse is often politically motivated as candidates and elected officials seek to garner votes by creating a sense of danger. See generally Daniel Bush, *Republicans Seize on Biden's Border Challenges to Reframe the Immigration Debate*, PBS NEWSHOUR (Mar. 25, 2021, 6:58 PM), <https://www.pbs.org/newshour/politics/republicans-seize-on-bidens-border-challenges-to-reframe-the-immigration-debate> [<https://perma.cc/JZJ7-KRYS>]; Matthew Impelli, *Ron DeSantis Calls Out Republicans on Immigration*, NEWSWEEK (Feb. 23,

different policy approach³⁵⁷ that will offer a fair and effective asylum system rather than addressing asylum arrivals with insistence on the “crisis” rhetoric.³⁵⁸ Policymakers may nonetheless urge that the more expansive and favorable approach to asylum seekers recommended here would open the door to endless new arrivals.³⁵⁹ There are several reasons why such thinking should not be used to thwart the adoption of the proposals described previously.

First, this response buys into the false narrative that the arrival of asylum seekers in large numbers is problematic or dangerous.³⁶⁰ This is the exact logic that has placed the U.S. asylum system in the circular loop that views asylum seekers as threatening from the start, and then sees a “crisis” when arrivals cannot be prevented through restrictive responses to the purported threat. Asylum seekers arriving in large numbers reflect the human rights situations in their home countries and do not present an inherent problem. The arrivals can be handled through proper deployment of resources.³⁶¹

2023, 2:51 PM), <https://www.newsweek.com/ron-desantis-calls-out-republicans-immigration-1783474> [<https://perma.cc/S2HA-2RDV>]; Jim Henson & Joshua Blank, *Why Immigration and Border Security Endure as the Central Axis of Texas Republican Politics*, TEX. POL. PROJECT (May 19, 2022), <https://texaspolitics.utexas.edu/blog/why-immigration-and-border-security-endure-central-axis-texas-republican-politics> [<https://perma.cc/2S4D-EP5K>].

357. Commentators with various political perspectives have supported proposals like those urged here as a sound policy approach to improving the asylum system. See HUMAN RIGHTS FIRST, LEADING BY EXAMPLE, *supra* note 176, at 16–20; Bier Testimony, *supra* note 175, at 2; Schacher, *Addressing the Legacy of Expedited Removal*, *supra* note 308, at 3; Dan Restrepo, *Migration Doesn't Have to be a Crisis, But Only a Hemisphere-Wide Plan Can Fix Washington's Failing Policies*, FOREIGN AFFAIRS (June 1, 2022), <https://www.foreignaffairs.com/articles/americas/2022-06-01/migration-doesnt-have-be-crisis> [<https://perma.cc/AHG6-V4EL>].

358. See Karen Musalo, *Enough with the Political Games; Migrants Have a Right to Asylum*, L.A. TIMES (Jan. 6, 2023, 3:00 AM), <https://www.latimes.com/opinion/story/2023-01-06/biden-border-immigration-asylum-title-42> [<https://perma.cc/7C24-L74W>] (arguing that abrogating the right to seek asylum at the border for political reasons results in “chaos at the U.S.-Mexico border”).

359. See *supra* note 245 and accompanying text (gathering up statements regarding floodgate concerns in the asylum context).

360. It is sometimes even suggested that asylum seekers present a risk of terrorism. Empirical studies indicate that this threat does not exist. See Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, CATO INST. (Sept. 13, 2016) (four out of the 700,522 asylum seekers admitted to the United States from 1975 through 2015, or 0.0006 percent, turned out to be terrorists).

361. In fact, asylum seekers bring significant benefits to the United States. See, e.g., *Starting Anew: The Economic Impact of Refugees in America*, AM. IMMIGR. COUNCIL (June 20, 2023), <https://www.americanimmigrationcouncil.org/research/economic-impact-refugees-america> [<https://perma.cc/6TFY-V66X>] (in 2019 alone refugees contributed \$25 billion in taxes, leaving them with \$68.6 billion in disposable income to stimulate the U.S. economy); Raiyan Kabir & Jeni Klugman, *Unlocking Refugee Women's Potential: Closing Economic Gaps to Benefit All*, GEO. UNIV. INST. FOR WOMEN, PEACE & SEC. GIWPS (July 2019), <https://giwps.georgetown.edu/resource/unlocking-refugee-womens-potential/> [<https://perma.cc/L5F7-YUDH>] (finding that refugee women could contribute \$1.6 billion to the U.S. gross domestic product if employment and wage gaps are

Second, even if more generous policies encourage use of the asylum system by migrants who do not fall within the refugee definition even broadly interpreted, that possibility can be addressed by means other than a return to exceptionality. Migrants might be motivated to use the asylum process if it becomes more open, because other aspects of the U.S. migration system are highly restrictive.³⁶² As a result, migrants seeking to reunify with family or to work in the United States might see no other option than to utilize the asylum system.³⁶³ The best response to this possibility might be to open up other channels of migration as well rather than to continue to restrict the asylum system.³⁶⁴

Regardless, the possibility that some individuals who simply do not fit the refugee definition might attempt to benefit from a more expansive asylum system is insufficient reason to maintain exceptionality at all costs. Too many genuine refugees are excluded as a result of exceptionality, and other grave harms are documented in this Article. As is recognized in other contexts, such as the tax system, the entire asylum system will be less efficient and effective overall if it is designed with an exclusive focus on preventing those relatively rare cases of abuse.³⁶⁵ In any case, under the revised and more expansive asylum system proposed in this Article, individuals might still be denied asylum if justified without recourse to exceptionality. Denial of asylum might result from a finding that an individual applicant presents a genuine danger or fails to meet even a generous interpretation of the refugee definition after a fair process.³⁶⁶

closed); T. Alexander Aleinikoff, *From Dependence to Self-Reliance: Changing the Paradigm in Protracted Refugee Situations*, TRANSATLANTIC COUNCIL ON MIGRATION (2015), https://www.migrationpolicy.org/sites/default/files/publications/TCM-Protection-Aleinikoff_0.pdf [<https://perma.cc/S7BL-MQ63>] (highlighting refugee potential to contribute to host communities globally through human capital and transnational connections).

362. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 7–10 (5th ed. 2009) (describing that nonimmigrants and immigrants alike must fit into narrow statutory categories, general quotas, numerical quotas, and preference categories to migrate legally to the United States).

363. Of course, most migrants have multiple reasons for leaving their homes and seeking to enter and remain in the United States, some of which might fit the refugee definition while others may not.

364. See Restrepo, *supra* note 357 (making this recommendation); Bier Testimony, *supra* note 175, at 1 (same).

365. See generally J.T. Manhire, *What Does Voluntary Tax Compliance Mean?: A Government Perspective*, 164 U. PA. L. REV. ONLINE 11, 11 (2015).

366. Where there may be good reason not to remove an individual from the United States who does not meet the technical refugee definition, particularly where there is a danger of violence upon return, the United States should develop “complementary measures of protection” that might allow for the individual to remain in the United States. Currently, the U.S. system provides only extremely

Third, the benefits of a more expansive asylum policy, in terms of legitimacy and public safety, are significant. The removal of exceptionality as a guiding principle for asylum would limit bias in decision-making and further U.S. compliance with domestic and international legal obligations. At the same time, the proposed changes would take away important incentives for serious criminal activity, for example, cartels engaged in smuggling and extortion operations.³⁶⁷ A system that does not employ a rhetoric of asylum seekers as threat would simultaneously allow for a focus on genuine sources of danger. These improvements in security and respect for the rule of law outweigh any concern about increased entries into the United States of asylum seekers.

Fourth, those who fear large-scale arrivals lose nothing by abandoning the current approach and may ultimately have much to gain in trying a different tack. Exceptionalism and exclusion have not prevented arrivals in large numbers and cannot be expected to do so, as discussed previously.³⁶⁸ In fact, the failures of legitimacy in the current asylum system may actually encourage irregular migration and efforts to evade the exclusionary apparatus in place.³⁶⁹

By instead acknowledging wide-scale refugee arrivals as such, the United States might be able to slow refugee flows over time by addressing their origins.³⁷⁰ In the process of recognizing patterns in refugee flows for group-based determinations, the United States would identify critical human rights and development problems in sending countries. Political

limited options other than asylum. See, e.g., Tamara Wood, *The Role of 'Complementary Pathways' in Refugee Protection*, U.N. HIGH COMM'R FOR REFUGEES, at 2 (Nov. 2020).

367. See *supra* notes 194–200 and accompanying text (noting that restrictive measures adopted in the asylum context create conditions that favor violence at the border); Bier Testimony, *supra* note 175, at 12 (border and immigration restrictions benefit cartels).

368. See *supra* notes 176–81 and accompanying text (explaining the lack of impact of exclusionary measures on the number of asylum seekers arriving at the southern border of the United States).

369. See *supra* notes 271–75 and accompanying text (highlighting elements of the U.S. immigration system that have led to a pervasive erosion of trust among asylum seekers and emphasizing the necessity for a more predictable and humane approach); see also O'NIONS, *supra* note 345, 4–5 (noting that, in Europe, restrictive policies and the depiction of immigration as a threat has closed off legal routes and has thereby fostered greater levels of irregular migration).

370. See, e.g., *Addressing the Root Causes of Migration in the Western Hemisphere*, COUNCIL ON FOREIGN RELATIONS (June 26, 2023), <https://www.cfr.org/event/addressing-root-causes-migration-western-hemisphere> [<https://perma.cc/8U36-CVYD>] (discussing the key drivers of migration and urging policies that recognize those drivers); Sonia Nazario, Opinion, *How the Most Dangerous Place on Earth Got Safer*, N.Y. TIMES (Aug. 11, 2016), <https://www.nytimes.com/2016/08/14/opinion/sunday/how-the-most-dangerous-place-on-earth-got-a-little-bit-safer.html> [<https://perma.cc/5EYF-74PL>] (explaining that the reduction of violence in Honduras, resulting from U.S.-funded programs, has strengthened the community and reduced migration).

and economic investments could be made to address those issues on a priority basis. In fact, the change in approach proposed in this Article would align the U.S. asylum system more closely with foreign policy agendas.³⁷¹ For example, under the new approach, the United States would not respond to increased refugee flows from Venezuela with measures to block asylum claims, even as the United States simultaneously critiques the human rights situation that results in flight from Venezuela. A more generous asylum policy would bring together foreign policy and asylum law to heighten pressure consistently in favor of democracy and human rights.

Fundamentally, effective policy requires more than commitment to the same mistakes and to ignoring the inevitability of large-scale arrivals.³⁷² By accepting that large-scale refugee flows will continue in the foreseeable future, rather than repeatedly seeking but failing to halt them, preparations can be made for the reception of asylum seekers in large numbers in the normal course of government activity.

Finally, this revised approach would also allow for U.S. leadership on asylum issues and create an opportunity for a meaningful collaborative system for addressing asylum needs internationally. Such international collaboration has long been sought by the United Nations, countries around the world, and the United States.³⁷³ By abandoning

371. Currently, U.S. foreign policy regularly condemns the human rights situations in countries in the Americas, including Central America, even while granting asylum at low rates for persons fleeing those situations. *See, e.g., Venezuela: Overview of U.S. Sanctions*, CONG. RSCH. SERV., *supra* note 265 (discussing historical terrorism, anti-democracy, human rights violations, and corruption-related sanctions placed on Venezuela by the United States); Press Release, Antony J. Blinken, Secretary of State, Announcing Sanctions on the Ortega Regime in Response to Arbitrary Detentions and Other Undemocratic Moves, U.S. DEP'T OF STATE (June 9, 2021), <https://www.state.gov/announcing-sanctions-on-the-ortega-regime-in-response-to-arbitrary-detentions-and-other-undemocratic-moves/> [<https://perma.cc/J6JM-N8P9>] (describing U.S. sanctions imposed on members of the Ortega regime in Nicaragua due to the country's failure to implement electoral reforms); Rami Ayyub, *U.S. Imposes Sanctions on MS-13 Gang Members in Nicaragua, Honduras*, REUTERS (Feb. 8, 2023, 4:16 PM), <https://www.reuters.com/world/us/us-imposes-sanctions-ms-13-gang-members-nicaragua-honduras-2023-02-08/> [<https://perma.cc/7TQ2-V6GQ>] (describing sanctions against members of an international criminal gang in Central America related to drug activity and homicide).

372. *See* Restrepo, *supra* note 357 (noting that the “movement of people throughout the Americas is not going to stop,” and identifying negative impacts on policymaking due to handling the border as a “matter of perpetual crisis management” and reacting with “hysteria”); HUMAN RIGHTS FIRST, LEADING BY EXAMPLE, *supra* note 176, at 11 (also noting that the inability of the U.S. government to plan for refugee arrivals and receive them as such, instead treating asylum seeker arrivals consistently as an “emergency,” has numerous costs).

373. *See, e.g., Refugees and Migration, Functional Bureau Strategy*, U.S. DEP'T OF STATE, BUREAU OF POPULATION (Feb. 19, 2019), https://www.state.gov/wp-content/uploads/2020/03/FBS_PRM_UNCLASS.pdf [<https://perma.cc/3AQ9-96RH>]; *Global Compact on Refugees*, U.N.

exceptionality, the United States would accept, rather than reject, flows from nearby nations and would encourage other developed nations to do the same. There is some evidence that other developed countries follow the same pattern as the United States, seeing flows from their respective regions as problematic.³⁷⁴ The current patterns of exclusion by developed nations mean that, globally, asylum seekers are either forced to remain in underdeveloped nations in their home region or must travel far around the globe to seek protection in distant developed nations.³⁷⁵ Meaningful international partnership can begin to take place if each developed nation accepts refugee flows from nearby countries as such rather than trying to halt them. Such a global response, with U.S. leadership, would alleviate the current unsustainable reality in which nations in the underdeveloped world that neighbor refugee-sending countries host the greatest numbers of the world's refugees with the least resources.³⁷⁶

HIGH COMM'R FOR REFUGEES (Sept. 13, 2018) (discussing the position of the United Nations High Commissioner for Refugees that countries should share responsibility for refugees).

374. Colin Packham, *Exclusive: Australia to Accept First Central American Refugees under U.S. Deal*, REUTERS (July 25, 2017, 2:14 AM), <https://www.reuters.com/article/us-usa-trump-australia-refugees/exclusive-australia-to-accept-first-central-american-refugees-under-u-s-deal-sources-idUSKBN1AA0NO> [<https://perma.cc/LMB7-SRH4>] (documenting the agreement pursuant to which United States would accept Middle Eastern and South Asian refugees while Australia would accept Central American refugees); Francisco Javier Ullan de la Rosa, *Immigration and Immigration Policies in Spain*, in *MIGRATION IN AN ERA OF RESTRICTION AND RECESSION* 175, 194–95 (David L. Leal & Nestor P. Rodríguez eds., 2016) (noting a bias against sub-Saharan Africans in asylum and border policies in Spain); Comisión Española de Ayuda al Refugiado, *supra* note 302, at 66–67 (documenting a low refugee recognition rate—about 9 percent in 2022—for neighboring Moroccan nationals).

375. For example, the European Union has adopted policies that prevent access to asylum for many asylum seekers from Afghanistan even after the Taliban takeover in August 2021. Afghans have had to seek asylum in the Americas as a result, and many have tried to make their way to the U.S. border. *See, e.g., Two Years On: Afghans Still Lack Pathways to Safety in the E.U.*, INT'L RESCUE COMM. (May 2023), https://www.rescue.org/sites/default/files/2023-05/P%26A2305_Safe%20pathways%20for%20Afghans_Report%20Final_web.pdf [<https://perma.cc/HB6L-VE37>] (discussing attempts by European Union states to send rejected Afghan asylum applicants to the countries that they traveled through); Mica Rosenberg et al., *Hundreds of Afghans Risk 11-Country Trek to Seek Haven in United States*, REUTERS (Feb. 1, 2023, 11:43 AM), <https://www.reuters.com/world/asia-pacific/hundreds-afghans-risk-11-country-trek-seek-haven-united-states-2023-02-01/> [<https://perma.cc/976T-3WCW>] (explaining the prevalence of Afghan refugees traveling through Brazil and Latin America to seek asylum in the United States).

376. *Figures at a Glance*, U.N. HIGH COMM'R FOR REFUGEES (June 14, 2023), <https://www.unhcr.org/about-unhcr/who-we-are/figures-glance> [<https://perma.cc/XS6W-JW36>] (76 percent of displaced persons hosted in low to middle income countries); U.S. DEP'T OF STATE, HUMANITARIAN INFO. UNIT, GLOBAL PROTRACTED REFUGEE SITUATIONS (Dec. 7, 2016), <https://reliefweb.int/map/world/global-protracted-refugee-situations-7-dec-2016> [<https://perma.cc/SJ9J-PQS7>] (illustration).

CONCLUSION

The events of recent years have compelled a close examination of the U.S. asylum system. This examination has revealed undeniable weak spots. While some would rush to fill in the holes that they see in the dam to exclude asylum seekers, the weakness of the system is instead in its focus on treating asylum as rare and exceptional at the expense of bona fide refugees. The United States should construct a system that prioritizes the need to accept refugees through our asylum system, including in the context of large-scale flows from nearby nations. Such a move away from exclusionary practices would strengthen the rule of law and would be more efficient and stable, as well as more humane.

APPENDIX

For the regression analysis, TRAC data between 2001 and 2021 are pooled so that each country analyzed has one observation containing its respective grant rate, representation rate, and detention rate for each year. All countries have complete data for all twenty years. Then simple regression analysis using STATA is conducted to show the relationship between the country's grant rate and the country's distance from the United States, controlling for representation rate, detention rate, and year. Model 1 uses a categorical variable of country, where Mexico is the reference category. This Model regresses country number on grant rate controlling for country-level representation rate, detention rate, and the year of asylum decision. The countries are organized in Figure 1 according to their respective region; region is not a variable included in the regression, though. Model 2 uses a continuous measure of the distance between borders on country grant rate controlling for representation rate, detention rate, and year. Model 3 uses a continuous measure of the distance between capitals controlling for representation rate, detention rate, and year. The regression analysis results are shown in Figure 1, and the relevant summary statistics for each measure are in Table 1.

TABLE 1: SUMMARY STATISTICS OF POOLED TRAC DATA FOR YEARS
2001–2021

	Mean	SD	Min Value	Max Value
Grant Rate ¹	.4972379	.2374974	.056338	.9259259
Country Number ²			1	32
Distance Between Borders (mi) ³	3244.906	2072.801	0	6543
Distance Between Capitals (mi) ⁴	5164.625	2522.794	1135	10158
Representation Rate ⁵	.7902278	.1289399	.2844445	1
Detention Rate ⁶	.3787106	.2453219	0	.9865125
Year of Decision ⁷	2011	6.059811	2001	2021
Observations	672			

1. Grant Rate is calculated for each country by year. The value represents the total number of granted asylum applications for that year for each country, according to the Excel Spreadsheet of TRAC Data on Asylum Decisions, over the sum of granted and denied applications for that year for each country.

2. Countries are numbered according to their distance between capitals, with Cuba as 1 and Indonesia as 32.

3. Distance between borders is the distance between the closest borders of each country and the U.S. in miles. Mexico is the smallest value at 0 miles from the border.

4. Distance between capitals is the measure of the straight-line distance in miles from each country capital to Washington D.C. Havana, Cuba is the closest capital at 1,135 miles and Jakarta, Indonesia is the farthest capital from Washington D.C. at 10,158 miles.

5. Representation Rate is calculated per country per year according to the Excel Spreadsheet of TRAC Data on Asylum Decisions. It shows the total number of represented cases over the sum of represented and non-represented cases. In the Excel Spreadsheet of TRAC Data on Asylum Decisions, the numbers for representation do not perfectly align with the numbers for yearly grant rate, thus this number is just a ratio of representation per country.

6. Detention Rate is calculated per country per year according to the Excel Spreadsheet of TRAC Data on Asylum Decisions. It shows the total number of ever detained cases over the sum of cases both detained, never detained, and released. The detention numbers do not perfectly align with grant rates in the Excel Spreadsheet of TRAC Data on Asylum Decisions.

7. The Year of Decision is the year that asylum cases were decided. For this analysis, the data in the Excel Spreadsheet of TRAC Data on Asylum Decisions for all years between 2001 and 2021 is used. The data is pooled so that each country in the analysis includes one observation for each year.

FIGURE 1: REGRESSION RESULTS SHOWING MEASURES OF DISTANCE FROM THE U.S. ON COUNTRY-LEVEL GRANT RATE⁸ CONTROLLING FOR DETENTION AND REPRESENTATION RATES

	(1) Model 1: Country on Grant Rate	(2) Model 2: Distance between Borders on Grant Rate	(3) Model 3: Distance between Capitals on Grant Rate
<u>Country⁹ (Categorical, Mexico Reference Category)</u>			
<i>Central America</i>			
Guatemala	-0.0340 (0.0301)		
Honduras	-0.0136 (0.0299)		
El Salvador	-0.0527 (0.0301)		
Nicaragua	0.0336 (0.0301)		
<i>Caribbean</i>			
Cuba	0.220*** (0.0304)		
Haiti	-0.0541 (0.0305)		
<i>South America</i>			
Venezuela	0.221*** (0.0310)		
Colombia	0.120*** (0.0310)		
Ecuador	-0.00793 (0.0313)		
<i>Eastern Europe</i>			
Russia	0.427*** (0.0311)		
<i>Southern Europe</i>			
Albania	0.350*** (0.0323)		
<i>Northern Africa</i>			
Egypt	0.502*** (0.0324)		

Country (continued)*Sub Saharan Africa*

Ethiopia	0.436*** (0.0319)
Somalia	0.345*** (0.0307)
Cameroon	0.422*** (0.0312)
Guinea	0.354*** (0.0308)
Eritrea	0.448*** (0.0332)
Mauritania	0.267*** (0.0318)
Nigeria	0.189*** (0.0300)

Western Asia

Iraq	0.433*** (0.0308)
Armenia	0.338*** (0.0312)
Syria	0.367*** (0.0308)

Eastern Asia

China	0.390*** (0.0325)
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Southeastern Asia

Burma	0.435*** (0.0314)
Indonesia	0.184*** (0.0320)

Southern Asia

India	0.264*** (0.0319)
Nepal	0.400*** (0.0325)
Bangladesh	0.270*** (0.0320)
Sri Lanka	0.324*** (0.0321)
Pakistan	0.256*** (0.0315)
Iran	0.435*** (0.0308)

Measures of Distance of Country from U.S. (Continuous)

Distance between Borders (mi) ¹⁰	5.68e-05*** (3.09e-06)		
Distance between Capitals (mi) ¹¹			4.49e-05*** (2.69e-06)

Controls (Continuous)

Representation Rate ¹²	0.614*** (0.0519)	0.592*** (0.0617)	0.607*** (0.0640)
Detention Rate ¹³	0.0215 (0.0271)	-0.153*** (0.0313)	-0.0904** (0.0318)
Year of Asylum Decision ¹⁴	0.00571*** (0.000820)	0.00845*** (0.00116)	0.00744*** (0.00119)
Constant	-11.73*** (1.624)	-17.10*** (2.302)	-15.14*** (2.358)
Observations	672	672	672

Standard errors in parentheses

*** p<0.001, ** p<0.01, * p<0.05

8. Grant Rate is calculated for each country by year. The value represents the total number of granted asylum applications for that year for each country, according to the Excel Spreadsheet of TRAC Data on Asylum Decisions, over the sum of granted and denied applications for that year for each country.

9. Countries are numbered according to their distance between capitals, with Cuba as 1 and Indonesia as 32. For the regression analysis, Cuba is the reference category.

10. Distance between borders is the distance between the closest borders of each country and the U.S. in miles. Mexico is the smallest value at 0 miles from the border.

11. Distance between capitals is the measure of the straight-line distance in miles from each country capital to Washington D.C. Havana, Cuba is the closest capital at 1135 miles and Jakarta, Indonesia is the farthest capital from Washington D.C. at 10,158 miles.

12. Representation Rate is calculated per country per year according to the data in the Excel Spreadsheet of TRAC Data on Asylum Decisions. It shows the total number of represented cases over the sum of represented and non-represented cases. In the Excel Spreadsheet of TRAC Data on Asylum Decisions, the numbers for representation do not perfectly align with the numbers for yearly grant rate, thus this number is just a ratio of representation per country.

13. Detention Rate is calculated per country per year according to the data in the Excel Spreadsheet of TRAC Data on Asylum Decisions. It shows the total number of ever detained cases over the sum of cases both detained, never detained, and released. The detention numbers do not perfectly align with grant rates in the Excel Spreadsheet of TRAC Data on Asylum Decisions.

14. The Year of Decision is the year that asylum cases were decided. For this analysis, the data in the Excel Spreadsheet of TRAC Data on Asylum Decisions for all years between 2001 and 2021 is used. The data is pooled so that each country in the analysis includes one observation for each year.