

WEAPONIZING MISERY: THE 20-YEAR ATTACK ON ASYLUM

by
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The Trump Administration is attacking asylum seekers—both in words and in deeds. In Attorney General Sessions’s speech against “dirty immigration lawyers,” for whom he blames for the rampant “fraud and abuse” in the system, the Attorney General highlighted policy initiatives undertaken by the Trump Administration to deter, delay, and deny asylum applicants who are seeking protections. This Article identifies the Trump Administration’s new policies and practices and criticizes those that impose irrational or unnecessary burdens on asylum seekers.

More salient, however, is that the Trump Administration’s attack on asylum is not a break from past practices. To the contrary, for over 20 years, the preceding three administrations have imposed significant burdens on asylum seekers, because they either caved to irrational political pressures or lacked the political will to protect those who need more.

Change is needed and concrete policy reforms exist. But the precondition to reform is the recognition that many newly arriving immigrants who are poor and persecuted are ironically the unique guardians of the American values that our country holds dear. Those who gave up everything for freedom, anti-corruption principles, or a refusal to abet a repressive regime hold and transmit the core democratic principles our country needs to thrive. Through policy initiatives that have been weaponizing misery, we have been deterring and denying legitimate asylum claims. We continue to do so at the detriment of our own country’s future.

* Assistant Professor, Boston College Law School. I wish to thank those who invited me to present prior iterations of this Article at the *Lewis & Clark Law Review* 2018 Symposium: The Immigration Nexus: Law, Politics, and Constitutional Identity and The Radcliffe Institute’s Who Belongs? Global Citizenship and Gender in the 21st Century conference. Stephen Manning is the first person I heard use the term “weaponizing misery” in the context of describing immigration policies designed to discourage applicants from proceeding. Holly Cooper, Martha Jones, Stephen Manning, and Juliet Stumpf engaged me in conversations that guided my thoughts. Nick Anastasi provided invaluable research. Liz Schmitt, Connor Bottomly, Bruce Lepore, and Emily Johnson provided excellent editorial suggestions.

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INTRODUCTION

Since President Trump's election, asylum has been part of his transformation of immigration law. In his first week in office, everyone knows that one of his first executive orders was the Travel Ban.¹ But in that same week, he also issued two other executive orders relating to his wider immigration crackdown in which he targeted asylum and asylum seekers for

¹ Conor Finnegan, *A Timeline of Trump's Battle With The Courts To Keep the Travel Ban Alive*, ABC NEWS (Oct. 19, 2017), <https://abcnews.go.com/Politics/timeline-trumps-battle-courts-travel-ban-alive/story?id=50559798>.

harm.² Starting in that first week and continuing until the present, Trump and his administration has been undermining procedural protections asylum seekers have, weaponizing misery to discourage those with legitimate claims to obtain protections they are due, and assassinating the character of those who seek asylum.

President Trump has been remarkable—and I say a genius—in realizing that rhetoric and optics are as—if not more—powerful than policy changes. On this front, he has been incredibly effective in framing asylum seekers and refugees as terrorists, burdens, and frauds. In April 2018, Trump announced his plans to use military force to stop what he called—and all of his claims are patently false—an impending invasion of asylum seekers who are barbarians ready to kill and rape Americans at will.³

Quietly, Attorney General Jeff Sessions has been making dramatic policy changes. As detailed in Part II, he is using his authority to create binding law over the Board of Immigration Appeals, the national agency overseeing all immigration courts, by making it more difficult for those fleeing from Central America and those fleeing from domestic violence to qualify for asylum. In April 2018, he announced a new policy to penalize immigration judges who do not close 700 cases each year, a policy that privileges speed over due process and fairness. It should be noted that immigration judges are not “judges” in the sense that they have independence from the prosecutors that appear before them. They are merely employees of the Department of Justice and the Attorney General has disciplined and fired them for not deporting people at the rates the Administration wanted. The current threats to close 700 cases is nothing more than telling the judges that they must choose between their own livelihoods or simply becoming a cog in mass deportation machine, wrong decisions and rushed hearings be damned.

The Trump Administration is also using other administrative remedies to interfere with substantive rights. They are seeking to expand expedited removal—the authority of one immigration officer to deport someone without a lawyer, hearing, or appeal. They are using detention

² Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); Memorandum from John Kelly, Sec’y, Dep’t of Homeland Sec., to Kevin McAleenan et al., Acting Comm’r, Customs & Border Protection, Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Im\[migration-Laws-to-Serve-the-National-Interest\].pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Im[migration-Laws-to-Serve-the-National-Interest].pdf); Memorandum from John Kelly, Sec’y, Dep’t of Homeland Sec., to Kevin McAleenan et al., Acting Comm’r, Customs & Border Protection, Implementing the President’s Border Security and Immigration Enforcement Improvement Policies (Feb. 20, 2017) https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

³ Graham Lanktree, *Can Trump Deploy Military to Mexico Border? President Vows “Taking Strong Action” Again*, NEWSWEEK (Apr. 4, 2018), <https://www.newsweek.com/can-trump-deploy-military-mexico-border-president-vows-taking-strong-action-871460>.

to weaponize misery to encourage people to give up actual claims and deter others whose lives are in danger not come to the United States.

The most unconscionable example of weaponizing misery is separating over 2600 children from their parents when the parents presented themselves at the border asking for asylum. The ACLU has filed a lawsuit to end this practice. The Washington Post called this “gratuitous malice” towards children. But the DHS defends it, saying it is simply protecting children from human traffickers—a patently false claim.

All of these practices are worthy of alarm and criticism.

But the Trump Administration is doing nothing new than how prior administrations—including and especially the Obama Administration—has done. Even the most shocking separation of mothers from children is different only in degree—not in kind.

Part I interrogates the ways that our laws have made it difficult to deny relief to those seeking protection. Since 1994, the administrations of President Clinton, President Bush, and President Obama, along with Congress, have been systematically seeking ways to undermine, burden, and deter asylum seekers. In six notable ways, for over 20 years, the United States has been slowly dimming Lady Liberty’s lamp.

With exacting regulatory and statutory changes, prior administrations have been making it hard for asylum seekers to be heard by imposing arbitrary filing deadlines, limiting and often preventing them from financially supporting themselves, and imposing a heightened burden of proof such that any inconsistency—no matter what type and how reasonable—can deny an otherwise credible account of fear.

More insidiously, the United States is weaponizing administrative delays and burdens to deter even those with meritorious claims. Starting with the Obama Administration, the United States uses detention to warehouse asylum seekers. Think about that. People fleeing for their lives are met with a prison cell. For over 20 years, our government has been placing children in prisons as their parents seek asylum. And it turns out those being imprisoned with their children may be the lucky ones in light of the Trump Administration’s actions that have separated 2600 children from their parents.

The United States is also using administrative procedures to forego hearings in the hopes that a border patrol agent—untrained in law and the intricacies of international conditions—can make an unreviewable decision about a person’s safety in their native country.

In Part II, this Article critiques the Trump’s Administration characterization—or more accurately mischaracterization—of the asylum process. The reality is that assertions of widespread fraud and abuse—although a central talking point among immigration restrictionists for decades—do not bear out in fact. The process by which an individual receives asylum is embedded with tests and procedures to merit out truth-tellers from imposters. When fraudulent schemes are found, they are low in number and often arise from predatory notaries or corrupt individu-

als, not asylum seekers.⁴ In addition, if the Administration were truly concerned about ending fraud, it could enlist the assistance of asylum applicants instead of punishing them for the actions of others.

Just as important, there are extremely low levels of fraud by people seeking the protections that our country offers them from harm. By the numbers used by the Administration, 88% of all asylum seekers who first encounter an immigration officer have what is known as a credible fear, a bona fide belief that they have experienced past violence or discrimination that places their lives in danger if they return to their native country. Since nearly 90% of the people appearing at the border have a legitimate basis to remain, it is time to stop demonizing them as frauds, “illegals”, or criminals.

Part III, then focuses on two steps to reform. The first part is easy, proposing eight concrete policy changes that will permit those with legitimate claims to more easily legalize and integrate into this country. Reforms include hiring more asylum officers to more quickly grant cases, ban the one-year filing deadline, and repeal the scheme that permits any inconsistency—instead of a material one—to deny a claim for relief. In addition, the attempts to expedite deportations is shown to speed up wrongful deportations. Administrative policies that prioritize speed over accuracy are no longer tenable. Another shift is to move from containment to community integration. No asylum seeker, especially a child, should ever be detained. Instead, work permits must be restored so that people are given immediate and lasting opportunities for self-sufficiency.

The second part is less tangible but more important in that it focuses on the common thread between the malice of Trump and callous indifference of Obama and Clinton: there is a fundamental error in how we elide the value asylum seekers bring to our country. In countries where the currency is corruption and repression, those who succeed are doing so by supporting or abetting conduct that undermine our democratic institutions.

I think many Americans deceive ourselves when thinking that we would have had the courage to stand up to Nazi Germany and hide Anne Frank, but the reality is that those brave and courageous people are in the minority. But it is those few brave ones who are the ones who show up poor and persecuted at our border. They have paid the ultimate price of risking life and eschewing personal possessions for the values of freedom, anti-corruption, and not harming their neighbors. These are people who hold these values dear, and when allowed to resettle in the United States, live out the values of tolerance, freedom, and anti-corruption that our democracy needs to thrive. They are the arriving heroes and not the

⁴ See, e.g., Press Release, Immigration and Customs Enforcement, DHS investigation uncovers alleged immigration asylum fraud scheme (Jan. 20, 2016), <https://www.ice.gov/news/releases/dhs-investigation-uncovers-alleged-immigration-asylum-fraud-scheme> (discussing a Rhode Island man who was indicted by a grand jury for running a scheme to prepare false asylum applications).

threats, liars, and burdens our government makes them out to be.

It is the newly-arrived immigrant who often is the true guardian of American values. We cannot afford to continue to deny them entry when our country benefits from their infusion of ideals and values for our continued existence. For 20 years, four administrations—both Democrat and Republican—have not done so. Whether it be from malice or indifference, our government has pursued policies against asylum seekers that are irrational and have been harming the very heart of our democratic society.

On immigration policy, our country is at a critical point in our history. The best possible outcome is that the cruelty of the Trump Administration will serve as an impetus for public awareness and legislative action that ultimately restores common sense and fairness into the asylum process. This Article seeks to start that conversation with facts, proposals, and needed rhetoric to challenge the current and prior administrations' distortions, misinformation, and fear.

I. FOR 20 YEARS, PRIOR ADMINISTRATIONS HAVE UNDERMINED SIGNIFICANT PROTECTIONS TO ASYLUM SEEKERS

A. *Overview of the Refugee and Asylum Processes*

Before continuing, it is important to discuss the difference between asylum seekers and refugees. Refugees are individuals who are seeking protection from outside of the United States.⁵ Although most are identified by the United Nations or have been living in displaced-persons camps, individuals who appear at embassies and consulates can also ask for this relief. This process is in many ways more extensive than asylum. There is a vetting process that takes up to two years to perform, and the arriving refugee is usually sent to live in a specific location that partners with a religious or community organization to assist in the resettlement process.⁶

Asylum, by contrast, is a legal remedy that is available only to those who are already in the United States or who present themselves at the border.⁷ A person who is physically in the country has one year to complete a form to initiate the process, whereby she will first meet an asylum officer in a non-confrontational interview.⁸ This remedy is available to all, no matter how they entered the country, whether it be at the airport, at a port of entry, or crossing the border in the dead of night without permission. This officer—who is an attorney trained in asylum law and country

⁵ 8 U.S.C. § 1101(A)(42) (2012).

⁶ Amy Pope, *Infographic: The Screening Process for Refugee Entry into the United States*, WHITE HOUSE PRESIDENT BARACK OBAMA (Nov. 20, 2015), <https://obamawhitehouse.archives.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states>.

⁷ 8 U.S.C. § 1158(a).

⁸ 8 U.S.C. § 1225(b)(1)(B)(i).

conditions—will interview the applicant and determine if the claim should be granted or referred to an immigration judge for further proceedings.⁹ At the interview stage, there is no government attorney seeking to oppose the request. At the immigration court, a government attorney is present and exercises discretion to contest or concede the claim and any subsequent appeal.

In addition to those who newly arrive to the country, people who have lived in the United States for more than one year, either as students, workers, or without status, may also seek asylum when unexpected events place them in danger. The qualifying events include a political coup in their native country or personal circumstances that are contrary to their native country's government policy, such as birth of a child or religious conversion.¹⁰ Those with preexisting residence or status are not subjected to automatic detention. Rather, they usually start with the asylum interview and have the right to additional court proceedings and appeals if needed.¹¹

The Trump Administration is focusing its first efforts on how people at the border are processed when they express a fear of returning to their country. This population includes both the people arriving at an airport with a student or tourist visa and the people crossing the border without authorization that either voluntarily surrender or are apprehended.

The asylum seeker has usually arrived from an arduous journey, often fleeing immediate persecution. Prior to 1996, this person was permitted to physically enter the United States and receive a hearing before an immigration judge to evaluate the merits of his or her claim.¹² After 1996, as will be discussed, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").¹³ IIRIRA, which per-

⁹ 8 U.S.C. § 1225(b)(1)(B)(ii).

¹⁰ 8 U.S.C. §1158(a)(2)(D) (allowing consideration for asylum upon "changed circumstances which materially affect the applicant's eligibility for asylum"); 8 C.F.R. § 208.4(a)(2)(B)(ii)(4) (2017); *see, e.g.,* *Taslimi v. Holder*, 590 F.3d 981, 987 (9th Cir. 2010) (holding religious conversion in the United States was a change in circumstances permitting consideration of an asylum claim); *Tuwainikai v. Holder*, 329 Fed. App'x 79, 82–83 (9th Cir. 2009) (holding a coup overthrowing asylum seeker's political party followed by threats of violence to his family constitutes a change in circumstances).

¹¹ There are criticisms over immigration judges' ability to be impartial based on the lack of political independence they have from the Attorney General and their lack of employment protection. Their title is one of judge, but they are in fact employed as attorneys and subjected to discipline by the Attorney General, including instances arising from political disagreements with the Administration's removal priorities. *See* Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 332–36 (2014) (discussing structural problems and political pressures exerted on immigration judges).

¹² *American Exile: Rapid Deportations that Bypass the Courtroom*, ACLU 3 (Dec. 2014), https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf.

¹³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended at 8 U.S.C.

mits a border patrol officer to conduct the first screening to determine if the person has a fear of returning or can legally be turned away without any hearing or access to counsel.

The actual number of asylum seekers and refugees is relatively small. In 2016, 120,000 refugees were admitted to the United States and 37,000 asylees (those who have been granted asylum).¹⁴ Of the asylum seekers, half were granted status when they were before an asylum officer. The other half received it during the court and appeal process.¹⁵ Those who were granted asylum account for 3% of all immigrants who received any form of legal status and, when refugees are added, the total rises to 13% of all who received legal status.¹⁶

Those seeking asylum are in fact small numbers, both in terms of the aggregate totals and the percentage of legal immigrants and new Americans. Their small relative population makes the systemic campaign against them all the more puzzling.

B. Five Current Impediments to a Rational Asylum Process

There are five impediments to a rational asylum process that originated in other administrations and are now being seized upon by the Trump Administration.

First, beginning in 1980, those who were seeking asylum in the United States were given a right to work while their cases were pending.¹⁷ Starting in 1995, Attorney General Janet Reno started erecting barriers for asylum seekers to support themselves through work.¹⁸ This is not a minor impediment. If people cannot legally work, they must choose between finding charitable handouts, working without authorization, or abandoning their bona fide claim for protection. When they have children to feed, those choices become starker.

Responding to charges of fraud, in 1995, President Clinton's Administration changed regulations so that now all applicants face a minimum delay of six months before receiving a means to lawfully support themselves, and many are denied an ability to work during a process that can

§§ 1101–1363a (2012)).

¹⁴ U.S. DEP'T OF HOMELAND SECURITY, 2016 YEARBOOK OF IMMIGRATION STATISTICS tbl.16 (2017), <https://www.dhs.gov/immigration-statistics/yearbook/2016/table16>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Lori A. Nessel, *Deliberate Destitution as Deterrent: Withholding the Right to Work and Undermining Asylum Protection*, 52 SAN DIEGO L. REV. 313, 319–20 (2015); former 8 C.F.R. § 109.1(b)(2) (1986). Additionally, a 1987 class action lawsuit compelled all eligible asylum seekers to receive employment while their cases were pending. Nessel, *supra* at 319–320.

¹⁸ *The 180-Day Asylum EAD Clock Notice*, Executive Office for Immigration Review, (Dec. 1, 2013) https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum_Clock_Joint_Notice.pdf.

take years to resolve.¹⁹

Second, under President Clinton, asylum seekers were systematically disadvantaged by arbitrary rules favoring administrative efficiency over accuracy. In the “tough on crime” era, Congress also enacted IIRIRA to be tough on immigration.²⁰ But the policies were not considered solutions to existing problems. IIRIRA was the result of political calculations that cemented the image of Democrats not being soft on immigration and won President Clinton reelection.²¹ But the law’s consequences were rules that were often arbitrary and had unintended consequences that reached asylum seekers.

Of note, this law created a one-year deadline for asylum seekers to apply.²² Opposed by the United Nations and the Acting Deputy Attorney General, the rule resulted in denying protections to those who were (and are) genuinely in danger based on random procedural rules.²³

Third, again starting with the Clinton Administration, IIRIRA introduced “expedited removal” procedures whereby an asylum seeker can be denied a hearing in favor of a border patrol agent making the first determination of whether a claim is viable.²⁴ If a claim is viable, a border patrol agent must refer the asylum seeker for a credible fear interview with an asylum officer (who is a lawyer, trained in asylum law, and versed in country conditions).²⁵ If this second hurdle is cleared, the asylum seeker will finally get a hearing before an immigration judge to evaluate whether the asylum claim warrants protection. The additional hurdles were designed to deny legitimate claims rather than ferret out fraudulent ones.

President Obama used expedited removal with ruthless efficiency, resulting in 76% of all deportations from 2010 to 2016 being made without hearings.²⁶ That is a lot of people who were deported and denied sta-

¹⁹ *See id.*

²⁰ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. §§ 1101-1363a (2012)).

²¹ Dara Lind, *The Disastrous, Forgotten 1996 Law that Created Today’s Immigration Problem*, VOX (Apr. 28, 2016), <http://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration>.

²² 8 U.S.C. § 1158(a)(2)(b) (2012).

²³ 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, 696 (2008).

²⁴ 8 U.S.C. § 1228.

²⁵ *Id.* § 1225.

²⁶ *See* BRYAN BAKER, U.S. DEP’T. OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2016, at 8 tbl.6 (2017), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf. From 2010 to 2016, 38.8% of all removals were from expedited removals and 36.7% were from reinstatement of removal procedures. *Id.* The remaining 24.5% include regular removal proceedings and final administrative removal orders, in which a single immigration officer finds that a non-citizen has a prior conviction that is an aggravated felony. *Id.*

tus without hearings. Before IIRIRA, in 1980, 18,013 people were deported and, in 1990, 30,039 people.²⁷

After IIRIRA, those numbers exploded. In 1997—IIRIRA's first year—114,432 were deported and by 2013, the deportations peaked at 433,034, before “dropping” to 340,056 in 2016.²⁸ From 1996 to 2016, 5,612,412 people were ordered deported, which averages to 280,607 people each year.²⁹ Extrapolating the 76% number to that population, over the past 20 years, 4,238,374 people were ordered deported without a hearing, judge, or appeal.³⁰

This statistic should be alarming, especially when coupled with recent reporting, whereby the border patrol officers made numerous errors when denying asylum applicants' claims. Some interviews were in Spanish without the officer being fluent; a claim was denied because the officer—who was not a lawyer or trained in asylum law—did not believe the country Uzbekistan existed; other reported claims were met with skepticism when a supervising officer did not understand why some Chinese Christians could not name their church, not knowing people often worship at home because there are few churches in China.³¹

President Trump has doubled-down on this flawed system, and as represented in Attorney General Sessions's recent actions and remarks, discussed below, wants to increase the use of expedited removals to replace hearings altogether.

Fourth, under President Bush, Congress passed the REAL ID Act, a law to make lies—no matter how small or how reasonable—a basis to deny otherwise valid claims for relief.³² The Ninth Circuit had developed a legal standard by which a lie from an asylum applicant was evaluated in context. If a person gave a false name or used a false passport at an airport, but did so because persecution from a repressive government led to distrust of the U.S. border official, that lie could not defeat otherwise consistent and credible testimony detailing the person's past persecution. Only lies that went to the “heart of the asylum applicant's claim” could be used to find someone not credible.³³

²⁷ U.S. DEP'T OF HOMELAND SECURITY, 2016 YEARBOOK OF IMMIGRATION STATISTICS tbl.39 (2017), <https://www.dhs.gov/immigration-statistics/yearbook/2016/table39>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM'N OF INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 27, 32 (Aug 2, 2016), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>; see notes *infra* 66–76.

³² REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005); Scott Rempell, *Gauging Credibility in Immigration Proceedings: Immaterial Inconsistencies, Demeanor, and the Rule of Reason*, 25 GEO. IMMIGR. L.J. 377, 378 (2011).

³³ *Shrestha v. Holder*, 590 F.3d 1034, 1043 (9th Cir. 2010) (“The REAL ID Act implemented an important substantive change concerning the kinds of inconsistencies that may give rise to an adverse credibility determination.

In 2005, Congress enacted a law that overruled the Ninth Circuit's standard and permitted a factfinder to rely on any lie, omission, and inconsistency—no matter how small or its context—to deny relief.³⁴ Although some federal courts have scaled back the REAL ID's scope,³⁵ this provision is an unreasonable barrier that denies legitimate claims.

It is unrealistic to evaluate all lies, omissions, and inconsistencies as the same. Indeed, Attorney General Alberto Gonzales and Attorney General Jeff Sessions have lied to Congress while being in the office of the Attorney General. Attorney General Gonzales was mired in a scandal in which he fired eight U.S. Attorneys after initially denying knowledge of their firings.³⁶ Attorney General Jeff Sessions “angrily deni[ed] lying to Congress” when he “forgot that two aides told him about their meetings with Russian officials.”³⁷

It is telling that when questions of their own veracity were raised, both men asked for Congress to consider the context of their statements when evaluating whether their own omissions and inaccurate statements were lies, damning ones, or unintentional misstatements.

The instincts of the Attorneys General to contextualize a lie are quite sound. In a concurring opinion denying a petition for rehearing en banc, former Judge Alex Kozinski wrote a very insightful opinion about the nature of lies and their centrality to the human condition.³⁸ In everyday life, every one—even the most upstanding of us—tell lies much more often than we care to admit. But as observed by Judge Kozinski, among the reasons for telling lies, deceptions can serve important and legitimate purposes relating to privacy, safety, and the benefit of others:

We lie to protect our privacy (“No, I don’t live around here”); to avoid hurt feelings (“Friday is my study night”); to make others feel better (“Gee you’ve gotten skinny”); to avoid recriminations (“I only lost \$10 at poker”); to prevent grief (“The doc says you’re getting better”); to maintain domestic tranquility (“She’s just a friend”); to avoid social stigma (“I just haven’t met the right woman”); for career advancement (“I’m sooo lucky to have a smart boss like you”);

Inconsistencies no longer need to ‘go to the heart’ of the petitioner’s claim to form the basis of an adverse credibility determination. 8 U.S.C § 1158(b)(1)(B)(iii). As a threshold matter, an IJ may consider any inconsistency.”).

³⁴ 8 U.S.C. § 1158(b)(1)(B)(iii) (2012).

³⁵ *Shrestha*, 590 F.3d at 1042 (9th Cir. 2010) (“The REAL ID Act did not strip us of our ability to rely on the institutional tools that we have developed, such as the requirement that an agency provide specific and cogent reasons supporting an adverse credibility determination, to aid our review.”).

³⁶ See *Gonzales Explanation of Firings Called ‘Sorry Excuse’*, CNN (Mar. 14, 2007), <http://www.cnn.com/2007/POLITICS/03/13/fired.attorneys/>.

³⁷ Joseph Tanfani & Cathleen Decker, *Atty. Gen. Jeff Sessions Angrily Denies Lying to Congress About Trump Campaign Russia Contacts*, L.A. TIMES (Nov. 14, 2017), <http://www.latimes.com/nation/la-na-pol-sessions-russia-hearing-20171114-story.html>.

³⁸ *United States v. Alvarez*, 638 F.3d 666, 673 (9th Cir. 2011) (Kozinski, J., concurring with denial of rehearing en banc).

to avoid being lonely (“I love opera”); to eliminate a rival (“He has a boyfriend”); to achieve an objective (“But I love you so much”); to defeat an objective (“I’m allergic to latex”); to make an exit (“It’s not you, it’s me”); to delay the inevitable (“The check is in the mail”); to communicate displeasure (“There’s nothing wrong”); to get someone off your back (“I’ll call you about lunch”); to escape a nudnik (“My mother’s on the other line”); to namedrop (“We go way back”); to set up a surprise party (“I need help moving the piano”); to buy time (“I’m on my way”); to keep up appearances (“We’re not talking divorce”); to avoid taking out the trash (“My back hurts”); to duck an obligation (“I’ve got a headache”); to maintain a public image (“I go to church every Sunday”); to make a point (“Ich bin ein Berliner”); to save face (“I had too much to drink”); to humor (“Correct as usual, King Friday”); to avoid embarrassment (“That wasn’t me”); to curry favor (“I’ve read all your books”); to get a clerkship (“You’re the greatest living jurist”); to save a dollar (“I gave at the office”); or to maintain innocence (“There are eight tiny reindeer on the rooftop”).³⁹

Our deeds are no less pure. The cosmetics industry generates 40 billion dollars each year and plastic surgery, artificial turf, and wood veneer paneling shape the world around us.⁴⁰

As related to the law, in other federal contexts, courts use the term “materiality” to distinguish lies and falsehoods from intended, damaging deceptions. In the very decision in which Judge Kozinski concurred with the result, the majority of judges in the Ninth Circuit had decided not to reconsider a decision that gave First Amendment protections to those falsely claiming military honors under the Stolen Valor Act.⁴¹ The Supreme Court affirmed this result, holding that “[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. . . . But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition.”⁴²

Outside of the First Amendment, not all lies evince a lack of moral turpitude. The Eighth Circuit observed that there may be legitimate reasons for a person to not tell the truth to an officer at a traffic stop.⁴³ The Tenth Circuit has clarified that not all false statements to government officials will be morally turpitudinous conduct, only those that include fraud as an element, require the statements to be material, and in fact

³⁹ *Id.* at 674–75 (Kozinski, J., concurring with denial of rehearing en banc).

⁴⁰ *Id.* at 675.

⁴¹ *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010).

⁴² *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

⁴³ *Bobadilla v. Holder*, 679 F.3d 1052, 1058 (8th Cir. 2012).

impair a government function.⁴⁴

These cases understand that not all liars have character flaws and that not all lies can be treated the same. It is obviously ironic for our nation's top lawyers to be wanting leniency for their own misstatements while continuing to hold those fleeing for their lives to a different, higher, and unforgiving standard. More than irony, the rigid condemnation of lies to disqualify someone from asylum misunderstands those who have lived under oppression and repression. For those fleeing persecution, especially from their own government, lies and deceptions have most likely led to their survival. During WWII, those who hid Jewish people from Nazi officers are not condemned for lying to their government. It truly is time to drop the overzealous righteous adherence to truth and reform asylum adjudications to mirror the complexities arising in life.

Fifth, under President Clinton, detention was introduced as a weapon of deterrence, which President Obama sharpened to levels never seen in the Western world. In the 1980s, 30 immigrants a day were in detention.⁴⁵ By 1998, because of IIRIRA, detention targeted arriving asylum seekers and the total number of detained non-citizens increased to 16,000.⁴⁶ Today, it stands at more than 400,000 non-citizens are detained each day for non-criminal conduct.⁴⁷ That cost to tax payers starts at \$2 billion each year and the private prisons that house them are profiting handsomely.

In 2014, when tens of thousands of asylum seekers from Central America showed up at the border, President Obama elected to use detention to deter them. President Obama held interviews telling asylum seekers to not come to the United States.⁴⁸ Vice President Biden went to Central American countries and coordinated with the media to have newspaper headlines read: "The U.S. will not give asylum to migrant children," a statement that is in violation of U.S. law.⁴⁹ Mothers and children were locked up in specially-built detention centers, a deliberate pol-

⁴⁴ *Flores-Molina v. Sessions*, 850 F.3d 1150, 1160 (10th Cir. 2017) (holding Colorado's statute criminalizing false statements to city officials is not a CIMT because it has no fraud element and no materiality element).

⁴⁵ Immigration Detention Map & Statistics, CIVIC, <http://www.endisolation.org/resources/immigration-detention/>.

⁴⁶ *Id.*

⁴⁷ Hanna Kozlowska, *The American Private Prison Industry Has Scored Another Big Win with the US Government*, QUARTZ (Dec. 1, 2016), <https://qz.com/850810/the-department-of-homeland-security-wants-to-keep-using-private-prisons-for-immigration-detention/>; Heather Long, *Private Prison Stocks Up 100% Since Trump's Win*, CNN (Feb. 24, 2017), <http://money.cnn.com/2017/02/24/investing/private-prison-stocks-soar-trump/>.

⁴⁸ Devin Dwyer, *Obama Warns Central Americans "Do Not Send Your Children To The Borders"*, ABC NEWS (Jun 26, 2014), <http://abcnews.go.com/Politics/obama-warns-central-americans-send-children-borders/story?id=24320063>.

⁴⁹ Bob Ortega, *Media in Central America to Migrants: Don't Go to U.S.*, THE REPUBLIC (Jun. 20, 2014), <https://www.azcentral.com/story/news/politics/immigration/2014/06/21/media-central-america-migrants-go-us/11205479/>.

icy decision favored over their release into the community.⁵⁰ The absurdity of locking up children for non-criminal matters was highlighted when the Obama Administration passed out crayons, installed a soccer field next to a 2,400 bed-detention center, and told a judge that its incarceration of children would turn the prison into a child care facility.⁵¹ Judges in California and Texas rejected the child care license requests.⁵²

In 2015, a federal judge ordered the Obama Administration to release tens of thousands of detained mothers and children who had been detained because they were housed in “deplorable conditions.”⁵³ The detention facilities were not “safe and sanitary.”⁵⁴

As observed by Dora Schriro, a DHS official who served in the Obama Administration, for over 20 years, the federal government “resist[ed] compliance” with the federal class action that “established binding standards for the detention and treatment of immigrant children in government custody.”⁵⁵ Indeed, it was President Obama who developed and successfully defended in court a policy for children—including toddlers as young as three years old—to represent themselves without a court-appointed lawyer.⁵⁶

II. WHAT THE TRUMP ADMINISTRATION IS GETTING WRONG

The day after his Travel Ban, in January 2017, President Trump issued two executive orders seeking to increase funding and efforts at immigration enforcement.⁵⁷ Buried within these documents were significant policy changes to asylum law. In October 2017, Attorney General Jeffer-

⁵⁰ Dora Schriro, *Weeping in the Playtime of Others: The Obama Administration's Failed Reform of ICE Family Detention Practices*, 5 JOURNAL ON MIGRATION AND HUMAN SECURITY 452, 455 (2017).

⁵¹ John Burnett, *Texas Judge Refuses to License Child Care Facility in Immigrant Detention Center*, NPR (May 6, 2016), <https://www.npr.org/sections/thetwo-way/2016/05/06/476976133/texas-judge-refuses-to-license-childcare-facility-in-immigrant-detention-center>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Schriro, *supra* note 50, at 471.

⁵⁶ Maura Dolan, *Children Aren't Entitled to Government Lawyers in Deportation Hearings, Court Rules*, L.A. TIMES (Jan. 29, 2018), <http://www.latimes.com/local/lanow/la-me-ln-immigrant-children-9th-circuit-20180129-story.html>; Jerry Markon, *Can a 3-Year Old Represent Herself in Immigration Court? This Judge Thinks So*, WASH. POST https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html?utm_term=.c6966ff05a56.

⁵⁷ Exec. Order No. 13767 of Jan. 25, 2017, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 30, 2017) (to be codified in 3 C.F.R. (2018)); Exec. Order No. 13768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (Jan. 30, 2017) (to be codified in 3 C.F.R. (2018)); Memorandum from John Kelly, Sec'y of Homeland Sec. (Feb. 20, 2017) (implementing these Executive Orders); *see supra* note 1 (discussing Travel Ban).

son Sessions made a remarkable speech in which he lodged scathing criticisms against asylum seekers, the attorneys who represent them, and the immigration laws that protect them.⁵⁸ The Attorney General asserted that asylum seekers are filing fraudulent claims without cost, that attorneys are engaged in routine fraud, and when hearings are offered, that lawyers prolong and abuse the process while asylum seekers avoid showing up.⁵⁹

Looking at both the Administration's policy and the justifications is important, because with the Trump Administration, the optics of how an issue is framed has often been as, if not more, damaging than the policy.

Instead of embracing the reality that there is an increase in people eligible for asylum, that our laws entitle them to protection, and that in fact asylum seekers contribute to the country when permitted to stay, the Trump Administration is taking a very different tack. Its objective is to delay the process, incentivize people to give up and leave, and deter people from coming. It is doing so with distortions, lies, and cruelty.

A. The Reality Is that Nearly Ninety Percent of People Seeking Asylum Are Eligible to Receive It

The first assault on asylum is the express claim that asylum and those that seek it pose a problem to preventing the expeditious removal of non-citizens. The Executive Order on Border Security and Immigration Enforcement Improvements, signed on January 25, 2017, began the assault on asylum in Section 11, promising to "end the abuse of parole and asylum provisions currently used to prevent the lawful removal of removable aliens."⁶⁰ It then claims measures must be taken to ensure that asylum is not "illegally exploited to prevent the removal of otherwise removable aliens."⁶¹

This very framing obscures the question of why people are seeking asylum. Those who are fleeing persecution—who have been physically harmed, or had their life, liberty, or safety threatened by government officials or people the government cannot apprehend—have left all that they have known (their families, communities, opportunities, and livelihood) to avoid these imminent threats.

The Trump Administration's framing presumes that every non-citizen has no claim to be in this country and as a normative matter should be deported immediately, without a hearing, and certainly without receiving protection. The presumption is that all non-citizens must be deported.

The proper presumption, however, is to ensure that all arriving asy-

⁵⁸ Jeff Sessions, U.S. Attorney Gen., Delivers Remarks to the Executive Office for Immigration Review (Oct. 12, 2017).

⁵⁹ *Id.*

⁶⁰ See Exec. Order No. 13767, 82 Fed. Reg. at 8795.

⁶¹ *Id.* at 8796.

lum seekers are given an opportunity to request, and when entitled, to receive relief. Asylum seekers are not “illegally exploiting” the system.⁶²

Under current law, if a non-citizen is stopped by ICE or the border patrol and claims fear of “persecution,” the person is referred to an asylum officer who conducts a cursory credible-fear interview to determine if the person’s life is in danger in their home country. “Persecution” is a legal term that means that a person’s life is in danger on the basis of race, religion, nationality, political opinion, or membership in a particular social group.⁶³ In this initial interview, no attorneys are present, no physical evidence is examined, and no legal arguments are made. If the asylum officer finds that this person is likely telling the truth and that her life is likely in danger for legally cognizable reasons, the applicant is referred to an immigration judge for a more extensive hearing.

Despite this flimsy procedural setting, in September 2016, 88% of asylum seekers were found to have a credible fear.⁶⁴ This finding would permit them to be referred to immigration court, where they would have had an opportunity to locate an attorney and present evidence for the legal and factual bases for their claim at a hearing.⁶⁵ The high number of asylum seekers initially found to have credible fear is not in dispute; the Attorney General relied upon it when giving his October 2017 speech.

What precisely then is in need of reform? According to Attorney General Sessions and others in the Trump Administration, the problem is a matter of numbers. Under the existing law, the nearly 90% referral rate resulted in the admission of 73,000 asylum seekers in 2016.⁶⁶ Additionally, the current backlog for all applicants in immigration courts is an average delay of 708 days, with some cities having more than a five-year delay.⁶⁷ The resulting situation then permits asylum seekers to live in the country while waiting for their hearing to be scheduled.

Attorney General Sessions argued that the only explanation for the growing numbers of asylum seekers is that they are all bringing fraudulent claims.⁶⁸

In my experience screening potential clients, presenting claims, and reviewing appeals, those numbers actually suggest that the vast majority

⁶² Kelly Cohen, *Jeff Sessions: Asylum System Is ‘Subject to Rampant Abuse and Fraud’*, WASH. EXAMINER (Oct. 12, 2017), <http://www.washingtonexaminer.com/jeff-sessions-asylum-system-is-subject-to-rampant-abuse-and-fraud/article/2637279>.

⁶³ INA § 208.

⁶⁴ Jeff Sessions, *supra* note 58.

⁶⁵ DHS Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 1208.14 (2017).

⁶⁶ Jeff Sessions, *supra* note 58.

⁶⁷ *Immigration Court Backlog Tool*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/ (select “Average Days:” under “What to graph:” and under “What to tabulate:”); *Despite Hiring, Immigration Court Backlog and Wait Times Climb*, TRAC IMMIGRATION, <http://trac.syr.edu/immigration/reports/468/>.

⁶⁸ Jeff Sessions, *supra* note 58.

of applicants have a legitimate claim to relief. Bearing this out is the fact that 88% asylum seekers pass the first screening, which shows they are telling the truth that their lives are in danger.⁶⁹

The increase in asylum seekers then is from the increase in war and human rights abuses.⁷⁰ In what has been called a global crisis, 65 million people have been displaced from their home countries.⁷¹ The last time we saw such high numbers of displaced persons was WWII.⁷²

The Trump Administration's attempt to forego existing legal protections that are owed to asylum seekers is what is breaking the law.

The United States had been a beacon of hope and has a number of legal protections and obligations for those fleeing from harm. This executive order would be akin to FDR dismissing people fleeing Nazi Germany as an impediment to ridding the country of a large numbers of arriving foreigners.

The tragic footnote is that FDR did precisely that. Four months before the start of World War II, in May 1939, 937 passengers from Germany, the majority of whom were Jewish people fleeing Nazi Germany, were on the *St. Louis*, a transatlantic ship seeking to dock in Cuba and eventually enter the United States.⁷³ The Cuban authorities refused the ship's entry, reflecting the U.S. population's resentment toward Jewish immigrants, arising from xenophobia and anti-Semitism.⁷⁴ Despite the sympathetic publicity towards the passengers in the U.S. press, despite the existing opposition the American people had to Hitler's regime, and despite personal pleas from some passengers for entry as they passed Florida, FDR did not extend protection to the Jewish refugees on the boat. In 1939, 83% of Americans favored our nation's restrictive immigration policy that did not protect refugees and no outcry was made to protect the *St. Louis* passengers.⁷⁵

The boat returned to Europe and four nations took in the refugees.⁷⁶ Those who landed in Great Britain survived the War; 254 others who were resettled elsewhere died in the Holocaust when the Nazis invaded the countries that had given them refuge.⁷⁷

From this tragedy, the United Nations created the 1951 Convention Relating to Status of Refugees, an international agreement recognizing

⁶⁹ Jeff Sessions, *supra* note 58.

⁷⁰ *Figures at a Glance*, UNHCR, <http://www.unhcr.org/en-us/figures-at-a-glance.html>.

⁷¹ *Refugees at Highest Ever Level, Reaching 65M, says UN*, BBC (June 20, 2016), <http://www.bbc.com/news/world-36573082>.

⁷² *Id.*

⁷³ *Voyage of the St. Louis*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

that the international community will share in extending protections to refugees.⁷⁸ This commitment arose to prevent instances of the *St. Louis* from happening again.⁷⁹ In 1965, President Lyndon Johnson signed the 1965 Immigration and Nationality Act,⁸⁰ which also abolished the country-specific quotas that had created an obstacle to admitting the *St. Louis* passengers.⁸¹

In 1980, Congress codified the international protections and expanded upon them in the Refugee Act of 1980.⁸² Up until Germany's recent eclipse of the United States, from 1980 to 2015, the United States had taken in more asylum seekers and refugees than any other country.⁸³ In 2015, Germany took the top spot with 1,000,000 refugees.⁸⁴ The United States admitted 70,000 refugees and an additional 25,971 asylum seekers that same year.⁸⁵

In addition, out of all of the means by which the United States confers lawful permanent residence to different individuals, asylum seekers and refugees account for 13% of the population of new lawful permanent residents, those with family ties to citizens and residents account for 67%, and employment-based immigration is approximately 11% of lawful permanent residents.⁸⁶

The Trump Administration, however, frames the issue as one where-

⁷⁸ See *The 1951 Refugee Convention*, U.N. REFUGEE AGENCY, <http://www.unhcr.org/1951-refugee-convention.html>.

⁷⁹ Bianca Hall, *Echoes of the Past as We Turn Boats Back*, SYDNEY MORNING HERALD (Jan. 19, 2014), <http://www.smh.com.au/federal-politics/political-opinion/echoes-of-the-past-as-we-turn-boats-back-20140118-311f4.html>; Kristine Phillips, *What the U.S. Learned from Turning Away Refugees Who Fled the Nazis*, WASH. POST (Jan. 29, 2017), <http://www.unhcr.org/1951-refugee-convention.html>.

⁸⁰ Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at scattered sections of 8 U.S.C. §§ 1101–1351 (2012)).

⁸¹ Tom Gjelten, *The Immigration Act that Inadvertently Changed America*, THE ATLANTIC (Oct. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/10/immigration-act-1965/408409/>.

⁸² Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 103 (codified at 8 U.S.C. § 1158(a)) (adding § 208(a) to the INA); see also David D. Jividen, *Rediscovering the Burden of Proof for Asylum and the Withholding of Deportation*, 54 U. CIN. L. REV. 943 (1986).

⁸³ Gaby Galvin, *10 Countries that Take in the Most Immigrants*, US NEWS (Sept. 25, 2015), <https://www.usnews.com/news/slideshows/10-countries-that-take-the-most-immigrants?>.

⁸⁴ Aamna Mohdin, *How Germany Took in One Million Refugees but Dodged a Populist Uprising*, QUARTZ (Sept. 22, 2017), <https://qz.com/1076820/german-election-how-angela-merkel-took-in-one-million-refugees-and-avoided-a-populist-upset/>.

⁸⁵ Daniel Marans & Alissa Scheller, *Here's the Number of Refugees the U.S. Would Need to Admit to Match Germany's Intake*, HUFFINGTON POST (Sept. 27, 2017), https://www.huffingtonpost.com/entry/refugees-us-germany-comparison_us_55f73b32e4b0c2077efbc52e; Galvin, *supra* note 83, at slide 12.

⁸⁶ These numbers are based on 2016 statistics compiled by the U.S. government. See OFFICE OF IMMIG. STATISTICS, DEP'T OF HOMELAND SEC., U.S. LAWFUL PERMANENT RESIDENTS: 2016, at tbl. 2 (2017), https://www.dhs.gov/sites/default/files/publications/Lawful_Permanent_Residents_2016.pdf.

by asylum seekers do not belong and are taking advantage of our country's generosity. The reality is that our nation has a policy of protecting asylum seekers and President Trump's presumption that asylum seekers are nefarious and burdensome harkens back to a dark chapter in our history.

B. The Trump Administration Is Eliminating Procedural and Substantive Protections for Asylum Seekers

There are two notable ways by which the Trump Administration is using administrative procedures to deny asylum applicants: eliminating procedural and substantive protections for those eligible for asylum and speeding up the process to incentivize denials.

The first means is that Attorney General Sessions has been quietly and effectively erecting legal barriers in the path of those seeking protections. The Attorney General has the legal authority to oversee the Board of Immigration Appeals—also known as the BIA or Board. The BIA currently has 16 permanent members and four temporary members who are tasked with reviewing 33,000 decisions from all 301 immigration judges (which numbered 26,473 in 2016) and the district directors of the USCIS agency (which numbered 5,637 in 2016).⁸⁷

These members—like the misnamed immigration judges—are not “judges” in the sense that they have independence from political pressures; rather they are employees of the Department of Justice.⁸⁸ Because the Attorney General also supervises the trial attorneys who argue cases before the immigration courts and Board of Immigration Appeals, many have pointed out that placing the courts and prosecutors under the same boss creates an enormous conflict of interest and taints the neutrality of the fact-finders charged with deciding who can be deported.⁸⁹

The conflict is not theoretical. Immigration judges and BIA members—as employees of the Department of Justice—are subjected to investigations and discipline based on political reasons.⁹⁰ They also have been fired for not deporting enough people: “in 2002, the board members were purged if they had viewpoints that differed from Attorney General Ashcroft’s prosecutorial agenda.”⁹¹ Within one year of the political-based

⁸⁷ Board of Immigration Appeals, <https://www.justice.gov/eoir/board-of-immigration-appeals-bios#TemporaryBoardMembers>; Ana Campoy, *US Immigration Courts Are Backwater Riper for Manipulation by Trump’s White House*, QUARTZ (Feb. 21, 2017), <https://qz.com/889607/us-immigration-courts-are-a-bureaucratic-backwater-ripe-for-manipulation-by-trumps-white-house/>; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2017 Statistics Yearbook, at Tbl. 18, R2 (Mar. 2017), <https://www.justice.gov/eoir/page/file/fysb16/download>.

⁸⁸ Campoy, *supra* note 87.

⁸⁹ *Id.*

⁹⁰ Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 337 & nn. 256–60 (2014).

⁹¹ *Id.* at 337.

firings, the denial rate of the BIA jumped from 59% to 86%.⁹²

The current Attorney General is seizing upon his authority and the agency's structural power-imbalance to disadvantage asylum seekers in two notable ways. He has been reconsidering BIA decisions that had been favorable to asylum seekers, including one that guaranteed a right to a full hearing before a judge made a decision and the other that had provided a legal basis for those fleeing domestic violence and gang violence to be eligible for protection.⁹³ Although the latter is still pending, in the former decision, Attorney General Sessions removed the procedural protection for a full and fair hearing.⁹⁴

In addition, the Attorney General announced a policy requiring the immigration judges to "close" 700 cases each year with appeals rates under 15% each year.⁹⁵ In light of this Administration's hostility towards immigrants, the aforementioned lack of job security for and independence of immigration judges, and the 2002 firings of those who did not deport people at the rates desired by the Bush Administration, this is a chilling call for immigration judges to choose between their own livelihood and providing justice to others.⁹⁶

The second way by which the Trump Administration is favoring speed over fairness is through the expansion of the expedited removal proceedings. The Trump Administration is expanding the use of expedited removals to quickly process and deny asylum seekers. In the executive order, "It is the policy of the executive branch to . . . expedite determinations of apprehended individuals' claims of eligibility to remain in the United States."⁹⁷ This has been achieved by increasing the use of the expedited removal procedure, which is plagued with errors. In 1996, Congress first created the rapid removal regime in a manner that "provid[es] comparatively fewer procedural safeguards—such as a trial attorney or an immigration judge."⁹⁸ Professor Shoba Sivaprasad Wadhia calls these "speed deportations"; Professor Jennifer Lee Koh calls them

⁹² *Id.* at 339 & nn. 273–76.

⁹³ See *Matter of E-F-H-L-*, 27 I. & N. Dec. 226, 226 (2018) (vacating *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014), which had previously found that a non-citizen must have an "opportunity to provide oral testimony and other evidence" before an IJ renders a decision in his or her case); *Matter of A-B-*, 27 I. & N. Dec. 227, 227 (2018) (referring the prior decision to himself to determine whether "a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal")

⁹⁴ *Id.*

⁹⁵ Dean DeChiaro, *Trump's Strategy to Shrink Immigration Court Backlog May Not Work*, ROLL CALL (Apr. 16, 2018), <https://www.rollcall.com/news/policy/trump-strategy-immigration-court-backlog-may-not-work>.

⁹⁶ See *supra* notes. 95–99.

⁹⁷ Exec. Order No. 13767, 82 Fed. Reg. at 8793.

⁹⁸ Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 2 (2015); see also Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 193–214 (2017) (discussing these procedures).

“removal in the shadows of immigration court.”⁹⁹

These rapid removal procedures include expedited removal, which apply to people first arriving in the country who do not have asylum claims or proof of prior residency.¹⁰⁰ Prior to 1996, someone seeking asylum would receive a hearing before an immigration judge to evaluate the merits of his or her claim. After 1996, a border patrol officer has the initial determination if someone does or does not have a reasonable fear, and if they do, then refers them to an asylum officer to conduct the credible fear interview.

These rapid removal procedures have been devastatingly efficient in effectuating mass deportations. As mentioned before, President Obama used expedited removal with ruthless efficiency, resulting in 76% of all deportations from 2010 to 2016 being made without hearings.¹⁰¹ That is a lot of people who were deported and denied status without hearings. In 1980, 18,013 people were deported; in 1990, the number climbed to 30,039 people.¹⁰² After IIRIRA, those increased to 114,342 in 1997, 433,034 in 2013, and 340,056 in 2016.¹⁰³ Extrapolating the 76% number to those who have been deported since 1996, 4,238,374 people were ordered deported without a hearing.¹⁰⁴

The consequence of rapid removals has been, as noted by the late Judge Harry Pregerson in a dissenting opinion, more than 4.2 million people have been deported “without a hearing, without a judge, without legal representation, and without the opportunity to apply for most forms of relief from removal.”¹⁰⁵

Those numbers should cause much pause. A main issue of concern is that this ruthless efficiency is coming at the expense of accuracy. There are now multiple sources that document routine and frequent mistakes that are occurring in this process. The mistakes are not surprising but rather the result of the procedure that is designed to permit a border patrol officer to exercise enormous discretion, without adequate training on relevant legal and factual issues, and without review of that decision

⁹⁹ See Koh, *supra* note 98, at 185.

¹⁰⁰ 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (2012).

¹⁰¹ See *supra* note 26. From 2010 to 2016, 38.8% of all removals were from expedited removals and 36.7% were from reinstatement of removal procedures. *Id.* The remaining 24.5% include regular removal proceedings and final administrative removal orders, in which a single immigration officer finds that a non-citizen has a prior conviction that is an aggravated felony. *Id.*

¹⁰² See *supra* note 30.

¹⁰³ See *supra* note 32.

¹⁰⁴ See *supra* note 33.

¹⁰⁵ United States v. Peralta-Sanchez, 847 F.3d 1124, 1143 (9th Cir. 2017) (Pregerson, J., dissenting), *opinion withdrawn on grant of reh'g*, 868 F.3d 852 (9th Cir. 2017), and *on reh'g*, No. 14-50393, 2017 WL 3601725 (9th Cir. Aug. 22, 2017) (citing JOHN F. SIMANSKI, DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2013 1 (2014) and *American Exile*, *supra* note 12).

by an impartial adjudicator. Among the errors that occur:

1. ICE officers who conduct interviews with non-citizens who are native Spanish speakers are not required to be fluent in the Spanish language. In a 2010 Ninth Circuit case, the majority decision took note of an ICE officer's testimony in which she explains that she conducts interviews with non-citizens about their status and rights in Spanish. "[Officer] Olson, however, is not fluent in Spanish, and her Spanish language education was limited to 'several classes' during her training with DHS's Bureau of Immigration and Customs Enforcement ('ICE')." ¹⁰⁶ When the officer testified in court and recited the advisals she provides to non-citizens, the Spanish language court interpreter "had difficulty comprehending," what the officer was saying, explaining that the alleged advisal was "nonsensical in part." ¹⁰⁷
2. CBP officers "tasked with identifying potential asylum seekers at the border are openly skeptical of asylum claims" and do not have the training to be aware of relevant country conditions before determining whether a claim of harm is potentially valid. ¹⁰⁸ In a 2016 report prepared by the U.S. Commission on International Religious Freedom, the government officials observed 400 interviews conducted at ports of entry. ¹⁰⁹ In support of its concern that the skepticism may not be based on fact, "a Border Patrol officer questioned the veracity of Chinese Christians' asylum claims because they could not name the church they attended; the official did not know that many Chinese Christians worship at home." ¹¹⁰
3. As reported in that same study, the Border Patrol Officers did not properly advise non-citizens of their rights, did not fully conduct the credible fear interview, and recorded erroneous information on the forms. "In more than half of the interviews . . . [U.S. Customs and Border Protection Officer of Field Operations] officer failed to read the required information advising the non-citizen to ask for protection without delay if s/he feared return. . . . [I]n 86.5% of the cases where a fear question was not asked, the record inaccurately indicated that it had been asked, and answered. And in 72% of the cases, asylum seekers were not allowed to review and correct the form before signing, as required." ¹¹¹

¹⁰⁶ See *United States v. Ramos*, 623 F.3d 672, 678 (9th Cir. 2010).

¹⁰⁷ *Id.*

¹⁰⁸ Press Release, U.S. Comm'n of Int'l Religious Freedom, Serious Flaws in U.S. Treatment of Asylum Seekers in Expedited Removal: Children Especially Harmed (Aug. 2, 2016), <http://www.uscirf.gov/news-room/press-releases/serious-flaws-in-us-treatment-asylum-seekers-in-expedited-removal-children>.

¹⁰⁹ CASSIDY ET. AL., *supra* note 31, at 19.

¹¹⁰ U.S. Comm'n of Int'l Religious Freedom, *supra* note 108.

¹¹¹ CASSIDY ET. AL., *supra* note 31, at 19.

4. In a July 2017 complaint filed in U.S. District Court, plaintiffs who were turned away in expedited removal procedures alleged that the border patrol officers were making active misrepresentations that “Donald Trump just signed new laws saying there is no asylum for anyone.”¹¹² Although the lawsuit focused on matters that have arisen since the start of the Trump Administration, the allegations of misconduct begin in 2016, when President Obama was in charge of this process.¹¹³
5. U.S. Citizens have erroneously, and illegally, been subjected to expedited removal. In a 2014 report, the ACLU details five specific individuals who were U.S. citizens but whom the border agents wrongfully concluded was not a citizen because s/he “does not speak English or was not born in a hospital.”¹¹⁴

The same report detailed two U.S. citizens who were illegally subjected to expedited removal because their mental impairments prevented them from providing accurate information about their status.¹¹⁵

These mistakes occur at a shockingly frequent rate. Indeed, attorney Stephen Manning, among others, was instrumental in helping develop a system for pro bono attorneys to provide legal representation to 35,000 people who had been subjected to expedited removal and detained in two different detention facilities.¹¹⁶

The mere addition of lawyers to the process dropped the rates of removal from 97% in one facility and 99% at the other.¹¹⁷ Legal representation stopped deportations for the vast majority of those subjected to expedited removal because they had been “wrongfully subjected to expedited removal proceedings or had a basis to request legal status.”¹¹⁸

The end result then is an administrative structure that is effective in deporting people as quickly as possible, without regard to—and arguably designed to maximize—errors, mistakes, and wrongful deportations.

¹¹² Complaint for Injunctive and Declaratory Relief at 1, *Al Otro Lado, Inc. v. Kelly*, No. 2:17-cv-5111, (C.D. Cal. July 12, 2017), ECF No. 1.

¹¹³ *Id.*

¹¹⁴ *American Exile*, *supra* note 12, at 75.

¹¹⁵ *Id.* at 48.

¹¹⁶ See Stephen W. Manning, *The Artesia Report*, at ch. X, <https://innovationlawlab.org/the-artesia-report/the-artesia-report/> (stating that after attorney representation began, the “pace of removals fell 80% within one month and, within two months, it had fallen 97%”).

¹¹⁷ *Immigration Policy Enforcement Conference*, MIGRATION POLICY INST. & CATHOLIC LEGAL IMMIGRATION NETWORK (Sept. 12, 2016), <https://www.c-span.org/video/?415068-102/immigration-policy-enforcement> (at minute 4:33); (explaining data and saying that “nearly universally” expedited removal orders were vacated and fewer than 0.01% of CARA represented clients were removed during the expedited removal process).

¹¹⁸ Stephen Manning & Kari Hong, *Getting it Right[ed]: Access to Counsel in Rapid Removals*, MARQ. L. REV. (forthcoming 2018).

C. The Trump Administration Is Weaponizing Misery by Using Costly, Unnecessary Civil Detention for the Improper Purpose of Deterrence

A third prong of the Trump Administration's attack on asylum seekers is to dramatically expand the use of detention centers, which interferes with their ability to present their claims and serves to deter asylum seekers. In the executive order, the Trump Administration declared that "[i]t is the policy of the executive branch to . . . detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law"¹¹⁹ In section 5 of that order, Trump directs the Secretary of Homeland Security to "immediately . . . construct, operate, or control facilities to detain aliens at or near the land border with Mexico,"¹²⁰ orders asylum officers to be reassigned to those facilities, and "ensure the detention" of all arriving non-citizens, including asylum seekers.¹²¹

The expansion of detention centers for asylum seekers is expensive and unnecessary. Under President Obama, on an annual basis, approximately \$2 billion in tax dollars was spent on immigration detention facilities, which housed an average of 40,000 non-citizens on any given day and 400,000 detainees each year.¹²² This money is spent on housing non-violent individuals who have not committed any actual crimes.

Detention is neither the most effective nor least costly means to keep track of asylum seekers. In sworn testimony, the Associate Director of ICE Enforcement and Removal Operations explained that ICE has alternative and available release mechanisms such as "bond, release on own recognizance, orders of supervision, or parole."¹²³ The existing Intensive Supervision Appearance Program ("ISAP") uses "electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants."¹²⁴ Community organizations that operate with full cooperation with ICE and without tax dollars "are also effective in assisting with court appearance rates and compliance with final removal orders."¹²⁵

¹¹⁹ Exec. Order No. 13767, 82 Fed. Reg. 8793, 8793.

¹²⁰ *Id.* at 8794.

¹²¹ *Id.* at 8795.

¹²² See Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 27-28 (2014); ("In FY2012, 400,000 people were subject to civil immigration incarceration, at a cost of \$2 billion."); Immigration Detention Map & Statistics, CIVIC, <http://www.endisolation.org/resources/immigration-detention> ("The United States maintains the largest immigration detention infrastructure in the world, detaining approximately 380,000 to 442,000 persons per year."); see also Kozlowska, *supra* note 47.

¹²³ Declaration of Thomas Homan at 11, *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) (No. 2:85-CV-04544-DMG), ECF No. 184-1.

¹²⁴ *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up*, ACLU 1, <https://www.aclu.org/other/aclu-fact-sheet-alternatives-immigration-detention-atd>.

¹²⁵ *Id.*

Who then is benefiting? Private corporations. In 2016, 90% of immigration detention facilities were run by private companies.¹²⁶ That number is expected to grow.¹²⁷ In August 2016, then Deputy Attorney General Sally Yates recommended that the Department of Justice stop housing criminal inmates in privately-run prisons after a study showed that they were less safe, less capable, and more expensive than government facilities.¹²⁸

In February 2017, Attorney General Sessions reversed the DOJ policy to reduce and not renew contracts with private prisons housing criminal inmates.¹²⁹ By November 2017, multi-million dollar contracts were awarded to private companies to build five more detention centers to house just immigration detainees.¹³⁰ One facility alone will cost taxpayers \$125 million to build, and the company is expected to profit by at least \$44 million each year.¹³¹

These are tax dollars that do not need to be spent. Because detention is neither the most efficient nor cost-effective means to process asylum seekers, it is only effective in deterring asylum seekers from coming to the United States or from remaining here to fight their case.

As mentioned above, in response to the 2014 Central American refugee crisis, the Obama Administration did not respond with a full-throated defense for immigration reform. Rather, under the Obama Administration, 52,000 young children and their parents who were fleeing gang violence were arrested and detained in an effort to convince others that the U.S. was not a welcoming place for asylum seekers to receive protections that were due.¹³²

This cynicism, weaponization of detention, and cruelty as a form of deterrence blazed the path for the Trump Administration to do the same. In addition to the increase of detention centers, the Trump Administration is heightening the cruelty by separating over 2600 children

¹²⁶ Kozłowska, *supra* note 47.

¹²⁷ *Id.*

¹²⁸ Matt Zapotosky & Chico Harlan, *Justice Department Says It Will End Use of Private Prisons*, WASH. POST (Aug. 18, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/08/18/justice-department-says-it-will-end-use-of-private-prisons>.

¹²⁹ Matt Zapotosky, *Justice Department Will Again Use Private Prisons*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/world/national-security/justice-department-will-again-use-private-prisons/2017/02/23/da395d02-fa0e-11e6-be05-1a3817ac21a5_story.html?utm_term=.2fa47d3fb29a.

¹³⁰ John Burnett, *Big Money as Private Immigrant Jails Boom*, NPR (Nov. 21, 2017), <https://www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom>.

¹³¹ Esther Yu Hsi Lee, *Private Prison CEO 'Very Pleased' by 'Improved Occupancy Rates' at Immigration Detention Centers*, THINK PROGRESS (Oct. 31, 2017), <https://thinkprogress.org/geo-group-3q-earnings-ice-4201f399b46d/>.

¹³² *Why Are so Many Children Trying to Cross the U.S. Border?*, BCC (Sept. 30, 2014), <http://www.bbc.com/news/world-us-canada-28203923>; see *supra* notes 48–60.

from their parents who are seeking asylum.¹³³ The Washington Post has called this action “gratuitous malice towards children.”¹³⁴ This government sanctioned-policy does nothing but inflict lasting trauma on children.¹³⁵ Like President Obama’s public campaign, radio ads informing potential asylum seekers of this policy play in Honduras.¹³⁶ John Kelly, acting DHS Secretary at the time this policy was being developed, praised this initiative as one of the “tough policies” that has stopped those from crossing the southern border.¹³⁷

Trump’s family separation policy is shocking and unconscionable, but so was Obama’s heartless policy to use detention facilities as a means to make life miserable for those seeking asylum. Deterrence is a concept used in criminal law to justify government-sanctioned punishment that will prevent the individual offender, and others like him or her, from engaging in future criminal conduct.¹³⁸ Whether in fact criminal punishment actually deters criminal conduct is debated and even doubted.¹³⁹ The Supreme Court has recognized, however, that civil detention may not be employed to that end.¹⁴⁰

For decades, scholars have rightfully denounced the expansive (and expensive) detention of asylum seekers as an improper use of criminal

¹³³ Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html> (reporting that more than 700 children have been separated from their parents).

¹³⁴ Opinion, *Gratuitous Cruelty by Homeland Security: Separating a 7-Year-Old from Her Mother*, WASH. POST (Mar. 4, 2018), https://www.washingtonpost.com/opinions/gratuitous-cruelty-by-homeland-security-separating-a-7-year-old-from-her-mother/2018/03/04/98fae4f0-1bff-11e8-ae5a-16e60e4605f3_story.html?utm_term=.6357bc76a7ff

¹³⁵ *Here’s Another Reason Kids Don’t Belong in Detention: Trauma Changes Growing Brains*, THE CONVERSATION (Nov. 29, 2015), <http://theconversation.com/heres-another-reason-kids-dont-belong-in-detention-trauma-changes-growing-brains-50582>

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Margaret A. Andruchek, *Homicide by Vehicle in Pennsylvania: Irrational Punishment of the Negligent Driver*, 90 DICK. L. REV. 833, 836 (1986)

(“Deterrence, on the other hand, involves the imposition of criminal punishment for the purpose of preventing future crime, through an effect on both the individual offender and other potential offenders in a society.”)

¹³⁹ There is conflicting evidence, and much debate, over whether capital punishment deters crime. See *Glossip v. Gross*, 135 S. Ct. 2726, 2768 (2015) (Breyer, J., dissent). On that question, “the National Research Council (whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine) reviewed 30 years of empirical evidence and concluded that it was insufficient to establish a deterrent effect and thus should “not be used to inform” discussion about the deterrent value of the death penalty.” *Id.*

¹⁴⁰ “If, however, civil confinement were to become a mechanism for retribution or general deterrence, . . . our precedents would not suffice to validate it.” *Kansas v. Hendricks*, 521 U.S. 346, 373, (1997) (Kennedy, J., concurring).

punishment on those detained.¹⁴¹ Using civil detention to subject people to misery for the purpose of dissuading other asylum seekers—with past experiences that place them in danger—from even entering the United States is a practice that rests on ethically and legally questionable authority.

III. THE WAY FORWARD: CONCRETE POLICIES AND CRITICAL RECOGNITION THAT OUR COUNTRY NEEDS ASYLUM SEEKERS

The Trump Administration's policies and practices towards asylum seekers are to deny protections and inflict misery upon them. As argued above, these differ only in degree from the policies of the Bush, Obama, and Clinton administrations. If Trump were to leave office, there is no reason to believe that asylum seekers would be treated differently under administrations presumed more liberal or humane. For that to occur, a fundamental shift in policy towards and valuation of asylum seekers must occur.

The starting point is to recognize that since 88% of all asylum seekers who are seeking protection deserve it, why has our country been so hostile to welcoming them? This section then proposes concrete reforms to speed up conferring legal status and encourage community integration. Just as important, it is critical to recognize that rhetoric is just as important as policy. The reality is that our country needs the poor and persecution to renew critical "American" values of hope and freedom. Those who have fled repressive regimes have courage and commitments that benefit our country. Those who have been persecuted have a unique ability to value fundamental rights and freedoms that make our democracy function. Speaking from personal experience, those who have persecuted transmit the values of gratitude, freedoms, and fortitude to the very country—the United States—that gave them refuge. Our country's policies to deny these who guard those values best is done at our detriment.

¹⁴¹ See generally César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 282 (2017) ("The very fact of imprisonment creates a perception of dangerousness from which it is difficult to escape. Immigration prisoners are thought to pose a public safety threat not because of any characteristics unique to them as individuals, but because they are imprisoned."); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1111–27 (1995); Arthur C. Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. REV. L. & SOC. CHANGE 353, 364–65 (1986).

A. *The Central Concern for Asylum Claims Must Not Be Accommodating Credible Fear and Not Policing Fraud*

The first set of reforms is to shift the framing of asylum from policing fraud—which exists neither on a large nor unmanageable scale—to accommodating reasonable fear.

The Trump Administration presumes asylum applicants are committing fraud when the facts demand recognition that asylum seekers are fleeing from real and actual harm in their home countries. The presumption of fraud was on display in Attorney General Sessions's remarkable public attack on "dirty immigration lawyers" and fraudulent asylum seekers.¹⁴² But the belief that fraud is embedded in the system pre-dates the Trump Administration. David Martin, current professor emeritus and prior general counsel to both the Immigration and Naturalization Service (1995 to 1998) and deputy general counsel of the Department of Homeland Security (2009 to 2010), is a notable scholar, policy maker, and person of great influence in shaping immigration policies.¹⁴³ It is fair to consider him a centrist who receives both the respect and ire of both sides of the aisle.

In 1995, Professor Martin defended the Clinton Administration's policy change that ended automatic work permits for those seeking asylum.¹⁴⁴ Professor Martin recognized that the new 180-day delay in receiving work permits was a "potential hardship" on asylum seekers but was justified to "provide adequate deterrence" to those with "manifestly unfounded" claims and those with "otherwise abusive" ones.¹⁴⁵

The first problem with this calculus is that there was no proof that asylum fraud was or is rampant. As noted by Professor Laila Haas, the asylum system has numerous safeguards that require an asylum officer and an immigration judge to scrutinize every individual seeking asylum. These safeguards include, "mandatory biographical and security checks, a fraud detection unit, mandatory supervisory review of all asylum decisions, government-funded monitoring of translators, and extensive asylum officer training."¹⁴⁶

For support that these individualized systems are working, Professors Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag analyzed 14 years of data and established that countries with serious human rights violations correlate with the number of granted asylum applicants from

¹⁴² Jeff Sessions, *supra* note 58.

¹⁴³ *Experts & Staff: David A. Martin*, MIGRATION POLICY INST., <https://www.migrationpolicy.org/about/fellows/david-martin>.

¹⁴⁴ David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 754 (1995).

¹⁴⁵ *Id.*

¹⁴⁶ Laila Haas, Opinion, *Congress Cries Wolf on Asylum Fraud*, BOS. GLOBE (Mar. 8, 2014), <https://www.bostonglobe.com/opinion/2014/03/07/congress-cries-wolf-asylum-fraud/LpwsimgjQU2Ps8mQyIOCeJ/story.html>.

those countries.¹⁴⁷ Their policy concerns did not involve applicants' claims of fraud but the disturbing and high disparities in grant and denial rates among individual asylum officers and immigration judges.¹⁴⁸

Their policy prescriptions to offset the disparities were to hire qualified individuals for these positions, increase training, and provide a reduction in workload to permit the adjudicators the adequate time, resources, and protections to make independent decisions.¹⁴⁹ These recommendations were made 10 years ago and are even more timely given the Administration's return to using political pressure and threats of employment terminations to result in more deportations.

The second problem with Professor Martin's 1994 calculus is that the "potential hardship" on asylum seekers by denying them work is profound, especially since the 180-day delay could be a permanent bar to obtaining work authorization while the case is litigated. Indeed, it was not until a 2013 class action settlement that some of the worst parts of the denial and delay of employment authorization were ameliorated.¹⁵⁰ The denial of work authorization was a form of using civil procedures for deterrence, a goal reserved for criminal punishment. Imposing hardship for these purposes is no longer tenable.

If nearly 90% of asylum seekers have a chance of winning, we should start resettling them, rather than making it harder to give them relief they are owed. The concrete policy proposals then are:

1. *Hire more asylum officers and train them so that they more quickly decide the cases and have lighter workload to do so.*

In 1994, Professor Martin noted that the cost for an asylum officer to adjudicate an asylum claim was \$600 per interview and jumped to \$1,200 when an immigration court had to hear the procedure.¹⁵¹ To keep costs down, and reduce the immigration court backlog, streamlining asylum claims into asylum proceedings would be more prudent and efficient than the status quo.

Instead of requiring administrative steps that are designed to turn people away, if the presumption that the vast majority of claims are valid, time and money will be saved by reforming administrative procedures to more expeditiously confer legal status to those who qualify for it. As recommended by the U.S. Commission of International Religious Freedom, asylum officers who currently conduct the credible fear interviews should

¹⁴⁷ Jaya Ramji-Nogales et. al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 379 (2007).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 381.

¹⁵⁰ *The ABT Settlement Agreement*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (May 12, 2017), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/abt-settlement-agreement>; Memorandum from Brian M. O'Leary, Chief Immigration Judge to All Immigration Judges 2 (Dec. 2, 2013), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/12/03/13-03.pdf>.

¹⁵¹ Martin, *supra* note 144, at 746.

have the authority to grant all meritorious cases, instead of sending them to immigration courts for a second, and unnecessary, round of review.

2. *Repeal the one-year bar ban to let documented fear, not filing deadlines, determine who gets relief.*

The policy that requires an asylum seeker to apply within one year of entry arose out of the unfounded fear of fraud.¹⁵² As documented by the Center for Gender and Refugee Studies, the bar is not weeding out fraud but resulting in the denial of tens of thousands of cases of people who are fleeing genuine persecution.¹⁵³

3. *Return to the heart of asylum claim standard to make sure that only material inconsistencies can deny claims.*

As recognized by courts, those seeking asylum—especially after fleeing government-sponsored persecution in their home countries—have a reasonable reaction to omit and even lie about matters such as their identity and native country when first encountering a U.S. official.

The only lies that should be sufficient to deny asylum are those that are evidence of malingering and evasion. Under prior law, the “heart of the asylum claim” explained that lies involving material facts about the person’s past experiences fell in this category but collateral matters involving specific dates, days, or explained inconsistencies do not. Our asylum system is too rigid in penalizing people for any inconsistency without evaluating the context or content of the dishonesty or deception.

B. *Shifting Containment of Asylum Seekers to Supporting Community Integration*

The second set of reforms is to shift policies from containing (and detaining) people to promote community integration. It is time to treat arriving asylum seekers as we do refugees—and greet them with services and support arising from community-based and religious organizations to promote self-sufficiency.

4. *Return work authorization to those who apply for asylum.*

Once fraud is recognized as an issue that can be rooted out in any individual situation, the return for self-sufficiency must be a priority. The delay and denial of work authorization to asylum seekers arose from the fear of fraud. This fear is in fact unfounded. The better policy is to return work authorization to asylum seekers so that they have a lawful means to work, obtain a social security number, and obtain a driver’s license in their state of residence.

5. *Provide resettlement services offered to refugees.*

When refugees arrive to the United States, the U.S. Government partners with private organizations provide refugees with “food, housing,

¹⁵² Musalo & Rice, *supra* note 23, at 702.

¹⁵³ *Id.* at 699.

clothing, employment services, follow-up medical care, and other necessary services.”¹⁵⁴ This program is successful in accelerating integration and facilitating self-sufficiency. There is no reason not to replicate it for those seeking asylum.

6. *End detention for asylum seekers.*

No one seeking asylum should be detained. The system is expensive and acts merely as an improper means of deterrence. This is particularly true because government officials have recognized under oath that alternative supervision methods are just as effective, have significantly less cost, and permit the asylum seeker to integrate into the community.

7. *End family detention centers.*

Although there is no reason to detain someone who is seeking asylum, there is absolutely no justification for our government to detain children. We have been doing this for over 20 years. For a nation who has a record of promoting human rights across the globe, there is no reason to detain a child in civil detention. And although this article was written before Trump’s zero tolerance policy, it goes without saying that there never is a legitimate reason to separate a child from a parent who is seeking asylum.

8. *End expedited removal.*

If the only way we can deport 4.2 million people is by taking away the protections of a hearing, judge, judicial review, and an opportunity to apply for relief, perhaps we should not be deporting 4.2 million people.

If this is an unrealistic reform, a starting point is to provide lawyers to all subjected to expedited removal. Stephen Manning’s work makes a compelling case for recognizing a constitutional right to access to counsel to those in expedited proceedings. States and cities on their own are funding attorneys to represent those who are detained, and the visible cruelty in the mass deportations appear to only be marshaling public support for the mitigation of harsh enforcement measures.

C. *Transmit the Narrative that the Persecuted Are Guardians of Our Country’s Most Sacred Values and We Need Their Entry for Our Own Survival*

It is critical to realize that the power of President Trump has been how effectively he communicates. He is aware of optics and rhetoric and maximizes his control over the perception of reality 140 characters at a time. The message—whether it be truthful or not—is not nearly as important as how often it is communicated and how effectively it can alter a debate with its mere framing of an issue. It makes no difference, for instance, that not a single federal court has permitted the Trump Administration to penalize a state or city for not participating in federal immi-

¹⁵⁴ *Services Upon Arrival*, REFUGEE COUNCIL USA, <http://www.rcusa.org/integration-of-refugees/>.

gration enforcement efforts.¹⁵⁵ Instead, there is a steady drumbeat from Trump, falsely conflating immigrants with crimes, and accusing cities and states that follow legal requirements as being soft on crime and the border.¹⁵⁶ The end result is that there are many who support Trump's attempted crackdown on Sanctuary Cities without awareness or concern over why that policy is misguided, ineffectual, and likely illegal.¹⁵⁷

We must learn from what President Trump does well and what his ability is to forge reality with sound bites and what sounds to be common sense. Calling asylum seekers frauds, burdens, criminals, and rapists serves a critical purpose: as observed by Hannah Arendt, "[t]he inclusion of criminals [among the targeted group of undesirables] is necessary in order to make plausible the propagandistic claim of the movement that the institution exists for asocial elements."¹⁵⁸ The propaganda against asylum seekers as criminals serves to communicate to the public that they are among "the lowest level of society,"¹⁵⁹ and deserve whatever punishment the government metes out.

It then is critical to realize that proposed policy changes will never be enough until this false perception of asylum seekers as the underbelly of society is challenged and rebutted. To change minds, one must change hearts, and to do that we must counter with a persistent effort and campaign to explain the value asylum seekers have and contributions they make to the United States.

As way of example, in April 2018, President Trump was increasingly agitated about the caravan of asylum seekers migrating through Mexico, starting with rants on Twitter and escalating with (what is criticized as questionable and likely illegal) criminal prosecutions at the border.¹⁶⁰ Along the way, he ordered the National Guard to the border, and did so seemingly unaware that his initial call to send the "military," rather than the National Guard, to the border for immigration enforcement would have been an act of war or illegal use of the armed forces.¹⁶¹ The media

¹⁵⁵ Devlin Barrett, *Appeals Court Rules Against Trump Administration Over "Sanctuary Cities"*, BOS. GLOBE (Apr. 19, 2018) <https://www.bostonglobe.com/news/nation/2018/04/19/appeals-court-rules-against-trump-administration-over-sanctuary-cities/LITBQkITcZCKZ0t1XfMKiO/story.html>.

¹⁵⁶ Kari Hong, *Sanctuary Cities vs. Trump: Who's Really Breaking the Law?*, CRIME REPORT (Jan. 8, 2018), <https://thecrimereport.org/2018/01/08/sanctuary-cities-vs-trump-whos-really-breaking-the-law/>.

¹⁵⁷ *Id.* (discussing constitutional, policy, and practical problems that arise when state and cities cooperate with federal immigration officers who make mistakes and act contrary to legal authority).

¹⁵⁸ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 448 (Harcourt Brace Jovanovich ed., 1973).

¹⁵⁹ *Id.*

¹⁶⁰ Paul Krueger & Tom Jones, *Criminal Charges Against Immigration 'Caravan' Members Prompts Criticism, Questions* NBC SAN DIEGO (May 1, 2018) <https://www.nbcsandiego.com/news/local/Criminal-Charges-Against-Immigration-Caravan-Members-Prompts-Criticism-Questions-481452941.html>.

¹⁶¹ *Trump Is 'Confused:' President's Plan to Militarized the U.S.-Mexico Border Is Illegal*,

responded to President Trump's ignorance (or obtuseness or, most generously, confusion) with a flurry of explanations over the Posse Comitatus Act.¹⁶² But no public figure counterattacked with an explanation as to how and why the arriving caravans of asylum seekers are needed to improve our country. Without such a defense, the asylum seekers remain stamped as dangerous or burdensome.

I think many of us have delusions that if we were tested during history's darker moments, we would have chosen the morally right path. Many believe that if we lived in Hitler's Germany, we would have been first in line to hide Anne Frank and her family. But I think in watching how few people have the actual bravery or power to stand up to even someone like President Trump has been humbling.¹⁶³ It seems to me that too few of us possess the courage to act in the world around us that exact consequences for such bravery that we assume we would have had in other times or places.

Those who are fleeing persecution, however, have proven that courage and ideals matter more than their own safety. President Trump has said he wants to restrict immigration to "merit-based" criteria.¹⁶⁴ But do we really want someone who has been successful in North Korea or in Putin's Russia? What have they done, and who have they hurt, to "succeed" in systems where corruption and oppression are the currency of advancement.

By contrast, those who show up penniless at our borders are the ones who had the bravery to stand up to oppression and corruption and did so at the cost of their well-being and worldly possessions. The asylum seekers are arriving heroes. They are the ones who should be getting the military parade, not detention.

For all of us who have immigrant members in our family, we really

HAARTZ & ASSOCIATED PRESS (Apr. 4, 2018), <https://www.haaretz.com/us-news/trump-s-plan-to-militarize-the-u-s-mexico-border-is-illegal-1.5976020> (discussing National Security expert Juliette Kayyem's appearance on CNN in which she explained how President Trump cannot employ the military along the U.S. border without causing an act of war if the troops are in Mexico, or if they are in the U.S., are an illegal use for domestic law enforcement activities).

¹⁶² See Josh Marshall, *Can Trump Send The Military to the U.S. Border?*, TPM (Apr. 3, 2018), <https://talkingpointsmemo.com/edblogger/can-trump-send-the-military-to-guard-the-us-border>.

¹⁶³ See generally Emily Stewart, *Mitt Romney Said He Wouldn't Accept an Endorsement from Trump. Monday Night He Did.*, VOX (Feb. 20, 2018), <https://www.vox.com/policy-and-politics/2018/2/20/17031658/mitt-romney-trump-endorsement> ("Mitt Romney happily accepted President Donald Trump's endorsement of his run for a U.S. Senate seat in Utah on Monday. Apparently, he's gotten past the president's comments about the KKK, Muslims, Mexicans, and people with disabilities from 2016—comments that two years ago he said would make him reject Trump's endorsements.").

¹⁶⁴ *President Trump Tweets He Wants "Merit Based" Immigration System*, ABC13 (Jan. 15, 2018), <http://abc13.com/politics/president-trump-tweets-he-wants-merit-based-immigration-system-/2946652/>.

understand that asylum seekers are the unique guardians of American values.

As a personal anecdote, before he was 5 years old my father lost a home, his parents, and a country. At age seven, my grandparents, who were U.S. citizens and in Europe resettling WWII refugees, adopted him.¹⁶⁵ My father's biological father named Aire was a Latvian chemist who had sought-after knowledge that would allow governments to identify their enemies by their fingerprints. The occupying Nazis first sought Aire's assistance, which he refused. When the occupying Soviets then later made the same request, he more forcefully refused and realized he was no longer safe in Latvia. Aire placed his wife and three children in a horse-drawn wagon and left the family home in the middle of the night. The family escaped through the forests to the sea and got on the last boat to Germany.

The family safely arrived in the American zone of occupied Germany. Aire, however, joined the underground and returned to the East each night to smuggle more refugees into the West and its freedoms. Someone betrayed him and tipped off the Soviets, who captured him. Aire was convicted for political crimes and sentenced to a Siberian prison until Stalin's death in 1955. My father's mother died from cancer, leaving my father to live in a German orphanage. My grandparents, upon being told of Aire's sacrifice for others, tracked down my father and his sister and adopted them.¹⁶⁶

My father Erik grew up in Minnesota, is a citizen of this country, graduated from college, and obtained a masters in philosophy. During college, my father enrolled in ROTC and served in the military for the next 20 years, including a tour of duty in Vietnam. His military service to the United States was from his gratitude and sense of duty to his country. In his retirement, he volunteered for six months in Bosnia, working with the same refugee organization for which my grandparents had worked.

I grew up in a family where one parent was a Democrat and one was a Republican. Growing up, political discussions were nightly and often heated. But whenever my siblings and I had what we thought was a sear-

¹⁶⁵ My paternal grandparents were Howard and Edna Hong. I make no qualification on the term grandparents. My grandmother explained to me, on many repeated occasions, that "[e]ven though blood may be thicker than water, love is thicker than blood." As a child I did not understand why she even repeated those words. Growing up and living in a world where others seek precision or are beholden to other markers of family, my grandmother's framework is the one that I too hold.

¹⁶⁶ My father's biological mother died in a hospital, leaving all three children orphaned in the camp. The Hongs were meanwhile working with the Lutheran World Federation to resettle displaced persons. Upon hearing about Aire's sacrifices and his three children, the Hongs sought out to adopt all three. They successfully adopted my father and my aunt, but my father's oldest brother was too old to be adopted. He later arrived in the United States and lived in Minnesota. As a personal note, I am humbled and grateful to have such legacy of kindness, both from my relatives tied by biology and, as my grandmother said, relatives tied by love.

ing critique of a government policy, my father was the first to say that we are lucky to live in a country where we could disagree with our government. He reminded us that disagreements need not be disagreeable and we are to always give someone with differing political opinions the benefit of the doubt.

My father knew how essential these values are to a democratic society. His own biological father was arrested by the Soviets and was locked up as a political prisoner for over 10 years. He never saw his biological father before he died. Aire, in registering his political disagreement with a repressive regime, lost his freedom, his livelihood, and his children.

My father has explained to me the tremendous importance of the First Amendment in a way my legal education never did.

My father transmitted his own gratitude for freedoms our country in a way I notice others without the benefit of new Americans in their families do not receive. My siblings and I have not just been enriched by my father's insights, but we truly learned how to appreciate and value critical essential freedoms that others take for granted. Those who have lived in countries with political prisoners, countries immersed in corruption, countries steeped in repression uniquely value that the United States operates without those flaws. Painter Augustus Annus noted that refugees are not ruined people; rather, they value what force cannot take away: hope, a faith in God, and family. Asylum seekers then offer the intangible benefit of renewing essential "American" values, gifts that should be embraced, not turned away. It is the persecuted who have been born abroad who, ironically, are best situated to be guardians of the American values of liberty, equality, and freedom. I am humbled to be the heir—by blood and by love—of my family's legacy of kindness, in which those who were saved expressed gratitude by helping others. In working with more than 100 asylum seekers, I do not believe my family story is exceptional with respect to how gratitude is magnified and repaid by parents and children alike. I have clients from Mexico and El Salvador who have volunteered to be government informants to prosecute criminal gangs their native countries cannot. An Iranian asylum seeker spends each Sunday volunteering with his church to help homeless people in his community. A Buddhist monk persecuted for his religion, volunteers with teenagers in his new American city. Asylum seekers are not burdens. Once on their feet, they offer an enormous amount to the fabric of our communities and country. I truly find it remarkable that those who have suffered greatly at the hands of persecution, respond to the protection offered by asylum with kindness, humility, and generosity towards others.

It is time to embrace asylum seekers as those who passed the test of courage (one which others fail with complicity or fear) and those whose own values amplify and renew our country's best ideals. We need more asylum seekers who are guardians of our most sacred values. To turn them away is done at our tremendous detriment.

CONCLUSION

The Trump Administration's policies that govern asylum claims are designed to quietly and quickly deter claimants by taking away procedural protections, speeding up deportations by incentivizing border patrol officers and immigration judges to favor speed over accuracy, and subjecting asylum applicants to miserable living situations in hopes they give up their claims and others who are in harm's way will chose to die in their home country instead of coming to the United States.

Those policies run counter to the values of a country that is a beacon of hope and defender of human rights in the world.

This Article provides eight concrete reforms to restore common sense and fairness in the adjudication of asylum claims. But those will never happen until we—as Americans—confront the reasons why the Trump Administration's policies are only different in degree rather than kind from the ones started by President Clinton and ruthlessly employed by President Obama.

To confront Trump's policies of malice—but also Obama, Bush, and Clinton's policies of callous indifference—we must engage in a public education effort on the invaluable contributions the poor and persecuted provide to our country. Repressive regimes are societies where corruption and oppression are the currency of power. Those who had the courage to reject offers of complicity pursued the righteous path at the expense of losing their homes, careers, and sometimes families. These people are the asylum seekers who show up poor and persecuted at our border. And it is those who so dearly love the freedoms, equality, and fairness on which our democracy thrives. It is time to welcome asylum seekers not as hostile foreigners but as the guardians of the beloved values central to our democracy. When we truly realize the contributions the persecuted make to the body politic, we realize that we cannot afford to turn them away any more. Our country's policies toward asylum seekers then can shift from hostility to integration.