

Title 42 and the power to exclude: Asylum seekers and the denial of entry into the United States

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Abstract

Debates to “secure the border” have often dominated immigration legislation. Since the COVID-19 pandemic began, this rhetoric has intensified with the use of the Title 42 program to “expel” asylum seekers without hearing the merits of their case. This article outlines how the Title 42 policy has exacerbated dangerous border crossings while advancing discriminatory policies which disproportionately affect non-White asylum seekers. Using the framework of Critical Race Theory, this article examines the impact(s) of race, ethnicity, and nationality within the immigration bureaucracy. It suggests that “race neutral” policies in immigration perpetuate racial subordination and exclusion for immigrants racialized as non-White. Intertwined with xenophobia and anti-immigrant bias, this work also suggests that public health rationales have long been used to exclude “unfit” or “unclean” migrants due to the “fear of contamination” and infection. The Title 42 program is a violation of human rights, immigration laws, and stipulations in the United Nations Charter which prohibits refugees from being expelled to countries where their lives or freedoms are threatened.

KEYWORDS

asylum seekers, border policy, COVID-19, critical race theory, customs and border protection, human rights, immigration policy, Mexico, migration protection protocols, Title 42, U.S.–Mexico border security, United States

Related Articles

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Garrett, Terence M., and Arthur J. Sementelli. 2022. “COVID-19, Asylum Seekers, and Migrants on the

Mexico–U.S. Border: Creating States of Exception.” *Politics & Policy* 50(4): 872–86. <https://doi.org/10.1111/polp.12484>.

Silverman, Stephanie J. 2012. “Regrettable but Necessary? A Historical and Theoretical Study of the Rise of the U.K. Immigration Detention Estate and Its Opposition.” *Politics & Policy* 40(6): 1131–57. <https://doi.org/10.1111/j.1747-1346.2012.00393.x>.

In June 2022, over 50 migrants were found dead in an over-heated tractor-trailer just south of San Antonio, Texas. While fatalities from human trafficking have long been reported on the north-bound path from Mexico and Central America, the sheer scale and disturbing details shocked immigration enforcement as well advocates. Reports included migrants trying to escape suffocating triple digit temperatures inside the truck while others tried to escape by jumping to their deaths along several city blocks (Dobbins et al., 2022; Edison & Svitek, 2022). As enforcement policies on the border have grown harsher and more punitive, so have the fatalities. In 2021, more than 650 migrants died crossing the U.S.–Mexico border (Rosenberg et al., 2022). Fatalities reflect the fact that migrants are taking more and more dangerous pathways to enter the country. Accelerating the danger, immigration advocates have pointed to the controversial Title 42 program that has been used to “expel” migrants at the southern border since the start of the COVID-19 pandemic (Beckett et al., 2022; Zard et al., 2022).

In March 2020, in the midst of a chaotic and decentralized response to COVID-19, the Centers for Disease Control and Prevention (CDC) invoked a little-known public health law, Title 42 of U.S. Code § 265 or simply “Title 42,” to suspend the entry of individuals into the United States in order to “prevent spread of communicable diseases” for public health reasons (Centers for Disease Control and Prevention, 2022). Instead of allowing migrants to seek asylum as had been the case before the pandemic, Customs and Border Protection (CBP) agents were ordered to swiftly expel migrants and designate thousands for expulsion under instructions that doing so would mitigate the spread of COVID-19 (Fabi et al., 2022; Marouf, 2021). Despite advances in vaccines in treating COVID-19, border officials have continued to make thousands of expulsions every month under Title 42. Even as the CDC has relaxed mask mandates, there have been few changes to Title 42. In May 2022, the CDC stated that “While the introduction, transmission and spread of COVID-19 into the United States is likely to continue to some degree, the cross-border spread of COVID-19 due to covered non-citizens does not present the serious danger to public health that it once did, given the range of mitigation measures now available” (Sacchetti & Miroff, 2022). Although unaccompanied children (UAC) were exempted from the Title 42 order in November 2020, it is still being used to expel adults and families. Still, immigration officials have maintained the ability to grant exceptions on a case-by-case basis. Reports suggest that over 20,000 Ukrainian refugees at the U.S.–Mexico border were granted entry and only .6% were subject to Title 42. In contrast, of the 18,000 Haitians at the border, 23.3% were expelled under the Title 42 order (Florida, 2022).

In this sense, the administration of Title 42 has become inherently racialized. This is because “non-White” migrants are more likely to face expulsion under the order. In particular, using Title 42, Haitian asylum seekers were put on flights back to Haiti despite fleeing unprecedented gang violence and political destabilization at home. Scenes of CBP agents on horseback forcibly rounding up Haitian asylum seekers in Del Rio, Texas drew widespread condemnation domestically and internationally (Miroff, 2022; Rose, 2021). In May 2022, Haitians accounted for 6% of migrants crossing the U.S.–Mexico border but accounted for 60% of expulsion flights (Sullivan, 2022). Data from the CBP suggests that



from March 2020 to March 2022, nearly 61% of migrants encountered at the border were expelled under Title 42. Countries with the highest numbers of expulsions include Mexico, Guatemala, Honduras, and El Salvador. Other migrants deported under the Title 42 policy are largely from Nicaragua, Cuba, Venezuela, Brazil, and the Dominican Republic (Sacchetti & Miroff, 2022).

Title 42 subverts both U.S. and international law and provides no documentation of due process. Beckett and others (2022) state that Title 42 disproportionately targets a small number of people seeking asylum at a time when ports of entry allow large numbers of people to cross the border (without being tested for COVID-19) daily. So, the continued exclusion of asylum seekers in the name of public health while adopting a “business as usual” stance for all other travel presents an incongruous and inconsistent message that violates immigrant rights under U.S. law. Underscoring the effect(s) of Title 42 on immigration, this article outlines how the structure and implementation of this policy has exacerbated fatalities, increased crossings, and promoted discriminatory asylum policies. This work also presents the continued use of Title 42 as a racial justice issue since non-White asylum seekers are more likely to be expelled under the order. When asylum seekers are racialized as non-White, one implication is that they are likely to face exclusion—or expulsion—along racialized lines. Title 42 embodies practices which are restrictive based on race, color, and nationality. Embedded within a formal bureaucratic system, the policy predominantly disadvantages members of racial minority groups or those from “non-White” countries. The policy also violates non-refoulement obligations (not to send migrants back to places where they face imminent danger or death). While public health grounds of exclusion have long been cornerstones of restrictive immigration policies, Title 42 exposes the greater disconnect between immigration, public health, and the rule of law. Using a framework of Critical Race Theory (CRT), this manuscript suggests that immigration policy is intertwined with race and nationality as well as public health. When punitive immigration policies contain xenophobia and anti-immigrant bias, dangerous health consequences follow. Policies like Title 42 have done little to curb the spread of COVID-19, yet have resulted in the premature death and displacement of migrants and asylum seekers.

CRITICAL RACE THEORY: IMMIGRATION, RACE AND NATIONALITY AT THE U.S.–MEXICO BORDER

A CRT approach to seeking asylum views race, nationality, and other social identities as fundamental elements within interrelated structures of power. This means that immigration policies operate within institutional or structural settings and greatly affect the lives of immigrants and asylum seekers. When policy is exclusionary and based on anti-refugee or anti-immigrant sentiment, it can have profound implications on the physical and mental health of asylum seekers (Esses & Hamilton, 2021; Fabi et al., 2022). CRT acknowledges how “race neutral” immigration laws and policies perpetuate racial subordination and exclusion. American immigration policy has a long history of racial exclusion from the 1880s, when Chinese immigrants were excluded to the national origins quotas of the 1920s, which were designed to exclude people based on their race and nationality (Obinna, 2018; Romero, 2008). CRT foregrounds race and racism within the American immigration bureaucracy. The treatment of people identified as “alien” or those who are “non-White” corresponds with the treatment of citizens of color racialized as non-White in the United States. Under this ideology, immigration policy has included the stereotyping of people of Latinx ancestry as “illegal aliens” as well as those who are Muslims or Arabs as “terrorists” (Asad, 2023). It has also been the motivation for aggressive enforcement practices such as: Operation Wetback, Operation Blockade, Operation Hold the Line, and Operation Gatekeeper designed to keep out “illegals” or those racialized as “others.”



Despite its strong stance on immigration enforcement, the United States is a signatory of the United Nations High Commissioner for Refugees (UNHCR) and its 1967 Protocol. A refugee is defined as a person seeking protection based on “persecution or a well-founded fear of persecution on account of their race, religion, nationality, membership in a particular social group or political opinion” (United States Department of State, 2022). Building on circumstances outlined in the 1967 Protocol, the Refugee Act of 1980 also states that the United States will allow a certain number of individuals to enter the country as refugees (Johnson, 2007; Strauss, 2009). These asylum laws were developed after World War II after many Allied countries refused to give refuge to thousands of Jewish refugees who had fled Nazi Germany. Since then, the stipulation *not* to return an individual to persecution or death has become codified.

During the 1980s however, civil war and economic uncertainty caused many Guatemalans, Salvadorans, and Nicaraguans to flee their countries—leading to a mass exodus to the United States and Canada. Despite widespread reports of human rights violations by state actors—including military officials who murdered activists, priests, and indigenous people, U.S. immigration officials regarded these asylum seekers as “economic migrants” who did not qualify for asylum. Guatemalans and Salvadorans apprehended at the border were pressured to “voluntarily return” to their countries (Menjívar & Abrego, 2012; Obinna, 2021b). Conversely, in 1992, the United States ratified the International Covenant on Civil and Political Rights (ICCPR), a human rights treaty guaranteeing protections for basic human rights without distinction based on race, color, religion, or nationality (Joseph, 2019). Additionally, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was signed and ratified. As a signatory, the United States is bound by international law to protect the rights of citizens and foreign nationals within its borders. Despite this, in 1995 over 140,000 Central American refugees applied for asylum in the United States and fewer than 10% were granted asylum (Menjívar & Abrego, 2012).

Domestically, Congress passed the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) a widely supported bi-partisan bill. The bill includes protections for victims of human trafficking as well as provisions for unaccompanied children who are often vulnerable to trafficking *en route* to the United States (Strauss, 2009). Under Title 8, U.S. Code § 1158, often referred to as Title 8, persons determined to have a credible fear of persecution or other threats in their home country are either held in custody or released into the United States while their case is pending in immigration court. Under the TVPRA and the Immigration and Nationality Act (INA), all people including non-citizens have the right to apply for asylum and cannot be removed without a screening or full proceeding before an immigration judge. Also included in the INA stipulations are prohibitions on refoulement, which state that a refugee cannot be expelled to a country where their life or freedoms will be threatened because of their race, nationality, political opinion, or membership in any group (Cabot, 2014; Johnson, 2007).

While it is up to each signatory to interpret the Convention through its immigration laws, under Title 42 asylum seekers are routinely expelled without consideration for the UNHCR Convention. For instance, despite ongoing political instability, natural disasters, and cartel violence, Central American asylum seekers have often faced discrimination and racism within the U.S. immigration system (Cabot, 2014). Even though many asylum seekers are at risk of violence in their home countries, requests for asylum are frequently denied since many lack counsel or were not notified of their hearing. Johnson (2007) acknowledges that the experiences of refugees are heavily mediated by race, nationality, and ethnicity. In some scenarios, immigration laws provide sanctuary and guarantee important protections while in other cases they serve to entrench discrimination and exclusion.

The Title 42 order effectively seals the border and denies entry to thousands of asylum seekers. In its implementation, it has had a devastating impact on Central American, Mexican, and Haitian asylum seekers who are unable to seek protection in the United States—a protection which they are legally entitled to seek. In contrast, many immigration advocates have drawn



attention to the disparities in treatment which Ukrainian asylum seekers have received at the border (Beckett et al., 2022; Esses & Hamilton, 2021). While those fleeing the war in Ukraine should be entitled the right to non-refoulement, their exclusion from Title 42 highlights racial disparities at the border. Unlike the thousands of asylum seekers also fleeing violence, the CBP specifically excluded Ukrainians from the Title 42 order. Scholars of U.S. immigration and refugee policy state that exempting Ukrainians from Title 42 is consistent with broader patterns of American sympathy, which tend to favor White immigrants from predominantly Christian countries (Ajrouch & Kusow, 2007; Whitehead et al., 2018). This was especially true when one considers the series of executive orders by President Trump described as the “Muslim ban.” The ban suspended the entry of people from Muslim majority countries including Syrian refugees who had fled the Syrian war amid violence perpetrated by the Islamic State. A 2017 version of the ban states that Syrian refugees were “detrimental to the interests of the United States and thus suspend[ed]” from admission with limited exceptions (Whitehead et al., 2018).

With regard to Title 42, it appears that the U.S. government favors White, European, mostly Christian asylum seekers to other groups. In this vein, scholars like Linke and Smith (2009) state that skin color, ethnicity, and race play important roles in who is granted asylum and who is denied. The conflation of “blackness and criminality” has become intertwined whereby people of color are often characterized as “the illegal alien,” “the outsider,” or the “diseased body” (Linke & Smith, 2009, p. 11). Through a CRT framework, xenophobic attitudes toward asylum seekers and the denial of entry highlight how the racialization of disease is also reflected in migration law and policy. This means that the fear of the racialized “other” is not only tied to skin color but also tied to nationality as well. Asylum seekers from predominantly non-White countries in Africa, Central America, and the Caribbean are more likely to have their asylum cases denied. Johnson (2007) states that xenophobic discrimination also stems from the notion of “deservingness” and “foreignness” where those seen as less likely to “assimilate” based on their perceived status as “cultural outsiders” are denied entry.

For many asylum seekers however, it is often their race, ethnicity, and/or religion that is the very reason why they are seeking protection from persecution. Experiencing racism and discrimination at home and again when seeking asylum can have a powerful physical and psychosocial effect on migrants. Data from Physicians for Human Rights (PHR) state that almost all of the migrants expelled under Title 42 reported poor mental health outcomes from the expulsion process. Most of this trauma was compounded by the pain of family separation and the long, harrowing journey to the U.S.–Mexico border. Migrants also showed signs of severe post-traumatic stress disorder (PTSD), depression, and anxiety. Adding to the stress of migration, the continued use of Title 42 presents a departure from legal obligations to those seeking asylum at the border. During the pandemic, fulfilling these obligations requires a re-prioritizing of resources and ensuring that asylum seekers are not unduly punished or blamed for the spread of COVID-19. Additionally, it should be noted that while Ukrainians have a slightly easier time in the asylum screening process, their claims as refugees due to the Russian invasion are no stronger than other asylum seekers who have been turned away as a result of Title 42. By adhering to the UNHCR guidelines as well as stipulations in the INA, no one seeking asylum at the border regardless of race/ethnicity or nationality should be subject to refoulement since many are fleeing violence and trauma in their home countries and deserve the right to seek protection.

PUBLIC HEALTH AS A RATIONALE FOR DISCRIMINATION AND EXCLUSION

Since the start of the COVID-19 pandemic, public health experts have noted that measures like masking, social distancing, and testing can be utilized in conjunction with the safe processing



of asylum seekers through points of entry. Public health experts have also drawn attention to the discriminatory nature of Title 42 given the fact that other travelers—including tourists—are allowed to enter the country with little to no public health measures in place (Beckett et al., 2022; Fabi et al., 2022). By contrast, Title 42 continues to be applied with the sole purpose of expelling asylum seekers. The order has remained intact even as masking mandates eased after the surge of the Delta and Omicron B.A.1 variants of COVID-19. Still, there is no documentation that non-citizens and asylum seekers are more likely to transmit COVID-19 than U.S. citizens, green card holders, or tourists entering the country. In fact, asylum seekers represent only a small fraction of the people who cross the border.

Already, the misuse and misappropriation of public health guidelines within immigration policy has caused untold damage to asylum seekers. Thousands of migrants have been returned to life-threatening conditions in their home countries even though many have a well-established fear of torture and persecution (García, 2022; Kriel, 2021). In a survey conducted by *Al Otro Lado* (a bi-national legal services organization with offices in Los Angeles, San Diego and Tijuana, Mexico) from mid-February to early April 2021 in Baja California, 81% of LGBTQ+ asylum seekers reported being targeted or violently attacked after being expelled back to Mexico as a result of Title 42. Other cases include kidnappings, rape, and extortion by cartels after expulsion (Rosenberg et al., 2022). Venezuelans have been expelled to Colombia and Haitians have been expelled back to Haiti despite the fact that the U.S. government contends that the country is “grappling with a deteriorating political crisis, violence and a staggering increase in human rights abuses” (United States Committee for Refugees and Immigrants, 2021). In addition, medical professionals in Tijuana have stated that overcrowding in migrant centers due to expulsions is causing increases in dangerous medical conditions in newborns and young children. Many of these diseases if left untreated could result in death (Marouf, 2021; Statz & Heidbrink, 2021).

The continued use of Title 42 to single out asylum seekers for expulsion illustrates yet another intersection between public health and immigration policy. In its administration, the policy fuels the xenophobic trope which castigates immigrants as vectors of disease and threats to public health (Esses & Hamilton, 2021; Markel & Stern, 2002). In so doing, this treatment of asylum seekers feeds into stigma and discrimination leading to unfair treatment toward those perceived as “foreign.” Green and others (2010) state that these grounds of inadmissibility usually only apply to non-citizens who are seeking entry into the United States or those seeking a change of status. The “fear of contamination” has long been present in immigration policy and used to exclude non-citizens from entry. In the 1880s for instance, one of the key driving forces for keeping out migrants was the exclusion of those with mental and physical defects.

As the Bubonic plague spread around the world in the mid-19th century, the United States became increasingly fearful that the pandemic would reach American shores. From 1900 to 1904 in San Francisco, Chinese immigrants were subject to stricter and longer quarantines even though there was no evidence that Chinese immigrants were more likely to have the Bubonic plague (Trauner, 1978). Later in the 1920s, during the pneumonia outbreak, the city of Los Angeles stereotyped Mexican immigrants and Mexican Americans as poor, second-class people with the assertion that the plague was an “ethnic trait” which resulted in their forced and targeted quarantine (Batelaan, 2021). During the AIDS epidemic of the 1980s and 1990s, more health-based exclusions were added to immigration policy. In 1992, about 140 Haitian refugees were denied entry into the United States after testing positive for HIV (Fairchild & Tynan, 1994). They were held in Guantanamo Bay until a federal judge intervened over a year later. Ordaz (2021) states that Haitian immigrants remained a scapegoat for the AIDS epidemic despite the lack of any scientific evidence between nationality and the spread of the virus. It was not until 2010 that President Obama finally removed HIV as grounds for inadmissibility into the United States. Still, more recently, President Trump stated that Haitian immigrants



“probably have AIDS and they're coming into our country. We don't do anything about it... We let everybody come in. It's like a death wish, for our country!” (Loh, 2021).

The continuance of Title 42 in spite of advances in combatting COVID-19 highlights the misuse of public health to block the life-saving right to asylum. Particularly concerning is the fact that asylum seekers have been singled out and classified as threats to public health. People who are fleeing persecution and torture are protected under U.S. and international laws and the UNHCR declared that countries must not deny or discriminate against asylum seekers because of the COVID-19 pandemic (UNHCR, 2022). This means that the manageable risks posed by COVID-19 must be balanced with the need to protect and safeguard the right to life and asylum of those seeking sanctuary and a reprieve from violence and conflict.

SEEKING ASYLUM IN THE UNITED STATES

Developments before the COVID-19 pandemic

Prior to the COVID-19 pandemic, the Migrant Protection Protocols (MPP), also referred to as “Remain in Mexico,” was implemented by the Trump administration in 2019. Under this program, asylum seekers at the southern border were required to remain in Mexico while their case was being heard by an immigration judge. Although the Biden administration took steps to end this policy, a federal judge in Texas ordered the resumption of the policy resulting in thousands of people waiting in Mexico. In June 2022, the Supreme Court ruled that the Biden administration could terminate the policy. Prior to the implementation of Title 42, in 2019 there were over 307,000 asylum filings of which approximately 46,000 people were granted asylum (García, 2022). The majority of these filings were defensive asylum petitions where individuals were in removal proceedings before an immigration judge. A smaller number of filings (or affirmative asylum cases) were people who were not facing removal proceedings.

Cabot (2014) states that affirmative asylum cases have a much higher likelihood of being granted than defensive asylum cases. Defensive asylum cases are primarily from Mexico, El Salvador, Honduras, and Guatemala. Refer to [Figures 1](#) and [2](#) for the process whereby applicants gain asylum in the United States. In 2019, Guatemala alone accounted for over 20% of all defensive asylum seekers, Honduras for about 15%, and Mexico for approximately 14%. About one in four affirmative asylum cases were from Venezuela, Guatemala at 10%, and China at about 10% as well (Hsin & Aptekar, 2022; Obinna, 2021a). In 2019, China accounted for the highest number of cases for asylum, which were granted at 16%, Venezuela at 15%, and El Salvador at 7%. Hatton (2020) states that most asylum seekers (defensive and affirmative) were persons fleeing violence and persecution. Others were fleeing after being victims of gang violence in their home countries.

Seeking asylum in the era of COVID-19

With the onset of COVID-19 in March 2020, the Trump administration endeavored to “close asylum loopholes.” Under Title 42, mandates were made for the immediate expulsion of migrants without screening for asylum (Beckett et al., 2022). This includes individuals who would normally be detained by the CBP, asylum seekers, unaccompanied children, and people attempting to enter the country without inspection. According to Lind (2020), a leaked internal memo from the CBP known as “Operation CAPIO” directed border officials to determine “on the spot” if asylum claims were valid or not. Part of the rationale for invoking the measure was to avoid holding people in overcrowded immigration facilities but advocates state that the policy is more of an effort to restrict immigration than it is a public health strategy (Fabi

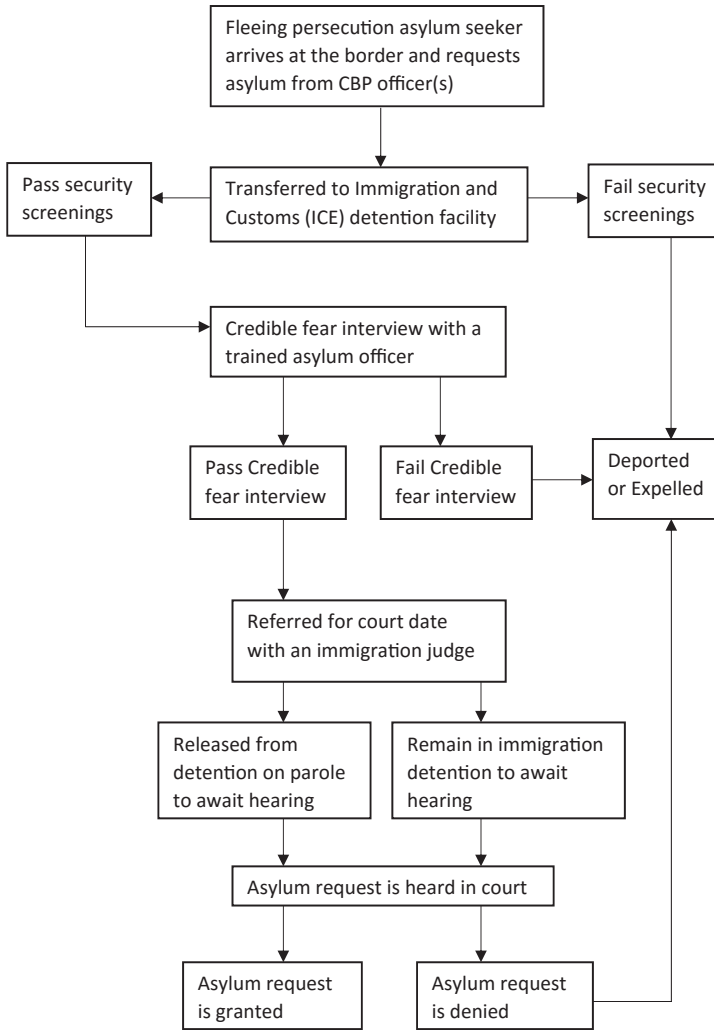


FIGURE 1 Flowchart of the affirmative asylum process. *Source:* Flowchart compiled from data available at: <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states>.

et al., 2022; Rosenberg et al., 2022). Under Title 42, CBP officials are directed to quickly process immigrants (within 15 minutes in an outdoor setting) without screening for asylum and expel migrants to Mexico or Canada or their country of origin. People on the southern border are usually driven by bus to the nearest port of entry and told to walk back to Mexico—often without their luggage and belongings. Undermining the tenets of the Refugee Act of 1980 as well as the TVPRA, those seeking asylum from persecution are turned away without any chance to make a legal claim for refugee status in the United States.

In order to keep a record of people arriving at the border, the CBP tracks migrants using a metric known as “encounters.” Encounters refer to two distinct kinds of scenarios: (1) expulsions where migrants are immediately removed from the country under Title 42 and (2) apprehensions where migrants are detained (at least temporarily) under Title 8 (Rosenberg et al., 2022). While the CBP has retained discretion on which migrants to process under Title 8 or Title 42, most encounters have led to expulsion under Title 42. Since the order went into effect, there have been nearly 2.9 million encounters with migrants on the U.S.–Mexico border. That is, since April 2020 and March 2022, about 61% or 1.8 million of those encounters

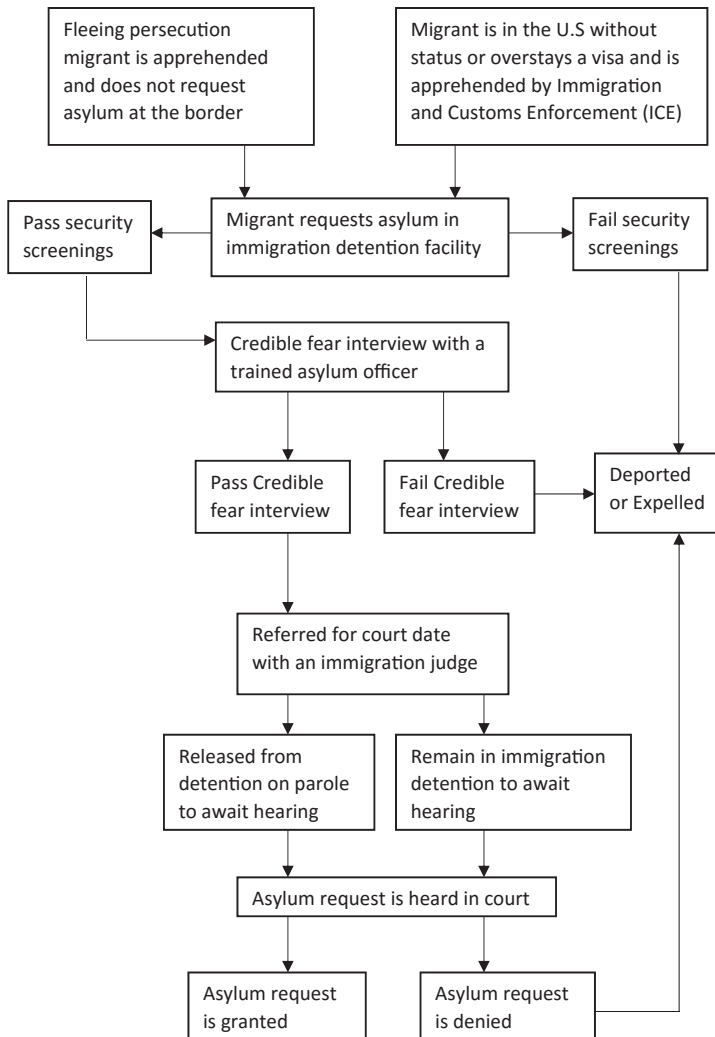


FIGURE 2 Flowchart of the defensive asylum process. *Source:* Flowchart compiled from data available at: <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states>.

resulted in expulsion under Title 42. The remaining 1.1 million encounters resulted in migrants being apprehended under Title 8. Those who are subject to Title 42 are not given any opportunity to appeal their expulsion. Between 2020 and 2022, [Figure 3](#) illustrates a sharp uptick in the number of encounters since Title 42 went into effect. Even if migrants inform CBP officers that they fear being tortured in the country to which they will be expelled, there is an extremely limited chance that they will be given an official screening by an asylum officer to guarantee that their claims are “reasonably believable.” From March 2020 to September 2021, just over 3,000 people were screened for torture prior to being expelled. Of that number, just 272 people were taken out of Title 42 and allowed to seek asylum (Rosenberg et al., 2022).

With respect to people seeking refuge, Title 42 has pushed asylum seekers (including refugees from Cuba, Haiti, and Venezuela) who used to arrive at official ports of entry to attempt to cross into the United States through more and more dangerous routes. In June 2022, *Human Rights First* published a report with government data confirming that in fiscal year 2017, 99% of Cubans and Haitians had arrived at a port of entry (Human Rights First, 2022). In light

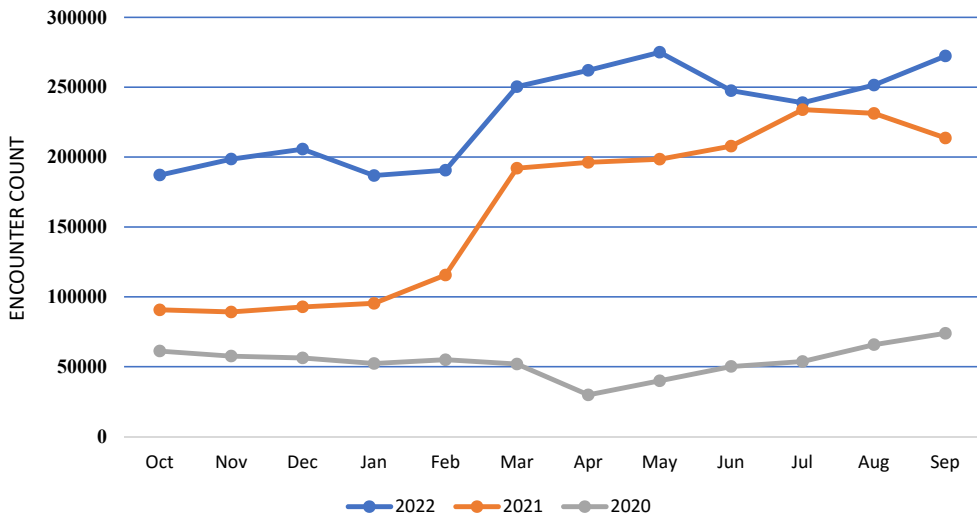


FIGURE 3 U.S. Customs and Border Protection (CBP) encounters by month. *Source:* CBP Nationwide, Southwest Land Border, and Northern Land Border Encounters <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

of ramped up restrictions at the border and the wide-reaching nature of Title 42, in the 2022 fiscal year, just .2% of Cubans and 14% of Haitians arriving at the southern border presented themselves at a port of entry. As a result, the CBP has been forced to deploy staff away from ports of entry to respond to increased crossings between ports and vehicle lanes. Dobbins and others (2022) state that crossings at non-traditional ports of entry are in large part because of the failure to process asylum seekers at designated locations. Other authorities such as the Government Accountability Office (GAO) have found that Title 42 led to “individuals trying to cross the border multiple times per day” (United States Government Accountability Office, 2021). The report also stated that repeated crossings increased to 34% in the first quarter of the 2021 fiscal year. Likewise, CBP concluded that the high number of border encounters “was partly driven by high recidivism rates (repeat encounters) among individuals processed under the CDC’s Title 42 public health authorities.” This means that Title 42 encourages migrants to make repeated dangerous journeys through the desert at locations that are *not* ports of entry and where they have limited access to medical care or health screenings. To illustrate, Figure 4 shows increases in the numbers of single adults, family units and UACs encountered since the Title 42 policy went into effect since 2020.

During the expulsion process, many migrants have also described being physically and verbally abused by CBP agents. In addition, Title 42 puts many families in the impossible task of staying together as a unit. Before the practice of expelling unaccompanied children was ended by the Biden administration, CBP had used Title 42 to turn away UACs. To effectuate this process, migrant children were often held for days in commercial hotels by private security guards unlicensed in child welfare before being expelled (Merchant, 2020; Pitzl, 2020). Later, in January 2021 the Mexican state of Tamaulipas (which borders south Texas) barred the CBP from expelling children under the age of seven to Mexico (Kriel, 2021). Since unaccompanied children are no longer subject to Title 42 expulsions, many parents have been compelled to send their children across the border alone (knowing the risks they face at home). In so doing, Title 42 has effectively forced family separations on asylum seekers. As a result, children, adults, and family units who have already experienced much trauma and persecution in their home countries are further traumatized at the border and often suffer profound mental and physical health consequences (Statz & Heidbrink, 2021). Many migrants seeking

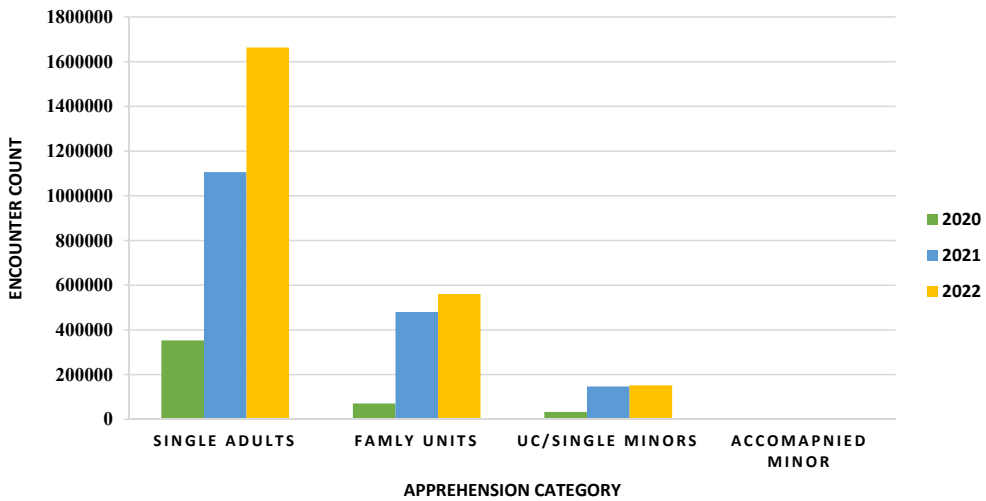


FIGURE 4 U.S. Customs and Border Protection (CBP) encounters by apprehension category. *Source:* CBP Nationwide, Southwest Land Border, and Northern Land Border Encounters <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

refuge also experience kidnapping, torture, rape, and other violent attacks following their expulsion. Additionally, widespread reports from Honduras, Guatemala, and El Salvador described the unmitigated spread of COVID-19 from deportees who were expelled from the United States under Title 42 (Kassie & Marcolini, 2020; Martin, 2020). Beset by widespread poverty and weak public health systems these countries are particularly vulnerable to the impacts of the pandemic. Figure 5 shows that since 2020, Title 42 has been used much more frequently than Title 8 especially with respect to migrants from Mexico, Honduras, Guatemala, and El Salvador.

BACKLOGS IN U.S. ASYLUM AND THE IMPACT OF RESTRICTIVE POLICIES

Even before the start of Title 42, the complicated nature of the U.S. asylum process had long been established. Asylum seekers must navigate a complex bureaucratic structure involving multiple government agencies that can take several months or years to complete. In some scenarios a person may file an application or pass a credible fear screening and receive a hearing or formal interview years into the future (Cabot, 2014; Haas, 2017). Backlogs which were already a feature of the U.S. asylum system have grown even longer due to COVID-19 restrictions and the months-long closures of several courts and asylum offices (Navarrete & Sanchez, 2020). Even after asylum offices reopened, social-distancing guidelines reduced the capacity and productivity for new interview-dependent asylum cases. Over the last decade, the asylum backlog has spiraled rapidly upward amid stagnating resources that have pushed the system to a breaking point. As of April 2022, there were over 470,000 affirmative asylum applications pending with U.S. Citizenship and Immigration Services (USCIS). At this point, the U.S. government does not estimate a timeline to schedule an initial interview with these asylum seekers though estimates state that it could take up to four years to complete (Sabatino, 2022).

Year after year, asylum applications filed in immigration court have taken longer and longer to complete. This means that the number of applications filed have long exceeded adjudications. While the asylum backlog is not new, the ballooning size of the backlog and the

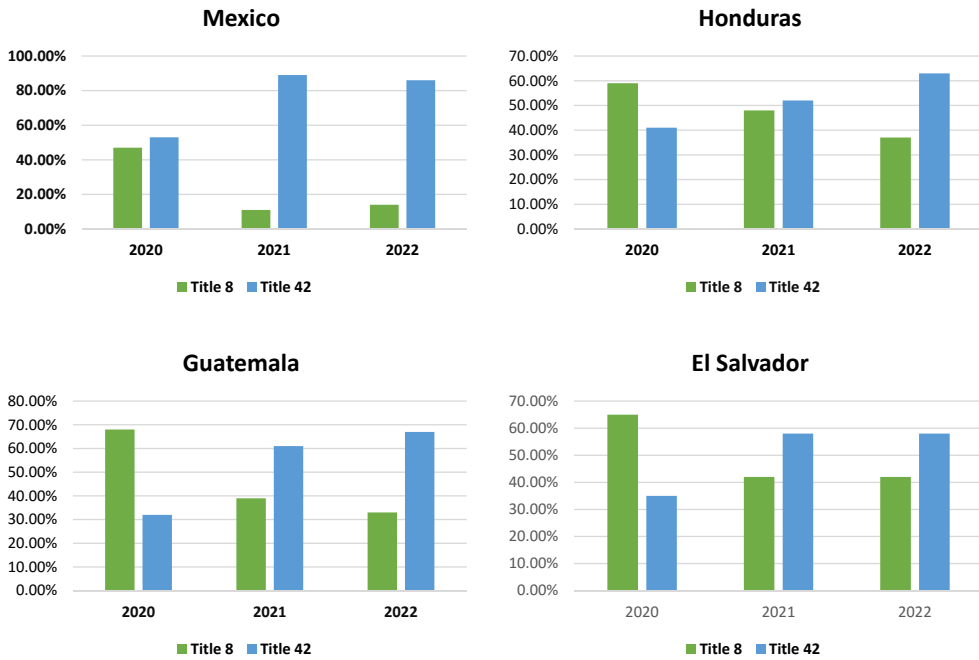


FIGURE 5 Highest percentages of Title 42 and Title 8 expulsions by country. *Source:* Data compiled from CBP aggregates at: <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

thousands of asylum seekers stuck in administrative limbo is concerning. Many stuck in the backlog face prolonged family separation, economic deprivation, and fears that they will be returned to countries where they will face persecution or death. Globally, the number of forcibly displaced persons has increased. Sabatino (2022) estimates this number to have doubled from about 40 million in 2011 to about 80 million in 2020. Increasing violence, climate change effects, and instability in Central America, Venezuela, and Haiti have created thousands of new asylum seekers seeking refuge in the United States (Navarrete & Sanchez, 2020; Statz & Heidbrink, 2021). Unfortunately, the U.S. asylum system has not adjusted to these demands. As such, asylum seekers and their families are left in limbo as their cases are pending. These backlogs and delays often leave family members abroad in dangerous situations and make it difficult to acquire pro-bono counsel. Asylum seekers in the backlog also experience poverty and barriers to health care. Additionally, they cannot obtain permanent work authorization, buy a home, or lease a car.

While asylum backlogs increased as a result of the COVID-19 pandemic, policies such as MPP forced asylum seekers to remain in dangerous conditions in Mexico as they waited for their asylum hearings. For over three years, MPP impacted asylum seekers with almost impossible expectations to properly state their case and prepare for a trial in English (Marouf, 2021). MPP in addition to Title 42 expulsions have required Mexico to fulfill humanitarian needs as asylum seekers wait (sometimes for years) to seek safety in the United States. Likewise, language barriers have made it increasingly difficult for non-English speakers as they often face discrimination and racism at the border (Beckett et al., 2022; Fabi et al., 2022). Asylum seekers are some of the most vulnerable people in the world. They often include children, mothers, victims of violence and torture, or other individuals who have experienced trauma and persecution. Most of the basic rights of asylum seekers are often threatened during flight and upon their relocation to camps in a sanctuary state. In the critical and most desperate search for asylum, many lose their belongings, security, family, and even their lives. Life in exile, for many, is as bad or worse than conditions in their home countries which forced them to flee. While



U.S. asylum laws provide asylum seekers with the right to remain in the country while their claim is being processed, policies such as MPP and Title 42 have undermined this guarantee. Further, immigration judges have often spoken out against efforts to make the asylum courts move faster without also guaranteeing due process and the resources needed to bolster the system. Advocates have also challenged the practice of detaining asylum applicants despite having a credible fear established when awaiting the adjudication of their claim. Johnson (2007) states that the outcomes of asylum cases are vastly different if applicants can obtain counsel. Detained asylum seekers on average find it more difficult to obtain counsel and are more likely to have their cases denied. With hundreds of thousands of asylum seekers patiently waiting in the asylum backlog, the need to prioritize the queues alongside the effects of Title 42 is urgent.

CONCLUSION

The fact that Title 42 remains in place despite vaccines and advances in treating COVID-19 demonstrates a disconnect between public health initiatives and immigration policy. Asylum seekers continue to be turned away at the border despite any scientific evidence that they are more likely to have COVID-19 than other persons at the border. It is therefore of the highest importance that the Title 42 expulsion order be revoked so that COVID-19 border screening occurs in line with public health principles and human rights concerns. This also means that inhumane family separations and detentions should be avoided for those seeking refuge. Concerted efforts need to be made to ramp up backlog processing of those in asylum (affirmative and defensive) queues. Additionally, the U.S. Congress must ensure that medical and mental health professionals—as well as child welfare experts are at the border in order to provide an ethical and humane reception. In this respect, sustainable efforts must be made in providing redress to families, adults, and children harmed by the Title 42 policy. Instead of unlawfully curtailing access to asylum, the United States must uphold its own asylum laws in addition to the 1951 UNHCR Convention and the 1967 Protocol to which the United States is a signatory. Asylum seekers must be protected from refoulement and death. By right, individuals are entitled to seek asylum in the COVID-19 era.

Migrants—regardless of country—are entitled to core human rights, due process, and non-refoulement. In its administration so far, Title 42 has been informal and arbitrary with no real process to challenge expulsion decisions. CBP agents have also failed in their duties under international law to fulfill human rights and not administer laws in a discriminatory manner. The denial of entry should only take place through an assessment of each individual claims. This means that a wide collective expulsion under Title 42 is a violation of due process and is prohibited under national and international law. Given the issues with the existing asylum backlog, efforts must be made to safeguard the rights of asylum seekers so that their decisions are heard and adequately addressed. People who are turned away under Title 42 will ultimately try to seek re-entry when the policy is lifted. However, it also means that these new asylum seekers will be added to the already long backlog of people who had been trying to seek asylum years before the policy was in place. As such, the CBP should not just return to its former methods when Title 42 ends. Instead, it must decrease the time asylum seekers spend in detention facilities. This will allow people to have a fairer shot at making their asylum case, passing the credible fear interview, and seeking counsel.

Beyond its inherent risks, Title 42 has elevated border apprehensions and intensified rates of recidivism. Yet, at this juncture, it has not served the public nor has it curtailed the spread of COVID-19. Instead, asylum seekers (who are mainly people of color) have been expelled to dangerous countries where they face discrimination, violence, and torture. The trauma caused from preventing people from seeking asylum has exacerbated other traumas which migrants already faced when they arrived in search of sanctuary at the border (Esses & Hamilton, 2021;

García, 2022). Title 42 is counterproductive and runs counter to the fair and orderly processing of those seeking asylum. Border processing must be reoriented to humanely transport people—especially families with young children—to community-based shelters or reception locations while allowing access to UNHCR agencies and human rights monitors. The U.S. government must respond to asylum seekers in a fair, efficient, and rights-based manner which also protects public health. However, this emphasis on humanitarian methods means that Title 42 must end as it is neither humane nor grounded in public health policy.

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