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Health Inequity and Tent Court Injustice

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Abstract

US law promises refugees they will not be deported until they receive fair, impartial review and determination of their asylum eligibility. Some refugees' illness experiences, however, preclude them from testifying and accurately representing their own interests during asylum adjudication proceedings. This article explains how health inequity compromises the capacity of ill refugees to successfully demonstrate their asylum eligibility, recounts federal policy changes that exacerbate their health and legal vulnerabilities, and suggests how the United States fails to meet international obligations to refugee-patients.

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Promise of Nonreturn

Faced with the depravity and tragedy of World War II and the Holocaust, international community members erected an international legal system that sought to bolster national sovereignty while promising to protect persons or families fleeing persecution. To guide determinations of those persons' eligibility for asylum, the 1951 Convention Relating to the Status of Refugees formally recognized and established 3 principles: *nondiscrimination*, *nonpenalization* (eg, breaking immigration laws), and *nonrefoulement* (ie, nonreturn).¹ This latter principle was regarded by the convention as fundamental and meant that no asylum seeker would be deported without fair, impartial review and determination of their asylum eligibility.¹ The US Congress incorporated all 3 international protections into domestic law by enacting the Refugee Act of 1980,² which recognized **harms refugees experienced** in their lands of origin, the health demands of exile, and trauma incurred while seeking safe haven. Since 2016, however, US policy changes to asylum adjudication processes and denial and curtailment of health services for persons in flight have abrogated these promises. This article describes international agreements protecting refugees, recounts federal policy changes that exacerbate their health and legal vulnerabilities, and examines how the United States fails to meet international obligations to refugee-patients.

International Agreements Protecting Refugees

The Convention Relating to the Status of Refugees established the framework adopted by most nations prohibiting the return of refugees to places of persecution and establishing procedures for the determination of asylum eligibility.³ Two features of this framework are important. The convention places the burden on asylum seekers to prove their asylum eligibility, and not all harm—experienced or feared—meets asylum eligibility criteria. Asylee status is limited to applicants demonstrating persecution or well-founded fear of persecution based on race, religion, nationality, political opinion, or social group membership.³ Significantly, evidence of physical or emotional scars can reveal proof of harm but can also compromise applicants' capacity to fully articulate the extent of harm necessary to meet asylum eligibility.

Asylum cases are not criminal prosecutions; therefore, US asylum seekers are not afforded attorney representation at US government expense. Under long-standing US constitutional and immigration law, asylum seekers may secure private legal representation, but those who cannot must navigate the procedural and substantive demands of asylum adjudication processes alone. Physically or emotionally ill asylum seekers experience an increased burden, disadvantaging their case and reducing the likelihood of a court granting asylum.

The United Nations High Commissioner for Refugees (UNHCR) offers recommendations to nations adjudicating asylum cases.⁴ Although not binding on US asylum adjudicators, these recommendations offer “significant guidance” to courts and asylum officers⁵ and require examiners to have “an understanding of an applicant’s particular difficulties and needs.”⁴ This acknowledgement of the importance of physical and emotional illness in determining applicants’ “difficulties and needs” obliges examiners to “obtain expert medical advice,” such that “conclusions of the medical report will determine the examiner’s further approach,” including when “to lighten the burden of proof normally incumbent upon the applicant.”⁴

Changes in US Asylum Adjudication

Since the 1990s, the legislative and executive branches of the US government have reneged on our commitments and obligations under international law and the Refugee Act. As the world’s population expands, democracies of the Global North and the Global West have experienced increasing numbers of refugees seeking entry.⁶ The United States has restricted entry and complexified asylum adjudication processes, diminishing an asylum seeker’s chance and ability to prevail. Since 2016, and especially since the COVID-19 pandemic, US policy has shifted from limiting to almost eliminating asylum application opportunities.

Metering. The Refugee Act allows asylum application “irrespective of ... status.”² But along the Mexico-US border, the Department of Homeland Security (DHS) uses metering to limit numbers of persons entering the United States at a designated port of entry on any given day and bars eligibility for asylum for anyone entering at any other location.⁷

Tent courts. Contrary to nonrefoulement, Migrant Protection Protocols (MPP) implemented on January 25, 2019, require asylum applicants to wait in Mexico until they are called to a tent court hearing just inside the US border.⁸ While waiting in Mexico, often for months, many live on the streets or in crowded shelters with few housing or health resources.⁹ On the date of their hearing, applicants at some facilities must arrive 4 hours before their hearing,¹⁰ which is not administered by the US

Department of Justice but by DHS—one indicator that enforcement, not justice, is the proceeding’s purpose.¹⁰ A **physician examines the asylum applicants**; if one member of a family appears ill, applicants must await a new court date, possibly weeks away.¹⁰

Although a short meeting with an attorney is allowed,¹⁰ few applicants have one. Prior to MPP and COVID-19, asylum adjudication procedures offered at least some opportunity for asylum applicants to contact an attorney prior to pleading their case. But in the tent courts, attorneys who can meet with their clients have reported having as little as 30 to 45 minutes to prepare them. Under the MPP policy, an applicant entering the court finds an immigration judge and a US government attorney virtually present through video.¹⁰ Fearful applicants—some injured or ill—testify, often via an interpreter, as best and as credibly as they can as to why they are an asylee.¹¹

MPP openly and notoriously betrays international and domestic commitments to protect refugees.¹² Federal officials have deployed this and a similar **policy of separating children** from their parents “precisely because it is offensive” and because the publicity it generates will, they hope, “deter others from trying to enter the U.S.”¹³ As Thomas and Stubbe write: “It is not simply that U.S. policy fails to account for the well-being of children. U.S. officials endeavor to create circumstances likely to cause children psychological damage as a vehicle for frightening other children and their parents.”¹³

Unmet Health Needs at the Mexico-US Border

Illnesses and injuries compound refugees’ hardships. The COVID-19 pandemic closed tent courts, forcing all asylum applicants to wait longer in Mexico and intensifying their experiences of extant illness or injury. Life in exile typically comes with 3 sources of trauma: loss of home, dangers of a **long journey**, and persistent uncertainty about safety in a new place.^{13,14} Adverse interactions among infection diseases, metabolic diseases, and mental health conditions further diminish adult migrants’ health status.¹⁴ Mental health conditions cause even greater damage to children, especially unaccompanied minors.^{15,16} Border communities, unprepared for an influx of people in need, are stymied or paralyzed by US border law enforcement practices and federal policies and so turn them away.¹⁷

The best efforts of volunteers and clinic staff are insufficient to meet the needs of unsheltered migrants awaiting their hearings,¹⁸ and threats of gang violence and kidnapping prevent many from seeking health care.⁹ Mexican nationals deported from the United States have been known to congregate in border towns, finding insufficient medical resources to deal with the sequelae of their exposure to traumatic events, including posttraumatic stress disorder (PTSD).¹⁹ As one court stated, conditions in Mexican mental health institutions “qualified as torture” for mentally ill patients.²⁰ Doctors Without Borders reported in 2019 that virtually all of its border patients suffered from psychological or physical harm.²¹ The pressure and anxiety of helping refugees who have experienced torture, rape, and murder of loved ones during their journeys lead service workers and clinicians to experience secondary trauma.²²

Disease Burden, Legal Burden

Recall that the convention places the burden on asylum seekers to prove they (1) have fled their place of origin because of persecution or a well-founded fear of persecution based on race, religion, nationality, political opinion, or social group membership²³; (2) are not precluded by one of the legal bars; and (3) merit a favorable discretionary grant of asylum.²⁴ Meeting these statutory criteria requires credible testimony sensitive to

specific terms and complexities of asylum adjudication law. Yet, as UNHCR recommendations state:

The expressions “fear of persecution” or even “persecution” are usually foreign to a refugee’s normal vocabulary. A refugee will indeed only rarely invoke “fear of persecution” in these terms, though it will often be implicit in his story. Again, while a refugee may have very definite opinions for which he has had to suffer, he may not, for psychological reasons, be able to describe his experiences and situation in political terms.⁴

Because an asylum applicant bears the burden of proof, government attorneys need only cross-examine an applicant and undercut one statutory requirement or undermine the applicant’s credibility to successfully extinguish their chance of asylum.²⁵ Without a legal education, few can parse the law’s logic and convincingly argue their case. Asylum claims must describe complex histories of persecuting nations with factual command. Without an attorney or even a therapist to help an applicant endure cross-examination or endure retelling their story in an imposing formal (even if tent-based) court setting, even a healthy applicant fluent in English could easily fail.

One court acknowledged an applicant’s hurdle, stating that proving that one is a member of a persecuted social group requires that an applicant establish “evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like.”²⁶ Another court stressed that “analysis of what constitutes political expression of these purposes involves a ‘complex and contextual factual inquiry’ into the nature of the asylum applicant’s activities in relation to the political context in which the dispute took place.”²⁷ Only 31% of asylum applicants obtained asylum or another immigration remedy in 2019.²⁸ The combination of MPP, tent court procedural barriers, and the trauma of exile will further reduce that outcome.

Traditionally, the US legal system prides itself on its fairness and success in finding the truth. The foundation for this belief lies in the ability of plaintiffs and defendants, prosecutors and defenders, and others to articulate their clients’ claims and the evidence with clarity and skill.¹¹ The judiciary’s capacity to pursue justice calls for 2 equal adversaries waging conflict under carefully drafted rules that expose weaknesses in theory or representation through cross-examination. John Henry Wigmore exalted cross-examination for its foundational role in the American legal system when he stated: “Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.”²⁹ Rarely, however, do scholars quote Wigmore’s preceding sentence: “It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians.”²⁹

Health Inequity, Justice Denied

For asylum seekers who have been through what most of them have been through, sustaining cross-examination by a US government attorney without protection or representation by one’s own attorney can hardly be called an endeavor in truth seeking. It is nearer to the role played by torture in the Middle Ages than the role intended for courts in providing a fair process that meets our domestic and international obligations.

Imagine a young Indigenous person facing a video screen in a tent court, hearing a Spanish interpreter translate a US official’s cross-examination through a monitor. When that person, who might experience PTSD or be a torture survivor, is asked to explain the circumstances of their persecution or an incident or several incidents of violence to that monitor in Spanish (possibly their second language) and to prove they meet legal

requirements of asylum, cross-examination can easily be experienced as intimidating, threatening, retraumatizing, or torturous. As Martinez and Fabri note:

The legal system is experienced, not as an advocate for victims, but as an adversary.... The torturer's tactics are re-experienced.... The story is rarely recounted without an actual sensory re-living of the experience (physical pain, tastes, sounds, smells). It is not simply a re-collection of events.³⁰

Studies of witnesses in war crimes trials have corroborated that recalling "traumatic events that may have happened years ago in a formal courtroom setting in the presence of strangers ... may contribute to re-traumatization of the witness or shutdown of emotions."³¹ Without legal counsel, without adequate health care and shelter and food, and with a video screen facing the asylum applicant, Wigmore's vision of equal contestants battling in a joint mission to find the truth has little in common with the inquisition taking place in MPP tent courts. Asylum cases for those fleeing persecution or a well-founded fear of harm can crumble in a split second of misunderstanding a yes or no question.³²

Public Health

The union of health and legal inequity that harms asylum applicants and threatens public health took on new significance with a March 20, 2020 directive by the Centers for Disease Control and Prevention (CDC).³³ Although purporting to cover most admissions, the directive, as Guttentag argues, is "an act of medical gerrymandering" that is "designed to accomplish under the guise of public health a dismantling of legal protections" for people seeking asylum.³⁴ In direct contravention of the principle of nonrefoulement, the CDC directive, based on a simultaneously released DHS interim final rule, orders refugees at Mexican and Canadian borders with the US to be removed to their home countries without a hearing or any semblance of fair process.³⁴ Asylum applicants were expelled, expressing Americans' historical tendency³⁵ and current "propensity to blame outsiders for the spread of dangerous pathogens,"³⁶ in a multi-agency assault on principles of the Convention Relating to the Status of Refugees.

But current US border closures that fall in line with similar historical restrictions "motivated by, and closely intertwined with, ideologies of racialism, nativism, and national security rather than substantiated epidemiological or medical observations"³⁶ have not helped control COVID-19. It has made it worse for many. More than half of the first group of Guatemalans deported from the US tested positive for the SARS-CoV-2 virus.^{37,38} Sums now directed to building a wall along the US southern border or increasing law enforcement should be redirected to public health programs or to providing better trauma-informed care for migrants who travel long distances with little baggage to facilitate flight.

Refugees carry a different kind of baggage. Julius Caesar once complained that baggage impeded an enemy's retreat.³⁹ The Romans' word *impedimentum*, from which *impediment* is derived, warns against carrying too much on long marches.³⁹ *Impediment's* etymology translates as "to shackle the feet."⁴⁰ Policy changes since 2016 shackle the feet of many *bona fide* asylees seeking safe haven in the United States. Migrants now carry a different burden. They must run the gauntlet of legal impediments that threaten health and safety. MPP tent courts and new restrictive policies preclude any place of safe haven, thus renege on our promises to protect refugees and turning our system of justice into one of injustice.

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