MIGRANT "PROTECTION" PROTOCOL: A REPORT FROM THE FRONT LINES

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by Stacy Caplow and Maryellen Fullerton*

The laws and policies protecting refugees and asylum seekers in the United States are under sustained assault. Since 1980, Congress has provided that noncitizens in the United States or at its borders "whether or not at a designated port of arrival" may apply for asylum.   Disagreeing with the statute, but lacking the votes to pass revised immigration legislation, the Trump Administration has chosen to defy the law, announcing and implementing numerous doctrines, programs and policies designed to interfere with or prevent people from exercising this right. Three new policies in particular have combined to sabotage the asylum statute and create chaotic situations for asylum seekers at the U.S.-Mexico border.

In November 2018 President Trump issued an Executive Order aimed at individuals who do not cross at a designated entry point: they are banned from applying for asylum. In January 2019, the Trump Administration took aim at individuals who arrived at the designated ports of entry: they must remain in Mexico while their asylum cases proceed in Immigration Courts in the United States. In July 2019 the Trump team added a new hurdle: all people, including children, who traveled through another country en route to the United States are forbidden to apply for asylum. By August 2019, there were reports of more than 10,000 asylum seekers waiting in Tijuana, Mexico for their asylum cases in the United States. These changes followed the highly criticized "zero tolerance" approach that separated parents and children, warehousing children in unsafe, unsanitary conditions. Although courts have temporarily blocked many programs, every week another, heretofore unimaginable, assault on the individuals and families seeking protection in the United States appears.

As Brooklyn Law School experts in asylum law, we responded to a call for volunteers to assist asylum seekers bottled up in Tijuana. The legal situation is bleak. We and other lawyers spent long weekend hours working at *Al Otro Lado*, an indefatigable nonprofit trying to help the asylum seekers just across the border in Mexico. We worked with asylum-seeking families from Honduras, Guatemala, Cuba, Venezuela and elsewhere, all caught in a process that is incomprehensible to them (and to us). Mexico has allowed them to remain during the pendency of their asylum claims in the United States, but they are not authorized to work. In Tijuana, a stone's throw from the United States border, they live in shelters, depend on handouts for food; their children – and there are many among the group we assisted – are not enrolled in school. They exist in limbo, and their circumstances are untenable.

The Migrant Protection Protocols, the Orwellian name that the Trump Administration has applied to its program keeping migrants **away** from protection, is known colloquially as the "Remain in Mexico" policy. Having now spent time on both sides of the border, we can report what we saw with our own eyes. From our vantage point on the ground in Tijuana, several facts were paramount.

First, many of the asylum seekers came to the U.S.-Mexico border as families with small children. They sought out U.S. officials to request asylum. After detention in *hieleras (*ice boxes) for many days U.S. officials returned them to Mexico. They carried with them their identity documents, their children's birth certificates, letters from school principals about gang threats at their elementary school, news articles about gang murders of family members. They are not the stereotypical economic migrants attempting to slip undetected across the border. Nor are they gang members bent on terrorizing Americans.

Second, the current policy whose clear aim is to deter, delay, and discourage asylum seekers, is also a policy to defy the laws of the United States that provide for due process in the asylum determination.   At pre-dawn hours, whole families are bused across the border for an Immigration Court proceeding in San Diego. Later that day, the U.S. bus returns them and deposits them on the Tijuana side of the border. Almost all the asylum seekers we met had already been to San Diego Immigration Court at least once and were destined to return multiple times—in almost every case, without a lawyer, forced to articulate their claim through an interpreter they had never met before..

A typical case may involve four visits to Immigration Court, each separated by weeks or months. The first trip provides formal notice of the charge that the asylum seeker has attempted to enter the United States without prior approval. Then, the case is adjourned for sometimes months, to give the applicant time to seek legal assistance. This is quixotic, even cynical because it raises false hopes. There simply are no resources to provide legal representation to so many people bottled up on the Mexican side of the border. The second Immigration Court appearance, with the applicant still unrepresented, typically involves submitting a formal request for asylum, followed by another adjournment during which the applicant can gather documents, official translations, and other evidence relevant to the asylum claim.   *Al Otro Lado* volunteers scramble to provide translations since the law requires English versions for even birth certificates and other obvious documents.   A third trip to San Diego Immigration Court frequently provides the asylum seeker the opportunity to submit any evidence that supports the application for asylum. The Immigration Judge then schedules a court hearing on the merits of the asylum claim. Finally, on the fourth (at the minimum) journey, the asylum seekers will testify—again *pro se*—and the Immigration Judge will review and assess the evidence. To date, no substantive hearings have actually taken place. Meanwhile, the asylum seekers—adults and children—languish in Mexico. This dilatory pace ensures that many will give up and leave Mexico. They aren't working; their kids aren't in school; they have no access to medical care; they are caught in an interminable and unfathomable situation.

Third, the Remain in Mexico policy effectively undercuts the legally guaranteed right to the assistance of counsel. Noncitizens in Immigration Court proceedings do not have the right—as do criminal defendants—to appointed counsel. But they do have the right to have an attorney represent them in these life and death matters if they can find one. Forcing asylum seekers to remain in Mexico guarantees that this never happens. It ensures they will have to proceed *pro se* because they cannot cross into the United States to meet with an attorney to prepare their case.

We met many asylum seeker in Tijuana clutching papers they had received on their first visit to Immigration Court. The Immigration Court, required to provide information to indigent individuals on sources for free or low-cost legal assistance, had handed out the standard list of California nonprofit legal

organizations. This is an exercise in futility. These organizations and local pro bono lawyers do not have the capacity to handle the volume of asylum seekers in Tijuana or the ability to properly prepare the applications. Even more fundamentally, the asylum seekers cannot cross the border to consult with U.S.-trained attorneys who might be able to help them.

Al Otro Lado tries to fill this gap with know-your-rights presentations in Tijuana, some referrals to social services, document translations and—once a month—a volunteer legal clinic where lawyers who can make their way to Mexico try to help asylum seekers fill out applications. But *Al Otro Lado* cannot provide direct representation to the flood of people essentially blockaded from U.S. legal assistance. And we know how much legal representation matters: studies show that 60% of those represented by a lawyer in Immigration Court are successful compared to 17% of those who are unrepresented.

During our short time in Tijuana, we saw the dehumanizing effects of the Remain in Mexico program. The aggregation of these conditions—the hazardous journey, the apprehension, the detention, the bare survival for months in desperate conditions, the anxiety of the repeated court proceedings, the absence of a true legal advocate—makes a mockery of one of the most universally accepted norms: refugees must be protected.

Our legal assistance was a drop in the bucket, but as we stood in line waiting to walk across the border back into the United States, we understood more poignantly than ever the freedom we enjoy. We cannot return to Tijuana every month, but, as lawyers, we are committed to continue making a contribution. We are encouraging our students to do the same. Our efforts to increase representation of immigrants in New York have proven what a difference even a little [bit of legal assistance can make.](#)

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Immigration & Nationality Act § 208(a)(1).

Presidential Proclamation *Addressing Mass Migration Through the Southern Border of the United States*, Nov. 9, 2018, implemented via Interim Final Rule, *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018).

U.S. Dept. Homeland Security, *Migrant Protection Protocols*, Jan. 24, 2019.

Third-Country Asylum Eligibility Rule, 84 Fed. Reg. 35409 (July 16, 2019) (partially stayed, *Barr v. East Bay Sanctuary Covenant,* (9th Cir. Aug. 16, 2019), appeal pending, see Amy Howe, *Government Seeks Emergency Relief on Asylum Rule*, SCOTUSblog, Aug. 26 2019).

Early reports show that up to June 2019 only 1.2% of noncitizens subject to MPP were represented by lawyers. TRAC Immigration, *Access to Attorneys Difficult for Those Required to Remain in Mexico*, July 29, 2019.

Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council (2016).

Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings, 33 Cardozo Law Rev. 357 (2011).