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Opportunistic oppression: U.S. migration restrictions and public health policy during the COVID-19 pandemic

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ABSTRACT

As the COVID-19 pandemic swept the world in Spring 2020, the Trump administration invoked war against the coronavirus to severely restrict admission of migrants and asylum seekers into the United States. At the same time, it declined to enact national measures to control viral community spread and sharply criticised public health policies. We analyse this notable inconsistency as a case of opportunistic oppression whereby policymakers take advantage of a crisis to pursue pre-existing, and often unrelated, policy preferences. We identify how the securitisation of health and the crisis-enabled politics of enmity allowed the Trump administration to cynically erode migrant human rights protections while simultaneously failing to contain the pandemic. Opportunistic oppression represents an attractive strategy for states facing real and imagined emergencies to pursue political agendas that are not necessarily part of a coherent and effective response to the crisis at hand.

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Introduction

‘As we gather today, our country is at war with an invisible enemy. We are marshalling the full power of the American nation — economic, scientific, medical, and military — to vanquish the virus … We have moved rapidly to mobilize every instrument of American power’.¹ This March 2020 declaration by former U.S. President Donald Trump should have presaged a multifaceted campaign to contain the COVID-19 pandemic. However, in the subsequent weeks and months, this ‘war’ fizzled as Trump increasingly questioned the danger posed by the novel coronavirus and sought to undermine public health measures such as stay-at-home orders, business and school closures, and mask mandates. For months after the pandemic upended normal life, there were few instances where the Trump administration consistently deployed federal authority and resources to combat the virus. One exception to this pattern of ‘executive under-reach’² was the administration’s migration policy. Despite serious humanitarian implications, the administration invoked emergency powers to grind most asylum processing to a halt and systematically expel asylum seekers. Indeed, the extent of
these anti-migration measures suggests the true ‘invisible enemy’ targeted by Trump was not the virus, but migrants.

As asylum seekers are not primary vectors of COVID-19 transmission, the U.S. border remained open to other types of travel, and the Trump administration actively undermined numerous public health initiatives, the emergency asylum restrictions are best understood as an extension of the Trump administration’s longstanding anti-migrant agenda. Instead of serving as impetus for new migration policies, the pandemic provided a useful rationale for deepening restrictions based on pre-existing policy preferences. We theorise this outcome as a case of what we call ‘opportunistic oppression’. Opportunistic oppression occurs when authorities use the pretext and opportunity structure created by a crisis—in this case, a pandemic and consequent fear-based public tolerance for extensions of government power and emergency laws—to engage in acts that restrict or violate human rights in ways that are not directly motivated or necessitated by that crisis. In this way, governments use crises opportunistically to justify their actions.

As scholars and activists have observed, opportunistic human rights violations are a pervasive phenomenon. Many states, particularly authoritarian regimes, have behaved abusively during the COVID-19 pandemic, invoking emergency necessity. For instance, Seewald analyses the extent of ‘opportunistic repression’ in Cambodian restrictions on free expression during the pandemic. Grasse et al. have recently theorised ‘opportunistic repression’ to refer to violent ‘repression that emerges as a function of state opportunity rather than in response to actual or possible mobilisation against the incumbent’. Situating their analysis in the peace and conflict literature, they empirically analyse patterns of violent repression in African states, especially Uganda, during the pandemic. Our conceptualisation of opportunistic oppression complements this body of research, but assesses government policy initiatives that do not necessarily involve violent repression or police and military action. Moreover, we focus on opportunistic oppression under liberal democracy rather than autocracy and trace how opportunistic actors seek to achieve policy outcomes rather than retain and reinforce incumbent power in the face of dissent. While Grasse et al. focus on how crises may provide greater legitimacy for repression in the eyes of the international community, our research examines how crises enable actors to pursue the domestic ‘plausible legality’ of oppressive policies, despite international legal criticism, often through securitising moves. It is crucial to examine not just how governments take advantage of opportunities, but also how the social and political framing of crises enables certain forms of abuse.

Historically, opportunistic oppression has accompanied a variety of crises, including national security emergencies, crime waves, economic contractions, and environmental destruction. Crises not only facilitate state violence under the guise of security, but transformative social and economic policies via profit-seeking ‘disaster capitalism’. As Naomi Klein notes of what she calls the ‘shock doctrine’ imposed on societies reeling from political upheaval, wars, and natural disasters, opportunistic actors cynically take advantage of ‘moments of collective trauma to engage in radical social and economic engineering’ such as mass privatisations and community displacement. In this way, governments utilise crises to push through corporate-friendly agendas that would otherwise meet opposition.

While many crises generate reactive government policies that may restrict or violate human rights, opportunistic oppression is distinctly recognisable; it is evident when
governments behave inconsistently or hypocritically in response to a crisis. For example, if authorities seek to downplay or ignore a crisis in general, invoking it primarily while emphasising targeted oppressive policies, opportunism is likely at work. It is important for human rights advocates to identify these patterns. When oppression occurs as a result of genuine efforts to address a crisis, critique must engage debates over appropriate value trade-offs and policy efficacy. However, when opportunistic oppression is at work, such debates may distract from identifying policy inconsistencies that render trade-offs moot.

Derogations from human rights treaties are permissible in exceptional circumstances, which include health emergencies, but they need to be based on four basic criteria: derogations must be necessary, in keeping with international law, proportionate, and non-discriminatory.9 We argue that not only did Trump’s harsh immigration and refugee controls during the pandemic fail to meet those criteria; these policies were also not adopted in good faith. In this regard, the best evidence for the Trump administration’s embrace of opportunistic oppression requires contextualising its border policy within its overall response to the pandemic. Unlike countries that shut down migrant and refugee admissions while also taking extensive measures to control the virus, the Trump administration downplayed COVID-19 risks, overtly opposed many state and local public health initiatives, refused to enact nationally coordinated virus mitigation policies, and dismissed the advice of public health experts. This stark inconsistency between a refusal to enact national measures to tackle the virus on the one hand and narrowly targeted anti-migrant policies on the other points to opportunistic oppression.

In the following pages, we discuss how the securitisation of health, which frames pandemic disease as a ‘threat’ requiring ‘war’ helps lay the groundwork for such opportunistic oppression. Our argument is not that the coronavirus is benign, but that these securitising moves create an exploitable opportunity structure for human rights restrictions and violations. Next, we examine the Trump administration’s tepid response to the pandemic overall, which contributed to the U.S. emerging as the global epicentre of the virus through uncontrolled community spread, despite the country’s extensive wealth and resources. We then document the administration’s longstanding antipathy towards migrants and trace how it leveraged the pandemic to further shut down the asylum system. Methodologically, we qualitatively analyse the Trump administration’s own statements and policy documents, along with contemporaneous news coverage, to demonstrate the striking contradictions of its policy posture. Finally, we contrast Trump’s approach with the subsequent Biden administration’s efforts to render greater aid to migrants while simultaneously advocating for strong public health measures to contain the pandemic—a dynamic that highlights, but has not necessarily overcome, its predecessor’s opportunistic oppression. While there have been policy shifts, the legal institutionalisation of opportunistic oppression is difficult to reverse.

Creating an oppressive opportunity structure: the ‘War’ on COVID-19

The onset of the COVID-19 pandemic was an exogenous shock that facilitated the pursuit of opportunistic oppression. However, the nature of the resultant opportunity structure was far from natural or inevitable. Instead, it was constructed through political discourses and actions that built on pre-existing patterns of political exclusion and enmity. To elaborate these patterns, we discuss how war rhetoric contributed to the
further oppression of migrants, but also how longstanding anti-migrant politics facilitated these moves.

Many countries have used war rhetoric when describing their COVID-19 responses. Xi Jinping vowed that China will win a ‘People’s War’, Emmanuel Macron declared France to be at war with an ‘invisible and elusive enemy’, and UK Prime Minister Boris Johnson proclaimed that ‘in this fight we can be in no doubt that each and every one of us is directly enlisted’. In the U.S., Trump declared that ‘I’m a wartime president. This is a war. This is a war. A different kind of war than we’ve ever had’. Such language is a powerful tool, emphasising urgent need for drastic action to address threats.

The invocation of ‘war’ allows governments to use extraordinary measures to fight enemies threatening the nation’s borders and national security. In theory, war efforts should promote unity against a common adversary and mobilise citizens and national resources. Who invokes war rhetoric matters, however, and Trump’s war was defined by his politics of anti-migrant enmity. We argue that rather than focusing on national efforts to use war resources to benefit public health, the Trumpian war instead revealed the limits of war rhetoric that primarily focused on scapegoating outgroups. In the present case, war rhetoric was not used to ‘fight’ the virus, but was instead deployed to attribute blame.

The U.S. last widely deployed war rhetoric after the 9/11 terrorist attacks, launching a ‘global war on terror’ in which legal rules were systematically upended to combat the emergent threat. This ‘war’ produced numerous serious human rights violations, such as arbitrary and indefinite detentions, torture and abusive interrogations, unlawful killings, and invasive surveillance measures. By invoking the language of war with associated fears and dangers, the Bush administration sought to legitimise and justify actions that were otherwise objectionable to both domestic and international audiences on human rights grounds. As scholars observe, ‘War rhetoric leads to greater public acceptance, and even active demand by the public, of government exercising expansive powers and authorities in order to overcome the threat and restore peace and security.’

The history of the ‘global war on terror’, along with other violent initiatives such as the failed ‘war on drugs’, points to the risk of securitising social, political, and criminal problems. Securitisation operates through speech acts in which a securitising actor, such as Trump, declares an issue, such as COVID-19, to constitute ‘an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure’. Securitisation shifts problems away from the realm of ordinary rule-governed politics towards the realm of extraordinary crisis, where extra-legal and abusive policies may be deemed essential. This creates space for political actors to promote a Schmittian understanding of existential division between friends and enemies, themes echoed in Trumpian rhetoric and policy. In this sense, the political construction of the pandemic as an existential crisis, a war, and a securitised threat laid the groundwork for oppressive policy responses.

The COVID-19 pandemic is not the first time a health issue has been cast as a threat to national security; other infectious diseases that have occupied security debates in recent years include HIV/AIDS, SARS, swine flu, avian flu, and Ebola. When it comes to public health, the invocation of ‘war’ waged against the ‘enemy’ of disease is relatively common. As philosopher Susan Sontag observed, ‘it is hardly possible to take up one’s residence in the kingdom of the ill unprejudiced by the lurid metaphors with which it has been
landscaped’. These associations evoke invasion, danger, and battle, concepts that spill over into policy responses. The securitisation of health may frame disease carriers as threats to be feared rather than patients to be cared for, mobilise repression and competition rather than cooperative problem-solving and knowledge-sharing, and elevate the protection of the already powerful over the needs of the marginalised, among other effects. Minorities, migrants, or other alleged deviant outsiders are frequently blamed for pandemics, fuelling patterns of xenophobia and even violence. This pandemic ‘othering’ misdirects resources, discourages sick people from disclosing symptoms, and conceals the extent of contagion among dominant communities, thus undermining rational and effective mitigation efforts.

While pandemic othering is a seemingly perennial problem, scapegoating migrants for disease is especially likely in contexts where anti-migrant hostility and racism, and the securitisation of migration, are already entrenched. In many countries today, right-wing populists have successfully directed public anger towards the waves of undocumented migrants and asylum seekers that have emerged from the worst global forced displacement crisis in decades. Migrants, and the ‘globalist’ ‘elites’ who have allegedly welcomed them are blamed for a host of woes—unemployment, economic precarity, crime, erosion of traditional culture, and the declining status of previously dominant groups—while nativist nationalism is offered as a pathway to political redemption. This is especially evident in the U.S., where anxieties over the Southern border and animus towards Muslim immigrants fuelled, and have in turn been amplified by, Trump’s stunning political ascendancy. The U.S. was thus primed for migration-centric responses to the pandemic.

Even before the COVID-19 pandemic, Trump utilised securitised public health rationales to attack migrants, claiming in 2015 that ‘tremendous infectious disease is pouring across the border. The United States has become a dumping ground for Mexico and, in fact, for many other parts of the world’. In 2018, he claimed the border wall was necessary to prevent ‘a tremendous medical problem coming into our country’. On several occasions in 2018 and 2019, the Trump administration invoked contagious illness at migrant detention centres in attempts to limit migration. During the pandemic, Trump frequently dubbed COVID-19 the ‘China virus’, even deploying the nakedly racist moniker ‘Kung Flu’. Similar to the religious and ethnic profiling of Arabs and Muslims that accompanied many post-9/11 counterterrorism measures, such responses demonise a stereotyped ‘other’, targeting foreigners and minorities for suspicion, blame, and stigmatisation. As a result, hate crimes against Asian people in the U.S. increased exponentially, including numerous physical attacks. Such scapegoating is not only inconsistent with international human rights law; it is also dangerous for human rights more generally. In times of emergency and heightened fears, governments often frame human rights, particularly the human rights of minorities, as politically correct luxuries that must be sacrificed to ensure security for the majority. However, human rights exist precisely to protect all individuals equally from states.

The U.S. is not the only country to take advantage of the virus to deepen pre-existing oppressive policy preferences. The NGO CIVICUS Monitor found that many states have engaged in increased surveillance, detention, and violence against dissidents and protesters, often ‘using the pandemic as an opportunity to introduce or implement additional restrictions on civic freedoms’. According to Human Rights Watch, ‘At
least 83 governments worldwide have used the Covid-19 pandemic to justify violating the exercise of free speech and peaceful assembly. UN Secretary-General António Guterres has warned:

Using the pandemic as a pretext, authorities in some countries have deployed heavy-handed security responses and emergency measures to crush dissent, criminalize basic freedoms, silence independent reporting and curtail the activities of non-governmental organizations. Human rights defenders, journalists, lawyers, political activists — and even medical professionals — are being detained, prosecuted and subjected to intimidation and surveillance for criticizing Government pandemic responses — or the lack thereof. Pandemic-related restrictions are being used to subvert electoral processes, weaken opposition voices and suppress criticism. At times, access to life-saving COVID-19 information has been concealed — while deadly misinformation has been amplified — including by those in power.

While many of these abuses have been perpetrated in states with already poor human rights records and autocratic governments, the case of the U.S. highlights that liberal democracies are also vulnerable to the dynamics of opportunistic oppression.

The Trump administration’s anaemic COVID-19 policy

To establish that ‘opportunistic oppression’ is at work, it is not enough to simply document increased restrictions on global migration. This is because the COVID-19 pandemic is a real health emergency that has compelled almost all governments to take drastic preventative measures including border closures and travel restrictions as well as quarantines, curfews, business and school closures, limits on public gatherings, mask and vaccine mandates, and intrusive health surveillance. In some cases, these measures are extraordinary; in others they extend existing ‘techno-authoritarian projects’. Bracketing debates over the public health merits or lack thereof of such policies, as well as civil libertarian concerns about personal freedom, we focus on tracing policy inconsistencies. When governments adopt discordant approaches to mitigation, opportunism becomes apparent. Below, we posit strong evidence for opportunistic oppression can be found in the Trump administration’s starkly contradictory approach to COVID-19.

While metaphors of war against COVID-19 may seem appropriate in the face of the health and economic calamity wrought by the pandemic, the Trump administration repeatedly failed to take concerted action to vanquish this viral foe. Instead, it focused on externalising blame. After initially speculating that the virus would miraculously disappear, the Trump administration pivoted to a ‘wartime’ footing in mid-March 2020 as the scope of the crisis became evident. However, this served more to deflect responsibility for failure to take early and decisive action, despite warnings from the Centers for Disease Control (CDC), World Health Organization (WHO), and other officials at the beginning of the year, than indicate a shift in domestic public health policy. After all, how could anyone see the ‘invisible enemy’ coming? Rather than coordinate and mobilise aggressive efforts to contain community spread, early U.S. action thus focused primarily on banning travel from China and later Europe, even as the virus was clearly already entrenched domestically. These external blame attribution dynamics continued to spill over into the administration’s attacks on and eventual withdrawal from the
WHO, which flowed from its pre-existing and well-documented hostility towards multilateralism and global governance.  

Trump’s war on COVID-19 was thus highly paradoxical, elevating war rhetoric while resisting aggressive federal action to effectively slow the pandemic. For instance, although the Trump administration invoked the Defense Production Act to partially mitigate medical supply shortages, deployed the military to help build emergency treatment centres, and approved massive congressional spending bills for economic relief and vaccine research, these measures did not prevent persistent ventilator and N95 mask shortages and poor testing capacity or stop the rampant spread of COVID-19 throughout the country. Instead, the administration placed the burden of procuring essential supplies on state governors, who were forced to outbid each other in a process some compared to the ‘hunger games’, and stoked conflict between Republican ‘red’ and Democratic ‘blue’ states, claiming the latter were naturally more susceptible to the virus. The Trump administration repeatedly declined to issue unifying national standards for business and school closures. Likewise, it invested heavily in Operation Warp Speed to develop a vaccine, but fumbled distribution efforts and failed to aggressively push back against the growing anti-vaccination conspiracy theories touted by Q-Anon adherents and other Trump supporters. It is deeply ironic that the administration’s most notable success, the rapid production of an effective vaccine, is so vociferously rejected by Trump’s base.

Many of the Trump administration’s emergency decrees during the pandemic undermined rather than enhanced public health and human rights. For instance, the Defense Production Act was used to keep meat packing plants open after viral outbreaks in several facilities, even though thousands of workers tested positive and hundreds eventually died from the virus. Despite the illnesses and deaths, in spring 2020 the ‘Department of Agriculture reported that total pork exports to mainland China in April reached their highest monthly total since the agency began keeping track 20 years ago’. Such measures harmed the human rights of ‘essential workers’, many of whom are migrants and people of colour, in pursuit of agribusiness profits.

In line with the expectations of ‘disaster capitalism’, the administration also used emergency powers to further deregulate the American economy, including suspensions of numerous environmental and labour protections, thereby implementing long standing corporate agendas. In his final days in office, Trump sought to significantly loosen international travel restrictions on tourists from Europe, the UK, and Brazil visiting the U.S., highlighting the degree to which anti-migrant measures were targeted at the Southern border, rather than travellers deemed economically beneficial.

Trump’s dismissal of CDC guidance and attacks on state efforts to control the pandemic became increasingly evident in summer 2020, eventually forming a central pillar of his re-election campaign. He accused Democrats, the media, and state officials of exaggerating the coronavirus’ risks. He insulted scientists, calling Dr. Anthony Fauci, the country’s top infectious disease expert, a ‘disaster’, suggested that people were ‘tired’ of hearing from ‘these idiots’, and accused drug regulators of undermining his re-election: ‘New FDA Rules make it more difficult for them to speed up vaccines for approval before Election Day. Just another political hit job!’. On numerous occasions, Trump and other Republican officials ignored federal guidelines to wear masks in public and respect social distancing, mocking those who heed health advice as weak and ‘politically correct’.

This
cavalier attitude resulted in Trump and dozens of his staff and associates contracting the virus in fall 2020 at various White House super-spreader events.

Trump’s policy posture was thus strikingly inconsistent and indeed, hypocritical. At the same time the pandemic was cast as an emergency necessitating dismantling migrant protections, the administration repeatedly downplayed the threat of the virus at home. This opportunistic targeting of migrants was underlined by Trump’s open support for vitriolic anti-lockdown protests by largely white, heavily armed, far-right extremist groups. For example, he called militia protesters who invaded the Michigan State Capitol ‘very good people’, urging the Governor to ‘make a deal’, while other Tweets called to ‘liberate’ Michigan, Virginia, and Minnesota. Trump cheered on his followers as they confronted lawmakers, harassed public health officials, flouted public health orders, and litigated to reverse policies they claimed restrict constitutional rights and freedoms. Attorney General William Barr compared stay-at-home orders to slavery, calling them the ‘greatest intrusion on civil liberties in American history’. This again testifies to the cynical nature of the Trump administration’s policies, which decried public health restrictions on Americans while leveraging the pandemic against those deemed ‘other’.

The U.S. war on COVID-19 thus tells a cautionary tale. While the invocation of war powers could in theory increase essential supply production and mobilise public solidarity against the virus, that did not happen. Rather, the Trump administration blamed foreign scapegoats for the pandemic, attacked multilateralism and cooperation, denigrated science, and permitted further corporate deregulation. From the beginning of the health crisis, the only war it seemed eager to pursue was a war on migrants.

The war on migration: opportunistic oppression of asylum seekers

The COVID-19 pandemic made migration and refugee resettlement objectively difficult as societies locked down and economies rapidly contracted. The UN High Commissioner for Refugees (UNHCR) and International Organization for Migration (IOM) faced reduced capacities, resulting in the lowest levels of resettlement in 20 years. In spring 2020, the UNHCR reported that ‘At the height of the pandemic, 168 countries fully or partially closed their borders, with about 90 making no exception for people seeking asylum, seriously limiting access to international protection’; ‘27 countries have returned asylum seekers to their country of origin, risking refoulement’; and ‘31 countries have sought to derogate from their treaty-based human rights obligations and many others have adopted emergency measures that impose severe and unreasonable limits on liberties’. Many states invoked COVID-19 to deepen existing migration deterrence policies as well as engage in physical migrant pushbacks and expulsions, further undermining cosmopolitan human rights obligations. Such policies violate the basic human rights of migrants and asylum seekers under international law. As we have suggested and further elaborate, these dynamics are particularly acute in the U.S. case. However, they do not simply represent the triumph of nationalism over internationalism, ‘us’ vs. ‘them’, in the face of an objective crisis, but are products of a politics of enmity that has little to do with consistent efforts to address the pandemic. This is important insofar as ‘bad faith’ policy initiatives do not implicate genuine policy dilemmas.
Hostility to migrants formed the core of Trump’s meteoric rise and political success ever since the start of his election campaign in 2015. From dubbing Mexicans ‘rapists’ to pledging to ‘build the wall’ to calling for a ‘complete and total shutdown of Muslims entering the United States’, restricting migration and attacking migrants were central to Trump’s political playbook. It is thus not surprising that the Trump administration used the COVID-19 crisis to accelerate and deepen its anti-migration agenda, invoking broad powers and policies that further crippled migrants’ ability to claim asylum or immigrate to the U.S.. Imposed ostensibly for public health reasons, these emergency measures in effect entrenched the administration’s anti-migration policies on two fronts: first, curbing migration at the Southern border and second, reducing immigration in general.

To prevent asylum seekers from entering the U.S., the CDC issued a sweeping order on March 20, 2020 encouraging the immediate deportation of non-citizens arriving overland from Mexico as well as Canada without valid documents. The order drew on a little known 1944 Health Service Act (codified at Title 42 United States Code, section 265) which authorises the Surgeon General to suspend the introduction of persons or goods into the U.S. on public health grounds. It was initially valid for a renewable period of 30 days, extended on April 20, and then again indefinitely on May 20. As stated in a leaked memo, subsequent implementation documents only allowed ‘Aliens that make an affirmative, spontaneous and reasonably believable claim that they fear being tortured in the country they are being sent back to (usually Mexico), to be further processed.’ In 2020, U.S. Customs and Border Protection expelled over 300,000 individuals at the Southern border on Title 42 public health grounds.

Because the CDC order translates into systematic and rapid expulsion of almost all potential asylum seekers, it violates the non-refoulement principle, a cornerstone of the international legal regime that protects the human rights of refugees and asylum seekers. Non-refoulement prohibits the forcible return of refugees and asylum seekers to any country where they are at risk of persecution, not only torture. This principle is well established in different international legal provisions which the U.S. is bound by, including the 1951 Convention Relating to the Status of Refugees, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the International Covenant on Civil and Political Rights (ICCPR). By leveraging emergency Title 42 public health powers, the CDC order sought to overcome these legal obstacles and establish the ‘plausible legality’ of returning asylum seekers to danger. This effort at legal rationalisation has proved remarkably successful.

It is evident that the CDC order was politically rather than scientifically motivated. The U.S. had higher rates of COVID-19 infection at the time than migrant source countries. Public health experts moreover expressed explicit concerns about the policy. As reported in the Washington Post:

The CDC’s director of global migration and quarantine, Michael Cetron, flatly refused to sign off on it, telling a colleague: ‘It’s just morally wrong to use a public authority that has never, ever, ever been used this way. It’s to keep Hispanics out of the country.’ It was ultimately signed by then-CDC Director Robert Redfield under political pressure from the White House, which viewed the pandemic as an opportunity to push through its
anti-immigrant agenda. Public health experts dispute that there is any health benefit to the policy, pointing instead to quarantine periods and diligent testing for arrivals.64

In addition, there was no international pressure to adopt such restrictive policies. On the contrary, the Inter-American Commission on Human Rights (IACHR), UNHCR, IOM, WHO, and numerous human rights NGOs ‘all identified upholding international obligations to refugees as an integral part of state responses to COVID-19’.65

The CDC order singled out those seeking asylum as potential vectors for disease, claiming that border processing and detention practices require migrants to be held in ‘common areas of the facilities, in close proximity to one another, for hours or days, as they undergo immigration processing. The common areas of such facilities were not designed for, and are not equipped to, quarantine, isolate, or enable social distancing by persons who are or may be infected with COVID–19’.66 The order therefore was not based on a particular or unique health risk posed by migrants as individuals, but on the hazardous confinement practices that transform them into medical risks that then warrant their expulsion.67 Yet to truly appreciate the opportunism of the administration’s stance, one must read it against the backdrop of its otherwise lacklustre response to the pandemic. Just days after the CDC order, Trump advocated that the U.S. should be ‘opened up and just raring to go by Easter’, a mere two weeks away.68

Using the pretext of public health concerns, the CDC order achieved Trump’s longstanding goal of undermining the right to claim asylum in the U.S.. Prior to COVID-19, the administration introduced numerous policies to deter and punish asylum seekers, including forcefully separating migrant children from their parents, metering asylum applications at Southern ports of entry, forcing asylum applicants to remain in Mexico while their claims were processed under the Migrant Protection Protocols (MPP), and sending migrants back to allegedly safe third countries under Asylum Cooperation Agreements with Guatemala, Honduras, and El Salvador.69 Between January 2019 and December 2020, more than 70,000 migrants were returned to Mexico under the MPP.70

While many of Trump’s pre-pandemic policies attacked the principle of non-refoulement, they faced legal pushback. For instance, one presidential proclamation,71 in conjunction with a joint interim final rule from the U.S. Department of Homeland Security (DHS) and Department of Justice (DOJ)72 declared that anyone crossing the U.S. Southern border without documents between ports of entry would be ineligible to apply for asylum.73 As this contravenes U.S. obligations under international and domestic laws, the rule was blocked by a federal district judge74 and challenged by a number of civil rights groups, which argued that the policy was a ‘direct violation of Congress’s clear command that manner of entry cannot constitute a categorical asylum bar’ and further that ‘consistent with its international obligations, Congress was specific and clear: Entering without inspection is not a basis to categorically deny asylum to refugees’.75 The order was again rejected in February 2020 by the U.S. Court of Appeals, which found that it ran ‘afoul of three codified rules: 1) the right to seek asylum; 2) the prohibition against penalties for irregular entry; and 3) principles of non-refoulement, which prohibit signatories to the 1951 Convention from returning a refugee to the frontiers of territories where his life or freedom would be threatened’.76
The new COVID-19 related Title 42 order similarly faced challenges from different sources. A number of members of Congress questioned its ‘flawed’ legal justifications, charging that the administration appeared to be using the pandemic as cover to expel asylum seekers ‘in clear violation of its obligations under domestic and international law to protect individuals fleeing persecution or torture’. They argued that the government’s legal explanation ‘raises serious questions about the accuracy of the Administration’s claims of protecting public health, the legality of the Asylum Ban, and the Administration’s respect for the rule of law’. Academic scholars were equally critical, particularly in relation to international law provisions. Oona Hathaway, for instance, argued that the Trump administration’s explanation ‘suggests that it is not only ignoring its international law obligations in this case, but it also, apparently, misunderstands international law altogether’. Most importantly, the administration failed to address its obligations related to non-refoulement. Nonetheless, the order remains in effect almost two years later, pointing to the efficacy of opportunistic oppression.

In addition to curbing asylum claims at the Southern border, Trump utilised the pandemic to continue his assault on immigration more generally. On April 20, 2020 he tweeted that In light of the attack from the Invisible Enemy, as well as the need to protect the jobs of our GREAT American Citizens, I will be signing an Executive Order to temporarily suspend immigration into the United States! Even though Trump hinted at wide-ranging changes to U.S. immigration, the Executive Order that was eventually issued two days later was narrower than he had suggested: it paused green card applications for a period of 60 days while still allowing visa-processing for hundreds of thousands of temporary employees like farm workers and crop pickers, who make up the majority of immigrants. The immigration restrictions were not justified by health concerns, but rather aimed at protecting American workers from competition during the pandemic. The order cites Section 2.12(f) of the 1952 Immigration and Nationality Act, which gives the president broad authority to block the entry of categories of people deemed ‘detrimental’ to U.S. interests. This is consistent with Trump’s track record of anti-immigration rhetoric and policy. Upon taking office in 2017, he made good on his infamous ‘Muslim ban’ promise, although the administration was forced to rewrite its order several times to comply with court rulings. Eventually, it was upheld in the sharply divided Trump v Hawaii opinion, in which the Supreme Court’s majority ignored Trump’s clearly discriminatory campaign rhetoric against Muslims, instead accepting the ‘facially neutral’ quality of the revised order.

In yet another attempt to opportunistically cement his anti-immigration agenda into law in the name of the pandemic, Trump issued a broad Executive Order on June 22, 2020 which extended the ban on green card applications and added a number of different temporary visa categories. Most controversially, the order halted H1B visas for workers with specialised knowledge, used extensively by technology and multinational companies. These rules imposed restrictions that immigration hard-liners had been advocating for years. Specifically, low skilled workers should be allowed to enter the country to be exploited, but should not be able to apply for status that would give them meaningful rights. For some critics, racism underpins all these positions: ‘The long-term objective of those who crafted the president’s executive order is not to protect American workers, or to serve American business interests, or to grow the American economy. It is to maintain America’s traditional aristocracy of race, by
any means necessary.86 Again, the inconsistency between banning asylum seekers and certain categories of immigrant workers while allowing temporary migrant workers highlights opportunistic oppression.87

The war on COVID-19 thus deepened and accelerated the Trump administration’s war on migration. The pandemic offered a pretext to push through its already long-standing agenda, shifting the battle against the virus onto asylum seekers and immigrants, violating international human rights protections in the process. From the early days of the administration, Trump’s chief immigration adviser, Stephen Miller, repeatedly raised the potential of citing public health concerns to curb immigration further. Reportedly, ‘ideas about invoking public health and other emergency powers had been on a ‘wish list’ of about 50 ideas to curtail immigration that Mr. Miller crafted within the first six months of the administration’.88 Thus, measures that were purportedly adopted in response to COVID-19 were in fact parts of drafts of earlier, already planned policies that received new legitimacy in the context of the pandemic. Similar attempts to use emergency measures in response to other health crises such as a 2019 outbreak of mumps in an immigration detention centre had failed.89 However, the global scale of COVID-19 along with the securitisation of the pandemic provided an ideal opportunity for the administration to successfully pursue its oppressive policy preferences.

Despite the Trump administration’s dual securitisation of health and migration, facilitating a pandemic-justified ‘war’ against the ‘enemy’ of allegedly dangerous and diseased migrants, no clear evidence of a link between migration levels and COVID-19 risk was apparent.90 Read against Trump’s initial weak efforts to prevent viral spread in the U.S. and later overt hostility to public health measures, the administration’s policies evinced opportunism at every turn.

The Biden administration: policy shifts and path dependencies

During the 2020 presidential campaign and throughout the initial months of his presidency, Joe Biden took the coronavirus demonstrably more seriously than his predecessor, wearing a mask in public, imploring Americans to take precautions, advocating mass vaccination, and actively pushing through a massive relief bill. In January 2021, the Biden administration set out its National Strategy to respond to the pandemic, which included leveraging the Defense Production Act to enhance vaccine supply and other shortages, increasing emergency funding to states, and restoring relations with the WHO.91 While Biden also compared the pandemic to war, he has emphasised the toll of casualties rather than the dynamics of enmity.92

Accordingly, it is not surprising that the Biden administration maintained and even tightened restrictions aimed at curbing the pandemic. For instance, it reversed Trump’s last-minute efforts to lift global tourist travel restrictions.93 Nonetheless, the Biden administration has not necessarily been more effective than its predecessor as surging Omicron variant cases in winter 2022 suggest. We claim only that Biden is somewhat less opportunistically inconsistent, not that he has successfully addressed the pandemic. When it comes to migration, the Biden administration has reversed or promised to reverse several migration restrictions. It lifted Trump’s travel ban order (the ‘Muslim ban’), is working through the courts (albeit half-heartedly and unsuccessfully) to suspend the MPP, substantially increased the cap on annual
refugee admissions, improved asylum processing capacity, promised to reunify forcefully separated migrant children and families, and ended deportation of unaccompanied minors crossing at the Southern border. The latter policy in particular garnered significant criticism from Republicans, who blamed a massive influx of child migrants and resultant overcrowded detention facilities in spring 2021 on the policy shift. In this sense, the Biden administration faced a significant political dilemma as migrants rushed to the border.

Efforts to control migration numbers likely account for the Biden administration’s controversial decision to maintain the CDC order that bars entrance to migrants who may be held in a congregate detention facility (i.e. migrants who arrive without visas), thereby bypassing normal immigration procedures. ‘Under the Title 42 order, those non-citizens can be rapidly screened, and then quickly expelled, substantially reducing the risk of [COVID-19] transmission,’ stated an administration lawyer in a January 2022 court case.94 This suggests certain path dependencies created by migration restrictions—once they are enacted they are politically difficult to reverse. As O’Brien and Eger95 note, when border controls loosen, migration increases, generating populist anti-migrant backlash and a vicious cycle of migration spikes and suppression. In this way, the human rights consequences of opportunistic oppression may outlive their progenitor. These consequences were made visible in September 2021, when human rights advocates rebuked Biden for expelling thousands of Haitians, some of them having been rounded up by border agents on horseback in scenes reminiscent of slavery, based on public health ground claims, in order ‘to protect migrants themselves, to protect the local communities, our personnel and the American public’.96 In fact, Title 42 border expulsions rose considerably since Biden took office with over one million migrants turned away at the Southern border in 2021 alone.97

As under Trump, ongoing restrictions on asylum processing undermine fundamental legal principles. For instance, Human Rights Watch notes that migrant expulsions under the order are taking place without conducting adequate credible fear interviews necessary to respect non-refoulement.98 Moreover, many expellees are in fact detained prior to their expulsions in conditions that increase their risk of contracting COVID-19. Since international tourist and visa travel continues unabated (with short interruptions for new virus variants) and public health mitigation efforts remain almost entirely absent in many areas of the U.S., there is still no evidence of any meaningful link between undocumented migration at the Southern border and the spread of COVID-19 domestically.

The Biden administration has in some ways inversely mirrored the Trump administration—advocating a more robust response to coronavirus while loosening restrictions on asylum seekers and immigrants. Regardless of the merits or lack thereof of these policies for protecting public health, they highlight Trump’s nakedly opportunistic use of the pandemic to enact migration restrictions that were not consistent with a coherent effort to address the pandemic. The point is not that all migration restrictions or border closures are always unjustifiable, but that such policies must be interpreted against the backdrop of overall crisis response. At the same time, the Biden administration has not overcome the trajectory created by opportunistic oppression. Even as it expresses sympathy for migrants, it has maintained previous policies such as Title 42. While it has stronger footing to make credible public health claims, it is hard not to see the temptations of opportunism in its policies.
Conclusions: implications of opportunistic oppression

The unfolding COVID-19 pandemic has proved devastating, leading to massive loss of life and extensive social and economic disruption. Despite declaring ‘war’ against the ‘invisible enemy’, the U.S. notably failed to contain the virus. Instead of effectively mobilising and coordinating public health efforts, the Trump administration stoked conflict and competition, denigrated science, and externalised blame, attributing responsibility for the nation’s woes to China, the WHO, and the threat of migrants. Eschewing the advice of public health experts, its most consistent efforts were directed at restricting immigration and locking down the U.S. asylum system.

When invoked by opportunistic actors, ‘war’ on COVID-19 thus failed to enhance public health outcomes. Rather, it facilitated growing nationalism and xenophobia against alleged foreign enemies (the ‘China virus’ and by extension, Asian-Americans and all migrants) and constricted space for international cooperation. Although wartime provisions such as the Defense Production Act are appropriate means to address specific logistical problems such as medical supply shortages, the dynamics we identify suggest that the securitisation of health has done little to control the virus in practice and has contributed to a legal and political fog in which vulnerable minorities are targeted and international human rights obligations are eroded.

The Trump administration’s COVID-19 response evinces what we have theorised as ‘opportunistic oppression’, a phenomenon that occurs when actors leverage crises to pursue pre-existing and/or unrelated policy preferences. While exogenous shocks create windows of opportunity, opportunistic oppression operates through the concerted politicisation of crises in ways that legitimate abuses. Such moves are themselves predicated on longstanding patterns of enmity and exclusion. At the same time, opportunistic oppression fails to successfully address crisis conditions. Because policymakers are focused on implementing preferences rather than assessing problems holistically and objectively, they may enact measures that do not work, even while invoking the crisis to justify their actions. The patterns of human rights restrictions and violations that emerge from opportunistic oppression should therefore not be understood as harsh trade-offs necessitated by emergency conditions. While such trade-offs may be genuinely required in some instances, including the COVID-19 pandemic, opportunists are not engaged in good faith deliberations over contentious policies. These motives matter because opportunistically deployed policies are less likely to be integrated into an overall coherent strategy. We have posited a method for identifying opportunistic oppression by examining policy inconsistencies. This redirects attention from normative debates over whether abuses are justifiable to analytical critiques of the purpose and function of such abuses in the first place.

The COVID-19 pandemic is not the first and will not be the last crisis that besets the world. By identifying and naming the phenomenon of opportunistic oppression, citizens, human rights advocates, and scholars will be better positioned to critique and challenge policies that are neither necessitated by nor effective solutions to the many problems societies continue to face.
Notes

6. Ibid.


15. Sanders, Plausible Legality.


44. Klein, The Shock Doctrine.


53. Dionne and Turkmen, ‘The Politics of Pandemic Othering’


56. Barnes and Makinda, ‘A Threat to Cosmopolitan Duties?’

57. T. Alexander Aleinikoff, Chaloka Beyani, Iain Byrne, François Crépeau, Joanne Csete, Guy S. Goodwin-Gill, Walter Kälin, Ian M Kysel, Jane Mcadam, Chidi Anselm Odinkalu, Anna Shea, Leah Zamore, and Monette Zard. ‘Human Mobility and Human Rights in the COVID-


63. Sanders, *Plausible Legality*; Birdsall and Sanders, 'Trumping International Law?'.


73. Ibid.


76. E. Bay Sanctuary Covenant v. Trump, 950 F.3d 1242 (9th Cir. 2020).


80. @realDonaldTrump, Twitter, Apr. 20, 2020, 10:06 PM, https://twitter.com/realDonaldTrump/status/1252418369170501639.


89. Ibid.


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