

Symposium: Managing Mixed Migration

Impoverishing Asylum: “Bona Fide” Asylum-Seekers and the End of Work Authorization

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INTRODUCTION

In August of 2020, the Trump Administration enacted regulations that significantly restricted asylum-seekers’ access to work authorization.¹ The new rules extended the wait time for work authorization eligibility from 180 to 365 days, eliminated eligibility for asylum-seekers who did not cross at a port of entry, removed all mandatory processing times for the adjudication of applications, and created myriad new procedural barriers to accessing work authorization.² Advocacy groups argued that the rules made it all but impossible for asylum-seekers to receive work authorization during the pendency of their cases.³

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1. Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532 (June 26, 2020) (codified at 8 C.F.R. pts. 208, 274a) [hereinafter “Employment Authorization Rule”]; Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applicants, 85 Fed. Reg. 37502 (June 22, 2020) (codified at 8 C.F.R. pt. 208) [hereinafter “Processing Rule”].

2. For a summary of changes, see Employment Authorization Rule, *supra* note 1, at 38533–38536. See also Lindsay Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOY. L. REV. 121, 173–175 (2021) (summarizing changes in the new work authorization regulations).

3. Int’l Refugee Assistance Project, Comment Letter on Proposed Employment Authorization Rule (Jan. 13, 2020), <https://www.regulations.gov/comment/USCIS-2019-0011-0787>; Human Rights First, Comment Letter on proposed Employment Authorization Rule (Jan. 9, 2020), <https://www.regulations.gov/comment/USCIS-2019-0011-0450>; Tahiri Justice Center, Comment Letter on Proposed

In promulgating the rules, the Department of Homeland Security (DHS) was explicit that its purpose had been to deter the filing of “non bona fide” asylum applications.⁴ The agency reasoned that by restricting asylum applicants’ ability to work and support themselves, the rules would create conditions of significant hardship that would decrease any “economic” incentives to apply for asylum.⁵ Notably, the rules in no way limit their deterrent effect to non-bona fide asylum applicants—the restrictions to work authorization eligibility apply equally to anyone applying for an asylum-applicant based work permit.⁶ In promulgating the new rule, however, DHS argued that bona fide applicants would be less likely to be deterred from applying for asylum in practice.⁷ The agency’s view appeared to be that those genuinely fleeing persecution should be more willing to risk poverty and homelessness than other migrants.

This Essay criticizes the legal construction of the bona fide asylum-seeker as a migrant necessarily willing to suffer economic precarity in order to flee persecution. In Section II, I discuss the details of the new regulatory regime and how its various provisions primarily function to restrict asylum-seekers’ access to work authorization. In Section III, I show how the new regulatory regime constructs a legal subject in the figure of the “bona fide asylum-seeker” as an individual willing to undergo social and economic immiseration to escape violence. In so doing, the new regulations depart from established domestic law understandings of bona fide asylum applications and exacerbate old tropes that distinguish “forced” migrants from “economic” migrants. In this section, I observe how the new rules conflict with the “mixed migration” paradigm; I also address how that paradigm is limited insofar as it underemphasizes the economic rights of asylum-seekers. In Section IV, I argue that the new regulations’ distinction between bona fide asylum-seekers and economic migrants significantly departs from the international legal regimes of asylum law and human rights law. International law recognizes that asylum-seekers are necessarily social and economic rights holders. Accordingly, the attempt to deprive asylum-seekers of economic rights as a condition of asylum eligibility is fundamentally at odds with states’ obligations to protect those fleeing persecution. A better legal regime for regulating the work authorization of asylum-seekers would recognize the social and economic rights of all asylum-seekers and abandon forced immiseration as a tool of migration governance.

Employment Authorization Rule (Jan. 14, 2019), <https://www.regulations.gov/comment/USCIS-2019-0011-0717>; Kids in Need of Def., Comment Letter on Proposed Employment Authorization Rule (Nov. 8, 2019), <https://www.regulations.gov/comment/USCIS-2019-0011-0639>; Asylum Seeker Advocacy Project, Comment Letter on Proposed Employment Authorization Rule (Jan. 14, 2020), <https://www.regulations.gov/comment/USCIS-2019-0011-0803> (author contributed to this comment).

4. Employment Authorization Rule, *supra* note 1, at 38555 (“[t]hrough this rule DHS seeks to separate the asylum application process from employment authorization as a deterrent to aliens who are not bona fide asylum seekers”).

5. *Id.* at 38546.

6. This is true for all those with pending cases; individuals who win asylum are immediately eligible to work legally and may apply for a work permits as granted asylees. *See* 8 U.S.C. § 1158(c)(1)(B).

7. Employment Authorization Rule, *supra* note 1, at 38558.

THE NEW REGULATORY REGIME GOVERNING ASYLUM-SEEKERS’
EMPLOYMENT ELIGIBILITY

Congress has granted the Secretary of DHS the authority to issue work authorization to asylum-seekers during the pendency of their cases.⁸ Congress originally authorized granting work authorization to asylum-seekers in the Refugee Act of 1980, as part of its fulfillment of the United States’ obligations as a party to the Protocol Relating to the Status of Refugees.⁹ When it passed the Illegal Immigration Reform and Immigrant Responsibility Act in 1996, Congress instituted a statutory requirement that asylum applicants must wait at least 180 days after filing their asylum applications before being granted work authorization.¹⁰ For nearly a quarter of a century—until the enactment of new work authorization rules by the Trump Administration in 2020—the governing regulations permitted asylum-seekers to apply for initial work permits on the 150th day after submitting their asylum applications and required the government to process their applications within thirty days of receipt.¹¹ Under this system, asylum-seekers could also renew their work authorizations, including while their cases were on appeal.¹² A narrow subset of individuals convicted of certain crimes were ineligible for work authorization, but otherwise, asylum-seekers could generally be expected to be granted a work permit.¹³

The 2020 regulations dramatically extended the period asylum-seekers had to wait to receive work authorization in two ways. First, the new rules increased the waiting period for initial work authorization eligibility from 180 days to 365 days.¹⁴ And second, through another simultaneous regulatory change, DHS eliminated the processing time requirements for initial work permit applications.¹⁵ The net effect of these two changes was that asylum-seekers had to wait at least one year after filing for asylum to even apply for work authorization, and then wait again for a potentially indefinite period of time for their applications to be processed.¹⁶

The new regulatory scheme also set significant bars for work authorization

8. See 8 U.S.C. § 1158(d)(2). The statute originally granted the authority to the Attorney General, but this authority, along with numerous other functions and duties, was transferred to the Department of Homeland Security Secretary when the new agency was created by the Homeland Security Act. See generally, 6 U.S.C. § 112.

9. See Refugee Act of 1980, § 101(a), Pub. L. No. 96-212, 94 Stat. 102, and signing on to the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577 (1968).

10. See 8 U.S.C. § 1158(d)(2) (“[a]n applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum”).

11. See 8 C.F.R. § 208.7 (prior regulation) (in effect 1996-2020). See also, *CASA de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 935-37 (D. Md. 2020) (summarizing the previous regulatory regime).

12. See 8 C.F.R. § 208.7 (prior regulation) (in effect 1996-2020).

13. *Id.*

14. Employment Authorization Rule, *supra* note 1, at 38584–38586.

15. Processing Rule, *supra* note 1, at 37503-37505.

16. As of December 10, 2021, USCIS reported processing times up to “7.5 months” for initial asylum seeker I-765 employment authorization applications. In practice, this means that asylum seekers would have to wait 19.5 months from the date of the filing of their asylum applications before being able to receive work authorization under the new rules. See USCIS, *Check Case Processing Times*, <https://egov.uscis.gov/processing-times/> (last visited Dec. 10, 2021).

eligibility. With narrow and limited exceptions, the rule eliminated work authorization for any asylum-seeker who did not cross into the United States at a designated port of entry¹⁷—and this bar applies despite the fact that the statutory provision that authorizes asylum explicitly states that individuals are eligible to apply “whether or not” they crossed a port of entry.¹⁸ The rule also sought to eliminate work authorization eligibility for anyone who missed the notorious and contested one-year filing deadline for initial asylum applications (even for those individuals who would challenge the applicability of that bar in their asylum cases).¹⁹ The rule imposed numerous additional procedural requirements that stripped eligibility, including penalizing applicants who sought continuances or changes of venue.²⁰ The list of criminal bars was dramatically expanded²¹ (contingent upon parallel rulemaking).²² The rule also eliminated parole-based work authorization eligibility for asylum-seekers,²³ imposed costly and redundant biometrics requirements,²⁴ limited work permit eligibility pending appeal of an asylum case,²⁵ and authorized DHS to deny any work permit on a purely discretionary basis.²⁶

Taken together, these changes threatened to render a vast number of asylum-seekers ineligible for work authorization during the entire pendency of their cases—potentially for years—and ensured that no asylum-seekers would receive work authorization until well more than a year after submitting their initial asylum applications. As numerous advocates stressed in notice-and-comment submissions, these rules aimed to all but eliminate work authorization for asylum applicants. The rules should be contextualized as part of a broader agenda seeking to limit access to asylum, including, among others, the “Remain in Mexico” program and the third-country transit ban.²⁷ Indeed, when the work

17. Employment Authorization Rule, *supra* note 1, at 38552–38553.

18. 8 U.S.C. § 1158(a)(1) (“[a]ny alien who is physically present in the United States or who arrives in the United States . . . whether or not at a designated port of arrival . . . irrespective of such alien’s status, may apply for asylum”). Notably, the new regulations also extend the minimum 180-day waiting period for work authorization set by Congress—accomplishing through regulation something that the prior administration might have otherwise sought to achieve legislatively. *See id.* at § 1158(d)(2).

19. Employment Authorization Rule, *supra* note 1, at 38567–38568. *See also*, Roy Xiao, *Refuge from Time: How the One-Year Filing Deadline Frustrates Valid Asylum Claims*, 95 N.C. L. REV. 523 (2017) (discussing in detail how the one-year filing deadline prejudices asylum claims and adversely impacts asylum seekers).

20. Employment Authorization Rule, *supra* note 1, at 38578–38580 (discussing DHS’s expansive definition of “applicant-caused delays”). Under the Employment Authorization Rule, an asylum applicant who has an unresolved “applicant-caused delay” at the time of the adjudication of her employment authorization filing will be denied a work permit.

21. *Id.* at 38570.

22. These bars are incorporated at 8 C.F.R. § 208.13(c)(6) but are currently enjoined. *See* Pangea Legal Servs. v. DHS, 501 F. Supp. 3d 792 (N.D. Cal. 2020).

23. Those who received parole after a positive Credible Fear Interview became ineligible for parole-based work permits. *See* Employment Authorization Rule, *supra* note 1, at 38582.

24. *Id.* at 38575–38576.

25. *Id.* at 38580.

26. *Id.* at 38555.

27. *See* HUMAN RIGHTS WATCH, “We Can’t Help You Here”: U.S. Returns Asylum Seekers to Mexico (2019), https://www.hrw.org/sites/default/files/report_pdf/us_mexico0719_web2.pdf (“The Trump administration has pursued a series of policy initiatives aimed at making it harder for people fleeing their homes to seek asylum in the United States, separating families, limiting the number of people processed daily at ports of entry, prolonging detention, and narrowing the grounds of eligibility for

authorization rules were first contemplated, news reports suggested that administration officials considered barring asylum-seekers from work authorization completely.²⁸ Commentary from administration officials at the time confirmed that the purpose of such a ban would have also been to deter asylum-seekers.²⁹

The new regulatory scheme became fully effective on August 25, 2020. Litigation initially restricted the application of certain provisions of the rules to the members of two major advocacy organizations, but apart from a limited preliminary injunction,³⁰ the rules remained in effect until February 7, 2022, when a district court ordered their vacatur.³¹ The district court decision relied entirely upon the argument that Chad Wolf was not lawfully installed as Acting Secretary of DHS when he issued the regulations and thus did not reach any substantive conclusions as to whether the regulations could be reconciled with the humanitarian purpose of Refugee Act.³² The government continues to defend the legality of the regulatory regime, and when this Essay went to press, was considering appeal of the vacatur. Moreover, regardless of whether the government appeals the vacatur, the reinstatement of at least several major components of rules appears to remain a priority for major political actors, indicating that the issue of who constitutes a bona fide asylum-seeker will remain a subject of legal and policy debate.³³

THE STATED PURPOSE OF THE NEW RULES AND THE CONSTRUCTION OF THE BONA FIDE ASYLUM-SEEKER AS A “NON-ECONOMIC” MIGRANT

In promulgating the new regulations, DHS made clear that its primary objective was deterrence: “DHS is implementing more stringent requirements for eligibility for employment authorization, *in order to disincentivize aliens who are not bona fide asylum-seekers* from exploiting a humanitarian program to seek

asylum. In January 2019, the administration expanded its crackdown on asylum with a wholly new practice: returning primarily Central American asylum seekers to several border towns in Mexico where they are expected to wait until their US asylum court proceedings.”).

28. See Julia Ainsley, *Trump Administration Weighs Restricting Asylum-Seekers from Working*, NBC (Nov. 4, 2019), <https://www.nbcnews.com/politics/donald-trump/trump-administration-weighs-restricting-asylum-seekers-working-n1076146>.

29. *Id.* (“[O]ne of the DHS officials said proponents of the policy believe prolonging the period when Mexicans are not allowed to work while they wait for their claim will deter them from coming to the U.S. in the first place.”)

30. *CASA de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 973-74 (D. Md. 2020) (enjoining the application of 365 day waiting period, one-year filing deadline bar, discretionary denials, biometrics fee collection, and repeal of the 30-day processing requirement for members of the Asylum Seekers Advocacy Project (ASAP) and CASA de Maryland (CASA)). The author is counsel in this litigation representing Plaintiffs.

31. *AsylumWorks v. Mayorkas*, No. 20-CV-3815 (BAH), 2022 WL 355213 (D.D.C. Feb. 7, 2022)

32. *Id.* at *8–11.

33. See, e.g., PBS News Hour, *Republicans Seize on Biden’s Border Challenges to Reframe Immigration Debate*, PBS (Mar. 25, 2021), <https://www.pbs.org/newshour/politics/republicans-seize-on-bidens-border-challenges-to-reframe-the-immigration-debate> (noting how Republican members of Congress called for preserving existing Trump regulations and reinstating them in cases where they had been rescinded).

economic opportunity in the United States.”³⁴ Throughout the final rule, DHS also drew a distinction between “bona fide” asylum applicants and other applicants who were merely “economic migrants,” blaming the backlog of asylum cases precisely on those “economic migrants” for “exploiting” the asylum system.³⁵ DHS, for instance, stated that the “asylum system was never meant to be an avenue for economic migrants to reside and work in the United States.”³⁶ In order to deter “economic migrants” from “abusing the asylum process,” DHS insisted that the new rule needed to “separate the asylum process from employment authorization.”³⁷

Two significant implications followed from DHS’s justificatory rationale for the new regulations. First, the agency seemingly offered a novel characterization of the bona fide asylum-seeker that is a significant departure from its narrow, standard legal meaning under domestic immigration law. Second, the agency argued—implausibly—that bona fide asylum-seekers would not be deterred from seeking asylum despite the rules’ deliberate imposition of hardship on all asylum applicants.

First, consider how DHS’s discussion of bona fide asylum applicants in the new rule diverged from the narrow legal definition. Although no domestic statute or regulations offers a per se definition of bona fide asylum applicants, the Immigration and Nationality Act provides that “no period in which an individual has a bona fide application for asylum pending should be considered when calculating the period of unlawful presence.”³⁸ In assessing whether an application for asylum was “bona fide” for the purpose of determining exceptions to unlawful presence, DHS has determined that any “application for asylum that has arguable basis in law or fact, and is not frivolous, whether or not approvable, is a bona fide application.”³⁹ Notably, this standard is a broad one that does not hinge on the ultimate merits assessment of the application. Indeed, this interpretation suggests that, at minimum, all asylum-seekers who are given a positive credible fear determination are treated as bona fide asylum applicants. Credible fear determinations typically happen at an early stage in defensive asylum applicants cases and require an asylum officer to find that an individual has expressed a “credible fear of persecution,” meaning that “there is a ‘significant possibility’ that he or she could establish in a full hearing before an immigration judge that he or she has been persecuted or has a well-founded fear of persecution or harm on account of his or her race, religion, nationality, membership in a particular social group, or political opinion if returned to his or

34. Employment Authorization Rule, *supra* note 1, at 38546 (emphasis added).

35. *Id.*

36. *Id.* at 38554.

37. *Id.* at 38555.

38. See INA § 212(a)(9)(B)(iii)(II).

39. USCIS, *Interoffice Memorandum: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I)*, 29 (May 6, 2009) https://www.uscis.gov/sites/default/files/document/memos/revision_redesign_AFM.PDF (“DHS has interpreted the phrase ‘bona fide asylum application’ to mean a properly filed asylum application that has a reasonably arguable basis in fact or law, and is not frivolous.”).

her country.”⁴⁰ By DHS’s own definition, then, when an asylum-seeker is found to have a credible fear, the agency is explicitly determining that they believe there is some “arguable basis in law or fact” upon which the asylum-seeker could later establish that she qualifies as a refugee before an immigration judge.

The statements made by DHS in the new work authorization regulations, however, diverge from the agency’s own standard for determining bona fide status. Throughout the final rule, the agency draws a contrast between bona fide asylum-seekers and a variety of other “categories” of asylum applicants, referring—seemingly interchangeably—to “frivolous,” “fraudulent,” “non-meritorious,” and not “legitimate” asylum-seekers.⁴¹ But this purported contrast ascribes far too much content to the meaning of bona fide asylum applicants and erroneously conflates types of applicants with significantly divergent legal significance. While it may be the case that “frivolous”⁴² asylum applications are per se not bona fide, it is certainly the case that some applications that fail on a merits adjudication are bona fide.⁴³ By conflating these various definitions, DHS focuses on exceedingly small and narrow subset of applicants (genuinely “frivolous” cases) in order to justify a regulatory change that will have significantly adverse effects on *all* asylum-seekers.

In conflating these various categories, DHS appears to suggest that all bona fide asylum applicants will ultimately receive asylum — a claim not only belied by the radically disparate rates of asylum grants across immigration court jurisdictions,⁴⁴ but also one that ignores entirely the numerous procedural and circumstantial reasons an otherwise meritorious asylum claim may be denied.⁴⁵ Asylum hearings in immigration court are adversarial proceedings, where government attorneys often seek to make any and all available arguments to defeat a petitioner’s claim for asylum, irrespective of whether that petitioner has expressed a genuine fear of persecution based on a protected category. If anything, data suggests that one of the most dispositive factors in determining whether an asylum claim will be granted is whether an asylum-seeker has competent legal representation.⁴⁶ Because asylum-seekers must pay for their

40. See 8 CFR § 208.30(e)(91) (“An alien establishes a credible fear of persecution if there is a significant possibility the alien can establish eligibility for asylum.”). See also, David L. Coats, *Credible Fear: A Manifestly Unfounded Standard*, 46 DENV. J. INT’L L. & POL’Y 191 (2017) (discussing the standard and its limitations, which are likely to, if anything, under capture bona fide asylum seekers).

41. See 8 C.F.R. § 1208.20 (discussing the standard for determining if an asylum application may be determined frivolous, but noting that this determination is to be made by an immigration judge or asylum officer).

42. See *id.* at § 1208.20(a)(1) (“An application is frivolous if...any of the material elements in the asylum application is deliberately fabricated”).

43. See TRAC Immigration, *Asylum Denial Rates Continue to Climb* (Oct. 28, 2020) <https://trac.syr.edu/immigration/reports/630/> (noting that in fiscal year 2020, 73.7 percent of immigration judges decisions denied asylum, even in a majority of cases where an applicant had previously passed a CFI).

44. See TRAC Immigration, *Judge-by-Judge Asylum Decisions in Immigration Court FY 2015-2020*, <https://trac.syr.edu/immigration/reports/judge2020/denialrates.html> (showing individual immigration judge denial rates for asylum ranging from ninety-nine percent to three percent).

45. See, e.g., ANDREW SCHOENHOLTZ ET AL., *THE END OF ASYLUM*, 31–47 (2021) (discussing the myriad procedural barriers to asylum).

46. Ingrid V., Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015) (discussing the significance of representation in immigration court).

own legal representation,⁴⁷ lack of access to employment authorization itself can be a major factor in determining whether an applicant will be able to prevail on their claim.⁴⁸

Second, the agency described bona fide asylum-seekers as individuals who would necessarily be willing to undergo extreme economic hardship to pursue asylum. Because the stated purpose of the regulation was to “disincentive” applicants, DHS did not dispute that the regulatory change would create significant hardship for *all* asylum-seekers. Numerous commentators also raised the fact that asylum-seekers are more likely to be economically vulnerable when they arrive in the United States,⁴⁹ as many asylum-seekers are forced to abandon any financial holding, property, or other material goods in order to flee persecution.⁵⁰ In response to commentators expressing concern that the regulations would result in increased poverty, exploitation of workers, and mental distress, the agency acknowledged that it had “reviewed the cited reports and research, and understands that there could be monetary and qualitative impacts to applicants and their support networks, including numerous types of hardship.”⁵¹ With regard to concerns that the rule would increase homelessness among asylum applicants, DHS acknowledged the validity of the concern, but stated that “[i]t continues to be incumbent upon every asylum seeker to have a plan for where they intend to live...while they are not employment authorized...[a]sylum seekers who are concerned about homelessness during the pendency of their employment authorization waiting period should become familiar with the homelessness resources provided by the state where they intend to reside.”⁵²

It is essential that DHS also acknowledged that the “numerous types of hardship” and “monetary and qualitative impacts” would be experienced by all types of asylum applicants, regardless of whether their claims were bona fide.⁵³ Simultaneously, however, DHS argued through the final rule that, even though the purpose of the new regulations was deterrence, only non-bona fide asylum applicants would be deterred by the negative economic and social impacts of the rule.⁵⁴ For example, in response to comments arguing that the rule violated the United States non-refoulement obligations under international law, DHS stated that “[b]ona fide asylum-seekers urgently needing protection from

outcomes); *see also* TRAC Immigration, *supra* note 43 (finding that in fiscal year 2020, only eighteen percent of unrepresented applicants were granted asylum, compared to thirty-one percent of represented applicants).

47. *See* Zachary Manfredi & Joseph Meyers, *Isolated and Unreachable: Contesting Unconstitutional Restrictions on Communication in Immigration Detention*, 95 N.Y.U. L. REV. 130, 133–136 (2020) (discussing non-citizens statutory and regulatory rights to privately funded counsel).

48. *See, e.g.*, Comment by Asylum Seeker Advocacy Project, *supra* note 3.

49. Employment Authorization Rule, *supra* note 1, at 38565–38566 (summarizing comments).

50. *See* HUMAN RIGHTS WATCH, *At Least Let Them Work*, 12–16 (Nov. 12, 2013), <https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united> (last visited Feb. 12, 2022).

51. Employment Authorization Rule, *supra* note 1, at 38591.

52. *Id.*

53. *Id.*

54. *Id.* at 38570

persecution...will apply for asylum regardless of when they would receive work authorization.”⁵⁵ The agency declined to elaborate on why it believed its regulatory scheme would prove exceptionally potent as a deterrent to only a subset of asylum applicants. The implications of this pronouncement were nonetheless clear: DHS believed that part of the way in which asylum applicants had to “prove” the genuineness of their fear of persecution was by being willing to endure extreme financial and social hardship. The tacit assumption behind this reason appears to be something akin to the idea that fear of persecution is only genuine if outweighs other concerns an asylum-seeker may have about social immiseration, up to and including homelessness and starvation. The regulation demands that asylum-seeker distinguish themselves from mere “economic migrants” by forswearing economic security during the pendency of their cases.

In this respect, the new regulatory scheme relies on a rigid distinction between asylum-seekers and economic migrants that the paradigm of “mixed migration” challenges. Originally developed by scholars and commentators in the 1990s as way to discuss the complexity of contemporary migrant flows, the mixed migration framework has increasingly been recognized by international organizations, including UNHCR.⁵⁶ Mixed migration may refer to both the “motivations” for migration at an individual level (that there are often multiple reasons that induce someone to flee their home) and, at a sociological level, to the “mixed” character of migrant flows (that different groups of migrants often travel together and are difficult to distinguish in practice).⁵⁷ Scholars have rightly criticized the limitations of this paradigm, while also recognizing its increasing relevance as a framework adopted by international organizations, NGOs, and even some states, to analyze and regulate contemporary migration.⁵⁸

While a deep engagement with this paradigm in the context of contemporary U.S. asylum policy is beyond the scope of this Essay, it useful to situate the new work authorization rules in mixed migration framework for two reasons. First, even though the mixed migration paradigm at times risks drawing overly rigid distinctions between “forced” and “economic” migrants,⁵⁹ it generally recognizes that seeking relief from economic precarity and fleeing from persecution based on protected status are not mutually exclusive.⁶⁰ Forced migration scholars acknowledge that persecution may take the form of economic

55. *Id.* at 38558.

56. See Marina Sharpe, *Mixed Up: International Law and the Meaning(s) of Mixed Migration*, 37 REFUGEE SURVEY QUARTERLY 117–119 (2018) (providing an overview of the literature on mixed migration, approaches of international organizations, and scholarly criticism).

57. See Sharpe, *supra* note 56, at 119.

58. See *id.* at 118–199. See also, Christina Oelgemöller, *Introduction: Global Compacts, Mixed Migration and the Transformation of Protection*, 23 INTERVENTIONS: INT’L J. POSTCOLONIAL STUDIES 184–185 (2021) (discussing the framework of mixed migration and developments and criticisms of it by scholars); Jane McAdam & Tamara Wood, *The Concept of “International Protection” in Global Compacts on Refugees and Migration*, 23 INTERVENTIONS: INT’L J. POSTCOLONIAL STUDIES 2–6 (2021) (also discussing scholarly commentary on mixed migration).

59. See McAdam & Wood, *supra* note 58, at 2–6.

60. See, e.g., Jonathan Crush, Abel Chikanda & Godfrey Tawodzera, *The Third Wave: Mixed Migration from Zimbabwe to South Africa*, 49 CAN. J. AFR. STUD. 363 (2015) (criticizing but also relying on the framework of mixed migration to analyze the latest developments in migration from Zimbabwe to South Africa).

deprivation and that direct violence creates conditions of social and economic destabilization.⁶¹ In this regard, mixed migration shows that the new DHS regulations are overbroad and exclusionary because they aim to deter asylum-seekers who are suffering economic precarity, but nevertheless clearly fleeing persecution. Second, the mixed migration paradigm is limiting insofar as it emphasizes economic need as a heuristic for categorizing distinct types of migrants.⁶² In this regard, scholars have noted that mixed migration analysis can be repurposed as a tool of governance to limit access to protections by better “sorting” migrant populations to determine who qualifies for protections.⁶³

Rather than defensively arguing that economic “motives” for migration need not be disqualifying for refugee protections, I argue that scholars and advocates ought to focus on the social and economic rights of migrants. As discussed below, extant international legal instruments already treat asylum-seekers as social and economic rights holders. A better legal regime for the regulation of asylum-seekers’ access to work ought to begin from the recognition of all asylum-seekers’ basic social and economic rights, rather than the assumption that economic precarity may be a disqualification for protection.

THE NEW RULES’ DEPARTURE FROM INTERNATIONAL LAW

The new rules conflict with the protections afforded asylum-seekers under international law. Both treaty law and customary international law require states to protect refugees’ and asylum-seekers’ right to work. Moreover, I argue that, properly understood, refugee law and international human rights law instruments reject the assumption that refugees can be treated as wholly distinct from “economic migrants.” Rather, a contextual reading of key international law instruments supports the conclusion that the right to seek asylum encompasses the right to seek improvement in one’s economic circumstances through migration.

First, any regulatory scheme that would prevent asylum-seekers from working during the pendency of their cases conflicts with Articles 17 and 18 of the 1951 Refugee Convention.⁶⁴ Although not a party to the Convention, the United States is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2 to 34 of the Convention.⁶⁵ Article 17 provides that refugees who are “lawfully staying” in a state party’s jurisdiction have the “right to engage in wage-earning employment,” comparable to the “most favorable treatment” accorded to nationals of foreign states.⁶⁶ Similarly Article 18 of the Convention guarantees refugees “treatment as favorable as possible,” regarding

61. McAdam & Wood, *supra* note 58, at 3–5.

62. See Sharpe, *supra* note 56, at 117–119.

63. See Nele Kortendiek, *How to Govern Mixed Migration in Europe: Transnational Expert Network and Knowledge Creation in International Organizations*, 21 GLOBAL NETWORKS 320 (2021).

64. The Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention].

65. The Protocol Relating to the Status of Refugees, Jan. 30, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].

66. Convention, *supra* note 64, at art. 17, ¶ 1.

“self-employment” such as “the right to engage on [their] own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.”⁶⁷

Differentiating asylum-seekers from refugees in its response to comments, DHS noted that it did not believe the 1967 Refugee Protocol conveyed any obligation to provide asylum-seekers work authorization prior to a positive final legal determination by an immigration judge or asylum officer on the merits of their asylum cases.⁶⁸ This interpretation, however, is significantly out of step with international law, and would undermine entirely the purpose of the Convention and Protocol. As a general matter, the United Nations High Commissioner for Refugees (UNHCR) has made clear that asylum-seekers must be treated as being entitled to the protections of refugees under international law while their claims are adjudicated: “[e]very refugee is, initially, an asylum-seeker...asylum-seekers must be treated on the assumption that they may be refugees until their status can be determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected...or returned to persecution on the grounds that their claim had not been established.”⁶⁹ Scholarly commentators and *opinio juris* also support the interpretation that the protections of the Convention and Protocol must be extended to asylum-seekers in order to avoid violating the basic principle of non-refoulment.⁷⁰ This interpretation also aligns with the text of Article 14 of the Universal Declaration of Human Rights (UDHR), which states that “[e]veryone has the right to seek and enjoy in other countries asylum from persecution.”⁷¹ DHS’s position, by contrast, undermines the Convention in the extreme because it treats even those asylum-seekers with ultimately meritorious claims as if they were not “lawfully staying” in the United States during the pendency of their cases.

With regard to Article 17 and 18 specifically, UNHCR also indicates that the treaty text referring to refugees “lawfully staying” in country is meant to embrace “temporary” (asylum-seekers) refugees as well as those receiving a final determination of refugee status.⁷² Importantly, UNHCR notes that the Convention “must be interpreted against its context” to “assure refugees the widest possible exercise of their rights,” and that “an interpretation or exercise of powers which, although on its face legitimate, in fact frustrates the object and

67. Convention, *supra* note 64, at art. 18.

68. Employment Authorization Rule, *supra* note 1, at 38559.

69. U.N. High Commissioner for Refugees (UNHCR), Note on International Protection, ¶ 11, U.N. Doc. A/AC.96/815 (1993). *See also*, UNHCR, RECEPTION STANDARDS FOR ASYLUM SEEKERS IN THE EUROPEAN UNION, 12 (2006) (noting that asylum seekers are “entitled to an adequate standard of living throughout the asylum procedure,” including by being afforded the right to work).

70. *See, e.g.*, JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 158 (2005) (arguing that “asylum seekers are rights holders under international law,” and that Article 17 should be interpreted to require that asylum applicants are afforded the right to work immediately upon the lodging of an asylum application).

71. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 14, ¶ 1 (Dec. 10, 1948).

72. U.N. High Commissioner for Refugees (UNHCR), “Lawfully Staying” — A Note on Interpretation, ¶ 7, May 3, 1988 [<https://www.refworld.org/docid/42ad93304.html>].

purpose of the Convention, could amount to a breach of international obligations under the Convention.”⁷³ The new rules explicit aim of attempting to deter asylum-seekers by creating conditions of economic hardship no doubt undermines the humanitarian “object and purpose” of the Convention of allowing for the safe relocation of refugees—the regulatory regime was specifically designed in order to make it more difficult for those fleeing persecution to seek protections.

Second, international human rights law also supports asylum-seekers’ right to work. Most specifically, Article 23 of the UDHR provides that “[e]veryone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.”⁷⁴ The International Covenant on Civil and Political Rights (ICCPR) also guarantees to “all individuals within [each state party’s] territory and subject to its jurisdiction” the rights enumerated therein;⁷⁵ commentators have noted that rights to life, dignity, and association in the ICCPR entail protection of individuals’ rights to seek employment and to support themselves and their families.⁷⁶ The International Covenant on Economic, Social and Cultural Rights also requires states parties to “recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.”⁷⁷ And although the United States is not a party to the International Covenant on Economic Rights, many have argued that its widespread acceptance has rendered certain provisions binding as customary international law.⁷⁸

The new work authorization regulations cannot be reconciled with the international legal framework for the protection of refugees and asylum-seekers.⁷⁹ At its core, the new regulatory regime aims to curtail, if not eliminate entirely, asylum-seekers’ abilities to legally work and support themselves while seeking asylum. The United States’ obligations under the Refugee Protocol, however, require robust protection of asylum-seekers’ rights, including legal provisions protecting their right to engage in wage-earning employment.

73. “Lawfully Staying” — A Note on Interpretation, ¶¶ 19–20.

74. Universal Declaration of Human Rights, *supra* note 71, at art. 23, ¶ 1.

75. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

76. See, e.g., Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243, 276 (2016) (arguing that the ICCPR “includes a right to life, which impliedly comes with a right to seek out the basic necessities of life, meaning, for most persons, work”).

77. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 6, U.N. Doc. A/6316 993 U.N.T.S. 3, (entered into force Jan. 3, 1976).

78. For a classical example arguing human rights law is a part of customary international law, see Antony D’Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT’L & COMP. L. 47 (1995).

79. Although I cannot explore this point fully here, it is also worth noting that the explicit purpose of the regulations—the deterrence of asylum applicants—runs counter to the principle of non-refoulement, because it aims to prevent individuals from seeking refuge from persecution. See M. Alvi Syahrin, *The Principle of Non-Refoulement as Jus Cogens: History, Application, and Exception in International Refugee Law*, 6 J. OF INDONESIAN LEG. STUD. 53 (2021) (arguing non-refoulement has been established as a fundamental preemptory norm under international law). For a broader discussion of how the United States’ asylum policy may violate its non-refoulement obligations and the legal implications of those violations, see Shirley Llain Arenilla, *Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States*, 15 ANUARIO MEXICANO DE DERECHO INTERNACIONAL, 283 (2015).

Likewise, international human rights law encourages adoption of robust domestic legal regimes protecting the right to work, as well as related rights to life, dignity, association, and social provision.

Taken collectively, the international legal instruments of refugee and human rights law suggests an alternative understanding of bona fide asylum-seekers as social and economic rights-holders. The Refugee Convention acknowledges asylum-seekers' rights to employment as part of the package of entitlements necessary to protect those fleeing persecution.⁸⁰ Similarly, much of human rights law extends protections to all individuals within the territorial ambit of states, rather than limiting those protections to nationals or citizens.⁸¹ This approach, moreover, rejects the effort to rigidly distinguish between asylum-seekers and refugees and "economic migrants," because it recognizes that asylum-seekers themselves are social and economic rights-holders. The right to seek asylum itself entails the right to seek economic security and well-being. And while recognizing the right to work does not wholly account for the needs or economic security of asylum-seekers, it does, at minimum, afford them the essential opportunity to provide for their own material well-being. As legal scholar Louis Henkin noted as U.S. delegate to the Refugee Convention negotiations: "without the right to work, all other rights are meaningless."⁸²

CONCLUSION: TOWARDS A MORE CAPACIOUS PROTECTION OF ASYLUM-SEEKERS' RIGHT TO WORK

Seeking economic security cannot and should not be a disqualifying condition for seeking asylum. This Essay criticizes DHS's new legal construction of the bona fide asylum-seeker as a migrant necessarily willing to suffer economic precarity to flee persecution. A proper reading of international refugee and human rights law instead focuses on asylum-seekers as entitled to both protection from persecution *and* economic rights. Any viable legal regime for regulating the work authorization of asylum-seekers ought to recognize asylum-seekers as social and economic rights-holders, rather than unilaterally subjecting all asylum-seekers to economic immiseration.

80. Convention, *supra* note 64, at art. 17, ¶ 1.

81. See, e.g., Tanya Basok & Emily Carasco, *Advancing the Rights of Non-citizens in Canada: A Human Rights Approach to Migrant Rights*, 32 HUM. RTS. Q. 342 (2010).

82. U.N. Economic and Social Council, Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva (Aug. 16, 1950), <https://www.unhcr.org/3ae68c1a0.html>.