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Deportation in Times of COVID-19 The Case of Unaccompanied Minors

Border regimes exist to manage migrants and refugees and use mechanisms such as filtering, selection, entry, permanence, redirection, and, finally, rejection if they are not functional for a given country. Deportation is a fundamental part of this regime. It is where the nation-state and its primary tools for excluding “others” (foreigners) come into play: citizenship vs. foreigner status, belonging vs. deportability, and rights vs. injustice. In fact, all non-citizens, regardless of their legal status in the immigration system of the country where they reside, may be subject to deportation. However, not all of them are expelled nor do they all face the same risk of deportation, which increases to the degree that they are viewed as no longer useful to the destination country.

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The 9/11 terrorist attacks and increased large scale transnational flows of persons in recent decades have spurred the proliferation of deportation policies and practices globally, since nations view these phenomena as undermining their sovereignty. Therefore, a deportation regime has been established, characterized by producing disposable, deportable people, based on criteria of race and class, according to a constantly growing list. The main reasons for inadmissibility include violating immigration laws, participating in criminal acts, or representing a threat to public safety. Furthermore, in the current context of the COVID-19 pandemic, situations have arisen that have expanded the reasons for deporting certain groups of foreigners, whereby the existing border regime also promotes racialized laws and policies related to sickness and contagion.

Deportation has a long history in the United States; after the September 11 terrorist attacks, it became a central part of “national security” strategy.¹ Obviously, in times

of the pandemic, deportations from the U.S. have not been put on hold.² On the contrary, based on the March 13, 2020 declaration of a national health emergency due to COVID-19 and related norms, the U.S. government continues to expel thousands of migrants in order to “diminish the propagation of the virus,” but without heeding the corresponding health care measures that recommend not deporting persons who are infected. With this practice the U.S. has contributed to spreading the virus in at least 11 developing countries that have deficient health care systems, as was revealed in a study by *The New York Times* and The Marshall Project.³ Detained migrants are confined in small unhealthy spaces where social distancing and hand washing are impossible and personal protective equipment is practically non-existent. This explains why in these facilities, since testing began in February and until November 1, 2020, at least 7 015 detainees had been infected with COVID-19 and 8 had died, as ascertained by U.S. Immigration and Customs Enforcement (ICE) itself.⁴

The Trump administration justifies these practices on the basis of the March 24, 2020 Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, a temporary emergency measure (in effect until the emergency is over) that allows the Centers for Disease Control and Prevention (CDC) to prohibit, for reasons of public health, entry to the United States of persons who could spread diseases. This regulation was issued in accordance with the Public Health Service Act of 1944, wherein section §362 (codified in Title 42 of the U.S. Code §265) authorizes the surgeon general of the United States to suspend or prohibit the entry of persons or property from a foreign country when a communicable disease that poses a serious danger of being introduced to the U.S. exists in that country and the suspension is required in the interest of public health.

The CDC order expands and redefines the previous provision. To begin with, it does not impose a requirement that the prohibited person be infected or pose a danger to public health. Furthermore, it does not require an individual determination. The order is carefully designed so as to apply solely to those foreigners without valid travel documents that enter the country by land. In other words, this racialized norm is aimed only at certain groups of persons considered to pose a danger to public health and who are additionally subject to, coincidentally, summary deportation proceedings provided for in the Executive Or-

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der Designating Aliens for Expedited Removal of July 23, 2019. Therefore, the CDC order is only applicable to a specific group of persons and is totally inapplicable to U.S. citizens and legal permanent residents, as intended by the legal foundation upon which it is based (section §362 of the Public Health Service Act of 1944).

In this way the order, invoking the COVID-19 pandemic and using a manipulated and unprecedented interpretation of Section §362 of the 1944 law, has established itself as an alternative norm in immigration matters and as explicit grounds for deporting irregular migrants, asylum seekers, and unaccompanied minors, who comprise the target population. It is thereby in violation of, at least, the following rights of these persons:

- 1) The right to seek asylum in case of persecution, provided for in the Refugee Act of 1980 codified in Title 8 of the U.S.C., section § 1158.
- 2) The right to not be returned to places where they are in danger of persecution as provided for in the Convention on the Status of Refugees of 1951: Article 33 - Prohibition of expulsion or return (“refoulement”).
- 3) The right to be protected against torture, provided for in the Convention against Torture. Since it is part of this international treaty the United States government is obligated to neither expel, extradite, nor return any person involuntarily to a country where substantial grounds exist to believe that they would be in danger of being tortured. This is in compliance with the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, 2681-821 and the 8 C.F.R. § 208.16(c), that implements the Convention.
- 4) The basic guarantees to the right of due process; while the order does not establish any procedure, it does authorize deportations without a prior hearing and thus denies access to requesting asylum. In fact,

it can be applied to persons traveling far from the border.

In this context, minors as well as adults are deported summarily, without the possibility to request asylum. Some are deported within a few hours of stepping on U.S. soil. Some are taken from U.S. government shelters at midnight, placed on planes, and deported with no notification to their family members. Others are confined alone, for days or weeks, in hotels instead of being sent to government shelters—which are empty and where they could get legal advice—while they await deportation to their countries of origin.⁵ The situation is quite controversial since the Department of Justice has tried to avoid supervision by the courts when detaining unaccompanied minors in hotels, arguing that the hotels are outside the protections provided for by the Flores Agreement of 1997. This agreement establishes general guidelines for the treatment of unaccompanied migrant children in government custody: to keep them in safe and hygienic facilities and make rapid and continuous efforts to release them and reunify them with their families, as well as to provide information on where they are being detained.⁶

Furthermore, this practice violates the legal guarantees and protections for unaccompanied migrant children provided for in the Trafficking Victims Protection Reauthorization Act (TVPA). This act requires that the Department of Homeland Security (DHS) must make a determination on a case-by-case basis within 48 hours when a minor who is a resident or citizen of a contiguous country is apprehended, even though that minor 1) has not been nor is currently at risk of being a victim of human trafficking; 2) is not afraid to return to the country of which he/she is a citizen; and 3) may make a decision to withdraw the request to be admitted to the United States. In the case of minors who are not from contiguous countries, the law indicates that they should be placed in the “care and

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custody” of the U.S. Department of Health and Human Services (HHS), within a period of no more than 72 hours after it has been determined that they are unaccompanied migrant minors. However, the CDC order does not address nor respect any of these provisions and does authorize summary deportations of unaccompanied migrant minors.

The data on the number of unaccompanied minors that have been deported during the pandemic is scarce and inconsistent, but it is estimated to be over 2000,⁷ which flagrantly violates the norms that provide for their legal protection. Previously, if they were to have arrived at the U.S. border unaccompanied by an adult, they would have had access to shelter, education, medical attention, and an exhaustive administrative process that would have allowed them to present the arguments to justify their remaining in the United States. Those who did not pass this filtering process were deported to their countries of origin, but care was taken to ensure that they had a safe place to which they could return. In the current context these practices are no longer in use and the United States maintains a form of “remote” custody over these minors.⁸ Subsequently they are deported alone,⁹ in some cases to their countries of origin,—from which they are fleeing—and in other cases they are deported to countries (like Mexico) of which they are not citizens and where they have no family ties or anyone to receive them, as is the case of minors from Guatemala, El Salvador, and Honduras.¹⁰

Since he became president, Trump has engaged in an open war on undocumented migrants and asylum seekers, both adults and minors, by issuing executive orders and policies, given the impossibility of achieving this through the Congress that allow for deporting them summarily and illegally, without granting them the possibility to apply for asylum, a legal status that is now almost impossible to attain. Unfortunately, the deportation regime in the United States operates “legally” through these kinds of regulations. This is the case of the CDC order. In spite of the fact that it is a norm issued by the executive branch, this order is, in effect, modifying migration and asylum laws, which have been sanctioned by Congress, that provide legal protections to persons who are in need of international protection and to unaccompanied minors. In this way, the CDC order is not part of a coherent public health plan for confronting the pandemic, but rather a clear example of how the law is applied in the

United States to serve specific political interests resulting in a racist and classist management of migration and asylum. **MM**

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Notes

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