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#### Recommended Citation

Sarah R. Sherman-Stokes, *Reparations for Central American Refugees*, in 96 *Denver Law Review* 585 (2019).

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# REPARATIONS FOR CENTRAL AMERICAN REFUGEES

SARAH SHERMAN-STOKES<sup>†</sup>

## ABSTRACT

In the midst of vicious and unrelenting attacks on Central American asylum seekers in the United States, this Article seeks to understand historic and present-day patterns of animus and discrimination facing this group of refugees, and to propose solutions. This Article begins by examining decades of prejudice faced by Central American asylum seekers, as well as attempts to right those wrongs through litigation, legislation, and the creation of Temporary Protected Status (TPS). Next, this Article identifies the predominant push and pull factors driving Central American refugees north—and the U.S. role in creating them. The Article then lays out the impact of this Administration’s systemic attacks on Central American asylum seekers, in particular, through family separation and zero-tolerance, the asylum ban and *Matter of A-B-*, and the framework in which refugees should be permitted to seek protection under current U.S. law. Finally, this Article evaluates several potential solutions including humanitarian asylum, an expansion of TPS, and litigation. Ultimately, this Article concludes that, in light of decades of abuse and prejudice directed at this class of refugees, the only adequate means of reparation is congressional legislation that would carve out special, tailored protections for this vulnerable group.

## TABLE OF CONTENTS

INTRODUCTION.....	586
I. THE HISTORY OF CENTRAL AMERICAN ASYLUM DISCRIMINATION .	590
<i>A. History of U.S. Refugee Admissions</i> .....	590
<i>B. Civil Wars in Central America Drive Refugees North Where They Face Discrimination in Adjudication of Their Claims</i> .....	592
<i>C. Present-Day Animus and Discrimination Continues to Plague Central Americans as Refugees Flee in Large Numbers</i> .....	597
<i>D. The U.S. Role in Creating the Peril</i> .....	598
II. U.S. ASYLUM LAW AND THE CHALLENGES FACING NORTHERN TRIANGLE REFUGEES .....	608
<i>A. Domestic Violence and Particular Social Group</i> .....	613

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<sup>†</sup> Clinical Instructor and Lecturer in Law and Associate Director of the Immigrants’ Rights & Human Trafficking Program, Boston University School of Law; J.D. Boston College Law School; B.A. Bates College. I would like to thank Professors Sabrineh Ardan, Sameer Ashar, Katherine Evans, Lindsay Harris, Laila Hlass, Mary Holper, Karen Musalo, Jayesh Rathod, Shoba Sivaprasad Wadhia and participants in the 2018 NYU Clinical Law Review Writer’s Workshop for their thoughtful feedback on earlier drafts of this Article. Special thanks to Daniel Ordorica for excellent research assistance, and to Boston University School of Law for the support needed to complete this Article. All errors are my own.

<i>B. Gang Violence and Particular Social Group</i> .....	615
III. SOLUTIONS TO ENSURE THE RIGHTS OF CENTRAL AMERICAN	
ASYLUM SEEKERS ARE PROTECTED .....	618
<i>A. Humanitarian Asylum</i> .....	619
<i>B. Temporary Protected Status</i> .....	623
<i>C. A Modern-Day ABC Case</i> .....	626
<i>D. Congressional Intervention</i> .....	628
<i>E. "Floodgates" Fears</i> .....	631
<i>F. Security Concerns</i> .....	632
CONCLUSION .....	633

#### INTRODUCTION

William<sup>1</sup> grew up in El Salvador where his father was a mechanic and his mother sold fruit and snacks from a small storefront. When William was twelve years old his uncle was murdered by gang members in front of his home. At thirteen, gang members broke multiple bones of William's father, Edwin, with baseball bats, while William stood by in tears. Edwin quickly fled the country, and the gang members began targeting William. Later that year, gang members came to William's home threatening to kill him, too. When William's grandmother refused to open the door, they shot at the family home, leaving bullet holes in the walls. Soon thereafter, William also fled.

Fourteen-year-old William traveled alone by foot, car, and bus to the U.S.–Mexico border, where he crossed the Rio Bravo by makeshift raft. Moments later, he was apprehended by Customs and Border Patrol (CBP) officials and, as an unaccompanied child, placed in the custody of the Office of Refugee Resettlement (ORR). Four months later, reunited with his mother in New England, William applied for asylum—legal protection for noncitizens who have been persecuted or who fear persecution in their home countries. His claim? William's father and uncle had been police informants, reporting criminal gang activity to the local authorities in El Salvador, and William argued that he had been harmed and threatened on account of his relationship to them. In his application, William's attorneys described how the violence and threats that both he and his family had suffered constituted "past persecution." They also described that, given the unrelenting gang violence in El Salvador and systematic targeting of his male family members, the violence and threats were likely to continue should William be forced to return there. Indeed, his attorneys argued that William very likely would be harmed or killed if he returned.

During his interview with an asylum officer, William broke down in tears recounting the violence he witnessed and suffered in El Salvador, and his fears that gang members would hurt or kill him if he returned there. He

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1. This vignette is based on the stories of the Author's former clients, though some identifying details have been changed to protect "William's" identity.

described almost daily nightmares of gang members chasing him with baseball bats—the same ones they had used to beat his father. After nearly eleven months of anxious anticipation, William received a letter in the mail: he had not been granted asylum. Instead, his case had been referred to the Immigration Court, where a judge could reconsider his request.

More than 66,000 children, like William, from the Northern Triangle countries of Guatemala, El Salvador, and Honduras entered the United States in fiscal year 2014.<sup>2</sup> In 2017, the U.S. government conducted more than 51,000 Credible Fear Interviews—an initial screening interview with an asylum officer conducted when a noncitizen presents to immigration authorities and expresses a fear of return to her home country.<sup>3</sup> The United Nations High Commissioner for Refugees (UNHCR) found that more than two-thirds of Central American-migrant children met the definition of refugee, qualifying them for protection.<sup>4</sup> The large numbers of asylum seekers from Central America arriving in the United States to seek protection have been described in the pejorative language of “plagues” and “natural disasters”<sup>5</sup>; a “flood,”<sup>6</sup> a “surge,”<sup>7</sup> a “tidal wave,”<sup>8</sup> an “infestation,”<sup>9</sup> an “invasion.”<sup>10</sup> Governments do not welcome natural disasters and, as I will argue here, they do not, and have not historically, welcomed bona fide

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2. “Since 2008, the US Government has recorded a 561 per cent rise in the number of new arrivals of unaccompanied and separated children.” UNITED NATIONS HIGH COMM’R FOR REFUGEES, WOMEN ON THE RUN 2 n.12 (2015) [hereinafter WOMEN ON THE RUN]. For FY 2014, the U.S. government apprehended 68,541 unaccompanied children. *Southwest Border Unaccompanied Alien Children FY 2014*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014> (last modified Nov. 24, 2015).

3. U.S. CITIZENSHIP & IMMIGRATION SERVS., MONTHLY CREDIBLE AND REASONABLE FEAR NATIONALITY REPORTS (2017), [https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED\\_FY17\\_CFandRFstatsThru09302017.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_FY17_CFandRFstatsThru09302017.pdf); see also *Questions & Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> (last updated July 15, 2015).

4. UNITED NATIONS HIGH COMM’R FOR REFUGEES REG’L OFFICE FOR THE U.S. & THE CARIBBEAN, CHILDREN ON THE RUN 6 [hereinafter CHILDREN ON THE RUN].

5. Jane Zavisca, *Metaphorical Imagery in News Reporting on Migrant Deaths*, in *MIGRANT DEATHS IN THE ARIZONA DESERT: LA VIDA NO VALE NADA* 167, 171–77 (Raquel Rubio-Goldsmith et al. eds., 2016) (surveying ten years of newspaper reporting to identify common metaphors used to describe migrants, including economic metaphors (“cost,” “calculation,” “gamble”) and metaphors of violence).

6. Jean Guerrero, *Group of Central Americans Seeking Asylum Reach U.S.–Mexico Border*, NPR (Apr. 27, 2018, 4:22 PM), <https://www.npr.org/2018/04/27/606580176/group-of-central-americans-seeking-asylum-reach-u-s-mexico-border>.

7. Cindy Chang & Kate Linthicum, *U.S. Seeing a Surge in Central American Asylum Seekers*, L.A. TIMES (Dec. 15, 2013), <http://articles.latimes.com/2013/dec/15/local/la-me-ff-asylum-20131215>.

8. Susan Knowles, *‘Tidal Wave’ of Central American Migrants Coming to U.S., GOP Silent*, MEDIUM (Apr. 2, 2018), [https://medium.com/@SusanKnowles\\_60982/tidal-wave-of-central-american-migrants-coming-to-u-s-gop-silent-3bbf112cf28a](https://medium.com/@SusanKnowles_60982/tidal-wave-of-central-american-migrants-coming-to-u-s-gop-silent-3bbf112cf28a).

9. See Donald Trump (@realDonaldTrump), TWITTER (June 19, 2018, 6:52 AM), <https://twitter.com/realdonaldtrump/status/1009071403918864385> (claiming that “Democrats” want unauthorized immigrants “to pour into and infest our Country, like MS-13”).

10. See Donald Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 AM), <https://twitter.com/realdonaldtrump/status/1010900865602019329> (referring to Central American migrants and stating, “We cannot allow all of these people to invade our Country.”).

asylum seekers and refugees from Central America like William. This Article argues that, given the long history by the United States of exploitation, intervention, and abdication of responsibility in Central America, the United States now has an obligation to repair—to make amends by carving out legislative space for the many Central American refugees who have been wronged and are now in need of protection.<sup>11</sup>

Scholars have written extensively on the history of Central American asylum seekers in the United States and the systemic discrimination they have faced.<sup>12</sup> Scholars have also written on the present-day increase in Central American asylum seekers and the policies of deterrence and detention employed by successive presidential administrations in an effort to thwart asylum seekers admission into the United States.<sup>13</sup> Others have argued persuasively of pathways forward for so-called “unconventional refugees” like those from Central America, rooting such arguments in philosophical, legal, and moral terms.<sup>14</sup> This Article fills a gap in the scholarship by knitting together the historic and present-day realities faced by refugees of the Northern Triangle. In particular, this Article will demonstrate patterns of racism and animus that prejudice asylum seekers’ claims for protection in the United States and evaluate potential solutions to protect their rights, including a reimagining of humanitarian asylum, an expansion of Temporary Protected Status (TPS), and the potential need for a new class action lawsuit. Ultimately, upon evaluation of the limitations of other potential remedies, this Article calls on Congress to carve out legislative space for reparations for this group—to make amends for generations of wrongdoing—by passing legislation to specifically protect the rights of Central American refugees.

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11. Others have argued for reparations in past refugee contexts. *See, e.g.*, Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States’ Haitian Immigration Policy*, 45 STAN. L. REV. 687, 688–89 (1993).

12. *See, e.g.*, Ann Aita, Note, *What About Us? NACARA’s Legacy and the Need to Provide Equal Protection to Guatemalan, Nicaraguan, Salvadoran, and Honduran Residency-Seekers in the United States*, 32 RUTGERS L.J. 341, 344 (2000); Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 LAW & SOC. INQUIRY 569, 570, 581 (2011); Daniel L. Swanwick, *Foreign Policy and Humanitarianism in U.S. Asylum Adjudication: Revisiting the Debate in the Wake of the War on Terror*, 21 GEO. IMMIGR. L.J. 129, 130 (2006); *see also* Michael J. Churgin, *Mass Exoduses: The Response of the United States*, 30 INT’L MIGRATION REV. 310, 319–20 (1996).

13. *See, e.g.*, Mary Bosworth, Katja Franko & Sharon Pickering, *Punishment, Globalization and Migration Control: ‘Get Them the Hell Out of Here,’* 20 PUNISHMENT & SOC’Y 34, 35 (2018); David Manuel Hernández, *Pursuant to Deportation: Latinos and Immigration Detention*, 6 LATINO STUD. 35, 46 (2008); Karen Musalo & Eunice Lee, *Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 “Surge” of Central American Women and Children at the US–Mexico Border*, 5 J. ON MIGRATION & HUM. SECURITY 137, 162–63 (2017).

14. *See, e.g.*, Elizabeth Keyes, *Unconventional Refugees*, 67 AM. U. L. REV. 89, 97–99 (2017) (contrasting justifications for providing broader protections to refugees from the perspective of both Rawls and Carens, and ultimately falling somewhere in between—recognizing that “we still have duties to people outside our borders when their basic rights—including that of safety—are at stake”).

Part I of this Article describes the U.S. government's historical treatment of asylum seekers from Central America and, specifically, the Northern Triangle countries of Guatemala, El Salvador, and Honduras. This Part will summarize the pivotal impact that Central American asylum seekers and their cases have had on the development of U.S. asylum law and policy, including through legislation and litigation in the 1980s and 1990s. In particular, this Part discusses the seminal lawsuit and subsequent settlement in *American Baptist Churches v. Thornburgh*<sup>15</sup> (*ABC Case*), highlighting the discriminatory practices faced by Central American asylum seekers in the 1980s.

This Part also discusses the government's attempts to right those wrongs, not only through this settlement but also through creation of TPS program and the Asylum Officer Corps. This Article will then examine the continuing efficacy of the *ABC Case* in providing protection to the Central American refugees of present-day. This Part will identify to what extent the protections of the *ABC Case* and other safeguards won in the 1980s and 1990s continue to be effective, or not, for the changing needs of today's Central American refugees. Finally, this Part describes the current crisis and climate facing Central American migrants and refugees, including: the impact of the Attorney General's decision in *Matter of A-B*<sup>16</sup> on domestic and gang-violence asylum claims; the ongoing saga of "zero-tolerance"; immigrant family separations at the southern U.S. border; and the recently announced "asylum ban" and concomitant "metering" at the U.S.–Mexico border that appears all but directed squarely at Central American refugees. This Part closes with a description of the absence of meaningful legal protections afforded to these migrants and refugees.

Part II of this Article outlines the legal framework and statutory requirements for seeking asylum in the United States. This Part will explain how U.S. laws have defined refugees and the criteria for seeking legal relief on the basis of past and future persecution. Finally, this Part will situate Central American claimants within this structure and historical context, noting how and why they have been treated differently.

Part III queries what the most suitable remedy is for refugees of the Northern Triangle in this climate of racism, animus, and a continuing devaluation of Central American asylum claims. Part III begins by asking whether humanitarian asylum, an often overlooked and perennially misunderstood pathway to refugee protection, can provide the kind of relief that present-day Central American asylum seekers need. Ultimately, I determine that a reimagining and expansion of humanitarian asylum is insufficient to protect the rights of Central American claimants. Next, this Article examines whether TPS could provide the kind of relief these applicants need. In examining the history of TPS, and the recently announced

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15. 760 F. Supp. 796 (N.D. Cal. 1991).

16. 27 I. & N. Dec. 316 (Att'y Gen. 2018), *abrogated by* *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

termination of TPS for several Central American countries, I similarly determine that TPS is an inadequate fix. Thereafter, I assess whether, given the limitations of current asylum law, an unrelenting erosion of the asylum system by the current Department of Justice (DOJ), and the combined legacies of racism and discrimination faced by Central American asylum seekers, we need a modern-day *ABC* case to ensure that the rights of these migrants are protected. Finally, in consideration both of the limits to the remedies mentioned above and past legislative successes for Central Americans, this Article concludes by proposing congressional action to address historic and present-day inequities, and patterns of discrimination that persist for this particular class of refugees. Just as the United States has carved out special legislation for other groups of migrants our government has wronged, taking responsibility for our role in creating peril and hardship, I suggest that here too—in the case of Central American refugees—is a place for reparation and amends.

#### I. THE HISTORY OF CENTRAL AMERICAN ASYLUM DISCRIMINATION

The treatment of asylum seekers from Central America by the U.S. government has historically been colored by the idea that this category of refugees is “generally undeserving.”<sup>17</sup> And yet, it is Central Americans, who have arrived to the United States in considerable numbers since the 1980s<sup>18</sup> and whose large-scale migration also coincided with the passage of the 1980 Refugee Act, that have, in many ways, shaped modern U.S. asylum law.<sup>19</sup> This Part begins by providing a brief history of refugee admissions. Next, this Part describes the history of Central American migration to the United States from the twentieth to the twenty-first century; concomitant discrimination<sup>20</sup> and resistance to Central American asylum claims;<sup>21</sup> and legal responses thus far.

##### *A. History of U.S. Refugee Admissions*

Following World War II, President Truman issued an executive order admitting 40,000 refugees; primarily some of the more than 60 million

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17. See Coutin, *supra* note 12, at 570.

18. Gabriel Lesser & Jeanne Batalova, *Central American Immigrants in the United States*, MIGRATION POL’Y INST. (Apr. 5, 2017), <https://www.migrationpolicy.org/article/central-american-immigrants-united-states> (noting that the population of Central Americans living in the United States tripled between 1980 and 1990, and that by 2015, 3.4 million people, or 8% of U.S. immigrants, were from Central America).

19. Coutin, *supra* note 12; see also Churgin, *supra* note 12, at 319.

20. Notably, the animus and discrimination of this Administration—and others—has certainly not been limited to Central Americans. Other groups of migrants and refugees have similarly endured hateful rhetoric and racist policies designed to limit their admission and presence in the United States. A larger discussion of the discrimination facing those groups is outside the scope of this paper. See, e.g., Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

21. Notably, discrimination and resistance to asylum claims has not been limited to the Central American context. See, e.g., Hiroshi Motomura, *Haitian Asylum Seekers: Interdiction and Immigrants’ Rights*, 26 CORNELL INT’L L.J., 695 (1993).

Europeans who had been driven from their homes during the war.<sup>22</sup> Thereafter, the 1948 Displaced Persons Act signaled growing concern for refugees from communist countries and territories, as did subsequent acts, including the Refugee Relief Acts of 1953<sup>23</sup> and 1954,<sup>24</sup> the Refugee Escapee Act of 1957,<sup>25</sup> and the Fair Share Act of 1960.<sup>26</sup> Finally, in 1965, Congress created a preference category explicitly for refugees, though limited to those fleeing the Middle East or communist-controlled territories.<sup>27</sup> It was not until the Refugee Act of 1980 that asylum was explicitly made available<sup>28</sup> to nationals fleeing violence in noncommunist countries.<sup>29</sup> Indeed, one of the explicit goals of the Act was to “assure greater equity in the treatment of refugees” and to repeal the previous law’s “discriminatory treatment of refugees” and replace it with a new definition of refugee that no longer applied only to refugees fleeing communism or the Middle East.<sup>30</sup> As Deborah Anker and others have argued, the Refugee Act of 1980 “was a clear statement of intention of the United States Congress to move away from a refugee and asylum policy which, for over forty years, discriminated on the basis of ideology, geography and even national origin, to one that was rooted in principles of humanitarianism and objectivity.”<sup>31</sup> In particular, the Act included a statutory definition of asylum to curtail what was perceived as the “politicized nature of the Executive’s decision making.”<sup>32</sup> Though in theory the 1980 Act brought U.S. law into conformity with international law and norms related to the admission and processing of asylum seekers and refugees, the anti-communist legacy of refugee law, as well as other factors, impacted its application.<sup>33</sup>

Soon after the passage of the 1980 Act, migration patterns to the United States shifted. In 1980, there were 354,000 Central Americans living in the United States; by 1990, that number had more than tripled to 1,134,000.<sup>34</sup> By 2015, the number had grown to 3,385,000 with immi-

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22. Statement and Directive by the President on Immigration to the United States of Certain Displaced Persons and Refugees in Europe, 1 PUB. PAPERS 572, 576–78 (Dec. 22, 1945), <https://www.trumanlibrary.org/publicpapers/index.php?pid=515&st=&st1=>

23. Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400.

24. Refugee Relief Act of 1954, Pub. L. No. 83-751, 68 Stat. 1044.

25. Refugee Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639.

26. Fair Share Act of 1960, Pub. L. No. 86-648, 74 Stat. 504.

27. See Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911 (1965); *The Refugee Act of 1979*, S. 643: *Hearing Before the S. Comm. on the Judiciary*, 96th Cong. 9 (1979) (statement of former Senator, newly appointed U.S. Coordinator for Refugee Affairs, Dick Clark) (testifying that prior to 1980, refugee programs were a “patchwork” of different programs “originally designed to deal with people fleeing communist regimes in Eastern Europe or repressive governments in the Middle East”).

28. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

29. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

30. Edward M. Kennedy, *Refugee Act of 1980*, 15 INT’L MIGRATION REV. 141, 142–43 (1981).

31. Deborah Anker, *The Refugee Act of 1980: An Historical Perspective*, 5 DEF. ALIEN 89, 89 (1982).

32. *Id.* at 93.

33. Churgin, *supra* note 12, at 318–22.

34. Lesser & Batalova, *supra* note 18.



grants from El Salvador, Guatemala, and Honduras—the Northern Triangle countries—accounting for almost 90% of the total growth in the population since 1980.<sup>35</sup> But why were they fleeing?

*B. Civil Wars in Central America Drive Refugees North Where They Face Discrimination in Adjudication of Their Claims*

During the 1980s and 1990s, El Salvador, Guatemala, and Nicaragua sustained devastating civil wars, political unrest, and rampant human rights abuses.<sup>36</sup> Tens of thousands were killed across the region, and in El Salvador and Guatemala, the United States was strongly allied with the governments in power, pumping millions of dollars into military and paramilitary units who committed mass atrocities in the name of fighting communism.<sup>37</sup> Bombing campaigns devastated civilian areas in El Salvador, and military and paramilitary groups swept through indigenous communities in Guatemala committing disappearances, human rights abuses, and massacres.<sup>38</sup> In Guatemala, a truth commission has blamed the degree of brutality shown during its civil war on the training that military officers

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35. *Id.*

36. BEATRIZ MANZ, CENTRAL AMERICA (GUATEMALA, EL SALVADOR, HONDURAS, NICARAGUA): PATTERNS OF HUMAN RIGHTS VIOLATIONS 2–3 (2008) (“From 1954 onwards Guatemala was governed by one military dictatorship after another, with various levels of repression, culminating with genocide in the 1980s. A rebel movement with Mayan support was met by widespread military counter-insurgency operations, directed as well at the civilian population. This resulted in over 600 massacres, the murder of 200,000 people, the destruction of more than 400 villages, and the displacement of approximately one million of the country’s 7 million inhabitants. . . . El Salvador has often been called the country with ‘fourteen families’ because such a small ruling elite holds land and economic power. The efforts of insurgents to change this power structure, as in Guatemala, led to internal wars during the 1970s and 1980s. As a result, at least 70,000 citizens were killed and millions were displaced internally or outside their country as refugees or undocumented migrants in the United States.”).

37. For a selection of works detailing significant and ongoing U.S. involvement in massacres, wars, and related human rights abuses across Central America, see MARK DANNER, THE MASSACRE AT EL MOZOTE (1993); STEPHEN KINZER, BLOOD OF BROTHERS: LIFE AND WAR IN NICARAGUA (1991); STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA (1982); see also Karen Musalo, *El Salvador—A Peace Worse than War: Violence, Gender and a Failed Legal Response*, 30 YALE J.L. & FEMINISM 3, 11 (2018).

38. LEIGH BINFORD, THE EL MOZOTE MASSACRE: ANTHROPOLOGY AND HUMAN RIGHTS 3–4 (1996) (describing brutality in El Salvador and the United States’ role in the El Mozote Massacre); LINDA GREEN, FEAR AS A WAY OF LIFE: MAYAN WIDOWS IN RURAL GUATEMALA 4–5 (1999) (providing an overview of the massacres that occurred in Guatemala and the lives of the widows and orphans left behind); TOMMIE SUE MONTGOMERY, REVOLUTION IN EL SALVADOR: FROM CIVIL STRIFE TO CIVIL PEACE 148–50 (2d ed. 1995) (providing a detailed account of the United States’ role in Salvadoran affairs in the 1980s); DIANE M. NELSON, A FINGER IN THE WOUND: BODY POLITICS IN QUINCENTENNIAL GUATEMALA 7–9 (1999) (providing an overview of Guatemala’s history and context for its thirty-year war); JENNIFER SCHIRMER, THE GUATEMALAN MILITARY PROJECT: A VIOLENCE CALLED DEMOCRACY I (1998) (“In Guatemala, a democracy was ‘born’ out of the womb of a counterinsurgency campaign in 1982 that killed an estimated 75,000, razed a proclaimed 440 villages, and displaced over one million refugees.”); see also *Ordonez-Quino v. Holder*, 760 F.3d 80, 83 (1st Cir. 2014) (describing brutality and serious human rights abuses in Guatemala).

received at the U.S.-run School of the Americas.<sup>39</sup> Many of those who survived the violence fled to the United States seeking asylum.<sup>40</sup> It is estimated that between 1981 and 1990, almost one million Salvadorans and Guatemalans entered the United States in search of protection and safe haven.<sup>41</sup> Indeed, the legacy Immigration and Naturalization Service (INS) reported “a seven fold increase in Central American asylum requests over” one four-year period in the 1980s: “from about 7,000 in 1985 to over 50,000 in 1988.”<sup>42</sup> Early on, it was clear what law enforcement, Congress, political leaders, courts, and adjudicators thought of these Central Americans: that they were undeserving economic migrants whose admission would open the “floodgates” for the world’s most poor and vulnerable to come pouring into the United States.<sup>43</sup>

In 1982, the American Civil Liberties Union (ACLU) revealed suspected evidence of bias against asylum seekers from Central America in a lawsuit. The U.S. District Court for the Central District of California issued a preliminary injunction, finding that the then-INS had violated the rights of Salvadoran asylum seekers.<sup>44</sup> The district court found that Salvadoran asylum seekers had been coerced into signing “voluntary departure” orders—effectively an agreement to “voluntarily” return to their home countries thereby giving up their right to apply for asylum.<sup>45</sup> The court further found that these asylum seekers were denied access to counsel and to legal information about their rights as well as placed in solitary confinement without an administrative hearing.<sup>46</sup> Following lengthy proceedings, in 1988, the district court issued the following orders: (1) INS was permanently enjoined from coercing Salvadoran detainees into signing voluntary departure agreements; (2) INS was required to notify Salvadoran detainees of their right to political asylum and their right to representation by counsel in deportation proceedings; and (3) INS was enjoined from transferring

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39. Mireya Navarro, *Guatemalan Army Waged ‘Genocide,’ New Report Finds*, N.Y. TIMES (Feb. 25, 1999), <https://www.nytimes.com/1999/02/26/world/guatemalan-army-waged-genocide-new-report-finds.html>.

40. UNITED NATIONS HIGH COMM’R FOR REFUGEES, ASYLUM APPLICATIONS IN INDUSTRIALIZED COUNTRIES: 1980–1999, at 167 (2001) (reporting almost 400,000 Salvadorans and Guatemalans applied for asylum in the United States between 1990 and 1999).

41. Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL’Y INST. (Apr. 1, 2006), <https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era>.

42. NANCY R. KINGSBURY, U.S. GEN. ACCOUNTING OFFICE, GAO/T-NSIAD-89-16, REFUGEES AND U.S. ASYLUM SEEKERS FROM CENTRAL AMERICA (1989), <http://archive.gao.gov/t2pbat15/138146.pdf>.

43. Keyes, *supra* note 14, at 127–28 (quoting James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L L.J. 129, 169–70 (1990)); Musalo & Lee, *supra* note 13 at 163; Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL’Y & L. 119, 119–20 (2007); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 40–41 (1984) (expressing fear of floodgates opening to asylees from places like El Salvador who would have difficulty assimilating).

44. *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385–86 (C.D. Cal. 1982).

45. *Id.* at 362–63.

46. *Id.* at 360–63.

detainees irrespective of established attorney–client relationships.<sup>47</sup> Throughout the court’s decision is a recognition of the harms suffered by both sides during the devastating civil war in El Salvador and the credible threats of violence faced by Salvadoran refugees.<sup>48</sup>

And yet, even after an injunction came down in *Orantes-Hernandez v. Meese*,<sup>49</sup> the U.S. government continued to advance the false narrative that Central American refugees were simply economic migrants, and congressional testimony echoed that sentiment. Assistant Secretary of State Elliott Abrams dismissed them as part of the usual and long-standing pattern of “large-scale illegal immigration [from El Salvador]” and INS Associate Commissioner Doris Meissner agreed, noting that Salvadorans were journeying north as the result of “poverty and lack of overall economic opportunity.”<sup>50</sup> Consistent with this rhetoric was the instruction relayed by the U.S. Department of State (DOS) to asylum adjudicators—specifically, deny the asylum claims of Guatemalan and Salvadoran asylum seekers.<sup>51</sup> The result? Claims of political bias in asylum adjudication were well-founded.<sup>52</sup> Asylum grant rates for Salvadorans and Guatemalans in 1984 were both under 3%.<sup>53</sup> In stark contrast, “the approval rate for Iranians was 60 percent, 40 percent for Afghans fleeing the Soviet invasion, and 32 percent for Poles.”<sup>54</sup> At the same time, the U.S. District Court for the Central District of California ordered an injunction after finding that INS agents “directed, intimidated, or otherwise coerced Salvadorans

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47. *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1511–12 (C.D. Cal. 1988), *aff’d sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

48. See, e.g., *Smith*, 541 F. Supp. at 356–57 (describing the harms faced by Salvadoran asylum seekers: “Two days later, their bodies turned up. Their heads were mutilated and their sexual organs cut off. Also their eyes had been gouged out.” And in another case: “[T]he armed men began shooting at us. Five of my friends were killed; one of the five was a pregnant woman—she was seventeen years old. I managed to escape death by throwing myself on the ground and acting as though I were dead; I was only wounded in the back by one of the death squad bullets.”).

49. 685 F. Supp. 1488.

50. *Temporary Suspension of Deportation of Certain Aliens: Hearing on H.R. 4447 Before the Subcomm. on Immigration, Refugees, and Int’l Law of the H. Comm. on the Judiciary*, 98th Cong. 66–67, 91 (1984) (statements of Elliott Abrams, Assistant Secretary of State for Human Rights and Humanitarian Affairs, and Doris M. Meissner, Executive Associate Commissioner, Immigration and Naturalization Service).

51. Swanwick, *supra* note 12, at 133–34.

52. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1032–33 (5th ed. 2009) (describing historical accusations of political bias in the asylum system).

53. Gzesh, *supra* note 41. It is worth noting that the grant rate for Nicaraguans in the 1980s was roughly 25%. While this rate remains substantially lower than for respondents from Iran, Afghanistan, and Poland, the reason for it being higher than that of other Central American nations can likely be attributed at least in part to U.S. political opposition to the leftist Sandinista government; see RUTH ELLEN WASEM, CONG. RESEARCH SERV., 91-530 EPW, *ASYLUM AND TEMPORARY PROTECTED STATUS UNDER U.S. IMMIGRATION LAW* 15–19 (1991).

54. Gzesh, *supra* note 41.

within their custody, who had not expressed a desire to return to El Salvador” to agree to “voluntary departure.”<sup>55</sup> The new, facially neutral definition of “refugee,” intended by the 1980 Act to assure “equality” in application, remained deeply tainted by a Cold War legacy of anti-communist rhetoric and action that was disproportionately and negatively impacting Central American asylum claimants.<sup>56</sup>

This clear disparity in treatment came to a head in 1985 when more than eighty religious and refugee groups brought suit in federal court, challenging the patterns of discrimination in asylum cases involving Salvadorans and Guatemalans.<sup>57</sup> They sued the INS, the Executive Office for Immigration Review (EOIR)—an office of the DOJ responsible for adjudicating all immigration cases—and the DOS.<sup>58</sup> That lawsuit, now commonly referred to as the “ABC Case,” alleged that the government’s discriminatory practices violated the Fifth Amendment of the U.S. Constitution.<sup>59</sup> Over the next several years, the government attempted to dispose of the case three times while the plaintiffs pursued extensive discovery regarding the government’s discriminatory practices.<sup>60</sup>

Then, in July of 1990, legacy INS promulgated new asylum regulations, including the creation of a specialized asylum officer corps to carry out asylum adjudication.<sup>61</sup> At the time, Attorney General Dick Thornburgh noted that, under these new rules, asylum would become a “more fair and sensitive” procedure that generates “uniform and consistent results.”<sup>62</sup> Driving home the corollary between the ABC Case and these new regulations, Senator Edward M. Kennedy commented at the time, “[t]oo often in recent years we have tolerated a double standard, under which asylum has been unfairly denied to legitimate refugees for fear of embarrassing friendly but repressive governments.”<sup>63</sup> It is hard to imagine that he was not thinking explicitly of our neighbors to the south.

Finally, the parties reached settlement in 1990, approved by the Northern District Court of California in 1991.<sup>64</sup> The agreement provides

55. *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1494 (C.D. Cal. 1988), *aff’d sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

56. See Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 70–72 (1981); see also Convention Relating to the Status of Refugees art. 3, Apr. 22, 1954, 19 U.S.T. 6259, 189 U.N.T.S. 150 (requiring parties to apply the convention “without discrimination as to race, religion or country of origin”).

57. *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991).

58. *Id.*

59. *Id.* at 830; *Am. Baptist Churches v. Meese*, 666 F. Supp. 1358, 1360 (N.D. Cal. 1987).

60. Carolyn Patty Blum, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers*, 3 INT’L J. REFUGEE L. 347, 351–52 (1991).

61. Robert Pear, *U.S. Issues Asylum Rules Praised as Fairer to Aliens*, N.Y. TIMES, Jul. 19, 1990, at A16.

62. Press Release, Dept. of Justice, Attorney General Thornburgh Signs Final Asylum Regulations (July 18, 1990), <http://digital.library.pitt.edu/islandora/object/pitt%3Aais9830.13.02.0282/viewer#page/1/mode/2up>.

63. Pear, *supra* note 61, at A16.

64. **Error! Hyperlink reference not valid.** Blum, *supra* note 60, at 353.

de novo asylum interviews—a new interview in which all issues are reviewed as if for the first time—and adjudication for previously denied cases of Salvadorans who had arrived in the United States by September 19, 1990, and Guatemalans who had arrived by October 1, 1990.<sup>65</sup> The settlement also provides work authorization and stays of deportation for certain classes of Salvadoran and Guatemalan asylum seekers as well as a prohibition on detention for most class members.<sup>66</sup>

The introductory paragraphs of the *ABC Case* agreement set out important guideposts for asylum adjudications, particularly as pertaining to discrimination directed toward asylum applicants from Guatemala and El Salvador, noting:

[F]oreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;

the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;

whether or not the United States Government agrees with the political or ideological beliefs of the individual is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;

the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadorans and Guatemalans as applies to all other nationalities . . . .<sup>67</sup>

Finally, the settlement referenced a new program created by the Immigration Act of 1990, TPS, which allowed registration for this new program to count as registration for the benefits of the settlement agreement.<sup>68</sup> The TPS program allows the Secretary of Homeland Security to designate a foreign state, or part of a foreign state, where it is not currently safe for individuals to return home in any of three circumstances: (a) ongoing armed conflict; (b) an environmental disaster; or (c) where “extraordinary and temporary conditions” prevent safe return and allowing the state’s nationals to remain in the United States would not be contrary to the national interest.<sup>69</sup> El Salvador was the very first country to receive TPS and the only country to have been granted TPS through congressional action, via

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65. *Id.*

66. *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 804–06 (1991).

67. *Id.* at 799.

68. Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, 5030–36.

69. § 302(a), 104 Stat. at 5031.

the Immigration Act of 1990.<sup>70</sup> Importantly though, TPS is not a grant of permanent status nor does it provide a pathway to such status. TPS was intended to be, as its name implies, “temporary.”<sup>71</sup> But the promise of TPS has been illusory for many migrants, and now more so than ever. In 2017 and 2018, the Trump Administration announced the end of TPS for Salvadorans, Hondurans, and Nicaraguans.<sup>72</sup> The end of this program will mean that nearly 260,000 Central Americans will be at risk of deportation in the coming months.<sup>73</sup>

*C. Present-Day Animus and Discrimination Continues to Plague Central Americans as Refugees Flee in Large Numbers*

Despite the promise of historic legislation and litigation in the 1980s and 1990s, intended to provide full and fair procedure to asylum seekers from all countries, and specifically El Salvador and Guatemala, a new pattern of discrimination directed at Central American asylum seekers has emerged in recent years. Michael Churgin was prescient when, in 1996, he spoke of the “moral relevance of numbers,” predicting that large groups of asylum seekers would (again) face “a new aggressive turn to prevent the operation of law from impeding governmental action.”<sup>74</sup> Central Americans have faced this “aggressive turn” head on.

Beginning in 2011, the United States saw a dramatic increase in the number of people, and specifically unaccompanied immigrant children, migrating from the Northern Triangle. Many, if not most, of them were seeking protection from gang and domestic violence. This migration peaked in fiscal year 2014, when the U.S. Border Patrol apprehended nearly 52,000 Central American children crossing the U.S.–Mexico Border.<sup>75</sup> Thereafter, the UNHCR conducted detailed and extensive interviews with these young people, revealing that nearly two-thirds of them

70. Madeline Messick & Claire Bergeron, *Temporary Protected Status in the United States: A Grant of Humanitarian Relief that Is Less than Permanent*, MIGRATION POL’Y. INST. (July 2, 2014), <https://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>.

71. *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> (last updated Mar. 8, 2019).

72. Termination of the Designation of Honduras for Temporary Protected Status, 83 Fed. Reg. 26,074 (June 5, 2018); Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2,654 (Jan. 18, 2018); Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59, 636 (Dec. 15, 2017).

73. Kathryn Johnson, *Trump Has Ended Temporary Protected Status for Hundreds of Thousands of Immigrants. Here’s What You Need to Know*, AM. FRIENDS SERV. COMM. (Feb. 7, 2019), <https://www.afsc.org/blogs/news-and-commentary/trump-has-ended-temporary-protected-status-hundreds-thousands-immigrants>.

74. Churgin, *supra* note 12, at 323.

75. U.S. BORDER PATROL, SOUTHWEST BORDER SECTORS, (2014), <https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14.pdf> (showing approximately 52,000 unaccompanied immigrant children apprehended, and over 60,000 people with family members from Guatemala, El Salvador, and Honduras, out of 250,000 “other than Mexican” apprehended in the southwest sector alone; there were another 200,000 other than Mexican apprehended in the Rio Grande sector).

had suffered harms and persecution that warranted international refugee protection.<sup>76</sup>

The UNHCR has found that men and women, too, are fleeing the Northern Triangle in large numbers, reporting that they and their children faced “extreme levels of violence on a near-daily basis.”<sup>77</sup> Eighty-five percent of women interviewees reported living in a neighborhood controlled by gangs or other violent criminal groups.<sup>78</sup> “Sixty-two percent of women reported that they were confronted with dead bodies in their neighborhoods,” many on a weekly basis.<sup>79</sup> Moreover, the women interviewed reported “prolonged instances of physical, sexual, and psychological domestic violence, for which authorities provided no meaningful help.”<sup>80</sup> Among the interviewees, two discernible patterns emerged that united these women and children in their need to seek safety: they had suffered violence by organized, armed criminal actors—largely gangs—and domestic violence in their homes.<sup>81</sup>

#### *D. The U.S. Role in Creating the Peril*

The United States bears some responsibility for the origins and escalation of gang and domestic violence in Central America. On the heels of violent civil wars across Central America in the 1980s and 1990s, millions of refugees fled north, struggling to make ends meet in poor neighborhoods across the United States.<sup>82</sup> Moreover, when their parents fled north to escape the devastation wrought by civil war, many children were left behind,<sup>83</sup> cared for by grandparents and other relatives.<sup>84</sup> This exodus led to a generational gap that opened a vacuum ripe for gang recruitment. Social-science research confirms that children are more susceptible to gang recruitment in the absence of parental guidance.<sup>85</sup> As their communities crumbled around them and they faced crises of hunger, unemployment, and the long-term impact of debilitating civil wars, children were not in a position to resist the allure of gang recruitment, including the financial support and stability a gang was perceived to provide—financial support and stability that was at times absent in their home lives.<sup>86</sup> Originating in

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76. CHILDREN ON THE RUN, *supra* note 4.

77. WOMEN ON THE RUN, *supra* note 2, at 4.

78. *Id.*

79. *Id.*

80. *Id.* at 25.

81. *Id.*

82. Sonja Wolf, *Mara Salvatrucha: The Most Dangerous Street Gang in the Americas?*, LAT. AM. POL. & SOC'Y, Spring 2012, at 65, 71; Lesser & Batalova, *supra* note 18.

83. ANNA LUCIA D'EMILIO ET AL., UNICEF, THE IMPACT OF INTERNATIONAL MIGRATION: CHILDREN LEFT BEHIND IN SELECTED COUNTRIES OF LATIN AMERICA AND THE CARIBBEAN 9–10 (2007).

84. *Id.*

85. Kathryn Kizer, *Behind the Guise of Gang Membership: Ending the Unjust Criminalization*, 5 DEPAUL J. FOR SOC. JUST. 333, 345 (2012).

86. Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT'L L.J. 417, 426–29 (2011).

the Salvadoran refugee and immigrant communities of Los Angeles in the 1980s, Mara Salvatrucha (MS or MS-13) and the 18th Street gang (Calle 18) emerged largely in U.S. jails, as immigrant detainees and inmates were confronted, and challenged, by U.S. prison gangs.<sup>87</sup>

Then, in 1996, Congress passed, and President Clinton signed, repressive immigration laws dramatically expanding the list of crimes considered “aggravated felonies” for immigration purposes, the result of which is nearly mandatory deportation from the United States.<sup>88</sup> The impact on immigrant communities was devastating: more than 67,000 immigrants were removed as a result of criminal convictions.<sup>89</sup> As others have explained, mass deportation and family separation sent thousands of Central American young people back to countries where they had few family connections. At least partially as a result of this family disintegration, children left behind leaned on gangs for support.<sup>90</sup> In the politically and economically fragile post-war region of Central America, gang members wielded significant power, mobilized young members, and unified their structure and influence.<sup>91</sup> In response, tough on crime “Mano Duro” policies swept the region, and Central American prison populations exploded, further fostering, and reifying, gang crime and gang culture.<sup>92</sup> In the ensuing years, many tried to escape the gang violence in Central America—some individuals were fleeing forced gang recruitment, as members<sup>93</sup> or as gang girlfriends;<sup>94</sup> others were fleeing harm for having renounced the gang;<sup>95</sup> and still others were seeking safety after serving as police informants or testifying against the gang.<sup>96</sup>

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87. INSIGHT CRIME & CTR. FOR LATIN AM. & LATINO STUDIES, *MS13 IN THE AMERICAS: HOW THE WORLD’S MOST NOTORIOUS GANG DEFIES LOGIC, RESISTS DESTRUCTION* 14–16 (2018).

88. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546.

89. See Freddy Funes, *Removal of Central American Gang Members: How Immigration Laws Fail to Reflect Global Reality*, 63 U. MIAMI L. REV. 301, 307 (2008) (citing *Deportees in Latin America and the Caribbean: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs*, 110th Cong. 24–26 (2007) (testimony of Gary Mead, Assistant Director for Management, Office of Detention and Removal Operations, Bureau of U.S. Immigration and Customs Management, U.S. Department of Homeland Security)); see also INT’L HUMAN RIGHTS CLINIC, HARVARD LAW SCH., *NO PLACE TO HIDE: GANGS AND CLANDESTINE VIOLENCE IN EL SALVADOR* 21–22 (2007).

90. Fogelbach, *supra* note 86.

91. Maureen Meyer & Elyssa Pachico, *Fact Sheet: U.S. Immigration and Central American Asylum Seekers*, WOLA (Feb. 1, 2018), <https://www.wola.org/analysis/fact-sheet-united-states-immigration-central-american-asylum-seekers>.

92. Steven Dudley, *How ‘Mano Dura’ Is Strengthening Gangs*, INSIGHT CRIME (Nov. 22, 2010), <https://www.insightcrime.org/investigations/how-mano-dura-is-strengthening-gangs>.

93. *Urgent Help Needed for Central American Children on the Run*, UNHCR (May 31, 2017), <http://www.unhcr.org/en-us/news/latest/2017/5/592d432c4/urgent-help-needed-central-american-children-run.html>.

94. Ben Ferguson & Matthew Taylor, *Gang Life: First He Builds Trust. Then You Help Out. Next You’re Cutting Crack*, GUARDIAN (Feb. 19, 2012, 2:00 PM), <https://www.theguardian.com/society/2012/feb/19/gang-life-interview>.

95. See, e.g., *Martinez v. Holder*, 740 F.3d 902, 906 (4th Cir. 2014); see also Julia Preston, *Losing Asylum, Then His Life*, N.Y. TIMES (June 28, 2010), <https://www.nytimes.com/2010/06/29/us/29asylum.html>.

96. See, e.g., *Crespin-Valladares v. Holder*, 632 F.3d 117, 120 (4th Cir. 2011).



The U.S. and Central American governments also play a role in enabling patterns of domestic violence and ensuring that abusers in the Northern Triangle face impunity. Following the brutal violence of the wars in Central America, funded in large part by the United States,<sup>97</sup> many perpetrators of violence were not held accountable. Experts have argued that the failure to hold perpetrators of wartime violence accountable—on a domestic or international level—has played an important role in perpetuating violence. In its 2001 report, the Commission on Human Rights stated that this failure “is one of the most important factors contributing to the persistence of such violations, as well as criminal and social violence.”<sup>98</sup> Indeed, the former Attorney General of Guatemala has argued that the traits displayed by domestic abusers including “their sense of power and their presumption that they would never be held accountable for their crimes” is the same attitude held by those who committed war crimes.<sup>99</sup> And moreover, that this has “contributed to the creation of a climate of impunity, and the message that these types of crimes are not considered to be of any importance either to the society or to the state.”<sup>100</sup>

Despite the horrific violence Central Americans are facing and our role in creating the peril they are now fleeing, the current Administration and the DOJ, among other law enforcement agencies, have taken every opportunity to single out Central American men, women, and children for discrimination in the asylum and protection process, both through public commentary and the legal process, reflecting deep animus toward Central American refugees and values tinged with both racism and sexism. In their actions and language, these officials have advanced the erroneous idea that these migrants are either criminals, economic opportunists, or both, and in need of deterrence, detention, and deportation.

While this rhetoric has intensified during the Trump Administration, it did not begin here. In 2014, in the throes of increased migration from Central America, then-Vice President Biden remarked conclusively that “none of these children or women bringing children will be eligible” to remain in the United States despite being legally entitled to an individual

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97. See, e.g., *U.S. Aid to the Contras: The Record Since '81*, N.Y. TIMES, Mar. 20, 1986, at A8; *Newly Released Department of Defense Files Recount El Salvador Military Operations*, U. WASH. CTR. FOR HUM. RTS. (Oct. 4, 2018), <https://jsis.washington.edu/humanrights/2018/10/04/defense-department-files-recount-salvadoran-military-operations>; Philip Taubman, *C.I.A. Said to Aid Salvador Parties*, N.Y. TIMES (May 12, 1984), <https://www.nytimes.com/1984/05/12/world/cia-said-to-aid-salvador-parties.html>.

98. INTER-AM. COMM'N ON HUMAN RIGHTS, FIFTH REPORT ON THE SITUATION OF HUMAN RIGHTS IN GUATEMALA, OEA/Ser.L/V/II.111, doc. 21 rev. ch. IV ¶ 57 (2001), <http://www.cidh.org/countryrep/guate01eng/chap.4.htm>.

99. Molly Redden, *Reminder: Women Migrants Are Fleeing Countries the U.S. Helped Decimate*, HUFFINGTON POST (July 22, 2018, 1:26 AM), [https://www.huffingtonpost.com/entry/reminder-migrants-are-fleeing-countries-the-us-helped-decimate\\_us\\_5b3e5349e4b09e4a8b2b0654](https://www.huffingtonpost.com/entry/reminder-migrants-are-fleeing-countries-the-us-helped-decimate_us_5b3e5349e4b09e4a8b2b0654).

100. *Id.*

screening to evaluate their fears of return and eligibility for asylum.<sup>101</sup> Meanwhile, the Obama Administration set up makeshift family detention facilities in Artesia, New Mexico, and elsewhere, to process and quickly remove thousands of women and children.<sup>102</sup> At the time, a senior, unnamed, Immigration and Customs Enforcement (ICE) official said the goal was to process the immigrants and have them deported “within 10 to 15 days to send a message back to their home countries that there are consequences for illegal immigration.”<sup>103</sup> What is worse, ignoring our domestic and international legal obligations to evaluate migrants’ claims for protection on a case-by-case basis, the Obama Administration’s message from the top meant that adjudicators down below felt emboldened to deny bona fide claims for relief.<sup>104</sup>

In September 2017, then-Attorney General Jeff Sessions, speaking to law enforcement in Massachusetts, pejoratively described Central American children as “wolves in sheep’s clothing.”<sup>105</sup> He erroneously suggested that refugee children from the Northern Triangle who flee north to the United States are, in fact, gang members, surreptitiously entering our country and feigning fear.<sup>106</sup> In the spring 2018, President Trump took to regularly referring to Central Americans and Central American gang members as “animals.”<sup>107</sup> Indeed, at a campaign rally for GOP Representative Marsha Blackburn, he invited attendees to participate in a call-and-response, joyfully inquiring, “What was the name?” to which the crowd gleefully responded, “Animals!”<sup>108</sup> Shortly thereafter, apparently seeking to explain President Trump’s words and to specify that he was referring only to Central American gang members, the White House Office of Communications issued a 488-word statement, “What You Need to Know

101. Press Release, White House, Remarks to the Press with Q&A by Vice President Joe Biden in Guatemala (June 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/06/20/remarks-press-qa-vice-president-joe-biden-guatemala>.

102. Wil S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), <https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html>.

103. See Juan Carlos Llorca, *Fed Says They Will Expedite Deportations to 10–15 Days at N.M. Facility*, SEATTLE TIMES (June 26, 2014, 8:58 PM), <https://www.seattletimes.com/nation-world/fed-says-they-will-expedite-deportations-to-10-15-days-at-nm-facility>.

104. Margaret H. Taylor & Kit Johnson, “Vast Hordes . . . Crowding in upon Us”: *The Executive Branch’s Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 185, 197–98 (2015) (explaining that “[t]his message filtered down to asylum officers conducting credible fear interviews at Artesia and to the immigration judges who conducted video hearings to review negative findings. During the first seven weeks that the Artesia facility was in operation, the credible fear approval rate for Artesia families was just 37.8%—less than half the nationwide figure.”).

105. Lauren Dezenski, *Sessions: Many Unaccompanied Minors Are ‘Wolves in Sheep’s Clothing’*, POLITICO (Sept. 21, 2017, 6:19 PM), <https://www.politico.com/story/2017/09/21/jeff-sessions-border-unaccompanied-minors-wolves-242991>.

106. *Id.*

107. Matthew Nussbaum & Christopher Cadelago, *White House Doubles Down on Trump’s ‘Animals’ Comments*, POLITICO (May 21, 2018, 5:19 PM), <https://www.politico.com/story/2018/05/21/trump-animals-white-house-immigrants-601843>.

108. *Trump Debuts New MS-13 Call-and-Response: ‘What Was the Name?’ ‘ANIMALS!’*, DAILY BEAST (May 29, 2018), <https://www.thedailybeast.com/trump-debuts-new-ms-13-call-and-response-what-was-the-name-animals>.

About the Violent Animals of MS-13,” that uses the contemptuous term, “animals,” a jaw-dropping ten times.<sup>109</sup>

The Attorney General and courts have also shown their hand in written decisions. In 2017, Judge Wilkinson, a federal judge on the Fourth Circuit Court of Appeals, wrote a concurrence in a decision denying asylum to Maria Suyapa Velasquez, a Honduran woman whose mother-in-law kidnapped her son on multiple occasions, and threatened to kill Velasquez. Later, the son of Velasquez’s mother-in-law murdered Velasquez’s sister, believing her to be Velasquez.<sup>110</sup> Dismissing her claim, Judge Wilkinson opined that the harm she suffered was “secondary to a grander pattern of criminal extortion that pervades petitioners’ societies.”<sup>111</sup> Quoting Wilkinson in part, then-Attorney General Sessions also suggested that there is just something inherently violent about Central American people and communities, noting the “pervasive nature of . . . violent criminality” in Central America.<sup>112</sup>

Then, on June 11, 2018, the then-Attorney General Jeff Sessions issued the decision, *Matter of A-B*.<sup>113</sup> Prior to the Attorney General’s decision in *A-B*, the Board of Immigration Appeals (BIA) held in a precedential decision that survivors of domestic violence could qualify for asylum.<sup>114</sup> The Board arrived at this decision after nearly two decades of advocacy and litigation over the matter—its decision was carefully reasoned, and the result of rare consensus between the private bar and law enforcement agencies, including the Department of Homeland Security (DHS).<sup>115</sup> Indeed, the question whether survivors of domestic violence were a cognizable “particular social group” (PSG) such to qualify them for asylum, was previously certified by three different Attorneys General (one Democrat and two Republican).<sup>116</sup>

But seeking to insulate such a sensitive matter from political whims, all three of these Attorneys General chose to leave the final determination

109. *What You Need to Know About the Violent Animals of MS-13*, WHITEHOUSE.GOV (May 21, 2018), <https://www.whitehouse.gov/articles/need-know-violent-animals-ms-13>.

110. *Velasquez v. Sessions*, 866 F.3d 188, 191–92, 198 (4th Cir. 2017).

111. *Id.* at 198–99 (Wilkinson J., concurring).

112. *A-B*, 27 I. & N. Dec. 316, 323 (Att’y Gen. 2018), *abrogated by* *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

113. *Id.* at 316.

114. *A-R-C-G*, 26 I. & N. Dec. 388, 388–89 (B.I.A. 2014), *overruled by* *A-B*, 27 I. & N. Dec. 316.

115. STEVEN R. ABRAMS ET AL., AILA DOC. NO. 18061134, RETIRED IMMIGRATION JUDGES AND FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS STATEMENT IN RESPONSE TO ATTORNEY GENERAL’S DECISION IN *MATTER OF A-B*, at 1(2018), <http://www.aila.org/infonet/retired-ijs-and-former-members-of-the-bia-issue>.

116. Samantha Schmidt, *‘Back to the Dark Ages’: Session’s Asylum Ruling Reverses Decades of Women’s Rights Progress, Critics Say*, WASH. POST (June 12, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/06/12/back-to-the-dark-ages-sessions-asylum-ruling-reverses-decades-of-womens-rights-progress-critics-say/>.

to the immigration judges (IJ) and the BIA.<sup>117</sup> That changed on June 11, 2018.

Then-Attorney General Sessions's decision in this case calls out by name Central American migrants who are fleeing domestic or gang violence.<sup>118</sup> The noncitizen at the center of *A-B-* is Salvadoran and, though not all women fleeing domestic violence are Central American, Sessions suggests they are, noting that the holding he is now overruling in *Matter of A-R-C-G-*,<sup>119</sup> in which the asylum seeker was Guatemalan, was wrongly extended "to encompass most Central American domestic violence victims."<sup>120</sup> In so doing, he both fails to recognize the many survivors of domestic violence from countries other than Central America who have already received asylum in the United States and he also crystallizes the particular animus he reserves for Central American refugees.

Moreover, in this decision, Sessions seems to further advance a false and dangerous narrative around Central American asylum seekers. Namely, that they are taking advantage of a loophole in the law that allows them to seek protection.<sup>121</sup> Sessions contends that "there are alternative proper and legal channels for seeking admission to the United States other than entering the country illegally and applying for asylum in a removal proceeding."<sup>122</sup> Of course, such rhetoric is in line with previous remarks Sessions made in 2017, accusing "dirty immigration lawyers" of using "magic words" to help would-be asylum seekers exploit similar loopholes.<sup>123</sup>

The main takeaway that Sessions intends to convey through *A-B-* is succinct and clear.<sup>124</sup> Sessions states, in unequivocal terms, that in most cases, "claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."<sup>125</sup> While advocates agree that *A-B-* should be read more narrowly, just overturning the particular PSG in *A-R-C-G-*,<sup>126</sup> the takeaway has in fact been interpreted much more broadly. Following *A-B-*, on June 13, 2018, U.S.

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117. ABRAMS ET AL., *supra* note 115.

118. *A-B-*, 27 I. & N. Dec. at 316, 320, 332.

119. 26 I. & N. Dec. 388.

120. *A-B-*, 27 I. & N. Dec. at 331–32.

121. Jeff Sessions, U.S. Att'y Gen., Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> (contending, without evidence, that "over the years, smart attorneys have exploited loopholes in the law, court rulings, and lack of resources to substantially undermine the intent of Congress" and that "[DOJ] can close loopholes and clarify our asylum laws to ensure that they help those they were intended to help").

122. *A-B-*, 27 I. & N. Dec. at 345.

123. Sessions, *supra* note 121.

124. *See A-B-*, 27 I. & N. Dec. at 320.

125. *Id.*

126. *See, e.g.*, NAT'L IMMIGRANT JUSTICE CTR., ASYLUM PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B-*, at 1 (2018), <https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%20206.21.18.pdf>.

Citizenship and Immigration Services (USCIS) issued interim written guidance instructing asylum officers to apply *A-B-* to credible fear interviews.<sup>127</sup> On July 11, 2018, final written guidance was issued that seems to all but foreclose claims based on domestic and gang violence. Taken together, these new credible fear policies seem intent on denying relief to bona fide refugees.<sup>128</sup> As outlined in a recently filed suit by the ACLU and the Center for Gender and Refugee Studies (CGRS), the new policies not only instruct officers to deny virtually all claims related to these harms but they also impose heightened standards for showing nexus; impose inappropriate and untenable evidentiary burdens on applicants to articulate cognizable PSGs; and instruct officers to improperly exercise discretion to deny claims and disregard contrary court of appeals precedent.<sup>129</sup> In December 2018, Judge Sullivan of the U.S. District Court in Washington, D.C., held that these policies—instructing asylum officers to “generally” deny claims related to gang and gender violence—violate immigration laws.<sup>130</sup> The court explained that “there is no legal basis for an effective categorical ban” on such claims and granted the request for a permanent injunction against the policies.<sup>131</sup>

The government’s continued discrimination against Central American migrants and refugees has also manifested in other ways. Beginning in April 2018, the Trump Administration began a “zero-tolerance” policy aimed at deterring predominantly Central American families seeking safety and refuge at the southern U.S. border.<sup>132</sup> The government’s zero-tolerance policy included a mandate to criminally prosecute every unauthorized entrant into the United States,<sup>133</sup> an unprecedented exercise of law enforcement authority. The government claimed that a necessary and nat-

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127. *AILA Doc. No. 18061930, Vox Obtains USCIS Interim Guidance on Matter of A-B-*, AM. IMMIGR. LAW. ASS’N (June 13, 2018), <https://www.aila.org/infonet/vox-obtains-uscis-interim-guidance-matter-of-a-b>.

128. U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., PM-602-0162, POLICY MEMORANDUM: GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* (2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf>.

129. Complaint for Declaratory and Injunctive Relief at 4–5, *Grace v. Sessions*, No. 1:18-CV-01853, 2018 WL 3812445 (D.D.C. Aug. 7, 2018), <https://www.aclu.org/legal-document/grace-v-sessions-complaint> (alleging that such instructions are violations of the INA, the Refugee Act, the Administrative Procedures Act, Separation of Powers, and Due Process).

130. *Court Rules Trump Policies Denying Asylum Protections to People Fleeing Domestic and Gang Violence Are Illegal*, U.C. HASTINGS CTR. FOR GENDER & REFUGEE STUD. (Dec. 19, 2018), <https://cgrs.uchastings.edu/news/court-rules-trump-policies-denying-asylum-protections-people-fleeing-domestic-and-gang-violence>.

131. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126, 146 (2018), *appeal filed* Jan. 19, 2019.

132. *President Donald J. Trump Is Acting to Enforce the Law, While Keeping Families Together*, WHITEHOUSE.GOV (June 20, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-acting-enforce-law-keeping-families-together> [hereinafter Briefing Statement].

133. *Q&A: Trump Administration’s “Zero-Tolerance” Immigration Policy*, HUM. RTS. WATCH (Aug. 16, 2018, 8:00 AM), <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy>.

ural byproduct of this criminal prosecution was the separation of immigrant children from their parents.<sup>134</sup> During six weeks in April and May of 2018, more than 2,300 immigrant children were separated from their parents according to the DHS.<sup>135</sup>

Following widespread public outrage at this policy, President Trump signed an Executive Order, “Affording Congress an Opportunity to Address Family Separation.”<sup>136</sup> The President’s Executive Order purported to put an end to family separation by inviting Congress and the courts to amend the law to allow for prolonged and indefinite family detention.<sup>137</sup> Specifically, the Administration asked the Attorney General to file a request to amend the 1997 *Flores* settlement, which has been interpreted by a district court judge to forbid the detention of immigrant children for longer than twenty days.<sup>138</sup> The Executive Order further suggests that, assuming *Flores* is amended to allow prolonged and indefinite family detention, the DHS is instructed to detain migrant families “throughout the pendency of . . . immigration proceedings.”<sup>139</sup> On June 26, 2018, a federal judge in California granted an injunction ordering that the Trump Administration end the practice of separating immigrant families.<sup>140</sup> He ordered that all children be reunited with their parents within thirty days.<sup>141</sup> Notwithstanding the court’s order, by July 26, 2018, more than seven hundred children remained separated from their families, though the government contended this was the result of “ineligibility” on the part of parents.<sup>142</sup> Of those parents declared “not eligible,” more than 460 had already been deported.<sup>143</sup> Another 127 parents had apparently “waived” their rights to be

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134. Liz Goodwin, ‘Children Are Being Used as a Tool’ in Trump’s Effort to Stop Border Crossings, BOS. GLOBE (June 10, 2018), <https://www.bostonglobe.com/news/nation/2018/06/09/border-separations/Z95z4eFZjyfqCLG9pyHjAO/story.html>; Lomi Kriel, *New ‘Zero Tolerance’ Policy Overwhelms South Texas Courts*, HOUS. CHRONICLE (June 9, 2018, 11:30 AM), <https://www.houstonchronicle.com/news/houston-texas/texas/article/New-zero-tolerance-policy-overwhelms-South-12981190.php>. This assertion is dubious at best. Children and parents, in Texas, were held in CBP facilities together. When parents were briefly brought into criminal court to receive “time served” for their unlawful entry, their children were removed. This was not necessary—children and parents could stay, and had been staying, together in CBP custody. See E-mail from Denise Gilman, Co-Dir., University of Texas School of Law to Sarah Sherman-Stokes et al., Clinical Instructor, Lecturer of Law, and Assoc. Dir. of the Immigrants’ Rights & Human Trafficking Program, Bos. Univ. Sch. of Law (June 20, 2018) (on file with author).

135. Dara Lind, *New Statistics: The Government Is Separating 65 Children a Day from Parents at the Border*, VOX (June 19, 2018 3:17 PM), <https://www.vox.com/2018/6/19/17479138/how-many-families-separated-border-immigration>.

136. Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018).

137. See *id.*; Briefing Statement, *supra* note 132.

138. Exec. Order No. 13,841, 83 Fed. Reg. 29,435, 29,436; Briefing Statement, *supra* note 132.

139. Exec. Order No. 13,841, 83 Fed. Reg. 29,435, 29,436.

140. *Ms. L. v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018).

141. *Id.*

142. Madeleine Aggeler, *Why Some Immigrant Parents Aren’t Eligible to Be Reunited with Their Children*, N.Y. MAG.: THE CUT (July 27, 2018), <https://www.thecut.com/2018/07/family-reunification-deadline-ineligible-parents.html>.

143. Jonathan Blitzer, *The Government Has Decided that Hundreds of Immigrant Parents Are Ineligible to Be Reunited with Their Kids. Who Are They?*, NEW YORKER (July 26, 2018), <https://www.newyorker.com/news/news-desk/the-government-has-decided-that-hundreds-of-immigrant-parents-are-ineligible-to-be-reunited-with-their-kids-who-are-they>.

reunited with their children, though serious, concerning questions remain about whether such waiver was knowing, with the ACLU arguing that the government acted in a “coercive and misleading” manner that led parents to sign documents without understanding the impact of their waiver.<sup>144</sup> In early August, the government all but abdicated responsibility for the remaining separated families, arguing that it was up to the ACLU to bring the remaining children and parents back together.<sup>145</sup> At the time of publication, a federal judge has stayed further deportations of previously separated families.<sup>146</sup>

Then, in the fall 2018, as a migrant caravan of thousands of Central American asylum seekers wound its way north through Central America and Mexico, en route to the United States, the President’s anti-Central American rhetoric intensified.<sup>147</sup> In direct response to these asylum seekers, on November 8, 2018, DHS and the DOJ issued an interim final rule foreclosing asylum to any noncitizen who enters the United States not at a port of entry.<sup>148</sup> A Presidential Proclamation followed the next day.<sup>149</sup> Because both the rule and the Proclamation act in direct contravention of a statute passed by Congress, allowing applicants to seek asylum whether or not they have entered at a port of entry,<sup>150</sup> the ban has already been challenged, and blocked, in federal court.<sup>151</sup>

The families impacted by the President’s policies, Proclamation, and Executive Order are disproportionately migrants and refugees from Central America. In 2017, Central Americans made up more than 50% of total

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144. *Id.*; Lydia Wheeler, *ACLU: Separated Parents Were Forced to Sign Paperwork They Can’t Read*, HILL (July 25, 2018, 5:17 PM), <https://thehill.com/homenews/news/398873-aclu-separated-parents-were-forced-to-sign-paperwork-they-cant-read>.

145. *ACLU’s Role in Reuniting Separated Families*, NPR: ALL THINGS CONSIDERED (Aug. 4, 2018, 5:33 PM), <https://www.npr.org/2018/08/04/635668333/aclus-role-in-reuniting-separated-families>.

146. Order Granting Plaintiff’s Motion for Temporary Restraining Order at 15, *M.M.M. v. Sessions*, No. 18cv1832 (S.D. Cal. Aug. 16, 2018).

147. Priscilla Alvarez, *The Latest Target of Trump’s Immigration Attacks*, ATLANTIC (Nov. 1, 2018), <https://www.theatlantic.com/politics/archive/2018/11/trump-escalates-rhetoric-against-migrant-caravan/574675>.

148. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations: Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,934–35 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1003, 1208).

149. Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018).

150. Immigration and Nationality Act § 208(a), 8 U.S.C. § 1158(a) (2018).

151. Order Granting Preliminary Injunction at 1–2, *E. Bay Sanctuary Covenant v. Trump*, No. 18-cv-06810 (N.D. Cal. Dec. 19, 2018).

southwest border apprehensions.<sup>152</sup> Among unaccompanied minors, Central Americans make up roughly 90% of border apprehensions.<sup>153</sup> Indeed, this Administration has made clear that its policies of detention, family separation, and its other attempts at “deterrence”<sup>154</sup> are specifically directed toward Central American migrants who have crossed the southern U.S.–Mexico border and are seeking asylum.<sup>155</sup>

As the struggle to obtain lawful status and protection for these migrants intensifies, what options remain open for them to pursue permanent legal status? Do the terms of the *ABC* Case still protect Salvadorans and Guatemalans?<sup>156</sup>

The terms of the *ABC* Case do remain in effect today and are available to protect those migrants who meet the above outlined requirements. Though negotiated nearly thirty years ago, this agreement may provide a pathway to lawful status for, in particular, certain Salvadoran migrants who will lose TPS in the coming months.<sup>157</sup> The settlement fails, however, to offer any kind of meaningful protection to Central American migrants who have recently crossed, or will cross, the border fleeing violence in the Northern Triangle today. A fuller analysis and evaluation of this potential remedy will be explored in Part III of this Article.

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152. Stephanie Leutert, *Who's Really Crossing the U.S. Border, and Why They're Coming*, LAWFARE (June 23, 2018, 10:04 AM), <https://www.lawfareblog.com/whos-really-crossing-us-border-and-why-theyre-coming>; see also *Southwest Border Migration FY2018*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018> (last modified Nov. 9, 2018) (showing that roughly 90% of migrants are Central American, and UAC/Family Units make up about 25% of the total number of apprehensions at the border). The numbers of children and families fleeing Guatemala are on pace to double what they have been in recent years. *U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions> (last modified Oct. 23, 2018) [hereinafter *2018 Southwest Border Apprehensions*].

153. *2018 Southwest Border Apprehensions*, *supra* note 152.

154. Rafael Bernal, *HHS Official Says Family Separation Policy Will Have 'Deterrence Effect'*, HILL (June 19, 2018, 11:40 AM), <https://thehill.com/latino/393000-hhs-official-says-family-separation-policy-will-have-deterrence-effect>. But see Adam Cox & Ryan Goodman, *Detention of Migrant Families as "Deterrence": Ethical Flaws and Empirical Doubts*, JUST SECURITY (June 22, 2018), <https://www.justsecurity.org/58354/detention-migrant-families-deterrence-ethical-flaws-empirical-doubts>.

155. See, e.g., Trump, *supra* note 9 (suggesting that immigrants from Central America are coming “to pour into and infest our Country, like MS-13”).

156. Specifically, do the terms of the settlement protect (1) those Salvadorans who first entered the United States on or before September 19, 1990, and who registered for benefits under the *ABC* Case agreement on or before October 31, 1991, either by applying for asylum or applying for TPS and (2) those Guatemalans who first entered the United States on or before October 1, 1990, and who registered for benefits under the *ABC* Case agreement on or before December 31, 1991? *American Baptist Churches v. Thornburgh (ABC) Settlement Agreement*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws/legal-settlement-notice/american-baptist-churches-v-thornburgh-abc-settlement-agreement> (last updated Oct. 28, 2008).

157. Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2,654 (Jan. 18, 2018) (ending TPS for Salvadorans).



## II. U.S. ASYLUM LAW AND THE CHALLENGES FACING NORTHERN TRIANGLE REFUGEES

Refugees of the Northern Triangle today face, in many courts, something of a sisyphian struggle to obtain asylum with denial rates for these cases remaining far higher than for other countries.<sup>158</sup> This Part will provide a brief overview of the history of modern asylum law as well as why PSG and nexus requirements have made the path to asylum particularly treacherous for Central American migrants. In many ways, the manner in which these requirements have developed is just the latest affront in a long legacy of animus toward these migrants.

Asylum allows a noncitizen to remain in the United States temporarily and, usually, permanently, if she can demonstrate that she meets the definition of a refugee under the law.<sup>159</sup> In the aftermath of World War II, the Convention Relating to the Status of Refugees (1951 Convention) was drafted to establish a worldwide standard for refugee status and protection.<sup>160</sup> Despite not being a signatory to the 1951 Convention, the United States later ratified the 1967 Protocol Relating to the Status of Refugees, which incorporated the refugee definition set out in the 1951 Convention.<sup>161</sup>

In 1974, the United States first issued regulations setting out asylum criteria and guidelines.<sup>162</sup> Six years later, as mentioned above, with the Refugee Act of 1980,<sup>163</sup> asylum received statutory recognition.<sup>164</sup> Today, the Immigration and Nationality Act (INA) defines a refugee as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or un-

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158. Holly Yan, *Which Nationalities Get Rejected the Most for US Asylum?*, CNN, <https://www.cnn.com/2018/07/12/world/us-asylum-denial-rates-by-nationality/index.html> (last updated July 12, 2018, 4:17 PM) (showing that the Northern Triangle countries have some of the highest denial rates for asylum cases, as compared to other countries—compare El Salvador (79.2%), Honduras (78.1%), and Guatemala (74.7%), to China, with denial rate of 20.3% or Ethiopia, with denial rate of 17%).

159. Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2018); *Green Card for Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/greencard/asylees> (last updated July 10, 2017).

160. See Convention Relating to the Status of Refugees, *supra* note 56, art. 1 (defining “refugee” as a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”).

161. Protocol Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

162. LEGOMSKY & RODRÍGUEZ, *supra* note 52, at 893; see Asylum, 39 Fed. Reg. 41,832 (Dec. 3, 1974).

163. Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 103–05 (1980).

164. Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2018).

willing to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .<sup>165</sup>

Though present-day Central American migrants can, and often do, seek asylum on the basis of other protected grounds,<sup>166</sup> this Article will focus on the evolution of the PSG and nexus requirements, and the distinct challenges they have posed for Central Americans seeking asylum because of gang, domestic, and family violence.<sup>167</sup>

Of the five bases on which a noncitizen can seek asylum, considerable case law has attempted to tackle the definition of a PSG. As others have noted, the term has likely created more debate and controversy than any other refugee law term of art.<sup>168</sup> Not defined either by the 1951 Convention or by statute or regulations, the evolution of the PSG has been solely through case-by-case adjudication.<sup>169</sup> The Board first gave meaning to PSG in *Matter of Acosta*,<sup>170</sup> a case involving a taxi driver and member of a taxi cooperative in El Salvador.<sup>171</sup> As a result of his activities, Mr. Acosta was beaten by men he believed were leftist guerillas, and his life was threatened on three occasions.<sup>172</sup> He argued that he feared harm by the government for his involvement in a “socialistic” cooperative and from the guerillas.<sup>173</sup> Mr. Acosta sought asylum as a member of a PSG “comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador” as well as on account of his political opinion.<sup>174</sup> At the time of the Board’s opinion in *Acosta* in 1985, there was little written in the way of interpretation of the PSG ground.<sup>175</sup> In holding that Mr. Acosta was not a member of a PSG, the Board determined that members of such a group must share a “common, immutable characteristic” that

165. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

166. *Maldonado v. Lynch*, 646 F. App’x 129, 130–31 (2d Cir. 2016) (dismissing Salvadoran respondent’s political opinion asylum claim); *Rios v. Lynch*, 807 F.3d 1123, 1126 (9th Cir. 2015) (affirming BIA’s denial of asylum claim because Guatemalan respondent failed to prove “sufficient nexus between the murders of his relatives and their religious beliefs”); *Castillo v. Holder*, 447 F. App’x 832, 834 (9th Cir. 2011) (granting asylum for persecution based on political opinion).

167. Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 777 (2003) (“The meaning of the term ‘particular social group’ and the determination of what is commonly referred to as ‘nexus,’—the shorthand term used in the refugee adjudication context to describe the required causal connection between persecution and a Convention reason—may be among the most thorny interpretive issues in refugee law.”).

168. Benjamin Casper et al., *Matter of M-E-V-G- and the BIA’s Confounding Legal Standard for “Membership in a Particular Social Group,”* IMMIGR. BRIEFINGS, June 2014, at 3; see DEBORAH ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* §§ 5:40–5:67 (2018).

169. See 8 C.F.R. § 1003.1(d)(1) (2018); ANKER, *supra* note 168, § 5.40.

170. 19 I. & N. Dec. 211 (B.I.A. 1985).

171. *Id.* at 216–17.

172. *Id.* at 217.

173. *Id.*

174. *Id.* at 232.

175. See, e.g., GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 48 (2d ed. 1996).

members of the group cannot change, or should not be required to change because it is “fundamental” to their identity or conscience.<sup>176</sup> The Board reasoned that because Mr. Acosta could change his job or choose not to participate in work stoppages, these characteristics were not immutable.<sup>177</sup> To arrive at such an interpretation, the Board relied on the doctrine of *ejusdem generis*, “of the same kind.”<sup>178</sup>

The Board concluded that all protected grounds shared the requirement of innate characteristics (race and nationality) or characteristics that a respondent should not be required to change (religion and political opinion).<sup>179</sup> Thus, the Board held, so too must the PSG ground.<sup>180</sup>

Since *Acosta*, the PSG definition has evolved and changed. Two decades after *Acosta*, the Board introduced the criteria of social visibility in *Matter of C-A*.<sup>181</sup> In denying asylum, the Board agreed with the IJ that a proposed PSG of “confidential informants . . . against the Cali [drug] cartel” failed in part because society did not recognize such a group.<sup>182</sup> Later, in *Matter of A-M-E- & J-G-U*,<sup>183</sup> the Board rejected the proposed PSG of “wealthy Guatemalans,” finding that pervasive crime and violence in Guatemala meant that such a group lacked social visibility.<sup>184</sup>

Today, in addition to the immutability requirement set out in *Acosta* through its decision in *Matter of M-E-V-G*,<sup>185</sup> the Board has narrowed what can constitute a PSG by adding the requirements of “particularity”<sup>186</sup> and “social distinction”<sup>187</sup> to the social group formulation. This new definition precludes large groups of persons from obtaining asylum based on size or breadth, “a restriction the Board does not place on the other protected grounds, that it rejected in *Matter of Toboso-Alfonso*,<sup>188</sup> and which has no basis in the INA.”<sup>189</sup> Moreover, and as others have articulated, the

176. *Acosta*, 19 I. & N. Dec. at 233–34.

177. *Id.* at 234.

178. *Id.* at 233–34.

179. *Id.* at 233–35.

180. *Id.*

181. *C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006), *aff’d*, *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006); see also Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 *YALE L. & POL’Y REV.* 47, 48, 58 (2008) (discussing the Court’s approach in the *Acosta* case and comparing the approach with the social visibility criteria).

182. *C-A-*, 23 I. & N. Dec. at 960.

183. 24 I. & N. Dec. 69 (B.I.A. 2007).

184. *Id.* at 76.

185. *M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014).

186. *Id.* at 238 (defining social distinction as, “[W]hether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group.”).

187. *Id.* at 239–40 (explaining that particularity requires that the group “be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective”).

188. 20 I. & N. Dec. 819 (B.I.A. 1990).

189. Casper et al., *supra* note 168, at 19.

new requirements set out in *M-E-V-G*- create metrics for particularity and social visibility that work in opposition to one another.<sup>190</sup> These requirements are completely out of step with international standards on social group protection, principles of treaty interpretation, and the law of other countries that are party to international refugee agreements.<sup>191</sup> Finally, in addition to these legal hurdles and inconsistencies, there are a number of practical challenges presented by the evolving PSG standard. Namely, that many, if not most, applicants are pro se, forced to navigate complex legal and procedural requirements without an attorney as well as to meet a substantial evidentiary burden on their own.<sup>192</sup> The Board has suggested that applicants can meet this evidentiary burden by providing “country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like.”<sup>193</sup> Additional hurdles have been put in place even following *M-E-V-G*-. In January 2018, the Board held that “[a]n applicant seeking asylum . . . based on membership in a particular social group must clearly indicate on the record before the IJ the exact delineation of any proposed particular social group.”<sup>194</sup> As former Board member Jeffrey Chase and others have noted,<sup>195</sup> this is a tall order for experienced asylum attorneys, and all the more so for an asylum applicant who may be unrepresented, detained, and non-English speaking.

As other scholars have pointed out, this shift is both a significant setback, and somewhat of a surprise.<sup>196</sup> Though not without its detractors,<sup>197</sup>

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190. See Brief of *Amicus Curiae* The National Immigrant Justice Center in Support of Petitioner at 14, *Santos v. Holder*, No. 14-1050 (3d Cir. May 29, 2014) (describing this phenomenon).

191. Casper et al., *supra* note 168, at 16.

192. Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 58 n.13 (2008) (noting that in a study of expedited removal cases, asylum seekers were 12.5 times more likely to be granted relief if represented by counsel) (citing Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 232, 239 (2005)). Another study found that asylum seekers with representation were three times more likely to be granted relief. *Id.* (citing Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007)).

193. *M-E-V-G*-, 26 I. & N. Dec. 227, 244 (B.I.A. 2014).

194. *W-Y-C*-, 27 I. & N. Dec. 189, 189 (B.I.A. 2018).

195. Jeffrey S. Chase, *The Impact of the BIA’s Decision in Matter of W-Y-C- & H-O-B-*, OPINIONS/ANALYSIS ON IMMIGR. L. (Jan. 26, 2018), <https://www.jef-freyschase.com/blog/2018/1/26/0sg8ru1tl0gz4becqimcrtt4ns8yjjz>.

196. See Lindsay M. Harris & Morgan M. Weibel, *Matter of S-E-G-: The Final Nail in the Coffin for Gang-Related Asylum Claims?*, 20 BERKELEY LA RAZA L.J. 5, 28 (2010) (arguing for affirmation of the *Acosta* standard); Rachel Gonzalez Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of “A Particular Social Group,”* 30 GEO. IMMIGR. L.J. 287, 297 (2016).

197. See Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 739, 795 (1989) (arguing for a “broad, literal interpretation of ‘social group’”); Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 60 (1983) (stating that “membership in virtually any group should be sufficient”); see also GOODWIN-GILL, *supra* note 175, at 47–48; see generally T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group,’* in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTANTS ON INTERNATIONAL PROTECTION 264, 285 (Erika Fuller et al. eds.,

the *Acosta* immutability standard was widely accepted for more than two decades and adopted by nearly all circuit courts.<sup>198</sup> Indeed, the *Acosta* standard was considered to be “a standard that is capable of principled evolution but not so vague as to admit persons without a serious basis for claims to international protection.”<sup>199</sup> As the Eleventh Circuit explained, “*Acosta* strikes an acceptable balance between (1) rendering ‘particular social group’ a catch-all for all groups who might claim persecution, which would render the other four categories meaningless, and (2) rendering ‘particular social group’ a nullity by making its requirements too stringent or too specific.”<sup>200</sup> So too was the *Acosta* standard incorporated into international norms and standards, including in guidelines issued by the UNHCR.<sup>201</sup> Nevertheless, as explained above, this definition was improperly amended and narrowed in *M-E-V-G*—indeed, the Seventh Circuit in particular has all but ignored the criteria laid out in *M-E-V-G*, opting instead for the *Acosta* test.<sup>202</sup>

As the term has changed and its interpretation has narrowed over the years, new PSGs have been recognized, including those based on gender,<sup>203</sup> sexual orientation,<sup>204</sup> uncircumcised women,<sup>205</sup> family,<sup>206</sup> clan membership,<sup>207</sup> and persons with mental illness,<sup>208</sup> among others. But as claims for asylum based on membership in a certain PSG have grown, it has become increasingly difficult for Central Americans fleeing gang and family violence to obtain asylum on these bases.

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2003) (resisting an overly broad definition of PSG); Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 543–48 (1993) (discussing the difficulties in defining a social group).

198. Lisa Frydman & Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, IMMIGR. BRIEFINGS, Oct. 2012, at 1, 3, 30 n.23; *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (adding “voluntary associational relationship” standard).

199. JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 427 (2d ed. 2014).

200. *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006).

201. U.N. High Comm’r for Refugees, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 10–13, U.N. Doc. HRC/GIP/02/02 (May 7, 2002); see also Harris & Weibel, *supra* note 196 (“Affirming the *Acosta* formulation for social group would ensure U.S. conformity with other asylum-receiving countries, such as Canada, New Zealand, and the United Kingdom, who have accepted that definition of social group.”).

202. *Sibanda v. Holder*, 778 F.3d 676, 681 (7th Cir. 2015); *R.R.D. v. Holder*, 746 F.3d 807, 809–10 (7th Cir. 2014); *N.L.A. v. Holder*, 744 F.3d 425, 428 (7th Cir. 2014).

203. See, e.g., *Cece v. Holder*, 733 F.3d 662, 676–77 (7th Cir. 2013); *Ahmed v. Holder*, 611 F.3d 90, 96 (1st Cir. 2010); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005).

204. *Toboso-Alfonso*, 20 I. & N. Dec. 819, 819–20 (B.I.A. 1990).

205. *Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996).

206. *Crespin-Valladares v. Holder*, 632 F.3d 117, 124–25 (4th Cir. 2011) (noting that social group of family is “paradigmatically immutable”); *C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006) (“Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.”).

207. *H-*, 21 I. & N. Dec. 337 (B.I.A. 1996).

208. *Temu v. Holder*, 740 F.3d 887, 892–94 (4th Cir. 2014) (holding that persons with bipolar disorder and erratic behavior may constitute a PSG).

*A. Domestic Violence and Particular Social Group*

For more than twenty years, noncitizen survivors of domestic violence have been pushing for recognition as a PSG. Beginning in 1995, the case of Rody Alvarado was a litigation battleground. Ms. Alvarado suffered a decade of brutal violence at the hands of her former-soldier husband.<sup>209</sup> In fact, she said that her husband's violence was largely fueled by the criminal acts he committed as a member of the Guatemalan military and for which he was never punished.<sup>210</sup> This sense of impunity persisted. Her court documents reveal that "to scare her . . . he would tell her stories of having killed babies and the elderly while he served in the army."<sup>211</sup> She finally fled Guatemala and sought asylum in the United States.<sup>212</sup> The IJ granted her asylum, finding that "Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination" constituted a PSG.<sup>213</sup> DHS appealed and the case was litigated for the next ten years, which included intervention by the Attorney General.<sup>214</sup> Ms. Alvarado finally received asylum by stipulation of the parties in 2009, at the same time that the DHS conceded via a briefing in a separate case that, in certain instances, domestic violence could be grounds for asylum.<sup>215</sup> But it was not until 2014 that a precedent decision emerged from the Board holding that women fleeing domestic violence, like Ms. Alvarado, can satisfy the refugee definition and qualify for asylum in the United States.<sup>216</sup>

In that 2014 case, *A-R-C-G-*, the Board considered the case of Aminta Cifuentes. Ms. Cifuentes fled Guatemala after her husband beat her, raped her, tried to set her on fire, and hit her so hard in the stomach that she gave birth prematurely.<sup>217</sup> The Board held that "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable PSG that forms the basis of a claim for asylum.<sup>218</sup> The Board held that gender

209. R-A-, 22 I. & N. Dec. 906, 908–09 (B.I.A. 1999).

210. *See id.* at 909.

211. Redden, *supra* note 99.

212. R-A-, 22 I. & N. Dec. at 909.

213. *Id.* at 911.

214. Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 113–17 (2013); Karen Musalo et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L.J. 161, 162–62 (2010); *see also* Lisa Frydman, *Recent Developments in Domestic-Violence-Based Asylum Claims*, 2009 LEXISNEXIS EMERGING ISSUES ANALYSIS 4075, [https://cgrs.uchastings.edu/sites/default/files/Recent\\_Developments\\_in\\_DV\\_Asylum\\_Frydman\\_08\\_2009.pdf](https://cgrs.uchastings.edu/sites/default/files/Recent_Developments_in_DV_Asylum_Frydman_08_2009.pdf).

215. Department of Homeland Security's Supplemental Brief at 14, L-R- (B.I.A. Apr. 13, 2009), <https://cgrs.uchastings.edu/our-work/matter-l-r>, (advancing two formulations of a social group that could meet the immutability, visibility, and particularity requirements, including: (1) Mexican women in domestic relationships who are unable to leave; or (2) Mexican women who are viewed as property by virtue of their position in a domestic relationship).

216. A-R-C-G-, 26 I. & N. Dec. 388, 388 (B.I.A. 2014), *overruled by* A-B-, 27 I. & N. Dec. 316 (Att'y Gen. 2018); *see also* Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, HARV. INT'L REV., Fall 2014/Winter 2015, at 45, 45.

217. Brief for CGRS to the BIA, CGRS Database Case No. 8767 (B.I.A. Nov. 14, 2012).

218. A-R-C-G-, 26 I. & N. Dec. at 388.

is immutable and that marital status, when one party is unable to leave the marriage, can similarly be immutable.<sup>219</sup> Moreover, the Board held, and DHS conceded, that the group was particular—that “married,” “women,” and “unable to leave the relationship”—have commonly accepted definitions within Guatemalan society based on the facts in this case, including the respondent’s (negative) experience with the police.<sup>220</sup> Finally, the Board held that this group is socially distinct as Guatemala has a culture of “machismo and family violence,” and that Guatemala has laws in place to protect survivors of sexual and physical violence but that enforcement is problematic and uneven.<sup>221</sup>

Unfortunately, despite the Board’s precedent decision in *A-R-C-G-*, relief for survivors of family and domestic violence remained irregular and unpredictable. The CGRS evaluated sixty-seven post-*A-R-C-G-* decisions, predominantly involving women from the Northern Triangle of Honduras, Guatemala, and El Salvador.<sup>222</sup> In that study, a series of patterns emerged that highlight the continued challenges these survivors face including: articulating cognizable PSGs where partners are unmarried,<sup>223</sup> proving that a woman is “unable to leave” her relationship, and establishing nexus.<sup>224</sup> Indeed, nexus has become a focal point in PSG claims, where regulations and case law require that applicants demonstrate that their persecutor is harming them “to overcome a protected ground.”<sup>225</sup> While application of the *A-R-C-G-* standard was far from uniform and a lack of clarity persisted, it was still understood to be an important step forward to providing the protection that survivors of domestic and family violence deserve.

But, as explained in Part I, this changed in 2018 with the Attorney General’s decision *A-B-*,<sup>226</sup> overruling *A-R-C-G-*. In *A-B-*, then-Attorney General Sessions dismissed claims of gender-based asylum as being worthy of asylum protection, deriding them as “personal, private conflict” and

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219. *Id.* at 392–93.

220. *Id.* at 393.

221. *Id.* at 394.

222. Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards of the Law*, 22 SW. J. INT’L L. 1, 10–11 (2016).

223. *But see* D-M-R- at 3, CGRS Database Case No. 11564 (B.I.A. June 9, 2015) (*Matter of A-R-C-G-* “does not necessarily require that an applicant seeking asylum or withholding of removal based on domestic violence have been married to his or her abuser. Rather, we look to the characteristics of the relationship to determine its nature.”).

224. Bookey, *supra* note 222, at 16.

225. To establish that the applicant is a refugee, and entitled to asylum, she must establish that a protected ground (e.g., membership in a PSG or political opinion) “was or will be at least one central reason for persecuting the applicant.” Immigration and Nationality Act § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2018) (setting forth the nexus standard); *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that nexus may be established through either direct or circumstantial evidence). For a discussion of the significance of circumstantial evidence of country conditions in cases of gender-based violence, see *Sarhan v. Holder*, 658 F.3d 649, 662 (7th Cir. 2011).

226. *A-B-*, 27 I. & N. Dec. 316, 316 (Att’y Gen. 2018), *abrogated by* *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

concluding that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”<sup>227</sup>

*A-B-* highlighted another hurdle for survivors of domestic violence: persecution by private actors. And yet, federal courts first recognized that private acts—that is, harm by a nongovernment actor—could constitute persecution as far back as 1964.<sup>228</sup> Since then, all eleven circuit courts have agreed.<sup>229</sup> In light of this history, the Attorney General’s dismissal of persecution by private actors was somewhat startling. Purporting to clarify the Attorney General’s decision in *A-B-*, in July 2018, USCIS issued “Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*.”<sup>230</sup> While this Guidance does not further change the law, it sends a deeply troubling message to asylum adjudicators: deny claims of asylum for survivors of domestic violence fleeing Central America.<sup>231</sup> And the message, clearly, has been received, as credible fear approval rates have plummeted in the wake of then-Attorney General Sessions’s decision.<sup>232</sup>

### *B. Gang Violence and Particular Social Group*

Survivors of gang violence in Central America have also historically faced serious challenges in prevailing in their asylum claims. The first published Board case to examine whether fleeing forced gang recruitment could constitute a cognizable asylum claim came in 2008 with *Matter of S-E-G-*.<sup>233</sup> In *S-E-G-*, the Board considered the case of the Mira brothers,

227. *Id.* at 320, 332.

228. Eusaph, 10 I. & N. Dec. 453, 454 (B.I.A. 1964); *see also* Cece v. Holder, 733 F.3d 662, 679 (7th Cir. 2013) (en banc) (Easterbrook, J., dissenting) (defining “persecution” as “mistreatment at public hands” unless public employees are complicit in the private conduct).

229. *See* Malu v. U.S. Att’y Gen., 764 F.3d 1282, 1291 (11th Cir. 2014); Paloka v. Holder, 762 F.3d 191, 195 (2d Cir. 2014); R.R.D. v. Holder, 746 F.3d 807, 809–10 (7th Cir. 2014); Constanza-Martinez v. Holder, 739 F.3d 1100, 1102 (8th Cir. 2014); Doe v. Holder, 736 F.3d 871, 877–78 (9th Cir. 2013); Karki v. Holder, 715 F.3d 792, 801 (10th Cir. 2013); Garcia v. U.S. Att’y Gen., 665 F.3d 496, 503 (3d Cir. 2011); Crespín-Valladares v. Holder, 632 F.3d 117, 128 (4th Cir. 2011); Kante v. Holder, 634 F.3d 321, 325 (6th Cir. 2011); Tesfamichael v. Gonzales, 469 F.3d 109, 113 (5th Cir. 2006); Pierre, 15 I. & N. Dec. 461, 461–62 (B.I.A. 1975) (formalizing the “unwilling or unable” to control standard for nongovernmental persecution in the context of a claim made under former section 243(h) of the INA, 8 U.S.C. § 1253(h) (1970)); *see also* Brief of Amici Curiae Immigration Law Professors at 2–20, *A-B-*, 27 I. & N. Dec. 316 (Att’y Gen. 2018).

230. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 128, at 1.

231. *Id.* at 5 (citing *A-B-*, 27 I. & N. Dec. at 337–38, 343–44) (“The mere fact that a country has civil strife or anarchy resulting in displaced persons or that it has problems effectively policing certain crimes, like domestic violence or gang-related activities, or that certain populations are or are more likely to become victims of crimes or violence, cannot, by itself, establish eligibility for asylum or refugee status.”).

232. Tal Kopan, *Impact of Sessions’ Asylum Move Already Felt at Border*, CNN (July 14, 2018, 8:09 AM), <https://www.cnn.com/2018/07/14/politics/sessions-asylum-impact-border/index.html>.

233. 24 I. & N. Dec. 579, 579 (B.I.A. 2008). A companion case to *S-E-G-* was also published on July 30, 2008. *E-A-G-*, 24 I. & N. Dec. 591, 591 (B.I.A. 2008) (holding that “persons resistant to gang membership” were not socially visible in Honduras, and that membership in a PSG of “young persons who are perceived to be affiliated with gangs” was not a social group because actual membership in a criminal gang is not a social group).



Pablo, Rene, and Silva, who all fled El Salvador after they were beaten and threatened by MS-13, who pressured them to join the gang.<sup>234</sup> When they refused, the gang also threatened to rape their older sister.<sup>235</sup> They declined to report the attacks as they did not believe the police could protect them, and they feared retaliation.<sup>236</sup>

The IJ found the brothers credible but denied them asylum, finding that they had not established nexus either to membership in a PSG or to a political opinion.<sup>237</sup> The IJ held that the beatings and threats occurred simply because the gang wished to recruit new members, and the brothers had not suffered past persecution.<sup>238</sup> Moreover, the IJ found that the brothers failed to show that the Salvadoran government was unwilling or unable to control criminal street gangs.<sup>239</sup>

Specifically, in considering the brothers' proposed social group of "Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities," the Board found the group lacking in both particularity and social visibility<sup>240</sup> (now social distinction).<sup>241</sup>

The years that have followed *S-E-G-* have not been promising for the children and adults fleeing pervasive gang violence in Central America. Cognizable PSGs for this community have been routinely denied, and alongside these denials, the asylum officer training manual was amended to include guidance instructing that officers should deny claims unless the applicant can "demonstrate a *substantial and realistic possibility of succeeding*."<sup>242</sup> With PSG claims being denied, the possibility of succeeding

234. See *S-E-G-*, 24 I. & N. Dec. at 579–80 (2008).

235. *Id.*

236. *Id.* at 580. For additional background on this case, see 2 SHANE DIZON & POOJA DADHANIA, IMMIGRATION LAW SERVICE 2d § 10:164 (2018); *Neither Youths Who Resist Gang Recruitment nor Their Families Are a "Particular Social Group," BIA Finds*, 85 No. 30 INTERPRETER RELEASES 2104 (2008).

237. *S-E-G-*, 24 I. & N. Dec. at 581. For an excellent discussion of the political opinion expressed here, and the Board's treatment of it, see Harris & Weibel, *supra* note 196, at 9–10 (2010); see also Diane Uchimiya, *Falling Through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence*, 23 BERKELEY LA RAZA L.J. 109, 151–53 (2013).

238. *S-E-G-*, 24 I. & N. Dec. at 581.

239. *Id.*

240. *Id.* at 579, 583.

241. See *M-E-V-G-*, 26 I. & N. Dec. 227, 228 (B.I.A. 2014) (clarifying that the "social visibility" element required to establish a cognizable "particular social group" does not mean "literal or 'ocular' visibility," and renaming that element as "social distinction").

242. Casper et al., *supra* note 168, at 24; see Immigration and Nationality Act § 235(b)(1)(B)(iii)(v), 8 U.S.C. § 1225(b)(1)(B)(iii)(v) (2018) (defining "credible fear of persecution" as a "significant possibility . . . that the alien could establish eligibility for asylum"); U.S. CITIZENSHIP & IMMIGRATION SERVS., LESSON PLAN OVERVIEW: CREDIBLE FEAR 15 (2014) [hereinafter CREDIBLE FEAR LESSON PLAN], <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf> (defining "the credible fear 'significant possibility' standard" as "requiring that the applicant 'demonstrate a substantial and realistic possibility of succeeding,' but not requiring the applicant to show that he or she is more likely than not going to succeed when before an immigration judge" (quoting Memorandum from Joseph E. Langlois, Asylum Div., Office of Int'l Affairs, on Increase of

in these types of cases becomes less and less of a “substantial and realistic possibility.”<sup>243</sup> This one-two punch has been harrowing for Central Americans fleeing gang violence in Central America.

The same year that *S-E-G-* was decided, nonconfidential informants testifying against gang members in El Salvador<sup>244</sup> and young men in El Salvador resisting gang violence<sup>245</sup> were also rejected as PSGs. And even after *M-E-V-G-*, in a perhaps misguided effort, the Board clarified that “social visibility” did not mean “ocular” or literal visibility, and renamed the element “social distinction.” Gang cases still proved difficult. In 2014, the Board held that “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” are not a PSG.<sup>246</sup> That same year, the Eighth Circuit rejected the claim of young Guatemalan men who had been beaten and extorted by the gangs, had opposed MS-13, and had faced retaliation as a result of reporting their attacks.<sup>247</sup> In 2015, the First Circuit held that “Guatemalan citizens who do not sport gang colors and tattoos” was “too amorphous and overbroad to be particular.”<sup>248</sup> The Sixth Circuit then found that neither “El Salvadoran male youth, who were forced to actively participate in violent gang activities for the majority of their youth and who refused to comply with demands to show their loyalty through increasing violence” or, alternatively, “active and long-term former gang members” constituted a cognizable PSG, as they both lacked social distinction.<sup>249</sup>

Of course, there have been some glimmers of hope for certain groups in certain circuits. Uniformity has never been a place where the asylum system has excelled, and that is true too for those fleeing gang violence.<sup>250</sup> However, there have been some recent, positive decisions where district courts have held that witnesses and family members of witnesses are cognizable PSGs in gang-based asylum claims.<sup>251</sup> Using the well-established

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Quality Assurance Review for Positive Credible Fear Determinations and Release of Updated Asylum Officer Basic Training Course Lesson Plan, Credible Fear of Persecution and Torture Determinations, to Asylum Office Directors et al. (Apr. 17, 2006)); Memorandum from John Lafferty, Chief, Asylum Div., on Release of Updated Asylum Division Officer Training Course Lesson Plan, Credible Fear of Persecution and Torture Determinations, to Asylum Office Directors et al. 2 (Feb. 28, 2014) (describing the major changes to CREDIBLE FEAR LESSON PLAN, *supra*).

243. See *supra* note 242.

244. *Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 87–88, 91 (1st Cir. 2008) (holding that this PSG lacked social visibility).

245. *Santos-Lemus v. Mukasey*, 542 F.3d 738, 744–46 (9th Cir. 2008).

246. *W-G-R-*, 26 I. & N. Dec. 208, 221 (B.I.A. 2014), *vacated in part on other grounds by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016).

247. *Garcia v. Holder*, 746 F.3d 869, 871–73 (8th Cir. 2014).

248. *Paiz-Morales v. Lynch*, 795 F.3d 238, 244 (1st Cir. 2015).

249. *Zaldana Menjar v. Lynch*, 812 F.3d 491, 498–99 (6th Cir. 2015).

250. *Ramji-Nogales et al.*, *supra* note 192, at 372–77.

251. See, e.g., *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013); *Crespin-Valldares v. Holder*, 632 F.3d 117, 124–26 (4th Cir. 2011). *But see Zelaya v. Holder*, 668 F.3d 159, 166–67 (4th Cir. 2012) (holding that while family members of witnesses formed a PSG, witnesses themselves did not).

“family” as a PSG has also had modest success.<sup>252</sup> As well, at least three circuits have held that former gang members can constitute a PSG as such a characteristic is immutable because former gang membership cannot be “cast off.”<sup>253</sup> Finally, some women and girls have succeeded in claims arguing that they were persecuted as members of the PSG of “Salvadoran women who are viewed as gang property” and similar “gang-girlfriend” type claims.<sup>254</sup>

The challenges of formulating a cognizable PSG, proving nexus, arguing persecution by private actors, and state protection issues have formed the perfect storm for the death of many gang-based asylum claims. While many have theorized, convincingly, how and why these hurdles should not spell denial for Central American claimants fleeing gang violence,<sup>255</sup> the reality on the ground is quite different. Across the southern border and into the northeast and northwest of the United States, refugees fleeing devastating violence in Central America will be systematically denied protection as a direct result of this constellation of inflexible, and inconsistent, decisions and policies.

### III. SOLUTIONS TO ENSURE THE RIGHTS OF CENTRAL AMERICAN ASYLUM SEEKERS ARE PROTECTED

Traditional avenues to protection and relief for Central Americans fleeing harm and persecution are systematically being winnowed by this Administration; reminiscent of the 1980s and 1990s, transparent discrimination and animus toward migrants from Central America abounds.<sup>256</sup> This Part explores possible solutions to protect the rights of these beleaguered refugees. First, this Part considers the possibility of humanitarian asylum. Could humanitarian asylum be expanded or reimagined to meet the needs of this group of migrants? Next, this Part entertains the possible extension or expansion of TPS for Northern Triangle migrants. This Part considers the temporary nature of this status and its vulnerability to the changing political winds. Thereafter, this Part evaluates the potential for a modern-day *ABC Case* and the increasing limitations on such class actions for noncitizens. Finally, in light of the limitations of the aforementioned

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252. L-E-A-, 27 I. & N. Dec. 40, 42–43 (B.I.A. 2017). The recent certification of this case by the Attorney General, L-E-A-, 27 I. & N. Dec. 494 (2018), raises questions as to the continued viability of this group.

253. *Martinez v. Holder*, 740 F.3d 902, 911–13 (4th Cir. 2014); *Urbina-Mejia v. Holder*, 597 F.3d 360, 365–67 (6th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009).

254. See, e.g., Memorandum of Decision and Order 5–6, 16, 18 (May 2, 2011), <http://louisetrauma.weebly.com/uploads/1/1/3/5/113529125/ij-5-2-11.pdf> (granting asylum to a Salvadoran woman who was raped, stalked, and threatened repeatedly by 18th Street gang members who referred to her as their “woman” and their “property”).

255. See, e.g., NANCY KELLY & JOHN WILLSHIRE CARRERA, A “CHILD-CENTERED APPROACH” TO ASYLUM CLAIMS OF CHILDREN FLEEING THE CENTRAL AMERICAN TRIANGLE 1–2, 4–5, [https://projects.iq.harvard.edu/files/indigenous/files/child\\_centered\\_approach\\_-\\_willshire.pdf](https://projects.iq.harvard.edu/files/indigenous/files/child_centered_approach_-_willshire.pdf) (presenting an excellent manual for approaching gang-based asylum claims of children, focusing on issues of PSG formulation, lack of state protection, and nexus).

256. Roberto Suro, Opinion, *We Need to Offer More than Asylum*, NY TIMES, (July 14, 2018), <https://www.nytimes.com/2018/07/14/opinion/sunday/migration-asylum-trump.html>.

potential solutions, this Part argues that congressional action is necessary to right the historic and modern-day wrongs faced by Central American refugees—wrongs that the U.S. government created and perpetuated.

#### A. Humanitarian Asylum

Can an often neglected, overlooked, and misunderstood path to protection, called “humanitarian asylum,” provide the kind of relief that Northern Triangle refugees like William, the child fleeing gang violence introduced at the beginning of this Article, need?

Traditional applicants for asylum fall into one of two categories: (1) those who have experienced past persecution and who continue to have a well-founded fear of future persecution, and (2) those who, despite not having suffered past persecution, have a well-founded fear of future persecution in their home country.<sup>257</sup> By regulation, when an applicant establishes past persecution, it gives rise to the presumption of a well-founded fear of future persecution and the burden then shifts to the DHS to rebut that presumption.<sup>258</sup> However a third, and often overlooked pathway to asylum exists for those applicants who do not have a well-founded fear of persecution but who nonetheless merit protection. These applicants can also be broken down into two categories: (1) those who have demonstrated “compelling reasons” for being unwilling or unable to return to their country, arising out of the severity of the past persecution,<sup>259</sup> and (2) those who have established that they may suffer “other serious harm” upon removal to that country.<sup>260</sup> Notably, as a threshold matter, to qualify for either form of humanitarian asylum, an applicant must establish that she falls into the category of a refugee and has experienced past persecution on account of one of the five protected grounds outlined in the statute.<sup>261</sup>

The former pathway toward humanitarian asylum, based on the severity of past persecution alone, was an idea first introduced following World War II, and originally intended to provide protection and safe haven to Holocaust survivors.<sup>262</sup> At that time, the United Nations developed a framework<sup>263</sup> to provide protection to refugees fleeing persecution, including those who suffered severe past persecution but had no fear of future persecution.<sup>264</sup> Though initially only applicable to pre-1951 refugees, the

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257. 8 C.F.R. § 208.13(b) (2018) (describing eligibility for asylum).

258. D-I-M-, 24 I. & N. Dec. 448, 450 (B.I.A. 2008); 8 C.F.R. § 208.13(b)(1).

259. 8 C.F.R. § 208.13(b)(1)(iii)(A).

260. *Id.* § 208.13(b)(1)(iii)(B).

261. Immigration and Nationality Act §§ 101(a)(42)(A), 208(a)(1), 8 U.S.C. §§ 1101(a)(42)(A), 1158(a)(1) (2006); *see also* Hamida v. Gonzales, 478 F.3d 734, 740–41 (6th Cir. 2007).

262. KAREN MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 481 (2d ed. 2002).

263. Convention Relating to the Status of Refugees, *supra* note 56, art. 1.

264. *Id.* art. 1(C)(5) (creating an exception to the Convention’s cessation provisions for a refugee “who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality”).

framework has since been expanded to cover any refugees who have suffered severe or atrocious forms of past persecution.<sup>265</sup>

U.S. regulations first included this particular pathway to asylum in 1990, following the BIA decision in *Matter of Chen*.<sup>266</sup> In *Chen*, the Board explained that it was “clear from the plain language of the statute that past persecution can be the basis for a persecution claim, and the case law has acknowledged this, if not focused on it.”<sup>267</sup> The Board granted humanitarian asylum on this basis.<sup>268</sup>

Until 2001, the availability of humanitarian asylum began and ended with *Chen* and its progeny.<sup>269</sup> But in January 2001, § 1208.13(b)(1)(iii)(B) was promulgated, opening up a second pathway toward humanitarian asylum. As the Attorney General explained, “The Department recognizes . . . that the existing regulation may represent an overly restrictive approach to the exercise of discretion in cases involving past persecution, but no well-founded fear of future persecution.”<sup>270</sup> And, it appears, that the “other serious harm” prong of humanitarian asylum may have also been added to bring the regulations into conformity with the provisions of the UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status, which, though not binding on the U.S. government, provided “significant guidance” and served as an “interpretative aid.”<sup>271</sup> In the proposed rule at the time, the Attorney General took pains to avoid spelling out what exactly would constitute “other serious harm” sufficient for a grant of humanitarian asylum. The only guidance provided was that the harm would have to be “so ‘serious’ as to equal the severity of persecution” though it need not be on account of one of the five protected grounds.<sup>272</sup>

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265. 8 C.F.R. § 208.13(b)(1)(iii)(A) (noting that an applicant may be granted asylum in the absence of a well-founded fear of persecution if “[t]he applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution”); United Nations High Comm’r for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, ¶ 136, U.N. Doc. HCR/IP/4/Eng/REV.1 (reissued 2011) (“It is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate.”).

266. See *Chen*, 20 I. & N. Dec. 16, 18–20 (B.I.A. 1989) (*Chen*, the son of a Christian preacher, was subject to brutal house arrest, interrogation, physical abuse, and food deprivation as a child at the hands of the Red Guards during the Cultural Revolution in China); Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,683 (July 27, 1990) (codified at 8 C.F.R. § 208.13(b)(1)(ii)).

267. See *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1043 (9th Cir. 1987). *But cf.* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440–41 (1987).

268. *Chen*, 20 I. & N. Dec. at 21.

269. See, e.g., *N-M-A-*, 22 I. & N. Dec. 312, 319–20 (B.I.A. 1998); *H-*, 21 I. & N. Dec. 337, 346–47 (B.I.A. 1996); *B-*, 21 I. & N. Dec. 66, 72 (B.I.A. 1995).

270. Executive Office for Immigration Review; New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31,945, 31,947 (proposed June 11, 1998).

271. See Asylum Procedures, 65 Fed. Reg. 76,121, 76,127 (Dec. 6, 2000).

272. Executive Office for Immigration Review; New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31,945, 31,947 (proposed June 11, 1998). The Attorney General did provide some minimal guidance on what would *not* qualify—namely, “mere economic disadvantage or the inability to practice one’s chosen profession.” *Id.*

In 2012, the Board provided a bit more clarity on the factors to consider in assessing claims for relief on “other serious harm” grounds.<sup>273</sup> These factors include current conditions that could severely affect the applicant, such as civil strife and extreme economic deprivation; and physical or psychological harm that the applicant might suffer if removed.<sup>274</sup> The Board emphasized that “other serious harm” can be generalized and that adjudicators should “pay particular attention to major problems that large segments of the population [could] face.”<sup>275</sup>

Though now clearly articulated in the statute and regulations, both of these forms of humanitarian asylum are underused by practitioners and applicants, and routinely misconstrued by adjudicators.<sup>276</sup> Indeed, some circuit courts have treated *Chen* as a minimum threshold—that is, that the facts of the case must be as severe as those in *Chen*, or worse, to merit a grant of asylum—while other courts have failed to set a discernible standard altogether or created their own criteria.<sup>277</sup> In 2011, the First Circuit noted dismissively, “[I]t can hardly be expected that every case should entail a detailed discussion of a last-resort form of relief that is difficult to obtain and rarely granted.”<sup>278</sup>

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273. L-S-, 25 I. & N. Dec. 705, 714 (B.I.A. 2012).

274. *Id.* at 713–14.

275. *Id.* at 714.

276. *See, e.g., Zongxun Jiang v. Holder*, 487 F. App'x 655, 657 (2d Cir. 2012) (remanding where the agency failed to consider whether the respondent had established a reasonable possibility of other serious harm in China); *see also Bello v. Holder*, 480 F. App'x 646, 648 (2d Cir. 2012) (upholding denial of humanitarian asylum and yet noting that the IJ and BIA “did not expressly discuss whether Bello would suffer ‘other serious harm’ upon return to the Central African Republic”); *Kone v. Holder*, 596 F.3d 141, 151–52 (2d Cir. 2010) (remanding the case and indicating that the parties had overlooked the possibility of a humanitarian asylum claim in a female genital cutting claim). *But see, e.g., Ordonez-Quino v. Holder*, 760 F.3d 80, 93 (1st Cir. 2014) (discussing thoroughly humanitarian asylum based on the severity of past persecution suffered); *Mohammed v. Gonzales*, 400 F.3d 785, 801 (9th Cir. 2005) (recognizing female genital mutilation as “a particularly severe form of past persecution because of its many continuing effects”).

277. *See, e.g., Ngarurih v. Ashcroft*, 371 F.3d 182, 184–86, 190 (4th Cir. 2004) (describing facts where respondent was arrested, held in a cell that was routinely flooded with water up to his chest, could not eat or sleep, experienced hallucinations and was held in solitary confinement for several months. The court denied asylum, because the persecution was less severe than that in *Chen*). *But see Rodriguez-Matamoras v. INS*, 86 F.3d 158, 161 (9th Cir. 1996) (noting that *Chen* does not set the minimum threshold for a grant on this basis); *see also Pergega-Gjonaj v. Gonzales*, 128 F. App'x 507, 509, 512–13 (6th Cir. 2005) (denying both kinds of humanitarian asylum to ethnic Albanians, a father and son, from the former Yugoslavia who were forced to work in a labor camp in abysmal conditions, and whose relative was murdered in front of them); *Amadu v. Ashcroft*, 84 F. App'x 711, 712 (8th Cir. 2003) (quoting *Francois v. INS*, 283 F.3d 926, 932 (8th Cir. 2002)) (denying asylum to Ghanaian respondent who was cut and stabbed on account of his political opinion); *Lal v. INS*, 255 F.3d 998, 1005 (2001) (reviewing BIA precedent and holding that permanent disability, as in *Chen*, is not a requirement for eligibility for humanitarian asylum); *Gonahasa v. INS*, 181 F.3d 538, 540 (4th Cir. 1999) (denying asylum but failing to articulate a standard by which to measure the severity or degree of harm suffered).

278. *Precetaj v. Holder*, 649 F.3d 72, 78 (1st Cir. 2011).

On one hand, theoretically and philosophically, there is robust support for an expansion of the definition of humanitarian asylum and a reconsideration of the narrow definition of a refugee.<sup>279</sup> In particular, consistent with the Convention refugee definition, humanitarian asylum should be expanded to include those who need protection from serious harm, regardless of the source of the harm. Historically, asylum was designed to solve a particular problem in a particular political moment—the crisis faced by post-World War II European refugees—and “was not a model for general application.”<sup>280</sup> Humanitarian asylum was later included specifically in response to the harms and violence faced by anti-communist activists and religious minorities during the Cultural Revolution in China.<sup>281</sup> Asylum has been politically and ideologically driven by very specific moments in the history of our country and our world.<sup>282</sup> Indeed, asylum law and legislation has, in some ways, been responsive to the needs of a changing political and socioeconomic landscape.<sup>283</sup> And yet, a reimagining of humanitarian asylum would still pose some of the very same challenges as traditional pathways to asylum for Central American refugees.

For one, it would still require an applicant to establish past persecution as a threshold hurdle. As courts have been unwilling to find past persecution in even egregious cases of harm by gang members and domestic partners, this hurdle would remain formidable despite humanitarian asylum’s other protections. Next, the source of the harm would still prove problematic. It is long established that both government actors and non-government actors can be the source of harm in a cognizable claim for asylum.<sup>284</sup> In fact, the BIA<sup>285</sup> as well as all eleven federal circuit courts to

279. See HATHAWAY & FOSTER, *supra* note 199, at 17; Peter Singer & Renata Singer, *The Ethics of Refugee Policy*, in OPEN BORDERS? CLOSED SOCIETIES?: THE ETHICAL AND POLITICAL ISSUES 111, 121, 128–29 (Mark Gibney ed., 1988); ARISTIDE R. ZOLBERG ET AL., ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD 3–5 (1989); Andrew E. Shacknove, *Who Is a Refugee?*, 95 ETHICS 274, 278, 284 (1985).

280. Gervase Coles, *Approaching the Refugee Problem Today*, in REFUGEES AND INTERNATIONAL RELATIONS 373, 374 (Gil Loescher & Laila Monahan eds., 1989).

281. Chen, 20 I. & N. Dec. 16, 21 (B.I.A. 1989).

282. HATHAWAY & FOSTER, *supra* note 199, at 133–35.

283. See Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit. II, 111 Stat. 2160, 2193–2201 (1997) (providing statutory relief when number of asylees overwhelmed the asylum process); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 601(a), 110 Stat. 3009-546, 3009-689 (making Republic of China’s enforcement of one-child policy grounds for political opinion asylum claim); Immigration Act of 1990, Pub. L. No. 101-649, §§ 302–303, 104 Stat. 4,978, 5030–38 (establishing TPS and special TPS for Salvadorans in response to refugee crisis); Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (1990) (establishing Deferred Enforced Departure for Chinese nationals in wake of Tiananmen Square Massacre).

284. Eusaph, 10 I. & N. Dec. 453, 454–55 (B.I.A. 1964) (first suggesting that private acts that a government was unable or unwilling to control could constitute persecution); see also Joseph H. Carens, *Who Should Get in? The Ethics of Immigration Admissions*, 17 ETHICS & INT’L AFF. 95, 103 (2003) [hereinafter Carens, *Who Should Get in?*] (“From a moral perspective, the great weakness of the definition is that it can be construed so narrowly that it excludes people from refugee status who clearly have fled in fear of their lives and need external assistance. . . . [W]hat should matter the most is the seriousness of the danger and the extent of the risk, not the source of the threat or the motivation behind it. So, in principle, the definition should be revised to reflect this wider perspective.”).

285. See, e.g., Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

have considered the question have held that persecution may be by private actors whom the government is either unable or unwilling to control.<sup>286</sup> However, in light of the Attorney General's decision in *A-B-*, which appears transparently directed at survivors of domestic and gang violence fleeing the Northern Triangle,<sup>287</sup> doubt (false and erroneous) has emerged over whether harm by private nongovernment actors can constitute persecution.<sup>288</sup> Finally, nexus could persist as an obstacle. As aforementioned, one requirement of being granted asylum is that the applicant demonstrate that she was persecuted "on account of" one of the five protected grounds. This causation or nexus requirement asks, "is the persecution inflicted to punish the applicant for possessing a belief or characteristic that the persecutor seeks to overcome?"<sup>289</sup>

Because courts have historically challenged nexus requirements in gang and family violence cases,<sup>290</sup> humanitarian asylum may also fall short in this arena.

### *B. Temporary Protected Status*

Congress created TPS in 1990.<sup>291</sup> TPS allows the Secretary of Homeland Security to designate a foreign state or part of a foreign state where it was not currently safe for individuals to return home in any of three circumstances: (a) ongoing armed conflict; (b) an environmental disaster; or (c) where "extraordinary and temporary conditions" prevent safe return and allowing the state's nationals to remain in the United States would not be contrary to the national interest.<sup>292</sup> In so doing, the statute creates clear criteria and procedures in lieu of the more ad hoc procedures previously used by the executive branch to provide relief.

286. See *Malu v. Att'y Gen.*, 764 F.3d 1282, 1291 (11th Cir. 2014); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102 (8th Cir. 2014); *Doe v. Holder*, 736 F.3d 871, 877–78 (9th Cir. 2013); *Karki v. Holder*, 715 F.3d 792, 801 (10th Cir. 2013); *Garcia v. Att'y Gen.*, 665 F.3d 496, 503 (3d Cir. 2011); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Kante v. Holder*, 634 F.3d 321, 325 (6th Cir. 2011); *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006); *Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975) (formalizing the "unwilling or unable" to control standard for non-governmental persecution in the context of a claim made under former section 243(h) of the INA, 8 U.S.C. § 1253(h) (1970)); see also Brief of Amici Curiae Immigration Law Professors at 1, *A-B-*, 27 I. & N. Dec. 316 (Att'y Gen. 2018), <https://uchastings.app.box.com/s/tt1ydlq5ttm1i2zx1z4rname4bk29s7/file/291245799324>.

287. *A-B-*, 27 I. & N. Dec. at 320 ("Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.")

288. See *id.* (attempting to elevate the government unwillingness or inability to protect standard to condone and complete helplessness).

289. *Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), *overruled in part on other grounds by Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

290. See, e.g., *Martinez-Martinez v. Sessions*, 743 F. App'x 629, 632–33 (6th Cir. 2018) (holding applicant could not show nexus between harm by MS gang and the social group of "married women in Honduras who are unable to leave their relationship"); *Guerra-Marchorro v. Holder*, 760 F.3d 126, 128–29 (1st Cir. 2014) (holding that applicant could not show nexus between harm by MS gang and the social group of abandoned Guatemalan children).

291. Immigration Act of 1990, Pub L. No. 101-649, §§ 302, 303, 104 Stat. 4,978, 5030–38.

292. Immigration and Nationality Act § 244A(b)(1), 8 U.S.C. § 1254a(b)(1) (2018).



The Secretary of Homeland Security may issue TPS for periods of six to eighteen months.<sup>293</sup> Periodically thereafter, the Secretary is tasked with reviewing the conditions in the designated country to determine whether conditions have changed or whether continued designation as a TPS-eligible country is appropriate.<sup>294</sup> If the latter, the Secretary may then redesignate a country, or the period of designation may be extended for up to eighteen months. There is no statutory limit on how many times TPS may be extended.<sup>295</sup> Whatever the Secretary's decision, it must be published in the Federal Register to provide ample notice to TPS beneficiaries who depend on this designation for work authorization, among others.

Since then, TPS designations have varied, with some countries designated for brief periods of time while others have received over a decade of designation due to ongoing war, disaster, or other extraordinary conditions.<sup>296</sup> Currently, more than 400,000 individuals from ten different countries have TPS.<sup>297</sup> Among them are 242,900 Salvadoran TPS recipients<sup>298</sup> and 57,000 Honduran TPS recipients currently in the United States.<sup>299</sup> Across the United States, more than 270,000 U.S. citizen children have at least one parent with TPS.<sup>300</sup>

Notably, in the past, in considering whether to redesignate or extend TPS, the Secretary had considered intervening events in the country of designation—whether environmental disaster or social or economic crisis had occurred *after* the initial designation. But after President Trump took office, DHS—without any formal announcement or other explanation—adopted a “new, novel interpretation of the TPS statute that eschews consideration of any intervening country conditions.”<sup>301</sup> This “new, novel” interpretation is presently being challenged on multiple fronts.<sup>302</sup>

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293. 8 U.S.C. § 1254a(b)(2)(B).

294. *Id.* § 1254a(b)(3)(A).

295. *Id.* § 1254a(b)(3)(C).

296. *See, e.g.*, 75 Fed. Reg. 3,476 (Jan. 21, 2010) (designating Haiti under TPS program); 66 Fed. Reg. 14,214 (Mar. 9, 2001) (designating El Salvador under TPS program); 64 Fed. Reg. 526 (Jan. 5, 1999) (designating Nicaragua under TPS program); 62 Fed. Reg. 59,737 (Nov. 4, 1997) (designating Sudan under TPS program).

297. Class Action Complaint at 2, *Ramos v. Nielsen*, No. 3:18-cv-1554 (N.D. Cal. Mar. 12, 2018), [https://www.aclusocal.org/sites/default/files/aclu\\_social\\_tps\\_20180312\\_complaint.pdf](https://www.aclusocal.org/sites/default/files/aclu_social_tps_20180312_complaint.pdf).

298. Robert Warren & Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, 5 J. MIGRATION & HUM. SECURITY 577, 581 (2017).

299. Dara Lind, *Trump Tells 57,000 Hondurans Who've Lived in the US for 20 Years to Get Out*, VOX (May 4, 2018, 4:25 PM), <https://www.vox.com/2018/5/4/17320352/tps-honduras-cancel-trump-temporary-protected-status>.

300. Class Action Complaint, *supra* note 297.

301. *Id.* at 1–2 (“Under previous administrations, DHS regularly considered natural disasters and social or economic crises that occurred *after* a country was originally designated for TPS in deciding whether to continue or instead terminate a country's designation. But after President Trump took office, DHS—without any formal announcement or other explanation—adopted a new, novel interpretation of the TPS statute that eschews consideration of any intervening country conditions.”).

302. *Id.*

Indeed, as explained in Part I, TPS will soon be ending for Central American migrants. El Salvador was the first country to receive TPS designation. While El Salvador remains one of the countries most in need of TPS's continuance, that country's designation will expire on September 9, 2019.<sup>303</sup> Similarly, TPS for Hondurans will terminate on January 5, 2020.<sup>304</sup>

In response to the termination of TPS, a number of organizations and plaintiffs have filed suit. Their allegations range from violations of the rights of U.S. citizens with TPS holding parents<sup>305</sup> to alleging that in ending TPS, DHS has violated the Equal Protection and Due Process Clauses of the Fifth Amendment.<sup>306</sup> Federal District Judge Casper, in allowing one suit to proceed in Boston, held "that the combination of a disparate impact on particular racial groups, statements of animus by people plausibly alleged to be involved in the decision-making process, and an allegedly unreasoned shift in policy" were sufficient to suggest the policy shift was motivated by discriminatory purposes.<sup>307</sup>

Could a continuation or expansion of TPS right the wrongs with regards to the protection of Central American refugees? Surely the ongoing, pervasive violence in Central America, and Central American governments' inability to protect their citizens from harm, presents the kind of extraordinary conditions contemplated by the creators of TPS. Unfortunately, however, this Administration has not shown the political will to continue, let alone expand, TPS protections for this group of migrants. And while we will not always have this President, TPS as a permanent solution still comes up short. TPS was not created to provide protection for refugees—that is the role of the asylum statute and Refugee Convention. Moreover, TPS does not provide a pathway to permanent immigration status. While work authorization and the rights and benefits attendant to such status—is meaningful and important, it provides neither the long-term stability nor the political power of permanent lawful status. There is no doubt that TPS has provided critical protection and relief to hundreds of thousands of noncitizens whose return to their home countries could not be accomplished safely; but this Article argues that we can, and should, do

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303. *Temporary Protected Status Designated Country: El Salvador*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-el-salvador> (last updated Mar. 1, 2018).

304. *Temporary Protected Status Designated Country: Honduras*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-honduras> (last updated Dec. 7, 2018).

305. Class Action Complaint, *supra* note 297, at 1–2.

306. See, e.g., Complaint at 33–35, *Centro Presente v. Dep't. of Homeland Sec.*, 332 F. Supp. 3d 393 (D. Mass. July 23, 2018) (No. 1:18-cv-10340), <https://www.clearinghouse.net/chDocs/public/IM-MA-0014-0001.pdf>.

307. Shira Schoenberg, *Boston Judge Lets Lawsuit Continue over President Trump Ending TPS*, MASSLIVE (July 24, 2018), [https://www.masslive.com/politics/index.ssf/2018/07/boston\\_judge\\_lets\\_litigation\\_c.html](https://www.masslive.com/politics/index.ssf/2018/07/boston_judge_lets_litigation_c.html).

more for noncitizens fleeing harm and persecution from the Northern Triangle.

### C. A Modern-Day ABC Case

Alternately, advocates could return to the language of the *ABC* Case agreement—the principles outlined there are instructive and indicative of lessons unlearned by recent administrations and the U.S. government agencies who carry out our immigration laws. Namely, advocates should begin from the premise that “foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution” and that “the same standard for determining whether or not an applicant has a well-founded fear of persecution applies” to Central Americans as applies to all other nationalities.<sup>308</sup> Indeed, these principles continue to govern—at least in theory—asylum adjudications today.<sup>309</sup> But, as we have seen, this is not enough to protect the rights of Central American refugees. Should advocates pursue a new lawsuit to ameliorate the devastating impact of the discrimination, animus, and disproportionate case denials faced by this community? Would another lawsuit be feasible? If so, would it provide sufficient remedies?

On the heels of the Attorney General’s decision in *A-B-* and subsequently issued new credible fear guidance, the ACLU and the CGRS filed suit in federal court.<sup>310</sup> They argued that the new policies violated the INA, the Refugee Act, the Administrative Procedures Act, Separation of Powers, and Due Process.<sup>311</sup> Their prayer for relief, though not a perfect *ABC* Case, provides powerful potential language for a modern-day *ABC* Case.<sup>312</sup> Inter alia, the complaint seeks a declaration by the court that the new credible fear policies are contrary to law, and that orders should be entered vacating the policies and enjoining defendants from continuing to apply them.<sup>313</sup> Moreover, the complaint seeks to stay the expedited removal of all plaintiffs (or vacate expedited removal orders if such exist), and enjoin defendants from removing plaintiffs without providing them a new credible fear process under the correct legal standard or a full removal hearing.<sup>314</sup> There is no doubt that, if granted, the relief sought in this case would be significant, and have a dramatic positive impact on the named plaintiffs.

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308. *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991).

309. TRINA REALMUTO, NAT’L IMMIGRATION PROJECT, *ABC V. THORNBURG: 20 YEARS LATER* 1–2 (2011), [https://nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/gen/2011\\_31Jan\\_abc-20-years.pdf](https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2011_31Jan_abc-20-years.pdf).

310. Complaint for Declaratory and Injunctive Relief, *Grace v. Sessions*, No. 1:18-CV-01853 (D.D.C. Aug. 7, 2018), <https://www.aclu.org/legal-document/grace-v-sessions-complaint>.

311. *Id.* at 30–32.

312. *See id.* at 33.

313. *Id.*

314. *Id.*

The legal action taken in this case feels both acutely necessary and also only one piece of a larger puzzle. Lawsuits and litigation yielded an exceedingly positive result for Central American beneficiaries of the *ABC* Case and yet, profound discrimination and bias remains in the adjudication of Central American asylum claims.

Further, there may be procedural hurdles in pursuing such a class action. Today, unlike the climate at the time of the *ABC* Case, there is increasing hostility to large-scale class actions in the immigration context. As Jill Family, Leti Volpp, Hiroshi Motomura, and Gerald Neuman have explained, since 1996 there has been an increasing erosion of the relative availability of judicial review in immigration matters.<sup>315</sup> Family articulates three specific threats to class actions in the immigration context: “(1) [A] general congressional willingness to restrict immigration judicial review; (2) the application of waivers of judicial review to immigration law; and (3) legislative jurisdiction-stripping attacks more specific to the immigration class action.”<sup>316</sup> Citing the *ABC* Case class action as one example, Family chronicles the history of class action lawsuits in the immigration context to protect due process rights,<sup>317</sup> challenge immigration detention procedures,<sup>318</sup> and even to advance systemic reform,<sup>319</sup> among other changes. Most recently, in *Jennings v. Rodriguez*,<sup>320</sup> the Supreme Court, in considering the question whether the government can indefinitely detain noncitizens without a bond hearing, also confronted these questions regarding judicial review.<sup>321</sup> Justice Alito, writing for the majority, invited the Ninth Circuit to consider whether plaintiffs can bring any claim at all for their alleged due process violations.<sup>322</sup> This troubling invitation, if extended, would call into question class action litigation of constitutional claims—the likes of which have been permitted and widely used in immigration and other contexts since the civil rights era.<sup>323</sup>

A class action alone may be insufficient to remedy the wrongs faced by Central American asylum seekers. There is no doubt that the *ABC* Case

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315. Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 WASH. U. J.L. & POL’Y 71, 82–83 (2008); Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385, 387 (2000); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1969 (2000); Leti Volpp, *Court-Stripping and Class-Wide Relief: A Response to Judicial Review in Immigration Cases After AADC*, 14 GEO. IMMIGR. L.J. 463, 463–64 (2000).

316. Family, *supra* note 315, at 74.

317. See, e.g., *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1027 (5th Cir. 1982).

318. See, e.g., *INS v. Nat’l Ctr. for Immigrants’ Rights*, 502 U.S. 183, 185–87 (1991) (upholding, in response to a class action, forbidding employment as a condition of immigration bond).

319. See Motomura, *supra* note 315, at 403–04; Neuman, *supra* note 315, at 1971, 1995–96; Volpp, *supra* note 315, at 467.

320. 138 S. Ct. 830 (2018).

321. *Jennings*, 138 S. Ct. at 839–40.

322. *Id.* at 851.

323. See Alexandra D. Lahav et al., *Government Class Actions After Jennings v. Rodriguez*, HARV. L. REV. BLOG (May 8, 2018), <https://blog.harvardlawreview.org/government-class-actions-after-jennings-v-rodriguez> (describing history and analysis on the use of class action lawsuits and what we can expect going forward in light of *Jennings*).

was monumental—affecting more than 500,000 class members, the settlement provided bona fide refugees who had been previously prejudiced a de novo asylum interview, work authorization, stays of deportation, administrative closure of pending cases, and limits on the detention of class members.<sup>324</sup> But notwithstanding the *ABC* Case and others like it,<sup>325</sup> and despite the principles outlined there, this Article argues that the ample and unrelenting bias that remains in the adjudication of Central American asylum claims requires something more: congressional intervention.

#### *D. Congressional Intervention*

In 1997, on the heels of devastating and draconian immigration reform and some partial improvements in country conditions in Central America, *ABC* Case class members were hit hard. Though some obtained TPS status, many of their asylum cases had yet to be adjudicated and, where they once had bona fide claims for asylum, the end of civil wars in Central America meant that their claims were no longer strong in the eyes of the immigration agency. Meanwhile, the immigration reform of 1996 eliminated a form of relief—“suspension of deportation”—that may have provided many of them relief if faced with removal.<sup>326</sup> In light of this constellation of events that left many *ABC* Case class members in a precarious legal state, Congress was poised to act, though not without a pitched political fight. What ultimately became known as the Nicaraguan Adjustment and Central American Relief Act (NACARA),<sup>327</sup> was originally sent to Congress by President Clinton framed as legislation to help Salvadorans, Guatemalans, and Nicaraguans make use of the now-defunct suspension of deportation.<sup>328</sup> Following fierce debate and competing proposals by Congressman Lamar Smith (R-FL) and Senator Edward Kennedy (D-MA), what came out the other side was entirely different. The legislation that ultimately passed set up a two-tiered system of relief. In one category were Cubans and Nicaraguans who entered the country before December 1, 1995—often having fled leftist governments the United States had opposed—who were able to apply immediately for lawful permanent residence.<sup>329</sup> The second, less favorable though still important, category was occupied by Salvadorans and Guatemalans, most of whom had fled governments the United States had supported, and who faced tougher stand-

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324. *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 797 (N.D. Cal. 1991).

325. *See, e.g., Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 354 (C.D. Cal. 1982).

326. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, 3009-596 (1996).

327. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit. II, 111 Stat. 2160, 2193-2201 (1997).

328. MARY GIOVAGNOLI, IMMIGRATION POLICY CTR., USING ALL THE TOOLS IN THE TOOLBOX: HOW PAST ADMINISTRATIONS HAVE USED EXECUTIVE BRANCH AUTHORITY IN IMMIGRATION 6 (2011).

329. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit. II, 111 Stat. 2160, 2193-2201 (1997).

ards and only the ability to pursue lawful permanent residence in immigration court—where the stakes are higher and the outcome less certain.<sup>330</sup> In fact, former President Clinton, acknowledging the double standard, called unsuccessfully on the DOJ to issue regulations that would dampen the disparity.<sup>331</sup> Despite its shortcomings, NACARA has provided important and meaningful relief—and a pathway to lawful permanent residence and ultimately, citizenship—for many noncitizens. NACARA’s history and conception provides a blueprint for legislative possibility; Congress can act to curb, or even cure, inequity. Congress can carve out legislation meant to right the wrongs faced by particular groups of migrants in need of protection.

This approach is not new; past Congresses and Administrations have enacted one-off pathways to relief for specific groups of migrants.<sup>332</sup> In particular, they have done so in instances where the U.S. government has been instrumental in creating the peril or exposing certain groups of migrants to discrimination and harm, including in the 1982 Amerasian Immigration Act, providing protection and lawful status to the abandoned children of U.S. service members in Southeast Asia,<sup>333</sup> or interpreters assisting the U.S. military in the Middle East, who faced great risks to their lives.<sup>334</sup>

The recently sworn in 116th Congress has the potential to be less resistant to meaningful immigration reform. Indeed, this Congress represents the most diverse Congress to date, including a record 102 women; the first Native American woman; the first Muslim-American woman; as well as congresswomen and men of color from across the country.<sup>335</sup>

The following Part outlines suggested norms and components of potential legislation that this session of Congress might consider. That said, given the particular political moment in which we are living, and the historical, political, and humanitarian tensions outlined above, it would be disingenuous to suggest that a perfect or simple solution exists.<sup>336</sup> Rather than attempt perfection, what follows are suggestions of norms and fixes that would ideally guide meaningful congressional action.

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330. GIOVAGNOLI, *supra* note 328, at 8.

331. See Presidential Statement on Signing District of Columbia Appropriations Legislation, 33 WEEKLY COMP. PRES. DOC. 1865 (Nov. 19, 1997).

332. See, e.g., Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (2018)) (placing Cubans on a path to citizenship one year after arrival).

333. Amerasian Immigration Act, Pub. L. No. 97-359, 96 Stat. 1716 (1982) (amendment to INA).

334. Afghan Allies Protection Act of 2009, Pub. L. No. 111-8, tit. VI, 123 Stat. 807, 807–11 (providing Special Immigrant Visas to certain Afghani interpreters); see also Refugee Crisis in Iraq Act of 2007, Pub. L. No. 110-181, §§ 1241–1249, 122 Stat. 395, 395–401 (enacting a similar program in 2008 for Iraqi translators and interpreters).

335. Catie Edmondson & Jasmine C. Lee, *Meet the New Freshmen in Congress*, N.Y. TIMES (Jan. 3, 2019), <https://www.nytimes.com/interactive/2018/11/28/us/politics/congress-freshman-class.html>.

336. Keyes, *supra* note 14, at 158.

As a starting point, this legislation should reiterate and reinforce the principles outlined in the *ABC* Case. Adjudicators must be reminded of their obligations to consider the merits of each case and avoid discrimination in adjudication of claims from particular countries. Next, this legislation should address the unique cluster of factors driving migration from the Northern Triangle, as well as the legacy of intervention, racism, and animus the U.S. government has shown toward the region. Like TPS before it, appropriate legislation should designate Central American migrants as a class rather than as individual applicants; not because their claims are uniform, but because patterns of private violence by gangs, abusive partners and cartels, weak governments, and impunity are widespread in the region, and because the U.S. government has been a critical driver of these realities. Central American migrants are fleeing the same kinds of civil strife that TPS anticipated. Unlike TPS, however, this legislation would provide a pathway to lawful status and protection that could ripen into citizenship. While others have suggested a more temporary, short-term response with repatriation as a goal,<sup>337</sup> this Article argues that real repair requires the possibility of more permanency given the legacies of discrimination, racism, and the underlying instability and violence that continue to plague the region.

In consideration of the limitations of humanitarian asylum articulated above, whether or not this legislation would require that migrants conform to the refugee definition set out in the Refugee Convention is an interesting one. Surely there are “many compelling drivers of migration that do not fall within the narrow international legal definition of a refugee.”<sup>338</sup> At the same time, it is relevant and meaningful to recognize the violence Central Americans are fleeing today for what, in large part, it is—harm that rises to the level of persecution. Moreover, this Author is wary of increasing and politically motivated characterizations of this violence in ways that demean survivors and fail to recognize that harm of this kind can constitute persecution.

In light of the present limitations of humanitarian asylum and the requirements of PSGs and nexus, this Article proposes legislation that would not require migrants and refugees from the Northern Triangle to satisfy the refugee definition, though past and future harm could, and should, be criteria for relief. One imagining of a pathway might include proof of past *or* future harm, the impossibility of internal relocation or state protection, as well as some other additional humanitarian factor that would compel relief. In this way, this legislative remedy would acknowledge the very real and often very serious harm and violence Central Americans are fleeing without requiring them to satisfy problematic PSG and nexus requirements.

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337. *Id.* at 162.

338. Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 611 (2017).

One possible “limit” on this legislation that could appropriately take into consideration the unique context and historical push and pull factors of migration from the Northern Triangle has been suggested by Professor Keyes. Namely, that “[o]nly those with a parent, grandparent, sibling or child already living in the United States could apply for this benefit.”<sup>339</sup> This would recognize the unique historical patterns of migration particular to Central American migrant communities as well as the role of the United States in pushing, and pulling generations of Central Americans to the United States.

While not perfect, legislation adopting these norms and values is needed. The long history of discrimination and animus faced by asylum applicants from Central America requires congressional action to prevent further bias and asymmetry in asylum adjudication and ensure protection to migrants fleeing harm.

#### E. “Floodgates” Fears

To begin with, arguments based on fear of opening the proverbial “floodgates” are pervasive in immigration law. So too might they arise in this context. While the total number of migrants apprehended at the southern U.S.–Mexico border are near their lowest levels in more than forty years,<sup>340</sup> the number of apprehended unaccompanied children and families is on the rise.<sup>341</sup> The United Nations Refugee Agency reports that requests for asylum from people from the Northern Triangle of Guatemala, El Salvador, and Honduras increased 25% from 2016 to 2017.<sup>342</sup>

But this Article argues that these fears are unfounded. For one, it is possible that legislative relief could apply only to those noncitizens already present in the United States.<sup>343</sup> Even if relief were prospective or included prospective carve outs for future migrants, we have seen—and overcome—“floodgates” argument pushback before. In 1996, the Board acknowledged that the practice of Female Genital Mutilation (FGM) could be the basis for a claim of asylum for Fauziya Kasinga.<sup>344</sup> As Karen Musalo has written, many who opposed a grant of asylum for Ms. Kasinga pointed to the fact that millions of women a year are subject to practices of FGM and female genital cutting.<sup>345</sup> Despite fears that a grant of asylum to Ms. Kasinga would lead to a dramatic increase in the number of women

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339. Keyes, *supra* note 14, at 161.

340. Adam Isacson, Commentary, *What 2017's Migration Statistics Tell Us About Border Security*, WOLA (Dec. 12, 2017), <https://www.wola.org/analysis/2017s-migration-statistics-tell-us-border-security>.

341. *Southwest Border Migration FY2018*, *supra* note 152.

342. *Population Statistics Data—Asylum Seekers (Refugee Status Determination)*, UNHCR, [http://popstats.unhcr.org/en/asylum\\_seekers\\_monthly](http://popstats.unhcr.org/en/asylum_seekers_monthly) (last visited Mar. 21, 2019).

343. *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (requiring certification of class affected by settlement as all Salvadorans in the United States as of September 19, 1990, and all Guatemalans in the United States as of October 1, 1990).

344. *Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996).

345. Musalo, *supra* note 43, at 132–33.



and girls seeking asylum from across the globe, there was no “appreciable increase in the number of claims based on FGM” in the post-*Kasinga* era.<sup>346</sup> In a separate context, amidst the decades-long litigation to provide protection to women fleeing domestic violence, it was the immigration agency itself that conceded that “floodgates” fears were unwarranted. At the time, the then INS acknowledged that it “did not expect to see a large number of claims if the United States recognized domestic violence as a basis of asylum.”<sup>347</sup> Finally, these arguments are specious at their core: if you satisfy the definition of a refugee, you are a refugee regardless of how many others are also refugees. As the Seventh Circuit explains, “The breadth of the social group says nothing about the requirements for asylum, just as the breadth of categories under Title VII of the Civil Rights Act says nothing about who is eligible to sue an employer for discrimination.”<sup>348</sup>

Ultimately, a fear of “floodgates” also underestimates the considerable expense—financially, physically, and emotionally—of journeying to the United States. Indeed, the cost of the journey north from Central America is not only monetary—which today can be more than \$9,000 U.S. dollars<sup>349</sup>—but also tremendously risky. Children and adults have reported pervasive physical and sexual violence, kidnappings, death by dehydration, or at the hands of a drug cartel, among other horrors.<sup>350</sup> The persecution a migrant is fleeing would have to be catastrophic to risk such violence on the road north.

#### F. Security Concerns

Other opponents to congressional immigration relief may point to security concerns, suggesting that given the numbers of migrants fleeing gang violence, some unaccompanied children or asylum-seeking adults may in fact be gang members hoping to take advantage of the immigration system. Indeed, the current Administration has championed this talking

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346. *Id.*

347. *Id.* at 133; *see also* Department of Homeland Security’s Supplemental Brief at 13 n.10, L-R- (April 13, 2009), [http://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf) (stating that there has not been a notable increase in asylum claims because of domestic violence).

348. *Cece v. Holder*, 733 F.3d 662, 673–74 (7th Cir. 2013); *see also* *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (“[T]he size and breadth of a group alone does not preclude a group from qualifying as such a social group.”).

349. Nicholas Kulish, *What It Costs to Be Smuggled Across the U.S. Border*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/interactive/2018/06/30/world/smuggling-illegal-immigration-costs.html>.

350. Jonathan Watts, *Driven by Fear: The Salvadorean Children Sent on the Perilous Journey to the US*, GUARDIAN (Aug. 29, 2015, 4:00 AM), <https://www.theguardian.com/world/2015/aug/29/el-salvador-children-journey-us>.

point at every opportunity, claiming members of the Central American migrant caravan are “hardened criminals” and members of MS-13.<sup>351</sup> Not only have many gang allegations been proven to be greatly exaggerated and erroneous<sup>352</sup> but such concerns also fail to account for the extensive background checks, including identity and security checks, that applicants for asylum must endure prior to being granted relief.<sup>353</sup> According to U.S. Border Patrol Acting Chief Carla Provost, of all unaccompanied minors apprehended at the southwest border since 2012, only 0.06% were either suspected or confirmed to have ties to gangs in their home country.<sup>354</sup> That is a meager 159 minors out of more than 250,000.<sup>355</sup> In the United States presently, MS-13 is absent from most cities and towns across America, holding steady at just 10,000 members nationwide since 2006.<sup>356</sup> According to the FBI, there are an estimated 1.4 million total gang members in the United States.<sup>357</sup> Put another way, MS-13 accounts for less than 1% (0.71%) of all U.S. gang membership. In short, there is no indication that MS-13, or any other Central American criminal street gang, is taking advantage of our immigration system or other supposed “loopholes” to enter the United States under the guise of needing protection.

#### CONCLUSION

El Salvador, Guatemala, and Honduras have some of the highest rates of violence across the globe.<sup>358</sup> In 2015, El Salvador received the dubious

351. See, e.g., *The Latest: Trump: Migrants Headed to US Hardened Criminals*, U.S. NEWS & WORLD REP. (Oct. 19, 2018, 10:23 PM), <https://www.usnews.com/news/best-states/arizona/articles/2018-10-19/the-latest-trump-calls-senate-hopeful-mcsally-brilliant>.

352. See, e.g., LAILA L. HLASS & RACHEL PRANDINI, IMMIGRANT LEGAL RES. CTR., DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS 8–10 (2018), [https://www.ilrc.org/sites/default/files/resources/deport\\_by\\_any\\_means\\_nec-20180521.pdf](https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf); see also Karen Morales & Yawu Miller, *Advocates Say Innocent Teens Are Stamped with ‘Gang’ Label*, BAY ST. BANNER (May 1, 2018), <https://www.baystatebanner.com/2018/05/01/advocates-say-innocent-teens-are-stamped-with-gang-label>; Sarah Sherman-Stokes, *Commentary, ‘These Are Animals’ Has Quickly Become American Doctrine—And That’s Dangerous*, WBUR: COGNOSCENTI (May 31, 2018), <http://www.wbur.org/cognoscenti/2018/05/31/trump-animals-immigrants-ms13-sarah-sherman-stokes>.

353. Immigration and Nationality Act § 208(d)(5)(A)(i), 8 U.S.C. § 1158(d)(5)(A)(i); 8 C.F.R. § 1003.47 (2018); see generally U.S. CITIZENSHIP & IMMIGRATION SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 66–68 (2013), [https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum\\_Procedures\\_Manual\\_2013.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf).

354. See *The MS-13 Problem: Investigating Gang Membership, Its Nexus to Illegal Immigration, and Federal Efforts to End the Threat: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 3 (2017) (statement of Carla Provost, Acting Chief, U.S. Border Patrol), <https://www.judiciary.senate.gov/meetings/the-ms-13-problem-investigating-gang-membership-its-nexus-to-illegal-immigration-and-federal-efforts-to-end-the-threat> (testifying that U.S. Border Patrol had identified 159 unaccompanied children with gang ties since 2012).

355. *Id.*

356. *A Close-up of MS-13: FBI Executive Visits El Salvador*, FBI (Apr. 19, 2006), <https://archives.fbi.gov/archives/news/stories/2006/april/burris041906>.

357. *Gangs*, FBI: WHAT WE INVESTIGATE, <https://www.fbi.gov/investigate/violent-crime/gangs> (last visited Mar. 21, 2019).

358. Rocio Cara Labrador & Danielle Renwick, *Central America’s Violent Northern Triangle*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle> (last updated June 26, 2018).

distinction of being the single most dangerous country in the world with an astonishing homicide rate of 103 per 100,000.<sup>359</sup> The role of the United States in enabling this violence and creating this peril cannot be understated. From toppling regimes that lead to decades-long dictatorships,<sup>360</sup> to training and funding militaries with atrocious human rights records,<sup>361</sup> to housing the streets and jails that gave rise to the MS-13 gang and then systematically deported its members,<sup>362</sup> the United States has been central to the creation of violence, conflict, and abuse across Central America. As the refugees of these man-made disasters have fled to our borders seeking protection, we have almost consistently met them with discrimination, animus, and even violence. Now is the time to turn the page on the decades of the racism and asymmetrical application of the law they have endured.

Informed by the principles of humanitarian asylum, TPS, and class action lawsuits providing prior relief to Central Americans, Congress must now provide reparations to these refugees. Congress must act to provide a pathway to protection tailored to this class of migrants to ensure that their rights and lives are protected. Today, William is still waiting for his asylum case to be heard by an IJ; the next step in his efforts to seek protection here in the United States. With a nationwide immigration court backlog of more than 869,000 cases,<sup>363</sup> William may wait for some time for his case to be heard. Hopefully, when that day comes, the protection he deserves will be available to him.

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359. See, e.g., David Gagne, Analysis, *InSight Crime's 2015 Latin America Homicide Round-up*, INSIGHT CRIME (Jan. 14, 2016), <https://www.insightcrime.org/news/analysis/insight-crime-homicide-round-up-2015-latin-america-caribbean>.

360. See, e.g., Tim Weiner, *Role of C.I.A. in Guatemala Told in Files of Publisher*, N.Y. TIMES (June 7, 1997), <https://www.nytimes.com/1997/06/07/us/role-of-cia-in-guatemala-told-in-files-of-publisher.html>.

361. Raymond Bonner, *America's Role in El Salvador's Deterioration*, ATLANTIC (Jan. 20, 2018), <https://www.theatlantic.com/international/archive/2018/01/trump-and-el-salvador/550955>.

362. Dara Lind, *MS-13 Explained*, VOX, <https://www.vox.com/policy-and-politics/2018/2/26/16955936/ms-13-trump-immigrants-crime> (last updated Feb. 5, 2019, 9:45 PM).

363. *Immigration Court Backlog Surpasses One Million Cases*, TRACIMMIGRATION (Nov. 6, 2018), <http://trac.syr.edu/immigration/reports/536>.