UNCONVENTIONAL REFUGEES

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INTRODUCTION/SYNOPSIS

We can park our chair on the beach as often as we please, and cry at the oncoming waves, but the tide will not listen, nor the sea retreat. [2]

The personal, moral, and legal challenges posed by those seeking refuge in the United States reveal the inadequacies of our current approach to refugee protection, which largely derives from the 1951 Convention on the Status of Refugees, or the "Refugee Convention." Current legal and policy responses are not designed to offer protection that fits the contours of current crises, from Syria to Central America. While Europe and the Middle East have most closely confronted the needs of Syrian refugees, the United States has similar issues, in smaller scale, connected with the flow of children and families from violence in Central America. The Central American migrants expose both dilemmas and opportunities, and call for a reframing of our ideas of who requires protection—and why and how they get such protection. This article terms those needing protection "unconventional refugees" because of their calls for protection that fall beyond what is afforded by the Refugee Convention itself.

The article is part of an important longer-term project, nascent but growing in academic scholarship, of thinking beyond the Refugee Convention as we look at the humanitarian needs of unconventional refugees in the 21st century.[3] Those fleeing Syria and certain countries in

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[2] Robert Winder, quoted in ZYGMUNT BAUMUN, STRANGERS AT OUR DOOR (2016), 5.

[3] This exploration has been most vibrant in the context of "environmental refugees," a term that itself challenges the technical limitations of the Refugee Convention which

Central America sharply expose the limits of the Refugee Convention, which was designed for a post-World War II context that bears little resemblance to the forces driving forced migration today. In the United States, the Central American migrants particularly expose those limits as their claims are heard and decided within the U.S. immigration system. By contrast, Syrian refugees arriving in the United States have already secured their refugee status through a lengthy status determination (and security vetting) process overseas.[4] Although there are similarities between the needs of these two very different forced migrations, this article focuses primarily on the Central American migrants.

Thus far, the debate within the United States about how best to conceptualize migration from Central Americans fleeing violence has been one between protection and deterrence, setting those two values artificially in opposition to each other. Those who emphasize protection define the displacement as a refugee problem. In so doing, they summon the mandatory protection framework of the Refugee Convention at and within our borders, wherein the United States cannot return people to places where they fear persecution on one of five protected grounds. Significantly, when the Refugee Convention applies, those who qualify for its protections in the United States may earn a benefit of enormous value: a position on the path to U.S. citizenship.

The protection-side undervalues the limitations inherent in the Refugee Convention itself, and focuses on improving access to a form of protection that, despite its malleable edges, is not designed for the breadth of these situations. The Convention protects those who have been or would be uniquely targeted on account of a protected characteristic, such as religion or political opinion,[5] and not those fleeing "generalized violence." Some of

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requires a human persecutor. "While the Refugee Convention may adequately provide protection for the harms that led individuals to seek refugee status in the mid-twentieth century, its refugee definition does not recognize modern forms of harm, such as environmental hazards, that lead many to seek refuge outside the borders of their home state. Brittan J. Bush, *Redefining Environmental Refugees*, 27 GEO. IMMIGR. L.J. 553, 554 (2013). See also Julia Toscano, *Climate Change Displacement and Forced Migration: An International Crisis*, 6 ARIZ. J. ENVTL. L. & POL'Y 457 (2015). The gaps are increasingly being explored in other migration contexts as well. See, e.g. Sanjula Weerasinghe, Abbie Taylor, et al, *On the Margins: Noncitizens Caught in Countries Experiencing Violence, Conflict and Disaster*, 3 J. ON MIGRATION AND HUMAN SECURITY 26 (2015).

[4] For a thorough explanation of the difference between refugee claims and asylum claims, *see* Nicole Ostrand, *The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom, and the United States*, 3 J. ON MIGRATION AND HUMAN SECURITY 255 (2015).

[5] Convention Relating to the Status of Refugees, Geneva, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) ("Refugee

those seeking refuge in the United States from Central America do meet the Convention's narrow definition, and even more importantly, have the ability to articulate and prove that they do—these are conventional refugees. But many do not fit the definition, or have great difficulty proving that they do. Even at its fullest interpretive extent, the Refugee Convention does not encompass all those seeking refuge in the United States.

On the other side, those who emphasize deterrence view these migrations as a security problem for both the migrants and the United States itself. For the migrants' own safety, and for the security of U.S. borders, these voices wish to deter the migrants from taking the trip in the first place. The security concerns for the migrants are undeniable, with a high percentage of migrants reporting rape, assaults, robbery, extortion, and other harrowing experiences along the route, and with many dying along the way. The security concerns for the U.S. have ranged from defensible concerns about specific individuals with close ties to organized crime or drug trafficking, to the indefensible policy treating individual migrants as security risks because the migrants as whole require diversion of law enforcement resources to the border, a policy the Administration ultimately had to withdraw.[6] Whichever justification for deterrence carries the day, the deterrence emphasis errs on an unnecessarily narrow interpretation of an already narrow Convention, and ignores the acute need for some form of protection for vulnerable populations.[7] The deterrent-side also ignores how these migrants have a claim to protection distinct from claims made under the Refugee Convention, further grounded in the very specific historical and foreign policy contexts driving the migration.

This article understands the concerns underlying both the drive for protection and the value of deterrence, and posits the two values have been needlessly set in opposition to each other. This is perhaps an inevitable result of focusing on the Refugee Convention as the starting *and* ending point of protection. The Convention has been extraordinarily durable, and even considering the many well-placed critiques and ongoing efforts to improve its implementation, it deserves enormous credit both for lives saved and for integrating international human rights so robustly into many States' domestic laws. It has also, to some extent, adapted through the years

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Convention").

[6] R.I.L-R v. Johnson, 80 F. Supp. 3d 164 (D.D.C. 2015). *See also* Report to the Inter-American Commission on Human Rights (Sept. 26. 2014) (critiquing the Administration's policy), at https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2014-10-IC-IACHR_Karnes_Report.pdf.

[7] The dominance of the deterrence paradigm also explains the continued reliance on deterrence as a response to the most recent "crisis," despite continued calls from scholars and civil society for a more protection-oriented and sustainable response.

to new kinds of persecution.[8]

Nonetheless, the Convention's focus on particular, targeted individuals fits uneasily with broader forced migrations of people, and has led to an unfortunate binary between "deserving" asylum-seekers and mere economic migrants.[9] As Professor Ramji-Nogales has noted, "Scholars of international migration law recognize that this binary does not adequately capture the range of reasons for migrating; there are many compelling drivers of migration that do not fall within the narrow international legal definition of a refugee."[10]

This article breaks apart the binary by asking what duty might be owed to unconventional refugees. Forced migration encompasses a population broader than those who meet the definition of a refugee, although it certainly *includes* those defined as refugees by the Refugee Convention.[11] Migrants who seek refuge from generalized strife and violence are forced migrants. Some among them may also have a demonstrable individualized claim to refugee status as well, but many of them will not. This concern for a more-encompassing nomenclature matches the Article's concern for a legal framework that also encompasses more than refugees.[12]

The Convention, and its limits, anchors this discussion, but is not the only law at play in the forced migrations of the past years, from Syria to Central America. Complementary forms of individualized protection appear throughout U.S. immigration law, past and present. In part I, the article focuses on the many precedents within U.S. immigration law for providing protection that is more broadly available than that available under the Refugee Convention. These are typically nationality-based statuses, and range in value from the highly valuable protection of the Cuban Adjustment Act (Cubans placed on a path to citizenship a year after arrival) to the much less durable protection offered by Temporary Protected Status (TPS)

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[8] Andrew I. Schoenholtz, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, 16 CHI. J. INT'L L. 81 (2015).

[9] Jaya Ramji-Nogales, *The Migration "Crisis" Construct*, 68 HASTINGS L. J. ___ (2017) (forthcoming).

[10] Ramji-Nogales, *supra* note __.

[11] Arthur C. Helton & Eliana Jacobs, *What Is Forced Migration*?, 13 GEO. IMMIGR. L.J. 521 (1999).

[12] Sharing Professor Ramji-Nogales' critique of the limitations of the crisis construct, I also avoid the term "crisis migration," which has done important work in showing how vulnerable migrants may or may not fit existing categories within international law. Susan Martin, Sanjula Weerasinghe and Abbie Taylor, *What is Crisis Migration?*, 45 FORCED MIGRATION REVIEW 5 (Feb. 2014), available at http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/crisis/martin-weerasinghe-taylor.pdf. This Article shares much in common with their important project, but eschews the word "crisis," which typically signifies something acute and of short duration; Northern Triangle dynamics are long-term ones and must be viewed as such. See Part II.B, *infra.*

designations for specific countries like Syria (no path to citizenship no matter how long TPS lasts). The range in value provides critical insights into a more flexible way of thinking about protection, beyond the all-or-nothing

Having considered the precedents already found in U.S. law, past and present, the article turns in Part II to a series of justifications for providing broader protections in certain circumstances. First, Part II situates itself within vigorous, ongoing philosophical debates surrounding the extent and nature of a nation-state's right to exclude would-be migrants. One branch of the debate flows from philosopher John Rawls' "original position,"[13] and has been articulated in the migration context by Michael Walzer. This view ascribes higher duties to those within a nation's borders, seeing a fundamental right to community self-determination, with some subsidiary right to determine the pace of cultural change that can be hastened by immigration. The other branch of the debate, first forcefully articulated by philosopher Joseph Carens, takes Rawls' original position and considers it on a global level, trying to understand what rules of migration would be adopted if the people making the rules had no idea whether they would be citizens of, for this example, the United States or El Salvador. This side often justifies open—or more open—borders.[14]

This article adopts a position within these extremes, sometimes called "weak cosmopolitanism," which recognizes that while our greatest duties may be owed to our co-citizens, we still have duties to people outside our borders when their basic rights—including that of safety—are at stake. This middle ground provides a way to thoughtfully consider the often baldly overstated, and racially tinged, concerns about how "refugees" hurt Americans; deep within that concern lies a sense of Michael Walzer's articulation of our right to community self-determination. At the same time, by asking us to define when and to what extent we do have some duties to those beyond our borders, this approach provides a way to understand why unconventional refugees might call upon a nation to respond.

After examining the philosophical options that help us understand the values and choices underling migration policy, the article turns in Part III to more pragmatic justifications for offering broader protection. First, the article assesses how current policies meet almost none of the articulated objectives of deterrence, control over the border, or protection; the current patchwork system places heavy demands upon the legal system, inhibiting

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[13] This is discussed further in Part II.A, *infra*, but can be summarized at its most basic as answering the question of what laws one would choose for a nation if determining them from behind a "veil of ignorance"—lack of knowledge of one's position in the society whose rules one is attempting to create.

[14] JOSEPH CARENS, THE ETHICS OF IMMIGRATION (2013).

migrants from claiming the rights available to them even *under* current narrow legal frameworks, and needlessly absorbing governmental and advocate resources alike. Second, contextual factors, like those underlying the causes of Northern Triangle migration, create a responsibility to deal with the predictable effects of those crises.[15] Third, the article suggests that our long-termed shared interests are better served by focusing intensely upon sustainable development and good governance initiatives in the Northern Triangle, and upon creating better long-term outcomes for the communities where forced migrants settle in the United States.

With these justifications elucidated, the article proposes a protection framework in Part III that *supplements* asylum, instead of replacing it. In addition to asylum, with its strong protection and relatively clear commitment to integration,[16] the migrants fleeing Central American violence need a broader remedy that is easier for the United States to administer and easier for migrants to access, but one with less intrinsic value than refugee or asylees status.

This proposed framework comes with two important caveats. First, the framework absolutely requires concurrent attention to and investment in the promotion of security and governance in the Northern Triangle, so that even as we protect people from grave and immediate dangers, we are reducing the conditions that send them seeking such protection in the first place.[17] That parallel question is beyond the scope of this article, and one that is better left to experts in the field of international development, who have been actively engaged in the discussion for years preceding this current migration. Second, the framework is intended to provoke conversations and critiques. The goal is to help break open a conversation about what protection *could* look like, instead of only looking at time-consuming, resource-intensive, slow, never adequate fixes to the protection system we currently have. Those changes and fixes are critical, but stepping back to reimagine something different is equally critical.

Will a broader program deter those with valid asylum claims from seeking that better status? Will it open the floodgates of migration? How could such a program be administered? Part III acknowledges those questions and good readers will find more risks and issues than the article itself identifies. The author is modest and realistic enough to know, with

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[15] Jaya Ramji-Nogales has provided a trenchant critique of seeing these migrants as a "crisis," and instead looking at the inevitability of population flows in light of broader U.S. foreign policy. Ramji-Nogales, *supra* note __.

[16] Part II(b) acknowledges some of the limitations of this commitment to integration, but nonetheless sees it as an option that performs well vis-à-vis the goal of integration.

[17] SLAVOJ ŽIŽEK, AGAINST THE DOUBLE BLACKMAIL: REFUGEES, TERROR AND OTHER TROUBLES WITH THE NEIGHBORS (2016) (urging a look at root causes, and worker solidarity).

certainty, that she alone cannot devise a new system; the goal is therefore the more modest one of breaking open the conversation. The principle of *non-refoulement* was once novel, and now constitutes a powerful principle of international law. A new principle for protecting unconventional refugees may also be possible, but only if we begin the task of imagining it.

I. PRECEDENTS FOR BROADER PROTECTION IN U.S. HISTORY

At this time in American history, with immigration an explosive factor in national and local politics alike, an article exploring *broader* protection for migrants clearly cuts against the political grain. So much of immigration-related policy in the early 21st century has focused on restriction and enforcement, with even the somewhat durable asylum regime caught in its sweep, and sympathetic legislation like that offering status to the undocumented young people known as the DREAMers failing annually in Congress.[18]

And yet, even now, there are examples of broad-scale protection within our current immigration laws. Temporary Protected Status (TPS) is a country-wide designation, limited only by the need for the individual to be admissible and to have arrived and continuously resided in the United States by certain dates. The Cuban Adjustment Act is another country-wide designation, even more generous than TPS, because it has no date restrictions and leads quickly to lawful permanent residence (and therefore provides a path to citizenship). This section's discussion of both forms of relief considers them with an eye to administrative efficiency and effectiveness, their effect creating or diminishing the migration dynamics, and their impact on root causes. By looking at benefits and criticisms of these programs, the article extracts principles that could help build a more effective framework for responding to the forced migrations that we see in the 21st century.

A. Cuban Adjustment Act

The Cuban Adjustment Act (CAA) of 1966, still in effect, provides both broad and deep relief for one nationality. The Act emerged after a three-year "surge" of Cubans immediately following the Cuban revolution. As Professors Hughes and Alum note, "[t]hese individuals left Cuba between 1959 and 1962, and did not expect their exile to be permanent; that is, they expected to return home to Cuba upon the imminent dissolution or overthrow of Castro's government."[19] Smaller numbers followed between

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[18] Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform, and Citizenship*, 14 NEV. L.J. 101(2013).

[19] Joyce A. Hughes & Alexander L. Alum, *Rethinking the Cuban Adjustment Act and*

1962 and 1965, with the suspension of air travel between the U.S. and Cuba, making travel more dangerous for would-be migrants. In 1965, many Cubans came through boatlifts, but were only paroled in to the United States, and thus in a legal limbo (as described above, with humanitarian parole). The disorder of the boatlifts and the desire for a more durable and prompt status created the impetus for the CAA.[20]

The CAA created a direct path to lawful permanent residence for these Cubans, without need to qualify under any of the immigrant visa eligibility categories in the INA, or the need to demonstrate that they met the definition of a refugee.[21] As originally enacted, the law offered permanent residence to any "native or citizen of Cuba…who has been admitted or paroled into the United States subsequent to January 1, 1959"[22] with two years of physical presence in the United States (later amended to only one year of physical presence).

Cubans benefited from special, more favorable rules concerning adjustment. "Adjustment" means adjusting from some other status, like the "nonimmigrant" status of tourist or worker (or under narrow, rare circumstances that of undocumented migrant) to the "immigrant" status of lawful permanent resident, or "green card" holder.[23] Generally, adjustment has provisions that limit its availability, such as the current availability of an immigrant visa, and the requirement of entering lawfully. These and other bars to adjustment[24] do not apply under the CAA.

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the U.S. National Interest, 23 ST. THOMAS L. REV. 187, 194 (2011)

[20] Harv. L. Rev. Ass'n, *The Cuban Adjustment Act of 1966: ?Mirando Por Los Ojos De Don Quijote O Sancho Panza?*, 114 HARV. L. REV. 902, 908 (2001) (citing "[f]our predominant reasons [that] motivated Congress to enact the CAA: Congress sought to advance Cold War objectives by destabilizing a Communist dictatorship that posed a threat to American national security; to create a safe haven in the United States, with as few administrative hurdles as possible, for Cuban refugees fleeing the island for political reasons; to prevent Cuban refugees in the United States from having to leave the country to apply for permanent residency; and to create an expeditious method for Cuban refugees to join the American workforce..

[21] Hughes & Alum, *supra* note __.

[22] An Act to Adjust the Status to the of Lawful Permanent Residents of the United States, and for Other Purposes P.L. 89-732 (Nov. 2, 1966).

[23] "Immigrant" is a term of art in the Immigration and Nationality Act, which divides visas into nonimmigrant visas, generally for temporary purposes, and immigrant visas, which provide lawful permanent residence. *Compare* INA § 101(a)(15) (defining the many different visa categories for nonimmigrants) *with* INA § 203 (defining the categories of immigrant visas). Immigrant visas are numerically limited, and are also subject to per-country quotas, which creates wait times for the visas in many categories, and for many countries. *See, e.g.* Dep't of State, *Visa Bulletin for January 2017* (Dec. 12, 2016), at https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2017/visa-bulletin-for-january-2017.html.

[24] INA § 245(c).

Professor Joyce Hughes and Alexander Alum have provided a thorough analysis of the four goals the CAA set out to achieve. Among the goals was, certainly, protection of Cuban dissidents, alongside the overarching foreign policy goal of embarrassing a Cold War foe and potentially destabilizing the Cuban government by accepting so many exiles. But the legislative history and the structure of the act showed attention to other goals as well, among them administrative efficiency. As Hughes and Alum write, "[t]he CAA was passed to alleviate the administrative burden on both Cuban exiles who wanted to become U.S. permanent residents, and U.S. diplomatic facilities in Canada and Mexico that lacked the resources to process the visa applications of Cubans paroled into the United States."[25] Integration of Cubans into the U.S. workforce was a final motivation, since Cubans who had come prior to the CAA were in a tenuous legal status with limited possibilities for integration.

The ability of the CAA to provide a clear path for Cubans is beyond doubt. As Professor David Abraham writes,

> It has acted as a strong magnet for both humble fishermen and all-star baseball players. Indeed, since its inception, over 770,000 Cubans — 130,000 in the Mariel boatlifts of 1980 alone — have come to the United States under its provisions and outside of normal immigration opportunities [such as the Special Cuban Migration Lottery]. As we shall see, over time, the iconic rafter has been joined by Cubans travelling more comfortably, including legally to Mexico, who are then welcomed when they appear at the same U.S./Mexican border where Mexicans are turned back."[26]

Abraham criticizes the CAA, however, for its presumption that all those leaving Cuba were political refugees, and draws a comparison between Cuban migrants who are welcomed, with Haitian migrants, who are presumed to be economic migrants only, and received far more skeptically if at all.[27]

The CAA has come under increasing criticism as relations between the United States and Cuba have changed. Among the criticisms are that it creates a powerful magnet for people whom the law was not intended to benefit, those fleeing the Castro regime for political reasons. This reflects a divide between older and newer Cuban migrants, as reported by Lizette Alvarez of the New York Times: "Many earlier immigrants say the law

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[25] Hughes & Alum, *supra* note __.

[26] David Abraham, *The Cuban Adjustment Act of 1966: Past and Future*, LexisNexis (May 2015), at p.2.

[27] Abraham, *supra* note __.

should only protect Cubans fleeing political oppression. Newer immigrants, who benefit most from the law, are more likely to support its blanket application to all Cuban immigrants. But the Cubans who have been here longest have the most political clout."[28] Professor Abraham also comments on this divide, that "To their great annoyance, the Miami elites can no longer count on Cuban immigrants to be politically hostile to the Castro government. The reservoir of class or ideological opponents has long been tapped out, and today's immigrants are increasingly mestizo and at peace with their home country's politics."[29]

In 2016, in the wake of the thawing relations between Cuba and the United States, the Miami Herald noted the unintended consequences of the Act:

> The prospect of legal residency in the United States is what drives the migration. Once here, they remit hundreds of millions of dollars back home, from which the government takes a cut. U.S. law acts as a safety valve to release internal discontent with conditions in Cuba, and, at the same time, lets the regime continue repressing those who remain behind. This is not what the law ever contemplated."

The editorial goes on to argue that "These days, real dissidents are able to leave Cuba and make a case for political asylum in the United States without relying on the Cuban Adjustment Act."[30]

After five decades of implementation, it is perhaps inevitable that the Act no longer meets all of its original goals. Of those goals, critics persuasively show how the foreign policy goal has diminished dramatically, and how the goal of providing refuge to dissidents could fit within standard asylum law and processes. (While accurate at one level, and therefore appealing, the article challenges how realistic this argument is in Part II, *infra*.) Critics have less to say about the Act's two other goals, however: integration and administrative efficiency, both of which remain valuable. The changing and sometimes competing value of any of these goals raises a point that this article will return to: that a good law should have a "fit" between its goals and the value of what it delivers. In the case of the Cuban Adjustment Act, it delivers an extremely high-value benefit (lawful permanent residence), which may have been appropriate when it was

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[28] Lizette Alvarez, *Law Favoring Cuban Arrivals is Challenged*, N.Y. TIMES, Feb. 1, 2015, available at http://www.nytimes.com/2015/02/02/us/law-favoring-cuba-arrivals-is-challenged.html.

[29] Abraham, *supra* note __, at 3.

[30] *Editorial: Repeal the Cuban Adjustment Act of 1966*, MIAMI HERALD, Apr. 16, 2016, at http://www.miamiherald.com/opinion/editorials/article72163832.html#storylink=cpy

meeting all four articulated goals in its early years of implementation; increasing recent criticism of the Act suggests that fit between value and goals is no longer there.

B. Nationality-Based Presumptions of Refugee Eligibility

In 1989, Congress passed a law with the Lautenberg Amendment, which created categories of people within several nations who were, without further individual scrutiny, refugees.[31] Specifically, the provision directed the Secretary of State and the Coordinator of Refugee Affairs to establish categories for nationals and residents of the Soviet Union "who share common characteristics that identify as targets of persecution in the Soviet Union on account of race, religion, nationality, membership in a particular social group, or political opinion;" a separate part of the Amendment specified that Soviet Jews were one such group.[32] The provision created that same mechanism for categories of Vietnamese, Laotian, or Cambodians who faced persecution.

As implemented, the Lautenberg Amendment essentially lowers the burden of proof for individuals from the selected countries, such that the applicants simply need to

Paired with the cap on the total numbers of refugees who could be admitted to the United States in any given fiscal year, the Lautenberg Amendment resulted in these countries receiving 83% of the available overseas refugee slots.[33] The provision has been extended repeatedly; in 2004, Congress expanded the provision to cover religious minorities within Iran.[34] The provision continues to have force; in FY 2015, 4,180 migrants entered the United States through the Lautenberg Amendment's provisions, with more than half from the former Soviet Union and the rest from Iran.[35]

C. Temporary Protected Status

By contrast to the Cuban Adjustment Act, Temporary Protected Status (TPS) provides a far less valuable source of broad protection. TPS exists on a country-wide basis, for countries deemed too dangerous or devastated by

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[31] 1990 Foreign Operations Appropriations Bill, Pub. L. No. 101-167 599D, 103 Stat. 1195, 1261 (1989) ("Lautenberg Amendment").

[32] Lautenberg Amendment, *supra* note __.

[33] Susan Raufer, *In-Country Processing of Refugees*, 9 GEO. IMMIGR. L.J. 233 (1995)

[34] Melanie Nezer, *Religion in Immigration Law*, 05-07 IMMIGR. BRIEFINGS 1 (2005), at text accompanying footnotes 222-224.

[35] Rep. Adam Schiff, *Press Release: Rep. Schiff Announces Extension of Lautenberg Amendment for Iranian Religious Minorities Fleeing Persecution Included in Omnibus* (2015), at https://schiff.house.gov/news/press-releases/rep-schiff-announces-extension-of-lautenberg-amendment-for-iranian-religious-minorities-fleeing-persecution-included-in-omnibus.

natural disaster to absorb returned citizens.[36] Similar programs existed before 1990, including Deferred Enforced Departure (still in effect for Liberia) and Extended Voluntary Departure (used for Salvadorans), and still are within the Executive's authority, as a form of prosecutorial discretion.[37] In 1990, Congress created the authority for Temporary Protected Status.[38] It flowed from "legislative proposals for 'temporary safe haven', as it was then termed, to regularize the procedures for offering protection to individuals who could not safely return to their countries, but who were not covered by existing refugee, asylum, or other immigration benefits law."[39] The Congressional Research Service in 2016 described TPS as the "statutory embodiment of safe haven for those aliens who may not meet the legal definition of refugee but are nonetheless fleeing—or reluctant to return to—potentially dangerous situations."[40]

As of this writing, thirteen countries have a TPS designation, including Honduras (designated in 1999) and El Salvador (designated back in 2001). The designation does not mean that those migrating currently from these two countries can apply for TPS. Hondurans continuously resident since December 1998 are eligible, and Salvadorans continuously resident since February 2001 are eligible. (The third Northern Triangle country, Guatemala, has no TPS designation at all.[41])

The program's beauty is its administrative simplicity. The eligibility requirements are discrete, with clearly draw lines and relatively few complicated legal concepts. An applicant needs to prove nationality, prove continuous presence in the United States as of a particular date and, relatedly, prove continuous residence as of a particular date (the legal standards differ slightly, but the evidence for both is similar).[42] The applicants need to answer sixty-nine questions about admissibility which track the inadmissibility grounds found in INA § 212; most issues of inadmissibility can be cured by filing a waiver with the application. There are few interpretive ambiguities that would require in-depth legal representation—so many TPS applicants can avail of "clinics" that explain

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[36] USCIS, *USCIS Academy Training Center Humanitarian Programs (*Oct. 2014), available at https://works.bepress.com/shoba_wadhia/32/download/ ("USCIS Training")

[37] Carla N. Argueta and Ruth Ellen Wassam, *Temporary Protected Status: Current Immigration Policy and Issues*, Cong. Research Serv. (Feb. 2016) ("TPS Report," at https://www.fas.org/sgp/crs/homesec/RS20844.pdf

[38] 8 U.S.C. §1254a (Immigration and Nationality Act of 1952 § 244).

[39] USCIS Training, *supra* note __, at 7

[40] TPS Report, *supra* note __.

[41] TPS marginally relates to current flows because those with TPS are considered qualifying relatives for purposes of the small CAM program discussed above.

[42] See Instructions to Application for Temporary Protected Status Form I-821 (https://www.uscis.gov/sites/default/files/files/form/i-821instr.pdf).

the process and assist with filling in the paperwork, which makes it easier to access than many other immigration statuses, and which permits greater access to justice than statuses like asylum, SIJS, or crime victim visas.

Criticisms of TPS center around how "temporary" it is,[43] in two different ways. First those who favor immigration restriction see it as an unintendedly large passageway to status in the United States. Second, those who are concerned with the creation of *de facto* second class citizens. The 1990 law creating TPS understood the status to be of relatively short duration—anywhere from a few months to 18 months. The reality is that most countries' TPS designations renew repeatedly, meaning that people can have TPS and work lawfully in the United States for a decade and more. As they work here, they develop stronger ties to the community, and stronger equities against deportation. As noted as early as 1995,

> Recipients of TPS begin to build their lives outside their country while still unsure whether the INS will eventually retract temporary protection…it should be recognized that dangerous conditions in the home country have not been of a temporary nature and that TPS recipients have built up equities in their respective communities.[44]

For restrictionists, this means that the program has not met its objectives, but instead offers people a *de facto* unending pass to relatively secure status in the United States, contrary to the rule of law. They also argue that programs like TPS create a magnet for future migration, as migrants may trust that some program will emerge to provide some form of status for them in the future.[45] This latter argument is merely hypothetical, as a TPS designation is fairly rare, and most often tied to natural disasters, not man-made strife. The first criticism, however, has some validity. TPS designation is intended to be temporary, and never contemplated the situation of countries being re-designated year after year, well past the duration of the precipitating disaster or strife. Yet, because TPS is valuable to both its recipients and to the designated countries (especially in the form

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[43] Claire Bergeron, *Temporary Protected Status after 25 Years: Addressing the Challenge of Long-Term "Temporary" Residents and Strengthening a Centerpiece of US Humanitarian Protection*, 2 J. ON MIGRATION AND HUMAN SECURITY 22 (2014).

[44] Bill Frelick and Barbara Kohnen, *Filling the Gap: Temporary Protected Status*, 8 OXFORD J. OF REFUGEE STUDIES 339 (1995).

[45] This criticism was thrown with more power at the previous version of TPS, Extended Voluntary Departure: "If it is not particularly difficult for an affected nationality to come to this country, the effect upon illegal immigration of a grant of EVD could be enormous. To, in effect, invite anyone to come to the United States from such a country might stimulate 'an ever-growing influx of economic migrants.'" Burke, *supra* note __ at 368 (quoting Elliott Abrams, *Diluting Compassion*, N.Y. TIMES, August 5, 1983, p. A23).

of remittances), the Executive Branch is pressured to re-designate far longer than would seem valid given the justification for the original designation. The Salvadoran and Honduras TPS designation, for example, came in light of Hurricane Mitch in 1998. Enormous international aid flowed in for recovery efforts, and according to multiple sources, those efforts were largely effective.[46] Despite that, TPS has been renewed for the three worst-affected countries ever since, on the premise that the countries are unable to "handle adequately the return of their nationals." Likewise, TPS for Sierra Leone and Liberia, designated in light of the ebola epidemic, continue well after the epidemic subsided. Whatever the justifications, such consistent renewals have provoked ire among immigration restrictionists, who decry TPS as a back-door "amnesty."[47]

Lurking under the extensions and re-designations are complex foreign policy issues. With each of the countries whose TPS designation has lasted the longest (Liberia, Honduras, El Salvador, Nicaragua), the United States has had unusually close and/or fraught relations. The U.S. founded Liberia, and Liberian elites, usually America-Liberian, have long had a close affinity to the United States. The U.S. role in Central America in the 1980s also created multi-layered connections in the countries' shared histories, including the refugee waves fleeing civil wars in the 1980s, and the more recent devastating impact of gang-members deported from the U.S. who have become a root cause of the current migrations from the region.[48] For

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[46] See, e.g. UNICEF, *Ten years after Hurricane Mitch, Honduras is once again hit by natural disaster* (Oct. 2008), at http://www.unicef.org/infobycountry/honduras_45850.html; International Federation of Red Cross and Red Crescent Societies, *Survivors of Hurricane Mitch have rebuilt their lives* (Oct. 2008), http://www.ifrc.org/en/nouvelles/nouvelles/common/survivors-of-hurricane-mitch-have-rebuilt-their-lives/; Joshua Lichtenstein, *After Hurricane Mitch: United States Agency for International Development Reconstruction and the Stockholm Principles*, Oxfam (Jan. 2001), at http://pdf.usaid.gov/pdf_docs/Pcaab248.pdf.

[47] Federation for American Immigration Reform, *Temporary Protected Status* (Aug. 2016), http://www.fairus.org/issue/temporary-protected-status.

[48] "The United States also bears responsibility to reform and enhance existing policies because Central American states are highly sensitive to a number of U.S. policy decisions that have direct effects on their welfare. These include immigration and trade as well as the approach to illicit drugs, money laundering, and the illegal southward flow of arms. The American demand for drugs, which has remained consistently high, buttresses the case for increased U.S. responsibility. The often unhappy history of U.S. intervention in countries such as Honduras, Guatemala, and El Salvador is yet another argument for a more constructive posture. Regardless of the past, U.S. officials regard the current situation in Central America as of critical concern to U.S. national security, although a sense of moral obligation should inform and contextualize current policy thinking." Michael Shifter, *Countering Criminal Violence in Central America*, Council on Foreign Relations (Apr. 2012), at http://www.cfr.org/americas/countering-criminal-violence-central-america/p27740.

all four countries, too, emigrant populations in the United States have become forceful advocates for extensions. The extent to which these factors *should* be considerations is considered further in part II, *infra.*

For immigrant advocates, the lack of "temporariness" means that people who have steadily integrated into life in the United States have no "on-ramp" to fuller legal and political inclusion. As Claire Bergeron has written,

> Extended grants of TPS run contrary to the policy goals of fostering integration and full membership within American society for long-term residents. Lacking many of the benefits that come with [lawful permanent resident] status, long-term TPS beneficiaries effectively find themselves locked in 'legal limbo' as *de* facto members of American society who are offered less than full membership."[49]

Bergeron proposes that after ten-years, TPS recipients could seek to adjust status to permanent residence.[50] Such a concept employs Hiroshi Motomura's concept of immigration as transition, and has deep historical analogs. One example of this in practice is the USCIS revelation that for the Central American Minors program, "By far, [TPS] was the immigration status held by the largest percentage of petitioning Qualifying Parents—approximately 89 percent." The inclusion of TPS as among the qualifying statuses is correct as a legal matter, but also shows how the liminal status is the basis for a slightly elevated claim upon the U.S.

Despite these unresolved internal contradictions between unmet intent and unintended consequences, some advocates have pushed for a new TPS program to respond to the current Central American violence.[51]

TPS provides an interesting set of opportunities and warnings for the possibility of using a broad-scale, administratively simple option for Central American migrants today. As compared to the Cuban Adjustment Act's goals, TPS scores favorably on administrative efficiency, on foreign relations, and providing refuge. It scores poorly on integration, as it provides no path to permanence and full integration, no matter how long the individual with TPS holds that status.

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[49] Bergeron, *supra* note __, at 29 (2014). *See also* Keyes, *supra* note __.

[50] Bergeron, *supra* note __.

[51] Suzanne Gamboa, *Hundreds of Groups Press for Temporary Protection for Central Americans* (Jan. 25, 2016), NBC NEWS at http://www.nbcnews.com/news/latino/more-200-groups-press-temporary-protection-central-americans-n503786; Refugees International, *Northern Triangle Temporary Protected Status National Letter* (Jan. 25, 2016), at http://www.refugeesinternational.org/advocacy-letters-1/2016/2/1/northern-triangle-temporary-protected-status-national-letter.

D. Other Nationality-Based Protection Programs

There is also a lengthy history of providing country-specific routes to immigration for certain countries based on political conditions. There have long been programs to permit "in-country processing," or application for a humanitarian immigration benefit before leaving the home country, including programs in Vietnam, Cuba, Haiti, and Iraq,[52] and most recently the Central American Minor (CAM) Program. The Migration Policy Institute has studied these programs in their 2015 report on *In-Country Processing: A Piece of the Puzzle*. From this, it is clear that such programs have always shared concerns with (1) the orderliness of migration as a rule of law matter, (2) the need to prevent dangerous forms of migration, (3) the need for administratively efficient forms of protection, and (4) consistency with foreign policy objectives—familiar themes found, to different extents, in both the Cuban Adjustment Act and Temporary Protected Status.

The very name of the Vietnam program—the Orderly Departure Program—demonstrates the rule of law preoccupation. The program emerged to reduce the foreign policy embarrassment of the large numbers of "boat people" fleeing post-war Vietnam. At first, the Vietnam program applied, for administrative simplicity, to any Vietnamese person whose refugee status was simply presumed. This broad eligibility criterion narrowed as the years went on—presumably as the capacity to do more individualized determinations increased.

Cuban in-country processing likewise evolved, but in an expansive way as foreign relations with Cuba remained stalemated.[53] Originally for political prisoners, the program expanded to also cover "(2) members of persecuted religious minorities; (3) human rights activists; (4) forced labor conscripts during the period 1965-1968; (5) persons deprived of their professional credentials or subjected to other disproportionately harsh or discriminatory treatment resulting from their perceived or actual political or religious beliefs; and, (6) others who appear to have a credible claim that they will face persecution as defined in the 1951 UN Convention on Refugees and its 1967 Protocol."[54] It is worth emphasizing here that these categories exceeded the protections of the Refugee Convention—such as

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[52] Faye Hipsman and Doris Meissner, *In-Country Processing: A Piece of the Puzzle*, MIGRATION POLICY INSTITUTE (Aug. 2015), pp. 10-11, http://www.migrationpolicy.org/research/country-processing-central-america-piece-puzzle.

[53] Note that in-country processing, meaning the acquisition of status before leaving the home country, is in addition to the protections of the Cuban Adjustment Act discussed *supra*.

[54] U.S. Dep't of State, Report to the Congress on Proposed Refugee Admissions for FY 1995 (Oct. 1994), at http://dosfan.lib.uic.edu/ERC/population/1995_Refugee_report.html (naming the new priority categories for Cuban in-country refugee processing).

those facing discrimination or deprivation of credentials—and that the refugee definition is used only as a catch-all for those not fitting into the other categories. This, then, is a time the U.S. Government has gone beyond the refugee definition in its identification of individuals qualifying for refugee status. For Cubans, the refugee definition was a floor, not a ceiling, for the availability of protection.

The Central American Minor Program (CAM) is the most recent entrant to this category of options. CAM, available to Northern Triangle countries only, emerged in 2015 in response to one of the Obama Administration's public justifications for its harsh deterrent message to Northern Triangle migrants. When the migrants, and especially the children, began crossing in larger numbers in 2014, the Administration quickly stated that its opposition was grounded in fear for the safety of the children while crossing Mexico into the United States: "we are working with our Central American partners, nongovernmental organizations, and other influential voices to send a clear message to potential migrants so that they understand the significant dangers of this journey and what they will experience in the United States."[55]

Months later the Administration created CAM in response to these concerns. The program allows those eligible to apply for status "in-country" before embarking on any journey to the United States. The CAM website bills the program as providing "a safe, legal, and orderly alternative to the dangerous journey that some children are currently undertaking to the United States."[56] The 2015 USCIS Ombudsman's Report to Congress also described the purposes as helping "children avoid this dangerous trip north by affording them an in-country process for safe relocation."[57]

The program exists for children[58] who meet the refugee definition and who already have a qualifying parent in the United States. The qualifying parent must have some form of status, from permanent residence to the more liminal statuses of deferred action or parole. Very few have applied, because of the requirement that the qualifying relative have legal status.

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[55] White House, *Letter from the President -- Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation's Southwest Border* (June 30, 2014), available at https://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle.

[56] USCIS, *In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors-CAM)* ("CAM Guidance"), at https://www.uscis.gov/CAM.

[57] DHS, *CIS 2016 Ombudsman's 2016 Annual Report* 17-18 (July 1, 2016), at https://www.dhs.gov/sites/default/files/publications/CISOMB%20Annual%20Report%202016_2.pdf.

[58] An in-country parent might also qualify, if the parent meets the refugee definition as well. CAM Guidance, *supra* note __.

And even among those who applies, very few have been interviewed: a year after the program was launched, only 90 of 3,955 applicants had been interviewed.[59] A few months later, by April 2016, 197 parents and children had entered the U.S. through the program.[60] Most (57%) entered with humanitarian parole, not refugee status, which limits their ability to achieve lawful permanent residence and citizenship.

The U.S. Government itself recognizes the limitations of the program.

> While the 7,357 [relative affidavits] received by March 21, 2016 signal a marked increase in program participation, the sustained number of UAC arrivals from the Northern Triangle to the southern U.S. border demonstrates that broader protections are needed.[61]

As a result, the State Department announced in January 2016 that it would work with UNHCR to bolster in-country refugee processing in the Northern Triangle, and some of those determined to be refugees would go to the United States, and some to other countries.[62]

In July 2016, the Obama Administration announced a few of the details of this new initiative to help address forced migration from the Northern Triangle. The plan is to do the initial screening within the Northern Triangle countries, including security screening, and then once processed, to use Costa Rica as a temporary site for refugees to stay while awaiting acceptance as refugees in the United States *or* in other countries willing to accept them.[63] Costa Rica and the United States entered into a "protection transfer agreement" with UNHCR and the International Organization for Migration The migrants would only go to Costa Rica—two hundred at a time—once security screening had happened in their home-countries, a process that takes months or years in other refugee settings, such as camps for Syrian refugees in Egypt or Lebanon.

In-country processing has been criticized as an "exception [that] is

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[59] UNHCR, *Press Release: U.S. announcement on Central America refugees highlights seriousness of situation*, Jan. 14, 2016, at http://www.unhcr.org/en-us/news/press/2016/1/5697d35f6/announcement-central-america-refugees-highlights-seriousness-situation.html ("UNHCR Press Release").

[60] Molly Hennessy-Fiske, *Frustrated by New U.S. Program to Take in Migrants, Central American Parents Turn to Smugglers*, L.A. TIMES (Apr. 21, 2016), available at http://www.latimes.com/nation/la-na-central-american-migrants-20160420-story.html.

[61] Ombudsman Report, *supra* note __, at 20.

[62] UNHCR Press Release, *supra* note __.

[63] Julie Hirschfeld Davis, *U.S. to Admit More Central American Refugees*, N.Y. TIMES July 26, 2016, available at http://www.nytimes.com/2016/07/27/us/politics/obama-refugees-central-america.html?_r=0.

seriously in danger of swallowing the rule."[64] One piece of the Convention definition of a refugee is that the person is outside the country of origin; in-country processing removes that requirement, procedurally, as a way of providing assurance that once an individual *is* outside the country of origin, they will have legal status. Another critique of in-country processing, most specifically the CAM program, is the danger it creates for prospective beneficiaries who must wait in dangerous circumstances before any decision is made.[65] Depending upon the level of immediate danger, the wait may be a disincentive for availing of in-country processing, and create an incentive for "disorderly" migration for the purpose of seeking asylum at the United States border.

Regardless of the critiques, these programs do show a precedent in United States law to see people in broad categories of need. In-country processing, temporary protected status, and country-specific refugee protections such as the Cuban Adjustment Act and Lautenberg Amendment cases, share a common goal of responding efficiently to either emerging or long-standing migration problems, and they all presume, to varying extents, a general underlying reason for the migration problem that is worth a response, while de-emphasizing heavily individualized determinations of the kind required by our asylum process, described in Part III.C, *infra*. Their benefits range from extremely valuable (permanent residence for Cubans) to liminal (Temporary Protected Status) to procedural (in-country processing). They thus demonstrate not only that broad protection has a rich history within U.S. immigration law, but also that there is considerable flexibility in its design and extent.

II. JUSTIFYING BROADER PROTECTION: PHILOSOPHY

Having demonstrated that broad protection is possible in many forms, the article turns to the essential question of why it is *necessary*. This question has a simple pragmatic answer, demonstrated by the quote with which the article begins: "We can park our chair on the beach as often as we please, and cry at the oncoming waves, but the tide will not listen, nor the sea retreat."[66] Doing nothing is an option unavailable to us. Such an answer is compelling, but incomplete and unsatisfying, however. This section proceeds to answer the question of necessity with an exploration of deeper

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[64] Susan Raufer, *In-Country Processing of Refugees*, 9 GEO. IMMIGR. L.J. 233, 236 (1995).

[65] Donald Kerwin, *The U.S. Refugee Protection System on the 35th Anniversary of the Refugee Act of 1980*, 3 J. ON MIGRATION AND HUMAN SECURITY 205, 228 (2015) ("Refugee Protection System").

[66] Robert Winder, quoted in ZYGNMUNT BAUMUN, STRANGERS AT OUR DOOR (2016), 5.

philosophical justifications for some level of duty to the "stranger" in our midst.

A. Confronting Reality

> *[Refugees] make us aware, and keep reminding us, of what we would dearly like to forget or better still to wish away: of some global, distant, occasionally heard about but mostly unseen, intangible, obscure, mysterious, and not easy to imagine forces, powerful enough to interfere with our lives while neglecting and ignoring our own preferences.*[67]

Fears of being deluged by migrants drive much of the reaction to Northern Triangle forced migration, and are nothing at all new. In 1984, Assistant Secretary of State for Human Rights Elliott Abrams wrote that "The policy they advocate, that anyone who gets here from El Salvador be permitted to stay, would virtually invite an ever-growing influx of economic migrants to the United States."[68] Quoting Abrams, former Deputy Secretary of State for Asylum W. Scott Burke argued that "'[R]ecent refugee migrations from the less developed world are perceived to be destabilizing in cultural, racial, political, and economic terms. [T]he desire to help the world's poor and oppressed clashes with the belief of most Americans that substantial immigration is undesirable and economically threatening to their interests.' The concern has thus shifted from the facilitation of refugee movements to the deterrence of asylum-seekers."[69]

Similar concerns were on vivid display with the Central American refugees in 2014, as protestors tried to stop buses carrying children from the border to temporary facilities,[70] or protesting foster care facilities deep in the interior.[71] Opponents of the children's arrival in the United States spoke

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[67] ZYGNMUNT BAUMUN, STRANGERS AT OUR DOOR (2016), 16.

[68] Elliott Abrams, *Diluting Compassion*, N.Y.TIMES, Aug. 5, 1983, at http://www.nytimes.com/1983/08/05/opinion/diluting-compassion.html.

[69] W. Scott Burke, *Compassion Versus Self-Interest: Who Should be Given Asylum in the United States?*, 8 FLETCHER F. 311 (1984)).

[70] Matt Hansen and Mark Borster, *Protesters in Murrieta Block Detainees' Buses in Tense Standoff* , L.A. TIMES (July 1, 2014), at http://www.latimes.com/local/lanow/la-me-ln-immigrants-murrieta-20140701-story.html.

[71] See, e.g. Sam Easter, *No vote, but protests go on*, SAGINAW NEWS, Aug. 19, 2014 2014 WLNR 22894512 (concerning protests over housing unaccompanied minors in Michigan); Samantha Marcus, *Dent tours KidsPeace, says lack of information spurs protests; Salisbury Township facility houses 51 young refugees from Central America*, ALLENTOWN MORNING CALL, Aug. 19, 2014, 2014 WLNR 22858462 (concerning similar protests in Allentown, Pennsylvania); Halimah Abdullah, *Not in my Backyard: Communities Protest Surge of Immigrant Kids*, CNN (July 6, 2014), at http://www.cnn.com/2014/07/15/politics/immigration-not-in-my-backyard/.

of criminality, fiscal burdens, and the lawlessness of illegal immigration.[72] Despite the numbers of migrants in 2014 being small related to overall immigration (some 70,000 people compared to X), the fact of them coming, and the fact of their right to enter the U.S. to seek asylum created a sense, among many, that they were an unstoppable wave—indeed the primary word used to describe the migrants was a "surge."[73]

Philosopher Zygmunt Bauman puts this reaction in the context of broader societal feelings of powerlessness in the face of globalization:

> [W]hile we can do next to nothing to bridle the elusive and faraway forces of globalization, we can at least divert the anger they causes us and go on causing, and unload our wrath, vicariously on their products, close to hand and within reach. This won't, of course, reach anywhere near the roots of the trouble, but might relieve, at least for a time, the humiliation of our helplessness and our incapacity to resist the disabling preciousness of our own place in the world.[74]

Likewise, he writes that "[t]hey are embodiments of the collapse of order, a state of affairs in which the relations between causes and effects are stable and so graspable and predictable, allowing those inside a situation to know how to proceed. Because they reveal these insecurities to us, refugees are easily demonized. By stopping them on the other side of our properly fortified borders, it is implied that we'll manage to stop those global forces that brought them to our doors."[75]

Respect for the rule of law underlies some part of these fears, and yet the rule of law concerns push and pull in different directions. Generally, fair and accurate implementation of laws is a fundamental aspect of respecting the rule of law, which encompasses such ideas as orderly entrance, due process rights, and—at opposite ends of the current political spectrum—legalization and enforcement.[76] Congress, in implementing the Refugee

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[72] Hansen and Borster, *supra* note __; Cindy Chang and Kate Linthicum, *U.S. Seeing a Surge in Central American Asylum Seekers,* L.A. TIMES (Dec. 15, 2013), at http://articles.latimes.com/2013/dec/15/local/la-me-ff-asylum-20131215/2.

[73] Muzaffar Chishti and Faye Hipsman, *Increased Central American Migration to the United States May Prove an Enduring Phenomenon* Migration Policy Inst. (Feb. 18 2016), at http://www.migrationpolicy.org/article/increased-central-american-migration-united-states-may-prove-enduring-phenomenon.

[74] ZYGNMUNT BAUMUN, STRANGERS AT OUR DOOR (2016) 17.

[75] Evans and Bauman, *supra* note __.

[76] As early as 1983, the Select Commission on Immigration and Refugee Policy noted the difficulty of agreeing on principles of the rule of law in the immigration context: "Of these three principles of immigration reform [including international cooperation, and the

Convention and in defining procedural due process at the border, has defined the rules that apply to migrants—from definitional (consider the Refugee Act incorporating the Refugee Convention's definition and protections into domestic law) to the procedural (the Trafficking Victims Protection Reauthorization Act of 2008 provides certain right and processes to unaccompanied minors at the border). Our Constitution delegates implementation and administration of these laws to the Executive, imbuing everything from administrative decision-making to detention policy with the validity of the "rule of law" mantel.

Recent Central American migration illustrates the extent to which rule of law concerns can determine or set policy. On the one hand, the rule of law at the border requires that government officials handle the case of each individual at the border in certain ways. For example, current law[77] requires that unaccompanied minors (from countries other than Mexico) be transferred to Department of Health and Human Services custody for release to the interior while their cases are heard. Likewise, children and adults expressing fear of return at the border are entitled by law to have those claims heard.[78] Those migrants who express a fear of returning are complying with the rule of law, by availing of protections written into our laws and policies.

On the other hand, large numbers of individuals arriving without visas at the border strains resources throughout the various agencies involved, and also creates a sense of immigration chaos, both of which undermine the rule of law.[79] Both those favoring protection and those favoring restriction see the lack of resources as a significant problem in this regard.[80] As a rare

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open society], the rule of law emerged as the most powerful and, strangely enough, the most controversial...It was the principle of the rule of law that had the most significance in forming the recommendations of the Commission, and yet was the most difficult to translate into recommendations. Lawrence H. Fuchs, *Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 438–39 (1983). For a demonstration of the current political competition for what constitutes the rule of law in immigration *compare* Russ Douthat, *The Great Immigration Betrayal*, N.Y. TIMES (Nov. 15, 2014), at http://www.nytimes.com/2014/11/16/opinion/sunday/ross-douthat-the-great-immigration-betrayal.html?_r=3 *with* Ilya Somin, *Obama, Immigration, and the Rule of Law (Updated)*, WASH. POST (Nov. 20, 2014), at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/20/obama-immigration-and-the-rule-of-law/.

[77] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(g), 122 Stat. 5044, 5081.

[78] 8 C.F.R. § 235.3(b)(4) (regulations for reasonable fear interviews in expedited removal proceedings); 8 U.S.C. § 1225(b)(1)(B) (providing for credible fear interviews).

[79] See, e.g., Bill O'Reilly, *Transcript: Why does illegal immigration chaos continue in the US?*, FOX NEWS, June 9, 2016, http://www.foxnews.com/transcript/2016/06/09/why-does-illegal-immigration-chaos-continue-in-us/.

[80] Josh Siegel, *Most in Surge of Child Border Crossers Aren't Leaving, Authorities Say*, THE DAILY SIGNAL (June 26, 2014) http://dailysignal.com/2014/06/26/surge-child-

point of agreement across the spectrum, it is worth elucidating exactly how the under-resourcing of these agencies undermines both protection and enforcement.

Consider the various agencies involved in this process. First, Border Patrol: The numbers alone would strain resources, but that strain is compounded by the complexity of laws the Border Patrol agents must administer as the "first responders" at the border, determining whether expedited removal is appropriate, transferring unaccompanied minors toward HHS custody, or sending other migrants toward USCIS for interviews to determine whether they have a credible fear of returning.

Second, USCIS: USCIS' obligation to have asylum officers conduct these interviews[81] has required detailing officers from asylum offices across the country to the border. This has resulted in tremendous backlogs at regional asylum offices, where individual asylum-seekers may now wait multiple years before having an initial asylum interview.

Third, Immigration Courts: Because the Administration has determined that these are priority cases for removal, Immigration Courts who must schedule initial hearings within 21 days of receiving a Notice to Appear, which creates the need to reschedule other lower-priority cases, and results in extremely crowded courtrooms, unpredictable dockets, lower-priority cases being delayed, and so forth.

The rule of law arguments therefore do not themselves lead toward one particular policy solution: deterrence would reduce the strain on the immigration system at the border and in the interior, yes, but potentially at a cost to legal obligations. Increased resources would also reduce the strain at the border and in the interior, while complying with international legal obligations, but at a fiscal cost in a time when loud and powerful factions within the U.S. demand fiscal restraint.

Nor does the actual scale of migration lead with clarity toward one view or another. The fear of migrants opening the floodgates of migration is a phenomenon with great staying power in immigration legal history. It forcefully counters arguments about even our duty of *non-refoulement*, let alone arguments for integration or broader temporary relief. Whether the present migration from Central America fits this definition of a flood almost certainly depends upon one's perspective,[82] but is also irrelevant to an

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border-crossers-arent-leaving-authorities-say/

[81] 8 C.F.R. § 208.30(d).

[82] In absolute terms, roughly 125,000 people arrived from the Northern Triangle in FY2014, out of a total of 1.3 million migrants worldwide to the U.S. in the same time period. United States Border Patrol, *Southwest Sectors*, at https://www.cbp.gov/sites/default/files/assets/documents/2016-Sep/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20August.pdf.

undeniable—not unchangeable, but presently undeniable fact: the migrants are coming.

For a while in 2015, the numbers of people arriving went down. The Obama Administration credits this reduction to a few strategies: public information campaigns in Central America discouraging migration; the use of detention at the border as a deterrent, and cooperation with Mexico to intercept migrants at Mexico's southern border.[83] The first of these likely had some impact, the deterrent power of detention has been widely questioned, and the involvement of Mexico likely accounts for most of the lower numbers. Yet in 2016, the numbers rose again, a testament to the enduring dynamics forcing migration from the region.[84] Despite a deterrent detention strategy, despite efforts to prevent migrants from reaching our borders in the first place, despite consistent messaging about the dangers of the journey, these migrants need safety and came.

As philosopher Ulrich Beck writes,

> We have been already cast (without having been asked) into a cosmopolitan condition of universal, humanity-wide interdependence. But we are still missing, and have not yet started in earnest to compose and acquire, an accompanying cosmopolitan awareness. This creates a kind of cultural lag, as William Fielding Ogburn would call it, the evidence of which is the treatment of the refugee. They may well remain the collateral victims of this lack of understanding until such time that we try in earnest to attend to that lag's institutional, state-based foundations."[85]

A focus on fears obscures the necessity of confronting this enduring reality.

B. What Duty to the Stranger?[86]

As noted above, a common theme in response to forced migrations is

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[83] Chishti and Hipsman, *supra* note __. ("While apprehensions at the U.S. border fell, apprehensions in Mexico rose significantly, suggesting that outflows from Central America remained fairly stable throughout 2015; many migrants were apprehended by Mexican authorities before reaching the U.S. border.") This policy has been criticized as restricting migrants' protection under international law. Georgetown Human Rights Institute, *The Cost of Stemming the Tide: How Immigration Enforcement Practices in Southern Mexico Limit Migrant Children's Access to International Protection* (2015), at http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/HRI-Fact-Finding-Report-Stemming-the-Tide-Web-PDF_English.pdf.

[84] MPI, *supra* note __ ("Despite the fluctuations in flows, the complex set of push and pull factors driving Central American migration has changed very little since 2014.")

[85] Ulrich Beck, *Cosmopolitan Vision*, quoted in Evans and Bauman, *supra* note __.

[86] A brief foray into the deep philosophical debates over duties to people outside one's

that articulated by President-elect Trump when he was campaigning. Asked about helping Syrian refugees, he responded "I'd love to help. But we have our own problems."[87] Leaving aside the argument that this may be a false choice, and that helping both populations could be possible, the quote names an intuition that has roots in a deep philosophical debate: to whom do we our duties? To our fellow citizens? To the stranger? To both in an equal degree, or in varying degrees? This debate is at least as old as the Greeks, where cosmopolitans contested the unique focus on the *polis*. This section focuses on how those debates have evolved in the modern era.

1. Justifying the Right to Exclude

Numerous philosophers find justification for prioritizing, perhaps exclusively, our fellow citizens. In his seminal SPHERES OF JUSTICE[88] Walzer considers that the right to exclude foreigners is a critical component of the right to self-determination for a community—the nation-state. In a succinct summary of his position, Amy Reed-Sandoval writes, "According to Walzer, the value and very nature of the goods that get distributed in political communities,"—here, we hear the echoes of Trump's statement about helping our own people—"is necessarily determined by the members of which these communities are comprised."[89] Walzer thus believes that membership is a "good that can be distributed" to be "determined by existing members of the community."[90] As applied to debates of migration in the United States, the idea here is that members of the United States polity—defined by citizenship—should be determining who shares in the polity's resources (including membership itself). As far as this goes, it simply reflects what is politically true, even in contentious times, namely that migration is a proper subject for legislation and national action, and is subject to limitations as defined by those laws and actions.

Finally, other philosophers have spoken of the right of communities to preserve culture or choose the pace of cultural change. David Miller articulates this, writing that people:

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borders is both necessary and impossible. Fortunately, for those interested in these debates, a wonderful collection of essays is available in THE ETHICS AND POLITICS OF IMMIGRATION: CORE ISSUES AND EMERGING TRENDS (ALEX SAGER, ED.) (2016) ("ETHICS AND POLITICS OF IMMIGRATION").

[87] Ian Hanchett, *Trump on Refugees: I'd Love to Help But We Have Our Own Problems*, BREITBART (Sept. 9, 2015), at http://www.breitbart.com/video/2015/09/09/trump-on-refugees-id-love-to-help-but-we-have-our-own-problems/.

[88] MICHAEL WALZER, SPHERES OF JUSTICE (1983).

[89] Amy Reed-Sandoval, *The New Open Borders Debate*, in ETHICS AND POLITICS OF IMMIGRATION, *supra* note __.

[90] Reed-Sandoval, *supra* note __.

> "want to be able to shape the way that their nation develops, including the values that are contained in the public culture. They may not of course succeed: valued cultural features can be eroded by economic and other forces that evade political control. But they may certainly have good reason to try, and in particular to try to maintain cultural continuity over time, so that they can see themselves as the bearers of an identifiable cultural tradition that stretches backward historically."[91]

This idea of the value of cultural preservation certainly animates part of the current immigration debates in the United States, the part expressed when people say "go back to where you came from" to those perceived as other (oftentimes regardless of whether they came from another country or were born in New Jersey or Indiana). It can, in such circumstances, conflate with racism and xenophobia, and critiqued as a consequence; there may equally be a concern removed from both racism and xenophobia about wishing, for example, to keep a democratic culture, or a culture that increasingly embraces women's rights or the rights of people of varying sexual orientations. This philosophical justification for closed borders is agnostic about the content of the culture being preserved (or reasons animating preservation), but acknowledges culture as a value sufficient to justify the idea of exclusion.

Even these various proponents of what Joseph Carens calls "bounded justice" recognize some level of duty to those beyond borders, however. Carens, who first powerfully articulated a philosophical defense of open borders, provides a nuanced articulation of those who find that "freedom of movement, equality of opportunity and distributive justice are not moral principles that transcend borders."[92] He sees how proponents of "bounded justice…do not deny that we have some moral duties to people outside our political community…for example, they usually acknowledge that we have a duty to address the plight of refugees, at least in part by admitting some of them."[93] Overall, however, he characterizes this view as one where;

> *There may be very significant differences between states in terms of*

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[91] David Miller, *Immigration the Case for Limits*, in Contemporary Debates in Applied Ethics (Eds. Andrew Cohen and Christopher Health Wellman) (2005), quoted in Wellman, Christopher Heath Wellman, *Immigration*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, EDWARD N. ZALTA (ED.) (2016), available at https://plato.stanford.edu/entries/immigration/#PolSelDet.

[92] CARENS, *supra* note __, at 256.

[93] Id.

> *the life chances that they offer their inhabitants, but this fact does not give rise to any strong moral claim for assistance from better off states to those less well off, or to a right for people to move from one state to another where prospects are better.*[94]

It is this lack of a strong moral claim that Carens addresses in his body of work, described briefly below.

2. Justifying Opening Borders

The chief case for acknowledging duties to those beyond our national borders comes from the work of Carens, but his work builds from the writing of John Rawls. In his A THEORY OF JUSTICE, Rawls argues that fair principles of justice depend upon devising those principles from behind a "veil of ignorance;" without knowing whether you were favored or disfavored in the society you were building (in terms of wealth or ability or other factors), what principles would be most likely to advance your interests?[95] Whatever principles people would agree to without knowing their standing in society are likely to be fair. He concludes that two principles would emerge. One would guarantee "equal basic rights and liberties needed to secure the fundamental interests of free and equal citizens and to pursue a wide range of conceptions of the good."[96] The other demands equality of opportunity.

Carens, in his seminal *Aliens and Citizens: The Case for Open Borders*[97] considered Rawls' arguments on a global level: would one choose borders if, *a priori*, one had no idea whether one would be born in a wealth and/or free society, or a repressive and/or poor society? In this "original position," again behind the veil of ignorance, borders act as "modern feudal privilege" locking citizens of certain countries into relative privilege, and citizens of other countries into poverty and danger. Carens argues therefore that borders do not meet the test set forth by Rawls. While an extreme idea in modern international relations, important examples do exist internationally and within countries. One is the European Union, which is being severely tested by the freedom of movement across countries within its jurisdiction. The other is the United States itself, whose Constitution upholds free movement across state borders.

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[94] Id.

[95] JOHN RAWLS, A THEORY OF JUSTICE (Ed. 1999).

[96] Samuel Freeman, *Original Position*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, EDWARD N. ZALTA (ED.) (2016), available at https://plato.stanford.edu/archives/win2016/entries/original-position/.

[97] Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POLITICS 251 (1987).

Whatever the philosophical arguments, open borders are simply not part of our political discourse on migration; while useful for establishing a moral and justice-oriented critique of borders, any contribution to a *political* conversation must accept the validity of borders.

3. Middle Ground

A middle ground between these two positions is sometimes labeled moderate, or weak cosmopolitanism. Acknowledging that we are citizens of both our nations and the world, this philosophy privileges duties owed to co-nationals, but recognizes a lesser set of duties that may yet be owed to non-nationals, such as these forced migrants. Immanuel Kant trod this middle ground, famously writing that "A visitor must not be treated in a hostile manner due to her arrival on the soil of another individual. The original inhabitant may, however, expel her, 'if it can be done without [her] ruin."[98] Kant's position has been described in many ways, oftentimes as a variation of "moderate cosmopolitanism" that sees us as both citizens of the world, a source of our duties to the stranger, and citizens of our own locality—and that peace in the world depends upon respecting the human rights of both groups.[99]

Since Kant, a tradition of "moral philosophers and moralists in the wake of eighteenth-century cosmopolitanisms have insisted that we human beings have a duty to aid fellow humans in need, regardless of their citizenship status."[100]

We also see philosophers examining how borders, once accepted as a practical matter, might be subject to certain exceptions, and seeking principles for such exceptions. Two ideas from this area are especially useful for thinking of Central American migration. One, from philosopher Shelly Wilcox, disaggregates "admission" from "membership."[101] She notes that a right to enter a country does not equate to a right of *membership* in that country, which introduces more flexibility than does Walzer's more binary discussion of membership (or not).

Within this flexibility, however, Wilcox finds a special duty to those whom a nation-state has harmed. This has particular relevance in the situation of migrants fleeing Central America, whose migration arises from a specific historical context with American roots. U.S. support of violent

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[98] Quoted in Gregor Noll, *Why Refugees Still Matter: A Response to James Hathaway*, 8 MELB. J. INT'L L. 536 (2007).

[99] Referencing "Toward Perpetual Peace" (1795), https://plato.stanford.edu/entries/cosmopolitanism

[100] ONORA O'NEILL, BOUNDS OF JUSTICE (2000).

[101] Shelly Wilcox, *Immigrant Admissions and Global Relations of Harm*, 38 J. OF SOCIAL PHILOSOPHY 274 (2007).

regimes in El Salvador, Guatemala, and Honduras (and contrasted that history with Nicaragua's self-determination, and subsequently stellar performance in providing security to its citizens relative to the Northern Triangle).[102] [Paragraph providing the "greatest hits" of our policy in the 80s.] Yet another, more modern, implication of the United States in the instability and insecurity of the region emerges from the war on drugs, the rise in gangs, and exporting of gangs to the Northern Triangle.[103]

> One need only contemplate that the term used to describe the gangs of Central America, maras, comes from the streets of Los Angeles, and that the rise of Central American gangs was precipitated by U.S. law enforcement policies that deported convicted gang members even when their lives and criminal histories had been shaped in the U.S."[104]

Acknowledging this context helps lift any policy responses—from protection to work on root causes—out of the realm of *noblesse oblige*, with the U.S. as a savior of the Northern Triangle charity-cases, and into a relationship of mutual obligation and, as developed in the next section, shared interest.[105] The broader historical context provides additional justification for an elevated United States role in providing meaningful refuge to these migrants. It also offers a principled reason why this migration situation might differ from others in the future, where the connection to U.S. policies is more attenuated.

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[102] Arturro Viscarra and Michael Prentice, *Children of the Monroe Doctrine: The Militarized Roots of America's Border Calamity*, Aug. 11, 2014, http://www.alternet.org/immigration/children-monroe-doctrine-militarized-roots-americas-border-calamity.

[103] Eyder Peralta, *Central American Presidents Say U.S. Shares Responsibility For Migration Crisis*, NPR, Jul. 24, 2014, at http://www.npr.org/sections/thetwo-way/2014/07/24/334942174/central-american-presidents-say-u-s-shares-responsibility-for-migration-crisis; Lowenthal, *supra* note __.

[104] Chantal Thomas, *Transnational Migration, Globalization, and Governance: Reflections on the Central America – United States Immigration Crisis*, in HANDBOOK ON INT'L LEGAL THEORY, OXFORD UNIV. PRESS (forthcoming).

[105] As Professor Jaya Ramji-Nogales has compellingly noted, concern for the Central American migrants overwhelmingly characterized their migration as a "crisis," devoid of context: [I]n the long term, the use of the label "crisis" obscures long-term systemic causes of situations of vulnerability and peril, framing them instead as epiphenomenal events that somehow snuck up on us." There is of course no discussion of the American appetite for drugs that fuels the cartels nor of the long-term causes of the extreme violence gripping the Northern Triangle countries of El Salvador, Guatemala, and Honduras…Rather than encouraging the creation of permanent institutions that might prevent future crises, the emergency rhetoric focuses attention on temporary solutions. Nogales, *supra* note __ at 8.

Matthew Lister is also attuned to the importance of context. In his work, he disaggregates forced migration into those who are admitted pursuant to the Refugee Convention, which requires a finding of persecution because of one of the Convention's protected grounds, and those who flee more generalize violence. Importantly, he connects the nature of harm experienced with the nature of protection afforded by the receiving state. He writes, "the best way to understand the normative point of refugee protection (or the logic of the refugee convention) is to see that it provides a particularly weighty *remedy* that is only appropriate when certain *special sorts of harm* are faced."[106] He understands that the remedy, which usually entails full membership, or a road to full membership, is highly valuable, just as Walzer posits. And he notes that it is "appropriate when the harm faced is serious, when it is not plausibly expected to be of short duration, and where other means of addressing the problem is not plausible."[107]

Lister uses these factors to provide justification for granting asylum to those fleeing harms where state authority has been usurped by persecutory actors, such as the criminal gangs in the Northern Triangle. But these same factors do permit a limiting principle for asylum, that it would not be available to all those fleeing difficult environments. By implication, in such circumstances, the plausible "other means" of addressing the problem, something short of the weight remedy of asylum, would be appropriate. Again, through an attention to situational distinctions, political philosophy recognizes both some level of duty to those beyond our borders, and some ability to differentiate the level of duty owed depending upon circumstances. This differentiation is the focus of the framework suggested in Part Iv, *infra.*

III. JUSTIFYING BROADER PROTECTION: PRAGMATISM

> *Historic notions of sovereignty have less real meaning in such circumstances, even if they are often vociferously articulated on both sides of the border. There is a stunning disconnect between quotidian reality and our concepts, policies and rhetoric. We cannot stop immigration by fiat nor can we easily avoid the impacts our society has on our closest neighbors, and that they have on us."*[108]

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[106] Matthew Lister, *Place of Persecution and Non-State Action in Refugee Protection*, in ETHICS AND POLITICS OF IMMIGRATION, *supra* note __, at 48 (emphasis added).

[107] Matthew Lister, *Place of Persecution and Non-State Action in Refugee Protection*, in ETHICS AND POLITICS OF IMMIGRATION, *supra* note __, at 48

[108] Abraham F. Lowenthal, *Op-Ed: The Underlying Significance of Central American Immigration*, BROOKINGS INSTITUTE, Aug. 3 2014, at https://www.brookings.edu/opinions/the-underlying-significance-of-central-american-immigration/.

Having established the fact of a situation that requires a response, and developed a philosophical justification for a broader response, the article now turns to pragmatic reasons for doing things differently, since the world is not offering a satisfactory "do nothing" option.

Our current system meets *none* of the diverse goals it is trying to meet, including promoting the rule of law, deterrence, administrative efficiency, accuracy, and wellbeing. Too often, these goals are set in opposition to each other, but when faced with goals that seem to undermine each other, we can consider changing the contours of the debate, lengthening or shortening the time-frame, or broadening or narrowing the geographic scope of ideas. The case of Central American migration shows how we can rethinking these goals to reduce the tensions among them, and generate options that better meet a variety of interests.

A. Deterrence: Short-Term Failures, Long-Term Possibilities

In the wake of Central American migration, the term "deterrence" has taken on specific meanings and political shadings. It is short-hand for efforts to prevent Central Americans from undertaking the journey to the United States, and happens in two ways. First, a deterrent policy advises migrants, prior to leaving, about the dangers of the journey, and the low likelihood of ultimate legal success in the United States.[109] Second, the deterrent policy leverages Mexican migration authorities to stop migrants at Mexico's own southern border, to cut down on the numbers reaching the United States,[110] and uses detention at the U.S. border as a further disincentive.[111] Deterrence is thus set up as being at odds with protection.

This dichotomy, while factually descriptive of existing policies, need not hold true. Consider the goals underlying meaningful deterrence:

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[109] See e.g., Valerie Hamilton, *How the US is Trying to Deter Migrants from Central America — with Music*, PRI, July 17, 2014, at https://www.pri.org/stories/2014-07-17/how-marimba-beat-helping-us-border-patrol-deter-migrants-coming-border.

[110] Georgetown Law Human Rights Institute, THE COST OF STEMMING THE TIDE: HOW IMMIGRATION ENFORCEMENT PRACTICES IN SOUTHERN MEXICO LIMIT MIGRANT CHILDREN'S ACCESS TO INTERNATIONAL PROTECTION, (Apr. 13, 2015), available at https://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/HRI-Fact-Finding-Report-Stemming-the-Tide-Web-PDF_English.pdf.

[111] "[A]s a result of our new emphasis on the security of the southern border, it will now be more likely that you will be apprehended; it will now be more likely that you will be detained and sent back; and it will now be more likely that your hard-earned money to smuggle a family member to the United States will be seized and will never reach its intended source." DHS, *Statement by Secretary Johnson Regarding Today's Trip to Texas* (Dec. 15, 2014), at https://www.dhs.gov/news/2014/12/15/statement-secretary-johnson-regarding-today's-trip-texas.

supporting communities in the Northern Triangle to make those communities safer for all; promoting the rule of law in the Northern Triangle; creating opportunities for orderly migration pursuant to the rule of law; and supporting the safety of the migrants themselves. Many of these goals are long-term projects, and considering deterrence in a longer-term context than is presently the case permits those on both sides of the political spectrum on this issue to find points of agreement, as well as to support the goals of many of the migrants themselves, who do not wish to leave home or undertake this voyage, but who see no option for themselves or their families.

Short-term deterrent measures, like the use of detention facilities and increasing security at Mexico's southern border, have failed because they do not address the root causes of why people choose to leave their homes.[112] Numerous reports have shown epidemic levels of violent crime in the three Northern Triangle countries,[113] and the gangs responsible for much of the crime operate in an organized fashion throughout the countries, reducing the effectiveness of an internal relocation option. Moreover, while the dangers of the trip to the United States are known, the imperative of leaving endemic violence paired with the *possibility* of a successful trip overrides that danger. As former INS Commissioner Doris Meissner has stated, "The research that we do know about is that people are very aware of the dangers, but they make the decision to try."[114]

A meaningful deterrent strategy would understand that those root causes cannot change immediately, and commit to medium-to-long-term work. This herculean task demands serious, sustained investment in foreign aid[115]

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[112] Professor Rebecca Hamlin states, "It's a realistic recognition that actually deterrence policies don't work…They might work when someone's only motivation to migrate is economic, but they really don't work—and this is consistently found all over the world—when it comes to people who are fleeing what they believe to be potentially a life-or-death situation." Priscilla Alvarez, *Obama's Last Attempt at Immigration Reform*, THE ATLANTIC, Aug. 8, 2016 (quoting Professor Hamlin), at https://www.theatlantic.com/politics/archive/2016/08/immigration-reform-central-american-refugees/494948/.

[113] Dennis Stinchcomb and Eric Hershberg, *Unaccompanied Migrant Children from Central America: Context, Causes, and Responses*, CLALS RESEARCH PAPER (Nov. 2014), available at: http://www.american.edu/clals/migrant-rights.cfm; Danielle Renwick, *CFR Backgrounder: Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (Jan. 19, 2016), at http://www.cfr.org/transnational-crime/central-americas-violent-northern-triangle/p37286.

[114] Valerie Hamilton, *How the US is Trying to Deter Migrants from Central America — with Music*, PRI, July 17, 2014 (quoting Commissioner Meissner) , at https://www.pri.org/stories/2014-07-17/how-marimba-beat-helping-us-border-patrol-deter-migrants-coming-border.

[115] http://www.worldpolicy.org/blog/2014/07/28/does-central-america-

paired with unprecedented commitment to improving governance and accountability in the sending countries, which are notoriously corrupt with entrenched elites who control both the political and economic spheres of their respective countries.[116] Former Vice-President Joseph Biden addressed this conundrum, noting both the importance of addressing such root causes and the political difficulties of doing so.

> "[Biden] lamented that domestic political concerns were preventing the leaders of those nations, who came to the White House last month to discuss the crisis, from taking the types of steps that Colombia has taken to curb narcotics and corruption under a U.S. assistance program known as Plan Colombia. 'Central American governments aren't even close to being prepared to make some of the decisions the Colombians made, because they're hard,' Biden said."[117]

Another piece of acknowledging the context, goes even deeper than foreign aid and encouraging governance reforms in the region. America's own role in the very conditions that fuel violence in these countries. Three phenomena in particular form this troubling role. First, the U.S. played a destabilizing role in the region in the 1980s, which is directly connected to the oligarchic, nondemocratic and unaccountable governance in those countries today.[118] Second, the U.S. is the destination for much of the drug traffic that passes through the region from drug-producing nations in South America. Third, U.S. deportation policy has had a significant effect on the rise of transnational gangs in the region; the gangs now destabilizing and terrorizing El Salvador, Guatemala, and Honduras, were born in the United States.[119]

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need-marshall-plan

[116] "Weak, underfunded institutions, combined with corruption, have undermined efforts to address gang violence and extortion… Tax revenues as percentage of GDP in the Northern Triangle are among the lowest in Latin America, exacerbating inequality and straining public services…There has been so much penetration of the state and so much criminal involvement in security forces, it makes it difficult to think about how they would [reform] without some outside intervention,' [Eric] Olson [of the Wilson Center] says." Danielle Renwick, *Backgrounder: Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (Jan. 19, 2016), at http://www.cfr.org/transnational-crime/central-americas-violent-northern-triangle/p37286.

[117] Associated Press, *Biden on minors at border: 'These are our kids'*, DAILY MAIL, Aug. 6, 2014, available at http://www.dailymail.co.uk/wires/ap/article-2718323/Biden-minors-border-These-kids.html#ixzz4GP69UNc2

[118] WILLIAM M. LEOGRANDE, OUR OWN BACKYARD: THE UNITED STATES IN CENTRAL AMERICA, 1977-1992 (1998).

[119] Sonja Wolf, *Maras transnacionales*: Origins and Transformations of Central

B. Short-Term Well Being

Any policies designed to address these root causes will need a generation or more to flourish, if past experience with international development and good governance programs is a guide.[120] If we admit that deterrence is a long-term project, then the next question is what to do in the short term. Again, we see that the status quo serves neither the United States nor for the migrants themselves. Because it is easy to see how the migrants' interests would be served by broader protection, the essay briefly addresses the far less intuitive claim that U.S. interests would *also* be served by broader protection.

The first piece of this claim centers on the rule of law. Court delays leave the migrants themselves in harmful limbo, straining to find lawyers, and perhaps not even having authorization to work while awaiting court. The delays also pose challenges to the governments of the cities, counties, and states where the migrants live; their liminal status may affect their ability to work, pay taxes, access health insurance, and more

The second piece of the claim centers on public safety, specifically the effect of uncertainty on gang recruitment, radicalization, and violence. The slow pace of the immigration system means many of those who will ultimately prevail live for years in the liminal space between being enforcement priorities and possessing lawful immigration status. This unsettling space pushes these migrants into vulnerable employment situations, puts education beyond the reach of many, and—for younger migrants—creates fertile ground for gang recruitment and attendant public safety issues.[121] Former Homeland Security Secretary Michael Chertoff commented that "when people do qualify for asylum and are moved into host countries, there has to be a process in place to integrate them, get them educated, make sure they can find work so they become productive members of society and not simply embittered clusters of people who are

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American Street Gangs, 45 LATIN AMER. RESEARCH REV. 256 (2010).

[120] Douglas Farah and Carl Meacham, *Alternative Governance in the Northern Triangle and the Implications for U.S. Foreign Policy*, Center for Strategic and International Studies (2015).

[121] For an in-depth analysis of the recent rise in gang-related violence in many cities in the United States, *see* Héctor Silva Ávalos, *The MS-13 Moves (Again) to Expand on US East Coast*, INSIGHTCRIME (Dec. 2, 2016), at http://www.insightcrime.org/investigations/ms13-moves-expand-us-east-coast. The phenomenon of Central American gangs has traveled back and forth between the United States, where it started, and Central America through deportations, with ongoing communications between the two regions. *See, e.g.* Clare Ribando Seelke, *Gangs in Central America*, CONGRESSIONAL RESEARCH SERVICE (Aug. 29, 2016), available at https://fas.org/sgp/crs/row/RL34112.pdf.

marginalized."[122]

Communities benefit by promoting migrant well-being. Worldwide, the costs of poor integration are on their most vivid display in Europe, with the rise in terrorism committed by "home-grown" terrorists—usually young people who feel alienated and without a meaningful connection to the society they live in.[123] Far from being an apology for terrorism, European nations are recognizing the need to address racial justice as a critical aspect of their own security. Zygmunt Bauman writes powerfully about the short-sightedness of demonizing refugees, instead of building bridges to them:

> [D]eceptively comfort-bringing (by chasing the challenge out of sight) in the short run, such suicidal policies store up explosives for future detonation…the sole way out of the present discomforts and future woes leads through rejecting the treacherous temptations of separation…Humanity is in crisis—and there is no exit from that crisis other than solidarity of humans.[124]

The World Economic Forum connected these migrant integration issues with national security concerns, and urged stakeholders in migrant-receiving countries to consider such measures as "work permits and access to jobs, skills recognition and training, and access to schools and public health services. At the same time, at the global level, the development community could help by focusing more strongly on building resilience and helping refugees to transition into self-reliance."[125]

The societal goods produced by integration are in tension, however, with any vision of these migrants as temporary—a tension that is impossible to resolve, but may be possible to reduce somewhat. The approach suggested in Part IV, *infra*, offers protection of less value and less permanence than the refugee convention provides, from concern that something highly valuable and durable would add a large pull factor to the

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[122] Donald Kerwin, *How Robust Refugee Protection Policies Can Strengthen Human and National Security*, 4 J. ON MIGRATION AND HUMAN SECURITY 83, 92 (2016) ("Human and National Security").

[123] *See, e.g.*, *France, Islam, terrorism and the challenges of integration: Research roundup*, HARV. KENNEDY SCHOOL (Nov. 16, 2015), at http://journalistsresource.org/studies/international/conflicts/france-muslims-terrorism-integration-research-roundup.

[124] BAUMUN, *supra* note __ (2016) 18-19.

[125] World Economic Forum, The Global Risks Report (2016), at http://www3.weforum.org/docs/Media/TheGlobalRisksReport2016.pdf. Don Kerwin notes of this WEF Report: "In other words, its diagnosis (crisis and risk) led it to identify security and protection as complementary needs." Human and National Security, *supra* note __, at 92

push-factors driving migration now—and possibly undermine the project of Northern Triangle safety. But the approach provides certain short-to-medium term status, permitting migrants to have some freedom and security within the United States, while keeping resettlement as the ultimate goal.

C. (In)Efficiency of Individualized Decisions

Another potential point of general agreement is the desire for administrative efficiency. Both the affirmative asylum system, for those who apply from within the United States, and the defensive system in immigration courts, for those who have been charged with removability, face extraordinary backlogs.[126] In part these systems are overwhelmed by the kinds of decisions the system must make. Complicated systems demand resources—governmental, private, and otherwise. And the protection mechanisms for many of those arriving from Central America are highly complex. Congress has created several categories within immigration law that offer some form of humanitarian protection to migrants who can establish their individual eligibility. As early as 2004, this set of approaches to protection was described as "piecemeal."[127] Humanitarian immigration sets out very specific categories: refugees and asylees; crime victims, with special provisions for human trafficking and domestic violence victims; and abused, abandoned, or neglected children. Although not designed with any specific nationality in mind, many of these forms of protection offer possibilities for Central American migrants.

As individualized options, applicants must make highly context- and fact-specific showings of eligibility, matching their situations to the nuances of caselaw and agency guidance. Once within such a category, these forms of protection generally lead quickly to permanent residence and, ultimately, citizenship, as described below. Such a path to citizenship makes these migration options highly valuable—and this article suggests that the difficulty and specificity of meeting the eligibility requirements makes sense in light of that value.[128]

1. Protection Derived from the Refugee Convention

The first set of humanitarian options all derive from the Refugee

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[126] Refugee Protection, *supra* note __, at 243.

[127] Carolyn J. Seugling, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 865 (2004).

[128] The value/difficulty trade-off shows up in reverse in the more broadly available Temporary Protected Status programs, among others, which have no such path to citizenship and which leave migrants in a liminal status that can last many years. Part III will explore these programs as a contrast to those discussed in the following sections.

Convention itself—asylum, withholding of removal, and Central American Minor status. While the eligibility for each of these does differ, all three require meeting the specific definition of a refugee. The definition of a refugee comes from the Refugee Convention, imported into the Immigration and Nationality Act through the 1980 Refugee Act,[129] and covers those who are "unable or unwilling 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."[130] There are thus multiple elements that must be met: someone must (1) have one or more of the five protected characteristics, (2) have experienced or fear persecution, (3) the persecution must be on account of the protected ground (the "nexus" requirement), and (4) the government must be unable or unwilling to protect them from this harm. It is available only through cases-by-case determinations. Early efforts to use asylum law to provide blanket coverage to certain nations failed.[131]

The Valuable Protection of Asylum: Asylum, as constituted in U.S. law, is both extremely narrow and relatively generous. The path to the status is narrow, constrained by the very specific definition of a "refugee," by evidentiary burdens, and by the complexity of the legal process. The reward for obtaining the status, on the other hand, is excellent, with its path to citizenship within approximately five years of being granted asylum. As Jaya Ramji-Nogales has written, "International refugee law's impressive power benefits only a select group of migrants who can fit within the narrow definition it lays out."[132]

The narrow availability of asylum was by design. As Refugee Convention scholar James Hathaway has written, the states drafting the convention needed to balance protection with pressures for restriction:

> The subjectivity of the refugee definition has provided a means of legitimating this restrictionist tendency: the strong political and economic links that exist between the West and many Third World states of origin have led to a predisposition to question the likelihood that those states could reasonably be expected to engage in persecutory behavior. … As a result, the persecution-based

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[129] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

[130] INA §101(a)(42).

[131] Martinez-Romero v. Immigration and Naturalization Service, 692 F.2d 595, (9th Cir. 1982) ("If we were to agree with petitioner's contention that no person should be returned to El Salvador because of the reported anarchy present there now, it would permit the whole population, if they could enter this country some way, to stay here indefinitely. There must be some special circumstances present before relief can be granted.")

[132] Ramji-Nogales, *supra* note __, at 4.

> standard now poses a major political impediment to the recognition of large numbers of refugee claims, humanitarian or human rights concerns notwithstanding."[133]

Consider the kinds of impediments which halt the paths of many fleeing violence in Central America. As seen in the definition, fear of generalized violence, no matter how likely, does not make someone eligible for asylum. "Persecution" signifies harm inflicted "in order to punish," and as the seminal *Acosta* case notes, "the word does not encompass the harm that arises out of civil or military strife in a country."[134] At the outset, then, those fleeing gang violence *generally* are excluded from the definition of a refugee, unless they can prove that violence is intended to punish them for one of the protected characteristics (a nexus problem). In the context of societies where violence is pervasive, proving the specific intent of the persecutor vis-à-vis a protected characteristic is difficult. The burden of proof is on the applicant[135] to demonstrate through testimony and, in most cases, through extensive corroborating evidence[136], that the harm they fear would be because of a protected characteristic that they have.

Even when applicants understand why the gang or the government is targeting them, that reason may still not fit the refugee definition. For example, gangs frequently target girls because of their gender, but U.S. law does not recognize gender as a particular social group because it is too broad.[137] Likewise, many migrants who run small or family businesses have been threatened with death if they do not make extortion payments to the gangs—and yet "business owner" is not a reliable "particular social group" as courts have found occupations to be changeable. An applicant who is able to find a creative lawyer might be able to develop a definition of their protected category that works, but as discussed below, this requires a sophisticated synthesis of the facts with the caselaw, which generally requires a lawyer well-versed in asylum law.[138]It also often requires time-

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[133] James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 169–70 (1990)

[134] Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985).

[135] 8 C.F.R. §§ 208.13(a); 208.13(b)(2)(iii)

[136] REAL ID Act of 2005, H.R. 418, 109th Cong. (2005).

[137] This makes the U.S. an outlier in international law, but the Refugee Convention purposefully permits countries to make their own determinations on matters such as this. Susan F. Martin, *Gender and the Evolving Refugee Regime*, 29 REFUGEE SURVEY QUARTERLY 104 (2010).

[138] TRAC examined data on "women with children" cases, as many of these Northern Triangle cases are classified. "While most cases are still pending, two strong patterns are already emerging: Less than 30 percent of these families have been able to find representation. Without representation, women with children almost never prevail even after they are able to demonstrate "credible fear" of returning to their own country — only

consuming appeals, as described below, and the development of amicus briefs, and litigation in federal circuit courts, all of which takes enormous resources and exacts an often-heavy price. Nonetheless, through this work, people fleeing Central American violence *are* often winning their asylum cases. The path is narrow, but the path exists.

Once won, asylum is a valuable form of protection, offering as it does a fairly rapid path to citizenship: permanent residence is available after one year, with its date of issuance back-dated one year. Four years later, if no special issues like criminal problems arise in the interim, the individual can apply for citizenship.[139] The status also permits the asylee to work lawfully immediately, to bring family members in to the United States, to travel on a refugee travel document, and to access some medical, job-training and other benefits for a period of eight months. Although scholars have justly called for improvements to the support system in place for asylees,[140] asylum can be seen rightly as a form of both protection *and* integration, and is highly valuable as a result.

Professor James Hathaway has written of the conundrum created by the high value of integration-oriented systems like asylum in the United States, nothing that "Refugee law is… fundamentally a mechanism of human rights protection, not a mode of immigration. By erroneously insisting on an absolutist linkage between refugee status and a right of permanent immigration, advocates raise the stakes for governments."[141] Keeping asylum status valuable and narrow, while designing a different form of protection with broader availability but les value may be the satisfactory solution to this conundrum, and the article suggests precedents and contours for that protection in part III, *infra*.

Less Valuable Withholding of Removal: Withholding of removal, under INA § 241, shares much in common with asylum, but is dramatically less valuable. It is in one way harder to obtain: based on the same refugee definition that asylum-seekers must meet, withholding applicants must show not simply a well-founded fear of persecution (a roughly 10% chance of harm occurring), but show that the harm would be "more likely than not," or a greater than 50% chance.[142] At the same time, withholding is

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1.5 percent were allowed to stay. While few decisions have occurred in represented cases, the win rate thus far has been 26.3 percent." TRAC |Immigration: *Representation is Key in Immigration Proceedings Involving Women with Children*, available at http://trac.syr.edu/immigration/reports/377/ (last checked Aug. 4, 2016).

[139] USCIS, *Green Card for Asylee*, at https://www.uscis.gov/green-card/green-card-through-refugee-or-asylee-status/green-card-asylee.

[140] Lindsay M. Harris, *From Surviving to Thriving? An Investigation of Asylee Integration in the United States*, 40 N.Y.U. REV. L. & SOC. CHANGE 29 (2016).

[141] Hathaway, *supra* note __ 96.

[142] INA § 241(b)(3)(B); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421(1987).

more expansive because it is not discretionary like asylum. Someone eligible for asylum might be barred from the relief because they applied more than one year after arriving in the United States or because they have criminal convictions that would put discretionary relief out of reach.[143] The same is not true for withholding.

If granted withholding, the individual may work lawfully, and may not be removed to the country where he or she faces persecution, unless circumstances there change. Withholding status, however, means that the individual cannot do many of the other things an asylee can, such as travel, file applications to reunited with family members, or access the public benefits available to asylum-seekers. Most significantly, there is no path from withholding status to lawful permanent residence and, ultimately, U.S. citizenship. With these limitations, it is significantly less valuable than asylum. It is a close approximation of the *non-refoulement* principle at the heart of the Refugee Convention, which was intended to be quite a basic form of protection, without the more robust protections and integrative features of asylum, which were features that the Convention left up to individual states to grant or not, in the state's discretion.

Malleability and its Costs: The Refugee Convention, with its specific post-World War II orientation, has been broadly critiqued as not having the flexibility to respond to the different kinds of migrations the world sees today. Such critiques have come powerfully from the environmental scholars, who see its limitations as rising oceans take the place of refugee convention persecutors in forcing people's migration. Feminist scholars have also sharply criticized the "universality" of a convention that failed to include gender as a protected ground.[144] Nonetheless, the definition of a refugee from the Refugee Convention is and always has been malleable at its edges, with national implementing laws and policies, and individual adjudications, adapting to new situations[145] and UNHCR sharing these national-level developments with Convention-signatories more broadly.[146]

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[143] If an applicant has committed a particularly serious crime (or crimes), the applicant may be ineligible even for withholding. INA §241(b)(3)(B); 8 C.F.R. §208.16. This reflects the Refugee Convention's concern that states not be forced to accept dangerous refugees. The Convention's exclusion clause, 1F, excludes from the definition of a refugee those who have "committed a crime against peace, a war crime, or a crime against humanity" or who have "committed a serious non-political crime outside the country of refuge." Refugee Convention § 1F.

[144] See, e.g. Jacqueline Greatbatch, *Gender Difference: Feminist Critiques of Refugee Discourse*, 1 Int'l J. Refugee L. 518 (1989).

[145] James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129 (1990).

[146] Deborah Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 137 (2002) ("Generally, the UNHCR tries to synthesize and advance the best practices of states, and mediates among different protection systems... Non-binding

The flexible boundaries of the framework embrace the work of creative advocates, who have expanded the range of claims protected under the Convention across the decades since its implementation. This is especially true with the protected ground of "membership in a particular social group" where many gender-based violence and gang-related claims fit. It is also true with political opinion (explicit and implied, alike), as Debbie Anker and Palmer Lawrence have powerfully argued,[147] but in this section I focus on the developments within the particular social group, or PSG, arena.

Even in the United States, which has a more limited approach to understanding PSGs than many other countries,[148] litigation has expanded the understanding of how PSGs apply to Central American forced migration on at least two fronts. First, in recent years, new PSGs have emerged as viable bases for seeking asylum. We have seen the approval of such PSGs as "women who are viewed as property and unable to leave the relationship,"[149] "former gang member,"[150] and "family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses."[151]

Second, litigation has clarified the "nexus" standard for showing that persecution is "on account" of a protected ground. [152] While "family" has long been seen as a quintessential social group,[153] in Hernandez-Avalos, the government challenged asylum for lack of evidence that persecution was

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norms articulated by the UNHCR influence the standards for protection in both legalized and non-legalized settings.")

[147] Deborah Anker and Palmer Lawrence, *"Third Generation" Gangs, Warfare in Central America, and Refugee Law's Political Opinion Ground*, 14-10 IMMIGR. BRIEFINGS (Oct. 2014), available at https://harvardimmigrationclinic.files.wordpress.com/2013/02/14-10-immigr-briefings-1.pdf.

[148] In the U.S., PSGs must be innate, socially distinct, and sufficiently "particular"—the third piece of which sets the U.S. apart from nations like Canada, Australia, and the U.K., as well as from UNHCR which notes that "The Board's application of the "particularity" requirement appears to stem from a general concern about the potential for unlimited expansion of the social group ground. This concern is misplaced. First, it is a well- established principle that 'the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.'" Enriquez v. Holder, UNHCR Amicus Brief, at p.21, available at http://immigrantjustice.org/sites/immigrantjustice.org/files/Henriquez-Rivas%20UNHCR%20Brief.pdf (citing to the UNHCR, *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*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), ¶18).

[149] Matter of A-R-C-G-, 26 I. & N. Dec. 388 (BIA 2014).

[150] Martinez v. Holder, 740 F.3d 902 (4th Cir. 2014).

[151] Crespin-Valladares v. Holder, 632 F.3d 117, 121 (4th Cir. 2011)

[152] Anjum Gupta, *Nexus Redux*, 90 IND. L.J. 465 (2015).

[153] Acosta, *supra* note __.

"on account of" that group membership; in 2014, the Fourth Circuit held that

> To prove that persecution took place on account of family ties, an asylum applicant "need not show that his family ties provide 'the central reason or even a dominant central reason' for his persecution, [but] he must demonstrate that these ties are more than 'an incidental, tangential, superficial, or subordinate reason' for his persecution."[154]

Creative lawyers are thus often able to expand the law's understanding of who might fit within the refugee definition—both through individual litigation, and through advocacy, such as the work to have the federal government issue long-delayed gender guidelines.[155] As one example shows, however, the important incremental adaptations of the law come at a significant expense.

The case in question is Martinez v. Holder,[156] a case litigated by the University of Maryland Immigration Clinic (led by Professor Maureen Sweeney). The Clinic represented a young former gang member, Julio Martinez, whom the US wanted to remove back to El Salvador. As Mr. Martinez was detained, his first victory was securing representation at all—most detainees do not.[157] His second victory was securing the kind of creative, diligent lawyers he did, through the clinic and Professor Sweeney, who prepared his claim for withholding of removal.

The evidence-intensive hearing in [date] took [get estimated # of hours from Maureen], and their client lost at that point, with the Immigration Judge concluding that Mr. Martinez was not in a protected group. Specifically, his proposed membership in a particular social group claim failed because the group needed to have a "common, immutable characteristic" and "voluntary association with a criminal gang" was unacceptable. The clinic appealed the case to the Board of Immigration Appeals, which upheld the judge's decision in October 2012. Undaunted, the clinic appealed to the Fourth Circuit Court of Appeals, briefed the issues, gathered amici, and made oral arguments in October 2013. Mr. Martinez emerged victorious in January 2014 when the Fourth Circuit

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[154] Hernandez-Avalos v. Lynch, 784 F.3d 944, 949 (4th Cir. 2015).

[155] See Schoenholtz, *supra* note __.

[156] Martinez v. Holder, 740 F.3d 902 (4th Cir. 2014).

[157] One recent study from New York showed that 60% of detained immigrants went unrepresented, and of those transferred to detention centers outside New York 79% lacked counsel. Study Group on Immigrant Representation, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* (Dec. 2011), at https://www.ils.ny.gov/files/Accessing%20Justice.pdf.

adopted Professor Sweeney's legal reasoning—although there were additional bumps in the road that took even more work to iron out even after the Fourth Circuit victory.

The process was arduous, for client and lawyers alike. Professor Sweeney notes the financial and emotional burdens that the process placed on Mr. Martinez and his family. The burden on the lawyers is not insignificant, either. Others have identified the significant issue of lawyer burnout and secondary trauma that arises in difficult cases like the Martinez case. There is also a lurking efficiency problem: imagine how many people could have been helped with the same time and energy, if we had laws that required less of a fight.

The efficiency of using litigation to change the law has been long debated, and found robust support from Justice Oliver Wendell Holmes to Judge Posner.[158] Common law has been seen as producing "just rules' and being "elastic and flexible and so could adapt itself to new circumstances while statutes could not change without legislative action."[159] In other scholarship, I have strongly endorsed the flexible discretionary edges of judicial decision-making. The point being made here is limited to this: as a way of responding to the immediate needs of a relatively large group of forced migrants, litigation is not going to be enough—and the nature of the limitations built into the refugee convention itself means that even expanded understandings of the "malleable" definitional framework will hit limits as a means of addressing this forced migration.

2. Other Forms of Protection

Other forms of protection do supplement the Refugee Convention already, and provide protection for some of those fleeing violence in Central America, but even these have important limitations as applied to forced migrants. Even with these options augmenting the Refugee Convention options, our protection patchwork still leaves significant gaps, because none was designed with this forced migration in mind. A chart comparing these options is available in Appendix A.

SIJS: Many Central American migrant children will qualify for Special Immigrant Juvenile Status (SIJS), a path toward permanent residence for those who, broadly speaking, have been abused, abandoned, or neglected (or similar) by one or both parents, and whose return to their home country would not be in their best interests. There is a significant area of overlap between the children fleeing Central America on account of the violence

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[158] Nuno Garoupa & Carlos Gómez Ligüerre, *The Evolution of the Common Law and Efficiency*, 40 GA. J. INT'L & COMP. L. 307, 309 (2012).

[159] Andrew P. Morriss, *Codification and Right Answers*, 74 CHI.-KENT L. REV. 355, 376 (1999).

there, and the children eligible for SIJS. Parental abuse, abandonment or neglect increases a child's vulnerability to violence there. Violence in the home can leave a child with few options but to spend more time on unsafe streets. An abandoned child has less protection from gang predations or, especially with girls, sexual assault (whether gang-related or not).

I have written elsewhere about the complexity of this process, which looks a little bit different in every juvenile court in every sub-state jurisdiction across the country, and which also leads to disparate results that depend upon where a child leaves.[160] The complexity makes it essential for the children to have lawyers—but also requires those lawyers to possess an unusual set of competencies, which limits the pool of available lawyers.[161]

Beyond the practical difficulties of fulling implementing SIJS as a protective form of immigration status for children, there is the problem that SIJS was simply not intended to be a broad source of protection, which is creating political backlash from some quarters. SIJS had a narrow purpose initially, for a specific subset of noncitizen children in foster care. Expansions over the intervening years have broadened the eligibility considerably, but with significant pushback from the Department of Homeland Security through interpretive memoranda and through the caselaw emerging from adjudications. Advocates for children rightly push for as many of the affected Central American children as possible to benefit from this means of achieving safety, but their collective success has reinforced an idea from DHS[162] and, more recently from Congress[163], that

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[160] Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33 (2016).

[161] "The work of representing vulnerable children in immigration proceedings required a large number of *pro bono* lawyers to become overnight experts in the intersection of two highly-specialized areas of the law: immigration removal defense, and child custody, guardianship and dependency proceedings. Immigration litigation is always difficult, but the children's cases raise a host of special challenges." *Id*., at __ (internal citations omitted).

[162] DHS U.S. Citizenship and Immigration Services Administrative Appeals Office (AAO), which has appellate authority over SIJS decisions and which may issue precedent decisions binding upon the adjudicating officers. As documented by Professor Fisher Page, the AAO is not supposed to "look behind" the state orders if they are facially sufficient, yet does so often, with the result that a child who succeeded at the state level fails at the federal level. Then, in 2016, the Department of State announced that the numbers available for SIJS visas from the Northern Triangle would be over-subscribed as of DATE. USCIS, *Special Immigrant Juveniles (SIJ) Status*, at https://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status.

[163] Congress periodically considers SIJS, and under its Republican leadership, sees the program as a vehicle for fraudulent immigration. In March 2015, the House Judiciary Committee Chair Bob Goodlatte wrote to DHS Secretary Jeh Johnson asking him to address fraud in light of a recently-televised investigative report into fraudulent SIJS claims in New York concerning migrants from India. Bob Goodlatte, *Press Release: Goodlatte to*

the system is not working as envisaged.

Moreover, many of those fleeing the Northern Triangle simply do not fit within SIJS eligibility. Anyone over the age of either 18 or 21 (depending upon an individual state's law) is too old for the program. And those who meet the age requirements may not have a parent who abused, abandoned, or neglected them. A child who fears gang violence but who has two loving parents will not benefit from SIJS, even when SIJS is applied as expansively as possible. SIJS thus offers only a limited supplement to protection for those fleeing Northern Triangle violence.

Convention Against Torture: In another individualized remedy, Article III of the Convention Against Torture (CAT) offers relief from removal for individuals who fear torture in their home countries—so long as the torture would be committed by government agents, or with the acquiescence of government agents. In FY2015, 621 individuals received withholding or deferral of removal under the Convention, while 9,858 were denied—a 6.3% grant rate.[164] The low grant rate captures the narrowness of the relief. CAT's requirement of government participation in or acquiescence to torture sets a high bar for relief. Acquiescence is tightly construed. [165] In a

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Secretary Johnson: Changes Needed to Reduce Fraud in Immigration System (Mar. 19, 2015), at http://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=298. (Advocates responded that the better response was to provide more judges for the overburdened New York family court, not to close down the SIJS program.) Lindsay Kaley and Kim Susser, *Setting the Record Straight on SIJS*, N.Y. LEGAL AID GROUP (Mar. 23, 2015), at http://nylag.org/blog/2015/03/setting-the-record-straight-on-sijs; Kirk Semple, *Federal Scrutiny of a Youth Immigration Program Alarms Advocates*, N.Y. TIMES (Mar. 31, 2015), at http://www.nytimes.com/2015/04/01/nyregion/federal-scrutiny-of-a-youth-immigration-program-alarms-advocates.html?_r=0.

USCIS has acknowledged the need for better fraud protection; one motivation behind its decision to centralize adjudications of SIJS claims in 2015 (implementation is still in process) was to reduce fraud. Director Rodriguez noted in testimony to Congress about the work of the Fraud Detection and National Security Directorate (FDNS) that "Centralization will better leverage and develop the expertise of personnel adjudicating SIJ benefits, to ensure consistency and better identify fraud indicators and trends." DHS, *Written Testimony of USCIS Director Leon Rodriguez for a House Committee on the Judiciary, Subcommittee on Immigration and Border Security Hearing Titled "Oversight of U.S. Citizenship and Immigration Services"* (Dec. 9, 2015), at https://www.dhs.gov/news/2015/12/09/written-testimony-uscis-director-house-judiciary-subcommittee-immigration-and-border.

[164] U.S. Dep't of Justice, *Executive Office for Immigration Review FY 2015 Statistics Yearbook*, at https://www.justice.gov/eoir/page/file/fysb15/download (Table 14, on page M1, includes data for withdrawn and abandoned CAT claims, and a large number marked "other" without explaining what "other" signifies. Likely, other includes those who filed asylum or withholding applications alongside their CAT claim, and won relief on one of the other grounds.)

[165] To demonstrate "acquiescence" by Colombian Government officials, the respondent must do more than show that the officials are aware of the activity constituting

typical case denying CAT protection, the First Circuit found that Salvadoran police failure to help in extortion cases did not constitute "acquiescence" to gang extortion.[166] In some Circuits, there is a slightly more expansive reading of acquiescence to include "willful blindness" by the government.[167]

Despite the high standard, individuals fleeing gang violence may qualify for CAT protection when the facts of their particular case demonstrate a close connection between the police or army officials and the persecution. Gang infiltration of the police is well documented, especially in El Salvador,[168] and is also a known phenomenon in Honduras[169] and Guatemala. If an individual makes a persuasive showing about government involvement or acquiescence, CAT provides limited benefits. It is available whether or not the migrant has serious criminal convictions, but a CAT victory only means relief from removal and work authorization; recipients have no path to permanent residence and citizenship, and may be indefinitely detained by DHS if deemed too dangerous for release to the community.

Visas for Crime Survivors: Finally, some Central American migrants, once here, may qualify for visas after being victims of a serious crime. Because of the vulnerabilities of new immigrants, and especially undocumented immigrants who have difficulty finding secure employment or safe housing, some percentage of the migrants will be victims of crimes, ranging from assault to robbery to rape to human trafficking.[170] Any of these, and more, provide a basis to possible immigration relief through the

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torture but are powerless to stop it. He must demonstrate that Colombian officials are *willfully accepting* of the guerrillas' torturous activities. In Re S-V-, 22 I. & N. Dec. 1306, 1312 (BIA 2000). The Ninth Circuit expanded this standard to include governmental "willful blindness" to torture. Zheng v. Ashcroft, 332 F.3d 1186, 1195 (9th Cir. 2003).

[166] Granada-Rubio v. Lynch, 814 F.3d 35, 39-40 (1st Cir. 2016). *See also* Amouri v. Holder, 572 F.3d 29 (1st Cir. 2009) (denying protection because government failure to control gangs did not amount to "acquiescence" under CAT).

[167] *See, e.g.*, Amir v. Gonzales, 467 F.3d 921, 927 (6th Cir. 2006) (joining the Ninth and Second Circuits in accepting a "willful blindness" standard for acquiescence).

[168] Mimi Yagoub, *480 Gang Members Infiltrated El Salvador Security Forces: Report* INSIGHT CRIME (Feb. 22, 2016), at http://www.insightcrime.org/news-briefs/did-480-gang-members-infiltrate-el-salvador-security-forces.

[169] Danielle Renwick, *Backgrounder: Central America's Violent Northern Triangle*, COUNCIL ON FOR. RELATIONS (Jan. 19, 2016), http://www.cfr.org/transnational-crime/central-americas-violent-northern-triangle/p37286.

[170] Garance Burke, *Feds' Failures Imperil Migrant Children*, ASSOC. PRESS (Jan. 25, 2016), at http://bigstory.ap.org/article/cc07b82ec58145cca37d6ff952f334c1/ap-investigation-feds-failures-imperil-migrant-children; Mary Turck, *Opinion: Central American Children Face New Peril in the United States*, AL JAZEERA (Jan. 30, 2016), at http://america.aljazeera.com/opinions/2016/1/central-american-children-face-new-peril-in-the-united-states.html.

U visa (for victims of a large number of fairly serious crimes) or the T visa (for victims of human trafficking). So long as the migrants cooperate with the investigation or prosecution of the crime, and in the case of U visas, they live in a jurisdiction where officials provide the required certification, they may be able to apply for one of these visas, which then puts them on a path toward permanent residence and citizenship. Some number of Central American migrants may qualify for these, but the remedy is disconnected from the reason for migration, and eligibility is a happenstance of who is unfortunate enough to be re-victimized by crime once in the United States.

Humanitarian Parole: DHS has the ability to issue humanitarian parole (HP) to temporarily admit someone who has no other lawful way to enter the United States.[171] It issues humanitarian parole only under compelling humanitarian circumstances. It is implicitly part of the Central American Minor (CAM) program, which relies upon the parole authority, but is *could* be available to those without the CAM's requirement of a qualifying relative in the United States. Nothing in the parole authority precludes that result. However, in practice, HP is granted extremely rarely.[172] Moreover, we have seen from other programs like DACA, that delineating clear eligibility criteria inevitably creates clear ineligibility criteria that reduces the likelihood of being granted broader relief (like deferred action, in the DACA context).[173] The CAM program provides clear criteria for those fleeing the Northern Triangle who qualify, and it seems unlikely that those falling outside the criteria could qualify for broader HP absent extremely compelling circumstances. Furthermore, as "parole" signifies, it is not a sturdy immigration status. Indeed, it does not even legally constitute an admission to the United States, as if the border were a rubber band around the individual paroled in.[174] There are no benefits attached to parole, except for the intrinsic benefit of achieving temporary safety (in the case of Central American migrants using HP to flee danger).

As Don Kerwin, Director for the Center on Migration, notes, such programs, long with Temporary Protected Status, "rest primarily on executive discretion, fail to cover numerous at-risk populations, and do not typically lead to permanent status or other durable solutions."[175]

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[171] INA§ 212 (d)(5)(A).

[172] USCIS estimates that worldwide, approximately 300 people annually receive humanitarian parole. USCIS Refugee, Asylum and International Operations Directorate, *Humanitarian Parole Program* (Feb. 2011), at https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Humanitarian%20Parole%20Program.pdf.

[173] Elizabeth Keyes, *Deferred Action: Considering What Is Lost*, 55 WASHBURN L. J. 129 (2015).

[174] INA § 212(d)(5)(A)

[175] Kerwin, at 2.

D. High-stakes accuracy

In a system reliant upon individualized determinations, accuracy of those determinations matter. Where relief is valuable, there is an inevitably a desire to squeeze an individual into a framework not intended for that person's case. Marc Rosenblum, of the Migration Policy Institute, has written about the importance of making accurate determinations, despite the challenges of doing so: "A fundamental immigration policy challenge is how to protect vulnerable populations while restricting the admission of people who may be fleeing deeply difficult conditions but lack valid claims to humanitarian protection in the United States."[176] Rosenblum's assessment is descriptively accurate of a system in which protection is individualized.

It is especially true of a system in which the path to eligibility for individualized protection is legally and procedurally complex, as discussed immediately above.[177] With the high-value benefit of asylum comes a stringent screening process that rightly separates out those who qualify from those who do not. Robust implementation of the rules we have now is critical, and the critique that the Government lacks resources to do so adequately is both important and accurate.[178] Writing about a different context, but one with familiar tensions, one scholar shows how injustices result when complex laws are administered without sufficient resources to make accurate determinations.[179] He writes, "[T]he numbers versus rights

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[176] Rosenblum, *supra* note __, at 16.

[177] Regarding the earlier Rosenblum quote: First, there is implicit in this dichotomy a notion of humanitarian protection as charity; humanitarian protection, in all its forms, can be seen as rooted in an almost moral-contract between the state and the individual receiving state protection—which heightens the need for ensuring a high degree of accuracy that the person receiving protection is eligible for the protection. The United States, understandable, does not want its humanitarian impulses "taken advantage of" by undeserving individuals. Such an idea is normatively appealing, and in large part defensible, but must be challenged by acknowledging the United States role in driving the migration—which makes the relationship more complex than savior-supplicant, an idea explored in section __, infra.

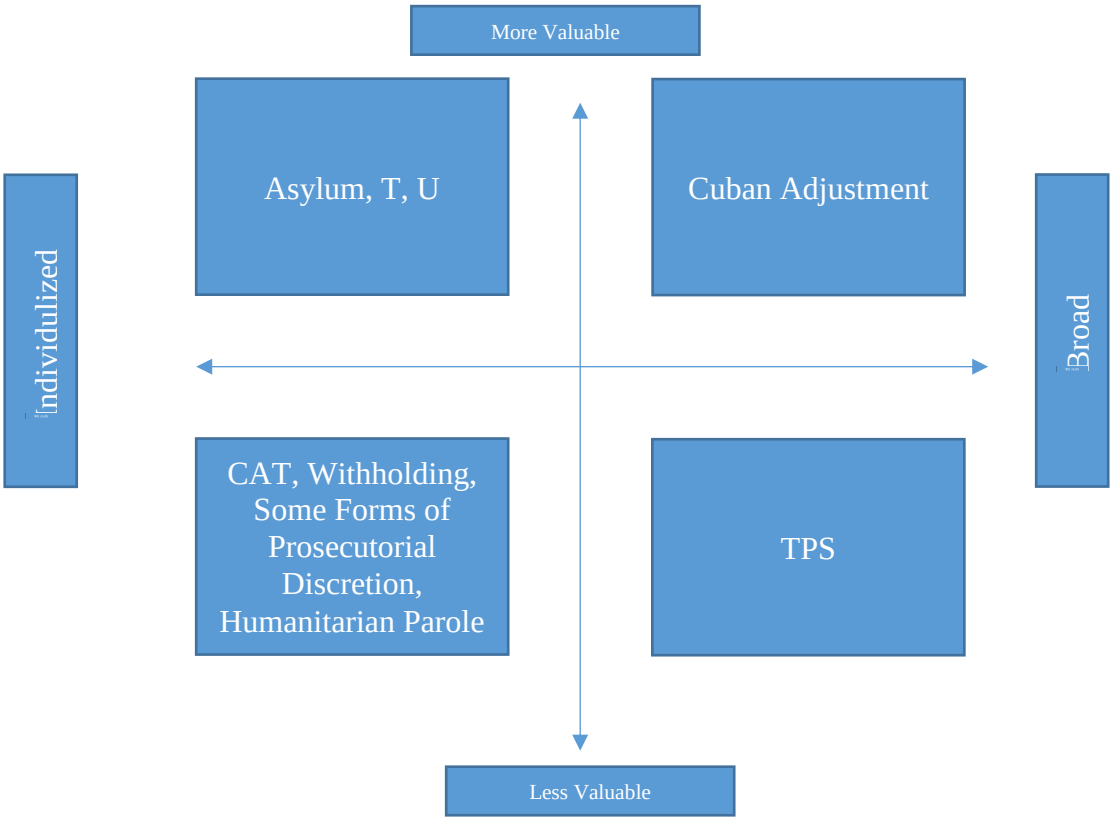
[178] As one scholar noted about a different forced migration context, "An interdependency however between the lack of proper legal framework and overburdening in cases where the institutions are obviously running out of capacities to perform their mandate as anticipated can lead to tragedies as the one in Cairo [where 20 asylum-seekers were killed in 2005 while protesting the lengthy process in harsh conditions for hearing their claims]."Maja Smrkolj, *International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination*, 9 GERMAN L.J. 1779, 1780 (2008); Brian Whitaker, *20 Killed as Egyptian Police Evict Sudanese Protestors*, THE GUARDIAN (Dec. 30, 2005), at https://www.theguardian.com/world/2005/dec/31/sudan.brianwhitaker.

[179] Meher Talib, *Numbers Versus Rights: State Responsibility Towards Asylum Seekers and the Implications for the International Refugee Regime*, 27 GEO. IMMIGR. L.J. 405, 419-

trade-off is an empirical trend that results from this incoherency, the implications of which challenge the fundamental principles of the international refugee regime."[180]

The importance of accuracy in a high-stakes protection regime, beyond being normatively important, also reveals an important underlying premise that this article challenges: resignation and adaptation to the complex and narrow rules that we have. If a system depends upon high levels of resources to function even at the most basic level, a rule of law analysis suggests only two possible answers. One answer is to allocate sufficient resources for the present system to function as designed—something that has thus far failed as a political matter, with the resulting strain on multiple government agencies. The other answer is to imagine a new system that could function well within the resources available. It is to this task that the article now turns.

Figure: Showing Where We Are Now



421 (2013)

[180] Talib, *supra* note __.

IV. CONCEPTUALIZING BROADER PROTECTION FOR TODAY'S FORCED MIGRANTS

In this section, the Article suggests a framework that takes into consideration the moral, historical, and pragmatic justifications for responding. Given the array of competing interests and tensions laid out already in this article, it is clear that a perfect solution is simply not possible. The host of impossible contradictions leaves us with only two options: do nothing, or do something less-than-perfectly satisfactory. The political environment that this particular situation confronts also makes many of these goals, even if feasible as a policy-matter, unobtainable politically.

This article, however, is more concerned with changing and broadening the norms and discourse around protection by contributing to the growing recognition that protection means more than refugee protection, and that our current patchwork system creates untenable resource strains that undermine *all* the possible goals of a protection regime, from humanitarian goals to self-interested goals.

Countries around the world have long looked for local and regional approaches to population displacements.[181] Generally, the United States has been geographically removed from the need for such regional efforts, with the exception of a major, ongoing commitment to Cuban migrants, and a much less concerted effort for Central Americans in the 1980s. The depth of the governance and safety problems in the Northern Triangle, and the strong historic patterns of migration that lead toward the United States, now make the United States part of the need for a regional solution, one piece of which could be the framework offered below.

A. Necessary Preconditions

A focus on root-causes must be the centerpiece to any policy response. If Central American patterns are ongoing, and driven by deep-rooted conditions of poor governance, a critical response to that reality is prevention, through long-term, serious investment in changing the root causes of forced migration. Since 2014, root causes have entered the dialogue, but at first in only a limited, window-dressing way (when a miniscule percentage of the budget for addressing the situation went toward governance in the Northern Triangle, and the overwhelming majority went to detention of the migrants). More can and will be done, and may already

[181] James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 159 (1990).

be having a positive impact.[182] But in the meantime, as migrants continue to arrive, we must respond—and as the next section emphasizes, we must respond in ways that work and that fit this particular migration problem.

Necessary work on root causes, while the ultimate antidote to the fears of ongoing, large-scale migration from the Northern Triangle to the United States, is no short-term answer. Again, the situation exists, and needs to be addressed instead of wished away. With necessary work on root causes being a long-term proposition, the policy response to forced migration must, at the very least, work on a short-to-medium term approach. Such an approach, as suggested in the following section, may entail protection of less value and less permanence than the refugee convention provides, from concern that something highly valuable and durable would add a large pull factor to the push-factors driving migration now.

B. One Example of a New Framework

The migration is happening, and we can wish it would not, or we can respond to it. Since the means of wishing it would not happen are, at best, a medium-term proposition, the foremost principle of a broader protection system is to promote short-term wellbeing through a system that fits the migration flows.

This system shares some similarities with the sojourner status being implemented in Europe, for those who "would face a real risk of suffering serious harm"—a standard short of fearing persecution.[183] Subsidiary protection provides broader protection than that available for those found to be refugees.[184] However, the proposal in this article differs in two important ways. First, unlike Europe's subsidiary protection, this system emphasizes administrative efficiency by embracing a per-country approach to the status, wherein people would be presumed eligible by virtue of their specific country of origin (like TPS), and only eliminated from eligibility upon a individualized showing of harm to the United States by permitting them to remain. Second, the subsidiary protection in Europe goes through the same system that determines whether someone has an asylum claim; the goal of this article's proposal is to reduce the burden on that asylum-adjudication

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[182] Sonia Nazarro, *How the Most Dangerous Place on Earth Got a Little Bit Safer*, N.Y. TIMES (Aug. 14, 2016), at http://www.nytimes.com/2016/08/14/opinion/sunday/how-the-most-dangerous-place-on-earth-got-a-little-bit-safer.html?ref=opinion&_r=0

[183] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L337, article 2(f), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0095.

[184] See generally, Ostrand, *supra* note __, at 261.

system by creating a separate and more easily administered alternative.

The status envisioned by this article would be akin to a sojourner status for individuals from designated countries, and would be based on simple criteria like those of TPS, which are country-based, and from which only unfavorable factors would disqualify an individual (like those under INA 212 such as a history of persecution of others, significant criminal convictions, national security risks). The status would last for five years, with a possibility of renewability unless the government declares that conditions have sufficiently improved in the designated country to allow return. If a country is designated sufficiently safe, the migrants would have the option to apply for a new form of cancellation of removal in court, available for those who can demonstrate strong ties to the United States—a concept defined with sufficient specificity that it would provide a narrow off-ramp from the time-limited status to permanent residence (analogous to, but different from extreme hardship standard).

This simple framework flows from the principle of fitting the response to the actual migration flow. Within this principle of "fit" are the related principles of administrative efficiency and access to justice: a system with simple criteria will be easier, faster, and less costly to administer. The complexity of the highly individualized remedies, including asylum, that are discussed in Part III.C, *supra*, put remedies beyond the reach of those needing protection, and consume governmental and private resources out of proportion to the actual benefit offered. A simpler system will be more far more accessible to migrants through community education, legal workshops, and lower-cost legal services, and will demand fewer governmental resources to adjudicate and manage.

Related to the question of fit is an effort to limit the benefit, by connecting it to U.S. history with the designated country or countries. Only those with a parent, grandparent, sibling or child already living in the United States could apply for this benefit. This recognizes that the migrants are coming to the U.S. in many cases because of existing connections, like relatives who have been here in many cases since the 1980s. Those without such relatives have less reason to favor the U.S. as a destination for protection, and could (and do) seek refuge in other countries like Nicaragua and Costa Rica; if they came to the United States, they would need to qualify for the higher standard of asylum.[185] But limiting the broadly available protection to those with existing ties mirrors and responds to the historical migration patterns; already people with ties are choosing the difficult travel to the U.S., and many of those without such ties are instead

[185] Washington Office on Latin America, *Five Facts About Migration from Central Americ's Northern Triangle*, https://www.wola.org/analysis/five-facts-about-migration-from-central-americas-northern-triangle/.

going to neighboring Costa Rica, Mexico or Nicaragua.

Those without such relatives do not benefit from the same historical and context-driven responsibilities, and should not be able to access the benefit. For them, the narrower paths of asylum or SIJS would still be available, and with many migrants diverted from those narrower paths through this new status, it would be more possible to serve and adjudicate those individuals' claims quickly and fairly.

Another important aspect of fitting protection to this situation is framing it as a short-term response, where effective repatriation—not citizenship in the United States—is the long term goal for most migrants, and integration into the United States is the goal for only a smaller subset of the migrants. Repatriation and integration exist in vivid tension, with one vision competing forcefully against the other. Successful integration of long-term migrants is in the interests of the United States, as described in Part III.B, *supra*. And forces moving toward integration in the United States are particularly strong once U.S. born children become a factor in a family's decisions. However, with decades of experience and study of this issue, UNHCR has developed principles for repatriation that would be helpful.[186] Instead of seeing U.S. citizenship as the ultimate, and only, success, success for many within this current migration population would consist of safe return to their home countries, with the possibility of economic and physical security there.

Such eventual repatriation (only at a time when safety could be much better assured) would also support, instead of act in tension with, the longer-term project of rebuilding those countries. A high-quality repatriation project would turn the historical norm on its head, wherein the U.S. sent back gang-involved felons without any coordination or communication with Northern Triangle governments, planting the seeds for today's gang violence in the region. By contrast, repatriation once the region's safety improves would focus on helping people settle in safe areas, find adequate housing, return with economic (and language) skills that would promote economic growth, and so forth. For decades, immigrant advocates have defined citizenship as success and deportation as punishment. The resettlement paradigm offers an alternative definition of success: effective resettlement not as punishment, but as pragmatic and offering the possibility of good long-term outcomes.

By emphasizing the goal of repatriation from the outset, the clear expectation is that most of those receiving protection should be planning

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[186] UNHCR, *Policy Framework and Implementation Strategy: UNHCR's Role in Support of the Return and Reintegration of Displaced Populations* (Oct. 2008), at http://www.unhcr.org/en-us/partners/guides/4c2203309/policy-framework-implementation-strategy-unhcrs-role-support-return-reintegration.html.

how to return from the outset. There are lessons the United States can learn from the best practices of humanitarian relief globally to do advanced repatriation planning, and to work with the receiving countries on such diverse issues as housing and safety planning.

CONCLUSION

This article has shown how our current system of protection fails the unconventional refugees who are part of the nature and reality of contemporary migration flows. The article identifies an ethical duty and policy imperative to build support for the politically difficult notion of doing more, at a time when loud, insistent voices clamor instead for restriction and doing less. Asylum and other protection options fail to correspond to the full realities of Central American, Syrian, and other forced migrations, and reveal how reliance on individualized protection fails these migrants. Existing protection options have stretched governmental and private actors to a breaking point, leaving important systems at our borders exhausted. The payoff for this exhaustion is, at the same time, paltry at best, and harmful at worst: we are not offering meaningful protection to so many who are in need of it, and while migrants dwell in the drawn-out uncertainties of our existing system, we fail at both integration *and* repatriation, and we devote too few resources to truly improving the security of the countries from which they flee.

The broader framework envisaged in this article is only a starting point for a conversation aimed less at making (much needed) improvements in the existing system, and more at thinking beyond existing options to devising a solution that fits the actual problem. The solution replaces costly individualized adjudications with broader, simpler protection that is easier to access. It privileges investment in the security and governance of the sending countries as the only durable way to change migration patterns in the long-term. And it balances the medium-term goals of repatriation with American interests in fully integrating immigrants who may be here longer term.

As Europeans deal with the exponentially greater challenges posed by the millions of Syrian migrants seeking protection, the American experiment on a smaller-scale may provide a vital testing ground for confronting the new realities of unconventional refugees in ways that promote wellbeing for the migrants themselves, for the nations the migrants are fleeing, and for the nation in which they seek protection. The challenges will be with us for many years to come; the need to develop a new framework must begin now.